ANALYSIS OF EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

RIGHT TO A FAIR TRIAL

ARMENIA

Yerevan, 2021

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Preface

Under Article 46 of the European Convention on Human Rights, Member States are obliged to comply with the final judgments of the European Court of Human Rights in each case in which they are parties. Implementation oversight is exercised by the Committee of Ministers. Thus, States undertake to take individual and general measures to eliminate violations of the applicants' rights accordingly (in an attempt to restore the situation existing prior to the violation) and to prevent new similar violations.

The effectiveness of the European Convention on Human Rights is largely dependent on the level of execution of judgments of the European Court of Human Rights, which in turn presupposes a continuous process of compliance of domestic legislation and law enforcement practice with the standards set by the Court.

However, the recurrence of applications to the European Court of Human Rights concerning identical violations indicates the existence of a systemic problem that gives rise to breaches of the law and indicates the need to take adequate preventive measures.

This study aims to identify issues related to the execution of judgments[1] concerning breaches of Article 6 of the European Convention on Human Rights, both at the level of legislation and law enforcement practice, and seeks to improve the human rights protection system in Armenia, proper exercise of the right of citizens to a fair trial and the exclusion of any recurrence of registered violations in the future.

Within the framework of the research, a number of judgments[2] against Armenia were singled out, concerning violations which were considered more problematic from the point of view of the legislative or legal implementation issues[3] underlying them. As a result of the analysis, certain solutions were proposed to prevent the identified violations.

We hope that the conducted research will be useful for the competent state bodies as regards keeping the identified issues in focus and finding systemic solutions, as well as contributing to an increase in the level of protection of the right to a fair trial in the RA.

[1] Towards the Republic of Armenia

[2] As of October 2020

[3] The selection of relevant judgments and analysis of isolated issues does not claim to be exhaustive. The investigation of the issues arising from the judgments of the European Court of Human Rights will be continuous. An assessment of the existence of problems related to the judge's impartiality in court practice arising from the judgement in *Nanushyan and Vardanyan v. Armenia* should be the subject of a separate examination.

CONTENTS

PART 1

Problems related to criminal procedural guarantees

Stepanyan v. Armenia (complaint number: 45081/04)[4]

Issue

The Court found a breach of Article 6(1) of the Convention on the ground that the Criminal Court of Appeal, as a court dealing with issues of fact, had not provided an opportunity for examination of the applicant and those who testified against him.

The Court found that the content of the decision of the President of the Court of Appeal which examined the applicant's complaint, in particular the conclusion that "the applicant did commit the acts in question", showed that the President of the Court of Appeal was competent to consider not only law but also fact. In addition, the President had the power to make a full assessment of the applicant's guilt or innocence and to impose a sentence, which he did on the basis of the case file.

The court found that due to certain circumstances of the case the applicant's guilt or innocence could not have been properly determined in a fair trial without a direct assessment of the applicant and the witnesses (in this case the police) who personally testified against him (they contradicted each other, and in his complaint to the Appeal Court, the appellant challenged the veracity of the testimony against him).

Government Action Report (October 24, 2014)[5]

(General measures)

✓ Legislative changes were made even before the verdict was announced, and the institution of administrative detention was abolished.

✓ In 2007, a specialized Administrative Court was established, and in 2010, the superior instance, the Administrative Court of Appeal, with provision to give the opportunity to appeal its decisions to the Court of Cassation..

✓ A comprehensive Administrative Procedure Code was adopted in 2013 and, under the new procedural legislation, the parties enjoy all basic procedural rights, including:`

- The right for their case to be heard
- The right to present evidence in their defense
- The right to submit motions for recusal
- The right to present evidence and to be present at their examination

[4] Stepanyan v. Armenia (complaint no. 45081/04, 27 October 2009),
Accessible at:
http://hudoc.echr.coe.int/eng?i=001-95288

[5] For details, see: http://hudoc.exec.coe.int/eng?i=DH-DD(2014)1324E

- The right to interrogate: each other, witnesses and experts; the right to submit motions and give explanations to the court, etc.

