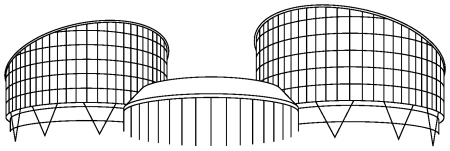

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF KARAPETYAN AND OTHERS v. ARMENIA

(Application no. 59001/08)

JUDGMENT

STRASBOURG

17 November 2016

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Karapetyan and Others v. Armenia,

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

Mirjana Lazarova Trajkovska, *President,*
Kristina Pardalos,
Linos-Alexandre Sicilianos,
Paul Mahoney,
Aleš Pejchal,
Robert Spano,
Armen Harutyunyan, *judges,*
and Abel Campos, *Section Registrar,*

Having deliberated in private on 30 August and 11 October 2016,

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

PROCEDURE

1. The case originated in an application (no. 59001/08) against the Republic of Armenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by four Armenian nationals, Mr Vladimir Karapetyan, Ms Martha Ayvazyan, Mr Araqel Semirjyan and Ms Karine Afrikyan ("the applicants"), on 29 November 2008.

2. The applicants were represented by Mr Vahe Grigoryan, a lawyer practising in Yerevan. The Armenian Government ("the Government") were represented by their Agent, Mr G. Kostanyan, Representative of the Government of Armenia before the European Court of Human Rights.

3. The applicants alleged, in particular, that their dismissal from office following their statements in the media had violated their right to freedom of expression under Article 10 of the Convention.

4. On 17 November 2011 the applicants' complaint under Article 10 of the Convention was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants, Mr Vladimir Karapetyan (the first applicant), Ms Martha Ayvazyan (the second applicant), Mr Araqel Semirjyan (the third applicant) and Ms Karine Afrikyan (the fourth applicant), are

Armenian nationals who were born in 1969, 1967, 1973 and 1954 respectively and live in Yerevan.

6. At the material time, the applicants occupied different posts within the Ministry of Foreign Affairs, namely Head of Press and Information Department, Head of NATO Division of Arms Control and International Security Department, Counsel of the European Department and Head of USA and Canada Division of the American Department respectively.

7. On 19 February 2008 a presidential election was held in Armenia. The main contenders were the then Prime Minister, Serzh Sargsyan, and the opposition candidate, Levon Ter-Petrosyan. Immediately after the election, Levon Ter-Petrosyan announced that the election had been rigged. From 20 February 2008 onwards nationwide protests, such as demonstrations and sit-ins, were organised by thousands of Levon Ter-Petrosyan's supporters.

8. On 23 February 2008 several ambassadors for Armenia in foreign countries made the following statement:

> "We, the undersigned, remaining faithful to our calling as Armenian diplomats and led by our feeling of responsibility before the Republic of Armenia and the Armenian people, with concern for the situation which has arisen in Armenia, with profound respect for the right of Armenian citizens to free elections, with the conviction that only a president elected as a result of free and fair elections can best tackle the challenges facing our country on the international level and substantially raise the international image of Armenia, express our support to our compatriots who have risen to struggle for freedom, protection of the right to a fair election and establishment of true democracy in Armenia.
>
> Considering the preservation of stability in the country important and public accord necessary, we appeal to our compatriots and especially the representatives of all the structures in the country responsible for maintaining public order and peace to avoid the temptation of resolving problems by use of force.
>
> We appeal to all television companies in Armenia, and especially to Armenian Public Television, to ensure impartial and comprehensive coverage and to provide live airtime to representatives of all the powers who have a constructive position in overcoming the current inner-political crisis.
>
> We appeal to all our colleagues working both in Armenia or abroad to join our statement."

9. This statement was reported by the mass media on the same day. According to the first applicant, he also received the statement via his electronic mail. According to the Government, the ambassadors who issued this statement were dismissed from their posts the following day and their dismissal was widely reported in the media.

10. On 24 February 2008 the applicants made the following statement:

> "By joining the statement issued by our colleagues from the Ministry of Foreign Affairs we express our concern with the situation created in Armenia, fraught with internal and external undesirable challenges, and outrage against the fraud of the election process, which shadow the will of our country and society to conduct a civilised, fair and free presidential election.

> As citizens of Armenia, we demand that urgent steps be undertaken to call into life the recommendations contained in the reports of the international observation mission, as well as other prominent international organisations.
>
> Only by acting in conformity with the letter and spirit of the law can we create democracy and tolerance in Armenia and earn the country a good reputation abroad."

11. The names of the applicants, with the indication of their office, appeared under the statement. It appears that this statement was reported by several mass media outlets, including Radio Liberty, on the same day.

12. On 25 February 2008 the Minister for Foreign Affairs of Armenia adopted decrees dismissing the first, second and third applicants from office. The fourth applicant was dismissed from office by a similar decree on 3 March 2008. As a ground for the dismissals, the decrees referred to sections 40, subsection 1, point (j) and 44, subsection 1, point (c), of the Diplomatic Service Act (ՀՀ օրենքը «Դիվանագիտական ծառայության մասին», containing description which stated, *inter alia*, that a diplomat had no right to use his official capacity and work facilities for the benefit of parties and non-governmental organisations, or in order to carry out other political or religious activity (see paragraphs 22-24 below).

