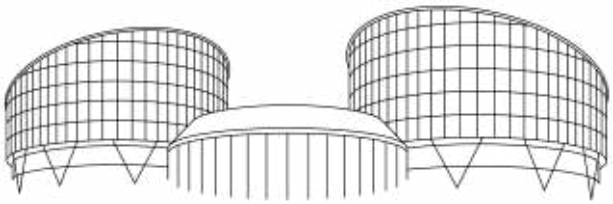

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF TSATURYAN v. ARMENIA

(Application no. 37821/03)

JUDGMENT

STRASBOURG

10 January 2012

FINAL

10/04/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Tsaturyan v. Armenia,

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

Josep Casadevall, *President,*
Corneliu Bîrsan,
Alvina Gyulumyan,
Egbert Myjer,
Ineta Ziemele,
Luis López Guerra,
Mihai Poalelungi, *judges,*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 29 November 2011,

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

PROCEDURE

1. The case originated in an application (no. 37821/03) 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 Ashot Tsaturyan ("the applicant"), on 28 November 2003.

2. The applicant was represented by Mr J.M. Burns, a lawyer practising in Georgetown (Canada), Mr A. Carbonneau, a lawyer practising in Patterson (USA), and Mr R. Khachatryan, a lawyer 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. On 6 September 2005 the President of the Third Section decided to give notice of the application to the Government.

4. On 23 June 2011 the President of the Third Section decided to apply Article 29 § 1 of the Convention and to rule on the admissibility and merits of the application at the same time.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1980 and lives in Yerevan.

A. Background to the case

6. The applicant is a Jehovah's Witness. From 1997 he attended various Jehovah's Witnesses religious services.

7. On 31 January 1997 the applicant was registered as a person liable for military service with the Shahumyan Military Commissariat. Because the applicant was studying at the university, his military service was postponed.

8. On 23 September 2002 the applicant received notice to appear at the military commissariat to report for military service.

9. On the same date the applicant wrote a letter to the Malatia-Sebastia District Military Commissariat, stating that he would not report for military service and requesting that his case be sent to the Prosecutor's Office. The applicant also informed the General Prosecutor of Armenia in writing that he refused to perform military service because of his religious beliefs but was willing to perform alternative civilian service.

10. On 2 October 2002 the Shahumyan Military Commissar wrote to the relevant police station about the applicant's refusal to report for military service, asking that he be forcibly brought to the military commissariat.

11. On 17 October 2002 the applicant made a statement at the police station, explaining that he refused to perform military service because of his religious beliefs but was willing to perform alternative civilian service.

12. By a letter of 8 November 2002 the Shengavit District Prosecutor's Office of Yerevan informed the applicant that he would face criminal charges if he failed to report for military service.

B. Criminal proceedings against the applicant

13. On 4 March 2003 criminal proceedings were instituted under Article 75 of the Criminal Code on account of the applicant's draft evasion.

14. On 18 March 2003 the applicant was questioned at the Shengavit District Prosecutor's Office of Yerevan. He once again submitted that he was refusing to serve in the army for religious reasons but was prepared to perform alternative civilian service.

15. On the same date the Shengavit District Court of Yerevan ordered that the applicant be detained on remand.

16. On 29 April 2003 the Shengavirt District Court of Yerevan found the applicant guilty of draft evasion and sentenced him to two years in prison.

17. On an unspecified date the applicant lodged an appeal.

18. On 24 June 2003 the Criminal Court of Appeal upheld the judgment of the District Court.

19. On 3 July 2003 the applicant lodged an appeal, arguing, *inter alia*, that his conviction violated his rights guaranteed by Article 9 of the Convention.

20. On 25 July 2003 the Court of Cassation upheld the applicant's conviction.

21. On 28 August 2003 the applicant was released on parole after having served five months and ten days of his sentence.

II. RELEVANT DOMESTIC LAW

22. For a summary of the relevant domestic provisions see the judgment in the case of *Bayatyan v. Armenia* ([GC], no. 23459/03, §§ 41-45, 7 July 2011).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

23. The applicant complained that his conviction for refusal to serve in the army had violated Article 9 of the Convention which reads as follows:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. Exhaustion of domestic remedies

24. The Government submitted that the applicant had failed to exhaust the domestic remedies, as required by Article 35 § 1 of the Convention, since he had not applied to the Government under Section 12 § 1 (c) of the Military Liability Act with a request for exemption from military service.

25. The applicant submitted that he had exhausted all the effective domestic remedies, having appealed against his conviction to the Court of Appeal and the Court of Cassation. In any case, Section 12 § 1 (c) of the Military Liability Act could not be considered as an effective remedy.

26. The Court notes that the Government raised an identical argument which was dismissed in the case of *Bayatyan v. Armenia* ((dec.),

no. 23459/03, 12 December 2006). There is no reason to come to a different conclusion in the present case.

27. This objection must therefore be dismissed.

2. Conclusion

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

B. Merits

1. Whether there was an interference

29. The Government claimed that there was no interference with the applicant's rights guaranteed by Article 9. They claimed that Article 9 was not applicable to the applicant's case since it, as interpreted by the former European Commission of Human Rights, did not guarantee a right to conscientious objection.

