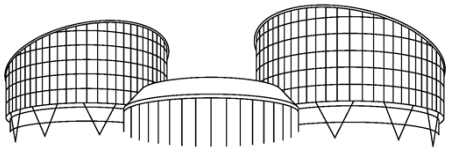

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF SMBAT AYVAZYAN v. ARMENIA

(Application no. 49021/08)

JUDGMENT

Art 11 • Freedom of peaceful assembly • Arbitrary prosecution and conviction of opposition supporter, linked to his participation in a protest movement • Repetitive pattern of artificial and politically motivated arrests and prosecution of opposition activists Art 5 § 1 • Lawful arrest or detention • No court decision for continued detention Art 5 § 3 • Reasonableness of pre-trial detention • Failure of domestic courts to provide relevant and sufficient reasons for applicant's continued detention Art 5 § 4 • Review of lawfulness of detention • Unjustified refusal to examine applicant's appeal against extended detention on sole ground that the criminal case was no longer considered to be in its pre-trial stage Art 6 § 1 (criminal) • Fair hearing • Criminal conviction for assaulting a police officer secured to decisive extent on testimony of police officers actively involved in contested events • Failure of domestic court to verify the incriminating statements

STRASBOURG

8 October 2020

FINAL

08/01/2021

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

In the case of Smbat Ayvazyan v. Armenia,

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

Krzysztof Wojtyczek, *President,*
Linos-Alexandre Sicilianos,
Aleš Pejchal,
Pere Pastor Vilanova,
Pauliine Koskelo,
Jovan Ilievski, *judges,*
Armen Mazmanyan, ad hoc *judge,*
and Renata Degener, *Deputy Section Registrar,*

Having regard to:

the application against the Republic of Armenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Armenian national, Mr Smbat Ayvazyan ("the applicant"), on 24 September 2008;

the decision to give notice of the complaints concerning the applicant's detention, the fairness of his trial, and an alleged violation of his right to freedom of expression and freedom of peaceful assembly to the Armenian Government ("the Government") and to declare inadmissible the remainder of the application;

the parties' observations;

the decision by the President of the Chamber to appoint Mr Armen Mazmanyan to sit as an *ad hoc* judge (Rule 29 of the Rules of Court), Mr Armen Harutyunyan, the judge elected in respect of Armenia, being unable to sit in the case (Rule 28);

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

Having deliberated in private on 15 September 2020,

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

INTRODUCTION

1. The case concerns the alleged failure of a short period of the applicant's detention to comply with the lawfulness requirement of Article 5 § 1 of the Convention, the failure of the domestic courts to provide relevant and sufficient reasons for his detention as required by Article 5 § 3 of the Convention, the refusal to examine his appeal against detention in violation of the guarantees of Article 5 § 4 of the Convention, the alleged unfairness of the applicant's trial and a breach of his right to call witnesses as guaranteed by Article 6 §§ 1 and 3 (d) of the Convention, and the allegation that the applicant's prosecution and conviction were in breach of the requirements of Articles 10, 11 and 14 of the Convention.

THE FACTS

2. The applicant was born in 1959 and at the time of his death in 2014 he was living in Paris. The applicant was represented by Ms L. Sahakyan, 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 19 FEBRUARY 2008 PRESIDENTIAL ELECTION AND THE POST-ELECTION EVENTS

5. On 19 February 2008 a presidential election was held in Armenia. The main contenders were the then Prime Minister, Mr Sargsyan, representing the ruling party, and the main opposition candidate, Mr Ter-Petrosyan.

6. Immediately after the announcement of the preliminary results of the election, Mr Ter-Petrosyan called on his supporters to gather at Freedom Square in central Yerevan in order to protest against the irregularities which had allegedly occurred in the election process, announcing that the election had not been free and fair. From 20 February 2008 onwards, nationwide daily protest rallies were held by Mr Ter-Petrosyan's supporters, their main meeting place being Freedom Square and the surrounding park. It appears that the rallies at Freedom Square attracted at times tens of thousands of people, while several hundred demonstrators stayed in that area around the clock, having set up a camp.

7. The applicant, a former member of the Armenian Parliament who had in the past also occupied different posts in the Government, including a ministerial one, was a member of the political council of an opposition party and a supporter of Mr Ter-Petrosyan's candidacy at the presidential election. He was an active participant in the rallies, regularly attending the ongoing demonstrations and sit-ins. It appears that the applicant spent the night of 23 to 24 February 2008 at Freedom Square.

II. THE CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

A. The applicant's arrest and institution of a criminal case

8. According to the applicant, on 24 February 2008 at around 10 a.m. he and two of his friends, A.Sis. and V.K., were driving home from the rally at Freedom Square when their car was blocked on Teryan Street by another car, from which masked gunmen emerged and demanded that he and his friends get out of their car. He was thrown to the ground and searched but

nothing was found. He and the others were then forced into the car and taken to the Principal Department for the Fight against Organised Crime of the Armenian Police (hereafter, the PDFOC).

9. According to the "record of bringing a person in", the applicant was "brought in" to the PDFOC on 24 February 2008 at around 11.30 a.m. by operative police officers of the PDFOC "on suspicion of carrying illegal arms and ammunition".

10. At 11.45 a.m. the applicant was subjected to a search at the PDFOC by police officers in the presence of two attesting witnesses. It was indicated in the relevant record that a spring baton had been found in the applicant's coat pocket. It was further indicated that the applicant had stated that the baton belonged to him and that he carried it for self-defence.

11. The applicant, in his application to the Court, contested the circumstances of his being searched and alleged that no arms or other prohibited items had been found as a result of this search. He had then been taken to another room where a police officer had produced a baton, saying that it had been found in his car. He had denied that the baton belonged to him or that it had ever been in his car, but the police officers had started persuading him to admit that the baton had been found during his personal search, saying that he, as a member of the Hunters' Union, was allowed to own it. Then they had threatened that if he refused to confess, they would record that the baton had been found during the personal search of A.Sis. and V.K. for which they, not being members of the Hunters' Union, would be prosecuted. Under such circumstances, he had been compelled to confess that the baton belonged to him. Only after that had the two attesting witnesses been called in and a record of his personal search had been drawn up.

12. At an unspecified hour the applicant's car was searched at the PDFOC and a Makarov-type pistol was found.

13. On the same day one of the PDFOC officers addressed a report to the Head of the PDFOC, according to which on 24 February 2008 at 11 a.m. an anonymous call had been made to the PDFOC stating that a Lexus-model black car was parked at the crossroads of Teryan and Koryun Streets in Yerevan and that its passengers were armed. An operative group of police officers of the PDFOC had immediately set off to the scene and taken into custody the above-mentioned car and its passengers: the applicant, A.Sis. and V.K. A spring baton had been found when the applicant was searched and a Makarov-type pistol was found on searching his car.

14. A statement was taken from the applicant, who submitted that he had spent the previous night at Freedom Square at a rally in support of Mr Ter-Petrosyan and that in the morning on his way home his car had been stopped on Teryan Street by police officers who had taken him and the other passengers to the PDFOC. The applicant further submitted that the Makarov pistol belonged to him, was a registered weapon granted to him in 1994 by

the Minister of Defence and that he had the necessary documents showing that he carried it legally. As regards the baton found during his search, it also belonged to him and he carried it for self-defence.

15. On the same day the applicant and the materials concerning his case were transferred for further inquiry from the PDFOC to Kentron Police Station of Yerevan, where an investigator decided to order that the applicant undergo a forensic toxicological-chemical examination to detect use of drugs, reasoning the need for such examination by the fact that a baton had been found in the applicant's possession. The investigator also ordered a forensic examination of the Makarov pistol, which was later found by the forensic expert to lack a hammer, rendering it ineffective and therefore not to be considered a firearm.

