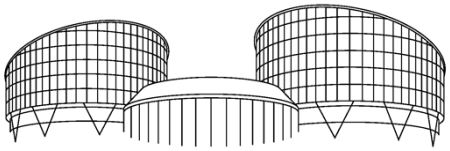

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF GASPARI v. ARMENIA

(Application no. 6822/10)

JUDGMENT

STRASBOURG

26 March 2020

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

In the case of Gaspari v. Armenia,

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

Aleš Pejchal, *President,*
Tim Eicke,
Jovan Ilievski, *judges,*
and Renata Degener, *Deputy Section Registrar,*

Having regard to:

the application 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 Vartgez Gaspari ("the applicant"), on 30 December 2009;

the decision to give notice of the complaints concerning the alleged lack of a fair trial and breach of the principle of equality of arms and of the applicant's right to obtain the attendance of witnesses on his behalf to the Armenian Government ("the Government") and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 3 March 2020,

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

INTRODUCTION

The case concerns the trial of the applicant who, relying on Article 6 §§ 1 and 3 (d) of the Convention, alleged that the criminal case against him had been based exclusively on police testimony, the principle of equality of arms had not been respected and that he had not been able to obtain the attendance of witnesses on his behalf on the same conditions as the prosecution.

THE FACTS

1. The applicant was born in 1957 and lives in Yerevan. The applicant was represented by Mr M. Shushanyan and Mr A. Zakaryan, lawyers practising in Yerevan.

2. The Government were represented by their Agent, Mr G. Kostanyan, and subsequently by Mr Y. Kirakosyan, Representative of the Republic of Armenia to the European Court of Human Rights.

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

A. Background to the case

4. On 19 February 2008 a presidential election was held in Armenia. The applicant, who was a well-known political activist, was an active supporter of the main opposition candidate, Mr Ter-Petrosyan, and acted as his official election assistant at one of the polling stations.

5. Immediately after the announcement of the preliminary results of the election, Mr Ter-Petrosyan called on his supporters to gather at Freedom Square in central Yerevan (also known as Opera Square) in order to protest against the irregularities which had allegedly occurred in the election process, announcing that the election had not been free and fair. From 20 February 2008 onwards, nationwide daily protest rallies were held by Mr Ter-Petrosyan's supporters, their main meeting place being Freedom Square and the surrounding park where they had also set up a camp. The applicant was an active participant in the rallies.

6. The applicant alleged that on 1 March 2008, at around 6 a.m., the police arrived at Freedom Square and attacked the several hundred demonstrators who were camping there, violently beating them with rubber batons, destroying the camp and dispersing the assembly. Within a few minutes no demonstrators remained at the square which was then sealed off by the police to prevent any further demonstrations.

7. According to the official account of events, the aim of the police operation in the morning of 1 March 2008 was to verify the presence of weapons among the demonstrators camping at Freedom Square. The demonstrators reacted aggressively by attacking the police and were then dispersed. After the square was cleared of demonstrators, it was sealed off and the relevant police units carried out an inspection at the scene.

B. The criminal proceedings against the applicant

8. According to the applicant, he had been at home when the assembly at Freedom Square was dispersed. Unaware of this, at around 7.45 a.m. he had headed to the rally, noticing on his way an unusually chaotic situation in the city and witnessing police officers chasing or attacking people in the streets, and forcing some of them into police vans. At around 7.55 a.m. he had arrived at the intersection of Mashtots Avenue and Tumanyan Street near Freedom Square, where there was a greater concentration of people and police officers. He had then been pushed from behind unexpectedly, forced into a police van and taken to Kentron Police Station where he stayed until around 11 a.m., whereupon he was transferred to Arabkir Police Station.

9. According to a record of the applicant's "bringing-in", the applicant was "brought in" to Arabkir Police Station on 1 March 2008 at 8.30 a.m. by two police officers, E.P. and G.H., from Mashtots Avenue "for showing resistance to police officers in the area of the Opera House". The applicant

was subjected to a body search and a relevant record was drawn up. It also appears that a report was addressed in this connection to the chief of police by police officer E.P.

10. According to the testimony of police officer E.P., dated 1 March 2008, he had participated that morning in the police operation at Freedom Square. E.P. alleged that there had been a standoff between the police and the demonstrators and described how he had taken one of the violent demonstrators, who was later identified as H.G., to Kentron Police Station, whence he had transferred H.G. to Arabkir Police Station. Thereafter he had returned to Freedom Square where he had met police officer G.H. He and G.H. had noticed a group of five or six people walking towards the square, which had been sealed off by then, and tried to stop them. One of those persons had reacted aggressively, disobeyed their orders to leave and started pushing and hitting them. After a short scuffle he and G.H. had grabbed that person and taken him to Kentron Police Station, whence they had transferred him in their car to Arabkir Police Station, where he was identified as the applicant.