30. The applicant argued that Article 9 was applicable to his case and that there has been an interference with his freedom to manifest his religion.

31. The Court notes that this issue was recently decided by the Grand Chamber which held that opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9 (see *Bayatyan*, cited above, § 110). In that case the Grand Chamber concluded that Article 9 was applicable to the applicant's case, who was similarly a Jehovah's Witness who had refused to serve in the army on conscientious grounds, finding that his objection to military service was motivated by his religious beliefs which were genuinely held and were in serious and insurmountable conflict with his obligation to perform military service (ibid., § 111).

32. The Court observes that the circumstances of the present case are practically identical. It therefore rejects the Government's argument and finds Article 9 to be applicable to the applicant's case.

33. The Court concludes that the applicant's failure to report for military service was a manifestation of his religious beliefs. His conviction for draft evasion therefore amounted to an interference with his freedom to manifest his religion as guaranteed by Article 9 § 1 (ibid., § 112). Such interference will be contrary to Article 9 unless it is "prescribed by law", pursues one or more of the legitimate aims set out in paragraph 2 and is "necessary in a

democratic society" (see, among other authorities, *Buscarini and Others v. San Marino* [GC], no. 24645/94, § 34, ECHR 1999-I)

2. Whether the interference was justified

(a) Prescribed by law

34. The applicant submitted that the interference was not prescribed by law because it was in violation of Armenia's Constitution, the commitments which the Armenian authorities had undertaken when joining the Council of Europe and Armenia's other international obligations such as those stemming from Article 18 of the International Covenant on Civil and Political Rights.

35. The Government did not comment on this point.

36. The Court, for the purposes of the present case and in view of its findings concerning the necessity of the interference (see paragraphs 44-45 below), prefers to leave open the question of whether the interference was prescribed by law (see *Bayatyan*, cited above, § 116).

(b) Legitimate aim

37. The applicant submitted that the interference did not pursue a legitimate aim. Article 9 § 2 did not permit limitations in the interests of national security, while no other aims were invoked by the domestic courts in convicting the applicant.

38. The Government did not comment on this point.

39. The Court considers it unnecessary to determine whether the interference pursued a legitimate aim under Article 9 § 2 since it was in any event incompatible with that provision for the reasons set out below (ibid., § 117).

(c) Necessary in a democratic society

40. The applicant submitted that the imposition of criminal sanctions on conscientious objectors, even in those few member States that have not yet implemented alternative civilian service, could not be considered necessary in a democratic society. The Armenian authorities had acknowledged that when they undertook a commitment to refrain from imprisonment of conscientious objectors even before a law providing for such service was passed. Furthermore, the punishment imposed on him was wholly disproportionate in a modern democratic State.

41. The Government did not comment on this point

42. The Court reiterates that, as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the

identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion (see *Kokkinakis v. Greece*, 25 May 1993, § 31, Series A no. 260-A; *Buscarini and Others*, cited above, § 34; and *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 104, ECHR 2005-XI).

43. While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares. Article 9 lists a number of forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance (see *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 60, ECHR 2000-XI, and *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, § 114, ECHR 2001-XII).

44. The Court notes that it has already examined a similar complaint in the case of *Bayatyan v. Armenia* and concluded that the imposition of a penalty on the applicant, in circumstances where no allowances were made for the exigencies of his conscience and beliefs, could not be considered a measure necessary in a democratic society (see *Bayatyan,* cited above, §§ 124-125). In the present case, the applicant was similarly a member of Jehovah's Witnesses who sought to be exempted from military service not for reasons of personal benefit or convenience but on the ground of his genuinely held religious convictions and the only reason why he was not able to do so and incurred criminal sanctions was the absence of such an opportunity.

45. For the above reasons, the Court considers that the applicant's conviction constituted an interference which was not necessary in a democratic society within the meaning of Article 9 of the Convention. Accordingly, there has been a violation of that provision.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

46. The applicant also raised a number of other complaints under Articles 9 and 14 of the Convention.

47. 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

48. 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

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

50. The Government did not comment on this claim.

51. The Court considers that the applicant has undoubtedly suffered non-pecuniary damage as a result of his conviction and imprisonment for his refusal to serve in the army on conscientious grounds. Having regard to the circumstances of the case and ruling on an equitable basis, it awards the applicant EUR 6,000 in respect of non-pecuniary damage.

B. Costs and expenses

52. The applicant claimed a total of EUR 12,250 for costs and expenses incurred in the domestic proceedings and the proceedings before the Court. The applicant submitted invoices in respect of three lawyers, one domestic and two foreign, containing lump sum amounts payable for each portion of the work done up to and including the taking of a final decision on his case.

53. The Government did not comment on this claim.

54. The Court reiterates that legal costs are only recoverable in so far as they relate to the violation found (see *Beyeler v. Italy* [GC], no. 33202/96, § 27, ECHR 2000-I). In the present case, the applicant's application to the Court included a number of other complaints under Articles 9 and 14 of the Convention, which were declared inadmissible. Therefore the claim cannot be allowed in full and a reduction must be applied. Making its own estimate based on the information available, the Court awards the applicant EUR 4,000 for costs and expenses.