13. On an unspecified date in March 2008, the applicants instituted administrative proceedings challenging their dismissal and seeking to be reinstated in their work. In particular, they claimed that the decrees on their dismissal contained no reasons regarding the particular instance where they had made use of their official capacity and work facilities for the benefit of parties or non-governmental organisations or for engaging in political or religious activities, as prohibited by the sections of the Diplomatic Service Act. They also claimed that dismissal on the ground of convictions and opinions was prohibited by law.

14. On 10 April 2008 the Ministry of Foreign Affairs, as a respondent, lodged a response with the Administrative Court (ՀՀ վարչական դատարան), claiming that the applicants, by making their statement of 24 February 2008 which had then been reported by the mass media and announced during the demonstration, had engaged in political activities. Furthermore, the applicants had made use of their official capacity since they indicated their official titles in the statement.

15. On 29 May 2008 the Administrative Court dismissed the applicants' claim, finding that their dismissal from work was lawful since the applicants, by making the impugned statement, in essence had engaged in political activity. In this respect, the Administrative Court mentioned that the impugned statement concerned political processes as it contained a political assessment of election and post-election events. Furthermore, that statement, as well as that of the ambassadors, had been read aloud during the demonstration organised by a political force and had received a political assessment. The Administrative Court also found that the applicants, by

indicating their post titles, had made use of their official capacity. The applicants' right to freedom of expression, as protected by Article 27 of the Constitution (ՀՀ Սահմանադրություն), was not breached since the applicants, in exercising that right, had made use of their official status and work facilities. Therefore, the restriction on that right was in compliance with Article 43 of the Constitution. Besides, the applicants had not been dismissed on the ground of their political opinion, but because in disseminating that opinion they had made use of their official status, which was prohibited by law.

16. On an unspecified date, the applicants lodged an appeal on points of law against the judgment of the Administrative Court, claiming, *inter alia*, a violation of their right to freedom of expression, as protected by Article 10 of the Convention. Besides, they claimed that they had been discriminated against on grounds of political opinion, in violation of Article 14, since those diplomats or state officials who had expressed publicly their support for the pro-governmental candidate had never faced any sanctions: the true reason for their dismissal was their critical opinion of government actions in the sphere of human rights and democratisation. They also claimed that their dismissal had been based on an erroneous interpretation of sections 40, subsection 1, point (j) and 44, subsection 1, point (c), of the Diplomatic Service Act since they had not made use of their official capacity or work facilities when making the impugned statement. Furthermore, the statement had not been made for the benefit of any political party and it could not be qualified as political activity as such.

17. On 23 September 2008 the Court of Cassation (ՀՀ վճռաբեկ դատարան) decided to declare the applicants' appeal on points of law inadmissible for lack of merit.

II. RELEVANT DOMESTIC LAW

A. The Constitution of 1995 (following the amendments introduced on 27 November 2005)

18. Article 27 of the Constitution (ՀՀ Սահմանադրություն) provides that everyone has the right to freedom of expression, including freedom to seek, receive and impart information and ideas by any means of communication and regardless of state frontiers.

19. Article 43 provides that the fundamental rights and freedoms guaranteed by, *inter alia*, Article 27 of the Constitution may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of national security, public order, prevention of crimes, health and morals, constitutional rights and freedoms of others and honour and good reputation.

B. Diplomatic Service Act

20. According to section 4 of the Diplomatic Service Act (ՀՀ օրենքը «Դիվանագիտական ծառայության մասին», which entered into force on 12 December 2001 and was in force at the material time), the objectives of the diplomatic service are implementation of the foreign policy of the Republic of Armenia, proper and consistent representation of the rights and interests of the Republic of Armenia before the international community and protection of the rights and statutory interests of the nationals of the Republic of Armenia and its legal entities.

21. According to section 39, subsection 1, of the Act, the following disciplinary penalties shall be applied to a diplomat in case he or she breaches the diplomatic ethics:

> "a) warning;
>
> b) reprimand;
>
> c) severe reprimand;
>
> d) salary reduction (up to three months) in accordance with a procedure defined by law."

22. Section 40, subsection 1, of the Act provides the grounds for dismissal from office of diplomatic service. A diplomat is dismissed from his or her office in the following cases:

> "...
>
> e) second application of one of the disciplinary penalties prescribed in clauses "b"-"d" in section 39, subsection 1, of the present Act within one year;
>
> ...
>
> j) breaching the restrictions prescribed in section 44 of the present Act;
>
> ..."

23. Section 43 (i) of the Act provides that one of the basic obligations of a diplomat is to observe the rules of ethics as prescribed by the Government of Armenia.

24. According to section 44, subsection 1, point (c), of the Act, a diplomat has no right to use his official capacity and work facilities for the benefit of parties and non-governmental organisations (including religious ones), or in order to carry out other political or religious activity.

