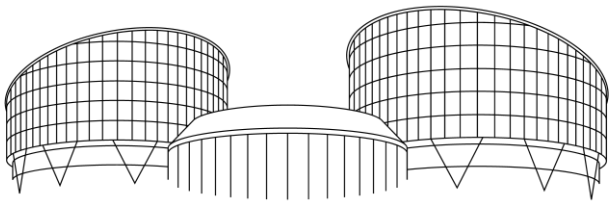

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

THIRD SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 29736/06
by Artashes DAVTYAN
against Armenia

The European Court of Human Rights (Third Section), sitting on 26 May 2009 as a Chamber composed of:

Josep Casadevall, *President,*
Elisabet Fura-Sandström,
Boštjan M. Zupančič,
Alvina Gyulumyan,
Ineta Ziemele,
Luis López Guerra,
Ann Power, *judges,*

and Stanley Naismith, *Deputy Section Registrar,*

Having regard to the above application lodged on 21 July 2006,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Artashes Davtyan, is an Armenian national who was born in 1962 and lives in Yerevan. He is represented before the Court by Ms L. Sahakyan, a lawyer practising in Yerevan, and Mr A. Ghazaryan.

A. The circumstances of the case

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

From 1997 to 1999 the applicant worked as the executive director of the Credit Service Bank (hereafter, the Bank).

1. The criminal proceedings against the applicant

(a) Institution of criminal proceedings and pre-trial investigation

On 19 March 2002 the prosecutor decided to institute criminal proceedings under paragraph 2 of Article 182 of the former Criminal Code (hereafter, the former CC) on account of abuse of official capacity by the former management of the Bank through embezzlement of funds entrusted to it in June 2001 by another company. It appears that at the material time the applicant worked as an advisor to the chamber of control of the Armenian parliament.

On 7, 14 and 18 October 2002 and 17 March 2003 the applicant was questioned as a witness in connection with the above criminal proceedings. The applicant alleges that during these interviews he was asked self-incriminatory questions.

On 31 March 2003 the applicant was invited to a confrontation with another former employee of the Bank. On the same date he was arrested on suspicion of large scale embezzlement, abuse of official capacity and official falsification under paragraph 4 of Article 90, paragraph 1 of Article 182 and Article 187 of the former CC.

On 1 April 2003 the applicant was formally charged under paragraph 4 of Article 90, paragraph 1 of Article 182 and Article 187 of the former CC with embezzlement through abuse of his official capacity and official falsification through preparation and use of false accounting documents during his office as the executive director of the Bank from 1997 to 1999, causing damage to the Bank and its clients. It appears that ten other persons were also charged with involvement in these or related crimes.

On the same date the Kentron and Nork-Marash District Court of Yerevan (*Երևան քաղաքի Կենտրոն և Նորք-Մարաշ համայնքների առաջին ատյանի դատարան*) granted the investigator's motion seeking to have the applicant placed in pre-trial detention for a period of two months. The applicant alleged that during the hearing his lawyer requested the court not to impose detention as a preventive measure, due to the applicant's state of health. The applicant's detention was subsequently prolonged by the District Court on two occasions until 31 August 2003.

On 2 April 2003 a group of nine members of the Armenian parliament applied to the Prosecutor General requesting that the applicant's detention

be replaced by another preventive measure in view of, *inter alia*, the applicant's state of health.

On 10 April 2003 the General Prosecutor's Office addressed a letter to the Head of Staff of the parliament, stating that the applicant's release was not possible since he had committed a grave crime and had refused to return the embezzled funds.

On 1 August 2003 a new Criminal Code (hereafter, the new CC) entered into force in Armenia.

On 11 August 2003 the charges against the applicant were adapted to the new CC and he was formally charged under Article 179 § 3 (1), Article 214 § 1 and Article 325 § 2 of the new CC.

On 20 August 2003 the investigator decided to recognise as an injured party a third person, S.H., who apparently had a share in the Bank's authorised capital.

On 26 August 2003 the investigation was completed and the applicant was granted access to the case file, which apparently consisted of 34 volumes of written materials.

(b) The court proceedings

On 14 November 2003 the prosecutor approved the indictment and the case was transmitted to the Kentron and Nork-Marash District Court of Yerevan for examination. The criminal case involved charges against eleven persons, including the applicant, and 114 witnesses.

