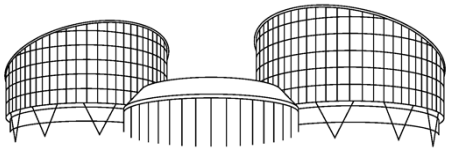

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF ASHOT MALKHASYAN v. ARMENIA

(Application no. 35814/14)

JUDGMENT

Art 2 (substantive and procedural) • Positive obligations • Death of applicant's son during compulsory military service, drafted in reckless disregard of medical conditions which rendered him unfit • Conduct of relevant military authorities and medical professionals beyond error of judgment or carelessness unjustifiably put applicant's son's life in danger • Ineffective-and lengthy criminal-investigation, eventually terminated due to statutory limitation

STRASBOURG

11 October 2022

FINAL

11/01/2023

This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.

In the case of Ashot Malkhasyan v. Armenia,

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

Gabriele Kucsko-Stadlmayer*, President,*
Tim Eicke*,*
Yonko Grozev,
Armen Harutyunyan,
Pere Pastor Vilanova,
Jolien Schukking*,*
Ana Maria Guerra Martins, *judges*,
and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to:

the application (no. 35814/14) 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 an Armenian national, Mr Ashot Malkhasyan ("the applicant"), on 23 July 2014;

the decision to give notice to the Armenian Government ("the Government") of the complaints concerning the death of the applicant's son and to declare inadmissible the remainder of the application;

the decision of 28 April 2022 to grant priority treatment to the application under Rule 41 of the Rules of Court;

the parties' observations;

Having deliberated in private on 20 September 2022,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns the death of the applicant's son during compulsory military service as a result of the authorities' alleged failure to adequately assess his state of health during his conscription, as well as the ensuing investigation. It raises issues under Article 2 of the Convention.

THE FACTS

2. The applicant was born in 1946 and lives in Yerevan. He was represented by Ms S. Safaryan, a lawyer practising in Yerevan.

3. The Government were represented by their Agent, Mr G. Kostanyan, and subsequently by Mr Y. Kirakosyan, Representative of the Republic of Armenia on International Legal Matters.

4. The facts of the case may be summarised as follows.

I. BACKGROUND TO THE CASE

5. The applicant is the father of A. Malkhasyan, who died at the age of 22.

6. Upon finishing university, A. Malkhasyan was drafted into the Armenian army in the summer of 2009. On 25 June 2009 he was found fit for military service and sent to his assigned military unit the next day.

7. On 4 July 2009 A. Malkhasyan lost consciousness and was transported to a local military hospital, where he was pronounced clinically dead. His medical records indicated the following clinical diagnosis: post-resuscitation disease and gastrointestinal bleeding.

8. On 5 July 2009 A. Malkhasyan was urgently transported by air ambulance to the Central Military Hospital in Yerevan, where he was placed in the intensive care unit in a coma. He was diagnosed with post-cardiopulmonary resuscitation syndrome, cerebral oedema (brain swelling), bilateral aspiration pneumonia and gastrointestinal bleeding. He died the same day.

II. STATE OF A. MALKHASYAN'S HEALTH PRIOR TO CONSCRIPTION

9. On 10 July 2008 an ambulance was called for A. Malkhasyan, who was violently vomiting a dark substance, extremely weak and experiencing epigastric pain. He was then diagnosed with cardial incompetence, reflux oesophagitis (inflammation of the oesophageal mucosa), laceration of the mucous membrane of the cardia, Mallory-Weiss syndrome (bleeding from a tear or laceration of the mucous membrane between the stomach and oesophagus), superficial gastritis and established bleeding. As a result of treatment received at Mikayelyan Hospital in Yerevan, his condition stabilised and the bleeding stopped. He was discharged on 21 July 2008 and instructed to remain under the care of a gastroenterologist and to undergo an examination in thirty days.

10. In December 2008 A. Malkhasyan underwent examinations owing to his poor state of health. He was diagnosed with, *inter alia*, a hiatal hernia, Gilbert's syndrome (elevated levels of unconjugated bilirubin in the bloodstream) and prescribed medication and a special diet. He was also advised to sleep with his head raised and not to bend or to lift heavy things.

III. A. MALKHASYAN'S CONSCRIPTION

11. In March 2009 A. Malkhasyan was requested to report to the Arabkir military commissariat in order to undergo an initial medical examination.

12. On an unspecified date he went to the Arabkir military commissariat and submitted his medical records to the relevant medical commission.

13. In April 2009 he asked to undergo an additional medical examination but the Arabkir military commissar, A.U., refused to refer him for further medical checks. Thereafter the applicant went to see A.U. and asked him to sign a note whereby his son would be referred for medical examinations. A.U.

refused to do so very rudely, stating that the applicant's son was going to be conscripted in any event.

14. On 25 May 2009 the applicant submitted a written request for an additional medical examination for his son.

15. On 29 May 2009 that request was refused by A.U. on the grounds that the medical documents submitted were sufficient to conclude that A. Malkhasyan was fit for military service.

16. The applicant sent similar requests to the Military Commissar of Armenia and the Chief of Staff of the Armenian Defence Forces.

17. On 12 June 2009 the Military Commissar of Armenia ordered A.U. to again present A. Malkhasyan to the Central Medical Commission in order to determine whether he was fit for military service.

18. Thereafter A.U. referred A. Malkhasyan to undergo further medical examinations at Erebuni Medical Centre in Yerevan from 15 until 19 June 2009, after which a relevant commission was to deliver a conclusion concerning his medical condition. Upon A.U.'s instructions, M.S., the surgeon of the Arabkir military commissariat medical commission, was present during A. Malkhasyan's examinations at Erebuni Medical Centre.

19. In the course of his medical examinations at Erebuni Medical Centre, A. Malkhasyan was examined by specialists, including a gastroenterologist who diagnosed him with erosive gastritis, superficial duodenitis, gastrointestinal motility and a hiatus hernia, and a neurologist who diagnosed him with vegetative vascular dystonia with crises.

20. On 19 June 2009 the relevant commission delivered a medical conclusion based on the results of A. Malkhasyan's examinations with the following final diagnosis: gastrointestinal motility disorders induced by psychological stress.

21. On 25 June 2009 A. Malkhasyan was summoned to the Central Medical Commission, which found him fit for military service.

IV. INITIAL INVESTIGATION

22. On 4 July 2009 A. Malkhasyan's brother went to the military unit to visit him. Having learnt that A. Malkhasyan had fainted that day and been rushed to hospital, his brother filed a report to the effect that he had suffered from a number of diseases before his conscription and that he had been drafted into the army unlawfully.

23. On the same date the Second Garrison Investigation Department of the Investigative Service of the Ministry of Defence made a decision to institute criminal proceedings into the matter under Article 376 § 1 of the Criminal Code (see paragraph 59 below).

24. On 5 July 2010 the Fourth Garrison Investigation Department started an investigation into the circumstances of A. Malkhasyan's death.

