



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

THIRD SECTION

DECISION

*This version was rectified on 15 April 2014
under Rule 81 of the Rules of Court*

Application no. 46435/09
Petros MAKEYAN and others
against Armenia

The European Court of Human Rights (Third Section), sitting on 5 June 2012 as a Chamber composed of:

Josep Casadevall, *President*,

Corneliu Bîrsan,

Alvina Gyulumyan,

Ineta Ziemele,

Luis López Guerra,

Nona Tsotsoria,

Kristina Pardalos, *judges*,

and Santiago Quesada, *Section Registrar*,

Having regard to the above application lodged on 26 August 2009,

Having deliberated, decides as follows:

THE FACTS

1. The applicants, Mr Petros Makeyan (the first applicant), Mr Shota Saghatelyan (the second applicant) and Ashot Zakaryan (the third applicant) are Armenian nationals who were born in 1954, 1947 and 1966. The first applicant lives in Yerevan, the second and the third applicants live in Gyumri. They are represented before the Court by Mr Kerim Yildiz, Mr Mark Muller, Ms Ajanta Kaza, Ms Saadiya Chaudary and

Ms Catriona Vine, lawyers of the Kurdish Human Rights Project (KHRP) based in London, and Mr Tigran Ter-Yesayan and Ms Narine Gasparyan¹, lawyers practising in Yerevan.

A. The circumstances of the case

1. The background to the case

2. The facts of the case, as submitted by the applicants, may be summarised as follows.

3. On 19 February 2008 a presidential election took place in Armenia. During the pre-election campaign the first and the second applicants were the heads of the regional and municipal electoral headquarters of the main opposition candidate, Mr Levon Ter-Petrosyan. On the voting day, all three applicants acted as the candidate's proxies.

2. Institution of criminal proceedings against the applicants, their arrest and detention

4. On 21 February 2008 criminal proceedings were instituted on account of the fact that on the voting day of 19 February 2008 the applicants visited in turn polling station no. 34/06 situated in Gyumri, had an argument with the chair and members of the electoral commission of the polling station concerning the stamping of voters' passports and threatened them, thus obstructing for about 30 minutes the work of the commission and interfering in the fulfilment of their powers by persons participating in the elections.

5. According to the applicants, in reality they visited separately the above polling station at different times during the voting day, voiced their concerns to the head of the polling station's election commission about different violations of the voting process in that polling station, including ballot stuffing and wrong passport stamping, and left.

(a) The first applicant

6. On 25 February 2008 the first applicant was arrested in connection with the instituted criminal case. The first applicant alleges that the day before his arrest, the police had conducted a search of his house.

7. On 27 February 2008 the first applicant was charged with obstructing the work of the electoral commission and other persons involved in the elections. On the same day the first applicant was detained by decision of the Kentron and Nork-Marash District Court of Yerevan and taken to Nubarashen detention facility. It appears that the first applicant had a legal representative during the detention hearing before the District Court.

¹ Rectified on 15 April 2014: the text was "Ms Narine Grigoryan".

8. The first applicant claims that he was prevented from contacting his lawyer and his family from 25 February to 4 April 2008. He further alleges that at Nubarashen detention facility he was kept in unhygienic and low standard cells.

9. On 23 April 2008 the first applicant was transferred from Nubarashen detention facility to Artik detention facility. He claimed that he was subjected to physical and psychological pressure in the penitentiary and, in protest, went on hunger strike.

(b) The second applicant

10. On 26 February 2008 the second applicant was arrested in connection with the same criminal case. On 29 February 2008 he was charged with the same offence as the first applicant, then detained and taken to Nubarashen detention facility.

11. The second applicant alleges that he was prevented from contacting his lawyer and family for three weeks starting from the date of his arrest and that the material conditions of detention at Nubarashen detention facility were substandard and unsanitary. He further claims that at some point he was transferred to serve his pre-trial detention in Artik detention facility where he was subjected to physical and psychological pressure.

(c) The third applicant

12. On 25 February 2008 the third applicant was arrested in connection with the same criminal case. On 28 February 2008 he was charged with the same offence as the first and the second applicants and on the same day detained by decision of the Kentron and Nork-Marash District Court of Yerevan and taken to a pre-trial detention cell at Vardashen detention facility. It appears that the third applicant had a legal representative during the detention hearing before the District Court.