On 1 December 2003 the District Court decided to set the case down for trial, fixing the date of the first hearing for 8 December 2003 and finding, *inter alia*, that there were no grounds to change or cancel the applicant's detention.

Between 8 December 2003 and 13 September 2005 the District Court, presided by Judge A., held 44 hearings at varying intervals, with the longest interval lasting about two months. Another twelve hearings were apparently adjourned during that period for various reasons.

On 18 February 2004 the injured party S.H. lodged a civil claim in the context of the criminal proceedings against the applicant and two co-accused, seeking damages in the amount of 500,000 US dollars.

The applicant alleges that in 2004 the General Prosecutor's Office instituted criminal proceedings against a number of judges of the District Court, including Judge A., on the ground that they had adopted unlawful judgments in the past. For this reason the applicant's lawyer challenged the prosecutor participating in the case for lack of impartiality. In particular, he submitted that the prosecutor headed the department which was investigating the criminal case against the judge, which could potentially have a negative impact on the judge's impartiality. This challenge was dismissed.

On 15 and 27 December 2004 the proceedings against four of the co-defendants were terminated due to a statute of limitations.

On 9 February 2005 the District Court granted the prosecutor's motion seeking to restrict the examination of all the 114 witnesses on the ground that 47 of them had already been examined and there was sufficient evidence provided by witnesses for the court to reach a decision.

On 13 September 2005 the District Court announced the end of the examination of the case and departed to the deliberation room.

On 14 November 2005 the District Court delivered its judgment. It found the applicant guilty under Article 179 § 3 (1) and Article 325 § 1 of the new CC. In particular, the applicant was found to have executed a number of financial operations involving bonds and fixed assets, the proceeds from which were embezzled by him. The District Court sentenced the applicant to six years' imprisonment without confiscation of property under Article 179 § 3 (1) and terminated the proceedings under Article 325 § 1 by applying a statute of limitations with reference to Article 35 § 1 (6) of the Code of Criminal Procedure (CCP). It also decided to grant partially S.H.'s civil claim, ordering the applicant and a co-accused to pay jointly a sum equivalent to S.H.'s investment in the Bank's authorised capital, namely AMD 44,000,000, plus fixed interest accrued for the period of misappropriation of this sum.

On 29 November 2005 the applicant lodged an appeal.

Between 17 January and 10 April 2006 the Criminal and Military Court of Appeal (*ՀՀ քրեական և զինվորական գործերով վերաքննիչ դատարան*) held eight hearings on the case at varying intervals.

On 10 April 2006 the Criminal and Military Court of Appeal decided to uphold the judgment of the District Court. The Court of Appeal found, *inter alia*, that:

> "The first instance court, considering [the applicant's] ... guilt in preparing and using false documents to be substantiated, rightly terminated the proceedings under Article 325 § 1 of [the CC] on the ground envisaged by Article 35 [§ 1] (6) of [the CCP]."

On 20 April 2006 the applicant lodged an appeal on points of law. In his appeal he argued, *inter alia*, that Article 325 of the new CC should not have been applied to his case because documents of commercial organisations could not be considered "official". He should therefore have been penalised under Article 214 of the new CC instead. The applicant further submitted that the civil claim lodged by S.H. was unfounded.

On 1 June 2006 the Court of Cassation (*ՀՀ վճռաբեկ դատարան*) dismissed the applicant's appeal. The Court of Cassation found, *inter alia*, that:

> "Documents to which public authorities give legal significance are considered official. Official documents may be issued both by public authorities, their officials and bodies of local self-government, and by legal entities, commercial and other types

of organisations. Such documents as credit or other financial documents drawn up by commercial banks can also be considered as [official documents], since they also have legal significance...”

2. Medical assistance provided to the applicant in detention

On 3 April 2003 the applicant was transferred to Nubarashen detention facility.

On 4 April 2003 the applicant was examined at the facility’s medical unit and diagnosed as having a throat tumour. He also complained of a sore throat, loss of voice and chest pain.

On 28 April 2003 the applicant was examined by an external doctor who recommended that the applicant be examined by an otolaryngology specialist.

On 29 April 2003 the applicant was examined by an otolaryngology specialist who confirmed the diagnosis of a throat tumour. In order to determine the nature of the tumour, the doctor recommended: (a) a biopsy to be carried out; (b) computer tomography of the throat; and (c) further examination and treatment.