25. On the same date an autopsy was ordered.

26. On 6 July 2009 the Minister of Defence ordered an internal investigation into the circumstances of A. Malkhasyan's death.

27. On 10 July 2010 the Investigative Department of the Ministry of Defence took over the investigation. The proceedings instituted on 4 July 2010 and the investigation into the circumstances of A. Malkhasyan's death were joined in one case.

28. Several of A. Malkhasyan's co-servicemen were questioned shortly after his death and submitted that he had not looked healthy and had been pale and very thin.

29. On 29 July 2009 A.K., the head of the Conscript Assembly Point Medical Commission, was questioned. He stated, *inter alia*, that on 5 July 2010, having learnt that A. Malkhasyan had been transferred to the Central Military Hospital, he had gone there and seen sufficient medical documents to cast doubt on Erebuni Medical Centre's conclusion regarding his state of health. Having familiarised himself with the full medical history taken at Erebuni Medical Centre and the results of the examinations there, and comparing them with the content of that conclusion, he was able to submit that those examinations had intentionally not been taken into account so that A. Malkhasyan would be found fit for military service. If the relevant information had been reflected in the conclusion, he would have been found unfit for military service.

30. On the same date the head of the Military Medical Department of the Ministry of Defence was questioned and stated, in particular, that A. Malkhasyan would have been found unfit for military service had the military commissariat and the Central Medical Commission properly examined his medical records.

31. On 26 August 2009 the Minister of Defence issued an order, based on the results of the internal investigation, whereby a number of persons who had been involved in A. Malkhasyan's conscription, including A.U. and A.K., were reprimanded. The relevant parts read as follows:

> "... the Central Medical Commission, having in its possession all relevant documents concerning [A. Malkhasyan's] illnesses, was obliged to treat him differently by sending him for thorough examinations; it should have made a correct decision concerning [his] conscription.
>
> ...
>
> - the medical commission of the Arabkir military commissariat had recognised [A. Malkhasyan] 'fit for combatant service' without an inpatient examination in a situation where the medical commission had difficulty in assessing the condition of his stomach and the hiatus hernia indicated in the medical records,
>
> - the military commissar had referred [A. Malkhasyan] for examination only when ordered to do so by his superior,
>
> - the military commissariat, Erebuni Medical Centre, the Central Medical Commission failed to fully take into account ... the medical documents submitted by [A. Malkhasyan],

- the results of the examinations carried out at Erebuni Medical Centre between 15 and 19 June of the current year had not been full and objective, based on which the military commissariat and the Central Medical Commission had recognised [A. Malkhasyan] as 'fit for combatant service';

- medical documents ... had not been included in [A. Malkhasyan's] personal file,

- the numbering of documents (16/22) in the personal file is mentioned with corrections and changes,

...

- [A.U.], according to the statement of [A. Malkhasyan's] brother, had an unjustified argument with [A. Malkhasyan's] relatives, treating them disrespectfully and expressing doubt as to the veracity of the documents submitted by the parent ...

In order to penalise those responsible and prevent the occurrence of such incidents in the future, I order:

1. A warning [to be issued] concerning 'Incomplete suitability for service' to [A.U.] ... for gross violations ...

2. The imposition of a 'strict reprimand' in respect of:

- [A.H.], the head of the conscription department of the Arabkir military commissariat;

- [A.K.] ...

3. The imposition of a 'reprimand' in respect of:

- [H.Sa.], the Arabkir military commissariat's secretary ...

...[illegible]

4. ... [illegible]

- involve more qualified medical professionals in the medical commission's participation in the conscription procedure ...

- examine the manner in which [A. Malkhasyan's] medical examinations were carried out at Erebuni Medical Centre.

5. The attention of the military commissar [to be drawn to] ... the deficient manner of record-keeping of the Arabkir military commissariat, ... medical professionals ...

...

8. The Military Commissar of [Armenia] to:

...

- pay attention to the medical documents submitted by conscripts and their relatives, examine in detail and render a fair decision in relation to each request/complaint ..."

32. On 12 August 2009 the autopsy report was received. The forensic expert concluded that the cause of A. Malkhasyan's death had been coronary artery disease due to rheumatic pancarditis, cardiomyopathy, rheumatic coronaritis, diffuse cardiosclerosis, connective tissue disorder of the aortic and pulmonary valves (semilunar valves), which the deceased had suffered while alive and which were directly linked to his death. It was further mentioned in the report that A. Malkhasyan had also suffered from

Mallory-Weiss syndrome, chronic oesophagitis with superficial erosions of the oesophagus and chronic gastritis, which were not directly linked to his death.

33. On 14 September 2009 A.U. was questioned and stated, *inter alia*, that he had ordered the removal of ten medical documents from A. Malkhasyan's personal file. He and the medical commission of the military commissariat had had serious doubts as to whether A. Malkhasyan was actually ill, and he had therefore instructed M.S. to be present during his medical check-ups at Erebuni Medical Centre. From 15 to 19 June 2009 M.S. had been present during A. Malkhasyan's medical examinations there in order to ensure objectivity.

34. On 26 January 2010 the investigator ordered a forensic medical examination to be conducted by a commission of forensic medical experts.

35. On 3 May 2010 the commission of forensic medical experts delivered its report, the relevant parts of which read as follows:

> "... the diseases that have caused the death, as determined by the forensic medical examination ... originated before 2008, a fact which is supported by the morphological changes to the body, as well as the typical changes recorded on the electrocardiogram performed at Mikayelyan Hospital in 2008 ...
>
> ... physical and psychological and emotional stress during military service could have had a negative effect on [A. Malkhasyan's] coronary and arterial diseases, thus aggravating his state of health.
>
> ... from a medical point of view, it was necessary to prescribe A. Malkhasyan a special diet, and limited physical and psychological and emotional stress. Although in the present case gastrointestinal diseases were not directly linked to the death, they could have ... contributed to the cause of death.
>
> ... According to the records of A. Malkhasyan's examinations at Erebuni Medical Centre, erosive gastritis and superficial duodenitis had been diagnosed but had not been reflected in the conclusion on the state of health ...
>
> If A. Malkhasyan had undergone the relevant examinations ... it would have been possible to diagnose the heart pathology that was the cause of his death as well as his other diseases ... if this had been diagnosed and relevant treatment administered ... it would have been possible to avoid the further deterioration of his health and also his death."

36. On 24 June 2010 the investigator brought charges under Article 315 § 2 of the Criminal Code (see paragraph 57 below) against T.G., a therapist, who at the relevant time was a member of the Central Medical Commission. The investigator's decision stated, in particular, that T.G. was being charged for failing to undertake the necessary measures in order to ensure A. Malkhasyan's complete medical examination and unlawfully recognising him fit for military service when he had not been.