13. According to the third applicant, the material conditions of the pre-trial detention cells at the facility were so poor that he had to pay from his own funds in order to have his cell renovated.

14. On 23 August 2008 the third applicant was moved from his pre-trial detention cell to the common barracks of the Vardashen detention facility.

3. The investigation of the applicants' case and the trial

15. During the investigation concerning the applicants' case the investigative authority questioned several witnesses, including S.H., the chair of the polling-station's electoral commission, K.H., L.M., S.V., L.Mel., V.G., N.H., H.K., L.S., G.G. and S.P., members of the polling-station's electoral commission and proxies of the presidential candidates. According to their witness testimonies, on voting day the applicants appeared in turn at the polling-station and disrupted the voting by arguing,

shouting and threatening the members of the electoral commission. It appears that confrontations were held between S.H. and the first and the second applicants; L.M. and the first applicant; and S.V. and the second applicant.

16. On an unspecified date the investigation was concluded and the applicants were committed to stand trial before the Shirak Regional Court.

17. All the above-mentioned witnesses, except for the last two, were summoned to appear for questioning before the trial court. During their questioning before the Regional Court the witnesses K.H., L.M., S.V., L.Mel., N.H., H.K. and L.S. retracted the statements they had given to the investigative authority claiming that these had been either guided or dictated by the investigator and that no incident involving the applicants had taken place. Witness S.H. stated that she was not able to mention any difference between her pre-trial depositions and the court testimony, while witness V. G. alleged that his pre-trial statements had not been guided or dictated by the investigator.

18. On 13 June 2008 the Shirak Regional Court found the applicants guilty as charged under Article 149 § 2 (3 and 5) of the Criminal Code and sentenced the first applicant to three years' imprisonment and the third applicant to two and a half years' imprisonment. In doing so, the Regional Court found that the applicants were acting as a group upon a preliminary agreement. As to the second applicant, the Regional Court decided to impose a suspended sentence of two and a half years' imprisonment and released him from the courtroom. In finding the applicants guilty, the Regional Court based itself on the statements given by the witnesses at the investigation stage. In this respect, the Regional Court held that the reasons and motives invoked by the witnesses for retracting their pre-trial statements could not be accepted as credible because they were not based on the circumstances of the case. Besides, some of the witnesses, before being questioned in court, had lodged requests with the trial court in which they maintained their pre-trial statements and asked not to be questioned in court due to the fear of testifying in the presence of a big audience gathered in the court-room as well as being exposed to moral and psychological pressure. The Regional Court thus concluded that the pre-trial witness statements were credible and well-founded as their retractions by the witnesses during the trial were conditioned by external influences and the intention to help the applicants to escape criminal liability. The trial court also described the statements given before it by witnesses S.H. and V.G. as "contradictory".

19. The applicants lodged appeals against the judgment of the Shirak Regional Court claiming, *inter alia*, that no grounds or proper justification for relying on pre-trial testimonies of the witnesses was provided and that the Regional Court, by not admitting as evidence the testimonies of the witnesses given during the trial, violated their right to a fair trial as protected by Article 6 of the Convention.

20. On an unspecified date the Criminal Court of Appeal admitted the applicants' appeals and assigned the date of the first appeal hearing on 15 August 2008.

21. On that date, as the Court of Appeal commenced the appeal hearing, the first and the third applicants started to argue with the presiding judge demanding not to be called "accused", which led to loud exclamations and remarks from the court audience. The presiding judge then decided to have the first and the third applicants removed from the courtroom and adjourned the court hearing till 20 August 2008.

22. On 20 August 2008, at the beginning of the court hearing, the first and the third applicants again started to argue with the judges for the same reasons as in the previous court hearing. The Court of Appeal then ordered their removal from the courtroom and decided to conduct the appeal proceedings in the absence of the accused in accordance with the procedure of examination of appeals by the Court of Cassation. In protest, the applicants' two defence lawyers refused to make any submissions in substantiation of the appeals and left the hearing. The second applicant stayed in the court room. The Court of Appeal then read out the appeals, heard the prosecutor's objection to them and went to the deliberation room to take its decision. According to the first and the third applicants, when appearing before the Court of Appeal, they had shackles attached to their legs.

