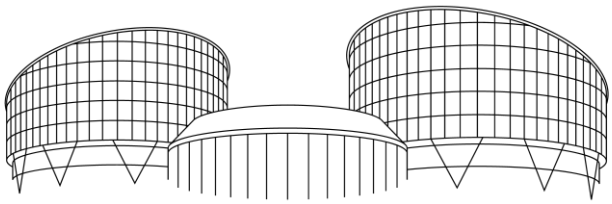

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

DECISION

Application no. 8696/09
Gagik JHANGIRYAN
against Armenia

The European Court of Human Rights (Third Section), sitting on 5 February 2013 as a Chamber composed of:

Josep Casadevall, *President,*
Corneliu Bîrsan,
Ján Šikuta,
Luis López Guerra,
Nona Tsotsoria,
Johannes Silvis,
Valeriu Griţco, *judges,*
and Marialena Tsirli, *Deputy Section Registrar,*

Having regard to the above application lodged on 22 January 2009,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Gagik Jhangiryan, is an Armenian national who was born in 1955 and lives in Yerevan. He was represented before the Court by Ms L. Sahakyan and Mr E. Varosyan, lawyers practising in Yerevan and Mr A. Ghazaryan, a non-practising lawyer.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

1. Background to the case

3. On 19 February 2008 a presidential election was held in Armenia. It appears that immediately after the election the main opposition candidate, the first President of Armenia, Levon Ter-Petrosyan announced that the election had not been free and fair. From 20 February 2008 onwards daily protest rallies were held by thousands of opposition supporters on Freedom Square in the centre of Yerevan.

4. The applicant was at the material time Deputy General Prosecutor of Armenia. He also held the rank of First Category State Justice Councillor. In the past, the applicant had occupied a number of high-profile posts, including Military Prosecutor of Armenia and Deputy Justice Minister.

2. The applicant's speech at an opposition rally and his release from office

5. On 22 February 2008 the applicant attended an opposition rally on Freedom Square and made a public speech to the rally participants in which he stated as follows:

> "Free citizens of the Republic of Armenia! I am grateful for this opportunity that you and your leader, the first President of Armenia Levon Ter-Petrosyan, provided to me. Thank you. Dear citizens, you have won, we have won; the Armenian people have elected their President. And I shall ask you from now on not to refer [to Levon Ter-Petrosyan] as the first President, because the first President is the third President.
>
> Dear citizens, now I want to set aside the emotional part for a while and to talk substance. This is what I am telling you: you know very well that I have seen and dealt with many elections. But the scale of the falsifications, the violence, the beating and the battering, and the intimidation committed during this election have never happened before. And I urge you and ask you to stand up for your vote. Levon Ter-Petrosyan alone cannot do anything: we, each of us, myself and every one of you should stand up for his own vote. Eventually, on this land we shall establish the rule of law; the enforcement of the law should not depend on the person against whom it is aimed. The law should not apply on the basis of expediency: the cases in Talin and Ashtarak should be qualified in the same way, under the same article, and incur the same sanction, rather than the victim turning into the accused, and the accused – into the victim. It will be the determinant: if you do not defend your vote, if you do not stand up for the elected president, you should not complain later about someone being unlawfully beaten, another unlawfully detained, and a third unlawfully convicted; do not complain about anyone, as you will have to complain about your own selves.
>
> Dear friends, I would be dishonest with myself if I did not discuss with you the case of 27 [the criminal case on the shootings in the Armenian Parliament on 27 October 1999 that killed several high-ranking officials, including Prime Minister Vazgen Sargyan, as well as a journalist]. I definitely join the political assessments made by Levon Ter-Petrosyan. However, the criminal proceedings of the detached part of the criminal case were unlawfully discontinued: the proceedings were discontinued with grave violations of the Criminal Procedural Code, and the investigation of this detached part is yet to happen. And I promise you that if you help, help the elected

President, and help me, we will carry it to the end. I address all the friends of Vazgen [Sargsyan], all of his friends-in-arms, all those who consider themselves to belong to Vazgen [Sargsyan's] team. I address all the fighters for liberty, regardless of the hat they are currently wearing: this is a test of the spirit, and they are the death-bound, the defenders of the land. Boys, enough proposing toasts around tables, crying, cursing and throwing mud. The day has come, the moment has arrived: be the owners of your country!