16. At 11 p.m. the applicant was taken by police officers K.H., E.P. and A.S. of Kentron Police Station to the National Bureau of Examinations where he underwent the assigned forensic toxicological-chemical examination, which revealed no traces of drugs in his body.

17. Upon return, the three police officers reported to the Chief of Kentron Police Station that on the way back from the Bureau the applicant had started complaining of being treated unlawfully and threatened them with violence. According to the police officers, upon reaching the police station the applicant had disobeyed their order to step out of the car, then pushed police officer K.H. when leaving the car and started a scuffle with him, refusing to enter the police building and punching K.H. several times in the chest. The applicant had then been forcibly pushed into the police station by the three officers, where he continued threatening them with violence.

18. The applicant alleged that no such incident had ever happened. According to him, as the car had pulled up at Kentron Police Station, he had got out of the car upon an order from one of the police officers and they had accompanied him into the building. The only thing that he had said at the time when he got out of the car had been to tell the police officers that his arrest was unlawful. The applicant further alleged that a number of his relatives and friends, one of his future defence lawyers and a journalist had been standing at that time near the police station, since they had been informed about his transfer to Kentron Police Station and had gathered there expecting his release.

19. On 25 February 2008 the investigator took statements from the three police officers, who confirmed their earlier reports.

20. On the same date the investigator decided to institute a criminal case under Article 316 § 1 (non-life or health-threatening assault on a public official) of the Criminal Code (CC). The relevant decision stated:

> "On 24 February 2008 around 11 p.m. [the applicant], who had been brought in from the crossroads of Koryun and Teryan Streets of Yerevan on suspicion of using drugs and illegal possession of arms, was transported to [the National Bureau of

> Examination] to give samples. On the way back, the applicant, first in the car and then in the front yard of Kentron Police Station, disobeying the lawful orders of the police officers, insulted them and assaulted them in a non-life-threatening way by punching [one of the] police officers."

21. On the same day at 1.35 a.m. a record of the applicant's arrest was drawn up which stated that the applicant was arrested on suspicion of having committed an offence under Article 316 § 1 of the CC.

22. On the same day police officers K.H., E.P. and A.S. were questioned as witnesses and confirmed their earlier statements.

23. The applicant was questioned as a suspect but refused to testify or answer any questions, declaring that he was a victim of political persecution and that the charge against him was trumped up.

24. On the same day police officer K.H. underwent a forensic medical examination which did not reveal any injuries on his body.

B. The charge against the applicant and his placement in detention

25. On 27 February 2008 the applicant was formally charged under Article 316 § 1 of the CC. The decision stated that on 24 February 2008 at around 11.30 p.m. in front of Kentron Police Station the applicant had threatened the police officers and, in defiance of their lawful orders, inflicted non-life-threatening violence on police officer K.H by punching him in the chest.

26. On the same date the applicant was brought before the Kentron and Nork-Marash District Court of Yerevan (hereafter, the District Court) which examined the investigator's application seeking to have him detained for a period of two months on the ground that, if he remained at large, he could commit a new offence, abscond or obstruct the investigation.

27. The applicant submitted before the District Court that the application was unsubstantiated. He had not resisted or punched the police officers and would not have been able to do so since he had been handcuffed. He was a war veteran and had many military awards, no criminal record and a permanent place of residence. The applicant declared that the case against him was politically motivated.

28. The District Court decided to allow the investigator's application, finding that, if the applicant remained at large, he could commit a new offence, abscond or obstruct the investigation.

29. On 29 February 2008 the investigator decided to order a forensic examination of the spring baton. The forensic expert concluded that, based on the overall appearance, measurements and structure of the baton, as well as on the relevant literature, it could be concluded that the baton was a factory-produced mace which could be characterised as a striking-crushing cold weapon (*սառը զենք*).

30. On the same date the results of the toxicological-chemical examination were produced and no traces of drugs were found in the applicant's body.

C. The events of 1-2 March 2008, institution of criminal proceedings and joinder of the applicant's case to those proceedings

31. On 1 March 2008 in the early morning a police operation was conducted on Freedom Square where several hundred demonstrators were camping, as a result of which Freedom Square was cleared of all the demonstrators, resulting in clashes between the demonstrators and the police.

32. On the same date criminal proceedings were instituted regarding the events at Freedom Square on the grounds that the leaders of the opposition and their supporters had organised unlawful demonstrations, incited disobedience and committed violence against the police (for further details see *Mushegh Saghatelyan v. Armenia*, no. 23086/08, § 15, 20 September 2018).

33. It appears that, later that day, the situation in Yerevan deteriorated and the rallies continued in a number of streets until early in the morning of 2 March, involving clashes between protesters and law enforcement officers and resulting in ten deaths, including eight civilians, numerous injured and a state of emergency being declared by the President of Armenia.

34. On 2 March 2008 another set of criminal proceedings was instituted on the grounds that the leaders of the opposition and their supporters had organised mass disorder in the streets of Yerevan, including murders, violence and other reprehensible acts (ibid., § 17).

35. On the same date both sets of proceedings were joined and examined under no. 62202608.

36. On 11 March 2008 the investigator decided to join the applicant's criminal case to case no. 62202608, stating that the applicant had also taken part in organising and conducting the unlawful demonstrations.

37. On 12 March 2008 the investigator, referring to case no. 62202608, prohibited the applicant's contact with the outside world, including close relatives, the media and any other person on the ground that such contact might obstruct the investigation.

38. On 2 April 2008 the applicant went on a hunger strike, demanding that the authorities stop his political persecution and release him from detention.

D. Extension of the applicant's detention and a new charge against him

39. On 15 April 2008 the investigator applied to the court to have the applicant's detention extended. Referring to the materials of the criminal case no. 62202608 and the progress made in the investigation of that case,

the investigator stated, *inter alia*, that sufficient information had been obtained suggesting that the applicant, after the defeat of Mr Ter-Petrosyan in the presidential election, having joined a group of Mr Ter-Petrosyan's like-minded followers and conspired with them to usurp State power in violation of Armenia's Constitution, had actively participated in the implementation of the mentioned criminal plan. It was necessary to carry out further investigative measures to clarify the circumstances of his involvement in the criminal act in question.

40. On 21 April 2008 the District Court allowed the investigator's application and extended the applicant's detention by two months, taking into account the nature and dangerousness of the imputed offence and the fact that the applicant, if he remained at large, could abscond, obstruct the investigation or avoid criminal responsibility and punishment. In doing so, the District Court made a similar reference to the investigation conducted into criminal case no. 62202608.

41. On 26 April 2008 the applicant lodged an appeal arguing, *inter alia*, that the District Court's decision was unreasoned and the risks of his absconding or obstructing the investigation were unsubstantiated.

42. On 8 May 2008 the Criminal Court of Appeal dismissed the appeal, finding that the circumstances on which the applicant's detention was based persisted, since there was still a high risk that the applicant could obstruct the investigation and abscond.

43. On 23 May and 3 June 2008 the investigator questioned two other police officers, S.H. and A.H., who were said to be on guard duty at Kentron Police Station on the night of 24 February 2008.

Police officer S.H. stated that he had heard loud noises from outside the police building, so he had stepped outside and seen police officers K.H., E.P. and A.S. holding the applicant by his arms, trying to push him into the police station. The applicant was disobeying, showing resistance to the officers and trying to free himself, while shouting and making threats. He had eventually been pushed inside the station where he had continued making threats.

Police officer A.H. stated that he had been inside the station and seen that a person, whom he later recognised as a former minister, held by his arms by the three officers, had been brought inside the station where he had briefly threatened to have the officers' heads smashed and then had calmed down and sat down.

