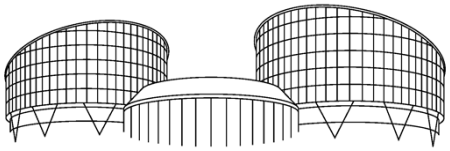

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF GHAVALYAN v. ARMENIA

(Application no. 50423/08)

JUDGMENT

Art 5 § 3 • Reasonableness of pre-trial detention • Applicant detained after arrest on suspicion of aiding and abetting tax evasion • Absence of relevant and sufficient reasons
Art 5 § 4 • Review by a court • Denial of judicial review of detention solely on grounds that criminal case no longer considered to be in pre-trial stage an unjustified restriction • Procedural guarantees of review • Absence of applicant's lawyer during appeal hearing against detention after alleged due notification by telephone • Absence of procedure for manner of notifying lawyers • Failure to provide sufficient safeguards against arbitrariness

STRASBOURG

22 October 2020

FINAL

22/01/2021

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

In the case of Ghavalyan v. Armenia,

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

Ksenija Turković, *President,*
Krzysztof Wojtyczek,
Linos-Alexandre Sicilianos,
Armen Harutyunyan,
Pauliine Koskelo,
Tim Eicke,
Raffaele Sabato, *judges,*

and Abel Campos, *Section Registrar,*

Having regard to:

the application (no. 50423/08) 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 Anush Ghavalyan ("the applicant"), on 16 October 2008;

the decision to give notice of the application to the Armenian Government ("the Government");

the parties' observations;

the letter by the applicant's son informing the Court of the applicant's death and of his wish to pursue the application lodged by her;

Having deliberated in private on 29 September 2020,

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

INTRODUCTION

1. The present case concerns the alleged failure of the domestic courts to provide relevant and sufficient reasons for the applicant's detention; the refusal of the Criminal Court of Appeal to examine an appeal by the applicant against a court order extending her detention; and respect for the principle of equality of arms at a detention hearing before the Criminal Court of Appeal.

THE FACTS

2. The applicant was born in 1972. At the time of her death on 21 July 2019 she was living in Yerevan. She was represented by Mr A. Zohrabyan, a lawyer practising in Yerevan.

3. 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.

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

I. THE APPLICANT'S ARREST, INDICTMENT AND PLACEMENT IN PRE-TRIAL DETENTION

5. On 21 March 2008 the applicant, who had worked as a cashier at a catering company, was arrested on suspicion of aiding and abetting tax evasion. She alleged that the investigator had urged her to cooperate and promised that she would not be arrested if she made incriminating statements against the manager of the company. Only after she had refused to do so was she taken into custody.

6. On 24 March 2008 she was charged.

7. On the same date the investigator applied to the court to have the applicant detained for a period of two months on the grounds that she might abscond and obstruct the proceedings by interfering with witnesses.

8. The applicant objected to the investigator's application, arguing, *inter alia*, that her detention was unjustified. She had always diligently appeared when summoned by the investigator and had never attempted to abscond or obstruct the proceedings.

9. On the same date the Kentron and Nork-Marash District Court of Yerevan allowed the investigator's application, taking into account the nature and gravity of the offence imputed to the applicant and the fact that she might obstruct the proceedings and exert unlawful influence on those involved in the proceedings. The District Court ordered the applicant's detention for twenty days, as opposed to two months, taking into account that she was a woman, was known to be of good character, had no previous convictions and had a dependent child. The decision stated that it could be contested before the Criminal Court of Appeal within five days.

10. On 26 March 2008 the applicant lodged an appeal, raising similar arguments.

11. On 4 April 2008 the Criminal Court of Appeal upheld the decision of the District Court. It considered there to be a real risk of the applicant obstructing the proceedings by exerting unlawful influence on those involved in the proceedings, since three other cashiers who had also been charged were in hiding. The decision stated that it entered into force immediately upon adoption.

12. On 23 April 2008 the applicant lodged an appeal on points of law with the Court of Cassation. In her appeal, she argued in substance that her detention was in violation of Article 5 § 1 (c) of the Convention and the Armenian Constitution because it was not based on a reasonable suspicion and there were no grounds justifying her detention, such as her being a flight risk. As grounds for admissibility of the appeal, the applicant relied on Article 414.2 § 1 (1) to (3) of the Code of Criminal Procedure (CCP), arguing that the examination of her appeal would allow the Court of Cassation to ensure uniform application of the law and that the alleged

judicial error made by the Criminal Court of Appeal had resulted in serious consequences for her and her family.

13. On 19 May 2008 the Court of Cassation declared the appeal on points of law inadmissible, reasoning that the appeal on points of law indicated the applicant as the appellant but did not contain her signature and had only been signed by her lawyer.

II. EXTENSION OF THE APPLICANT'S DETENTION

A. First extension

14. On 31 March 2008 the investigator applied to the court for a two-month extension of the applicant's detention, which was due to expire on 10 April 2008.

15. On 7 April 2008 the Kentron and Nork-Marash District Court of Yerevan allowed the application in part and extended the applicant's detention by a month, until 10 May 2008. The court took into account the nature and gravity of the offence imputed to the applicant, the fact that if she remained at large, she might abscond and obstruct the proceedings, and the fact that she was a woman, had a dependent child and mother, had no previous convictions and was known to be of good character. The decision stated that it could be contested before the Criminal Court of Appeal within five days.