37. On 16 July 2010 the investigator charged A.K. with aggravated negligent attitude to service under Article 376 § 1 of the Criminal Code (see paragraph 59 below). The investigator's decision stated, in particular, that A.K. was being charged for failing to take into account the information

concerning A. Malkhasyan's state of health indicated in the medical documents submitted by him and to send him for additional examinations, as a result of which the latter, who had not been fit for service, had been drafted into the army unlawfully.

38. On 30 August 2010 the investigator brought charges under Article 315 § 2 of the Criminal Code (see paragraph 57 below) against G.H., a neurologist, who was a member of the Central Medical Commission at the relevant time. The investigator's decision stated, in particular, that G.H. was being charged for failing to undertake the necessary measures to ensure A. Malkhasyan's complete medical examination and recognising him fit for military service as a result of which the latter, who had not been fit for service, had been drafted into the army unlawfully.

39. On 2 November 2010 the investigator ordered a combined forensic medical and military medical examination on the grounds that such an examination was the only possible way to clarify a number of discrepancies which had arisen during the investigation.

40. On 12 November 2010 a commission of experts was formed, based on the relevant order of the Minister of Health for the purpose of conducting the combined forensic examination.

41. On 17 September 2011 the commission delivered its report, according to which the sharp deterioration of A. Malkhasyan's health on 4 July 2009 and his subsequent death could possibly have been linked to acute gastrointestinal bleeding ("Mallory-Weiss syndrome") associated with covert pathological changes affecting the heart (coronary sclerosis, cardiosclerosis) and the resultant cardiac arrest and swelling in the brain as a result of the necessary resuscitation measures. Apart from his gastrointestinal disorders, A. Malkhasyan had suffered from coronaritis and cardiosclerosis, which had been asymptomatic and without functional changes since he had not made any complaints in this regard. A. Malkhasyan's additional treatment and the postponement of his conscription could possibly have prevented the fatal outcome. Also, it could not be ruled out that the accumulation of such pathological conditions might have led to the same outcome in civilian life.

42. On 17 July 2014 the investigator decided to discontinue the prosecution of T.G., A.K. and G.H. for lack of *corpus delicti* and to terminate the criminal proceedings on the grounds that A. Malkhasyan's death had resulted from asymptomatic heart diseases, the symptoms of which could not have been felt but which later, as a result of a change of lifestyle and routine, had led to the aggravation of asymptomatic pathologies resulting in heart failure. The diseases in question had not been detected and could not have been detected even prior to conscription, either at the clinics where A. Malkhasyan had previously been examined, or subsequently by the doctors who had examined him during the conscription process. In respect of this point, the investigator referred, in particular, to the expert report of 17 September 2011.

V. APPLICANT'S APPEALS

43. The applicant disputed the investigator's decision of 17 July 2014 before the Military Prosecutor, who dismissed his complaint.

44. On 13 August 2014 the applicant requested a judicial review of the above-mentioned decisions of the investigator and prosecutor.

45. By a decision of 11 November 2014 the Arabkir and Kanaker-Zeytun District Court of Yerevan ("the District Court") dismissed the applicant's complaint and fully upheld the decisions in question.

46. The applicant lodged an appeal, which was dismissed by the Criminal Court of Appeal on 27 December 2014.

47. The applicant lodged an appeal on points of law whereby he requested that the lower courts' decisions be quashed and the case be remitted for fresh examination. His appeal was admitted for examination by the Court of Cassation.

48. By a decision of 5 June 2015 the Court of Cassation partly allowed the applicant's appeal. It quashed the first-instance and appellate decisions of 11 November and 27 December 2014 respectively and adopted a new decision ordering the investigating authority to remedy the violations of the applicant's rights arising from the criminal proceedings concerning the death of his son. The relevant parts of that decision read as follows:

> " ... Turning to the circumstances of the present case, the Court of Cassation notes that there is ample evidence in the case file showing that the conscript [A. Malkhasyan] suffered from a number of illnesses ... Nevertheless, after examination by the Arabkir military commissariat medical commission, Erebuni Medical Centre and then the Central Military Medical Commission, [A. Malkhasyan] was found fit for military service and drafted into the army ...
>
> The Court of Cassation finds it necessary to note that it is clear from the content of the combined forensic examination report [delivered on 17 September 2011] that only the coronaritis and cardiosclerosis were asymptomatic, a finding which was based on the absence of complaints by [A. Malkhasyan] while alive ... This finding does not mean that the absence of a person's complaints rules out the objective possibility of diagnosing the above-mentioned coronary diseases via the relevant examinations ... Therefore, the Court of Cassation finds that the investigator's conclusion that [A. Malkhasyan's] coronary diseases could not have been detected by medical professionals is unsubstantiated ...
>
> Moreover, in circumstances where there were two forensic medical examinations, [the autopsy] and [by a commission of forensic medical experts] ... it is not clear from the investigator's decision to appoint a combined forensic medical and military medical examination ... whether it is additional or repeated ... the above-mentioned circumstances may cast serious doubts on the results and credibility of the forensic examination in question.
>
> ... the investigative authorities have failed to duly consider ... the following facts:
>
> 1) there is a significant body of evidence in the case file ... establishing that the results of [A. Malkhasyan's] examinations by the medical commission of Erebuni Medical

Centre have not been fully reflected in the conclusion submitted to the Central Medical Commission ... In particular:

- the gastroenterologist's diagnosis of 'erosive gastritis, superficial duodenitis, gastrointestinal motility [and a] hiatus hernia' has not been reflected in the conclusion on the state of health, the neurological diagnosis 'vegetative vascular dystonia with crises' was not correctly formulated.

... the Court of Cassation notes that the case file contains ample evidence that [A. Malkhasyan] was not fit for military service due to his state of health ... Whereas his state of health was not objectively and fully assessed by the doctors and (or) reflected in the conclusion concerning his state of health.

... the investigator has failed to establish the reasons for not carrying out the relevant medical examinations and for not objectively and completely reflecting the results of the examinations that had been carried out in the ... conclusion ...

... the investigator has failed to make a proper legal assessment ... of [A.U.'s] actions ... [A.U.] stated that he had ordered the removal of ten documents from [A. Malkhasyan's] file ... However, the investigator has failed to clarify the purpose for which A.U. had ordered the removal of the documents from [A. Malkhasyan's file], especially documents that could have been crucial in determining whether he was fit for military service. Also, the investigator has not established whether [A.U.] was authorised to make such an order.

... the investigator has failed to establish whether the Arabkir Military Commissariat interfered with the professional activity of the doctors of Erebuni Medical Centre by sending [its person M.S.] there ...

... the Court of Cassation notes that the reasonable time-limits for investigation have been grossly violated in the present case ..."

VI. FURTHER INVESTIGATION

49. On 5 November 2015 the criminal proceedings were resumed and the case was sent to the Department for the Investigation of Cases of Special Importance of the Investigative Committee for further investigation.

50. A number of witness interviews were conducted, including with medical personnel of Erebuni Medical Centre and members and staff of the military medical commissions involved in A. Malkhasyan's conscription.