On 8 May 2003 the applicant, apparently in reaction to the medication that he was taking, showed symptoms of anaphylactic shock such as urticaria, coldness of extremities, severe shivering and a drop of blood pressure to 20/40 followed by loss of consciousness. First aid was provided by the detention facility’s medical unit and an ambulance was called. It appears that thereafter the applicant continued to experience symptoms of allergy such as face and body swelling, itch and blood pressure fluctuations.

On 20 May 2003 an external allergy specialist was invited who diagnosed the applicant as having Quincke’s oedema, pollinosis and an atypical form of bronchial asthma.

On 13 June 2003 the applicant’s condition drastically deteriorated. He experienced laboured breathing, facial swelling, drop of blood pressure to 50/20, swelling of extremities and Quincke’s oedema. First aid was provided.

On 10 July 2003 the applicant was examined by a psychiatrist. The applicant complained of low spirits, irritability, insomnia and tachycardia, as well as recurring headaches, chest pains and high blood pressure due to frequent emotional stress. From that day on the applicant remained under the psychiatrist’s regular supervision, during which it was found that the applicant was suffering from depression, fits of anger, irritability, insomnia, headaches, chest pains, tension and anxiety.

On 5 November 2003 the applicant was examined by prison doctor N., who noted his complaints of haemoptysis, hoarseness and a weakened swallowing reflex. The applicant was also noted to suffer increased pallor and significant weight loss. It appears that these symptoms continued from that day on.

On 10 January 2004 the applicant was examined by prison doctor N., who noted his complaints of skin rash and itch and shortness of breath which were apparently caused by his emotional stress. Medication was prescribed.

On 20 March 2004 the applicant complained to prison doctor N. of asthenia, hoarseness and a cough which turned into asphyxia.

The applicant alleges that on or around 27 April 2004 he was informed that he was going to be transferred from the detention facility's medical unit to an ordinary cell. The applicant refused to be transferred, referring to his state of health, so he was moved to a punishment cell for three days. In the punishment cell he was not given blankets or bed linen on the first night. On the second night the applicant's health deteriorated and he experienced laboured breathing, asphyxia attacks and high blood pressure. The applicant asked the guard to call the feldsher (doctor's assistant). When the feldsher arrived, he was unable to enter the punishment cell because it was locked and the guard did not have the key. It took half an hour to find the key after the feldsher protested. On the morning of the third day the applicant was transferred back to the medical unit.

On 20 May 2004 the applicant's health deteriorated. According to his medical card, his allergy worsened at night and he fell into a collaptoid state. The applicant complained of cough, itchy skin and nose, shortness of breath, asphyxia attacks, and swelling of the face and lips.

On 17 July 2004 a cardiologist was invited to examine the applicant, who complained of severe chest pain, headache and shortness of breath. His blood pressure jumped to 180/100.

It appears that from August 2004 to January 2005 the applicant continued showing all of the above symptoms during regular medical check-ups.

On 14 January and 23 February 2005 an ambulance was called as the applicant showed symptoms of stenocardia and hypertension. His blood pressure jumped to 160/100.

On 27 January 2005 the applicant was examined by a specialist and was advised, *inter alia*, to undergo an endoscopic examination of the throat and biopsy of the tumour.

By a letter of 4 February 2005 the acting chief of Nubarashen detention facility and the head of its medical unit informed the District Court that the applicant had made numerous complaints about his health, including asthenia, loss of weight, voice hoarsening and haemoptysis. After an examination by specialists of the Ministry of Health, the applicant was diagnosed as having a throat tumour. The applicant therefore needed to be examined in a specialised clinic of the Ministry of Health.

On an unspecified date in April 2005 the applicant was examined by an external doctor who noted that, in order to reach a final diagnosis concerning the applicant's throat tumour, he needed to undergo computer tomography or an NMR (nuclear magnetic resonance) test.

On 8 April 2005 prison doctor N. informed the District Court that the applicant was unable to participate in the hearing to take place on that date because he was suffering from Quincke's oedema.

On an unspecified date in May 2005 the applicant experienced a rash, skin and nose itch, cough and laboured breathing followed by asphyxia and loss of consciousness. His face and lips were swollen. An ambulance was called and first aid was provided. The diagnosis of Quincke's oedema, pollinosis and an atypical form of bronchial asthma was confirmed.

On 16 May 2005 the applicant was provided with first aid after showing the following symptoms: severe headaches, dizziness, chest pain, shortness of breath and a disruption in coordination of movements. He further experienced persistent dizziness, facial swelling and excessive sweating. The applicant was diagnosed with hypertensive crisis and an acute disturbance of cerebral blood circulation of the vertebrobasilar area.

