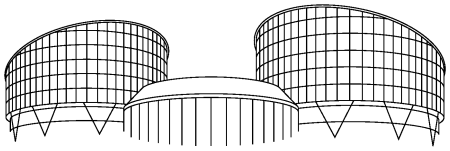

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF TOVMASYAN v. ARMENIA

(Application no. 11578/08)

JUDGMENT

STRASBOURG

21 January 2016

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Tovmasyan v. Armenia,

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

Mirjana Lazarova Trajkovska, *President,*
Päivi Hirvelä,
Linos-Alexandre Sicilianos,
Paul Mahoney,
Aleš Pejchal,
Robert Spano,
Armen Harutyunyan, *judges,*

and André Wampach, *Deputy Section Registrar,*

Having deliberated in private on 15 December 2015,

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

PROCEDURE

1. The case originated in an application (no. 11578/08) 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, Ms Rehan Tovmasyan ("the applicant"), on 13 February 2008.

2. The applicant, who had been granted legal aid, was represented by Mr A. Vareljyan and Ms M. Hakobyan, lawyers practising in Yerevan. The Armenian Government ("the Government") were represented by their Agent, Mr G. Kostanyan, Representative of the Republic of Armenia at the European Court of Human Rights.

3. The applicant alleged that her right to a fair trial guaranteed by Article 6 of the Convention had been violated.

4. On 30 September 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1948 and lives in Yerevan. She is unemployed and receives state welfare benefit.

6. On 10 October 1991 the Republic of Armenia Executive Committee of the Mashtots District Council of People's Deputies decided to allocate a

flat to the applicant in a building in Yerevan, which was to be constructed by Kanaz Aluminium Factory (hereafter - the Factory).

7. It appears that the foundation of the future building was laid but, as the Soviet Union collapsed, the construction of the building was stopped.

8. On an unspecified date the Factory went bankrupt and a liquidation commission (hereafter - the commission) was set up.

9. It appears that on 8 May 2007 the applicant lodged a request with the commission seeking to be allocated a flat or to receive money equivalent to its value.

10. On 10 May 2007 the head of the commission rejected the applicant's request on the ground that the building, of which one flat was to be allocated to the applicant, had not been constructed due to the lack of financial means. He stated that the Factory had carried out construction activities with direct financial support from the Soviet Government and that after the Soviet Union collapsed it had to stop construction projects for lack of financial means.

11. On 13 June 2007 the applicant, who was not represented by a lawyer, lodged a claim with the Arabkir and Kanaker-Zeytun District Court of Yerevan seeking to oblige the Factory to allocate a flat to her or provide her compensation equivalent to its value.

12. On 19 July 2007 the District Court dismissed the applicant's claim on the same grounds as those relied on by the head of the commission. It also found that the Factory had been declared bankrupt and had no legal successor as such.

13. On 23 July 2007 the applicant, still unrepresented, lodged an appeal against this judgment.

14. On 15 October 2007 the Civil Court of Appeal dismissed the applicant's appeal and upheld the judgment of the District Court.

15. The applicant did not lodge an appeal on points of law with the Court of Cassation. She alleges that she was unable to do so as she could not afford to hire an advocate authorised to act before that court, whose services were costly. She further claims that she applied to many lawyers with a request to provide her with free legal services as regards her application to the Court of Cassation. However, her requests were turned down on the ground that the issue concerned an apartment and legal aid was not available for this type of a dispute.

II. RELEVANT DOMESTIC LAW

16. For a summary of the relevant domestic provisions see the judgment in the case of *Shamoyan v. Armenia* (no. 18499/08, §§ 14-18, 7 July 2015).

17. In addition to the relevant parts of the Constitutional Court's decision of 8 October 2008 already cited in the *Shamoyan* judgment referred to above, this decision also stated that according to information received

from the Chamber of Advocates of Armenia, two out of the four public defenders licensed to act before the Court of Cassation had drafted sixteen appeals on points of law free of charge. The Constitutional Court noted that, considering the high number of criminal and civil cases examined in the Armenian courts, free legal assistance provided by licensed advocates was negligible given the absence of a clear definition of such cases and procedures in the law which made it dependent on the "good will" of the office of the public defender.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

18. The applicant complained under Article 6 of the Convention that her right to a fair trial had been violated stating, *inter alia*, that she was unable to lodge an appeal on points of law against the judgment of the Court of Appeal of 15 October 2007 since she could not afford the services of an advocate licensed to act before the Court of Cassation. The Court considers that the applicant's complaint essentially raises an issue of access to court and should therefore be examined from the standpoint of Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

1. The parties' submissions

19. The Government submitted that the applicant had not exhausted the domestic remedies available to her since she had failed to lodge an appeal on points of law in accordance with the applicable procedural rules. They further submitted that the applicant had not substantiated that she had ever applied to a licensed advocate to find out whether the latter would provide her with *pro bono* legal advice, which possibility was envisaged by Article 6 of the Advocacy Act, and that she had been refused.