As regards the right to an oral hearing, the Government states that it has taken all the required measures to ensure that this is legislatively guaranteed. In particular, according to the Administrative Procedure Code, cases shall be heard orally, the only exception being if there is mutual agreement of the parties to examine the case in writing. It is specially emphasized that, according to Article 142 of the of Administrative Procedure Code, cases are heard by the Court of Appeals in accordance with the rules of examination of the Administrative Court, taking into account the specifics of the same article, which means that all guarantees which apply to examination in the court of first instance also apply here. According to the Government, the above provisions exclude the risk of recurrence of such a breach in the future, as they clearly guarantee the rights of oral hearings and competitive litigation in administrative proceedings.

As regards the jurisdiction of the Court of Appeal, the Government submits that the Military and Criminal Court of Appeal has been dissolved, and in its place the Criminal Court of Appeal is established, and that all administrative cases are now heard by the Administrative Court of Appeal. Under article 144 of the Administrative Procedure Code, the Administrative Court of Appeals, within the framework of an appeal, reviews the judicial act of the Administrative Court of First Instance within the limits of the appeal, and takes appropriate measures to examine the merits of the case. In addition, according to the same provision, the Administrative Court of Appeal has the power to admit evidence not submitted or examined during the proceedings in the court of first instance. This means that the Administrative Court of Appeal examines both issues of law and fact.

Legislative regulations / issues

Regarding administrative proceedings

The procedure for hearing a case in the Administrative Court of Appeal is defined by Article 142 of the RA Administrative Procedure Code. This provides that the trial of a case in the Court of Appeal is carried out in accordance with the rules of conducting a trial in the Administrative Court, taking into account the specific provisions of the same article. Part 3 of the article sets out these specific provisions and, accordingly, a trial in the Court of Appeal begins with the report of the presiding judge: he/she sets out a summary of the appeal and the defense, then the panel judges have the right to ask questions to the presiding judge and the participants of the trial, after which the trial of the case ends and the place and time of issuing the judicial act are announced.

Part 1 of Article 144(1) of the Administrative Procedure Code (limits of appeal in the Court of Appeal) stipulates that the Court of Appeal shall review the judicial act within the limits of the request set forth in the appeal, taking the necessary measures to examine the merits of the appeal. According to the 2nd and 3rd parts of the same article:

"2. The Court of Appeals shall accept the evidence not submitted to the Administrative Court by the participant of the trial within the period established under this Code or by the Administrative Court, unless it deems that it is not essential for the resolution of the case (:…).

3. During the examination of the appeal in the Court of Appeal, a fact confirmed in the Administrative Court shall be accepted as a ground if that fact is not disputed in the appeal, or the Court of Appeal does not consider it necessary to re-examine it."

Interpretation of the cited provisions may lead to the possibility that evidence examined in the lower court be re-examined in the Court of Appeal. However, at any rate one cannot equate the possibility of re-examining the evidence examined in the court of first instance with re-examination of the interrogated witnesses, as the testimony given by a witness is considered evidence, while the evidence formed as a result of re-interrogation of a witness is new testimony: new evidence.

Similarly, although the provision in Article 144(2) clearly defines the possibility of presenting and examining in the appellate court evidence which was not submitted to the lower court, under the current regulations this cannot be equated with the possibility of questioning witnesses not questioned in the court of first instance.

Regarding criminal proceedings

Under Article 390 of the RA Criminal Procedure Code, the examination of cases in the Criminal Court of Appeal is carried out in accordance with the rules established by Article 391 or the rules for the examination of cases in the Court of Cassation, except for the procedure established by the written appeal procedure in the Court of Cassation[6]. Accordingly, the evidence examined in the court of first instance is only examined in the court of appeal if the parties request and if the court deems it necessary.

In addition to the above, Article 382 of the Code, in exceptional cases, gives the parties the right, in order to substantiate their grievances or to respond to the grievances of the other party, to submit new materials to the court or to request a court to call a witness or expert they have appointed or to order expert examination, if they can demonstrate that they had not objectively been able to do so, or that the motion was rejected by the court of first instance as unfounded.

Thus, in effect, the Criminal Court of Appeal has the legislative power in the case to examine previously examined evidence, moreover, to admit and obtain new evidence, and cross-examine previously uninvestigated witnesses, but, like the Administrative Court of Appeal, it does not have the power to cross-examine already interrogated witnesses.

The same issues are retained in the new draft Criminal Procedure Code: Articles 365 and 369(4).