16. On 8 April 2008 the applicant lodged an appeal.

17. On an unspecified date the hearing on the appeal was scheduled for 3 p.m. on 17 April 2008.

18. The Government alleged that the applicant's representatives had been notified of the hearing and submitted several handwritten documents entitled "transcript of a telephone conversation" (*հեռախոսազիր*) in support of their allegation. According to one such transcript, at 4.10 p.m. on 16 April 2008 a judge's assistant at the Criminal Court of Appeal called the offices of the applicant's representatives and informed the secretary that the hearing was scheduled for 3 p.m. the next day. The secretary promised to pass on the message. At 4.30 p.m. the assistant called the offices again and was informed by the secretary that the applicant's lawyer, Mr Zohrabyan, was aware of the hearing and that she would inform him again.

19. On 17 April 2008 the hearing at the Criminal Court of Appeal began as scheduled. The presiding judge stated at the outset that the applicant's lawyers had been duly notified. In particular, the assistant had called and informed them, and had even tried to call them again in the morning. The presiding judge asked those appearing in court whether they had any information regarding the lawyers' absence. The investigator stated that he was not aware of the reasons for their absence, but added that he himself had found out about the hearing from the lawyers the previous day, before

he had even been contacted by the court. The Criminal Court of Appeal decided to proceed with the hearing and heard both the prosecutor and the investigator. It appears that the hearing lasted about half an hour and was then adjourned until 10 a.m. the next morning.

20. According to another "transcript of a telephone conversation" submitted by the Government, following the hearing, at 4.20 p.m., the judge's assistant called Mr Zohrabyan on his mobile telephone in order to enquire about the reasons for his absence, but he did not answer. The assistant then called the lawyers' offices and informed an employee, N., that the hearing had been adjourned until the next morning. According to the same transcript, the judge's assistant called the offices again at 9.15 a.m. the next day and spoke to a trainee, A., who said that she would inform the lawyers of the hearing. Between 9.15 and 10 a.m. the judge's assistant made calls to Mr Zohrabyan's mobile telephone but he did not answer.

21. At 10 a.m. on 18 April 2008 the Criminal Court of Appeal resumed the hearing. The presiding judge stated that they had once again tried to contact the lawyers. Numerous calls had been made to the lawyer's mobile telephone but he had never answered, while at the office it had always been a secretary or trainee who had answered and promised to try to inform the lawyers. The court decided to proceed with the hearing. It heard both the prosecutor and the investigator and upheld the decision of the District Court, finding that the applicant had been accused of a serious crime punishable by imprisonment alone, which increased the possibility of her absconding. The appellate court repeated that there was a risk that the applicant would obstruct the proceedings by unlawfully influencing those involved in the proceedings who were in hiding. The decision stated that it entered into force immediately upon adoption. It appears that a copy of the decision was served on the applicant on 28 April 2008.

22. The applicant contested the Government's above allegations and claimed that her lawyers had not been present at the hearing of 17 to 18 April 2008 since they had not received any notification, either by telephone or in writing.

23. On 29 May 2008 the applicant lodged an appeal on points of law against the Criminal Court of Appeal's decision of 18 April 2008, raising similar arguments as in her appeal of 23 April 2008 (see paragraph 12 above). She further added that the court had failed to give reasons for its decision, and to duly notify her lawyers of the hearing and thereby to ensure equality of arms.

24. On 2 July 2008 the Court of Cassation decided to leave the appeal on points of law unexamined on the grounds that it had been lodged outside the one-month time-limit prescribed by the CCP.

B. Second extension

25. On 30 April 2008 the investigator applied to the court to have the applicant's detention, which was due to expire on 10 May 2008, extended by two more months.

26. On 7 May 2008 the Kentron and Nork-Marash District Court of Yerevan allowed the application in part and extended the applicant's detention by another month, until 10 June 2008, on the same grounds. The decision stated that it could be contested before the Criminal Court of Appeal within five days.

27. On 12 May 2008 the applicant lodged an appeal, raising similar arguments as previously.

28. On 26 May 2008 the Criminal Court of Appeal upheld the decision of the District Court on the same grounds. The decision stated that it entered into force immediately upon adoption.

29. On 26 June 2008 the applicant lodged an appeal on points of law, raising similar arguments as previously.

30. On 24 July 2008 the Court of Cassation declared the appeal inadmissible for failure to indicate any of the admissibility grounds specified in the CCP.

C. Third extension

31. On 5 June 2008 the investigator applied to the court to have the applicant's detention, which was due to expire on 10 June 2008, extended by another month.

32. On 9 June 2008 the Kentron and Nork-Marash District Court of Yerevan allowed the application in part and extended the applicant's detention by twenty days, until 30 June 2008, on the same grounds. The decision stated that it could be contested before the Criminal Court of Appeal within five days.

33. On 13 June 2008 the applicant lodged an appeal with the Criminal Court of Appeal, raising similar arguments as previously.

34. In the meantime, the investigation was completed and on 19 June 2008 the applicant's case was transferred to the Yerevan Criminal Court for examination on the merits.