C. Government Decree on Approving the Rules of Ethics of a Diplomat

25. The Government Decree "On Approving the Rules of Ethics of a Diplomat" (Degree no. 590 of 20 May 2002) provides that:

"3. A breach of these Rules shall entail disciplinary sanctions.

4. A diplomat is obliged:

...

c) not to criticise representatives of the State and public agents and their actions in public (in writing or orally), refrain from actions or public statements which cast doubt on the politics of the authorities of the Republic of Armenia, the international policy of the Republic of Armenia;

d) to secure political impartiality of the diplomatic service.

...

6. A diplomat is obliged:

a) not to use his official duties for personal benefit or the benefit of third (private) persons and to avoid situations which may entail a conflict between professional duties and private interests, and, in particular, to uphold the restrictions prescribed by [*inter alia*] section 44, subsection 1, ... point (c) ... of the Diplomatic Service Act;

b) not to use or abuse his professional (official) capacity and work facilities, or the information obtained when performing his official duties, for personal benefit or the benefit of third persons, as well as for the benefit of parties and non-governmental organisations (including religious ones) or in order to carry out other political or religious activity."

III. RELEVANT INTERNATIONAL MATERIALS

26. According to the Resolution 1609 (2008) of the Parliamentary Assembly of the Council of Europe on the functioning of democratic institutions in Armenia, the 2008 presidential elections involved a political crisis in Armenia. The Resolution states, inter alia, that:

"2. The Parliamentary Assembly regrets that the violations and shortcomings observed did nothing to restore the currently lacking public confidence in the electoral process and raised questions among a part of the Armenian public with regard to the credibility of the outcome of the election. This lack of public confidence was the basis for the peaceful protests – held without prior official notification – that ensued after the announcement of the preliminary results, and which were tolerated by the authorities for ten days.

3. The Assembly deplores the clashes between the police and the protesters and the escalation of violence on 1 March 2008 which resulted in 10 deaths and about 200 people being injured. The exact circumstances that led to the tragic events of 1 March, as well as the manner in which they were handled by the authorities, including the imposition of a state of emergency in Yerevan from 1 to 20 March 2008 and the alleged excessive use of force by the police, are issues of considerable controversy and should be the subject of a credible independent investigation.

4. The Assembly condemns the arrest and continuing detention of scores of persons, including more than 100 opposition supporters and three members of parliament, some of them on seemingly artificial and politically motivated charges. This constitutes a *de facto* crackdown on the opposition by the authorities.

...

6. While the outbreak of public resentment culminating in the tragic events of 1 March 2008 may have been unexpected, the Assembly believes that the underlying causes of the crisis are deeply rooted in the failure of the key institutions of the state to perform their functions in full compliance with democratic standards and the principles of the rule of law and the protection of human rights. ...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

27. The applicants complained that their dismissal from office following their statements in the media had violated their right to freedom of expression under Article 10 of the Convention.

28. Article 10 of the Convention reads as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

29. The Government contested that argument.

A. Admissibility

30. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

31. As regards the lawfulness of the interference with their freedom of expression, the applicants agreed that the Diplomatic Service Act had met the requirement of accessibility, but argued that it had lacked sufficient

precision and foreseeability. Section 44, subsection 1, point (c), of the Act referred to "other political activity" which was vague as a term, and the adjective "political" had been given an extremely broad scope, involving practically any activity in the applicants' social and professional environment. The way the provision was phrased at the material time, all elements mentioned in it had to exist in order for it to become applicable. It could not therefore have been applied in the present case, in which all required elements did not exist. It was only after the amendment of the Act in 2010 that the existence of a single element made the provision applicable. Moreover, the provision had lacked foreseeability as it had not been applied to anyone before the applicants and it was therefore not known how it would be interpreted. The interference with the applicants' freedom of expression had thus not been prescribed by law as section 44, subsection 1, point (c), of the Diplomatic Service Act had lacked precision and foreseeability. On the other hand, the applicants agreed that the interference had pursued the legitimate aim of protecting national security and public safety as well as preventing disorder.

32. As to the necessity in a democratic society, the applicants maintained that their statement had been of strictly neutral political content and that it had aimed to achieve values enshrined in the Constitution and in the international treaties binding on Armenia. It had not been intended to support any political party. The applicants had drafted the statement as citizens of Armenia and not in their official capacity. The fact that the first applicant had received the statement of several ambassadors in his electronic mail could not be held against him, as he had only been a passive receiver. The interference had not been proportionate as section 44, subsection 1, point (c), of the Diplomatic Service Act had been applied to the applicants selectively and without all required statutory elements being present. The applicants argued that the reasons relied on by the Government had not been relevant to justify the interference with the applicants' freedom of expression and to show that it had been necessary in a democratic society. It had been disproportionate to the aims pursued.

