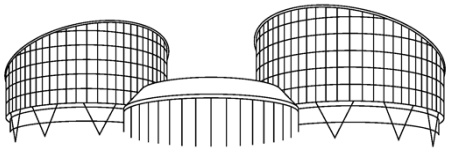

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF AYVAZYAN v. ARMENIA

(Application no. 46245/08)

JUDGMENT

STRASBOURG

18 October 2018

This judgment is final but it may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Ayvazyan v. Armenia,

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

Kristina Pardalos, *President,*
Ksenija Turković,
Tim Eicke, *judges,*

and Renata Degener, *Deputy Section Registrar,*

Having deliberated in private on 25 September 2018,

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

PROCEDURE

1. The case originated in an application (no. 46245/08) against the Republic of Armenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Armenian national, Mr Masis Ayvazyan ("the applicant"), on 12 September 2008.

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

3. On 27 November 2012 the complaint concerning the alleged unlawfulness of the applicant's detention between 1 and 13 May 2008, and on 21 February 2017 the complaint concerning the alleged lack of relevant and sufficient reasons for the applicant's detention, were communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1956 and lives in Jrvezh.

5. On 19 February 2008 a presidential election was held in Armenia, which was followed by daily protest rallies held at Yerevan's Freedom Square from 20 February onwards by the supporters of the main opposition candidate. On 1 March 2008 the assembly at Freedom Square was dispersed by the police. The applicant, who was present at Freedom Square at that time, was arrested and later charged under Article 316 § 1 of the Criminal Code (CC) with assaulting police officers.

6. On 4 March 2008 the Kentron and Nork-Marash District Court of Yerevan ordered the applicant's pre-trial detention for a period of two months, namely until 1 May 2008, on the ground that the applicant, if at large, might abscond and obstruct the investigation by exerting unlawful influence on the persons involved in the criminal proceedings.

7. On 10 March 2008 the applicant lodged an appeal, arguing that there was no evidence to substantiate the need for his detention. He was a former high-ranking police officer and a law-abiding citizen who enjoyed trust and respect in society.

8. On 21 March 2008 the Criminal Court of Appeal dismissed the appeal, finding that the fact that the applicant was accused of a grave offence punishable by up to ten years' imprisonment increased the probability of his evading criminal liability and punishment and was sufficient to conclude that the applicant, if at large, might commit a new offence. As to the applicant's good character, mentioned by him in his appeal, this was not sufficient for lifting the detention order.

9. On 29 April 2008 the indictment was finalised and the applicant's case was sent to court for trial. The applicant remained in detention by virtue of Article 138 § 3 of the Code of Criminal Procedure (CCP).

10. On 13 May 2008 the District Court decided to set the case down for trial, ruling in the same decision that the applicant's detention was to remain unchanged. That decision was not subject to appeal.

11. On 11 June 2008 the District Court found the applicant guilty under Article 316 § 1 of the CC of assaulting police officers and sentenced him to a suspended term of one and a half years' imprisonment.

II. RELEVANT DOMESTIC LAW

12. For a summary of the relevant domestic provisions see the judgments in the cases of *Poghosyan v. Armenia* (no. 44068/07, §§ 26-41, 20 December 2011) and *Ara Harutyunyan v. Armenia* (no. 629/11, §§ 30-32, 20 October 2016).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

13. The applicant complained that his detention between 1 and 13 May 2008 had not been authorised by a court and had therefore been unlawful. He relied on Article 5 § 1 of the Convention which, in so far as relevant, reads as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law ..."

A. Admissibility

14. The Government submitted that the applicant had failed to exhaust the domestic remedies. In particular, he had not applied to either the administration of the detention facility or the trial court with a request to be released on the ground that his detention was unlawful. He had also failed to raise that issue in his appeals lodged with the Criminal Court of Appeal and the Court of Cassation against his conviction of 11 June 2008 by the District Court.