35. On 1 July 2008 the Criminal Court of Appeal decided to leave the appeal of 13 June 2008 unexamined on the grounds that the scope of judicial control over pre-trial proceedings was limited to the investigation stage. Since the investigation had been completed and the case had been transferred to a court for examination on the merits, it was now up to that court to examine questions of the lawfulness and validity of detention. The decision stated that it entered into force immediately upon adoption.

36. On 8 July 2008 the Yerevan Criminal Court set the applicant's criminal case down for trial and dismissed an application lodged by her for release on bail by "leaving her detention unchanged".

37. On 16 July 2008 the applicant lodged an appeal on points of law against the Criminal Court of Appeal's decision of 1 July 2008, arguing that it had failed to examine her appeal of 13 June 2008 speedily and that its eventual refusal to examine the merits of that appeal had violated her right of access to court.

38. On 16 August 2008 the Court of Cassation admitted the appeal on points of law for examination, finding that it complied with the requirements of Article 414.2 § 1 (1) of the CCP since the issues raised therein were important for the uniform application of the law.

39. On 6 November 2008 the Yerevan Criminal Court allowed the applicant's application to be released on bail and the applicant was released from detention.

40. On 28 November 2008 the Court of Cassation quashed the decision of 1 July 2008 and remitted the case to the Court of Appeal for fresh examination. It found that the appellate court had refused to examine the applicant's appeal of 13 June 2008 on grounds not provided for by law. It further stated that it was unacceptable to restrict a person's right to appeal against a detention order or its extension based on the particular stage of the proceedings in which the appeal was lodged. The Court of Appeal had therefore violated the applicant's right to have the lawfulness of her detention reviewed, as well as her right of access to court. The Court of Cassation concluded that the procedural violations in question had been sufficiently serious since they had influenced the proper outcome of the case, and called for the Court of Appeal's decision to be quashed and the case to be re-examined.

41. On 16 December 2008 the Criminal Court of Appeal admitted the appeal of 13 June 2008 for examination and scheduled a hearing for 24 December 2008. It appears that prior to the hearing the applicant applied to the same court with a request to terminate the proceedings.

42. On 27 December 2008 the Criminal Court of Appeal allowed that request and terminated the proceedings.

RELEVANT LEGAL FRAMEWORK

I. CONSTITUTION (1995, WITH AMENDMENTS OF 2005)

43. Article 92 provides that the court of the highest instance in Armenia, except matters falling within the constitutional jurisdiction, is the Court of Cassation, which is called upon to ensure the uniform application of the law.

II. JUDICIAL CODE (2007, IN FORCE UNTIL 2018)

44. Article 50 § 1 provided that the role of the Court of Cassation was to ensure the uniform application of the law. In performing this mission, the Court of Cassation had to strive to facilitate the development of the law. Article 50 § 6 provided that the Court of Cassation reviewed judicial decisions not determining a case on the merits in exceptional cases stipulated by law.

III. CODE OF CRIMINAL PROCEDURE (1999, AS IN FORCE AT THE MATERIAL TIME)

A. General principles regarding pre-trial detention

45. For a summary of the relevant domestic provisions, see *Ara Harutyunyan v. Armenia* (no. 629/11, §§ 30-35, 20 October 2016).

B. Ordering and extending pre-trial detention

46. Article 285 provides that, where it is necessary to order pre-trial detention or extend the detention period, the prosecutor or the investigator lodges an application with a court. The application must contain motives and grounds justifying the accused's detention. The application for detention must be examined promptly by the court with territorial jurisdiction over the investigation in a single-judge formation in the presence of the official who lodged the application, the accused, his legal guardian and his defence lawyer, if any. The court is obliged to duly notify the official who lodged the application, the accused, his or her legal guardian and his or her defence lawyer, if any, of the time and place of the court hearing. Following the examination of the application, the court will order the accused's detention, extend the detention period or dismiss the application.

C. Appeals against the first-instance court's decision ordering or extending pre-trial detention

47. Article 287 provides that appeals against a judge's decision ordering detention or extending the detention period or refusing to do so are lodged with the Court of Appeal.

48. Article 288 provides that a judicial review of the lawfulness and well-foundedness of the detention order and any extension of the detention period is carried out by the Court of Appeal. The court reviews the lawfulness and well-foundedness of the detention or its extension within three days of receipt of the material justifying the lawfulness and well-foundedness of the detention. The judicial review takes place *in camera* in

the presence of the prosecutor and the defence lawyer. If a party who has been notified beforehand of the date of examination of the appeal fails to appear, this will not obstruct the judicial review. Following the judicial review, the Court of Appeal will: (a) cancel the detention and release the person, (b) order detention or extend the detention period or (c) dismiss the appeal.

49. Articles 376 § 1, 376.1 (4) and 377 provide that the suspect, the accused, his or her defence lawyer and his or her legal guardian are entitled to lodge appeals with the Criminal Court of Appeal against the first-instance court's decision ordering, replacing or cancelling detention.

50. Article 379 § 1 (3) provides that an appeal against a decision of the first-instance court ordering detention or extending the detention period may be lodged within five days of adoption of the decision, while appeals against all other decisions of the first-instance court not determining a case on the merits may be lodged within ten days of adoption of the decision.

