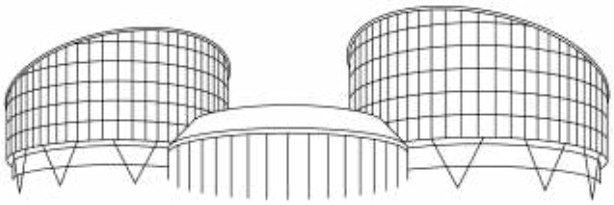

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

DECISION

Application no. 44837/08
by Vardan MINASYAN
against Armenia

The European Court of Human Rights (Third Section), sitting on 22 November 2011 as a Chamber composed of:

Josep Casadevall, *President,*
Corneliu Bîrsan,
Alvina Gyulumyan,
Ján Šikuta,
Luis López Guerra,
Nona Tsotsoria,
Mihai Poalelungi, *judges,*

and Marialena Tsirli, *Deputy Section Registrar,*

Having regard to the above application lodged on 16 July 2008,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Vardan Minasyan, is an Armenian national who was born in 1974 and lives in Yerevan. He is represented before the Court by Ms L. Sahakyan, Mr E. Varosyan, lawyers practising in Yerevan, and Mr A. Ghazaryan, a non-practising lawyer.

A. The circumstances of the case

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

1. The applicant's arrest, indictment and placement in detention

3. On 18 December 2007 criminal proceedings were instituted on account of a fight with use of firearms between two groups of people, which took place on the same day. As a result of the fight, one person died and two others were wounded. It appears that the applicant participated in the fight and opened fire from his two guns. It further appears that the applicant went into hiding and a search for him was declared.

4. On 22 December 2007 the applicant turned himself in to the police. He surrendered his two guns and stated that he had used them during the fight in defence against an assault by unknown persons. He was arrested and taken into custody.

5. On 25 December 2007 the applicant was charged with an aggravated count of murder, as provided for by Article 104 § 2 (6) of the Criminal Code (CC), an aggravated count of infliction of heavy injuries, as provided for by Article 112 § 2 of the CC and illegal possession of firearms, as envisaged by Article 235 § 1 of the CC.

6. On the same date the investigator filed a motion to the Kotayk Regional Court seeking to have the applicant detained for two months. The motion stated that on 18 December 2007 the applicant, in a manner dangerous to the life of many, had opened fire from illegally-possessed guns on individuals G.S., R.V., V.H., as a result of which he had unlawfully and intentionally deprived G.S. of his life and inflicted serious injuries on R.V. and V.H. The motion further stated that the applicant had to be detained because, *inter alia*, he had committed a grave crime.

7. On the same day the Kotayk Regional Court decided to grant the motion and detain the applicant for two months, namely from 22 December 2007 until 22 February 2008, finding that the applicant might abscond, obstruct the examination of the case, avoid criminal liability and serving the imposed sentence and hinder the execution of the judgment. In finding so, the Regional Court took into account the nature and gravity of the imputed offence and the fact that the applicant had committed a grave crime.

8. On 9 January 2008 the applicant lodged an appeal, claiming that his detention was not based on a reasonable suspicion that he had committed an offence and that the Regional Court had not adduced sufficient reasons when finding that his detention was justified. He also alleged that the principle of the presumption of innocence had been breached since the Regional Court stated in the affirmative that he had committed a grave crime.

9. On 29 January 2008 the Criminal Court of Appeal upheld the decision of the Regional Court. The Court of Appeal found that there was sufficient evidence to raise a reasonable suspicion that the applicant had committed an offence. In this regard, it referred to the applicant's statements made to the investigative bodies and the results of G.S.'s autopsy, according to which he

had died from a bullet wound. As to the reasons for detention, the Court of Appeal found that the applicant might obstruct the examination of the case. In finding so, it referred to the nature and gravity of the imputed offences, the scope of possible investigative activities and the circumstances of the case. Concerning the allegation of a violation of the presumption of innocence, the Court of Appeal found that the Regional Court's statement had to be taken solely as meaning that the offence was imputed.

10. It appears that during the examination of the appeal it was established that the fatal incident had been the consequence of a casual street argument that had occurred between the applicant and the victims earlier the same day.

11. On 25 April 2008 the applicant lodged an appeal on points of law.

12. On 19 May 2008 the Court of Cassation left the appeal unexamined on the ground that it had been lodged outside the prescribed one month time-limit.

