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

FIRST SECTION

DECISION

Application no. 22329/13
Armen BADALYAN
against Armenia

The European Court of Human Rights (First Section), sitting on 13 March 2018 as a Committee composed of:

Aleš Pejchal, *President,*
Armen Harutyunyan,
Jovan Ilievski, *judges,*

and Renata Degener, *Deputy Section Registrar,*

Having regard to the above application lodged on 20 March 2013,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Armen Badalyan, is an Armenian national who was born in 1976 and lives in Metsamor. He was represented before the Court by Mr A. Ghazaryan, a lawyer practising in Yerevan, and Mr A. Zeynalyan, a non-practising lawyer.

2. The Armenian Government ("the Government") were represented by their Agent, Mr G. Kostanyan, Representative of the Government of Armenia to the European Court of Human Rights.

A. The circumstances of the case

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

4. On 23 June 2011 the applicant filed a request with the authorities, seeking to launch criminal proceedings against another person.

5. On 22 July 2011 there was an exchange of telephone calls and SMS messages between the applicant and the investigator who was in charge of the examination of his request. During one of these calls and in an SMS, the applicant insulted the investigator whilst expressing his dissatisfaction with the manner of processing of his request of 23 June 2011.

6. On the same day criminal proceedings were instituted against the applicant.

7. On 25 July 2011 the applicant was charged under Article 316 of the Criminal Code, which prescribes a penalty for the uttering of threats of the use violence against a representative of a public authority.

8. During those proceedings the investigator, who was involved as an injured party, and his colleague, who was involved as a witness, provided statements against the applicant. In particular, they testified that during a phone call on 22 July 2011, in addition to using insulting words, the applicant had also threatened the investigator with physical harm in connection with the processing of the applicant's request.

9. On 10 July 2012 the prosecutor decided to modify the charge against the applicant. In particular, he dropped the charge under Article 316 and brought a new charge under Article 347 § 2 of the Criminal Code, which prescribes a penalty for uttering threats to an investigator in connection with the conduct of an investigation.

10. During the trial proceedings the applicant submitted that he had only insulted the investigator, but had not threatened him. He argued that even if he had threatened the investigator, in the absence of formal criminal proceedings, and therefore of an investigation, such a threat could not constitute an offence as defined in Article 347 § 2 of the Criminal Code.

11. On 6 August 2012 the Armavir Regional Court convicted the applicant of the offence defined in Article 347 § 2 of the Criminal Code and sentenced him to one year and six months' imprisonment. According to the Regional Court's interpretation of that provision, the main principles protected by the offence were the interests of justice and the safety of persons conducting criminal proceedings. The Regional Court concluded that Article 347 § 2 of the Criminal Code was applicable irrespective of the stage of the criminal proceedings during which the applicant had uttered the threats to the investigator in connection with the discharge of his official duties, as such threats diminished the interests of justice and the safety of the persons conducting the criminal proceedings.

12. The applicant appealed against that judgment.

13. On 20 September 2012 the Criminal Court of Appeal rejected the applicant's appeal and upheld the judgment of the Regional Court.

14. The applicant lodged an appeal on points of law.

15. On 26 November 2012 the Court of Cassation declared the applicant's appeal on points of law inadmissible for lack of merit.

B. Relevant domestic law and practice

16. Article 347 of the Criminal Code (in force since 2003) prescribes:

> "1. Uttering threats to cause death, bodily harm or the destruction of or damage to property to a judge or his next of kin, in connection with the examination of a case or case-file material in court, shall be punishable by a fine in the amount of three to five hundred times the monthly minimum salary or by imprisonment for a term of up to three years.
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> 2. The same act committed against ... an investigator... or his next of kin in connection with conducting a preliminary investigation (*նախնական քննություն*), or the examination of the case or case-file materials in court, or the execution of the sentence, verdict or other act, shall be punishable by a fine in the amount of two to four hundred times of the monthly minimum salary or detention for a term of one to three months or imprisonment for a term of up to two years."

17. According to Article 188 of the Code of Criminal Procedure (in force since 1999), which is entitled "Mandatory nature of preliminary investigation":

> "An investigation (*նախաքննություն*) is mandatory for all cases. A preliminary inquiry (*հետաքննություն*) may be the initial phase of a preliminary investigation (*նախնական քննություն*) conducted within 10 days of institution of the criminal case."