51. On 13 February 2017 the investigator assigned a commission of experts to conduct an additional combined forensic medical and military medical examination, finding that the expert report of 17 September 2011 (see paragraph 41 above) was not sufficiently clear and complete. The relevant parts of the report delivered by the expert commission on 20 March 2017 read as follows:

" ...

Question: Should the diagnosis of 'Mallory-Weiss syndrome, gastrointestinal bleeding' given by Mikayelyan Hospital ... have been recorded in the conclusion of the surgical department of 'Erebuni Medical Centre' concerning [A. Malkhasyan's] state of health ... ?

Answer: Yes ...

Question: Which of the diagnoses mentioned ... could have resulted in anaemia and cardiac arrest ...?

Answer: Mallory-Weiss syndrome is characterised by gastrointestinal bleeding which can lead to anaemia, while the latter, among other reasons, could have resulted in acute changes in the heart muscle and caused cardiac arrest.

Question: Which of the diagnoses mentioned ... specifically caused cardiac arrest ... ?

Answer: ... gastrointestinal bleeding linked to Mallory-Weiss syndrome ... could have been the cause of heart affection.

Question: If [A. Malkhasyan's] ... diagnoses were fully and objectively reflected in the conclusion, what decision should the surgeon or neurologist of the [Central Medical Commission] have reached during the session of [25 June 2009] ... and would [A. Malkhasyan] have been found fit for military service?

Answer: ... had all the diagnoses been included ... the members of the ... commissions could have possibly reached a different decision ... In that case, most probably, the [Central Medical Commission] would have suspended [A. Malkhasyan's] conscription for three years ...

Question: Did the surgeon of the [Central Medical Commission] reach an incorrect decision ... considering the medical documents [concerning previous diagnoses]...?

Answer: In view of the presence of the ... medical documents [concerning previous diagnoses] in the case file ... the surgeon of the [Central Medical Commission] reached an incorrect decision by stating that 'No surgical pathology has been discovered' ...

...

Question: Is there a link between the actions of the members of the commission of the surgical department of 'Erebuni Medical Centre' and the medical specialists of the [Central Medical Commission] and the subsequent deterioration of [A. Malkhasyan's] health and his death?

Answer: [The people referred to in the question] failed to diagnose the diseases and pathological conditions discovered during the autopsy which are directly linked to his death ... "

52. By a decision of 19 July 2017 the investigator terminated the criminal proceedings. He found it established that after A. Malkhasyan had been referred to Erebuni Medical Centre's surgical department for medical examinations, military commissar A.U. had sent M.S., the surgeon of the Arabkir military commissariat medical commission, there with A. Malkhasyan, instructing her to attend his medical examinations without A.U. having authority to do so. A.S., the surgeon on duty that day, had taken charge of A. Malkhasyan's medical examinations and had been involved as a member of the commission carrying out the medical and expert examination of his state of health. The commission had been presided by H.S. while A.A., the head of the surgical department, had been its other member.

On 15 June 2009, the first day of the medical examinations, A. Malkhasyan had submitted his medical documents to A.S., including the diagnosis provided by Mikayelyan Hospital. M.S. had attended

A. Malkhasyan's medical examinations at Erebuni Medical Centre from 15 to 17 June 2009 and reported their results to A.U. Upon completion of the medical examinations, on 19 June 2009 A.S. had drawn up a conclusion which did not fully and accurately reflect the results. The members of the Erebuni Medical Centre commission, displaying a negligent attitude to service, had signed the incomplete conclusion concerning A. Malkhasyan's state of health.

On 25 June 2009 that conclusion had been submitted to the Central Medical Commission where, despite the presence of medical documents in the file attesting to Mallory-Weiss syndrome, gastrointestinal bleeding and other conditions, surgeon A.Uz. had stated "No surgical pathology has been discovered", following which A. Malkhasyan had been recognised as fit for combatant service. On 26 June 2009, the day A. Malkhasyan was to be drafted into the army, A.U., without having authority, had instructed the removal of A. Malkhasyan's medical documents from his file and that he be sent to the Conscript Assembly Point without those documents. However, on the same day, the applicant had provided A.K., the head of the Conscript Assembly Point medical commission, with A. Malkhasyan's medical documents. A.K. had then had a telephone conversation with A.Uz., who had stated that the diagnoses in the medical documents in question had not been confirmed during the medical examinations carried out at Erebuni Medical Centre. A.K. had accepted the Central Medical Commission's decision as final, on the basis of which A. Malkhasyan had been drafted into the army the same day.

53. By a decision of the same date the investigator decided not to prosecute H.S., A.A., A.S. and A.Uz. According to the decision, it was established that they had failed to properly fulfil their obligation by displaying a negligent attitude to service as a result of which A. Malkhasyan – despite him suffering from diseases incompatible with military service – had been drafted in to the army, where his diseases had progressed and led to his death within days. The actions of H.S., A.A., A.S. and A.Uz. were thus punishable under Article 315 § 2 of the Criminal Code (see paragraph 57 below). However, their prosecution had become time-barred and they had not objected to their prosecution being discontinued.

54. By another decision of the same date the investigator decided not to prosecute A.U. for lack of *corpus delicti* in his actions. The relevant decision stated, in particular, that A.U., in his capacity as Arabkir military commissar, had had no authority to send M.S. to Erebuni Medical Centre with A. Malkhasyan and to remove any documents from the latter's personal file and that by having given such orders he had exceeded his public authority. However, the application of Article 375 § 1 of the Criminal Code (see paragraph 58 below) required the actions in question to have caused grave damage and there to have been a causal link between those actions and such damage. However, M.S. had not interfered with A. Malkhasyan's medical examinations, and the medical specialists of the Central Assembly Point had

been informed about A. Malkhasyan's previous diagnoses as the applicant had transmitted the relevant documents to the head of its medical commission. In such circumstances, no grave damage had been caused as a result of A.U. exceeding his authority.

RELEVANT LEGAL FRAMEWORK

RELEVANT DOMESTIC LAW

A. Criminal Code

55. Article 19 § 3 of the Criminal Code provides that intentional acts for which the maximum penalty does not exceed five years' imprisonment and negligent acts for which the maximum penalty does not exceed ten years' imprisonment are considered "medium gravity offences".

56. Article 75 § 1 (2) provides that a person is exempted from criminal liability if five years have passed since the commission of a "medium gravity offence".

57. Article 315 § 2 provides that failure by an official to carry out or to properly carry out his duties as a result of a negligent attitude to service or bad faith, which has negligently caused a person's death or other grave consequences, is punishable by a maximum of five years' imprisonment.

58. Article 375 § 1 provides that abuse of authority or public position, exceeding public authority or omission by a superior or public official, if such acts were committed for selfish purposes, personal interests or in the interests of a group and this has resulted in serious harm, is punishable by two to five years' imprisonment.

59. Article 376 § 1 states that a military official's negligent attitude to service which has caused considerable damage is punishable by temporary exclusion from military service for a maximum period of two years, a maximum of two years' military confinement or a maximum of three years' imprisonment. The same offence which has caused grave consequences is punishable by three to six years' imprisonment (Article 376 § 2).