11. Police officer G.H. made similar statements in his testimony dated 2 March 2008.

12. On 5 March 2008 the applicant was formally charged under Article 316 § 1 of the Criminal Code (CC) as follows:

> "...having participated in the unlawful public events, including mass demonstrations, 24-hour-long rallies, assemblies, pickets and sit-ins, organised and conducted by the presidential candidate Levon Ter-Petrosyan and his supporters disrupting the normal life, traffic, functioning of public and private institutions and peace and quiet of the population in Yerevan, on 1 March 2008 at around 8.30 a.m. in the vicinity of Freedom Square [the applicant] committed non-life- and health-threatening assault and also threatened to commit such assault on [police officers E.P. and G.H. of Arabkir Police Station], having disobeyed their lawful orders, after they once again warned him and demanded that he stop his participation in the unlawful event."

13. On 3 April 2008 the General Prosecutor approved the bill of indictment under Article 316 § 1 of the CC. It was stated that, after Freedom Square had been cleared of demonstrators in the morning of 1 March 2008, that area had been sealed off and inspections had been carried out there. At around 8.30 a.m. police officers E.P. and G.H., who were on duty at Freedom Square, had noticed on Mashtots Avenue the applicant, who was shouting and walking towards Freedom Square. They had approached and informed him that investigative measures were being carried out at Freedom Square, ordering him to leave and not to go there. The applicant had refused to comply with their lawful orders and had become agitated and started behaving aggressively, stating that no one could stop him from participating in the rallies. Thereafter he had assaulted the two officers in a non-life- and health-threatening way by hitting, pulling and pushing them, and also threatened to square accounts with them. The indictment relied on the following evidence:

(a) the testimony of police officers E.P. and G.H.;

(b) the records of inspection of the scene and the results of the forensic examination of the weapons allegedly found at Freedom Square; and

(c) the record of the applicant's "bringing-in".

14. On the same date the applicant's case was sent to the Kentron and Nork-Marash District Court of Yerevan for trial.

15. The applicant submitted during the trial that he was being prosecuted for his political opinions and that police officers E.P. and G.H. were unreliable witnesses who had made false statements. He had had no encounter with them in the morning of 1 March 2008 and he had in fact been taken to Kentron Police Station by other police officers.

16. It appears that police officers E.P. and G.H. also confirmed their earlier statements during the trial.

17. At the hearing of 21 August 2008, after the examination of police officer G.H., the applicant requested the court to admit as evidence and examine a video recording made by a news agency in front of Kentron Police Station in the morning of 1 March 2008, in which he and fellow demonstrator H.G. could be seen being taken out of the police station, put in a police car and taken to Arabkir Police Station. Neither police officer E.P. nor police officer G.H. were among the police officers transporting them. The applicant submitted that the recording proved that both officers had made false statements and could not be considered reliable witnesses. He also submitted that the same video recording had been presented during the criminal trial of another demonstrator, in which police officer E.P. had also acted as a witness and made similar statements, after which E.P.'s testimony had been found to be unreliable and the demonstrator in question had been acquitted.

18. The applicant also requested the court to call four persons as witnesses, including H.G., who could confirm the fact that, contrary to the statements of the police officers, they had been transferred from Kentron to Arabkir Police Station together and that neither of the two officers had been among those accompanying them. The other witnesses, including two MPs, Z.P. and A.M., and the head of an NGO, Lawyers for Human Rights, S.M., could also confirm that version of events because they had all been present in front of Kentron Police Station at the material time and witnessed how he and H.G. had been taken out and transferred to Arabkir Police Station. Moreover, S.M. had also witnessed how he and H.G. had been brought in to Kentron Police Station and could confirm that neither of the two officers had been among those who had brought him in.

19. The District Court refused to examine the requests, reasoning that they had not been made in due time, namely during the preparatory stage of the trial, and examining them would disturb the order of examination of evidence which had already been determined. The applicant submitted that

the video recording in question had not been available to him before the start of the trial, but the District Court refused to change its decision.

20. On 10 November 2008 the Kentron and Nork-Marash District Court of Yerevan, recapitulating the facts as presented in the bill of indictment, found the applicant guilty as charged and sentenced him to one year's imprisonment. In doing so, the District Court relied on the testimony of police officers E.P. and G.H., the records of the applicant's "bringing-in" and body search and the police report, while finding the records of inspection of the scene not to be relevant evidence.

21. On 9 December 2008 the applicant lodged an appeal complaining, *inter alia*, of the refusal of the District Court to examine the video recording and to call witnesses.

