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Meeting: 1193 meeting (4-6 March 2014) (DH)

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Communication from Armenia concerning the case of Sefilyan against Armenia (Application No. 22491/08)

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Réunion : 1193 réunion (4-6 mars 2014) (DH)

Référence du point : Bilan d'action

Communication de l'Arménie concernant l'affaire Sefilyan contre Arménie (requête n° 22491/08) (***anglais uniquement***).

ACTION PLAN
SEFILYAN v. ARMENIA
(Application no. 22491/08, Judgment of 02/10/2012)

INTRODUCTORY CASE SUMMARY

The case of *Sefilyan* concerns: (i) a violation of the unlawfulness of the applicant's detention, in particular Article 5 § 1 (lack of legal basis for detention period between 10 and 22 June 2007), § 3 (failure to provide relevant and sufficient reasons for the applicant's continued detention) and § 4 (failure to provide adversarial proceedings and ensure equality of arms); (ii) a violation of the applicant's right to respect for private life and correspondence, prescribed in Article 8.

(i) The applicant's complaints concerned his detention following his arrest on 9 December 2006 at 10:30 p.m. on the charges for public calls for a violent overthrow of the government. The applicant was not immediately brought before a judge and part of his pre-trial detention – between 10 and 22 June 2007 – was unlawful. The applicant also complained of the fact that the domestic courts had failed to provide reasons for his continued detention. The applicant also complained that the proceedings of 7 February 2007 in the Kentron and Nork-Marash District Court of Yerevan were not adversarial and that he had been deprived of an oral hearing before the Court of Appeal on 14 May 2007.

(ii) The applicant's complaint under Article 8 concerned the secret surveillance of his phone conversations. The applicant argued that at the material time there was no law in Armenia which would prescribe the procedure for secret surveillance and recording of phone and other communications.

I. INDIVIDUAL MEASURES

In its judgment, the European Court of Human Rights held that the Armenian Government was to pay the applicant EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, and EUR 55 (fifty-five euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into Armenian drams at the rate applicable at the date of settlement.

Payment of just satisfaction

Details of just satisfaction

Non-pecuniary damage	Costs and expenses	**Total**
EUR 6,000	EUR 55	EUR 6,055
Paid on 15/03/2013 (*see* Annex 1)		

The Just Satisfaction Form with regard to the payment was already submitted (*see* Annex 2).

II. GENERAL MEASURES

The Government would like to mention in particular the following general measures that have been introduced:

(a) Dissemination of information about the judgment

The judgment was translated into Armenian language and published on the official website of the Armenian Ministry of Justice on 27 August 2013. The relevant authorities involved in the case were duly informed about the judgment and provided with the translation. It was also respectively disseminated.

A study of the European Court of Human Rights case-law, and the *Sefilyan* case in particular, is included in the training curriculum of the Police Academy, the Prosecutors' School, and the Judicial School, Public Service Training Courses as well as in the trainings organized for the staff of the detention facilities.

(b) Legislative measures

(i) Violation of Article 5 §§ 1, 3, 4

The issue concerning unlawful limitation of a person's right to liberty due to contradiction of Article 138 paragraph 3 of the current Code of Criminal Procedure (CCP) with Articles 11 paragraph 2 and 136 paragraph 2 of the same Code and Article 5 paragraph 1 of the Convention has been resolved via adopting the decision N 3/0106/01/08 dated as of 10 April 2009 by the Court of Cassation, which the European Court of Human Rights cited in the case of *Poghosyan v. Armenia* (application no. 44068/07, judgment of 20 December 2011, § 46).

By that decision the Court of Cassation obliges investigating authority, while submitting the case to the court in cases when there is less than 15 days left before the expiry of detention term to resolve also the question of person's detention, namely release him if the grounds justifying his detention have ceased to exist or file a motion with the court seeking a prolongation of the detention period if there are relevant grounds. The period of 15 days has been considered by the Court of Cassation in order to make a court, while taking one of the decisions envisaged by Article 292 of the CCP, take it within the mentioned time-limit upon taking over the case and not to exceed the two months pre-trial detention term.