20. The applicant referred to the Constitutional Court's decision of 8 October 2008 which stated, *inter alia*, that according to the information provided by the Chamber of Advocates only two out of four public defenders authorised to act before the Court of Cassation had drafted sixteen appeals on points of law on a *pro bono* basis. It further stated that, given the high number of civil and criminal cases examined in Armenian courts, there was a very scarce guarantee ensuring free legal assistance by licensed

advocates in the absence of a clear procedure and circumstances of such assistance which was simply dependent on the "good will" of the Office of the Public Defender.

2. The Court's assessment

21. The Court reiterates that in order to comply with the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention, normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged (see, among other authorities, *Assenov and Others v. Bulgaria*, 28 October 1998, § 85, *Reports of Judgments and Decisions* 1998-VIII).

22. The only remedies to be exhausted are those which are effective. 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. 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, or that special circumstances existed which absolved him or her from this requirement (see *Kalashnikov v. Russia* (dec.), no. 47095/99, ECHR 2001-XI (extracts) and *Melnik v. Ukraine*, no. 72286/01, § 67, 28 March 2006).

23. The Court observes that the essence of the applicant's complaint is that her access to the Court of Cassation was restricted precisely because of the procedural requirement that appeals on points of law could only be lodged by a licensed advocate, whom she was unable to approach due to her difficult financial situation. The issue of exhaustion of domestic remedies is therefore closely linked to the merits of the applicant's complaint that she was deprived of her right of access to court because of the state of the law at the material time. Accordingly, the Court considers that the Government's objection should be joined to the merits of the applicant's complaint under Article 6 § 1.

24. 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

1. The parties' submissions

25. The applicant claimed that her right of access to court was violated. She submitted that the procedural requirement whereby appeals on points of law could only be lodged by advocates holding a special licence to act before the Court of Cassation was found by the Constitutional Court to be unconstitutional since it disproportionately restricted access to that court by making judicial protection conditional on an appellant's financial means.

26. The Government submitted that the applicant was not precluded from lodging an appeal on points of law with the Court of Cassation but there was a certain procedure envisaged by the law at the material time which should have been respected by a person willing to apply to this court. They argued that procedural requirements for lodging appeals were not incompatible with the guarantees of Article 6 of the Convention. Furthermore, the domestic law envisaged a possibility to receive free legal assistance upon the initiative of an advocate. The Government finally submitted that the requirement that appeals on points of law could only be lodged by licensed advocates pursued the legitimate aim of ensuring the quality of appeals lodged with the Court of Cassation and was later abolished due to difficulties revealed during the practical implementation of the relevant procedural rules.

2. The Court's assessment

27. The Court reiterates that the "right to a court", of which the right of access is one aspect, is not absolute; it is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard. However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired; lastly, such limitations will not be compatible with Article 6 § 1 if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, among other authorities, *Levages Prestations Services v. France*, 23 October 1996, § 40, *Reports of Judgments and Decisions* 1996-V citing *Ashingdane v. the United Kingdom*, 28 May 1985, § 57, Series A no. 93; *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, § 59, Series A no. 316-B and *Stanev v. Bulgaria* [GC], no. 36760/06, § 230, ECHR 2012).

28. The Convention does not compel the Contracting States to set up courts of appeal or of cassation. However, where such courts do exist, the guarantees of Article 6 must be complied with, for instance in that it guarantees to litigants an effective right of access to the courts for the

determination of their "civil rights and obligations" (see *Levages Prestations Services*, cited above, § 44; and *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32). However, the manner in which Article 6 § 1 is to be applied in relation to appellate or cassation courts depends upon the special features of the proceedings involved. Account must be taken of the entirety of the proceedings conducted in the domestic legal order and of the role of the appellate or cassation court therein (see *Monnell and Morris v. the United Kingdom*, 2 March 1987, § 56, Series A no. 115 and the cases cited therein; *Tolstoy Miloslavsky v. the United Kingdom*, cited above, § 59).