Folks, I am a prosecutor, so far...I am a lawyer, I do not call you to violence, but I say that you should not retreat in the face of any force, and there is no general or army officer in this country who would lift a hand against the Armenian people."

6. It appears that on the same day, upon a decision of the General Prosecutor of Armenia, disciplinary proceedings were instituted in respect of the applicant and a disciplinary panel was set up. It further appears that unsuccessful attempts were made by the panel members to contact the applicant.

7. On the same day the disciplinary panel issued its written conclusion which stated, *inter alia*, as follows:

"...On 22 February 2008 [the applicant] ... attended a rally held on Freedom Square where he made ... political and work-related statements and calls supporting Levon Ter-Petrosyan and his co-thinkers, and compromising the current authorities...

With the above-mentioned actions [the applicant] ... grossly violated the requirements of Section 7 § 1 and Section 43 § 5 (2) of the Prosecutor's Office Act; failed to carry out and to observe the requirements of Section 42 § 1 (2 and 6) of the Prosecutor's Office Act, ... that is, did not display political restraint and neutrality, trampled the independence of the activity of a prosecutor and the authority of the prosecutor's office, vitiated the calling of a prosecutor and his reputation, honour and dignity by using his official stance in the interests of ...[political] parties supporting Levon Ter-Petrosyan, agitated in their favour, [and] carried out a political activity...

The applicant's guilt in the above disciplinary violations is confirmed by the following evidence:

Political and work-related statements and calls supporting Levon Ter-Petrosyan and his co-thinkers and compromising the current authorities as made by the applicant on Freedom Square in Yerevan on 22 February 2008, as well as TV and radio reports concerning [the applicant's speech], and respective publications on a number of websites...

Taking into account the nature and gravity of the disciplinary violations committed by [the applicant] ... the disciplinary panel proposes the General Prosecutor to submit a corresponding motion with the President of Armenia to subject [the applicant] to a disciplinary liability and, pursuant to Section 47 § 1 (6) of the Prosecutor's Office Act, to apply in his respect a disciplinary penalty of "release from office".

8. On the same day, the General Prosecutor, based on the conclusions of the disciplinary panel, issued a written note to the President in which he stated that the applicant, in gross violation of Section 7 § 1 of the Prosecutor's Office Act (hereafter, the Act), had participated in a rally held

on Freedom Square on 22 February 2008 and made political statements, and sought the applicant's release from the post of Deputy General Prosecutor.

9. On 23 February 2008 the President of Armenia adopted two decrees releasing the applicant, pursuant to Article 55 § 9 of the Constitution and Sections 7 § 1 and 47 § 5 of the Act, from the post of Deputy General Prosecutor and depriving him, pursuant to Article 55 § 16 of the Constitution, of the rank of First Category State Justice Councillor (hereafter "the Decrees").

10. The applicant alleged that the disciplinary proceedings in his respect were instituted and conducted post-factum, that is after the General Prosecutor had submitted the motion to release him from the post. As a result, he was denied the right under Article 48 (b) of the Act to give an explanation during the disciplinary proceedings.

3. Dispersal of opposition supporters from Freedom Square and the ensuing deadly clashes

11. In the early morning of 1 March 2008 police forces forcibly cleared Freedom Square of the opposition supporters. Some clashes apparently took place between the demonstrators and the law enforcement authorities at that time. Later that day more clashes took place between the police and the opposition supporters, which continued until late at night and resulted in ten deaths and dozens injured. It appears that the disorder was accompanied with pogroms and looting.

4. Court proceedings concerning the legality of the applicant's release from office and deprivation of his service rank

12. On 22 April 2008 the applicant lodged a claim with the Administrative Court seeking to annul the Decrees as unlawful. In particular, he claimed that his release from office on the basis of a violation of Section 7 § 1 of the Act was not envisaged by Section 50 of the Act, which contained an exhaustive list of grounds for releasing a prosecutor from office. Furthermore, the President was not empowered to deprive him of his rank; he was denied the right to give an explanation in the course of the disciplinary proceedings; and he was not served the Decrees and therefore they could not be considered as having entered into force.