By a letter of 9 June 2005 the chief of Nubarashen detention facility and the head of its medical unit informed the District Court that the applicant had recently been showing symptoms of hoarseness, haemoptysis and asthenia, and that it was impossible to conduct a proper examination at the detention facility's medical unit. They requested the court to allow the applicant's transfer to Armenia Medical Centre in order to carry out a specialised examination, to clarify the diagnosis and to decide on further treatment. It appears that the District Court granted this permission.

On 10 June 2005 the applicant was examined by an otolaryngologist at the Armenia Medical Centre. He was diagnosed with a tumour on the vocal chords and was advised to undergo surgical treatment and a pathohistological test of the tumour. It appears that there was no follow-up to these recommendations.

By a letter of 20 December 2005 the acting chief of Nubarashen detention facility and the head of its medical unit informed the applicant's lawyer that the applicant had been admitted for in-patient treatment at the detention facility's medical unit with the following complaints: laboured breathing, asphyxia, haemoptysis, voice hoarsening, headache, dizziness and frequent loss of consciousness. Following a number of examinations the applicant was diagnosed as having a throat tumour of unknown nature, allergy of unknown aetiology, Quincke's oedema and fits of anaphylactic shock. According to the conclusions reached by the specialists of the Ministry of Health, the applicant needed to undergo specialised instrumental and histological examinations and surgery. Recently the fits of anaphylactic shock and loss of consciousness had become more frequent. The applicant was under permanent medical surveillance and was receiving symptomatic treatment.

By a letter of 22 December 2005 the acting chief of Nubarashen detention facility and the head of its medical unit informed the applicant's

lawyer that it was not possible to carry out the required examinations and surgery in respect of the applicant at the detention facility's medical unit.

On 23 December 2005 the applicant's lawyer filed a motion with the Court of Appeal, requesting that the applicant be released for health reasons. Copies of the letters of 20 and 22 December 2005 were attached to this motion. The applicant alleges that the Court of Appeal included this motion in the case file without ruling on it.

At the hearing of 26 January 2006 the applicant's lawyer filed another motion similar to that of 23 December 2005. She further requested the court to summon the applicant's prison doctor. A copy of the applicant's medical record was attached to this motion. It appears that the Court of Appeal decided to postpone the examination of this motion in order to establish certain essential circumstances. The court further requested the applicant's lawyer to submit a certified copy of the applicant's medical record.

At the hearing of 27 January 2006 the applicant announced that he was unable to testify because of his inability to speak and that he would testify in writing. He requested the court to release him because of his health condition. It appears that the Court of Appeal again decided to postpone the examination of this request in order to establish certain essential circumstances.

At the hearing of 31 January 2006 prison doctor N. was examined in court. The doctor, at the outset, presented details of the diseases suffered by the applicant and the dynamics of their development. He further submitted that all possible treatment had been prescribed but, despite occasional improvements, the applicant's condition continued to deteriorate. The anti-allergy treatment had yielded no results. The applicant had been examined on numerous occasions by otolaryngology and oncology specialists who had unanimously concluded that the applicant needed examination and treatment in a specialised clinic. There was no possibility to carry out such treatment at the detention facility's medical unit, so the applicant received symptomatic treatment. Shortness of breath and asphyxia attacks had become more frequent in December 2005 and January 2006 and were accompanied by coughing and haemoptysis leading to loss of consciousness. The applicant had been resuscitated on several occasions but the growth of the tumour could result in respiratory obstruction causing the applicant's death, all of which was a matter of 3-4 minutes. Doctor N. recommended the applicant's immediate transfer to a specialised clinic in order to eliminate the risk of death. He further stated that not only Nubarashen detention facility's medical unit but the entire penitentiary system lacked the necessary specialists and equipment to carry out a full-scale examination and treatment of the applicant.

At the same hearing the applicant's lawyer filed a motion requesting the applicant's release which was dismissed by the Court of Appeal. She further requested the court to examine the previously filed motions concerning the

applicant's state of health. It appears that the Court of Appeal again decided to postpone the examination of these motions, stating that the information at its disposal was not sufficient to resolve the question of the preventive measure.