23. On the same day the Court of Appeal pronounced its decision by dismissing the applicants' appeals and upholding the judgment of 13 June 2008. As regards the reliance by the Regional Court on the witness testimonies given at the investigation stage, the Court of Appeal found it lawful on the same grounds as those invoked by the Regional Court.

24. On an unspecified date the applicants lodged an appeal on points of law against the judgment of the Court of Appeal complaining, *inter alia*, that the Court of Appeal had removed them from the courtroom and conducted the appeal proceedings without their presence and that it had admitted as evidence the statements of the witnesses made to the investigating authority despite the fact that those witnesses had retracted them at the trial stage.

25. On 27 February 2009 the Court of Cassation declared the applicants' appeal inadmissible for lack of merit.

26. On 22 June 2009 the first and the third applicants were released under an amnesty.

B. Relevant domestic law

The Criminal Code

27. Article 149 § 2 (3 and 5) provides that obstructing the work of a pre-election commission, if such act is accompanied with a threat of use of violence and committed by a group of persons, shall be punishable by deprivation of liberty for a term from two to five years.

COMPLAINTS

28. The applicants complain under Article 3 of the Convention that they suffered severe anguish, distress and humiliation when detained incommunicado, because of the insanitary and inadequate conditions of their pre-trial detention cells at Nubarashen and Vardashen detention facilities, because of being subjected to physical and psychological pressure during their imprisonment and when brought in shackles before the Court of Appeal.

29. They complain under Article 5 §§ 1 (c), 3 and 4 of the Convention that their detention was arbitrary as it was unjustified and because they were forbidden access to their legal representatives. They further complain under the same Article that their subsequent imprisonment was unlawful as it was based on an unsound conviction.

30. The applicants complain under Article 6 §§ 1 and 3 (d) of the Convention that they were denied a fair trial as their motion to call witnesses for their defence, namely the police officers who were on duty at the polling-station, was dismissed. They further claim under the same Article that the domestic courts admitted and used the pre-trial witness statements as incriminating evidence, despite the fact that during the trial those witnesses had retracted their statements as being made under duress; and because the equality of arms principle was breached as they were excluded from the appeal proceedings and were not provided with an opportunity to present their defence, while the Court of Appeal, following their exclusion from the courtroom, conducted a speedy examination and dismissed their appeal. The applicants also allege that, because of the above actions, the domestic courts were not independent and impartial.

31. The applicants also complain that the house searches conducted by the police violated their right to respect for their home as protected by Article 8 of the Convention. They further complain under the same Article that their right to respect for their private and family life was violated since they were denied contact with their family and legal representatives during the initial period of their pre-trial detention.

32. The applicants complain under Article 10 of the Convention that their right to freedom of expression was violated since the real reason for their prosecution was to prevent their political activity and their voicing concerns about election violations.

33. They further complain that their right under Article 11 of the Convention was violated since they were arrested and detained due to their activities as proxies for the opposition candidate.

34. The applicants also complain under Article 13 of the Convention that they had no effective domestic remedy in the context of the general failure to protect their rights under the Convention.

35. The applicants further complain under Article 14 of the Convention that they were subjected to discriminatory treatment as they were prosecuted due to their political opinions.

36. Lastly, the applicants complain that their arrest and detention violated their rights under Article 3 of Protocol No. 1.

THE LAW

A. Use of pre-trial witness statements as evidence

37. The applicants complain about the use of pre-trial witness statements as incriminating evidence against them. In particular, they allege that the domestic courts disregarded the crucial witness testimonies made on oath before the trial court in favour of the pre-trial statements which the witnesses claimed to have been made under duress. In this respect, they invoke Article 6 § 1 of the Convention which, insofar as relevant, provides:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

38. The Court considers that it cannot, on the basis of the file, determine the admissibility of this part of the application and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of the Court, to give notice of this complaint to the respondent Government.

B. Other alleged violations of the Convention

39. The applicants also raised a number of other complaints under Article 3, Article 5 §§ 1 (c), 3 and 4, Article 6 §§ 1 and 3 (d), Articles 8, 10, 11, 13 and 14 of the Convention and Article 3 of Protocol No. 1.

40. Having regard to all the material in its possession, and in so far as these complaints fall within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in

the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicants' complaint concerning the use of pre-trial witness statements as incriminating evidence against them;

Declares the remainder of the application inadmissible.

Santiago Quesada
Registrar

Josep Casadevall
President