18. Article 192 § 1 of the Code of Criminal Procedure, which is entitled "Commencement of investigation", provides:

> "An investigation shall be conducted only after a decision to institute criminal proceedings has been taken."

19. In its decision no. 1253 of 2 February 2016, the Constitutional Court found that conduct of a preliminary inquiry fell within the supervisory powers of the prosecutor. An investigator was under a duty to notify the prosecutor promptly about the crime(s) which had been committed or were being planned and about other incidents, regardless of whether or not an investigation had been instituted. Failure to fulfill this obligation or doing it only once the investigation had been instituted would result in distortion of the essence of prosecutorial control over the preliminary inquiry (*հետաքննություն*) and investigation (*նախաքննություն*) provided for by Article 103 of the Constitution.

COMPLAINT

20. The applicant complained under Article 7 of the Convention that he had been convicted under Article 347 § 2 of the Criminal Code for an act which, at the material time, had not constituted an offence under that provision because the penalty which it prescribed related to uttering threats

to an investigator in connection with the conduct of an investigation, whereas in his case no criminal proceedings had been instituted and therefore no official investigation was being carried out.

THE LAW

21. The applicant complained under Article 7 of the Convention that he had been convicted under Article 347 § 2 of the Criminal Code for an act which, at the material time, did not constitute an offence.

22. Article 7 of the Convention reads as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
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> 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

A. The parties' submissions

1. The Government

23. The Government maintained that there had been no violation of Article 7 of the Convention since the applicant's conviction under Article 347 § 2 of the Criminal Code had been compatible with the requirements of that Article. It had been foreseeable for the applicant that uttering threats to the investigator in a situation where the latter was carrying out an examination of the case-file materials concerning the request filed by the applicant constituted an offence under Article 347 § 2 of the Criminal Code. According to that provision, liability for uttering threats to an investigator existed during the preliminary investigation, the examination of the case or case-file materials in court, and the execution of the sentence, verdict or other act. Consequently, the uttering of threats to an investigator in connection with the conduct of a preliminary investigation by the latter entailed criminal liability under that provision.

24. The Government pointed out that, according to Article 188 of the Code of Criminal Procedure, an investigation (*նախաքննություն*) was mandatory in all cases. A preliminary inquiry (*հետաքննություն*) could take the form of the initial phase of a preliminary investigation (*նախնական քննություն*) conducted within 10 days of initiation of the criminal case. According to Article 192 of the same Code, the investigation (*նախաքննություն*) was conducted only once the decision to initiate

criminal proceedings had been taken. A preliminary investigation (*նախնական քննություն*) could thus consist of two stages: the preliminary inquiry (*հետաքննություն*) and the investigation itself (*նախաքննություն*): in order for the preliminary investigation to begin, a formal decision on initiation of criminal proceedings was mandatory.

25. In the present case, the investigator had been examining the facts of the case − that is to say, had been conducting a preliminary inquiry − when the applicant uttered the threats. Article 347 § 2 of the Criminal Code aimed at protecting the interests of justice and the safety of persons conducting the criminal proceedings, irrespective of whether or not a criminal case was initiated prior to or after such official decision. It had not been the legislator's intention to make any differentiation between these situations. Giving an opposite interpretation to this provision would render it unforeseeable since one could not know for sure whether a criminal case had been officially initiated or not, since that information was communicated only to the parties concerned. The interpretation given to this provision by the domestic courts was fully in line with Article 7 of the Convention.

2. The applicant

26. The applicant argued that the wording of Article 347 § 2 of the Criminal Code suggested that the period when examination of the facts took place was not included in the preliminary investigation phase and that had been the legislator's intention. Otherwise the provision would have been formulated differently. At the time when the applicant committed the crime, no official decision on the initiation or refusal to initiate a criminal case had been taken. In fact, the decision refusing such a preliminary investigation was issued only a month after the incident. It had thus not been foreseeable for the applicant that he was criminally liable. There had therefore been a violation of Article 7 of the Convention.

B. The Court's assessment

1. General principles

27. The Court reiterates that the guarantee enshrined in Article 7 of the Convention is an essential element of the rule of law. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 92, 17 September 2009; and *Huhtamäki v. Finland*, no. 54468/09, § 41, 6 March 2012). Article 7 is not confined to prohibiting the retroactive application of criminal law to the disadvantage of an accused. It also embodies, more generally, the principle that only the law can define a crime

and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that criminal law must not be extensively construed to the detriment of an accused, for instance by analogy (see *Achour v. France* [GC], no. 67335/01, § 41, ECHR 2006-IV; *Kononov v. Latvia* [GC], no. 36376/04, § 185, ECHR 2010; *Kokkinakis v. Greece*, 25 May 1993, § 52, Series A no. 260-A; and *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII).