On 6 February 2006 the applicant was transferred to the otolaryngology department of the Armenia Medical Centre because of a drastic deterioration in his state of health. The applicant underwent another examination and was diagnosed with chronic laryngotracheitis and malignisation of the tumour. An urgent in-patient examination and surgical treatment in a specialised clinic were recommended.

At the hearing of 8 February 2006 the applicant was unable to finish his testimony because of his inability to speak and the hearing was adjourned.

By a letter of 9 February 2006 the chief of Nubarashen detention facility informed the head of the Criminal Executive Department of the Ministry of Justice that, based on the results of the relevant medical examinations, the conclusions of specialists and the progressive nature of the applicant's disease, he needed to undergo urgent surgery in a specialised clinic, as the tumour was growing and could cause respiratory obstruction.

At the hearing of 15 February 2006 the applicant's lawyer filed another motion with the Court of Appeal seeking to have the applicant released because of his state of health. A certified copy of the applicant's medical record and a copy of the results of the examination of 6 February 2006 were attached to this motion. The Court of Appeal dismissed this motion on the ground that the examination of the case was in its final stage and there were no relevant documents, such as an expert opinion, justifying the need to carry out the applicant's urgent examination and treatment in a specialised clinic.

By a letter of 27 February 2006 the chief of Nubarashen detention facility and the head of its medical unit informed the Court of Appeal that the applicant had been examined by specialists of the Armenia Medical Centre and it had been established that his throat tumour had grown and that he was in need of urgent surgery. They requested the applicant's transfer to the Medical Centre for surgery. It appears that the Court of Appeal granted this request.

On 2 March 2006 the head of the detention facility's medical unit informed the Court of Appeal that the applicant was unable to participate in the hearing to take place on that date because he was suffering from fits of asphyxia.

On 4 March 2006 the applicant was transferred to the Armenia Medical Centre. He was diagnosed as having a vocal chord tumour (C-R?), first degree stenosis and, as accompanying pathologies, nasal septum deviation and chronic hypertrophic rhinitis. The applicant was advised to undergo two operations. The first operation was scheduled for 14 March 2006 but was

postponed upon the applicant's request, as he wished to participate in a court hearing in his case.

On 18 March 2006 the applicant was examined by a psychiatrist who diagnosed him as suffering from reactive depression accompanied by a phobic syndrome. It appears that the applicant showed symptoms of suicidal thoughts. Administration of tranquilisers was recommended.

On 23 March 2006 the applicant underwent his first operation. Partial excision of the mucous membrane of the nasal septum and a double-sided inferior and right-side medial conchotomy were performed. The doctors noted that the applicant's mental condition prevented the second operation being carried out and advised that it be performed after the applicant's general condition had stabilised.

On 3 April 2006 the applicant was again examined by a psychiatrist, who diagnosed him as suffering from a severe form of depression without mental symptoms. The psychiatrist recommended that treatment be continued and the applicant be kept under strict supervision to prevent possible suicide attempts.

On 5 April 2006 the applicant's lawyer filed a motion with the Court of Appeal, requesting the applicant's release on, *inter alia*, health grounds. The applicant alleges that the Court of Appeal postponed the examination of this request without giving any reasons.

On 25 April 2006 the applicant underwent his second operation which involved the removal of polyps on the vocal chords. The operation went smoothly but complications, including inflammation of the vocal chords, adhesions and haemorrhage, occurred in the post-operative period.

On 26 May 2006 the applicant was discharged from the Armenia Medical Centre in an improved condition and transferred back to the detention facility's medical unit.

On 23 June 2006 the applicant was released on parole.

B. Relevant domestic law

1. The Criminal Code of 1961 (no longer in force as of 1 August 2003)

The relevant provisions of the Code, as in force at the material time, read as follows:

Article 90: Embezzlement of property through appropriation, dissipation or abuse of official capacity

> "[1.] Appropriation or dissipation of property entrusted to a person or placed under his management, as well as embezzlement committed by a public official through abuse of his official capacity, shall be punishable by imprisonment for a period not exceeding three years or by a fine in the amount between forty and sixty times the fixed minimum wage, with or without deprivation of the right to occupy certain posts or to carry out certain activities.

...

[4.] The same act, if committed on a particularly large scale, shall be punishable by six to twelve years' imprisonment with confiscation of personal property."