13. On 1 August 2008 the Administrative Court dismissed the applicant's claim as unsubstantiated. The Administrative Court found that the applicant had made a political speech at the rally that took place on 22 February 2008 on Freedom Square and thus engaged in a political activity in violation of the requirements of Section 7 § 1 of the Act. In this respect, the Administrative Court referred to multiple publications of pro-opposition newspapers and internet media websites relating to the applicant's political speech. Furthermore, the Administrative Court held that

the applicant's release from office had a basis in the domestic law, being a type of disciplinary penalty prescribed by Sections 46 and 47 of the Prosecutor's Office Act, while the legal ground for adopting the Decree releasing the applicant from office was Article 55 § 9 of the Constitution and Sections 7 § 1 and 47 § 5 of the Act. As to the deprivation of rank, the President had power to do so as the term "confer" of Article 55 § 16 of the Constitution implied both the power to "give" and to "deprive" a person of a rank. The applicant's allegation that his right to give an explanation in relation to the instituted disciplinary proceedings had been violated was unsubstantiated since, as it appeared from the materials of the disciplinary proceedings, attempts were made to get in touch with him, albeit unsuccessfully. Besides, in accordance with a delivery slip present in the materials of the case file, copies of both Decrees had been duly delivered to the General Prosecutor's Office, while a corresponding notification had been made to the mass media and they were also posted on the President's official website. Hence, the applicant could be considered as having been duly notified of the impugned Decrees, as required by Section 60 of the Law on Legal Acts.

14. On 31 October 2008 the applicant lodged an appeal on points of law against the judgment of 1 August 2008 raising arguments similar to those submitted before the Administrative Court.

15. On 14 November 2008 the Court of Cassation decided to declare the applicant's appeal on points of law inadmissible for lack of merit.

B. Relevant domestic law

1. The Constitution of 1995 (following the amendments introduced on 27 November 2005)

16. According to Article 55 § 9, the President of Armenia shall, upon a recommendation by the General Prosecutor, appoint and release from office the deputies of the General Prosecutor.

17. Article 55 § 16 stipulates that the President of Armenia shall confer high diplomatic and other classification ranks.

18. Article 56 provides that the President of Armenia shall adopt orders and decrees which shall not contradict the Constitution and laws of the Republic of Armenia.

2. The Law on Legal Acts

19. Section 4 § 1 provides that decrees and orders of the President are considered as legal acts.

20. Section 60 § 1 of the Law on Legal Acts, as in force at the material time, provides that individual legal acts of the President shall enter into

force on the next day after the date on which they were adopted unless the law or a higher legal act or the individual legal act in question stipulates a later date. If such individual legal acts establish a duty (including instructions) or contain a norm worsening a legal condition of the public authorities, national and local institutions or individuals, they shall enter into force on the next day after the date on which they were delivered to the respective authorities or organisations, or were handed over or sent to the address of the domicile of the official or individual concerned, or on the next day after the date on which the official or individual concerned was otherwise duly notified.

21. Individual legal acts of the President that establish a liability shall enter into force starting from the moment on which they were delivered to the respective authorities or organisations, were handed over or sent to the address of the domicile of the official or person concerned, or starting from the moment on which the official or person concerned was otherwise duly notified, unless the law or a higher legal act or the individual legal act in question stipulates a later date.

3. The Prosecutor's Office Act

22. Section 7 § 1 provides that a prosecutor cannot be a member of any political party or otherwise carry out a political activity. A prosecutor is obliged to display political restraint and neutrality in any circumstances.

23. According to Section 42 § 1 (2 and 6), the duties of a prosecutor shall include the fulfillment of the requirements of the Constitution, laws and other legal acts, and maintenance of work discipline.

24. According to Section 43 § 5 (2), during the performance of his official duties a prosecutor has no right to use his official stance in the interests of parties, to agitate for them as well as to carry out other political activity.

25. According to Section 46, which envisages grounds for disciplinary liability, a prosecutor can be subjected to a disciplinary penalty in case of, *inter alia*, (2) a gross violation or regular violations of the law during the exercise of his powers; and (4) non-observance of the requirements of Sections 42 and 43 of the present Code.

26. Section 47 § 1 (6) prescribes "release from office" as a type of disciplinary penalty.

27. Pursuant to Section 47 § 5, the penalty as envisaged, *inter alia*, by Section 47 § 1 (6) shall be applied in respect of the deputies of the General Prosecutor by President, upon a recommendation by the General Prosecutor.