(b) The Government

33. The Government maintained that the applicants' dismissal from their posts, following their statement of 24 February 2008, was compatible with Article 10 of the Convention. Their dismissal was prescribed by law as it had been based, in particular, on section 40, subsection 1, point (j), of the Diplomatic Service Act which provided that a diplomat should be dismissed from office if he violated any of the restrictions prescribed in section 44 of the Act. One of those restrictions was that a diplomat had no right to use his official capacity and work facilities for the benefit of political parties or non-governmental organisations, or in order to carry out other political or religious activity. Contrary to what the applicants claimed, at the relevant

time the existence of a single element made the provision applicable. This Act was both accessible and foreseeable and the notions used in it were sufficiently clear. The Act had been designed to cover relations within the diplomatic service and it was thus designed for professionals. The applicants had had from 11 to 15 years' professional experience as members of diplomatic corps. Had they been uncertain about the content of the Act, they could have sought advice from the Ministry of Foreign Affairs. Taking into consideration the applicants' positions and professional experience, they had to be aware of the legal framework regulating their service, including the restrictions. They had also been well aware of the political situation in Armenia, the character of their public statement and its possible impact. The applicants could, and must, have foreseen the consequences of their statement, especially as the ambassadors who had issued the original statement had been dismissed from their posts the day before and their dismissal had been widely reported in the media.

34. The Government argued that the applicants' dismissal pursued a legitimate aim, namely the aim of guaranteeing the neutrality of civil servants, including diplomatic corps. The restriction provided in section 44, subsection 1, point (c), of the Diplomatic Service Act had the legitimate aim of establishing a professional diplomatic service which would not be politically loaded, would not endure impact from any political force and would not depend on internal political developments and changes in political conjuncture. The aim was thus to uphold democracy and to protect national security in a newly independent country.

35. As to the necessity in a democratic society, the Government maintained that the interference had been proportionate to the legitimate aim pursued and that the reasons adduced by the national authorities to justify it had been "relevant and sufficient". The applicants' statement had had political content and it could have had a negative effect on Armenia's international reputation. In their statement the applicants had assessed a political process, supported a political line of a political force, and put in question the presidential elections of 2008. They had carried out this political activity using their names and positions. In particular, any public statement made by the first applicant, who was the press secretary to the Foreign Minister, could potentially be perceived as the official position of the Ministry. Diplomats were completely free in their political opinions as long as these were not pronounced publicly. Moreover, the statement had also been discussed in the media and this had impaired the political neutrality and reputation of the diplomatic staff of the Ministry of Foreign Affairs. The interference was thus necessary in a democratic society.

2. The Court's assessment

(a) Whether there was an interference

36. The Court notes that even though neither of the parties took a specific stand on the issue of whether there had been an interference within the meaning of Article 10 of the Convention, the Court finds it that the applicants' dismissal from their posts as a result of their statement issued on 24 February 2008 clearly constituted an interference with their right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention.

(b) Whether it was prescribed by law and pursued a legitimate aim

37. The Court notes that, according to the Government, the impugned measures had a basis in Armenian law, in particular in sections 40, subsection 1, point (j) and 44 of the Diplomatic Service Act which provisions were both accessible and foreseeable, and the notions used in them were sufficiently clear. Moreover, the interference complained of pursued a legitimate aim, namely the aim of guaranteeing the neutrality of civil servants, including diplomatic corps. The applicants agreed that the Diplomatic Service Act had been accessible but argued that it had lacked sufficient precision and foreseeability. However, they agreed that the interference had pursued the legitimate aim of protecting national security and public safety as well as preventing disorder.

38. The Court reiterates that freedom of expression is subject to the exceptions set out in Article 10 § 2 of the Convention. The Court accepts that, in the present case, the interference was based on sections 40, subsection 1, point (j) and 44 of the Diplomatic Service Act, as in force at the relevant time, and that these provisions were accessible. The parties' views, however, diverge as far as the precision and foreseeability of the said provisions are concerned. The Court must thus examine whether the provisions in question fulfil the precision and foreseeability requirements.

39. A norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the individual to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may entail excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are a question of practice (see Sunday Times *v. the United Kingdom (no. 1)*, 26 April 1979, § 49, Series A no. 30; and *mutatis mutandis, Kokkinakis v. Greece*, 25 May 1993, § 40, Series A no. 260-A).

40. As concerns the provisions in question at the relevant time, the Court finds no ambiguity in the contents of section 40, subsection 1, point (j), of the Diplomatic Service Act: it clearly provides that a diplomat shall be dismissed from office if he violates the restrictions enumerated in section 44 of the Act. As regards section 44, subsection 1, point (c), of the Act, the Court notes that the Administrative Court seems to have qualified the applicants' act both as falling into the category of "other political activity", and as falling under the "use of official capacity and work facilities for the benefit of parties and non-governmental organisations". The Court finds that the latter category is sufficiently clearly worded for the purposes of Article 10 § 2 of the Convention. As to "other political activity", it is true that this formulation is more vague. However, it is apparent that the purpose of this general clause is to capture all other possible situations to which the provision may apply and which have not been specifically enumerated in the provision.

