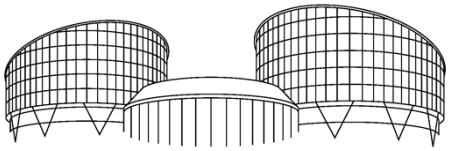

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF NORIK POGHOSYAN v. ARMENIA

(Application no. 63106/12)

JUDGMENT

Art 5 § 5 • Compensation • No award of non-pecuniary compensation for detention after applicant's acquittal • Art 5 § 1 breach established on account of domestic law categorisation of applicant's detention as unlawful, thereby rendering Art 5 § 5 applicable • Non-recognition of compensation for non-pecuniary damage in domestic law, contrary to Court case-law

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 Norik Poghosyan v. Armenia,

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

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

and Abel Campos, *Section Registrar,*

Having regard to:

the application (no. 63106/12) 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 Norik Poghosyan ("the applicant"), on 18 September 2012;

the decision to give notice to the Armenian Government ("the Government") of the complaint concerning the lack of an enforceable right to compensation for non-pecuniary damage under domestic law and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 22 and 29 September 2020,

Delivers the following judgment, which was adopted on the last-mentioned date:

INTRODUCTION

1. The case concerns the availability of an enforceable right to compensation under Armenian law, in compliance with the requirements of Article 5 § 5 of the Convention.

THE FACTS

2. The applicant was born in 1983 and lives in the village of Metsavan. The applicant was represented by Mr K. Tumanyan, a lawyer practising in Vanadzor.

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.

5. On 29 September 2008 the applicant and a number of others were charged with a drug-related crime.

6. On 17 October 2008 the Lori Regional Court decided to detain the applicant. It appears that the applicant did not lodge an appeal against that decision.

7. On 12 October 2009 the Lori Regional Court found the applicant guilty as charged and sentenced him to three years' imprisonment.

8. Following an appeal by the applicant, on 22 December 2009 the Criminal Court of Appeal decided to uphold the guilty verdict, but to reduce the sentence to one year and six months' imprisonment.

9. Following a further appeal by the applicant, on 26 March 2010 the Court of Cassation decided to quash those judgments and to remit the case for fresh examination. The Court of Cassation found that there had been a breach of the applicant's right to defence and that his conviction had been based on evidence obtained in a manner which breached that right. In particular, the Court of Cassation noted that, at the initial stage of the investigation during which the applicant had been involved as a witness, he was in fact already considered a suspect and should have been able to avail himself of the rights enjoyed by a suspect in criminal proceedings, including the right not to incriminate himself and to have a lawyer. However, he had been interviewed only as a witness and had not been provided with a lawyer from the very start and, moreover, in a situation where a lawyer's participation was mandatory. Thus, the evidence in question had been obtained as a result of investigative measures conducted in breach of the applicant's right to defence, including his interview as a witness and a confrontation between him and another suspect.

10. On 17 April 2010 the applicant was released from prison after serving his sentence.

11. On 5 October 2010 the Lori Regional Court examined the case again and acquitted the applicant. In doing so, the Regional Court declared the above-mentioned evidence inadmissible and found that the remaining evidence had not been reliable and sufficient to substantiate the applicant's guilt. Following appeals by the prosecutor, that judgment was upheld by two higher courts and became final.

12. On 21 July 2011 the applicant lodged a civil claim with the Lori Regional Court against the State seeking compensation for both pecuniary and non-pecuniary damage, estimating the latter at 6,500,736 Armenian drams (AMD). He argued that he was entitled to compensation, as his acquittal had rendered unlawful the time that he had spent in detention. He relied on, *inter alia*, Articles 17 and 1064 of the Civil Code (CC), Article 66 of the Code of Criminal Procedure ("the CCP"), and Article 5 § 5 of the Convention.