22. During the examination of the applicant's case on appeal, the Criminal Court of Appeal decided to grant the applicant's request to admit and examine the video recording in question. It appears that, after the examination of the video recording, which confirmed the applicant's version of events, the police officers changed their earlier statements regarding the circumstances of the applicant's transfer from one police station to the other.

23. As regards the applicant's request to call witnesses, the Court of Appeal found that there was no need for that, since the circumstances of the applicant's "bringing-in" and transfer to Arabkir Police Station had been established on the basis of numerous materials, including the above-mentioned video recording and the applicant's own submissions.

24. On 30 March 2009 the Criminal Court of Appeal upheld the applicant's conviction. The Court of Appeal stated that the District Court, while reaching correct conclusions on the merits of the case, had nevertheless committed certain procedural breaches, including not giving proper consideration to the applicant's requests and not taking any final decisions to grant or refuse them. To correct those shortcomings, the Court of Appeal had decided to examine and rule on the requests in question. The Court of Appeal further stated that it could be seen from the video recording in question that police officer E.P. had not been among those who had transferred the applicant from Kentron to Arabkir Police Station. On the other hand, it was not possible to see who had brought the applicant in to Kentron Police Station. The Court of Appeal considered the contradictions in the police officers' statements regarding the applicant's "bringing-in" and transfer from Kentron to Arabkir Police Station not to be essential and not to cast doubt on their testimony, while dismissing the applicant's submissions as untrustworthy.

25. On 30 April 2009 the applicant lodged an appeal on points of law.

26. On 5 June 2009 the Court of Cassation declared his appeal on points of law inadmissible for lack of merit. That decision was served on the applicant on 9 July 2009.

RELEVANT LEGAL FRAMEWORK

27. Article 316 § 1 of the Criminal Code (2003) provides that non-life-threatening or non-health-threatening assault or threat of such assault on a public official or his or her next-of-kin, connected with the performance of his or her official duties, is punishable by a fine of between 300 and 500 times the minimum wage or detention of up to one month or imprisonment for a period not exceeding five years.

28. Article 102 § 2 of the Code of Criminal Procedure (1999) provides that requests and demands must be examined and decided upon immediately after being lodged, unless the provisions of the Code envisage a different procedure. The taking of a decision on a request may be adjourned by the authority dealing with the case until circumstances essential for taking such a decision are clarified. A request not made in due time is left unexamined in cases prescribed by the Code.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

29. The applicant complained that the criminal case against him had been based exclusively on police testimony, the principle of equality of arms had not been respected and that he had not been able to obtain the attendance of witnesses on the same conditions as the prosecution. He relied on Article 6 §§ 1 and 3 (d) of the Convention, which, in so far as relevant, reads as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by ... [a] tribunal...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ..."

A. Admissibility

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 trial had not been fair. In particular, his conviction had been based entirely on the testimony of two police officers who had been unreliable witnesses and made false statements, whereas he had not been allowed to contest effectively the charge against him by submitting evidence and calling witnesses. The video recording that he had requested to have examined and the witnesses whom he had wished to call could have refuted the police officers' testimony and cast doubt on the credibility of their statements and the charge against him. His requests, however, had been dismissed arbitrarily without any proper reasons. Even if the Court of Appeal later examined the video recording in question, the only finding that that court made in its judgment concerned the absence of police officer E.P.

32. The Government refrained from submitting observations.

33. The Court reiterates that its task under Article 6 of the Convention is to ascertain whether the proceedings as a whole, including the way in which evidence was obtained, were fair. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence have been respected and whether the applicant was given the opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy. As a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce. Similarly, Article 6 § 3 (d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses, in the "autonomous" sense given to that word in the Convention system. In the context of taking evidence, the Court has paid particular attention to compliance with the principle of equality of arms, which is one of the fundamental aspects of a fair hearing and which implies that the applicant must be "afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent". Therefore, even though it is normally for the national courts to decide whether it is necessary or advisable to call a witness, there might be exceptional circumstances which could prompt the Court to conclude that the failure to do so was incompatible with Article 6. When a request by a defendant to examine witnesses is not vexatious, is sufficiently reasoned, is relevant to the subject matter of the accusation and could arguably have strengthened the position of the defence or even led to his acquittal, the domestic authorities must provide relevant reasons for dismissing such a request. If they fail to do so, the Court may conclude that the overall fairness of the proceedings has been undermined (see, among other authorities, *Mushegh Saghatelyan v. Armenia*, no. 23086/08,

§§ 202-204, 20 September 2018, and *Murtazaliyeva v. Russia* [GC], no. 36658/05, §§ 139-159, 18 December 2018).