2. Prolongation of the applicant's detention

(a) The first four prolongations of the applicant's pre-trial detention

13. On 18 February, 18 April, 16 May 2008 and 17 June 2008 the Kentron and Nork-Marash District Court of Yerevan, on the basis of corresponding motions lodged by the investigator, prolonged the applicant's detention until 22 April, 22 May, 22 June and 22 July 2008 respectively on the ground that, taking into account the hostility between the applicant and the victim's friends and relatives, the applicant might commit a new crime. It further found that, taking into account the nature and gravity of the imputed offence the applicant, if at large, might commit a new crime, abscond, obstruct the examination of the case and avoid criminal liability.

14. On 25 February, 22 April, 21 May and 23 June 2008 the applicant lodged appeals against the decisions of the District Court, claiming *inter alia*, that no relevant and sufficient reasons justifying his detention were invoked by it.

15. On 7 March, 7 May, 6 June and 4 July 2008 the Criminal Court of Appeal upheld the respective decisions of the District Court. In this respect, it held that the applicant's continued detention on remand was justified, taking into account the applicant's personality and the nature and gravity of the imputed offence, punishable by a maximum of life imprisonment, which increased the likelihood of his absconding.

16. On 25 April, 4 June, 4 July and 4 August 2008 the applicant lodged an appeal on points of law against the respective decisions of the Court of Appeal.

17. On 19 May 2008 the Court of Cassation left the applicant's appeal of 25 April 2008 unexamined on the ground that it had been lodged outside the prescribed one month time-limit.

18. On 2 July, 4 August and 5 September 2008 the Court of Cassation declared the applicant's appeals of 4 June, 4 July and 4 August 2008 inadmissible for lack of merit.

(b) Modification of the charges and the fifth prolongation of the detention

19. On 4 July 2008 the investigator decided to drop and modify the charges against the applicant. In particular, the charge of illegal arms possession (Article 235 § 1 of the CC) was dropped, while the charges under Article 104 § 2 (6) and Article 112 § 2 (1) were modified and replaced with the charge for two aggravated counts of attempted murder (Article 104 § 2 (1) and (6) in conjunction with Article 34) and the charge for two aggravated counts of hooliganism (Article 258 §§ 3 (1) and (4) respectively).

20. On 10 July 2008 the investigator brought modified charges against the applicant.

21. On 11 July 2008 the investigator filed a motion seeking to have the applicant's detention prolonged by two more months.

22. On 17 July 2008 the Kentron and Nork-Marash District Court of Yerevan, having examined the materials of the criminal case, decided to grant partially the motion and to prolong the applicant's detention for one month, namely until 22 August 2008 on the same grounds as those invoked in its previous decisions. As a reason for considering that the applicant might avoid responsibility, the District Court referred to the fact that the applicant had gone into hiding after committing the crime and thus obstructed the examination of the case.

23. On 22 July 2008 the applicant lodged an appeal claiming, *inter alia*, that the principle of equality of arms had been violated since the District Court referred in its decision to certain materials of the case, which had not been produced during the court examination.

24. On 1 August 2008 the Court of Appeal upheld the decision of the District Court finding that the applicant, if he remained at large, might abscond, obstruct the proceedings or, given the continuing hostility between the two sides, the applicant might commit new crimes. As regards the complaint concerning an alleged violation of the principle of equality of arms, the Court of Appeal dismissed it, finding that the District Court had based its decision only on those materials which had been examined during the hearing and which were available to both the applicant and his lawyers.

(c) Modification of the charges and the sixth prolongation of the detention

25. On 12 August 2008 the investigator decided to drop and modify the charges against the applicant. In particular, the charge of an aggravated count of hooliganism under Article 258 § 3 (1) was dropped and new charges under Article 104 § 2 (1) and (6) in conjunction with Article 34 of

the CC and Article 258 § 4 of the CC were brought. The next day the modified charges were brought against the applicant.

26. Meanwhile, on 12 August 2008 the investigator lodged a motion seeking to prolong the applicant's detention for two months.

27. On 15 August 2008 the Kentron and Nork-Marash District Court of Yerevan decided to grant the investigator's motion partially and prolonged the applicant's detention for one month, namely until 22 September 2008.

(d) The seventh prolongation of the detention

28. On 16 September 2008 the investigator brought another motion seeking to prolong the applicant's detention for 15 days.