51. Article 402 provides that the Court of Appeal's decision enters into force immediately upon adoption.

D. Proceedings before the Court of Cassation

52. Article 403 provides that the Court of Cassation reviews decisions of the Court of Appeal determining a case on the merits and those not determining a case on the merits, as well as decisions of the Court of Appeal taken following a review of decisions of the first-instance court not determining a case on the merits.

53. Articles 406 provides that an appeal on points of law may be lodged on grounds of a judicial error, namely a violation of procedural or substantive law which has, or may have, affected the outcome of the case.

54. Article 414.2 § 1 provides that an appeal on points of law is admissible for examination if: (i) the decision of the Court of Cassation on the issues raised in the appeal may be important for the uniform application of the law; (ii) the contested decision prima facie conflicts with an earlier decision of the Court of Cassation; or (iii) the Court of Appeal has made a prima facie judicial error which may have, or has had, serious consequences.

E. Right to apply to an international court

55. Article 499.15 provides that anyone who believes that his rights guaranteed by an international treaty to which Armenia is a party have been violated by a final decision taken in the criminal case in accordance with this Code is entitled to apply to an international court. For the purposes of this chapter, a decision of the Court of Cassation is considered to be the final decision.

THE LAW

I. PRELIMINARY REMARKS

56. The Court notes at the outset that the applicant died on 21 July 2019, while the case was pending before the Court. The applicant's son, Mr Artur Ghavalyan, her heir, informed the Court in a letter of 14 February 2020 that he wished to pursue the application lodged by her.

57. The Government argued that the applicant's son lacked victim status to pursue the application on her behalf. Referring to a number of cases (*Biç and Others v. Turkey*, no. 55955/00, § 22, 2 February 2006; *Khayrullina v. Russia,* no. 29729/09, § 91, 19 December 2017; and *Magnitskiy and Others v. Russia*, nos. 32631/09, 53799/12, § 278, 27 August 2019), they argued that he could not claim to be an indirect victim of an alleged violation of the Convention because the rights guaranteed under Article 5 of the Convention belonged to the category of non-transferable rights, unless they were connected to a complaint under Article 2 of the Convention relating to the victim's death or disappearance engaging the State's liability, which was not the case here.

58. The applicant's son argued that, according to the Court's case law, an applicant's next-of-kin was normally permitted to pursue an application, provided he or she had a legitimate interest, where the original applicant had died after lodging the application with the Court. This also concerned applications raising issues under Article 5 of the Convention. The question was not whether the rights in question were transferable but whether the Convention mechanism had been activated by the victim of an alleged violation exercising his or her right to individual petition. In his view, he had a legitimate interest in pursuing the application lodged by his deceased mother under Article 34 of the Convention.

59. In so far as the Government referred to the cases of *Biç and Others*, *Khayrullina* and *Magnitskiy and Others* (cited above), the Court reiterates that it has differentiated between applications where the direct victim has died before the application was lodged with the Court, and those where he or she has died after the application was lodged, like in the present case. In the latter cases, the Court has accepted that the next of kin, close family member or heir may in principle pursue the application, provided that he or she has sufficient interest in the case (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 97, ECHR 2014; *Fartushin v. Russia*, no. 38887/09, § 33, 8 October 2015; and *Ivko v. Russia*, no. 30575/08, § 67-70, 15 December 2015). It is not only material interests which the successor of a deceased applicant may pursue by his or her wish to maintain the application. Human rights cases before the Court generally also have a moral dimension, and persons near to an applicant may thus have a legitimate interest in ensuring that justice is done, even

after the applicant's death (see *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, ECHR 2000-XII). Thus, in cases where the direct victim has died after the application was lodged, the decisive factor is not whether the rights at issue are transferable to heirs willing to pursue an application, but whether the persons wishing to pursue the proceedings can claim a legitimate interest in seeking that the Court decide the case on the basis of the applicant's desire to use his individual and personal right to lodge a case before the Court (see *Ergezen v. Turkey*, no. 73359/10, § 29, 8 April 2014; *Vaščenkovs v. Latvia*, no. 30795/12, § 27, 15 December 2016; and *Barakhoyev v. Russia*, no. 8516/08, § 22, 17 January 2017, all of which concerned complaints under Article 5 of the Convention).

60. Having regard to the circumstances of the present case, the Court does not see any special reasons to depart from its established case-law and is prepared to accept that the applicant's son has a legitimate interest in pursuing the application initially brought by Mrs Anush Ghavalyan. It therefore dismisses the Government's preliminary objection. For convenience, the Court will continue to refer to Mrs Ghavalyan as the applicant in the present judgment.

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

61. The applicant complained that the extension of her detention on 7 April and 9 June 2008 had not been carried out in compliance with the time-limits prescribed by domestic law. She relied on Article 5 § 1 of the Convention, which reads as follows:

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

62. The Government contested that argument.

63. The Court notes that it has already examined similar complaints in a number of cases against Armenia and found them to be manifestly ill-founded (see *Malkhasyan v. Armenia*, no. 6729/07, §§ 54-56, 26 June 2012; *Grigoryan v. Armenia*, no. 3627/06, §§ 78-80, 10 July 2012; and *Sefilyan v. Armenia*, no. 22491/08, §§ 68-70, 2 October 2012). The applicant did not present any argument which would persuade the Court to reach a different conclusion in the present case.

64. 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.