34. In a number of cases in which prosecution and conviction of individuals for their conduct at a public event was based exclusively on the submissions of police officers who had been actively involved in the contested events, the Court found that, in those proceedings, the courts had accepted the submissions of the police readily and unequivocally and had denied the applicants any opportunity to adduce any proof to the contrary. It held that in the dispute over the key facts underlying the charges where the only witnesses for the prosecution were the police officers who had played an active role in the contested events, it was indispensable for the courts to use every reasonable opportunity to check their incriminating statements (see *Kasparov and Others v. Russia*, no. 21613/07, § 64, 3 October 2013; *Navalnyy and Yashin v. Russia*, no. 76204/11, § 83, 4 December 2014; and *Frumkin v. Russia*, no. 74568/12, § 165, ECHR 2016 (extracts)). A similar situation was examined by the Court in a case against Armenia, in which a violation of Article 6 was found and which, moreover, concerned the same events as in the present case (see *Mushegh Saghatelyan*, cited above, §§ 200-211).

35. It appears that the criminal proceedings against the applicant were conducted in a similar manner. The criminal case against the applicant, who was, like the applicant in the above case, facing charges for certain acts allegedly committed in connection with the assembly at Freedom Square, was built entirely on the testimony of two police officers who had been, as the domestic courts found, actively involved in the contested events and whose statements, moreover, appear to have contained inconsistencies. The applicant's requests to admit a video recording and to call witnesses, which were sufficiently substantiated and of relevance to the charges against him, were not even examined by the trial court, in violation of the domestic procedure, as later confirmed by the appeal court (see paragraphs 19 and 24 above). It is true that the appeal court then examined those requests and even admitted the video recording in question for examination. However, it is questionable whether this rectified the flaws in the first-instance proceedings. Firstly, as regards the request to admit the video recording, it appears that the appeal court *a priori* viewed the failure of the trial to rule on that request as a purely procedural flaw not affecting in any way the merits of the trial court's findings (see paragraph 24 above). It therefore appears that the appeal court's review of that flaw was of a purely formalistic nature and it does not appear that due consideration was given to that evidence. Secondly, as regards the request to call witnesses, that request was dismissed by the appeal court without sufficient and convincing reasoning, especially in view of the fact that one of the witnesses whom the applicant sought to call was allegedly able to testify regarding not only the circumstances of the applicant's transfer from one police station to another

but also those concerning his "bringing-in" to Kentron police station, which was of direct relevance to the charge against him (see paragraphs 18 and 23 above).

36. The Court therefore considers that the domestic courts, in a dispute over the key facts underlying the charges which, moreover, were based on conflicting evidence, failed to use every reasonable opportunity to verify the incriminating statements of the police officers who were the only witnesses for the prosecution and had played an active role in the contested events. Their unreserved endorsement of the police version of events, failure to address properly the applicant's submissions and refusal to examine the defence witnesses without proper regard to the relevance of their statements can be said to have led to a limitation of the defence rights incompatible with the guarantees of a fair hearing (see, *mutatis mutandis*, *Mushegh Saghatelyan*, § 210).

37. Based on the above, the Court concludes that the criminal proceedings against the applicant, take as a whole, were conducted in violation of his right to a fair hearing under Article 6 § 1 of the Convention.

38. Having reached this conclusion, the Court does not consider it necessary to examine separately whether there has also been a violation of Article 6 § 3 (d) of the Convention in respect of the same facts.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

39. 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

40. The applicant claimed 100,000 euros (EUR) in respect of pecuniary damage for loss of profits allegedly incurred by his private company while he had been imprisoned. He also claimed EUR 25,000 in respect of non-pecuniary damage.

41. The Government submitted that there was no causal link between the violations alleged and the applicant's claim for pecuniary damage. His claim for non-pecuniary damage was exaggerated and, in any event, a finding of a violation would be sufficient having regard to the possibility to reopen the proceedings in question.

42. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, in view of the context of the case, the Court finds it

appropriate to award the applicant EUR 5,500 in respect of non-pecuniary damage.

B. Costs and expenses

43. The applicant also claimed EUR 10,930 for legal costs incurred before the domestic courts and the Court, and 55,790 Armenian drams for postal expenses.

44. The Government submitted that the applicant's claim for legal costs was exaggerated and not duly substantiated. The contract signed between the applicant and his lawyer dated from 9 November 2018 in respect of services, most of which had allegedly been provided ten years prior to that. Furthermore, the hourly rates claimed were grossly exaggerated.

45. Regard being had to the documents in its possession and to its case-law, the Court considers it reasonable to award the sum of EUR 350 covering costs under all heads.

C. Default interest

46. 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

1. *Declares* the complaint concerning the fairness of the trial admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention as regards the fairness of the applicant's trial;

3. *Holds* that there is no need to examine the complaint under Article 6 § 3 (d) of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 5,500 (five thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 350 (three hundred and fifty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts 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 26 March 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener	Aleš Pejchal
Deputy Registrar	President