Legal practice / issues

In practice too, the Administrative Court of Appeal does not enable interrogation of witnesses whether or not they were examined and unexamined in the Court of First Instance, and this was confirmed by the Chief of Staff of the Court in response to an inquiry by the Law Development and Protection Foundation (hereinafter also referred to as the *Foundation*), according to which such case law does not exist.

[6] The procedure for hearing an appeal in the Court of Cassation does not, in essence, involve the examination of evidence (Criminal Procedure Code, Article 418).

As regards the case law of the Criminal Court of Appeal on the same issue, we learn from the Judicial Information System (www.datalex.am) that there are many criminal cases in which the court has examined both evidence examined in the lower court and newly obtained evidence, interrogated previously unexamined witnesses, victims or experts[7], but no cases have been reported in which the court has questioned witnesses who were already cross-examined in the first instance.

Interviews with about 10 advocates (hereinafter referred to as *advocates*) with 5-20 years of legal experience have also shown that there is almost no such practice. Specifically, only two of the respondents mentioned that in practice they had one case when the Criminal Court of Appeal upheld the motion to question a witness / expert who had been cross-examined in the first instance.

Conclusion

As a result of the analysis, we can state that the problem of applying general measures arising from the ECHR decision of Stepanyan v. Armenia exists, both at the legislative level and in law enforcement practice. In particular, neither the administrative nor the criminal procedure legislation provides for the possibility of questioning in the court of appeals, if necessary, and directly assessing the testimony of a witness who was interrogated in the court of first instance. At the same time, in this matter also, the courts are usually not directly guided by the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the *Convention*).

Gabrielyan v. Armenia (application No. 8088/05)[8]

[7] ARD1/0006/01/19, ARAD/0043/01/17, AVD/0076/01/17, AD3/0070/01/17, ARD/0076/01/16, EAQD/0123/01/16 and EKD/0145/01/16
[8] Gabrielyan v. Armenia (application No. 8088/05, April 10, 2012),
Accessible at: http://hudoc.echr.coe.int/eng?i=001-110266

Ter-Sargsyan v. Armenia (application no. 27866/10)[9]
Avetisyan v. Armenia (application no. 13479/11)[10]
Manucharyan v. Armenia (application no. 35688/11)[11]
Asatryan v. Armenia (application no. 3571/09)[12]
Chap Ltd v. Armenia (application no. 15485/09)[13]
Dadayan v. Armenia (application no. 14078/12)[14]
Avagyan v. Armenia (application no. 1837/10)[15]
Martirosyan v. Armenia (application no. 18550/13)[16]

Issue[17]

In the above group of cases (Gabrielyan v. Armenia being the leading case, the others repeating the issue), the Court found a breach of Articles 6(3)(d) and 6(1) on a number of grounds as regards both those witnesses whose pre-trial testimony was crucial for the outcome of the case (in terms of establishing the guilt of the person), as well as for not providing the opportunity to interrogate the experts and for the inadequacy of safeguards against their absence during the trial.

Gabrielyan v. Armenia[18]

[9] Ter-Sargsyan v. Armenia (application no. 27866/10 27866/10, October 27, 2016),
Accessible at: http://hudoc.echr.coe.int/eng?i=001-167762
[10] Avetisyan v. Armenia (application No.13479/11, November 10, 2016),
Accessible at: http://hudoc.echr.coe.int/eng?i=001-168390
[11] Manucharyan v. Armenia (application number 35688/11, November 24, 2016),
Accessible at: http://hudoc.echr.coe.int/eng?i=001-168860
[12] Asatryan v. Armenia (application number 3571/09, April 27, 2017),
Accessible at: http://hudoc.echr.coe.int/eng?i=001-173089
[13] Chap Ltd v. Armenia (application number 15485/09, May 4, 2017),
Accessible at: http://hudoc.echr.coe.int/eng?i=001-173366
[14] Dadayan v. Armenia (application number 14078/12, September 6, 2018),
Accessible at: http://hudoc.echr.coe.int/eng?i=001-186037
[15] Avagyan v. Armenia (application number: 1837/10, November 22, 2018),
Accessible at: http://hudoc.echr.coe.int/eng?i=001-187688
[16] Martirosyan v. Armenia (application number: 18550/13, December 6, 2018),
Accessible at: http://hudoc.echr.coe.int/eng?i=001-187941
[17] *Al-Khawaja and Tahery v. the United Kingdom [Grand Chamber]*, no.s 26766/05 and 22228/06 in paragraphs 119-147 the Grand Chamber clarified the principles that should apply when a witness fails to appear in open court. These principles were explained in detail in *Schachashvili v. Germany [Grand Chamber]* (No. 9154/10, §§ 111-131). Accordingly, the court must first consider whether there is good reason to recognize as evidence the testimony of a witness who has not appeared in court, whether that testimony is conclusive or the only evidence, and whether there are procedural safeguards against the absence of a witness at trial.