28. From these principles it follows that an offence must be clearly defined in law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation thereof, what acts and omissions will make him criminally liable. When speaking of "law", Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, in particular those of accessibility and foreseeability (see, among other authorities, *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 50, ECHR 2001-II; *S.W. v. the United Kingdom*, 22 November 1995, §§ 34-35, Series A no. 335-B; and *C.R. v. the United Kingdom*, 22 November 1995, §§ 32-33, Series A no. 335-C).

29. In any system of law, including criminal law, however clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation. There will always be a need for the elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the Convention States, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of the legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see, among others, *Vasiliauskas v. Lithuania* [GC], no. 35343/05, § 155, 20 October 2015; *S.W.*, cited above, § 36; *Streletz, Kessler and Krenz*, cited above, § 50; and *K.-H.W. v. Germany* [GC], no. 37201/97, § 45, ECHR 2001-II).

2. Application of these principles to the present case

30. The Court notes that, in the present case, the applicant was convicted of uttering threats against an investigator under Article 347 § 2 of the Criminal Code. The applicant claims that, under this provision, one can be convicted of uttering threats only if criminal proceedings have already been instituted, which had not happened in his case. The Court must thus examine whether this provision and its application were in accordance with Article 7 of the Convention.

31. The Court notes at the outset that, according to Article 347 § 2 of the Criminal Code, uttering threats against an investigator in connection with the conduct of a preliminary investigation is punishable by a fine (see paragraph 16 above). The issue of possible ambiguity relates, in particular, to the term "preliminary investigation". The Government argued that a preliminary investigation could consist of two stages, namely the preliminary inquiry and the actual investigation, and that Article 347 § 2 of the Criminal Code covered both of these stages (see paragraphs 24 and 25 above). The applicant argued that the literal reading of Article 347 § 2 of the Criminal Code covered only the "investigation" and excluded the phase involving the examination of the facts (see paragraph 26 above).

32. The Court finds that the provision in question may give rise to some ambiguity. Nevertheless, Article 188 of the Code of Criminal Procedure provides that "An investigation is mandatory for all cases" and that "A preliminary inquiry may be the initial phase of a preliminary investigation". Reading this provision together with Article 347 § 2 of the Criminal Code suggests that the latter provision must be understood in a broad sense as covering all investigative phases conducted by the investigator irrespective of whether or not an official decision to start investigation has been taken. To hold otherwise would run counter the logic of the provision. Moreover, the Constitutional Court's decision no. 1253 supports the idea that the legislator did not intend to make any differentiation between the time before and after the taking of such official decision (see paragraph 19 above).

33. Although there may have been some ambiguity in Article 347 § 2 of the Criminal Code, the Court reiterates that Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen. In the present case, the development was fully in line with the essence of the offence and foreseeable for the applicant. Even if this issue were ruled upon for the first time in the applicant's case, a violation of Article 7 of the Convention will not arise if the meaning given is both foreseeable and consistent with the essence of the offence (see *Jorgic v. Germany*, no. 74613/01, § 114, ECHR 2007-III; and *Custers and Others v. Denmark*, nos. 11843/03, 11847/03 and 11849/03, 3 May 2007).

34. Moreover, according to the Court's general approach, it does not question the interpretation and application of national law by national courts unless there has been a flagrant non-observance or arbitrariness in the application of that law (see, *inter alia*, *Société Colas Est and Others v. France*, no. 37971/97, § 43, ECHR 2002-III and, *mutatis mutandis*, *Lavents v. Latvia*, no. 58442/00, § 114, 28 November 2002). The Court is unable to find such non-observance or arbitrariness in the present case.

35. In the light of all these considerations, the Court concludes that, acting within their margin of appreciation, the domestic courts could convict

the applicant of uttering threats against an investigator under Article 347 § 2 of the Criminal Code.

36. It follows that the application is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and must therefore be declared inadmissible pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 5 April 2018.

Renata Degener	Aleš Pejchal
Deputy Registrar	President