B. Code of Criminal Procedure

60. Article 35 § 1 (6) of the Code of Criminal Procedure provides that if the relevant limitation period has expired, no criminal case may be instituted and no criminal prosecution may be carried out, whereas a criminal case that has already been instituted must be terminated.

61. Article 35 § 3 provides that the investigator and the prosecutor must decide whether to terminate the proceedings or discontinue the prosecution if they discover, at any stage of the pre-trial proceedings, circumstances precluding the continuation of the criminal case.

62. Article 35 § 6 provides that it is not permissible to terminate the criminal case and discontinue the prosecution on the basis of, *inter alia*, Article 35 § 1 (6) of the CCP if the accused objects. In such cases, criminal proceedings will continue under the ordinary procedure.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

63. The applicant complained under Articles 2 and 13 of the Convention about the death of his son during military service, and that the authorities had failed to carry out an effective investigation into the matter. Since it is master of the characterisation to be given in law to the facts of the case (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 114, 124 and 126, 20 March 2018), the Court finds it appropriate to examine the applicant's complaints solely under Article 2 of the Convention, the relevant part of which reads as follows:

> "1. Everyone's right to life shall be protected by law."

A. The Government's request to strike out the application under Article 37 § 1 of the Convention

64. The Government submitted a unilateral declaration requesting the Court to strike the application out of its list of cases pursuant to Article 37 § 1 of the Convention.

The applicant disagreed with the terms of the unilateral declaration.

65. It may be appropriate in certain circumstances to strike out an application, or part thereof, under Article 37 § 1 of the Convention on the basis of a unilateral declaration by the respondent Government even where the applicant wishes the examination of the case to be continued. Whether this is appropriate in a particular case depends on whether the unilateral declaration offers a sufficient basis for finding that respect for human rights as defined in the Convention does not require the Court to continue its examination of the case (Article 37 § 1 *in fine*; see, *inter alia*, *Tahsin Acar v. Turkey* (preliminary issue) [GC], no. 26307/95, § 75, ECHR 2003-VI). Relevant factors in this respect include the nature of the complaints made, whether the issues raised are comparable to issues already determined by the Court in previous cases, the nature and scope of any measures taken by the respondent Government in the context of the execution of judgments delivered by the Court in any such previous cases, and the impact of these measures on the case at issue (see *Tahsin Acar*, cited above, § 76).

The present application raises serious issues, which have not already been determined by the Court in previous cases, as regards the assessment of a conscript's physical health when determining whether the individual in

question is fit to undergo military service. The Court therefore considers that the unilateral declaration submitted by the Government does not offer a sufficient basis for finding that respect for human rights as defined in the Convention does not require the Court to continue its examination of the case (Article 37 § 1 *in fine*). Hence, the Court rejects the Government's request to strike the application out and will accordingly pursue its examination of the admissibility and merits of the case.

B. Admissibility

1. Compliance with the six-month rule

66. The Government argued that the six-month period in relation to the applicant's complaint under the substantive limb of Article 2 of the Convention should be calculated from 26 August 2009, the date of the order of the Minister of Defence whereby the persons involved in A. Malkhasyan's conscription had been reprimanded and a number of shortcomings in the procedure had been established (see paragraph 31 above). They maintained that the criminal proceedings, which had been pending when the Minister of Defence had issued the order, could not have established any more facts as regards the State's failure to protect A. Malkhasyan's life. By the order of 26 August 2009 the domestic authorities had acknowledged the breach of his right to life in its substantive aspect.

67. The applicant submitted that the order of the Minister of Defence of 26 August 2009 (see paragraph 31 above) had been an administrative decision which had not acknowledged the breach of A. Malkhasyan's right to life. It had merely been aimed at reprimanding those in breach of the relevant internal service regulations.

68. As a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Where it is clear from the outset, however, that no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on or prejudice to the applicant, and, where the situation is a continuing one, once that situation ends (see, among other authorities, *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, § 259, ECHR 2014 (extracts)).

69. The Government argued that the applicant's complaint about the State's alleged failure to protect A. Malkhasyan's life during military service had been lodged outside the six-month limit which, according to the Government, should be calculated from 26 August 2009 (see paragraph 66 above).

70. The Court notes at the outset that it has not been provided with any details or documents in relation to the internal investigation carried out by the Ministry of Defence. Thus, there is no material available before it in relation to the internal investigation, including its dates, duration, the names and

positions of the officials who assigned it or those of the officials who conducted it. In any event, it is clear that the internal investigation by the Ministry of Defence was purely internal and that the applicant was neither aware of it nor provided with its material at or around the time of the adoption of the order of the Minister of Defence of 26 August 2009. It is also clear from the content of that order that it was of a purely disciplinary nature and concerned the specific officials who were reprimanded for certain breaches of internal service regulations thereby identified rather than it addressing in any form the question of responsibility of the authorities and the Ministry of Defence for, in particular, failure to protect A. Malkhasyan's life.

71. Against this background, the Court finds that the order of the Minister of Defence of 26 August 2009 cannot be considered a "final decision" within the meaning of Article 35 § 1 of the Convention. It cannot therefore be said that the applicant failed to comply with the six-month rule by not bringing his complaint under the substantive limb of Article 2 of the Convention to the Court within six months of that order. The Court notes that the applicant lodged the present application before the Court on 23 July 2014 while the criminal proceedings into the death of his son were still pending. The Government's objection as to the failure to respect the six-month rule should therefore be dismissed.

2. Non-exhaustion of domestic remedies

72. The Government maintained that the applicant had failed to exhaust the domestic remedies available to him in respect of his complaint under the procedural aspect of Article 2 of the Convention. They stated that he had not availed himself of the possibility of claiming compensation for non-pecuniary damage from the State on the basis of the Court of Cassation's decision of 5 June 2015 (see paragraph 48 above). That court had expressly acknowledged that the requirement of promptness of the investigation had not been respected in the case at hand, which had given the applicant the possibility to claim non-pecuniary damage under Articles 162.1 and 1087.2 of the Civil Code already in force at the relevant time (see *Nana Muradyan v. Armenia*, no. 69517/11, §§ 78-83, 5 April 2022, for an outline of the relevant provisions of the Civil Code).

73. The Government further maintained that the applicant had not appealed against the investigator's decisions of 19 July 2017 (see paragraphs 52, 53 and 54 above). They submitted that the applicant should have at least appealed against the decision not to prosecute A.U. (see paragraph 54 above).

74. The applicant submitted that the Court of Cassation's decision of 5 June 2015 (see paragraph 48 above) had merely obliged the investigating authority to eliminate the procedural breaches identified therein. Furthermore, subsequent to that decision, the investigation had been reopened as late as on 5 November 2015. In any event, the resumption of the

investigation and the investigative measures taken thereafter had been meaningless, considering that the offences in question had become time-barred by the time the investigation had been resumed. In those circumstances, the applicant had not seen the point in bringing appeals against the decisions of 19 July 2017.