[18] The main positions on the issue under discussion were stated by the Court in the case of Gabrielyan v. Armenia; they are largely repeated in the other cases, so the additional positions of the Court are presented in the section dedicated to them.

The Court has held that the efforts of both the Court of First Instance and the Court of Appeal to determine the whereabouts of witnesses absent from their place of residence and to ensure that they can be questioned, cannot be considered sufficient to guarantee the right under Article 6(3) of the Convention. In particular, the courts sought the assistance of the police to ensure the presence of these witnesses, but the latter, apart from learning that the witnesses were absent from their place of residence, made no other effort to locate them, including no evidence that the police had tried to get their new addresses or to find out whether their absence was temporary or permanent. In addition, the Criminal Court of Appeal, like the Police, on finding that one of the witnesses had left for Russia and the other had left Armenia, made no extra effort to locate them, including no attempt to apply for international legal assistance to establish the whereabouts of the witness who had left for Russia.

The court found that even the fact that a witness was absent from the country was not in itself sufficient to prevent him from being questioned, but required positive action from the state, allowing the accused to cross-examine witnesses who testified against him.

The Court also held that the requirement of good reason for admitting evidence presented by an absent witness is a priority matter, which must be considered before the evidence can be considered sole or decisive, and even if it is not, there is a breach of the Convention if no grounded reason is given for not examining the witness.

Ter-Sargsyan v. Armenia

In this case, the Court did not find convincing that the reasons for the witnesses not appearing at the trial, including lack of funds, family and work circumstances, could be considered as grounds for not questioning them and for admitting their pre-trial testimony – which was decisive in convicting the applicant – as evidence.

The Court found that the national courts could have relied on international legal assistance under the Minsk Convention of 22 January 1993[19], to which both Armenia and Kazakhstan were party, rather than easily accepting the reasons given by the witnesses without even considering the possibility of reimbursing their travel and accommodation expenses as provided for in the said convention.

Avetisyan v. Armenia

The court found that the debate with one of the witnesses during the pre-trial investigation was not sufficient to make up for the lack of cross-examination of witnesses during the trial, as the national court did not assess the result of the applicant's debate with the witness from the point of view of assessing the reliability of the witness's testimony.

The Court notes that the fact that the applicant agreed (in effect involuntarily) to continue the trial in the absence of these witnesses does not mean that he waived the right to cross-examine witnesses who testified against him.

Manucharyan v. Armenia

[19] HHAGNPT 2004.12.20/3(11), For more details, see the Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Cases, HRAS 2004.12.20 / 3 (11), https://www.arlis.am/DocumentView.aspx?docID=79371:

As in the cases of Gabrielyan and Ter-Sargsyan, in this case too the Court found that the absence of a witness from the jurisdiction was not in itself sufficient grounds to justify his absence from the trial, and the authorities should "actively search for the witness" and undertake "everything which was reasonable to secure the presence of the witness". The court did not consider it sufficient that the police had visited the witness's house several times and, being informed that he was abroad, did not check the authenticity of that information, nor did they try to ascertain his whereabouts.

Asatryan v. Armenia

In its decision in the case, the Criminal Court of Appeal relied on the pre-trial testimony of a number of witnesses to substantiate the applicant's motive for killing the victim, but their testimony was not researched – neither by the Court of First Instance nor the Court of Appeal. These witnesses have also not been questioned in court.

The court found that these testimonies had played a significant role, and in the circumstances described it was possible that admitting them as evidence may have limited the defense's possibilities, and so the Criminal Court of Appeal was obliged to give the applicant a proper opportunity to present his defense and present all his arguments. In such circumstances, the fact that the Court of Appeal did not personally examine the witnesses whose testimony was subsequently used against the applicant could have had a significant impact on the applicant's right of defense. The Court also found a breach of domestic law (Article 393 of the RA Criminal Procedure Code) on the basis of the Court of Appeals admitting the testimony of witnesses not examined in the Court of First Instance or in its proceedings.