29. On 17 September 2008 the Kentron and Nork-Marash District Court of Yerevan granted the motion and prolonged the applicant's detention for 15 days, namely until 7 October 2008, taking into account the nature and dangerousness of the imputed offence, the factual circumstances of the case, and the fact that the applicant, if he remained at large, might abscond, obstruct the proceedings or avoid criminal liability.

30. On 22 September 2008 the applicant lodged an appeal.

31. It appears that in the meantime the investigation was completed and, on 1 October 2008, the applicant's case was referred to the Northern Criminal Court for trial.

32. On 7 October 2008 the Criminal Court of Appeal decided to leave the appeal of 22 September 2008 unexamined on the ground that the scope of judicial control over pre-trial proceedings was limited to the investigation stage. Since the investigation had been completed and the case had been referred to a court, it was now up to that court to examine questions of lawfulness and validity of detention.

33. On 7 November 2008 the applicant lodged an appeal on points of law against the Court of Appeal of 7 October 2008. However, in finalizing his appeal, the applicant requested that his detention be cancelled, as ordered by the decision of the District Court of 17 September 2008, and that he be released.

34. On 21 November 2008 the Court of Cassation decided to leave the applicant's appeal unexamined on the ground that it had been directed against the decision of the District Court of 17 September 2008, which was not subject to appeal on points of law. In this respect, it referred to the fact that the request contained in the applicant's appeal on points of law was to cancel his detention as ordered by the decision of the District Court of 17 September 2008.

35. In the meantime, on 15 October 2008 judge M. of the Northern Criminal Court decided to take over the examination of the case. In the same decision, the judge imposed detention on the applicant, as a preventive measure.

36. On 27 October 2008 the applicant lodged an appeal against this decision, claiming that the judge had no right under the procedural law to order his detention together with the decision to take over the examination of the case because such a decision could be taken only together with a decision to set the case down for trial, after consulting the case file in order to see if ordering detention was justified. Besides, the detention decision could not be considered as lawful since it was taken together with another procedural decision, contained no reasons and no time-limit for detention.

37. On 23 December 2008 the Court of Appeal dismissed the appeal, finding that the applicant's detention was justified because, taking into account the gravity and nature of the imputed offence, there was a high risk that the applicant might abscond or obstruct the examination. As to the lawfulness of the detention decision, the Court of Appeal held that, since detention on the sole ground that the criminal case had been transferred to the trial court was incompatible with Article 5 § 1 of the Convention, the Northern Court had ordered the applicant's detention together with its decision to take over the examination of the case in order to create a legal basis for such detention and to make it "lawful" under Article 5 § 1. As regards the alleged violation of the procedural law, the Court of Appeal referred to the Court's case-law, according to which even flaws in the detention order did not necessarily render the underlying period of detention unlawful within the meaning of Article 5 § 1.

38. On 22 January 2009 the applicant lodged an appeal on points of law.

39. On 9 March 2009 the Court of Cassation declared the applicant's appeal admissible.

40. On 10 April 2009 the Court of Cassation examined the applicant's appeal on the merits and decided to dismiss it, finding that the Northern Criminal Court was competent to rule on the applicant's detention together with its decision to admit the case to its proceedings, since this was prompted by the necessity to observe the right to liberty and security of person, as protected by the Convention.

41. On an unspecified date the criminal case, in accordance with procedural amendments introduced in the meantime, was transferred to the Kotayk Regional Court for examination. It appears that during the examination of the case, the prosecutor decided to modify the charges against the applicant by replacing them with a charge of attempted murder in excess of the boundaries of necessary defence (Article 108 in conjunction with Article 34 of the CC) and a charge on an aggravated count of hooliganism (Article 258 § 3 (1) of the CC).

42. On 8 May 2009 the Kotayk Regional Court found the applicant guilty under Article 108 in conjunction with Article 34 and Article 258 § 3 (1) and sentenced him to a total of three years' imprisonment.

B. Relevant domestic law

1. The Criminal Code

43. According to Article 34, an attempted crime is an intentional action (or omission) aimed directly at committing a crime, if the crime was not completed due to circumstances which were beyond the person's will.

44. According to Article 104 § 2, the murder of two or more persons (sup-paragraph 1) committed in a manner dangerous to the lives of many (sub-paragraph 6) shall be punishable by imprisonment from eight to fifteen years or for life.

45. Article 112 § 2 provides that intentional infliction of bodily injuries or other serious damage to health, which endangers life, to two or more persons shall be punishable by imprisonment from five to ten years.