29. Furthermore, the requirement that an appellant be represented by a qualified lawyer before the court of cassation is compatible with the characteristics of the Supreme Court as a highest court examining appeals on points of law and it is a common feature of the legal systems in several member States of the Council of Europe (see, for instance, *Siałkowska v. Poland*, no. 8932/05, § 106, 22 March 2007; *Gillow v. the United Kingdom*, 24 November 1986, § 69, Series A no. 109).

30. The Court further reiterates that it is for the Contracting States to decide how they should comply with the fair hearing obligations arising under the Convention. However, the Court must satisfy itself that the method chosen by the domestic authorities in a particular case is compatible with the Convention (see *Siałkowska v. Poland*, cited above, § 107).

31. The Court notes that it has already examined an identical complaint and similar arguments in relation to its admissibility and merits in the case of *Shamoyan* (see *Shamoyan v. Armenia*, no. 18499/08, §§ 32-39, 7 July 2015), where it rejected the Government's objection as to non-exhaustion of domestic remedies and found that the absence of the possibility to apply for legal aid, given the procedural requirement at the material time that appeals on points of law could only be lodged by advocates licensed to act before the Court of Cassation, placed a disproportionate restriction on the effective access to that court.

32. At the same time, the Court notes that in contrast to the applicant in the *Shamoyan* case, the applicant in the present case did not lodge an appeal on points of law even directly by herself (see paragraph 15 above). The Court observes, however, that the applicant's appeal on points of law in any event would not have been admitted for examination, for failure to comply with the law in view of the procedural requirements in force at the time. In such circumstances, the Court does not consider that different considerations should apply to the applicant's situation where she did not lodge an appeal on points of law directly, knowing that it would not be accepted for examination because of the state of the law at the material time. The Court, therefore, does not see any reason to depart from its findings in the above-cited judgment in the case of *Shamoyan* in the present case.

33. In view of the foregoing, there has been a violation of Article 6 § 1 of the Convention. The Government's objection as to non-exhaustion of domestic remedies is accordingly dismissed.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

34. Lastly, the applicant raised other complaints under Article 6 of the Convention.

35. 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 or its Protocols. 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.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. 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

37. The applicant asked to be provided with the flat which should have been allocated to her by the Factory, or in the alternative compensation in the amount of AMD 25,000,000 (approximately EUR 45,550) in respect of pecuniary damage. She submitted that as a result of the courts' refusal to grant her claim whereby she sought allocation of a flat to her or equivalent compensation for it she had experienced considerable moral suffering, and left the determination of the amount of compensation for non-pecuniary damage to the discretion of the Court.

38. The Government submitted that the applicant's claims in respect of pecuniary and non-pecuniary damage had no connection with the alleged violation of Article 6 of the Convention and should therefore be rejected.

39. The Court does not discern any causal link between the violation found concerning the lack of access to a court and the pecuniary damage alleged. Consequently, there is no justification for making any award under this head. The Court accepts that the applicant has suffered non-pecuniary damage, such as distress and frustration, resulting from her inability to appeal to the Court of Cassation against the decision of the Court of Appeal which was unfavourable to her, which is not sufficiently redressed by the

finding of a violation of the Convention. Making its assessment on an equitable basis, the Court awards the applicant EUR 3,600 under this head.

B. Costs and expenses

40. The applicant also claimed EUR 850 in reimbursement of legal costs incurred before the Court. She submitted a preliminary contract for provision of legal services whereby she was bound to pay this sum only in the event of the Court finding in her favour and awarding her an amount in just satisfaction.

41. The Government submitted that the legal costs claimed by the applicant had not actually been incurred since she had failed to submit any evidence that she had made any payment to her lawyers. They argued that the preliminary contract for the supply of services could not be considered as appropriate documentary proof for the purposes of the applicant's claims under this head since she had failed to demonstrate that the conclusion of the actual contract followed her preliminary undertaking, which she was free to retract under the law.

42. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the Court does not find it necessary to examine whether the documentary proof submitted by the applicant could serve as proper evidence in support of her claims for legal costs since in any event the applicant was already granted legal aid in the amount claimed. The Court therefore rejects the applicant's claim for costs and expenses.

C. Default interest

43. 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. *Joins* the Government's objection as to non-exhaustion of domestic remedies to the merits of the applicant's complaint under Article 6 § 1 of the Convention and *dismisses* it;

2. *Declares* the complaint concerning lack of access to the Court of Cassation admissible and the remainder of the application inadmissible;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,600 (three thousand six hundred euros) in respect of non-pecuniary damage, to be converted into Armenian drams at the rate applicable at the date of settlement plus any tax that may be chargeable;

(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 21 January 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach
Deputy Registrar

Mirjana Lazarova Trajkovska
President