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

65. The applicant complained that the courts had failed to provide relevant and sufficient reasons for her continued detention. She relied on

Article 5 § 3 of the Convention, which, in so far as relevant, reads as follows:

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

A. Admissibility

66. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

67. The applicant submitted that the only reason for her detention had been that she had refused to give evidence against the company manager. The risk of her absconding could not be justified only by the severity of the possible sentence. The first-instance court had failed to assess all the circumstances of her case, including the fact that she had voluntarily appeared before the investigating authority, her good reputation and the fact that she had dependants, such as her child and sick mother. There had been no evidence to suggest that she might flee or obstruct the investigation. When extending her detention, the courts had simply copied and pasted their earlier decisions.

68. The Government submitted that the applicant's continued detention had been based on relevant and sufficient reasons, as established by the Convention case-law. The domestic courts had examined the particular circumstances of the applicant's case when ordering and extending her detention. Three other cashiers indicted under the same criminal case had been in hiding, which had provided sufficient grounds for the courts to believe that the applicant might also abscond and exert unlawful influence on those people, thereby obstructing the proceedings.

69. The Court refers to its general principles under Article 5 § 3 of the Convention relating to the right to be released pending trial (see *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, §§ 92-102, ECHR 2016 (extracts), and *Ara Harutyunyan* (cited above, §§ 48-53) and notes that the domestic courts, when ordering the applicant's detention and its extension, referred to the risks of her absconding and obstructing the proceedings. However, both the Kentron and Nork-Marash District Court of Yerevan and the Criminal Court of Appeal mostly limited themselves to repeating those grounds in an abstract and stereotyped manner, without indicating any specific reasons as to why they considered those risks to be well-founded or trying to refute the applicant's arguments (see paragraphs 9, 15, 21, 26, 28, 32 and 36 above). The Court notes that it has already examined a number of

cases against Armenia, in which a violation of Article 5 § 3 of the Convention was found in similar circumstances (see *Piruzyan v. Armenia*, no. 33376/07, §§ 97-100, 26 June 2012; *Malkhasyan*, cited above, §§ 74-77; *Sefilyan*, cited above, §§ 88-93; *Ara Harutyunyan*, cited above, §§ 54-59; *Arzumanyan v. Armenia*, no. 25935/08, §§, 36-37, 11 January 2018; and *Mushegh Saghatelyan v. Armenia*, no. 23086/08, §§ 189-92, 20 September 2018).

70. It is true that on one occasion the Criminal Court of Appeal justified its assertion that the applicant might unlawfully influence three other suspects by referring to the fact that they were in hiding (see paragraph 11 above). However, it is not clear how the fact that three other suspects were in hiding meant that there was a real risk of unlawful conduct on the part of the applicant. It is notable that the Court of Appeal's reasoning lacked any specific details.

71. Lastly, the Court notes the contrast between the domestic courts' repeated statements that the applicant was known to be of good character and their findings that the risks of her absconding and obstructing the investigation were justified.

72. The Court therefore concludes that the domestic courts failed to provide relevant and sufficient reasons for their decisions ordering and extending the applicant's detention.

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

IV. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

74. The applicant raised several complaints under Article 5 § 4 of the Convention: (a) that the Court of Appeal had failed to examine her appeal of 13 June 2008 speedily and had eventually refused to examine it, (b) that the hearing of 17 to 18 April 2008 before the Court of Appeal had been conducted in violation of the principle of equality of arms; and (c) that the Court of Cassation had failed to examine her appeals of 23 April and 29 May 2008 speedily and had eventually refused to examine the appeal of 23 April 2008. Article 5 § 4 reads as follows:

> "4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. Speediness of the proceedings before the Criminal Court of Appeal and its refusal to examine the appeal of 13 June 2008

75. The Court notes at the outset that the applicant raised two complaints under Article 5 § 4 of the Convention with regard to her appeal of 13 June

2008: that it had not been examined speedily because the Criminal Court of Appeal had breached the relevant domestic time-limits prescribed for examination of an appeal and had breached her right of access to court by eventually refusing to examine it. The Court considers it necessary to first address the second issue.

1. Refusal to examine the appeal

(a) Admissibility

76. The Government submitted that the applicant could no longer claim to be a victim of an alleged violation of Article 5 § 4 of the Convention because the Court of Cassation, by its decision of 28 November 2008, had quashed the decision of the Court of Appeal of 1 July 2008 refusing to examine of the applicant's appeal of 13 June 2008 and had remitted the case to the Criminal Court of Appeal for fresh examination. In doing so, the Court of Cassation had expressly acknowledged the violation of the applicant's rights guaranteed under the Convention and had thereby provided adequate redress.

77. The applicant submitted that her appeal on points of law had been admitted only on formal procedural grounds. The issue at stake had not been resolved by the Court of Cassation or subsequently by the Criminal Court of Appeal. She could therefore still claim to be a victim of an alleged violation.

78. The Court reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him or her of "victim" status unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, among other authorities, *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 180, ECHR 2006-V). The redress afforded must be appropriate and sufficient. This will depend on all the circumstances of the case, with particular regard to the nature of the Convention violation in issue (see, among other authorities, *Gäfgen v. Germany* [GC], no. 22978/05, § 116, ECHR 2010). Whether an individual has victim status may also depend on the amount of compensation awarded by the domestic courts and the effectiveness (including the promptness) of the remedy affording the award (see *Scordino*, cited above, § 202).