75. The general principles concerning exhaustion of domestic remedies under Article 35 of the Convention are summarised in *Vučković and Others v. Serbia* ((preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 69-77, 25 March 2014).

76. The Government argued that that the applicant had failed to bring a civil claim for compensation in respect of non-pecuniary damage based on the Court of Cassation's decision of 5 June 2015 which, in their submission, had constituted judicial acknowledgment of a violation of his fundamental rights guaranteed by the Convention, allowing him to claim damages from the State (see paragraph 72 above).

77. The Court notes that it has already examined and dismissed a similar objection of non-exhaustion in another case against Armenia concerning death of a conscript during military service (see *Nana Muradyan*, cited above, §§ 107-11). Since the Government did not advance any new arguments, the Court sees no reasons in the present case to depart from its earlier findings. It therefore dismisses their first objection of non-exhaustion (see paragraph 72 above).

78. The Government also stated that the applicant had failed to appeal against the investigator's decisions of 19 July 2017.

79. The Court observes at the outset that the applicant lodged his application with the Court complaining of, *inter alia*, the ineffectiveness of the investigation on 23 July 2014, that is, before the resumption of the investigation in November 2015 (see paragraph 49 above).

80. It further observes that on 19 July 2017 the investigator made three decisions. In particular, he decided not to prosecute H.S., A.A., A.S. and A.Uz. as their prosecution under Article 315 § 2 of the Criminal Code (see paragraph 57 above) had become time-barred (see paragraph 53 above) and then, by another decision of the same date, he decided not to prosecute A.U. on the grounds that the constituent elements of the offence under Article 375 § 1 of the Criminal Code (see paragraph 58 above) had not been made out (see paragraph 54 above). Lastly, by another decision of the same date and with reference to the mentioned two decisions not to prosecute, the investigator decided to terminate the criminal proceedings (see paragraph 52 above).

81. The applicant argued that an appeal against the decisions of 19 July 2017 would not have been effective (see paragraph 74 above).

82. The Court notes that, in general, an appeal against a decision not to prosecute or to terminate an investigation is an effective remedy under the Armenian legal system (see, for example, *Gulyan v. Armenia*, no. 11244/12,

§§ 54 and 60, 20 September 2018, where the courts set aside the decisions to discontinue the investigation twice during the same set of criminal proceedings). Indeed, the applicant did succeed in his appeal against the decision of 17 July 2014 whereby the criminal proceedings were terminated for the first time (see paragraphs 42, 44 and 48 above).

83. However, in circumstances where, following the resumption of investigation more than six years after A. Malkhasyan's death, the investigator decided not to prosecute H.S., A.A., A.S. and A.Uz. because of the five-year statutory limitation of their criminal liability under Article 315 § 2 of the Criminal Code (see paragraph 57 above), it is not clear what reasonable prospects of success the applicant could have had if he had chosen to pursue an appeal. The Court notes in this connection that under the law of criminal procedure, the only possibility of pursuing those persons' prosecution would have been if they themselves objected to the application of the statutory limitation period (see paragraphs 60 and 62 above). However, in the present case no such objection was made (see paragraph 53 above). In addition, the Government, in so far as they submitted that the applicant should have at least appealed against the decision concerning A.U., appear themselves to have admitted that an appeal against the relevant decisions with regard to H.S., A.A., A.S. and A.Uz. could not have offered any reasonable prospects of success to the applicant (see paragraph 73 above).

84. The situation is different as regards the decision concerning A.U. since his prosecution was discontinued because the investigator concluded that the constituent elements of the offence under Article 375 § 1 of the Criminal Code (see paragraph 58 above) had not been made out (see paragraph 54 above). In particular, it was considered that, although A.U. had overstepped his official powers by sending M.S., his subordinate, to Erebuni Medical Centre with A. Malkhasyan and removing documents from his personal file, those actions had not caused grave damage. In these circumstances, and, as suggested by the Government, there is nothing to indicate that the applicant could not have lodged an appeal against the relevant decision not to prosecute A.U. similar to his appeal against the decision not to prosecute T.G., A.K. and G.H. (see paragraphs 42 and 44 above). That being said, the Court notes that by that point A.U.'s prosecution for the offence under Article 375 § 1 of the Criminal Code (see paragraph 58 above), a medium gravity offence with a statutory limitation period of five years, had similarly become time-barred (see paragraphs 55 and 56 above). In any event, and without the Court having to speculate on whether A.U. would or would not have objected to the proceedings being discontinued for the expiry of statutory limitation periods had the applicant succeeded in his appeal, it cannot be considered that the applicant failed to pursue the domestic remedies available to challenge the results of the entire investigation by failing to lodge an appeal against the decision not to prosecute A.U.

85. Accordingly, and in the circumstances of the present case, the Court does not consider that, by not filing appeals against the decisions of 19 July 2017 (see paragraphs 52, 53 and 54 above), the applicant failed to exhaust the domestic remedies. The Court therefore dismisses the Government's objection in that regard.

3. Other grounds for inadmissibility

86. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

C. Merits

1. The parties' submissions

87. The applicant maintained that the authorities had been responsible for the death of his son since, as had been clearly established during the investigation, the relevant officials and medical professionals involved in his conscription had failed to properly assess his state of health and reach a correct conclusion as to whether he was fit for military service. The authorities had then failed to conduct an effective and prompt investigation into the matter. As a result, those found responsible had never been held accountable as the offences imputed to them had become time-barred precisely because of the unjustified delays and ineffectiveness of the investigation. As regards, in particular, A.U., the applicant argued that the investigation had continuously failed to make an adequate legal assessment of the latter's actions aimed at drafting an ill conscript into the army.

88. The Government did not make any submissions on the merits of the complaints raised by the applicant.

2. The Court's assessment

(a) General principles

89. The Court reiterates that Article 2, which safeguards the right to life, ranks as one of the most fundamental provisions in the Convention. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The object and purpose of the Convention as an instrument for the protection of individual human beings requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective (see, among other authorities, *McCann and Others v. the United Kingdom*, 27 September 1995, §§ 146-47, Series A no. 324).

90. The first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction

(see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports of Judgments and Decisions* 1998-III).

91. In the context of individuals undergoing compulsory military service, the Court has previously had occasion to emphasise that, as with persons in custody, conscripts are under the exclusive control of the authorities of the State, since any events in the army lie wholly, or in large part, within the exclusive knowledge of the authorities, and that the authorities are under a duty to protect them (see *Beker v. Turkey*, no. 27866/03, §§ 41-42, 24 March 2009; *Mosendz v. Ukraine*, no. 52013/08, § 92, 17 January 2013; and *Malik Babayev v. Azerbaijan*, no. 30500/11, § 66, 1 June 2017).