28. Section 48 provides, *inter alia*, that (1) the Prosecutor General shall institute disciplinary proceedings in respect of a prosecutor on account of a fact of a disciplinary violation; (3) a prosecutor has a right to give an explanation in relation to the disciplinary proceedings instituted against

him; and (11) a prosecutor has the right to challenge before a court the disciplinary penalty to which he was subjected.

29. According to Section 50 § 1, a prosecutor shall be released from office on the ground of: (1) a personal request; (2) reaching the age of 65; (3) entry into force of a guilty court verdict in his respect; (4) cessation of the nationality of the Republic of Armenia; (5) staff reduction; (6) a dissolution or reorganisation of a division of a prosecutor's office, in the event of the prosecutor's refusal to be transferred to another division (7) a court decision recognising him as fully or partially legally incapacitated, or declaring him as a missing person; (8) discontinuance of criminal proceedings against him on non-exonerating grounds; (9) acquisition of a disease as provided for by Section 33 § 2, or a physical disability.

30. Section 50 § 2 further stipulates that a prosecutor may also be released from office on the ground of: (1) a violation of the procedure for his appointment as prosecutor; (2) non-attendance at the workplace for six months within one year due to a temporary loss of work capacity; and (3) a decision taken pursuant to Section 54 § 14 (6).

31. According to Section 54 § 14 (6) which regulates the issue of attestation of a prosecutor, the attestation commission, based on the results of the attestation, shall decide, *inter alia*, that the prosecutor concerned does not correspond to the office of prosecutor, and shall submit a motion to release him from office.

COMPLAINTS

32. The applicant complained that the Armenian authorities, by dismissing him from the post of Deputy General Prosecutor and depriving him of the rank of First Category State Justice Councillor, violated (a) his right to freedom of expression, as protected by Article 10 of the Convention; (b) his right to freedom of peaceful assembly, as protected by Article 11 of the Convention; (c) his right to private life, as protected by Article 8 of the Convention and (d) the requirement of Article 14 of the Convention as they subjected him to discriminatory treatment based on his political views.

THE LAW

A. Complaint under Article 10 of the Convention

33. The applicant complained that the Armenian authorities, by dismissing him from the post of Deputy General Prosecutor and depriving him of the rank of First Category State Justice Councillor, violated his right to freedom of expression, as protected by Article 10 of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

1. The applicant's submissions

34. The applicant alleged, *inter alia*, that the ground on which he was dismissed was not provided for by Section 50 of the Act. Furthermore, the disciplinary proceedings were conducted post-factum and he was deprived of a possibility to give an explanation during the proceedings. His deprivation of rank was unlawful too as Article 55 § 16, invoked in the Decree, on deprivation of his rank conferred no such power on the President. Besides, neither Decree had been delivered to him as required by Section 60 § 1 of the Law on Legal Acts and accordingly could not be considered as having entered into force.

35. As to the issue of whether such interference was necessary in a democratic society the applicant, *inter alia*, alleged that his speech was prompted by his willingness to give an opinion on a number of issues of concern to the public. Although his speech was emotional and of a critical nature, he made no calls for violence or disorder. To the contrary, he specifically emphasised the need to be guided by law and the Constitution. Such behaviour could not be considered as engagement in active politics. Furthermore, he was disproportionately subjected to the most severe disciplinary penalty, namely release from office, and was also deprived of his rank, which aggravated the severity of the measure. The application of

the most severe disciplinary penalty in his respect had undoubtedly had a "chilling effect" on all law-enforcement officials.

2. The Court's assessment

36. The Court observes that the applicant was Deputy General Prosecutor at the time when he made the impugned speech. In this respect, the Court reiterates that the guarantees of Article 10 apply to public servants such as judges (*Kudeshkina v. Russia*, no. 29492/05, § 80, 26 February 2009) and police officers (see *Rekvényi v. Hungary* [GC], no. 25390/94, § 26, ECHR 1999-III). It follows that Article 10 is also applicable to the present case. Consequently, the applicant's release from office and deprivation of rank constituted an interference with his right to freedom of expression.