41. The Court observes that the precision of the term "other political activity" is also connected to its foreseeability. However, even if it were true that at the relevant time in February 2008 there was no case-law concerning the interpretation of section 44, subsection 1, point (c), of the Diplomatic Service Act, the Court finds that the possibility that a diplomat could be dismissed on the basis of "other political activity" cannot be regarded as unforeseeable. The Act was enacted to cover professional conduct of diplomats, who formed a specific and restricted group. At the time of the impugned events, the Act had been in force for several years. The Court agrees with the Government that the applicants, who were all professional diplomats and who had worked in this field for more than 10 years, could not therefore claim to be ignorant of the content of the said provision. Had they had doubts about the exact scope of the provision in question, they should either have sought advice about its content or refrained from issuing their statement. Moreover, it appears that those ambassadors who had issued the original statement only a day before were consequently dismissed from their posts on the basis of the same provision. Although the fact that they had been dismissed may not have been known to the applicants at the relevant time, they must have held it possible that such interpretation of the provision in question could be foreseeable. It must therefore be concluded that section 44, subsection 1, point (c), of the Diplomatic Service Act was sufficiently clearly formulated in order to fulfil the requirements of precision and foreseeability under Article 10 § 2 of the Convention.

42. Moreover, the applicants also claimed that the application of section 44, subsection 1, point (c), of the Diplomatic Service Act to their cases had been erroneous, as all elements required for its application did not exist. The Court reiterates that it is not its function to deal with errors of fact or law allegedly made by a national court, unless and insofar as they may have infringed rights and freedoms protected by the Convention (see,

mutatis mutandis, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I). In the present case, there is no indication that the domestic courts in their interpretation and application of the relevant law went beyond the margin allowed to them under the Convention.

43. The Court therefore concludes that the impugned interference was "prescribed by law". In addition, it has not been disputed that the interference pursued the legitimate aim of protecting national security and public safety as well as preventing disorder, within the meaning of Article 10 § 2 (see paragraphs 31 and 34 above).

(c) Whether the interference was necessary in a democratic society

(i) General principles

44. The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established (see, for example, *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24; *Lingens v. Austria*, 8 July 1986, § 41, Series A no. 103; and *Jersild v. Denmark*, 23 September 1994, § 37, Series A no. 298).

45. The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.

46. The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are

"relevant and sufficient" (see The Sunday Times *v. the United Kingdom (no. 2)*, 26 November 1991, § 50, Series A no. 217). In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see *Jersild v. Denmark*, cited above, § 31).

47. While the Court has admitted that it is legitimate for a State to impose on civil servants, on account of their status, a duty of discretion, civil servants are individuals and, as such, qualify for the protection of Article 10 of the Convention (see *Vogt v. Germany*, 26 September 1995, § 53, Series A no. 323; and *Baka v. Hungary* [GC], no. 20261/12, § 140, ECHR 2016). It therefore falls to the Court, having regard to the circumstances of each case, to determine whether a fair balance has been struck between an individual's fundamental right to freedom of expression and the legitimate interest of a democratic State in ensuring that its civil service properly furthers the purposes enumerated in Article 10 § 2 of the Convention.

48. In carrying out this review, the Court will bear in mind that, whenever a civil servant's right to freedom of expression is in issue, the "duties and responsibilities" referred to in Article 10 § 2 of the Convention assume a special significance which justifies leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference is proportionate to the above aim (see *Vogt*, cited above, § 53; *Albayrak v. Turkey*, no. 38406/97, § 41, 31 January 2008; and *Baka*, cited above, § 162). In this regard, the Court considers that measures directed at the need to preserve the political neutrality of a precise category of civil servants can in principle be considered legitimate and proportional for the purposes of Article 10 of the Convention (see *Ahmed and Others v. the United Kingdom*, 2 September 1998, § 63, *Reports of Judgments and Decisions* 1998-VI). However, such a measure should not be applied in a general manner which could affect the essence of the right protected, without having in mind the functions and the role of the civil servant in question, and, in particular, the circumstances of each case (see, *mutatis mutandis*, *Küçükbalaban and Kutlu v. Turkey*, nos. 29764/09 and 36297/09, § 34, 24 March 2015; and *Dedecan and Ok v. Turkey*, nos. 22685/09 and 39472/09, § 38, 22 September 2015).

49. Furthermore, the Court has recognised, bearing in mind the role of diplomats in society, that it is a legitimate aim in any democratic society to have a politically neutral body of civil servants, including the diplomatic corps. In view of the particular history of some Contracting States, the national authorities of these States may, so as to ensure the consolidation and maintenance of democracy, consider it necessary to have constitutional safeguards to achieve this aim by restricting the freedom of civil servants to engage in political activities (see, *mutatis mutandis*, *Rekvényi v. Hungary*

[GC], cited above, § 46). A democratic State is thus entitled to require civil servants to be loyal to the constitutional principles on which it is founded (see *Vogt v. Germany*, cited above, § 59).

50. The Court has found that the special bond of trust and loyalty between a civil servant and the State as employer is important, in particular in cases of diplomats who are especially expected to be loyal to the State. This is a particularly important element in societies which are in the process of building up the institutions of a pluralistic democracy (see, *mutatis mutandis*, *Rekvényi v. Hungary* [GC], cited above, § 47).