79. Turning to the present case, on 1 July 2008 the Criminal Court of Appeal issued a decision refusing to examine the applicant's appeal of 13 June 2008 against the extension of her detention, which she then contested on 16 July 2008. However, by the time the Court of Cassation examined and allowed the applicant's appeal on points of law, quashing the decision of the Court of Appeal and ordering an examination of her appeal (28 November 2008), the contested detention period had long expired and the applicant's detention had already been extended for an indefinite period by the trial court on 8 July 2008 (see paragraph 36 above). More

importantly, the applicant had already been released on bail by then and a subsequent examination of her appeal in such circumstances would have been ineffective and pointless (see, *mutatis mutandis*, *S.T.S. v. the Netherlands*, no. 277/05, § 60, ECHR 2011). Thus, the quashing of the decision of the Court of Appeal was unable to provide any immediate redress to the applicant. Furthermore, even if the Court of Cassation, in its decision of 28 November 2008, appears to have acknowledged – if not explicitly, then at least in substance – the Convention violation in issue (see paragraph 40 above), no compensation was – or even could be – awarded to the applicant for the breach of her Convention right, in view of the absence of non-pecuniary damage as a form of compensation at the material time (see *Khachatryan and Others v. Armenia*, no. 23978/06, § 158, 27 November 2012; and, *mutatis mutandis*, *Gavril Yosifov v. Bulgaria*, no. 74012/01, § 41, 6 November 2008; *Moskovets v. Russia*, no. 14370/03, § 50, 23 April 2009; and *S.T.S. v. the Netherlands*, cited above, § 61). In the Court's opinion, a simple acknowledgement would not have been enough in the circumstances of the case to deprive the applicant of her victim status. The Court therefore concludes that the applicant can still claim to be a "victim" within the meaning of Article 34 of the Convention.

80. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

(b) Merits

81. The applicant submitted that the refusal of the Criminal Court of Appeal to examine her appeal of 13 June 2008 had violated her right of access to court guaranteed under Article 5 § 4 of the Convention. The court had not been authorised to refuse to examine her appeal on the grounds that the investigation had been completed and the case had been transferred to a court for examination on the merits.

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

83. The Court reiterates that, according to its case-law, Article 5 § 4 enshrines, as does Article 6 § 1, the right of access to a court, which can only be subject to reasonable limitations that do not impair its very essence (see *Shishkov v. Bulgaria*, no. 38822/97, §§ 82-90, ECHR 2003-I (extracts), and *Bochev v. Bulgaria*, no. 73481/01, § 70, 13 November 2008).

84. The Court notes that it has already examined an identical complaint in a number of cases against Armenia, in which it held that denial of a judicial review of the applicant's detention solely on the grounds that the criminal case was no longer considered to be in its pre-trial stage was an unjustified restriction of the right to bring proceedings under Article 5 § 4 (see *Poghosyan v. Armenia*, no. 44068/07, §§ 78-81, 20 December 2011; *Piruzyan*, cited above, §§ 125-27; and *Minasyan v. Armenia*, no. 44837/08,

§§ 76-78, 8 April 2014). The Court sees no reason to reach a different conclusion in the present case.

85. There has accordingly been a violation of Article 5 § 4 of the Convention.

2. Speediness of the proceedings

86. Having reached this conclusion, the Court declares this complaint admissible but does not consider it necessary to examine separately whether there has also been a violation of Article 5 § 4 of the Convention in respect of the first issue raised by the applicant with regard to her appeal of 13 June 2008, namely whether it was examined speedily by the Criminal Court of Appeal.

B. Equality of arms at the hearing of 17 to 18 April 2008 before the Court of Appeal

1. Admissibility

87. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

2. Merits

(a) Submissions by the parties

88. The applicant submitted that her lawyers had not been notified of the time and date of the hearing of 17 to 18 April 2008, not even by telephone. The transcripts of telephone conversations submitted by the Government did not correspond to reality and had been made up in order to justify unlawful actions, namely the examination of her appeal in the absence of her lawyers. No other evidence had been submitted by the Government in support of their allegations, other than those unreliable transcripts. Besides, the lawyers' offices had never had an employee called N. or a trainee called A. Moreover, the opening hours of those offices had been from 10 a.m. to 6 p.m., so at the time when the telephone calls had allegedly been made on the morning of 18 April 2008 they had been closed.

89. The applicant further submitted that no telephone calls had been personally received by her lawyers. In her view, calling a lawyer who did not answer the telephone was not the same as notifying him, and summoning a party to a hearing had to be done in an objective manner that ruled out any arbitrariness and did not violate the principle of equality of arms. The Court of Appeal should have adjourned the hearing in the absence of her lawyers. Furthermore, the investigator's statement made at the hearing of 17 April 2008 – that he had found out about the hearing from one of the lawyers – had been false. The lawyer had represented her

interests and not those of the prosecution, and he had had no mandate or obligation to inform the prosecution of the date and time of the hearing.