Article 182: Abuse of power or official capacity

"[1.] Abuse of power or official capacity, that is the intentional use of official capacity by a public official to the detriment of his office, if committed for mercenary or other selfish motives, and which has caused serious damage (in case of pecuniary damage, an amount (value) exceeding five hundred times the fixed minimum wage in Armenia) to State or public interests or to rights and interests of citizens protected by law, shall be punishable by imprisonment for a period not exceeding three years and a fine in the amount of forty to sixty times the fixed minimum wage, or correctional labour for a period not exceeding two years and a fine in the amount of forty to sixty times the fixed minimum wage, or dismissal and a fine in the amount of sixty to eighty times the fixed minimum wage.

...

A public official referred to in the articles of this chapter means a person who permanently or temporarily performs functions of a representative of authorities, as well as a person who permanently or temporarily holds a post in State or public institutions, organisations or enterprises, involving organisational-managerial or administrative-economic duties, or has special authorisation to perform such duties in the above institutions, enterprises or organisations."

Article 187: Official falsification

"Official forgery, namely the entering of obviously untrue data into official documents, falsification, scratching off [the date] or entering a [false] date, the preparation and provision of obviously false documents, or the entering of obviously false records into the registers, committed by a public official for selfish ends or other personal motives, shall be punishable by imprisonment for a period not exceeding two years or correctional labour for the same period or removal."

Article 213: Falsification of documents and the preparation, use or sale of false documents, stamps, seals, forms or licence plates of vehicles

"1. Falsification of a certificate or other document conferring an entitlement or absolving from liability issued by a State or public agency, institution or organisation for the purpose of using or selling such a document, as well as the preparation or sale of false stamps, seals or forms of State or public agencies, institutions or organisations or licence plates of vehicles for the same purposes shall be punishable by imprisonment for a period not exceeding three years or correctional labour for a period not exceeding two years. ..."

2. The Criminal Code of 2003 (in force from 1 August 2003)

The relevant provisions of the Code, as in force at the material time, read as follows:

Article 179: Appropriation or dissipation

"2. [Appropriation or dissipation, namely the embezzlement of considerable amounts of somebody else's property entrusted to the offender] ... if committed ... on

a large scale ... shall be punishable by a fine in the amount between four hundred and seven hundred times the minimum wage or by two to four years' imprisonment or by deprivation of the right to occupy certain posts or to carry out certain activities or without such deprivation.

3. [The same act] ... if committed ... (1) on a particularly large scale ... shall be punishable by four to eight years' imprisonment with or without confiscation of property."

Article 214: Abuse of power by employees of commercial or other organisations

"1. Use of administrative or other powers by employees of commercial or other organisations to the detriment of that organisation's interests and with the aim of using [them] in their own favour or in favour of other persons or gaining privileges or causing damage to other persons, if substantial damage has been caused to the lawful rights and interests of persons, organisations or the State, shall be punishable by a fine of two hundred to four hundred times the minimum wage, or by correctional labour for a period from one to two years, or by detention for a period from one to three months, or by imprisonment for a period not exceeding two years. ..."

Article 325: Falsification, sale or use of documents, stamps, seals, forms or licence plates of vehicles

"1. Falsification of a certificate or other official document conferring an entitlement or absolving from liability to be used or to be sold by the falsifier himself or another person, or the sale of such a document, or the preparation or sale of false seals, stamps, forms or licence plates of vehicles for the same purposes, as well as the use of an obviously false document shall be punishable by a fine in the amount between two hundred and four hundred times the minimum wage, or by correctional labour for a period not exceeding one year, or by imprisonment for a period not exceeding two years.

2. The acts envisaged by the first paragraph of this Article, if committed by a group of persons by conspiracy, shall be punishable by correctional labour for a period not exceeding two years or by imprisonment for a period not exceeding four years."

3. The Code of Criminal Procedure

According to Article 35 § 1(6), criminal proceedings may not be instituted and criminal prosecution may not be carried out, while the instituted criminal proceedings must be terminated, if the statute of limitations has expired.

4. The Law on Conditions for Holding Arrested and Detained Persons («Ձերբակալված և կալանավորված անձանց պահելու մասին» ՀՀ օրենք)

According to Article 13, a detainee has the right, *inter alia*, to health care, including to receive sufficient food and urgent medical assistance.

According to Article 21, the administration of a detention facility shall ensure the sanitary, hygienic and anti-epidemic conditions necessary for the

preservation of health of detainees. At least one doctor having a general specialisation shall work at the detention facility. A detainee in need of specialised medical assistance must be transferred to a specialised or civilian medical institution.