(a) "Prescribed by law" and legitimate aim

37. The applicant claimed that his release from office was not "prescribed by law" as no such penalty was envisaged by Section 50 of the Act. However, the Court notes that the applicant was released from office on the basis of Section 47 § 1 (6) of the Act which clearly provided for such disciplinary penalty. In general, the Court observes that the institution and conduct of disciplinary proceedings against the applicant were carried out in accordance with the relevant provisions of the Act and the Constitution. In so far as the applicant may be understood to challenge the quality of the law applied in his case, the Court does not find sufficient ground to conclude that the legal acts relied on by the domestic authorities – both when releasing the applicant from office and depriving him of his rank – were not published or that their effect was not foreseeable (see, *mutatis mutandis*, *Kudeshkina*, cited above, § 81). As regards the applicant's arguments relating to the unfairness of the disciplinary proceedings and their post-factum conduct, the Court considers that they essentially concern the proportionality of the disputed measure and will be more appropriately considered under that head (see paragraph 44 below). In sum, the Court considers that the interference with the applicant's right to freedom of expression was "prescribed by law".

38. As to the existence of a legitimate aim, the Court has previously found that the requirement for public officials, including police officers, to refrain from political activities pursued the legitimate aims of protection of national security, public safety and prevention of disorder (see *Rekvényi*, cited above, § 41). In the same manner, the Court considers that the restriction in question, namely the requirement for prosecutors, who together with police officers are considered as law enforcement officials, to display political restraint and not to carry out political activity pursued a legitimate aim within the meaning of paragraph 2 of Article 10 of the Convention.

(b) "Necessary in a democratic society"

39. In the present case, the Court's task is to determine whether a fair balance has been struck between the fundamental right of the individual to freedom of expression and the legitimate interest of a democratic State in ensuring that its civil service properly furthers the purposes enumerated in Article 10 § 2. In carrying out this review, the Court will bear in mind that whenever civil servants' right to freedom of expression is in issue "the duties and responsibilities" referred to in Article 10 § 2 assume a special significance, which justifies leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference is "proportionate" to the legitimate aim in question (see *Vogt*, cited above, ibid.; and *Rekvényi*, cited above, § 43). In this respect, a particular importance will be attached to the office held by the applicant, his statement and the context in which it was made (see *Wille v. Liechtenstein* [GC], no. 28396/95, § 63, ECHR 1999-VII).

40. Turning to the circumstances of the present case, the Court notes that the applicant, at the time he made the impugned statements, occupied one of the highest posts in the law enforcement system of Armenia. As a public servant who was acting as the depository of public authority responsible for protecting the general interests of the State, he was under a duty to display political restraint and neutrality and had no right to use his official position in the interests of political parties, to agitate for them and, in general, to carry out other political activity (see paragraphs 22 and 24 above).

41. The Court observes that on 22 February 2008 the applicant attended a rally at which he made a public speech supporting an opposition presidential candidate and criticising the current authorities, in particular as far as the conduct of the election was concerned. This was in fact acknowledged by the applicant in his submissions. The applicant further encouraged the rally participants to continue holding protest actions and not to retreat in the face of any force. The applicant's speech was therefore of a clearly political nature. Besides, it also contained work-related statements, in particular, concerning the allegedly flawed investigation of the deadly terrorist attack on the Armenian Parliament in 1999.

42. As to the context in which the applicant's speech was made, the Court notes that the political situation in Armenia following the 19 February 2008 presidential election was characterised by the escalation of political confrontation between the authorities and the opposition which claimed that the election results had been rigged and held mass protest rallies.

43. In sum, the Court considers that the interference with the applicant's right to freedom of expression, even in the form of such measures as release from office and deprivation of rank, was proportionate to the legitimate aim pursued and therefore was "necessary in a democratic society".

44. As to the applicant's allegations that the disciplinary proceedings against him were conducted post-factum, as a result of which his right to

give an explanation was breached, the Court notes that, even assuming that it had been the case, the applicant instituted administrative court proceedings contesting the lawfulness of the state actions against him during which he was able to submit arguments – and indeed did so – in support of his claim. Therefore, the fact that the applicant was deprived of his right to give an explanation during the disciplinary proceedings can be offset by the fact that he was able to do so before the Administrative Court.

45. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. Remainder of the application

46. The applicant also complained that his dismissal from office and deprivation of rank were in violation of the guarantees of Articles 8, 11 and 14 of the Convention.

47. In the light of all the material in its possession, and in so far as the matter complained of is within its competence, the Court finds that it does not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. Accordingly, this part of the application must be rejected as manifestly ill-founded and declared inadmissible pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Marialena Tsirli	Josep Casadevall
Deputy Registrar	President