On the other hand, according to Article 15 § 4 of the Judicial Code of Armenia the reasonings of the judicial acts of the Court of Cassation or the European Court of Human Rights in cases containing specific factual circumstances, including the interpretation of laws, are of mandatory nature for a court while ruling on a case with similar factual circumstances, save the case, when it argues, by virtue of serious arguments that those are not applicable to given factual circumstances.

However, the Government considered also necessary to lay down the above-mentioned legal reasoning of the Court of Cassation in the new Draft Code of Criminal Procedure (hereinafter "the Draft CCP").

(a) As to the violation of Article 5 § 1

According to the Draft CCP if the accused is detained, the bill of indictment alongside with the criminal case shall be submitted to court not later than 15 days before the expiry of detention term (Article 208 § 2).

Article 316 § 2 prescribes that the Court, receiving criminal case, within the period of two days, shall take a decision on taking over the case and assigning preliminary court hearings.

Paragraph 3 of the same Article stipulates that if the term prescribed by Article 208 § 2 is not kept, the Court, without taking decision on having preliminary court hearings, shall return criminal case to prosecutor who exercises supervision over the case.

Paragraph 5 of the same Article further provides that based on preliminary court hearings the first court hearing shall be assigned within the period of two weeks after the decision, prescribed by paragraph 2 of this Article, having been taken.

(b) As to the violation of Article 5 § 3

As to the issues raised in the judgment of *Sefilyan* concerning the failure of the domestic courts to provide reasons for the applicant's continued detention (Article 5 § 3).

Thus, Article 116 of the Draft CCP prescribes:

1. A preventive measure shall not be applied if there is no any reasonable suspicion that the accused has committed the crime incriminated to him.
2. A preventive measure shall be applied if it is necessary for:
1) preventing the escape of the accused;
2) preventing the commitment of a crime by the accused;
3) ensuring the fulfillment of the obligations by the accused imposed on him by law or a court decision.
3. There is no need for justifying the circumstances prescribed in the §2 of this Article, if:
1) in case of application alternative preventive measures provided by this Code;
2) In case of application preliminary detention or alternative preventive measure in respect of the accused charged with grave or extremely grave crimes;
4. While deciding the type of preventive measure all possible circumstances in respect of the accused ensuring his proper behavior and obstructing those shall be considered.

Besides, for envisaging the issue of legitimacy of detention Article 118 of the Draft CCP provides the following:

1. Detention is the deprivation of the accused's liberty based on the decision of the court in cases and terms prescribed by law and for the period prescribed by law and the same decision of the court.
2. Detention can be applied only in cases when the application of alternative preventive measure is impossible or insufficient for preventing the accused's unlawful behavior.
3. Detention can be applied only when by the sufficient completeness of factual circumstances the corresponding conditions of legitimacy prescribed by Article 116 of the instant Code have been reasoned by the investigator or the prosecutor and have been reasonably approved by the court. For the application of detention during the court proceedings the reasoned approval of the mentioned conditions by the court is sufficient.
4. During the prolongation of the detention period before the court it is necessary to reason also the due diligence of the investigative authority for disclosure of the circumstances important for the proceedings, as well as the necessity to continue the criminal prosecution of the accused.

Furthermore, Article 119, *Detention Term*, of the Draft CCP prescribes the following:

1. The person can be detained for a period which is necessary for providing the normal course of the proceedings but in any case that period cannot exceed the maximum periods of detention prescribed in this Article.
2. During the pre-trial proceedings the period of initial detention period cannot exceed one month. During the pre-trial proceedings the period of the accused's detention can be prolonged each time for no more than two months, preserving the maximum period of keeping a person under detention during the pre-trial proceedings provided in this Article.
3. The maximum period of keeping a person under detention during the pre-trial proceedings is:
1) two months for charges on minor gravity crimes;
2) four months for charges on medium gravity crimes;
3) ten months for charges on grave crimes;
4) twelve months for charges on extremely grave crimes.
4. The period of keeping the accused under detention is calculated from the moment of his actual deprivation of liberty. The period of keeping under detention includes also the period when by the court

decision the accused has been in a medical institution for exercising examination or when as a safety precaution he has been under medical surveillance.

5. The total period of keeping under detention does not include the period when a person has been under arrest on the territory of a different country due to the transfer of proceedings or extradition of a person.