13. On 23 December 2011 the Lori Regional Court gave its judgment on the applicant's civil claim. It noted that the applicant had been deprived of his liberty between 17 October 2008 and 17 April 2010 and that on 5 October 2010 he had been acquitted. The law stipulated the grounds and

the procedure for awarding compensation for damage caused as a result of unlawful deprivation of liberty. In particular, under Article 66 of the CCP, an acquitted person had the right to claim compensation for pecuniary damage (including lost income and legal costs) sustained as a result of unlawful arrest, detention, prosecution and conviction. Under Article 1064 of the CC, such compensation was to be paid by the State. An award of damages was to be made if it were to be established that the plaintiff had sustained such damage, the respondent had behaved unlawfully, and there was a causal link between the damage and the unlawful behaviour. Finding that the applicant had been unlawfully convicted and had incurred pecuniary damage – namely lost income and legal costs – as a result of unlawful actions on the part of the respondent, the Regional Court decided to allow in part his claim for compensation for pecuniary damage. As regards the applicant's claim for compensation for non-pecuniary damage, the Regional Court decided to terminate that part of the proceedings on the grounds that the law did not allow for the awarding of compensation of that type. In reaching its findings, the Regional Court also relied on Article 16 of the Constitution, Article 17 of the CC, Article 5 § 5 of the Convention, and the Court of Cassation's decision of 1 July 2011 in the case of *A. Davtyan and Vank Ltd v. the Republic of Armenia*.

14. On 24 January 2012 the applicant lodged an appeal in which he argued, *inter alia*, that the Regional Court, in deciding on his claim for compensation for non-pecuniary damage, should have been guided by Article 5 § 5 of the Convention, which prevailed over the domestic law.

15. On 28 March 2012 the Civil Court of Appeal upheld the judgment of the Regional Court in the part concerning the applicant's claim for compensation for non-pecuniary damage.

16. On 12 April 2012 the applicant lodged an appeal on points of law, raising similar arguments.

17. On 23 May 2012 the Court of Cassation ruled the applicant's appeal on points of law inadmissible for lack of merit.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. CONSTITUTION (1995 (AMENDED IN 2005))

18. Article 16 provided at the material time that everyone had the right to liberty and security of person. Every person had the right to compensation in the event of his or her unlawful detention on the grounds – and in accordance with a procedure – prescribed by law.

II. CODE OF CRIMINAL PROCEDURE (1999)

19. Article 66 § 3 provides that an acquitted person is entitled to claim full compensation for pecuniary damage sustained as a result of unlawful arrest, detention, prosecution and conviction – that is to say any possible lost profits.

III. CIVIL CODE (1999)

A. The relevant provisions as in force at the material time

20. Article 17 provides that a person whose rights have been violated may claim full compensation for damage suffered, unless the law or a contract provides for a lower level of compensation. Damage that may be compensated includes the expenses borne or to be borne by a person whose rights have been violated in connection with (i) restoring those violated rights, (ii) the loss of his property or damage to it (pecuniary damage), including lost earnings, which the person would have realised under normal conditions of civil life had his rights not been violated.

21. Article 1064 provides that damage caused as a result of unlawful conviction, criminal punishment, the imposition of a preventive measure in the form of detention or a written undertaking not to leave one's residence, or the imposition of an administrative penalty shall be compensated for in full by the Republic of Armenia, in accordance with the procedure prescribed by law, regardless of whether it was the officials of the relevant body of inquiry, investigating authority, prosecutor's office or courts who were at fault in that regard.

B. The amendments introduced on 19 May 2014

22. Since 1 November 2014 Article 17 has included non-pecuniary damage in the list of the types of civil damage for which compensation can be claimed in civil proceedings. The CC was supplemented by new Articles 162.1 and 1087.2, which regulate the procedure for claiming compensation for non-pecuniary damage. Until the introduction on 30 December 2015 of further amendments (which came into force on 1 January 2016), compensation in respect of non-pecuniary damage could be claimed where it had been established that a person's rights, as guaranteed by Articles 2, 3 and 5 of the Convention, had been violated, and also in cases of wrongful conviction.

IV. THE COURT OF CASSATION'S DECISION OF 1 JULY 2011 IN THE CASE OF *A. DAVTYAN AND VANK LTD. V. THE REPUBLIC OF ARMENIA* (CASE NO. HKD1/0012/02/08)

23. This decision concerned the claim of Mr A. Davtyan against the State for compensation for damage sustained as a result of, *inter alia*, his allegedly unlawful pre-trial detention. Mr Davtyan, who had eventually been acquitted, had been an accused in a criminal case, in the course of which he had spent three periods in pre-trial detention, ranging from four days to about two months. The Court of Cassation was called upon to interpret, *inter alia*, the rules applicable in cases of unlawful conviction, punishment, detention or the requirement to give a written undertaking not to leave one's residence. The relevant parts of the decision read as follows:

> "Rules for compensation for damage sustained as a result of unlawful conviction, punishment, detention or a [requirement to give a] written undertaking not to leave one's residence.
>
> [Citations of Article 16 of the Constitution, Article 18 of the Constitution (right to an effective remedy) and Articles 5 § 5 and 13 of the Convention.]
>
> It follows from the above-mentioned provisions that the right to compensation for damage in cases where a person is unlawfully deprived of his liberty as a result of unlawful actions on the part of public authorities is a constitutional principle, which is also prescribed by international treaties.
>
> ...
>
> The implementation of the above-mentioned principle must be viewed in the light of the right to an effective remedy, especially in cases where a person sustains damage as a result of unlawful actions on the part of public authorities.
>
> [Citation of general principles of the Court's case law regarding Article 5 § 5, including *Rehbock v. Slovenia*, no. 29462/95, § 92, ECHR 2000-XII; *Wassink v. the Netherlands*, 27 September 1990, § 38, Series A no. 185-A; *N.C. v. Italy* [GC], no. 24952/94, § 49, ECHR 2002-X; *and Sakık and Others v. Turkey*, 26 November 1997, §§ 55-61, *Reports of Judgments and Decisions* 1997-VII.]
>
> The Court of Cassation considers that, in order to ensure the above-mentioned provisions, the law provides with sufficient certainty the grounds and the procedure for awarding compensation for damage sustained in cases of unlawful deprivation of liberty. [Citations of Article 66 § 3 of the CCP and Article 1064 of the CC]. It follows from an analysis of these provisions that – taking into account the specifics of the status of an acquitted person, the necessity to remedy his legal and *de facto* situation, and the constitutional and international legal provisions – the legislature has stipulated the rule [that] full compensation should be paid to an acquitted person for damage sustained owing to his having been unlawfully deprived of his liberty. Furthermore, damage to be compensated for is that resulting from unlawful conviction, punishment, detention or [the requirement that he give] a written undertaking not to leave his residence."

The Court of Cassation then enumerated the types of damage that may be compensated for, including lost salary, pension, benefits, court fees, legal

costs and possible lost income, and proceeded to examining whether Mr Davtyan had substantiated with evidence the pecuniary damage claimed.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 5 OF THE CONVENTION

24. The applicant complained that he had been denied compensation for non-pecuniary damage suffered as a result of unlawful detention. He relied on Article 5 § 5 of the Convention, which reads as follows:

> "Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

A. Admissibility

25. The Government submitted that the applicant had failed to exhaust the domestic remedies, since he had not lodged an appeal against the decision of the Lori Regional Court of 17 October 2008 remanding him in custody and had thereby failed to challenge the alleged unlawfulness of his detention.

26. The applicant submitted that he had contested his deprivation of liberty in general by lodging appeals against his conviction.

27. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges those seeking to bring a case against the State before an international judicial body to use first the remedies provided by the national legal system, thus dispensing States from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal systems. The obligation to exhaust domestic remedies requires an applicant to make normal use of remedies that are available and sufficient in respect of his or her Convention grievances (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 70-71, 25 March 2014). In the present case, the Court notes that the applicant's grievances do not concern the question of the lawfulness of his detention but rather the fact that no compensation for non-pecuniary damage was available to him under domestic law for his allegedly unlawful detention. It therefore dismisses the Government's non-exhaustion claim.

28. 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

1. The parties' submissions

29. The applicant submitted that under Armenian law, namely Article 66 of the CCP, an acquitted person was entitled to full compensation for damage sustained as a result of having been unlawfully deprived of his liberty. He had been both unlawfully convicted and unlawfully detained for a period of eighteen months, which had been recognised by the domestic courts. In allowing his claim for compensation for pecuniary damage, the domestic courts had been guided by Article 5 § 5 of the Convention and had acknowledged a violation of that provision. Thus, Article 5 § 5 was applicable to his case, and the fact that no compensation for non-pecuniary damage was available to him under domestic law violated the guarantees of that Article.