(ii) Application of the above principles to the present case

51. Turning to the facts of the present case, the Court considers that, in the light of the above principles, it must in its examination take account of the circumstances and the overall background against which the applicants' statements were made. It must look at the impugned interference in the light of the case as a whole, attaching particular importance to the office held by the applicants, the form and content of their statements and, in particular, the context in which they were made (see *Baka*, cited above, § 166). The Court's task is to determine whether the applicants' dismissal corresponded to a "pressing social need" and whether it was "proportionate to the legitimate aim pursued".

52. According to the Government, the applicants had in their statement assessed a political process, supported a political line of a political force, and put in question the presidential elections of 2008, using their names and positions. In the Government's view, diplomats were completely free in their political opinions as long as these were not pronounced publicly (see paragraph 35 above).

The applicants disagreed with the Government, maintaining that their statement had been of strictly neutral political content and that it had aimed to achieve values enshrined in the Constitution and in the international treaties binding on Armenia. It had not been made in support of any political party. The applicants argued that the reasons relied on by the Government had not been relevant to justify the interference with their freedom of expression and to show that it had been necessary in a democratic society (see paragraph 32 above).

53. The Court notes that, in the present case, the only act which was regarded as political by the domestic courts and authorities, and which led to the applicants' dismissal from their posts, was the fact that they had published the impugned statement on 24 February 2008. As a consequence, the Minister for Foreign Affairs of Armenia adopted on the next day, on 25 February 2008, decrees dismissing the first, second and third applicants from office. The fourth applicant was dismissed from office by a similar decree on 3 March 2008 (see paragraph 12 above).

54. At the outset, the Court considers it of particular importance in its assessment that all of the four applicants occupied high-ranking positions within the Ministry of Foreign Affairs and that their names, with an explicit reference to their official titles, appeared on the impugned statement (see paragraphs 6 and 11 above). In the light of its case-law (see paragraphs 47-50 above), the Court thus considers that the respondent State, in its assessment on whether to institute disciplinary proceedings and proceed with dismissals, was entitled to have regard to the requirement that high-ranking civil servants such as the applicants respected and ensured the special bond of trust and loyalty between them and the State in the performance of their functions.

55. Furthermore, the Court notes that in their published statement of 24 February 2008 (see paragraph 10 above), the applicants made a specific reference to the statement made on the previous day by several ambassadors for Armenia (see paragraph 8 above), explicitly stating that they joined that statement. Then, in the applicants' statement, "outrage" was expressed "against the fraud of the election process", and a "demand" was put forward that "urgent steps be undertaken to call into life the recommendations" contained in international reports. The Court thus considers that it is not in a position to call into question the relevance of the Administrative Court's finding (see paragraph 15 above) that the applicants' impugned statement concerned "political processes as it contained a political assessment of election and post-election events".

56. The Court also notes that the applicants instituted proceedings for judicial review, challenging their dismissal and seeking to be reinstated in their posts. In its examination of the applicants' claims, the Administrative Court found that the applicants, by indicating their official titles in the published statement, had made use of their official capacity. In consequence, the domestic court found that their right to freedom of expression, protected by Article 27 of the Constitution, had not been breached in view of the limitation clause as provided for by Article 43 of the Constitution. In the Court's view this demonstrates that the domestic court took into account the applicants' right to freedom of expression in its overall assessment of the applicants' claims in a manner sufficiently in conformity with the requirements of the Convention.

57. Finally, in its assessment, the Court attaches particular importance to the overall domestic context in which the applicants published their statements under their official titles. That context seemingly involved a political crisis (see, *inter alia*, Resolution 1609 (2008) of the Parliamentary Assembly of the Council of Europe on the functioning of democratic institutions in Armenia in paragraph 26 above).

58. The Court reiterates that as civil servants enjoy the freedom to express their opinions and ideas under Article 10 of the Convention, like all other individuals (see *Baka*, cited above, § 140), Contracting States must

allow a certain space in domestic public debate, even in difficult times, for the participation of civil servants, in particular where their experience and expertise may be conducive to an informed debate on issues of public interest and importance. However, the position of the applicants in the present case differs from that of the applicant in the *Baka* case. Contrary to the present applicants, the *Baka* case concerned a public servant who had a specific statutory duty as President of the National Council of Justice to express his opinion on legislative reforms affecting the judiciary (see *Baka*, cited above, § 168).

59. The Court recalls that, as it has previously held, in view of the particular history of a Contracting State, the national authorities may, so as to ensure the consolidation and maintenance of democracy, consider it necessary to have constitutional safeguards to achieve the aim in a democratic society of having a politically neutral body of civil servants, including the diplomatic corps, by restricting the freedom of civil servants to engage in political activities (see paragraph 49 above). Viewing the particular circumstances of the present case as a whole, the Court considers that no evidence has been adduced that could call into question the respondent State's assessment in this matter.

60. As to the sanction, the Court considers that the dismissal of the applicants, although severe, did not constitute a disproportionate measure taking into account the particular circumstances of the case and the available options under domestic law.