Both S.H. and A.H. stated that police officer K.H. had sat down when inside the station, holding his hand to his chest and saying that the applicant had punched him.

44. On 15 June 2008 the investigator applied to the court to have the applicant's detention extended once more. He once again made a reference to the materials of criminal case no. 62202608, adding that, following a number of investigative measures, no sufficient evidence had been obtained

directly implicating the applicant in the commission of the criminal act investigated in that case.

45. On 18 June 2008 the applicant's criminal case was disjoined from case no. 62202608 as it was apparently ready for trial.

46. On 19 June 2008 the General Prosecutor's Office wrote to the investigator dealing with the applicant's case, drawing his attention to the fact that the applicant had been charged only under Article 316 § 1 of the CC, whereas his actions had also contained elements of an offence envisaged by Article 235 § 4 of the CC (illegal carrying of a cold weapon). The investigator was instructed to bring new charges.

47. On 20 June 2008 the District Court extended the applicant's detention by 20 days, namely until 15 July 2008, on the same grounds as previously.

48. On 24 June 2008 the applicant lodged an appeal, raising the same arguments as previously.

49. On 26 June 2008 the investigator decided to bring a new charge against the applicant under Article 235 § 4 of the CC. The decision stated that a spring baton had been found in the applicant's coat pocket as a result of the personal search conducted upon "bringing him to the police station" on 24 February 2008.

50. On 7 July 2008 the investigation into the applicant's criminal case was completed and the case was referred to the District Court for trial.

51. On 9 July 2008 the Criminal Court of Appeal decided to leave the applicant's appeal of 24 June 2008 without examination on the ground that the investigation had been completed and the case had been referred for trial.

E. The court proceedings

52. On 14 July 2008 a judge of the District Court who had taken over the applicant's criminal case decided to set the case down for trial.

53. On 22 July 2008, during the first hearing, the applicant requested to be released from detention arguing, *inter alia*, that his detention authorised by a court had expired on 15 July 2008, while the judge had failed to address the issue of his detention when deciding to set the case down for trial, in violation of Articles 293 and 300 of the Code of Criminal Procedure (CCP).

54. On the same day the judge took a decision stating that the question of the applicant's continued detention had been examined on 14 July 2008 when adopting the decision to set the case down for trial and it had been decided to leave the applicant's detention unchanged. However, as a result of a typographical error, that paragraph had not been reflected in the operative part of the decision which was to be read as containing the phrase "to leave the applicant's detention unchanged". At the next hearing on

28 July 2008 the judge presented the parties with that decision and dismissed the applicant's request for release.

55. On 17 September 2008 another judge of the District Court who had taken over the applicant's case decided to set the case down for trial and also ruled to leave the applicant's detention unchanged.

56. In the course of the trial the District Court summoned for questioning police officers K.H., E.P., A.S., S.H. and A.H. who maintained their statements against the applicant.

57. After police officers S.H. and A.H. gave their testimony, the applicant requested additional time to prepare for their questioning. The District Court dismissed the request on the ground that the applicant and his defence lawyers had had enough time to prepare themselves. The District Court stated, however, that it was ready to allow such a request in the future if it were substantiated. At the next court hearing the applicant lodged a similar request, seeking to summon and question the two above-mentioned police officers. The District Court announced that it would examine the request after the applicant's questioning but it appears that it never revisited that question.

58. The applicant pleaded not guilty and contested the factual allegations against him, providing his account of events (see paragraphs 11 and 18 above).

59. The applicant also lodged several requests with the District Court seeking to call witnesses on his behalf.

Firstly, the applicant requested that a number of persons be summoned, including S.A., V.A., L.S., P.K., K.G. and A.Y., who were his relatives, political supporters and one journalist, submitting that, having learned about his arrest, they had gathered at Kentron Police Station and had been standing at the entrance when he was brought back by police officers from the forensic examination and that they could confirm that no incident had taken place as he left the car and entered the police building.

Secondly, the applicant requested that A.Sis. and V.K., who had been kept at Kentron Police Station on the night from 24 to 25 February 2008, be summoned, submitting that they had witnessed from their cell window how he had been escorted into the police building and later had heard no shouts or sounds of protest when he had been escorted through the lobby inside the building.

In support of those requests, the applicant's lawyer submitted records of statements which the lawyer had taken from those persons containing their relevant submissions.

60. The District Court dismissed the first request on the ground that the case file contained no information about the persons in question, while the second request was dismissed on the ground that it was not necessary to call those persons since the materials of the case contained sufficient information to draw appropriate conclusions.

61. The applicant's lawyer then requested the District Court to admit as evidence the records of the statements taken from those persons. The District Court granted that request and the statements were included in the case file.

62. On 19 November 2008 the District Court found the applicant guilty as charged and sentenced him under Article 316 § 1 of the CC to two years' imprisonment and under Article 235 § 4 of the CC to a fine in the amount of 300,000 Armenian drams (AMD). The District Court found it to be established as follows:

> "[The applicant] illegally carried a spring baton (mace) characterised as a striking-crushing cold weapon which was found in his coat pocket and seized during his personal search on 24 February 2008.
>
> ...
>
> Having found out about the need to take samples from him, [the applicant] became agitated, started complaining and, on the way back [to the police station], made threats of retribution against the accompanying police officers who were performing their official duties.
>
> After urine and blood samples were taken from [the applicant], [the police officers accompanying him, namely K.H., E.P. and A.S.] were obliged, in accordance with the prescribed procedure and as part of their official duties, to bring [the applicant] before the authority which had ordered the forensic examination. Near the entrance to Kentron Police Station ... the victim, [K.H.], and witnesses, [E.P. and A.S.], for the purpose of performing their official duties, ordered [the applicant] to step out of the car and to enter the police building. [The applicant] disobeyed their lawful order and refused to step out of the car and to enter the building. After the victim [K.H.] repeated the order, [the applicant] first pushed and then, using non-life and health-threatening violence, pulled and punched several times in the chest the victim [K.H.] who was performing his official duties, causing him physical pain. Thereafter [the applicant] was forcibly taken inside the lobby of Kentron Police Station, while he continued his threats addressed at the police officers."

63. In reaching the above findings, the District Court relied on the statements of the police officers, the record of the applicant's "bringing-in", the record of the applicant's search, the conclusions of the forensic expert characterising the baton as a striking-crushing cold weapon and the applicant's statement of 24 February 2008 in which he had admitted that the baton belonged to him. As regards the applicant's arguments and the materials submitted by him, the District Court found them to be unreliable, in conflict with the circumstances of the case and provided by persons who had close relations with the applicant, were not impartial and aimed to protect him.

64. On 9 December 2008 the applicant lodged an appeal arguing, *inter alia*, that the District Court had failed to assess properly the evidence, ignored his submissions in support of his innocence, based its findings solely on the statements of police officers, refused to hear the persons whom he had sought to call as witnesses on his behalf and deprived him of the

opportunity to question witnesses against him, namely police officers S.H. and A.H. He also alleged that the true reason for his prosecution and conviction was his being an opposition activist and to prevent his participation in the opposition demonstrations, arguing that he had been discriminated against on the basis of his political views.

65. On 27 January 2009 the Criminal Court of Appeal upheld the judgment of the District Court and dismissed the applicant's appeal, finding that the arguments relied on therein, including the impossibility to question in court police officers S.H. and A.H., could not serve as a valid ground for quashing the judgment as they were not indicative of a substantial violation of the criminal process and because the indictment and the conviction were based on sufficient evidence proving the applicant's guilt. Besides, the applicant's allegations that the true reason for his prosecution was his political activism and participation in the opposition demonstrations were unsubstantiated as the District Court had been guided by the law, legal awareness, inner conviction and the evidence obtained and examined in court.