30. The Government argued that Article 5 § 5 was not applicable, since no violation of any of its other four paragraphs had taken place in the applicant's case. Nor had his detention ever been found to be unlawful by the domestic courts. The mere fact of the applicant's acquittal had not rendered his pre-trial detention unlawful, and he had not been entitled to compensation within the meaning of Article 5 § 5. The courts examining his civil case had merely awarded the applicant compensation for lost income in the light of his acquittal, taking into account the fact that domestic law provided for such compensation for acquitted persons. However, those courts had not addressed the issue of the lawfulness of the applicant's detention and had not been in a position to do so. In any event, the applicant had received full compensation at the domestic level for lost income in respect of the period during which he had been deprived of his earnings; his complaint concerning the lack of compensation was therefore baseless.

2. The Court's assessment

31. The Court reiterates at the outset that a right to compensation under Article 5 § 5 of the Convention arises if a breach of one of its other four paragraphs has been established, directly or in substance, either by the Court or by the domestic courts (see, among other authorities, *N.C.*, cited above, § 49; *Staykov v. Bulgaria*, no. 49438/99, § 107, 12 October 2006; and *Stanev v. Bulgaria* [GC], no. 36760/06, § 182, ECHR 2012). The Court is not called upon, in the present case, to determine whether there has been a breach of any of those provisions. It is therefore necessary to determine whether such a breach was established in the applicant's case by the domestic courts.

32. The applicant argued that Article 5 § 5 was applicable since his detention was considered "unlawful" under domestic law as a result of his acquittal. The Court reiterates in this respect that the Convention organs have consistently refused to uphold applications from persons convicted of

criminal offences who complain that their convictions or sentences were found by the appellate courts to have been based on errors of fact or law (see *Benham v. the United Kingdom*, 10 June 1996, § 42, *Reports of Judgments and Decisions* 1996-III)). Similarly, a period of detention is, in principle, "lawful" if it is based on a court order. A subsequent finding of a superior domestic court that a lower court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention (see *Mooren v. Germany* [GC], no. 11364/03, § 74, 9 July 2009). Furthermore, a conviction that has been imposed by a judgment following a breach of substantive provisions of domestic law in criminal proceedings does not automatically render the detention by virtue of that judgment unlawful (see *Gruber v. Germany* (dec.), no. 45198/04, 20 November 2007). The Court has, however, held that mere mistakes are to be distinguished from a flagrant denial of justice undermining not only the fairness of a person's trial, but also the lawfulness of the ensuing detention and that, as a consequence, in such circumstances Article 5 § 5 will only apply where the detention followed a conviction imposed in manifestly unfair proceedings amounting to a flagrant denial of justice automatically implying a breach of Article 5 § 1 of the Convention (see *Shulgin v. Ukraine*, no. 29912/05, §§ 49-58, 8 December 2011, and *Vasilevskiy and Bogdanov v. Russia*, nos. 52241/14 and 74222/14, § 19, 10 July 2018).

33. In the present case, the Court would draw attention to the peculiarity of the Armenian domestic legal system, namely Article 66 § 3 of the CCP and Article 1064 of the CC, which provide an acquitted person with a right to compensation as a result of unlawful deprivation of liberty. Those provisions were interpreted by the Court of Cassation in its decision of 1 July 2011 as entitling an acquitted person to full compensation for pecuniary damage sustained by him "owing to his having been unlawfully deprived of his liberty" (see paragraph 23 above). Consequently, the relevant rules operate to the effect that any detention of a person who has subsequently been acquitted is considered unlawful by virtue of the law. They are laid down in unambiguous terms and their interpretation and the manner of their application, as noted above, were confirmed by the highest judicial authority of the respondent State (see paragraph 23 above).

34. The Court observes that where domestic law provides that the accused shall be, in the event of a final acquittal, entitled to compensation for his detention in the course of the preceding proceedings, such an "automatic" right to compensation cannot in itself be taken to imply that the detention in question were to be characterised as "unlawful". Moreover, while it cannot be said that Article 5 § 5 of the Convention imposes such an "automatic" right to compensation solely on the grounds that the criminal proceedings have been concluded by an acquittal, the choice of legal solutions to comply with the requirements of that provision remain a policy

choice to be determined by domestic law. In this regard, the Court cannot but note that under Armenian law not only was the applicant entitled to compensation as a consequence of his acquittal but his detention was also considered "unlawful" within the meaning of domestic law.