COMPLAINTS

1. The applicant complains under Article 3 of the Convention that his continued detention amounted to inhuman and degrading treatment. In particular, he was unsuited to detention for health reasons and was not provided with the requisite medical assistance in detention, which caused him mental and physical suffering.

2. The applicant complains under Article 5 § 1 of the Convention that his detention from 31 August to 1 June 2006 was unlawful as there allegedly was no court decision authorising his detention during that period. He further complains under Article 5 § 3 of the Convention that the length of his detention was excessive.

3. The applicant complains under Article 6 of the Convention of the following.

(a) The criminal proceedings against him were not conducted within a reasonable time. He argues that the proceedings lasted four years, two months and thirteen days, namely from the date of their institution on 19 March 2002 until the charge was finally determined on 1 June 2006.

(b) The courts granted an unfounded civil claim against him.

(c) Judge A. examining his case at first instance was not impartial because of the criminal proceedings that had been instituted against him.

(d) The courts failed to adopt reasoned judgments and decisions.

(e) His right to be presumed innocent was violated because of the statements made by the General Prosecutor's Office in its letter of 10 April 2003 addressed to the Head of Staff of the Armenian Parliament.

(f) He was not able to examine a number of witnesses against him.

4. The applicant complains under Article 7 of the Convention that Article 325 of the new CC lacked legal certainty as opposed to its predecessor in the former CC, namely Article 213, which contained the words "State or public organisations". Therefore, given that he was an employee of a private company and the documents in question could not be considered as "official", the interpretation and application of that Article to his case went beyond what could reasonably be foreseen by him.

5. The applicant complains under Article 1 of Protocol No. 1 that as a result of the criminal proceedings an arbitrary and excessive sum of money was confiscated from him. He further complains that Section 58 of the Law on the Enforcement of Judicial Acts, pursuant to which up to 75% of a

person's salary could be retained in order to pay a judgment debt, placed an excessive burden on him.

THE LAW

1. The applicant complains about the lack of requisite medical assistance in detention under Article 3 of the Convention which provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

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

2. The applicant raised a number of complaints under Article 5 §§ 1 and 3 of the Convention which, in so far as relevant, provides:

> "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:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> ...
>
> (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."

The Court reiterates that it may only deal with a case within a period of six months from the date of the final decision. Where an applicant complains of a continuing situation, the six month period set by Article 35 § 1 begins when the situation ends (see, among other authorities, *Papon v. France (no. 1)* (dec.), no. 64666/01, ECHR 2001-VI).

The Court notes that the applicant in the present case was detained on account of the criminal proceedings against him, so his initial detention was effected for the purposes of Article 5 § 1 (c). In this respect, the Court observes that the applicant's detention period within the meaning of Article 5 §§ 1 (c) and 3 terminated with his conviction at first instance on 14 November 2005 and thereafter his detention was covered by

Article 5 § 1 (a) (see *Wemhoff v. Germany*, 27 June 1968, § 9, Series A no. 7). The applicant, however, lodged his application with the Court only on 21 July 2006, which is more than six months from the date of his conviction at first instance.

It follows that the applicant's complaints about the lawfulness of his detention from 31 August 2003 to 14 November 2005 and about the length of his detention were lodged out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

As regards the lawfulness of the applicant's detention from 14 November 2005 to 1 June 2006, as the Court already noted above, this detention period was lawful under Article 5 § 1 (a).

It follows that this complaint must be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

3. The applicant raised a number of complaints under Article 6 § 1 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 within a reasonable time by an ... impartial tribunal ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him ..."

(a) As regards the length of the criminal proceedings against the applicant, the Court reiterates that in criminal matters in order to assess whether the "reasonable time" requirement contained in Article 6 § 1 has been complied with, one must begin by ascertaining from which moment the person was "charged"; this may have occurred on a date prior to the case coming before the trial court, such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when the preliminary investigations were opened (see, among other authorities, *Corigliano v. Italy*, 10 December 1982, § 34, Series A no. 57). The Court further reiterates that "charge" has an autonomous meaning under the Convention. It is to be given a substantive, not a formal, meaning so it is necessary to look behind the appearances and investigate the realities of the procedure in question. When doing so, the test is whether the applicant is "substantially affected" by the steps taken against him (see *Deweer v. Belgium*, 27 February 1980, §§ 42, 44 and 46, Series A no. 35).