90. The Government claimed that the applicant's lawyers had been duly notified of the hearing of 17 to 18 April 2008. In support of their allegation, they submitted several transcripts of telephone conversations which had allegedly been drafted by the judge's assistant after the calls had been made. Since the lawyers had failed to appear, the Court of Appeal had been right to proceed with the examination of the case. The Government added that the lawyers had been informed of the previous hearing of 4 April 2008 in a similar manner, namely by telephone calls from the judge's assistant. That showed that they considered such a means of notification to be adequate and acceptable.

(b) The Court's assessment

91. The Court reiterates that Article 5 § 4 requires that a court examining an appeal against detention provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure "equality of arms" between the parties, the prosecutor and the detained person (see, among other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 58, ECHR 1999-II, and *Şandru v. Romania*, no. 33882/05, § 46, 15 October 2013).

92. In the present case, the Court notes that the domestic rules of procedure required the presence of both the prosecution and defence counsel at the hearings in which the detainee's appeal against a decision extending pre-trial detention was examined, but the court was authorised to proceed with the examination if a party who had been notified of the day of the hearing failed to appear (see paragraph 48 above). The parties in the present case disagreed as to whether the applicant's lawyers had been duly notified of the hearing of 17 to 18 April 2008. The Government alleged that they had been notified by telephone and submitted a number of handwritten documents entitled "transcript of a telephone conversation" in support of their allegation.

93. The Court notes, however, that domestic criminal procedure law did not contain any rules on notifying parties of hearings concerning detention, by telephone or other means. Thus, the alleged attempts to notify the applicant's lawyers were not based on any rules. In the Court's opinion, such a lack of rules significantly increased the likelihood of arbitrariness. Indeed, there is no objective way of verifying whether the alleged telephone calls were actually made and, if so, whether the transcripts in question accurately reflected their content.

94. Furthermore, even assuming that that was how parties to detention proceedings were generally notified of hearings, it cannot be ruled out that on this particular occasion such a method of notification failed. It is notable that none of the alleged telephone calls reached the applicant's lawyers personally. It is therefore surprising that the Criminal Court of Appeal

found that "the lawyers had been duly notified" and that "the [judge's] assistant had called and informed them" (see paragraph 19 above). The Court cannot speculate on the reasons why the lawyer, Mr Zohrabyan, did not answer his telephone. It considers, however, that that fact cannot be interpreted in such a way as to put the blame for the failure to be notified on him. Moreover, it is not clear why – if the appeal had been lodged on 8 April 2008 and the hearing was scheduled for 17 April 2008 – the first alleged attempt to contact the lawyers was made in the late afternoon of the day preceding the hearing and not earlier (see paragraph 18 above).

95. In such circumstances, the Court is not satisfied, in the absence of clearly defined rules, with the manner in which the authorities allegedly tried to fulfil their obligation to ensure the presence of the applicant's lawyers at the hearing of 17 to 18 April 2008, since they failed to provide sufficient safeguards against arbitrariness. As a result, the applicant's lawyers were absent from the hearing at which both the investigator and the prosecutor were present and made submissions. The Court considers that the manner in which that hearing was conducted breached the adversarial nature of the proceedings and the principle of equality of arms between the parties.

96. There has accordingly been a violation of Article 5 § 4 of the Convention.

C. Speediness of the examination of the appeals on points of law of 23 April and 29 May 2008 lodged with the Court of Cassation and its refusal to examine the appeal of 23 April 2008

97. The applicant complained that the Court of Cassation had failed to examine her appeals of 23 April and 29 May 2008 speedily and that its eventual refusal to examine the appeal of 23 April 2008 had been unjustified, in violation of her right of access to court. The Court notes at the outset that the parties were asked to provide observations on the question of whether the procedure before the Court of Cassation was an effective remedy and fell within the scope of Article 5 § 4 of the Convention. It therefore considers it necessary to examine this question first.

98. The Government submitted that, in accordance with the Constitution and the Judicial Code, the Court of Cassation was the court of the highest instance and was entrusted with ensuring the uniform application of the law and striving to facilitate the development of the law. Under Article 414.2 § 1 of the CCP, the Court of Cassation only admitted an appeal for examination on the merits if it found that: (a) it raised a matter important for the uniform application of the law, (b) the contested judicial decision prima facie conflicted with an earlier decision of the Court of Cassation or (c) the lower court had made a prima facie judicial error resulting in serious consequences. Thus, in view of the jurisdiction of the Court of Cassation,

whether or not the procedure before that court was an effective remedy depended on the particular circumstances of the case, namely the issues raised in the appeal and whether the Court of Cassation found them to be in compliance with the above-mentioned admissibility grounds. If it admitted and examined an appeal, then the Court of Cassation procedure became an effective remedy. However, if an appeal did not meet the admissibility requirements and was not admitted for examination, then the Court of Cassation procedure could not be considered an effective remedy. In the present case, the Court of Cassation decided not to admit the appeals in question and was consequently not an effective remedy.

99. The applicant submitted that the Government's arguments were groundless because, under Article 499.15 of the CCP, a person could apply to an international court if his or her rights had been violated by a final decision. Under the same Article, the "final decision" was the decision of the Court of Cassation. So the law considered the Court of Cassation as the highest instance and reserved the right to apply to an international court only after applying to that instance. As to the refusals to admit her appeals, those had been made on purely formal and unlawful grounds.