92. In the same context, the Court has further held that the primary duty of a State is to put in place rules geared to the level of risk to life or limb that may result not only from the nature of military activities and operations, but also from the human element that comes into play when a State decides to call up ordinary citizens to perform military service. Such rules must require the adoption of practical measures aimed at the effective protection of conscripts against the dangers inherent in military life and appropriate procedures for identifying shortcomings and errors liable to be committed in that regard by those in charge at different levels (see *Kılınç and Others v. Turkey*, no. 40145/98, § 41, 7 June 2005, and *Mosendz*, cited above, § 91).

93. The Court further reiterates that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be an effective official investigation when individuals have been killed as a result of the use of force, either by State officials or private individuals (see, among many other authorities, *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, §§ 169 and 171, 14 April 2015). The essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life. The same standards also apply to investigations concerning fatalities during compulsory military service (see *Malik Babayev*, cited above, § 79, and the cases cited therein).

94. The investigation must be effective in the sense that it is capable of leading to the establishment of the facts and, where appropriate, the identification and punishment of those responsible (see *Mustafa Tunç and Fecire Tunç*, cited above, § 172). It should also be thorough, which means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions (see *Mocanu and Others*, cited above, § 325, and *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 183, ECHR 2012).

95. A requirement of promptness and reasonable expedition is implicit in the context of an effective investigation with the meaning of Article 2 of the

Convention. The protection machinery provided for in domestic law must operate in practice within a reasonable time such as to conclude the examination on the merits of specific cases submitted to them (see *Talpis v. Italy*, no. 41237/14, § 106, 2 March 2017).

(b) Application of these principles to the instant case

(i) Substantive limb

96. The Court notes that it was unequivocally established at domestic level – both as a result of the internal investigation and the criminal proceedings – that A. Malkhasyan had been drafted into the army despite him having medical conditions which rendered him unfit for military service and of which the military authorities were aware of at the time of his conscription (see paragraphs 31, 52, 53 and 54 above).

97. A. Malkhasyan was found fit for military service on 25 June 2009 and called up the next day (see paragraphs 6 and 21 above). He died only ten days after he started service (see paragraph 8 above).

98. According to the material in the case file, as early as in March or April 2009 A. Malkhasyan submitted medical documents concerning his medical history, including the medical conclusions issued in July and December 2008 (see paragraphs 9, 10 and 11-13 above) to the Arabkir military commissariat. Nevertheless, Arabkir military commissar A.U. not only did not seek to have him examined in order to verify his medical condition, he refused his requests and then those of the applicant – both oral and in writing – to refer him for medical examinations (see paragraphs 13-15 above). What is more, although eventually and as a result of the applicant's hierarchical complaints, A.U. was ordered by his superior to refer A. Malkhasyan for medical examinations, he, overstepping his public authority, intervened in what was meant to be an objective assessment of A. Malkhasyan's medical condition by sending one of the doctors working under his supervision to Erebuni Medical Centre to be present during the relevant examinations and report the results to him (see paragraphs 18, 33 and 54 above).

99. Upon completion of A. Malkhasyan's medical examinations at Erebuni Medical Centre, the relevant expert commission, including surgeons H.S., A.A. and A.S., issued its conclusion diagnosing him with "gastrointestinal motility disorders induced by psychological stress" (see paragraph 20 above). That conclusion, which was considered by the investigating authority to have been "incomplete" (see, in particular, paragraph 52 above) neither reflected A. Malkhasyan's previous diagnoses including Mallory-Weiss syndrome (see paragraph 9 above) nor even the results of his examinations by the gastroenterologist and neurologist of the same hospital during the three-day examination in question (see paragraph 19 above).

100. In turn, based on that "incomplete" conclusion, the Central Medical Commission recognised A. Malkhasyan fit for military service despite there being his personal file of medical documents attesting to his medical history, including the diagnosis of Mallory-Weiss syndrome, gastrointestinal bleeding which was subsequently considered by the expert commission as the possible cause of the cardiac arrest resulting in his death (see paragraph 51 above). In particular, A.Uz., the surgeon member of the Central Medical Commission, mentioned that A. Malkhasyan had no surgical pathology despite the available medical evidence (see paragraph 52 above).

101. Subsequently, A.U. ordered the removal of A. Malkhasyan's medical documents from his file, including those containing his previous diagnoses, thereby trying to misrepresent his medical history to the Conscript Assembly Point medical commission. In those circumstances, the applicant had to provide A.K., the head of that medical commission, with those documents directly. However, that did not rectify the situation either as, during a telephone conversation between A.K. and A.Uz. the latter stated that the diagnoses mentioned in the documents in question had not been confirmed by the expert commission of Erebuni Medical Centre (see paragraphs 29, 33, 52 and 54 above).

102. Against this background, the Court considers it sufficiently established that the conduct of the military authorities of the Arabkir military commissariat and the Central Medical Commission, that is A.U. and A.Uz., as well as that of the members of the Erebuni Medical Centre expert medical commission, namely H.S., A.A. and A.S., went beyond an error of judgment or carelessness, engaging the State's responsibility under Article 2 of the Convention (see *Zinatullin v. Russia*, no. 10551/10, § 33, 28 January 2020, and *Tkhelidze v. Georgia*, no. 33056/17, § 59, 8 July 2021). In this context, it is striking to note A.U.'s conduct, including his negative predisposition from his very first encounters with A. Malkhasyan and the applicant to the extent that he apparently did everything possible to have him drafted into the army up to the point that he even falsified his personal file before submitting it to the Conscript Assembly Point (see paragraphs 33 and 54 above).

103. In the light of the foregoing, the Court finds that the military authorities and the medical professionals involved in A. Malkhasyan's conscription – in reckless disregard of the latter's medical history, including his acute state necessitating emergency hospitalisation less than a year before the events at issue in the present case (see, in particular, paragraph 9 above) – actively contributed to the decision that he was fit for military service, which was apparently inconsistent with his then state of health. As was established during the investigation, that decision eventually resulted in his death within days of him starting service (see paragraphs 7, 8, 51 and 53 above). The Court therefore concludes that the authorities in the instant case unjustifiably put the applicant's son's life in danger when they decided to call him up to

perform military service, thus failing to comply with their positive obligation under Article 2 of the Convention to protect his life.

104. There has accordingly been a violation of the substantive limb of Article 2 of the Convention.

(ii) Procedural limb

105. The Court reiterates that, in cases concerning possible responsibility on the part of State officials for deaths occurring as a result of their alleged negligence, the obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case (see, among many other authorities, *Kotilainen and Others v. Finland*, no. 62439/12, § 91, 17 September 2020). However, there may be exceptional circumstances where only an effective criminal investigation would be capable of satisfying the procedural positive obligation imposed by Article 2. Such circumstances can be present, for example, where a life was lost or put at risk because of the conduct of a public authority that goes beyond an error of judgment or carelessness. Where it is established that the negligence attributable to State officials or bodies goes beyond an error of judgment or carelessness, in that the authorities in question – fully realising the likely consequences and disregarding the powers vested in them – failed to take measures that were necessary and sufficient to avert the risks, the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation of Article 2, irrespective of any other types of remedy that individuals may exercise on their own initiative (see *Tkhelidze*, cited above, § 59).