66. On 27 April 2009 the applicant lodged an appeal on points of law, raising similar arguments as in his appeal of 9 December 2008.

67. On 15 June 2009 the Court of Cassation declared the applicant's appeal on points of law inadmissible for lack of merit.

68. It appears that later that month the applicant was granted amnesty and released from prison after having served more than half of his sentence.

RELEVANT LEGAL FRAMEWORK

69. For a summary of the relevant domestic law, as well as of the relevant international materials, see *Mushegh Saghatelyan* (cited above, §§ 91-134), *Ara Harutyunyan v. Armenia* (no. 629/11, §§ 30-37, 20 October 2016) and *Poghosyan v. Armenia* (no. 44068/07, §§ 26-41, 20 December 2011). A number of relevant international materials which were not quoted in those judgments provide as follows.

I. PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE (PACE)

70. On 15 April 2008 the PACE Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe produced the Report on the Functioning of Democratic Institutions in Armenia (Doc. 11579). The relevant extracts from the Explanatory Memorandum to the Report provide:

> "10. The opposition received a boost in support when a number of high-level state officials publicly denounced the election as fraudulent and announced their support for Mr Levon Ter-Petrosyan. These officials were subsequently dismissed from their

positions and a number of them, as well as several opposition activists, were arrested on seemingly artificial charges, which left the impression that their prosecution was politically motivated. According to the Helsinki Association of Armenia, a total of 14 persons were arrested and placed under investigation in the period from 20 to 29 February 2008."

II. ORGANISATION FOR SECURITY AND COOPERATION IN EUROPE/OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS (OSCE/ODIHR)

71. Between April 2008 and June 2009 the OSCE/ODIHR conducted a monitoring project of about a hundred trials of opposition leaders and supporters related to the events of 1-2 March 2008, which included the applicant's case under number 88.

THE LAW

I. PRELIMINARY REMARKS

72. The Court notes at the outset that the applicant died on 8 June 2014, while the case was pending before the Court. The applicant's widow, Mrs Ruzanna Sargsyan, who is his heir, informed the Court that she wished to pursue the application lodged by him. The Court points out that it has accepted on numerous occasions that close relatives of a deceased applicant are entitled to take his or her place in the proceedings, if they express their wish to do so (see, among other authorities, *Dalban v. Romania* [GC], no. 28114/95, §§ 38-39, ECHR; *Ashot Harutyunyan v. Armenia*, no. 34334/04, §§ 86-87, 15 June 2010; *Arras and Others v. Italy*, no. 17972/07, §§ 32-33, 14 February 2012; and *Ergezen v. Turkey*, no. 73359/10, §§ 29-30, 8 April 2014).

73. The Court does not see any special circumstances in the present case to depart from its established case-law and is prepared to accept that the applicant's heir can pursue the application initially brought by Mr Smbat Ayvazyan.

II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

74. The applicant complained under Article 5 § 1 of the Convention that his detention between 15 and 22 July 2008 had been unlawful since there had been no court decision authorising that period of detention as required by domestic law, under Article 5 § 3 of the Convention that the courts had failed to provide relevant and sufficient reasons for his continued detention, and under Article 5 § 4 of the Convention that the Criminal Court of Appeal had refused to examine his appeal of 24 June 2008. Article 5 §§ 1, 3 and 4 of the Convention, in so far as relevant, reads as follows:

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

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

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. Admissibility

75. The Government submitted that the applicant had failed to exhaust the domestic remedies in respect of his complaints under Article 5 §§ 3 and 4 of the Convention, as required by Article 35 § 1 of the Convention. Firstly, he had not appealed against the decision of the District Court of 27 February 2008 to the Criminal Court of Appeal despite the fact that such a possibility was clearly provided for by the CCP. Secondly, the decisions of the Criminal Court of Appeal of 8 May and 9 July 2008 had not been appealed against to the Court of Cassation.

76. The applicant argued that he had not appealed against the District Court's initial decision on his detention of 27 February 2008 to the Criminal Court of Appeal because, under the given circumstances, that remedy would have been ineffective. In this connection he referred to the relevant findings of the OSCE/ODIHR's Final Report on the Trial Monitoring Project in Armenia (see paragraph 71 above). As regards an appeal to the Court of Cassation, referring to the Court's judgments in the cases of *Muradkhanyan v. Armenia* (no. 12895/06, § 92, 5 June 2012) and *Grigoryan v. Armenia* (no. 3627/06, § 113, 10 July 2012), he submitted that he had not enjoyed in law a right to appeal to the Court of Cassation against decisions on pre-trial detention and therefore that remedy was ineffective.

77. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 of the Convention obliges those seeking to bring their case against the State before an international judicial or arbitral organ to use first the remedies provided by the national legal system (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 70, 25 March 2014).

78. The Court notes, as regards the Government's first argument, that this question is closely linked to the substance of the applicant's complaint under Article 5 § 3 of the Convention and must be joined to the merits. As regards the Government's second argument regarding the applicant's failure to lodge an appeal on points of law with the Court of Cassation, which concerns both Article 5 § 3 and Article 5 § 4 of the Convention, the Court notes that it has already examined and dismissed a similar objection of non-exhaustion in another case against Armenia (see *Arzumanyan v. Armenia*, no. 25935/08, §§ 28-32, 11 January 2018). Given that the Government did not advance any new arguments, it sees no reasons in the present case to depart from its earlier findings. It therefore dismisses the part of the Government's objection of non-exhaustion based on that argument.

79. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. Article 5 § 1 of the Convention

80. The applicant submitted that there had been no court decision authorising his detention between 15 and 22 July 2008 in violation of domestic law and the principle of lawfulness of Article 5 § 1 of the Convention. The failure to address the question of his continued detention in the decision of 14 July 2008 could not be justified by a simple typographical error. If the judge had indeed intended to decide on his continued detention but simply forgot to add a sentence in the operative part of the decision, as alleged by the Government, he would have at least included some remarks in the reasoning part of that decision. As regards the decision of 22 July 2008, this had been prompted by the applicant's own request for release and had been simply an attempt to find a way out of the situation in which the judge had found himself. The fact that the judge's omission had been justified by a simple typographical error showed what a minor formality was the issue of deciding on a preventive measure. In any event, regardless of the reasons for the judge's failure to rule on the applicant's continued detention, the very fact that there had been no court decision authorising his detention for that period was a violation of the principle of lawfulness.

81. The Government submitted that the examining judge had addressed and resolved the question of the applicant's continued detention on 14 July 2008 but had not noted it in his decision taken on that day because of a typographical error. It had therefore been merely a technical mistake which had been corrected by the decision of 22 July 2008. Thus, there was no

violation of Article 5 § 1 of the Convention since the applicant's detention from 15 July 2008 had been based on the decision taken by the examining judge on 14 July 2008.

82. The Court reiterates that Article 5 of the Convention enshrines a fundamental right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. The words "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof (see *Creangă v. Romania* [GC], no. 29226/03, §§ 84 and 101, 23 February 2012).

83. The Court notes that under Armenian law, namely Article 136 § 2 of the CCP, a person could be detained in criminal proceedings only upon a court decision. Furthermore, Article 293 § 2 of the CCP required that the decision setting the case down for trial contain, *inter alia*, a ruling cancelling, modifying or imposing a preventive measure, while Article 300 of the CCP obliged the domestic courts, when adopting decisions, including decisions setting the case down for trial, to examine the question of whether the preventive measure imposed was justified.