C. Default interest

55. The Court considers it appropriate that the default interest 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* by a majority the complaint concerning the applicant's conviction for draft evasion admissible under Article 9 of the Convention and the remainder of the application inadmissible;

2. *Holds* by six votes to one that there has been a violation of Article 9 of the Convention;

3. *Holds* by six votes to one
   (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, the following amounts, to be converted into Armenian drams at the rate applicable at the date of settlement:
      (i) EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 4,000 (four thousand 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;

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

Done in English, and notified in writing on 10 January 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinions of Judges Gyulumyan and Ziemele are annexed to this judgment.

J.C.M.
S.Q.

DISSENTING OPINION OF JUDGE GYULUMYAN

The instant application was lodged at the same time as *Bayatyan v. Armenia* (GC, no. 23459/03, 7 July 2011) and raises the same issue under Article 9 of the Convention.

In the case of *Bayatyan* the Grand Chamber voted in favour of finding a violation of the above-said Article, and in the present case the majority of the Chamber followed the same approach.

For the reasons set out in my detailed dissenting opinion in *Bayatyan*, I voted against the majority on the admissibility and merits of the claim, and so I did the same in the present case.

CONCURRING OPINION OF JUDGE ZIEMELE

1. This case follows the approach that the Court took in the leading judgment in the case of *Bayatyan v. Armenia* ([GC], no. 23459/03, §§ 41-45, 7 July 2011). There are three main grounds for finding a violation of the right to freedom of religion in cases of conscientious objectors: first, a person's conscience or deeply and genuinely held religious or other beliefs constituting a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9 (see *Bayatyan*, cited above, § 110); second, the fact that at the time the alleged events took place in Armenia the right to conscientious objection was recognised in State practice in Europe; and, third, that Armenia had pledged to enact the necessary legislation to implement that right at domestic level.

2. The *Bayatyan* judgment, as followed by the Chamber in this case, raises a very interesting question regarding the application of the Convention in the light of an established regional customary norm with respect to a State which – in the context of a political process – has been given a certain time-limit for complying with that customary norm. The Court's answer is that even if the facts of the case arose before and during the transitional period for the enactment of the relevant domestic law on alternative service granted to Armenia upon its accession to the Council of Europe, the obligation to respect the right to freedom of religion of conscientious objectors applies from the moment the right itself is established in international law and the State concerned has ratified the Convention. This sheds an interesting light on the role of the Council of Europe and the political process of negotiating the entrance conditions for prospective member States of the organisation. Neither the Grand Chamber in the *Bayatyan* judgment nor the Chamber in this case have provided a clear solution to this. Instead, the dialogue of Armenia with the Council of Europe has been one of the arguments considered by the Court as part of the balancing exercise between the rights of the applicants and the public interest.

3. It appears to me that the Court has in the past taken a clearer position on the question of possible conflicting obligations. For example, in the *Slivenko v Latvia* case it stated that:

"By ratifying the Convention and Protocols Nos. 1, 4, 6 and 7 on 27 June 1997, [Latvia] has undertaken to "secure", as from that date, the rights and freedoms defined in the Convention and the said Protocols to everyone within its jurisdiction (Article 1 of the Convention), subject to any valid reservations made under Article 57 of the Convention. ... It follows from the text of Article 57 § 1 of the Convention, read in conjunction with Article 1, that ratification of the Convention by a State presupposes that any law then in force in its territory should be in conformity with the Convention. If that should not be the case, the State concerned has the possibility of entering a

reservation in respect of the specific provisions of the Convention (or Protocols) with which it cannot fully comply by reason of the continued existence of the law in question (see *Slivenko v. Latvia* (dec.) [GC], no. 48321/99, §§ 58 and 60, ECHR 2002-II (extracts))".

4. Finally, in this and the other cases, I find the test established by the Court of a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9 a rather difficult one. It is not clear to me how the Court will assess whether there is sufficient cogency, seriousness and cohesion. In the present case, the applicant became a Jehovah's Witness the same year that he was registered as a person liable for military service. In any event, the Chamber did not examine the cogency of the beliefs of the applicant. The Court concluded that:

".. the applicant was similarly a member of Jehovah's Witnesses who sought to be exempted from military service not for reasons of personal benefit or convenience but on the ground of his genuinely held religious convictions and the only reason why he was not able to do so and incurred criminal sanctions was the absence of such an opportunity" (see paragraph 44). It seems to me that the European Court acts on the basis of an assumption that the applicant indeed holds genuine convictions as confirmed by all the procedures that he has gone through at domestic level and that, in the absence of any proper domestic assessment or arguments to the contrary from the Government, the Court has had to maintain that assumption. I can certainly agree that the Government did not submit any evidence to the contrary or, for that matter, any other relevant explanation. In my view, there is still an unresolved question regarding the test and how it will be applied in practice in future cases.