35. In their judgments given in the applicant's case the Lori Regional Court and the Civil Court of Appeal relied on the above-mentioned provisions, as well as the Court of Cassation's decision of 1 July 2011, and awarded the applicant compensation for the pecuniary damage suffered as a result of his "unlawful" detention, referring to the entire period spent by him in detention, namely from 17 October 2008 to 17 April 2010 (see paragraphs 13 and 15 above).

36. The Court reiterates in this connection that it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law (see *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, § 169, 24 January 2017). Furthermore, on the question whether detention is "lawful", including whether it complies with "a procedure prescribed by law", the Convention refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof, and disregard of that law entails a breach of the Convention (see *Öcalan v. Turkey* [GC], no. 46221/99, § 83, ECHR 2005-IV, and *Merabishvili v. Georgia* [GC], no. 72508/13, § 191, 28 November 2017). Thus, in view of the fact that the applicant's detention was rendered unlawful within the meaning of domestic law following his acquittal and considered as such by the domestic courts, the Court concludes that, in the particular circumstances of the case, a breach of the guarantees of Article 5 § 1 has been established in substance at the domestic level and that, consequently, Article 5 § 5 is applicable to the applicant's case.

37. The Court reiterates that Article 5 § 5 is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4 (see *N.C.*, cited above, § 49). In a number of cases concerning other countries the Court has considered, in their particular circumstances, the compensation due to the applicants as a result of their acquittal to be sufficient for the purposes of Article 5 § 5 and consequently found no violation of that provision, on the ground that such compensation was indissociable from any compensation they might have been entitled to under Article 5 § 5 of the Convention as a consequence of their deprivation of liberty being contrary to the other paragraphs of Article 5 (see *N.C.*, cited above, §§ 57-58; *Staykov*, cited above, §§ 108-110; and, in contrast, *Włoch v. Poland (no. 2)*, no. 33475/08, §§ 29-33, 10 May 2011).

38. In the present case, however, the applicant, while entitled to compensation of pecuniary nature as a result of his acquittal, had no possibility of obtaining compensation for damage of a non-pecuniary nature in respect of his unlawful detention, since such a type of compensation was

not provided for under domestic law. Thus, his claim for compensation for non-pecuniary damage was dismissed by the domestic courts on the grounds that Armenian law did not recognise "[compensation for] non-pecuniary damage" as a type of compensation. The Court reiterates in this connection that Article 5 § 5 should not be construed as affording a right to compensation for purely pecuniary damage, but should also afford a right to compensation in respect of any distress, anxiety and frustration that a person may have suffered as a result of a violation of other provisions of Article 5 (see *Khachatryan and Others v. Armenia*, no. 23978/06, § 157, 27 November 2012). It notes that it has already found the unavailability of compensation for damage of a non-pecuniary nature under the Armenian law to be in violation of the guarantees of Article 5 § 5 of the Convention (see *Khachatryan and Others*, cited above, §§ 158-159, and *Sahakyan v. Armenia*, no. 66256/11, § 31, 10 November 2015). There are no reasons to depart from that conclusion in the present case. It follows that, at the material time, the applicant did not enjoy, in law or in practice, an enforceable right to compensation within the meaning of that Article.

39. The Court, at the same time, takes note of the fact that following the events of the present case, non-pecuniary damage has been introduced in Armenia as a type of compensation (see paragraph 22 above). The applicant, however, was not able to benefit from this new legislation.

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. 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

42. The applicant claimed 12,960 euros (EUR) in respect of non-pecuniary damage.

43. The Government submitted that the applicant had already received compensation for lost income.

44. The Court considers that the applicant has suffered non-pecuniary damage, which is not compensated for by the finding of a violation. Making its assessment on an equitable basis, it awards the applicant EUR 6,000 in respect of non-pecuniary damage.

B. Costs and expenses

45. The applicant also claimed a total of EUR 7,125 for the legal costs incurred before the domestic courts and those incurred before the Court.

46. The Government argued that the applicant had failed to provide any documentary evidence of the legal costs in question. Nor had he substantiated their necessity and reasonableness.

47. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the applicant has failed to submit any proof of the legal costs allegedly incurred. The Court therefore rejects the applicant's claim for legal costs.

C. Default interest

48. 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. *Declares* the complaint concerning the lack of an enforceable right to compensation of a non-pecuniary nature under domestic law admissible;

2. *Holds* that there has been a violation of Article 5 § 5 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage:
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *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 Registrar	Ksenija Turković President