84. In the present case, the domestic court adopted a decision to set the case down for trial on 14 July 2008 but failed to rule on the applicant's continued detention (see paragraph 52 above), which then expired on 15 July 2008. Thus, there was no court decision authorising the applicant's detention until 22 July 2008 when the domestic court finally addressed that question. Both the domestic court and the Government justified the failure to rule on the applicant's continued detention with a typographical error and alleged that that question had in fact been addressed and ruled upon on 14 July 2008. The Court notes, however, that the Government have failed to provide any evidence in support of their allegation. Nor is there any material in the case file to suggest that the question of the applicant's continued detention had indeed been addressed by the examining judge when adopting the decision of 14 July 2008. In any event, even assuming that this had been so, it would still not affect the fact that the relevant decision contained no ruling regarding the applicant's detention. It follows that there was no court decision authorising the applicant's detention between 15 and 22 July 2008, in violation of domestic law. The Court underlines in this connection that a mere retroactive reference to a typographical error cannot be regarded as remedying that situation.

85. There has accordingly been a violation of Article 5 § 1 of the Convention.

2. Article 5 § 3 of the Convention

86. The applicant submitted that the domestic courts had failed to provide relevant and sufficient reasons for his continued detention.

87. The Government argued that the courts had provided relevant and sufficient reasons for the applicant's detention, such as the nature and the dangerousness of the imputed offence and the risk of absconding, obstructing the investigation and committing a new offence.

88. 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 it has already found the use of stereotyped formulae when imposing and extending detention to be a recurring problem in Armenia (see, among other authorities, *Piruzyan v. Armenia*, no. 33376/07, §§ 97-100, 26 June 2012; *Malkhasyan v. Armenia*, no. 6729/07, §§ 74-77, 26 June 2012; *Sefilyan v. Armenia*, no. 22491/08, §§ 88-93, 2 October 2012; and *Ara Harutyunyan*, cited above, §§ 54-59). In the present case, the domestic courts similarly justified the applicant's continued detention with a mere citation of the relevant domestic provisions and a reference to the gravity of the imputed offence without addressing the specific facts of his case or providing any details as to why the risks of absconding, obstructing justice or reoffending were justified. The Court therefore concludes that the domestic courts failed to provide relevant and sufficient reasons for the applicant's detention.

89. Having reached this conclusion, the Court considers it necessary to address the remainder of the Government's non-exhaustion objection, namely the argument concerning the failure of the applicant to lodge an appeal with the Criminal Court of Appeal against the initial decision of the District Court to detain him (see paragraph 28 above).

90. The Court notes that the applicant's complaint concerns the failure of the domestic courts to provide relevant and sufficient reasons for his continued detention which started with the above-mentioned initial decision of the District Court on 27 February 2008 and ended on the date the applicant was found guilty, namely on 19 November 2008. It is true that the applicant did not lodge an appeal against that particular initial decision. However, he did raise the issue of lack of reasons before the Criminal Court of Appeal in two subsequent appeals (see paragraphs 41 and 48 above). Furthermore, as already indicated above, the reasoning provided by the District Court remained the same throughout that entire period and was, moreover, couched in abstract and stereotyped language. Thus, the applicant can be said to have brought this issue before the Criminal Court of Appeal and this complaint cannot be dismissed for failure to exhaust the domestic remedies. The Court therefore decides to reject the remainder of the Government's objection of non-exhaustion.

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

3. Article 5 § 4 of the Convention

92. The applicant submitted that the refusal to examine his appeal of 24 June 2008 had violated the guarantees of Article 5 § 4.

93. The Government did not comment on the merits of the applicant's complaint.

94. 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 *Poghosyan*, cited above, § 76, and *Piruzyan*, cited, above, § 125).

95. The Court notes that it has already examined a similar complaint in a number of cases against Armenia, in which it held that denial of judicial review of the applicant's detention on the sole ground that the criminal case was no longer considered to be in its pre-trial stage had been an unjustified restriction on his right to take proceedings under Article 5 § 4 and concluded that there had been a violation of that provision (see *Poghosyan*, cited above, §§ 78-81, and *Piruzyan*, cited above, §§ 126-127). The circumstances of the present case are similar (see paragraph 51 above). The Court therefore sees no reason to reach a different conclusion.

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

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

97. The applicant complained that (a) his conviction had been based on the statements of the police officers, while he had not been allowed to call any witnesses on his behalf, and (b) he had not been able to question two witnesses. He relied on Article 6 §§ 1 and 3(d) of the Convention which, in so far as relevant, provides:

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

A. Admissibility

98. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

99. The applicant submitted that his trial had been conducted in violation of the guarantees of Article 6 §§ 1 and 3(d) of the Convention.

100. Firstly, he had not had a reasonable opportunity to challenge the charges against him. In particular, the charge under Article 316 of the CC had been based solely on the testimony of the police officers which he had sought to challenge by calling a number of persons who could have confirmed that no incident had taken place between him and the police officers. His requests had been dismissed by an unreasoned and unfounded decision of the trial court which, for unexplained reasons, had given priority to the testimony of the police officers, which moreover contained many contradictions. The applicant added that the practice of basing convictions solely on police testimony in cases related to the events of February-March 2008 had been criticised by the PACE, according to which such judgments would raise reasonable doubts as to their impartiality since the police were one of the parties to the conflict. The applicant argued that, even if the records of the statements taken by his lawyer from the persons whom he had sought to call as witnesses had been included in the case file, they had not had the same evidentiary value as witness testimony made in court and, in any event, the decision to include those records had been a mere formality since the District Court had not given them any importance.

101. Secondly, he had been denied the possibility to question two witnesses against him, namely police officers S.H. and A.H., either during the investigation or the court proceedings. There had been contradictions between the statements of those two officers and the three officers who had escorted him from the National Bureau of Examinations and it was of paramount importance from the point of view of fairness of his trial to question those witnesses in order to clarify those inconsistencies. The trial court had therefore deprived him of the opportunity to challenge the central argument against him.

(b) The Government

102. The Government submitted that, according to the Court's case-law, it was in principle for the domestic courts to consider whether a particular witness should be heard. The reasons provided by the trial court for refusing the applicant's request to call additional witnesses had been sufficient and justified. Furthermore, the records of the statements taken from those persons by the applicant's lawyer had been read out during the trial and admitted as evidence by the trial court, which then made a proper assessment of those documents and found them unreliable since the

testimony contained therein had been provided by the applicant's close friends.

103. The Government further submitted, as regards the applicant's alleged inability to question police officers A.H. and S.H., that both officers had been summoned and gave testimony in court but the applicant's lawyers did not want to examine them at that hearing, arguing that they needed more time to prepare for their examination as there were discrepancies between their pre-trial statements and those made at trial. The court refused the lawyer's request to adjourn the police officers' examination on the ground that the lawyers had been familiarised with the records of their pre-trial statements and had had sufficient time to prepare for their questioning at trial. Thus, the refusal had been justified and did not violate the applicant's rights guaranteed by Article 6 §§ 1 and 3(d) of the Convention.

2. The Court's assessment

104. The Court reiterates that, as a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce. Article 6 § 3 (d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses, in the "autonomous" sense given to that word in the Convention system. In the context of taking evidence, the Court has paid particular attention to compliance with the principle of equality of arms, which is one of the fundamental aspects of a fair hearing and which implies that the applicant must be "afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent". Therefore, even though it is normally for the national courts to decide whether it is necessary or advisable to call a witness, there might be exceptional circumstances which could prompt the Court to conclude that the failure to do so was incompatible with Article 6. When a request by a defendant to examine witnesses is not vexatious, is sufficiently reasoned, is relevant to the subject matter of the accusation and could arguably have strengthened the position of the defence or even led to his acquittal, the domestic authorities must provide relevant reasons for dismissing such a request. If they fail to do so, the Court may conclude that the overall fairness of the proceedings has been undermined (see, among other authorities, *Mushegh Saghatelyan*, cited above, §§ 202-204, and *Murtazaliyeva v. Russia* [GC], no. 36658/05, §§ 139-159, 18 December 2018).