100. The Court observes at the outset that Article 5 § 4 provides a *lex specialis* in relation to the more general requirements of Article 13 of the Convention, which guarantees the right to an effective remedy. It entitles an arrested or detained person to institute proceedings bearing on the procedural and substantive conditions which are essential for the "lawfulness" of his or her deprivation of liberty (see, among other authorities, *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 202, ECHR 2009). The existence of a remedy under Article 5 § 4 must be sufficiently certain, not only in theory but also in practice, failing which it will lack the requisite accessibility and effectiveness (see *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 130, 15 December 2016).

101. The Court notes that it has previously examined the procedure before the Court of Cassation with regard to detention matters in a number of cases against Armenia, after notice of the present application was given to the Government. In particular, in the case of *Grigoryan*, in which the Court of Cassation had left without examination an appeal on points of law lodged against a judicial decision ordering the applicant's detention, the Court agreed with the Government that, following the constitutional amendments of 6 December 2005, the applicant did not enjoy a right under domestic law to bring an appeal on points of law against a detention order and declared his complaint under Article 5 § 4 of lack of access to the Court of Cassation manifestly ill-founded (see *Grigoryan*, cited above, §§ 112-15). In the case of *Arzumanyan*, in which the Government claimed non-exhaustion because the applicant had not lodged appeals on points of law against his detention, the Court confirmed its earlier finding that an appeal procedure before the Court of Cassation in detention matters was not

prescribed by the CCP. The Court took note of the fact that, at around the same time the applicant's detention case was pending before the courts, in two unrelated detention cases the Court of Cassation had admitted for examination appeals on points of law lodged by the Prosecutor General's Office. The Court concluded, however, that this did not signify a decisive shift on that matter since this had happened in the absence of any amendments to the CCP or any explanation by the Court of Cassation for its decisions to do so and dismissed the Government's non-exhaustion objection (see *Arzumanyan*, cited above, §§ 31-33).

102. The Court notes that there is no evidence to suggest that at the time the applicant lodged her appeals on points of law in the present case the situation was significantly different from that described in the two above-mentioned cases. While it is true that some months had passed since the circumstances of the *Arzumanyan* case and the applicant in the present case, unlike the applicant in that case, did try to pursue an appeal before the Court of Cassation, there had not been any pertinent amendments to the CCP or any case-law by the Court of Cassation regarding the right to lodge an appeal on points of law in detention matters, including its powers of review in such cases. Similarly, none of the decisions of the Court of Appeal, which the applicant attempted to contest before the Court of Cassation, stated that they were amenable to appeal. Thus, the applicant tried to avail herself of a remedy which, at the material time, cannot be said to have been sufficiently certain either in theory or in practice for the purposes of Article 5 § 4.

103. 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.

V. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

104. Lastly, the applicant raised a number of other complaints under Article 5 § 1 of the Convention.

105. 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.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

106. 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

107. The applicant claimed the following amounts in respect of pecuniary damage: 765 euros (EUR) for lost income for the period spent in detention; EUR 2,334 for lost tips; EUR 1,600 for lost income for the months which she spent looking for another job following her release; EUR 1,954 for the medical costs she had incurred as a result of the stress caused by her detention; and 500,000 Armenian drams (AMD) for the bail payment which had allegedly not been returned to her.

108. The applicant further claimed AMD 30,000 (approximately EUR 60 at the material time) and EUR 10,000 in respect of non-pecuniary damage.

109. The Government submitted that there was no causal link between the pecuniary damage claimed and the violations found. Furthermore, no compensation for non-pecuniary damage should be awarded either, as the applicant had failed to prove that she had suffered any such damage.

110. The Court does not discern any causal link between the violations found and the pecuniary damage claimed. It therefore rejects these claims. On the other hand, ruling on an equitable basis, the Court awards the applicant EUR 3,000 in respect of non-pecuniary damage.

B. Costs and expenses

111. The applicant also claimed EUR 161 for postal expenses.

112. The Government submitted that there had been no need to use the expensive DHL service when the applicant could have used a much cheaper postal service.

113. 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. The Court considers that the applicant's claim for costs and expenses must be allowed and awards her the sum of EUR 161.

C. Default interest

114. 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. *Holds* that the applicant's son and heir has standing to continue the present proceedings in the applicant's stead;

2. *Declares* admissible the complaints concerning the failure to provide relevant and sufficient reasons for the applicant's detention, the refusal to examine her appeal of 13 June 2008 and the lack of equality of arms at the hearing of 17 to 18 April 2008, and the remainder of the application inadmissible;

3. *Holds* that there has been a violation of Article 5 § 3 of the Convention on account of the failure to provide relevant and sufficient reasons for the applicant's continued detention;

4. *Holds* that there has been a violation of Article 5 § 4 of the Convention on account of the refusal to examine the applicant's appeal of 13 June 2008 against her detention;

5. *Holds* that there is no need to examine the complaint under Article 5 § 4 of the Convention as regards the speediness of the examination of the applicant's appeal of 13 June 2008;

6. *Holds* that there has been a violation of Article 5 § 4 of the Convention in that the hearing of 17 to 18 April 2008 was conducted in violation of the principle of equality of arms;

7. *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, the following amounts, to be converted into [the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 161 (one hundred and sixty-one 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;

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

Done in English, and notified in writing on 22 October 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos	Ksenija Turković
Registrar	President