Chap Ltd v. Armenia

The court considered Article 6 to be applicable also to fines and penalties against the applicant company (administrative proceedings).

The court noted that the Administrative Court refused to grant the applicant's motion to call a number of witnesses, arguing that their testimony was irrelevant, and thus the question of good reasons for their not appearing was not even raised, although the court relied on the documents and statements made by those witnesses when reaching its decision (they were crucial). At the same time, there were no legal safeguards to balance the limitation on the applicant company's ability to interrogate these witnesses, in particular the RA Administrative Court rejected the applicant company's request to examine the tax documents of those companies which claimed that they had not received properly documented services from the applicant company, although such interrogation could have enabled an assessment of the credibility of their statements.

Dadayan v. Armenia

The witnesses in this case, whose testimony was decisive in determining the applicant's guilt, were convicted in the Republic of Georgia, the authorities of which refused to transfer them to Armenia on the grounds that their judgments had not yet entered into force and were still subject to appeal.

The Court, however, did not consider this a valid reason for not questioning the witnesses, noting that the trial court did not make any other efforts, such as to find out when their convictions would become final, and whether they could, according to the 1959 European Convention on Mutual Assistance in Criminal

Matters[20], be later transferred to Armenia. No other means of allowing the applicant to cross-examine the witnesses were considered, such as taking oral statements from them in Georgia, or video link.

Avagyan v. Armenia

The applicant's guilt in the case was determined on the basis of the results of a number of examinations. The expert opinions had significant contradictions, so the Applicant asked the Court of First Instance to summon some experts for questioning in connection with their conflicting findings, but his request was denied. The applicant did not have the opportunity to question those expert witnesses in person at the pre-trial stage either.

The Court found that the applicant's motion was not unfounded, as the expert opinions under discussion were crucial to the case. Referring to its case-law, the Court noted that the defense should have not only the right to review and challenge the expert opinion, but also the right to challenge the credibility of its authors through direct questioning[21].

Martirosyan v. Armenia

In this case, the Court reiterated the issue of the national court not taking additional measures to bring persons to court to be questioned, and relying on their pre-trial testimony (not seeking two of them in Armenia and not seeking international legal assistance to determine the whereabouts of the others).

The court noted that one of the requirements of a fair trial was to give the accused the opportunity to challenge the admissibility of a witness's testimony against him or to question the witness who testified against him in the presence of the judge who would make the final decision in the case. Because the latter's observations on the witness's behavior and on the extent of his/her trustworthiness can have repercussions for the accused[22].

The Court also noted the fact that the Court of First Instance did not indicate in its judgment that special care had been taken in respect of unverified evidence or that such testimony had been given less importance.

Government Action Plan (11.07.2018 թ.)[23]

(General measures)

✓ Article 67 of the Constitution as amended in 2015 regulates in more detail the right of a person to question those who testify against him/her

✓ The current Criminal Procedure Code guarantees the right of the accused to interrogate the person who testified against him in both the pre-trial and trial stages, and stipulates the investigator's obligation to ensure a debate between the accused and other persons in cases of discrepancies in their testimony.

[20] For details see: HHAGNPT 2004.12.20/5(13), https://www.arlis.am/DocumentView.aspx?DocID=81172:
[21] Kashlev v. Estonia, No. 22574/08, § 47:
[22] Hanu v. Romania, No. 10890/04, § 40:
[23] For details, see: http://hudoc.exec.coe.int/eng?i=DH-DD(2018)764E:

✓ The current Criminal Procedure Code provides for the possibility of forcing a witness to appear in cases of non-appearance without reasonable grounds, in addition, the witness is obliged to inform the investigating body about any change of residence as well as to inform the summonsing body, within the period stipulated in the summons, of the reason for failure to attend court

✓ The new draft Criminal Procedure Code establishes a completely new principle of criminal procedure, according to which a person's guilt cannot be established solely or mainly based on the testimony of a person whom the accused or his/her defense counsel did not have the opportunity to cross-examine; in addition, it stipulates that the parties must have an equal opportunity to present and defend their position, and the judgment may be based only on evidence which has been examined on an equal footing by all parties; the draft also envisages the possibility of remote interrogation of a witness.