105. In a number of cases in which prosecution and conviction of individuals for their conduct at a public event was based exclusively on the submissions of police officers who had been actively involved in the contested events the Court found that, in those proceedings, the courts had accepted the submissions of the police readily and unequivocally and had denied the applicants any opportunity to adduce any proof to the contrary. It

held that in the dispute over the key facts underlying the charges where the only witnesses for the prosecution were the police officers who had played an active role in the contested events, it was indispensable for the courts to use every reasonable opportunity to check their incriminating statements (see *Kasparov and Others*, cited above, § 64; *Navalnyy and Yashin v. Russia*, no. 76204/11, § 83, 4 December 2014; and *Frumkin v. Russia*, no. 74568/12, § 165, ECHR 2016 (extracts)). A similar situation was examined by the Court in a case against Armenia, in which a violation of Article 6 was found and which, moreover, concerned the same events as in the present case (see *Mushegh Saghatelyan*, cited above, §§ 200-211).

106. It appears that the criminal proceedings against the applicant were conducted in a similar manner. The charge against the applicant under Article 316 § 1 of the CC was built to a large and decisive extent on the testimony of three police officers who had been actively involved in the contested events, with the other two police officers who also testified against the applicant not witnessing the alleged assault on police officer K.H. The applicant's requests to call witnesses, which were sufficiently substantiated and of direct relevance to the charge against him, were dismissed by the trial court with very brief and unconvincing reasoning (see paragraph 60 above). It is true that the contested events were not, strictly speaking, related to the applicant's conduct at a public event. They nevertheless concerned an alleged incident which on arguable grounds was related to the applicant's involvement in the rallies and in which the police officers were actively involved (see paragraph 129 below). Furthermore, the fact that the written statements taken by the applicant's lawyer from the persons whom he had sought to call as witnesses were included in the case file could not compensate for the fact that those persons were not called and questioned in court at an oral and adversarial hearing. Nor does it appear that due consideration was given to that evidence by the trial court (see paragraph 63 above). The Court therefore considers that the domestic courts, in a dispute over the key facts underlying the charges, failed to use every reasonable opportunity to verify the incriminating statements of the police officers who were the only witnesses for the prosecution and had played an active role in the contested events. Their unreserved endorsement of the police version of events, failure to address properly the applicant's submissions and refusal to examine the defence witnesses without proper regard to the relevance of their statements can be said to have led to a limitation of the defence rights incompatible with the guarantees of a fair hearing (see, *mutatis mutandis*, *Mushegh Saghatelyan*, cited above, § 210).

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

108. Having reached this conclusion, the Court does not consider it necessary to examine separately whether there has also been a violation of

Article 6 § 3 (d) of the Convention in respect of the same facts or whether Article 6 §§ 1 and 3(d) of the Convention has also been violated as a result of the applicant's non-examination of police officers A.H. and S.H.

IV. ALLEGED VIOLATION OF ARTICLES 10 AND 11 OF THE CONVENTION

109. The applicant complained that his prosecution and conviction had violated his rights guaranteed by Articles 10 and 11 of the Convention which, in so far as relevant, provide:

Article 10

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Article 11

"1. Everyone has the right to freedom of peaceful assembly...

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others..."

A. Admissibility

110. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

111. The applicant submitted that his prosecution and conviction had been a disguised form of interference with his right to freedom of expression and right to participate in the continuing protests against the

authorities. Referring in that regard to PACE Resolutions nos. 1609 and 1620, he contended that the aim of his prosecution had been to isolate him from other opposition supporters and activists who had been organising continuing protests against the irregularities in the presidential election and to punish him for his adherence to opposition forces and his continued participation in the rallies. Even if this had been a disguised form of prosecution based on fabricated charges, a number of elements of the case showed a clear link between the formal basis and the real motives of his prosecution. In particular, his case had been joined with criminal case no. 62202608 which had been a class action against the supporters of Mr Ter-Petrosyan for organising the protests; he had been repeatedly questioned about his role in organising the protests during the investigation; his detention had been extended and his access to the outside world had been restricted with reference to that case; his trial had been conducted in a highly politicised atmosphere where nearly all the seats in the courtroom had been occupied by plainclothes police officers as a way of putting pressure on the courts. Even though his case had eventually been disjoined from the main criminal case, this was only because the authorities had failed in their attempt to set up charges against him for involvement in the peaceful protests. That was the reason why, at the same time, they had brought the charge of illegally carrying a baton. In support of his contention that his arrest and subsequent prosecution had been politically motivated, the applicant also drew parallels between his case and that of *Virabyan v. Armenia* (no. 40094/05, §§ 204-207 and 224, 2 October 2012).

112. The applicant further submitted that the interference had not only been unlawful in terms of domestic law but also arbitrary because its aim had been to neutralise him as an actor in the civil movement and to punish him for his activities and critical views towards election fraud and the government in general. The failure of the authorities to verify whether his allegations of politically-motivated prosecution had been substantiated was also a factor to be taken into account. In sum, the interference had been unlawful, had not pursued any legitimate aim and had not been necessary in a democratic society.

113. The applicant lastly contested the Government's allegation about his arrest being linked to his alleged use of drugs, arguing that nothing in the record of his "bringing-in" suggested that he had been taken to the police station on those grounds. The decision assigning a toxicological-chemical examination had mentioned only the possession of a baton.

(b) The Government

114. The Government submitted that the applicant had been taken to a police station on a suspicion of illegally carrying a weapon and drug dealing, which had happened when he was returning from a demonstration. The applicant's behaviour and certain signs raised doubts that he might have

used drugs. Besides, a baton had been found in his possession after he had been searched. Thus, the applicant's prosecution and subsequent conviction had not interfered with his rights guaranteed by Articles 10 and 11 of the Convention. In any event, even assuming that there had been such an interference, the interference had been lawful since the applicant had been deprived of his liberty for criminal acts envisaged by the Criminal Code, it had pursued the legitimate aim of preventing crime and protecting public safety and it had been necessary in a democratic society since the prosecution of alleged crimes was a genuine feature of any democratic society.

2. The Court's assessment

(a) The scope of the applicant's complaints

115. The Court notes that the applicant's complaints under Articles 10 and 11 are mainly based on the allegation that his prosecution and conviction were a measure to prevent him from participating in demonstrations and to punish him for having done so. In such circumstances, Article 10 is to be regarded as a *lex generalis* in relation to Article 11, which is a *lex specialis*. The Court therefore finds that the applicant's complaints should be examined under Article 11 alone (see *Ezelin v. France*, 26 April 1991, § 35, Series A no. 202, and *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, § 85, ECHR 2015).

116. On the other hand, notwithstanding its autonomous role and particular sphere of application, Article 11 must, in the present case, also be considered in the light of Article 10. The protection of personal opinions, secured by Article 10, is one of the objectives of freedom of peaceful assembly as enshrined in Article 11 (see *Ezelin*, cited above, § 37; *Kudrevičius and Others*, cited above, § 86; and *Navalnyy v. Russia* [GC], nos. 29580/12 and 4 others, § 102, 15 November 2018).