106. The Court has already established above that the conduct of the military authorities and medical experts involved in A. Malkhasyan's conscription procedure went beyond an error of judgment or carelessness (see paragraphs 102 and 103 above). Therefore, in view of the aforementioned case-law, only an effective criminal investigation was capable of satisfying the procedural positive obligation imposed by Article 2.

107. The Court notes that the investigation concerning the death of A. Malkhasyan, which lasted eight years, was terminated as a result of the decisions, issued on 19 July 2017, not to prosecute H.S., A.A., A.S. and A.Uz. on account of the statutory limitation period and, in so far as A.U. was concerned, on account of a lack of *corpus delicti* in his actions (see paragraphs 24, 52, 53 and 54 above).

108. The Court further notes that in its decision of 5 June 2015 the Court of Cassation essentially found that the investigation, which at that point had been pending for already six years, had been ineffective and unreasonably lengthy (see paragraph 48 above).

109. In view of the Court of Cassation's findings that the investigation prior to its decision did not meet the requirements of Article 2 of the Convention, the Court will examine the investigation which took place after

that decision (see *Baranin and Vukčević v. Montenegro*, nos. 24655/18 and 24656/18, § 141, 11 March 2021).

110. The Court observes that, following the Court of Cassation's decision of 5 June 2015, the investigation was not resumed until five months later, on 5 November 2015 (see paragraph 49 above). The investigator took a number of investigative steps. In particular, he interviewed further the doctors of Erebuni Medical Centre, and members and staff of the military medical commissions involved in the procedure resulting in the decision to draft A. Malkhasyan into the army. He also obtained an additional medical expert report, albeit more than a year after the proceedings had been resumed (see paragraphs 50 and 51 above).

111. While those investigative measures were undoubtedly aimed at addressing some of the shortcomings identified by the Court of Cassation in the decision of 5 November 2015, a number of issues outlined therein were never dealt with.

112. In particular, the investigator still failed to establish why the doctors of Erebuni Medical Centre had failed to fully and objectively assess A. Malkhasyan's state of health, including, most importantly, whether their professional activity had been interfered with as a result of M.S., a representative of the Arabkir Military Commissariat, being present during his medical examinations (see paragraph 48 *in fine* above).

113. In addition, during the further investigation the purpose for which A.U. ordered the removal of important medical documents from A. Malkhasyan's file was still not clarified. The Court notes in this connection that the decision of 19 July 2017 not to prosecute A.U. merely stated, without reference to any specific piece of evidence, that M.S. had not interfered with A. Malkhasyan's medical examinations (see paragraph 54 above).

114. As regards the decision of 19 July 2017 not to prosecute H.S., A.A., A.S. and A.Uz. on account of the statutory limitation period, the Court notes the following.

115. It transpires from the Court of Cassation's decision of 5 June 2015 that at the time the investigation was terminated for the first time on 17 July 2014 (see paragraph 42 above), the case file contained a "significant body of evidence" substantiating that A. Malkhasyan's state of health had not been objectively and fully assessed by the doctors of Erebuni Medical Centre and that the results of the examinations that had been carried out had not been fully reflected in their conclusion (see paragraph 48 above). However, it was not until July 2017 that the investigator considered it established that H.S., A.A. and A.S. had failed to properly fulfil their obligations (see paragraph 53 above). Notably, no new evidence was specifically referred to by the investigator in the decisions of 19 July 2017 other than the report of the expert commission of 20 March 2017 (see paragraphs 51, 52 and 53 above). Likewise, in so far as the legal assessment of the conduct of A.Uz., then

surgeon member of the Central Medical Commission (see paragraph 52 above), was concerned.

116. The Court observes, however, that although the expert report of 20 March 2017 did state more specifically that A. Malkhasyan's previous diagnosis of Mallory-Weiss syndrome – which was believed to have been the cause of gastrointestinal bleeding resulting in cardiac arrest – should have been included in the conclusion concerning his state of health, the expert report of 17 September 2009 had already then found that the sharp deterioration of A. Malkhasyan's health on 4 July 2009 and his subsequent death had been possibly linked to acute gastrointestinal bleeding ("Mallory-Weiss syndrome") whereas, as noted above, there was already available evidence to the effect that the conclusion delivered on 19 June 2009 had not been complete (see paragraphs 20, 41, 48 and 51 above).

117. In those circumstances, it is not clear why the investigator initially brought charges against T.G. and G.H., the therapist and neurologist of the Central Medical Commission but not A.Uz., the surgeon of the same commission who had in fact reached the conclusion that A. Malkhasyan had no surgical pathology (see paragraph 52 above) or the members of the expert medical commission of Erebuni Medical Centre, namely H.S., A.A. and A.S., who had issued the incomplete and inaccurate medical opinion which served as the basis for the Central Medical Commission's decision in the first place (see paragraphs 20 and 21 above). As a result, the prosecution of those individuals after more than eight years after the events in question became time-barred (see paragraphs 53, 56 and 60 above).

118. The Court reiterates in this connection that the procedural obligations arising under Articles 2 and 3 of the Convention can hardly be considered to have been met where an investigation is terminated, as in the present case, through statutory limitation of criminal liability resulting from the authorities' inactivity (see *Mocanu and Others*, cited above, § 346, and *Association "21 December 1989" and Others v. Romania*, nos. 33810/07 and 18817/08, § 144, 24 May 2011).

119. The foregoing considerations are sufficient to enable the Court to find that the authorities failed to conduct an effective investigation in the present case.

120. The Court therefore concludes that there has been a procedural violation of Article 2 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

121. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

122. The applicant claimed 50,000 euros (EUR) in respect of pecuniary damage, which included loss of the salary that A. Malkhasyan could have potentially earned had he not died. He further claimed EUR 70,000 in respect of non-pecuniary damage.

123. The Government did not make any submissions.

124. The Court considers that the applicant's claim for compensation for lost earnings is of a speculative nature and should therefore be rejected in its entirety. On the other hand, in view of the grave nature of the violations found, the Court awards the applicant EUR 35,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

125. The applicant also claimed EUR 3,080 for the costs and expenses incurred before the domestic courts and the Court. Those claims included EUR 2,480 for legal fees and EUR 600 for translation and postal costs.

126. The Government did not make any submissions in relation to those claims.

127. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,500 covering costs under all heads, plus any tax that may be chargeable to the applicant.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Rejects* the Government's request to strike the application out of the list;

2. *Declares* the application admissible;

3. *Holds* that there has been a violation of Article 2 of the Convention under its substantive limb;

4. *Holds* that there has been a violation of Article 2 of the Convention under its procedural limb;

5. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 35,000 (thirty-five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 2,500 (two thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 11 October 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth Deputy Registrar	Gabriele Kucsko-Stadlmayer President