61. Against this background, and taking account of all of the elements described above, the Court finds that the Government have demonstrated that the measures taken against the applicants were based on relevant and sufficient grounds and were proportionate to the legitimate aim pursued.

62. The Court accordingly finds that there has been no violation of Article 10 of the Convention.

II. REMAINDER OF THE APPLICATION

63. The applicants also complained under Article 6 of the Convention that the Administrative Court had lacked independence and impartiality since it had failed to apply the law and to evaluate the evidence correctly. Besides, the applicants had been denied access to a court as the Court of Cassation had failed to give any reasons when declaring their appeal on points of law inadmissible for lack of merit. The applicants further complained under Article 14 of the Convention that they had been discriminated against on the ground of their political opinion.

64. Having regard to the material before it, the Court finds that the facts complained of do not disclose any appearance of a violation of the applicants' rights under the Convention. Accordingly, this part of the

application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously, the complaint concerning Article 10 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds*, by six votes to one, that there has been no violation of Article 10 of the Convention.

Done in English, and notified in writing on 17 November 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos	Mirjana Lazarova Trajkovska
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judges Sicilianos and Mahoney;
(b) dissenting opinion of Judge Lazarova Trajkovska.

M.L.T.
A.C.

CONCURRING OPINION OF JUDGES SICILIANOS AND MAHONEY

We have voted with the majority in holding that no violation of Article 10 of the Convention can be found on the basis of the material before the Court. We would however have preferred that, for the sake of clarity, the judgment contain more developed reasoning on the issue of the proportionality of the interference with the applicants' exercise of their freedom of expression.

Paragraph 60 of the judgment reads:

> "As to the sanction, the Court considers that the dismissal of the applicants, although severe, did not constitute a disproportionate measure, taking into account the particular circumstances of the case and the available options under the law."
>
> This is a general affirmation, the only specification of the grounds for the conclusion arrived at being 'the particular circumstances of the case' and 'the available options under the law'".

The latter mention is presumably a reference to section 40(1) of the Diplomatic Service Act, which appears to prescribe dismissal from office as the sole sanction available for misconduct contrary to section 44 of the Act (see paragraphs 21-24 of the judgment). It is difficult to understand how this feature of the law, although relevant to the issue of "lawfulness" (dealt with in paragraphs 37-43 of the judgment), constitutes a factor indicative of the proportional nature of an individual measure taken under the law. Indeed, in some instances it may be the inflexibility of the applicable law, in not allowing for graduated sanctions, which is the source of disproportionality of the interference, in the form of an excessively severe sanction in relation to the misconduct found.

By definition, in every case the application of the test of proportionality, whichever way it goes, depends on "the particular circumstances of the case". That being so, the first ground mentioned in paragraph 60 of the judgment merely states the obvious and does not offer any substantive reasoning for the conclusion arrived at. In our view, the factors on which the authorities could rely in order to provide for and impose dismissal from office as a suitable sanction for the misconduct held against the applicants are indeed adverted to the judgment, at paragraph 54 where the Court outlines in an introductory manner a number of factual considerations of importance for the application of the relevant Convention principles to the present case. Thus,

> "... the respondent State, in its assessment on whether to institute disciplinary proceedings and proceed with dismissals, was entitled to have regard to the requirement that high-ranking civil servants such as the applicants respected and

> ensured the special bond of trust and loyalty between them and the State in the performance of their functions."

In brief, for us what makes it possible for dismissal from office to be regarded as a proportionate measure is the fact that, in making use of their official capacity for political purposes in a publicly disseminated statement, the applicants could be taken by the State, as their employer, to have destroyed the special bond of trust and loyalty that they, as relatively senior diplomats in the Ministry of Foreign Affairs, owed to it.

We would therefore have preferred that some such explanation as to the proportionality of the interference with the applicants' exercise of their freedom of expression be given – and developed – in paragraph 60, rather than being presented in paragraph 54 as a general introductory consideration.

On a second point, we have noted the conclusion of the Parliamentary Assembly in relation to the violence that occurred in Armenia in March 2008 in the wake of the disputed presidential election that was the subject of the applicants' statement. This conclusion (in §6 of the Parliamentary Assembly's Resolution 1605 (2008) on the functioning of democratic institutions in Armenia – quoted at paragraph 26 of the judgment) reads:

> "While the outbreak of public resentment culminating in the tragic events of 1 March 2008 may have been unexpected, the Assembly believes that the underlying causes of the crisis are deeply rooted in the failure of the key institutions of the State to perform their functions in full compliance with democratic standards and the principles of the rule of law and the protection of human rights. ..."

As demonstrated by the sad example of the totalitarian regimes in power in some European States prior to and after the Second World War, in extreme instances not merely the active collaboration of civil servants in the commission of human rights abuses by the authorities but even their passivity in the face of such abuses may be condemnable in human rights terms.