(b) Whether there has been an interference with the exercise of the right to freedom of peaceful assembly

117. The Court reiterates that an interference with the freedom of peaceful assembly does not need to amount to an outright ban, legal or *de facto*, but can consist in various other measures taken by the authorities. The term "restrictions" in Article 11 § 2 must be interpreted as including both measures taken before or during an assembly, such as a prior ban, dispersal of the rally or the arrest of participants, and those, such as punitive measures, taken afterwards, including penalties imposed for having taken part in a rally (see *Mushegh Sathatelyan*, cited above, § 228).

118. In the present case, it is in dispute between the parties whether there was an interference with the applicant's right to freedom of assembly. The applicant alleged that the true reason behind his prosecution and

conviction was to prevent his participation in the ongoing rallies and to punish him for his opposition activism and his role and active participation in the rallies, while the Government denied that and argued that he had been prosecuted exclusively for the offences in question.

119. The Court notes that in essence the parties are disputing the factual basis for the applicant's prosecution and conviction. The Court has emphasised on many occasions that it is sensitive to the subsidiary nature of its role and recognises that it must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case. As a general rule, where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and it is for the latter to establish the facts on the basis of the evidence before them. Though the Court is not bound by the findings of domestic courts and remains free to make its own appreciation in the light of all the material before it, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by the domestic courts (see *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 180, ECHR 2011 (extracts), and *Austin and Others v. the United Kingdom* [GC], nos. 39692/09 and 2 others, § 61, ECHR 2012).

120. The Court further reiterates that, in assessing evidence, it has adopted the standard of proof "beyond reasonable doubt". However, it has never been its purpose to borrow the approach of the national legal systems that use that standard. Its role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof. In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 147, ECHR 2005‑VII).

121. The Court notes at the outset that it has already examined a number of cases against Armenia in which applicants made similar allegations of interference under Article 11 during periods of increased political sensitivity, usually involving mass protests around election periods resulting in various types of punitive measures against opposition supporters or activists by means of administrative or criminal proceedings in which police testimony was the sole evidence directly implicating the applicants and

served as the only basis for their eventual convictions, if any (see, among other authorities, *Hakobyan and Others v. Armenia*, no. 34320/04, §§ 87-90, 10 April 2012; *Virabyan v. Armenia*, no. 40094/05, §§ 203-210, 2 October 2012, which concerned similar allegations but in the context of Article 14 of the Convention; and *Mushegh Saghatelyan*, cited above, §§ 241-243, which concerned the same protest movement as in the present case). In the case of *Hakobyan and Others*, in particular, the Court found that during a period when opposition rallies had been held in protest against the results of the presidential election of 2003 there had been an administrative practice of deterring or preventing opposition activists from participating in those rallies, or punishing them for having done so, by resorting to the procedure of short-term imprisonment under the Code of Administrative Offences, including on such grounds as using foul language or disobeying police orders in circumstances unrelated to the rallies. Finding that the applicants, three opposition supporters, had fallen victim to that practice, the Court rejected the factual basis for their convictions on those grounds and concluded that the true reason for their imprisonment was to prevent or discourage them from participating in the ongoing opposition protests (see *Hakobyan and Others*, cited above, §§ 90-99). A similar conclusion was reached in the case of *Virabyan* in respect of the applicant's arrest on suspicion of illegal possession of a weapon and subsequent administrative proceedings for alleged disobedience to police (cited above, §§ 203-210). The Court has applied a similar approach in the context of Article 11 also in a number of cases against other countries (see *Nemtsov v. Russia*, no. 1774/11, §§ 66-71, 31 July 2014; *Karpyuk and Others v. Ukraine*, nos. 30582/04 and 32152/04, §§ 194-206, 6 October 2015; and *Huseynli and Others v. Azerbaijan*, nos. 67360/11 and 2 others, §§ 87-97, 11 February 2016).

122. The Court further draws attention to the general context surrounding the circumstances of the present case. As already noted in the case of *Mushegh Saghatelyan*, this was a period of increased political sensitivity in Armenia involving opposition rallies held in protest against an allegedly unfair presidential election result. The response of the authorities that followed, including the arrests and detention of scores of opposition supporters, was condemned by the PACE and described as a "*de facto* crackdown on the opposition". The charges brought against many of them, especially those based solely on police evidence, were suspected to have been "artificial and politically motivated" (see *Mushegh Saghatelyan*, cited above, §§ 125-131 and 243). Moreover, there was evidence suggesting some opposition activists may have fallen victim to arrests and prosecutions on "seemingly artificial charges" already in the period from 20 to 29 February, that is before the events of 1 March 2008 and institution of the main criminal case no. 62202608 against the leaders and supporters of the opposition (see paragraph 70 above). Bearing in mind the description of the

general context provided in the above-mentioned reports by various Council of Europe bodies, which are cause for grave concern and call for special vigilance and scrutiny on the part of the Court in dealing with the applicant's particular case, the Court will refer in this connection to the following factors.

123. Firstly, it is undisputed that the applicant was a member of the political opposition and a known public figure who took active part in the post-election demonstrations and whose arrest happened when the rallies were in full swing and was indirectly linked to his participation in the ongoing protests, as the applicant was alleged to have been illegally armed while on his way from a demonstration.

124. Secondly, the Court notes the controversial manner in which the criminal case against the applicant was initiated. In particular, the trigger for the applicant's arrest was an alleged anonymous telephone call received at the PDFOC alleging that the applicant and the persons accompanying him were armed. There is, however, no objective evidence to support the fact that such a telephone call was indeed received at the PDFOC, such as for example a recording of that conversation or its detailed transcript. The precise nature of that anonymous telephone call was never revealed or examined at any stage of the proceedings either, which may call into question the veracity of this fact (compare with *Virabyan*, cited above, § 205). The police officers immediately proceeded to take the applicant into custody on such precarious grounds without first making any attempts to verify the information provided or carrying out any searches or checks on the spot (ibid., § 206). This initial suspicion against the applicant was almost immediately forgotten once the circumstances of his arrest gave rise to a different charge, namely that of an assault on a police officer which, moreover, was based exclusively on the statements of the police officers concerned (ibid., § 207; *Hakobyan and Others*, cited above, § 94; and *Mushegh Saghatelyan*, cited above, § 251). All the above factors, as well as the striking vagueness of all the official documents concerning the initial reasons for the applicant's arrest (see paragraphs 9, 20 and 21 above), prompt the Court to believe that there were no genuine reasons for taking the applicant into custody and the fact that he was arrested on such precarious grounds actually gives an impression that the intention was to deprive the applicant of his liberty at any cost and that his arrest may have been effected in bad faith (compare with *Virabyan*, cited above, §§ 205-207, and *Mushegh Saghatelyan*, cited above, § 249).

125. Thirdly, it is not clear why the applicant was taken for a drug test, which then gave rise to the disputed incident, in the first place. Both the record of his "bringing-in" and the initial police report indicated the alleged illegal possession of arms as the sole reason for the applicant's arrest and mentioned nothing about any drug-related suspicions (see paragraphs 9 and 13 above). Even the investigator's decision justified the need for a drug

test with nothing more than the fact that a baton had been found in the applicant's possession, although the Court has difficulty seeing the connection between the two (see paragraph 15 above). It is true that the decision to institute a criminal case stated that the applicant had been brought in on suspicion of, *inter alia*, drug use (see paragraph 20 above) but there is no evidence whatsoever to support that statement. For the same reasons, the Government's arguments in that connection do not appear convincing and reliable.

126. Fourthly, the Court notes that, while being formally charged with threatening and assaulting police officers on 24 February 2008 in circumstances unrelated to the protest movement that gripped Armenia following the disputed presidential election of 19 February 2008, the applicant's criminal case was joined with the main criminal case no. 62202608 instituted against the leaders and supporters of the opposition in connection with that protest movement. Moreover, this was done with reference to his participation in organising and conducting the rallies in question (see paragraphs 32, 34 and 36 above). The materials of that criminal case and the applicant's alleged involvement in a conspiracy to "usurp State power" were relied on to extend the applicant's detention (see paragraphs 39 and 40 above). Furthermore, strict restrictions were placed on his contact with the outside world, again with reference to that criminal case, even though the only formal charge against the applicant was that of minor assault (see paragraph 37 above).