15. The Government further submitted that this complaint should be declared inadmissible because the applicant had not suffered a significant disadvantage. They argued, in particular, that the issue in question was of no subjective significance for the applicant, taking into account his inactive conduct at the domestic level in respect of the detention in question.

16. The applicant did not comment on the Government's claims.

1. As regards non-exhaustion of domestic remedies

17. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged (see *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99 et al., ECHR 2010). The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see *Paksas v. Lithuania* [GC], no. 34932/04, § 75, ECHR 2011 (extracts)). It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *Kennedy v. the United Kingdom*, no. 26839/05, § 109, 18 May 2010). Once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case (see *Selmouni v. France* [GC], no. 25803/94, § 76, ECHR 1999-V).

18. The Court notes that in all the cases referred to by the Government, in which the applicants had lodged requests for release with the administration of the detention facility or the trial court on the ground that their detention, as authorised by a court, had expired and was no longer

lawful, the requests in question produced no results and were systematically refused by the said authorities with a mere reference to Article 138 § 3 of the CCP (see *Poghosyan*, cited above, §§ 15, 17, 18 and 21; *Piruzyan v. Armenia*, no. 33376/07, §§ 27-29, 26 June 2012; and *Malkhasyan v. Armenia*, no. 6729/07, §§ 38-39, 26 June 2012). It therefore cannot be said that the remedies in question offered reasonable prospects of success and were effective. As regards the argument that the applicant had failed to raise the question of alleged unlawfulness of his detention in his appeals against his conviction, the Court notes that the appeals in question are of no relevance for the applicant's complaint under Article 5 § 1 of the Convention since they did not concern his detention but rather his conviction at first instance. In sum, there are no grounds to allow the Government's non-exhaustion objection.

2. As regards the absence of a "significant disadvantage"

19. As regards the Government's claim that the applicant had not suffered a significant disadvantage, the Court reiterates that this admissibility criterion hinges on the idea that a violation of a right, however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international court. The assessment of this minimum level is, in the nature of things, relative and depends on all the circumstances of the case. The severity of a violation should be assessed, taking account of both the applicant's subjective perceptions and what is objectively at stake in a particular case (see *Bannikov v. Latvia*, no. 19279/03, § 57, 11 June 2013).

20. The Court notes that the present complaint concerns the applicant's detention between 1 and 13 May 2008 which, as he alleged, was unlawful. It therefore concerns a matter of principle for the applicant, namely his right under Article 5 § 1 of the Convention not to be deprived of his liberty (see, *mutatis mutandis*, *Čamans and Timofejeva v. Latvia*, no. 42906/12, § 80, 28 April 2016). The Court has reiterated on many occasions the importance of personal liberty in a democratic society (see *Storck v. Germany*, no. 61603/00, § 102, ECHR 2005-V, and *Stanev v. Bulgaria* [GC], no. 36760/06, § 120, ECHR 2012). The fact that the applicant did not pursue remedies which, as already noted above, had no prospects of success does not suggest that the matter was of no significance to the applicant. The Court therefore considers that it has not been established that the applicant has not suffered a significant disadvantage and dismisses the Government's objection.

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

B. Merits

22. The applicant submitted that his detention between 1 and 13 May 2008 had not been authorised by a court as required by law and had therefore been unlawful. During that period he had been kept in detention by virtue of Article 138 § 3 of the CCP, which could not be considered as a valid and lawful ground.

23. The Government did not submit any observations on the merits.

24. The Court notes that it has already examined an identical complaint in another case against Armenia, in which it concluded that there had been a violation of Article 5 § 1 of the Convention in that the applicant's detention had not been based on a court decision and had therefore been unlawful within the meaning of that provision (see *Poghosyan*, cited above, §§ 56-64). It sees no reason to reach a different conclusion in the present case and concludes that the applicant's detention between 1 and 13 May 2008 was unlawful within the meaning of Article 5 § 1.