46. According to Article 235 § 1, illegal possession of firearms shall be punishable by up to three years of imprisonment.

47. Article 258 § 3 prescribes that hooliganism accompanied with violent acts or a threat of such acts, or destroying or damaging another person's property, committed by a group of persons or an organised group shall be punishable by up to five years' imprisonment. Paragraph 4 of the same Article prescribes that if the hooliganism, as envisaged by the third paragraph of the same Article, was committed together with the use of arms or objects used as arms, it shall be punishable by up to seven years' imprisonment.

2. The Code of Criminal Procedure

48. Article 136 § 2 provides that detention may be ordered by a court decision only and that the court can adopt such a decision upon its own initiative during the court proceedings.

49. According to Article 291 § 1 a judge shall, in a procedure prescribed by law, decide to take over the examination of the case submitted to the court.

50. Article 292 § 1 provides that the judge who has taken over the examination of the case shall examine the materials of the case and within fifteen days from the date of taking over the examination of the case shall adopt a decision setting the case down for trial.

51. Article 293 § 2 provides that the decision setting the case down for trial shall contain a decision cancelling, modifying or imposing a preventive measure.

52. According to Article 300, together with adopting decisions, the court is obliged to examine the issue of whether or not to impose a measure of restraint and whether or not the type of the imposed measure of restraint is justified.

COMPLAINTS

53. The applicant complains under Article 5 § 1 of the Convention that

(a) from 7 October 2008 until 15 October 2008 his detention was not based on a court decision;

(b) the detention decision of 15 October 2008 could not be considered as "lawful" because the Northern Criminal Court took it in violation of the procedural law, merged it with another decision and provided no reasons or time-limit for his detention.

54. The applicant complains under Article 5 § 3 of the Convention that

(a) his detention was not based on a reasonable suspicion;

(b) the courts failed to provide relevant and sufficient reasons when imposing and prolonging his detention;

(c) his detention was lengthy and the authorities did not display due diligence in the conduct of the proceedings; and

(d) the investigating authority and the court violated the presumption of innocence by stating during the pre-trial stage that he had committed an offence.

55. The applicant complains under Article 5 § 4 that

(a) the Court of Appeal failed to examine properly his arguments concerning the absence of a reasonable suspicion and lack of sufficient reasons for detention, while the Court of Cassation decided not to admit his appeals on points of law without good reasons;

(b) the principle of equality of arms was violated since the domestic courts, when ordering his detention, relied on the materials of the case file which had not been produced and examined during court hearings;

(c) the Court of Appeal was not impartial as the presiding judge had already drafted a decision dismissing his appeal of 21 May 2008 before the start of the appeal hearing;

(d) the Court of Appeal, by its decision of 7 October 2008, refused to examine his appeal of 22 September 2008; and

(e) a two-month detention period ordered by a court, without a possibility to initiate a review of the lawfulness of his detention in the meantime, cannot be considered as a "reasonable interval" within the meaning of that Article.

THE LAW

A. Alleged unlawfulness of the applicant's detention from 7 to 15 October 2008

56. The applicant complains that there was no court decision authorising his detention from 7 to 15 October 2008. He invokes Article 5 § 1 of the Convention, which 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:
>
> ...
>
> (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".

57. 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. Alleged lack of relevant and sufficient reasons for the applicant's detention and the expeditiousness of the investigation

58. The applicant complains that his detention was not based on relevant and sufficient reasons and that the authorities did not display special diligence in dealing with his case while he was in detention. He refers to Article 5 § 3 of the Convention, which reads as follows:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

59. 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.

C. Non-examination of the applicant's appeal of 22 September 2008

60. The applicant complains that, by refusing to examine his appeal of 22 September 2008, the domestic courts violated his right to obtain a review

of lawfulness of his detention. In this respect, he invokes Article 5 § 4 of the Convention, which provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful".

61. 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.

D. Other alleged violations of the Convention

62. The applicant also raises a number of other complaints under Article 5 §§ 1, 3 and 4 of the Convention.

63. 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 applicant's complaints concerning the alleged unlawfulness of the applicant's detention from 7 to 15 October 2008, the alleged lack of relevant and sufficient reasons for the applicant's detention and the expeditiousness of the investigation, and the non-examination of the applicant's appeal of 22 September 2008;

Declares the remainder of the application inadmissible.

Marialena Tsirli	Josep Casadevall
Deputy Registrar	President