127. Fifthly, as regards the applicant's eventual conviction for alleged illegal possession of a weapon and an assault on a police officer while in custody, the Court notes that the weapon in question, namely a spring baton, was allegedly found in the applicant's possession on the very first day of his arrest. However, for unexplained reasons no charge in that respect was brought against the applicant for the following four months, which casts doubt on the credibility and genuineness of that charge. It is notable that the bringing of that charge happened around the same period when the authorities gave up on their attempts to charge the applicant with the offence of usurpation of State power, which gives an impression that the authorities wanted to secure the applicant's conviction at any cost (see paragraphs 44, 46 and 49 above and compare with *Mushegh Saghatelyan*, cited above, § 251). Furthermore, as for the applicant's conviction for assault, that conviction was based exclusively on the testimony of the police officers concerned and the findings of fact made in that respect by the domestic courts appear to have been a mere and unquestioned recapitulation of the circumstances as presented in that testimony (compare with *Hakobyan and Others*, cited above, § 98, and *Mushegh Saghatelyan*, cited above, § 243). Thus, the manner in which the proceedings relating to that charge were conducted is strikingly similar to other cases where opposition activists had been prosecuted and convicted for similar acts, in similar

circumstances and on the basis of similar evidence, which points to the existence of a repetitive pattern and casts doubt on the credibility of the criminal proceedings against the applicant (see *Hakobyan and Others*, cited above, §§ 97-98; *Virabyan*, cited above, §§ 204-209; and *Mushegh Saghatelyan*, cited above, § 253).

128. Lastly, it is notable that the applicant's criminal case, while on the whole being seemingly unrelated to the protest movement, was nevertheless included among the cases monitored by the OSCE/ODIHR as part of a trial monitoring project of more than a hundred cases instituted against the leaders and supporters of the opposition in connection with the events of 1-2 March 2008 (see paragraph 71 above).

129. The Court therefore finds a number of striking resemblances between the applicant's case and those cited above (see paragraph 121 above). In view of all the above factors, the Court considers that there are cogent elements in the present case prompting it to doubt whether the true reasons for the applicant's arrest and subsequent prosecution were those indicated in the relevant police materials. The entirety of the materials before it allows the Court to draw sufficiently strong, clear and concordant inferences as to the applicant's prosecution, and consequently the resulting conviction, being linked to his involvement and active participation in the protest movement led by the opposition. The Court is, therefore, prepared to assume that the entirety of the facts on which the applicant's prosecution and conviction were based can be regarded, on arguable grounds, as an instance of an "interference" with his right to freedom of peaceful assembly (see, *mutatis mutandis*, *Hakobyan and Others*, cited above, § 99; *Virabyan*, cited above, § 210; and *Mushegh Saghatelyan*, cited above, § 234).

(c) Whether the interference was prescribed by law

130. The Court reiterates that an interference will constitute a breach of Article 11 unless it is "prescribed by law", pursues one or more legitimate aims under paragraph 2 and is "necessary in a democratic society" for the achievement of those aims (see *Kudrevičius and Others*, cited above, § 102).

131. The first step in the Court's examination is to determine whether the interference with the applicant's right to freedom of peaceful assembly was "prescribed by law". The applicant alleged that the interference had been unlawful and arbitrary since his prosecution had been a disguised way of preventing him from participating in the rallies and punishing him for having done so. The Court reiterates that the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected (see *Associated Society of Locomotive Engineers and Firemen (ASLEF) v. the United Kingdom*, no. 11002/05, § 37, 27 February 2007). It notes that it has already found instances of similar interferences to be unlawful and arbitrary and therefore

not in compliance with the requirement that any interference be prescribed by law (see *Hakobyan and Others*, cited above, §§ 107-108, and *Huseynli and Others v. Azerbaijan*, nos. 67360/11 and 2 others, §§ 98-100, 11 February 2016).

132. Having regard to its findings regarding the existence of an interference, the Court considers that the situation in the present case is comparable to that examined in the cases of *Hakobyan and Others* and *Huseynli and Others*, cited above. Indeed, the applicant was prosecuted and convicted of certain acts, namely illegally carrying a cold weapon and an assault on a police officer, under Articles 235 § 4 and 316 § 1 of the CC criminalising such acts, whereas the true reason for his criminal punishment was his active participation in the protest movement. In these circumstances, the impugned interference with the applicant's freedom of peaceful assembly could only be characterised as manifestly arbitrary and, consequently, unlawful for the purposes of Article 11 of the Convention (see, *mutatis mutandis*, *Hakobyan and Others*, cited above, § 107, and *Huseynli and Others*, cited above, § 98).

133. The Court therefore concludes that the interference in question did not meet the Convention requirement of lawfulness. That being so, it is not required to determine whether the interference pursued a legitimate aim and, if so, whether it was proportionate to the aim pursued.

134. There has accordingly been a violation of Article 11 of the Convention

V. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

135. The applicant further complained that his prosecution and conviction had been motivated by his political opinion and amounted to discrimination in breach of Article 14 of the Convention, which provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

136. The Government contested that argument.

137. Having regard to its findings under Article 11 of the Convention (see paragraphs 121-134 above), the Court declares this complaint admissible but considers that there is no need to examine whether, in this case, there has been a violation of Article 14 of the Convention in conjunction with Article 11.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

138. 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

139. The applicant claimed 19,200 euros (EUR) in respect of pecuniary damage, in particular the cost of the food parcels which he had allegedly received from a friend while in prison. He also claimed EUR 50,000 in respect of non-pecuniary damage.

140. The Government argued that the applicant's claims for pecuniary and non-pecuniary damages were unsubstantiated. Furthermore, the amount of non-pecuniary damages claimed was excessive.

141. The Court notes that the applicant failed to submit sufficient evidence in respect of the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 14,000 in respect of non-pecuniary damage.

B. Costs and expenses

142. The applicant also claimed AMD 1,600,000 for the legal costs incurred before the Court, supported by a copy of a contract of legal services.

143. The Government argued that the claim was not properly substantiated and that the amount claimed was excessive.

144. 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 were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and to its case-law, the Court considers it reasonable to award the sum of EUR 2,000 covering costs for the proceedings before the Court.

C. Default interest

145. 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 widow and heir has standing to continue the present proceedings in the applicant's stead;

2. *Decides* to join to the merits the Government's objection of non-exhaustion of domestic remedies and *rejects* it;

3. *Declares* the application admissible;

4. *Holds* that there has been a violation of Article 5 § 1 of the Convention in that the applicant's detention between 15 and 22 July 2008 was unlawful;

5. *Holds* that there has been a violation of Article 5 § 3 of the Convention in that the domestic courts failed to give relevant and sufficient reasons for the applicant's detention;

6. *Holds* that there has been a violation of Article 5 § 4 of the Convention as regards the refusal to examine the applicant's appeal of 24 June 2008 against detention;

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

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

9. *Holds* that there has been a violation of Article 11 of the Convention as regards the applicant's prosecution and conviction;

10. *Holds* that there is no need to examine the complaint under Article 14 of the Convention taken in conjunction with Article 11 of the Convention;

11. *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 14,000 (fourteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (ii) EUR 2,000 (two 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;

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

Done in English, and notified in writing on 8 October 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener Deputy Registrar	Krzysztof Wojtyczek President