25. There has accordingly been a violation of Article 5 § 1 of the Convention.

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

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

> "3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

A. Admissibility

27. The Government submitted that the applicant had failed to exhaust the domestic remedies. Firstly, he had not lodged an appeal on points of law against the decision of the Criminal Court of Appeal of 21 March 2008, a right which he enjoyed under Article 403 of the CCP. Secondly, after the trial court decided on 13 May 2008 to set the case down for trial and to keep the applicant in detention, he had the right under Article 136 of the CCP to lodge a request for release on bail which he had failed to do (see *Martirosyan v. Armenia*, no. 23341/06, § 44, 5 February 2013).

28. The applicant, referring to the case of *Grigoryan v. Armenia* (no. 3627/06, §§ 71-73 and 113-114, 10 July 2012), submitted that an appeal on points of law was not an available and effective remedy.

29. The Court notes, as far as the Government's first argument is concerned, that it has already examined and dismissed a similar objection in

another case against Armenia (see *Arzumanyan v. Armenia*, no. 25935/08, §§ 28-32, 11 January 2018). It sees no reason in the present case to depart from its earlier findings. As regards the Government's second argument, the Court notes that, as opposed to the case of *Martirosyan* in which the applicant had spent nearly two years in detention during trial without ever requesting the trial court to release him on bail (see *Martirosyan*, cited above, § 45), in the present case the applicant's detention during trial lasted less than a month, namely between 13 May and 11 June 2008. He had previously, on 10 March 2008, appealed against the trial court's decision to detain him, while the decision of 13 May 2008 was not subject to appeal. The fact that the applicant did not lodge a request for release on bail during that short period is not sufficient for the Court to conclude that he failed to exhaust the domestic remedies in respect of his complaint under Article 5 § 3 of the Convention. It therefore dismisses the Government's objection of non-exhaustion.

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

B. Merits

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

32. The Government argued that the courts had provided relevant and sufficient reasons for the applicant's detention, such as the risk of absconding, obstructing the investigation and committing a new offence.

33. The Court refers to its general principles under Article 5 § 3 of the Convention relating to the right to be released pending trial (see *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, §§ 92-102, ECHR 2016 (extracts), and *Ara Harutyunyan*, cited above, §§ 48-53) and notes that it has already found the use of stereotyped formulae when imposing and extending detention to be a recurring problem in Armenia (see, among other authorities, *Piruzyan v. Armenia*, no. 33376/07, §§ 97-100, 26 June 2012; *Malkhasyan v. Armenia*, no. 6729/07, §§ 74-77, 26 June 2012; *Sefilyan v. Armenia*, no. 22491/08, §§ 88-93, 2 October 2012; and *Ara Harutyunyan*, cited above, §§54-59). In the present case, the domestic courts similarly justified the applicant's continued detention with a mere citation of the relevant domestic legal principles and a reference to the gravity of the offence without addressing the specific facts of his case or providing any details as to why the risks of absconding, obstructing justice or reoffending were justified. The Court therefore concludes that the domestic courts failed to provide relevant and sufficient reasons for the applicant's detention.

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

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

35. Lastly, the applicant raised a number of other complaints under Article 5 §§ 1 (c) and 2, Article 10 and Article 11 of the Convention.

36. Having regard to all the material in its possession, and in so far as these complaints fall within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

37. Article 41 of the Convention provides:

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

A. Damage

38. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

39. The Government submitted that the applicant had failed to provide any evidence that he had suffered non-pecuniary damage and requested the Court to reject his claim.

40. The Court considers that the applicant has undoubtedly sustained non-pecuniary damage on account of the breaches of the Convention found and awards the applicant EUR 4,500 in respect of non-pecuniary damage.

B. Costs and expenses

41. The applicant did not claim any costs and expenses.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 5 § 1 of the Convention concerning the alleged unlawfulness of the applicant's detention between 1 and 13 May 2008 and the complaint under Article 5 § 3 of the Convention concerning the alleged failure of the domestic courts to provide relevant and sufficient reasons for his detention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

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

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, EUR 4,500 (four thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 18 October 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener Deputy Registrar	Kristina Pardalos President