In the present case, the Court notes that the criminal proceedings in respect of the former management of the Bank were instituted on 19 March 2002. However, the applicant's name was not specifically mentioned in the prosecutor's decision of the same date. Moreover, the investigation concerned allegations of embezzlement which happened after June 2001, that is after the period when the applicant worked as the

executive director of the Bank, namely from 1997 to 1999. It therefore cannot be said that the applicant's situation was affected within the meaning of Article 6 § 1 by the institution of the criminal proceedings in question. In such circumstances, there is no material before the Court to suggest that the applicant was charged within the meaning of Article 6 § 1 on any earlier date than the date of his arrest on 31 March 2003. Thus, the period to be taken into account ran from that date until the charge was finally determined by the Court of Cassation on 1 June 2006, amounting to a total of about three years and two months.

The Court reiterates that the reasonableness of the length of the proceedings is to be assessed in the light of the particular circumstances of the case, having regard in particular to the complexity of the case and the conduct of the applicant and of the relevant authorities. On the latter point, what is at stake for the applicant has also to be taken into consideration (see *Kudła v. Poland* [GC], no. 30210/96, § 124, ECHR 2000-XI).

The Court notes that during the period in question an investigation was carried out and the case was examined at three judicial instances. It is true that the proceedings at first instance lasted almost two years. However, it appears that the case was a fairly complex one, involving at various periods from seven to eleven co-defendants, the examination of at least 47 witnesses and 34 volumes of written materials. Furthermore, during that period there were no significant periods of inactivity: the court held 44 hearings with the maximum interval between the hearings not exceeding two months. In such circumstances, the Court considers that there is no appearance of a violation of the "reasonable time" requirement contained in Article 6 § 1 of the Convention.

It follows that this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

(b) As regards the determination of the civil claim against the applicant, the Court reiterates that it is not for the Court to act as a court of appeal in respect of the decisions taken by domestic courts. It is the role of the domestic courts to interpret and apply the relevant rules of procedural or substantive law (see, among other authorities, *Fehr v. Austria*, no. 19247/02, § 32, 3 February 2005). Furthermore, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, among other authorities, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I).

In the present case, it transpires from the case file that the applicant had the benefit of adversarial proceedings. At various stages of these proceedings he was able to submit arguments and evidence to contest the civil claim against him. Furthermore, he was represented by a lawyer at all the stages of the proceedings. The courts gave reasons for their decisions which do not appear arbitrary. In such circumstances, the Court considers

that there is no appearance of a violation of the fair trial guarantees of Article 6 § 1 of the Convention.

It follows that this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

(c)-(f) The applicant raised a number of other complaints under Article 6 of the Convention. The Court reiterates that it may only examine complaints in respect of which domestic remedies have been exhausted (see, among other authorities, *Valašinas v. Lithuania* (dec.), no. 44558/98, 14 March 2000). Furthermore, the exhaustion rule requires that the complaints intended to be made at the international level should first be aired in substance before the domestic courts (see *Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III). In the present case, the Court notes that the applicant did not raise any of his remaining complaints under Article 6 of the Convention in his appeals against his conviction.

It follows that the applicant has failed to exhaust domestic remedies in respect of these complaints, as required by Article 35 § 1 of the Convention, and that this part of the application must be rejected pursuant to Article 35 § 4 of the Convention.

4. The applicant complains about the application of Article 325 of the new CC to his case and invokes Article 7 of the Convention which, in so far as relevant, provides:

> "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..."

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

5. The applicant raised several complaints under Article 1 of Protocol No. 1 which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

As regards the amount of civil damages that the applicant was ordered to pay by the courts, the Court is mindful of its relevant case-law and its finding above concerning the same complaint under Article 6 of the Convention. It does not see any reason to reach a different finding under Article 1 of Protocol No. 1.

It follows that this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

As regards the applicant's complaint concerning Section 58 of the Law on the Enforcement of Judicial Acts, there is no evidence in the case file that this provision was ever applied to the applicant. In any event, even assuming that it was, the applicant never raised this issue before any domestic authority.

It follows that the applicant has failed to exhaust domestic remedies in respect of this complaint as required by Article 35 § 1 of the Convention, and that this part of the application must be rejected pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicant's complaints concerning the alleged lack of requisite medical assistance in detention and the foreseeability of application of Article 325 of the Criminal Code of 2003 to his case;

Declares the remainder of the application inadmissible.

Stanley Naismith
Deputy Registrar

Josep Casadevall
President