(c) As to the violation of Article 5 § 4

As regards the violation of Article 5 § 4 by the failure to provide adversarial proceedings and ensure equality of arms, the Government underlines that, in the case of *Sefilyan* the issue concerned the preliminary investigation materials being made public only with the permission of the investigating authority, which was prescribed by Article 201 of the current Code of Criminal Procedure.

Instead, Article 188 of the Draft CCP prescribes:

"1. Private parties to proceedings, the witness and his lawyer have the right to publish the preliminary investigation materials disclosed to them within the scope of proper legal procedure, if the investigator did not prohibit their publication in a written form on one of the grounds prescribed by paragraph 2 of this Article.

2. The publication of the preliminary investigation materials is prohibited if it can:

1) impede the normal course of the pre-trial proceedings;
2) become a cause for commission of a crime;
3) endanger the rights and legitimate interests of the parties to the proceedings or other persons;
4) entail the disclosure of secret information guaranteed by law;

3. The limitations to publish the preliminary investigation materials prescribed by this Article shall not apply to the exchange of information between the attorney and his client."

(ii) Violation of Article 8

As concerns the violation of the applicant's right to respect for private life and correspondence, prescribed in Article 8 of the Convention, new provisions have been laid down in the Draft CCP.

Thus, Article 26 prescribes the following:

"1. The competent authorities shall collect, store and use the information about a person without his consent only in the cases and terms prescribed by law, if it is necessary for revealing important circumstances for the proceedings.

(…)

3. The telephone conversations, correspondence, postal, telegraphic and other communications of a person may be subject to secret surveillance only by court decision in cases and order prescribed by law.

(…)."

In this regard Article 248 of the Draft CCP also prescribes the types of secret investigative activities;

"The secret investigative activities are:

(…)

4) Digital, including telephone conversations secret surveillance."

Besides, there are also some safeguards for performing secret investigative activities, which are prescribed in Articles 249, 250 and 256 of the Draft CCP.

Thus the relevant provisions stipulate the following:

(a) As to the types of offences in whose respect secret surveillance could be authorised

"Article 249. Grounds and conditions for carrying out secret investigative activities

(…)

Secret investigative activities can be carried out in respect of grave and extremely grave crime proceedings, whereas in cases prescribed by Article 256 § 4 of the instant Code those can be carried out in respect of the proceedings on alleged minor and medium gravity crimes.

(b) As to the circumstances, time-limit for secret surveillance

Article 250. Guarantees of legitimacy of secret investigative activities

1. If in the course of carrying out secret investigative activities information, materials and documents about a person have been obtained, the receipt of which was not prescribed by the decision on carrying out those activities, they cannot be used as evidence in the criminal proceedings and shall be destroyed, except for cases when the investigating authority acted in a good faith. A separate protocol on this information, materials and documents shall be drawn up.

2. Secret investigative activities prescribed in Article 248 §§ 1-5 of the instant Code can be carried out:

1) in respect of a natural person regarding who there are available facts on commission of alleged crime;

2) in respect of the accused;

3) in respect of a natural person regarding who there is a substantial assumption that he has periodically communicated with or may have reasonably communicated with the accused;

4) in respect of a legal person regarding who there is a substantial assumption that its activity totally or partially can be controlled, scrutinized or factually has been directed by persons mentioned in subparagraphs 1 or 2 of this paragraph.

(…)

5. Regardless of the status, the period for carrying out any of the secret investigative activities prescribed in Article 248 §§1-5 of the instant Code in respect of the same person, cannot exceed twelve months. Moreover, each time the court's authorization can be granted for a period not exceeding three months.

6. The secret investigative activities shall be terminated if:

1) there is no necessity to conduct such activities;

2) the preliminary investigation is complete;

3) the period established by the competent court decision or the total period of carrying out secret investigative activities has expired.

(…)."

Article 256. Digital, including telephone conversations secret surveillance

(…)

3. Activities envisaged in subparagraph 1 "b"-"d", subparagraph 2 "b" and subparagraph 3 "b" also subparagraph 4 of this paragraph can be carried out in respect of proceedings on minor and medium gravity crimes envisaged in Articles 137, 144, 155 §2, 181, 233-234, 251-257, 263, 379.1 of the Criminal Code of the Republic of Armenia.

(…)."