The present applicants did not, however, claim that the facts of their case were an illustration of such an extreme instance. They did not, for example, argue that, although their "political" action on 24 February 2008 might in a normally functioning "democratic society" as referred to in paragraph 2 of Article 10 have been prima facie susceptible of justifying a disciplinary measure as severe as dismissal, it was nonetheless called for in defence of "democratic standards and the principles of the rule of law and the protection of human rights", to use the words of the Parliamentary Assembly. Had the applicants adduced some such argument on the basis of sufficiently plausible material, the Court's scrutiny of compliance with the

requirements of paragraph 2 of Article 10 would undoubtedly have been more demanding. As it is, the applicants' submissions in this connection were rather directed towards showing that their statement was neutral and not "political" as such (see paragraph 32 of the judgment). It is on that basis that, like our colleagues, we have subscribed to the conclusion in paragraph 59 of the judgment that "no evidence has been adduced that could call into question the respondent State's assessment" as to the necessity to restrict the applicants' freedom to engage in "political" activities.

DISSENTING OPINION OF JUDGE LAZAROVA TRAJKOVSKA

I regret that I am unable to agree to a finding of no violation of Article 10 in this case; in my view, this case should be referred to the Grand Chamber.

Freedom of expression is one of the essential foundations of a democratic society (see *Handyside v. the United Kingdom*, judgment of 7 December 1976, § 49, Series A no. 24). Although it is legitimate for a State to impose on civil servants, on account of their status, an obligation of discretion, civil servants are individuals and, as such, qualify for the protection of Article 10 of the Convention (see *Baka v. Hungary* [GC], no. 20261/12, § 140, ECHR 2016). The status of civil servant does not deprive a person of the protection afforded by Article 10 of the Convention. In such cases, it falls to the Court, having regard to the circumstances of each case, to determine whether a fair balance has been struck between the fundamental rights of the individual to freedom of expression and the legitimate interests of a democratic State in ensuring that its civil service properly furthers the purposes enumerated in Article 10 § 2 (see *Vogt v. Germany*, 26 September 1995, § 53, Series A no. 323).

I agree with the majority that the applicants' dismissal from their posts as a result of their statement published on 24 February 2008 clearly constituted an interference with their right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention. I can also agree that this interference was prescribed by law and pursued a legitimate aim. Where I disagree with the majority is in respect of the Chamber's reasoning regarding the necessity and the proportionality of the impugned interference.

In particular, in my view, the Administrative Court did not balance the applicants' right to freedom of expression under Article 10 of the Convention with the interests of the State. It does not emerge from the reasoning of the Administrative Court what "pressing social need" in the present case existed to justify, as proportionate to the legitimate aim pursued, the protection of the State's interests over the applicants' right to freedom of expression.

Moreover, I disagree with the majority that the dismissal of the applicants, as the most severe measure, did not constitute a disproportionate measure, given the particular circumstances of the case and the available options under domestic law. In this connection, I note that the Court has usually considered dismissal from employment to be a very harsh measure, particularly when other more lenient and more appropriate disciplinary sanctions could or should have been envisaged (see, for example, in other contexts, *Guja v. Moldova* [GC], no. 14277/04, § 95, ECHR 2008; *Fuentes Bobo v. Spain*, no. 39293/98, § 48, 29 February 2000, and *Kudeshkina v. Russia*, no. 29492/05, § 98, 26 February 2009). Armenian legislation provides for a variety of reprimands which can be applied to a

diplomat should he or she breach diplomatic ethics, starting with a warning, followed by a reprimand, a severe reprimand, a reduction in salary and finally dismissal. Government Decree "On Approving the Rules of Ethics of a Diplomat" (Decree no. 590 of 20 May 2002) provided, *inter alia*, that a diplomat is obliged:

> "... (b) not to use or abuse his professional (official) capacity and work facilities, or the information obtained when performing his official duties, for personal benefit or the benefit of third persons, as well as for the benefit of parties and non-governmental organisations (including religious ones) or in order to carry out other political or religious activity"

and that

> "a breach of these Rules shall entail disciplinary sanctions."

It appears from the background to this case that the domestic authorities did not consider the imposition of other sanctions, but instead proceeded instantly, as a result of applicants' actions, to their dismissal from office. The effects of the applicants' dismissal were severe. They were deprived of the opportunity to exercise the profession for which they had a calling, for which they had been trained and in which they had acquired skills and experience (see *Vogt v. Germany*, cited above, § 60). The fact that there were no real effective safeguards available to the applicants added to the severity of the sanction. It seems that there was no possibility for the applicants to appeal before the administrative organs. It will be recalled, in this respect, that the fairness of the proceedings and the procedural guarantees afforded are also factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10 (see, for example, *Kudeshkina v. Russia*, § 83, and *Baka v. Hungary*, § 102, both cited above).

In light of all the foregoing, the reasons put forward by the Government in order to justify their interference with the applicants' right to freedom of expression were not sufficient to establish convincingly that it was necessary in a democratic society to dismiss them. Even taking into account the difficult political situation at the time and allowing the national authorities a certain margin of appreciation, to dismiss the applicants from their posts as diplomats was disproportionate to the legitimate aim pursued.