✓ The Court of Cassation has developed its case law, bringing it in line with the standards set by the ECHR, namely:

- The court may not base its judgment on "unverified" evidence
- It will be considered a breach of criminal procedure law if a person is convicted solely or to a decisive extent on the testimony of a person whom the accused has not had the opportunity to question or whose testimony he/she has not been able to investigate.
- Face-to-face questioning should be carried out even if the accused has exercised his/her right to remain silent and has not testified: he/she he should have the opportunity to interrogate the person who testified against him/her

✓ The Board of the Prosecutor's Office has decided that, on the initiative of the suspect or accused, cross-examination should be carried out diligently and without exception. Moreover, it must be ensured that any witness who has provided decisive information must be cross-examined. In the absence from Armenia of such witnesses, measures should be taken to establish their whereabouts through international legal assistance, wither to ensure their presence or at least their interrogation using telecommunications.

Chap Ltd v. Armenia

✓ The government noted that in 2018 the RA Tax Code came into force, which guarantees a new system for appealing the actions or inaction of the tax officer (appeal to the tax authority's appeals board), which gives the taxpayer the right to interrogate witnesses during such proceedings and ensures all the safeguards of Article 6 of the Convention during the non-judicial protection of taxpayers' rights. Also, a new Code of Administrative Procedure has been adopted, which guarantees the basic procedural rights of the parties, as well as the authority of the court ex officio to demand the parties to give explanations and to present evidence, etc.

Legislative regulations / issues

Cases when the witness has failed to appear in court upon request, or has absconded

Article 86 of the Criminal Code stipulates the obligation for a witness to appear at the summons of the body conducting the proceedings and not to leave for another place without the court's permission, but the RA legislation does not provide for any liability for failure to comply.

Compulsory appearance of a witness in court

The mechanism for compelling a witness to appear is excessively flawed. In particular, although Article 153 of the Criminal Procedure Code provides for the possibility to make a ruling on the apprehension of persons who have not appeared at the trial without good reason, and places the obligation to implement on the police, the Law on the Police, although it repeats this obligation, does not set out any procedures for implementation (the issue is also not regulated in the new draft Criminal Procedure Code). In other words, the current legislation does not in any way specify the actions to be taken by the relevant officer in the implementation of the decision to detain the person (at least the minimum provisions). At the same time, by the decision of the RA Government no. 884-N of 22.06.2006, the Police is authorised to use the Border Electronic Information System (BEIS), and so it has the opportunity to verify the fact of the witness going abroad.

Ability to undertake remote interrogation of an absent witness

As of 2020, the current Criminal Procedure Code provides for the possibility of interrogating an absent witness and the victim remotely (via video link) – but only at the pre-trial stage – if they are unable to appear for questioning due to ill health or age or are out of the Republic of Armenia. The draft of the new Criminal Procedure Code, in contrast to the current law, also provides for the possibility of remote interrogation at the trial stage of the case, of those due to be questioned (Article 327).

Ensuring the attendance of a witness who is abroad

Article 481 of the RA Criminal Procedure Code clearly stipulates the possibility of summoning persons outside the country as witnesses in a criminal case conducted in the Republic of Armenia, in order to carry out necessary investigative or judicial actions in the Republic of Armenia in accordance with international treaties. Moreover, the Republic of Armenia has ratified such international treaties, including 1) the 1993 Minsk Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Matters, and 2) the 1959 European Convention on Mutual Assistance in Criminal Matters. In addition, both provide a mechanism for reimbursement of travel and subsistence expenses in order to ensure the attendance of a witness, the former even fixing the obligation of the requesting state to reimburse the salary of the invited person for days off work.

Use of the testimony of a witness who was not questioned in court

Article 342 of the RA Criminal Procedure Code set out the possibility of publishing the testimony of a witness given during the investigation, preliminary investigation or a previous court hearing (accordingly, using it as evidence), as well as the possibility of videotaping or audio taping his/her testimony during the trial, in cases where the witness is absent for reasons that exclude the possibility of him/her appearing in court. There is no safeguard against the misuse of such testimony. Such a guarantee is provided by the new draft Criminal Procedure Code, according to which the conviction of the accused cannot be based solely or mostly on the testimony of a person against whom the accused or his defense counsel or representative had no opportunity to question (Article 22(7))[24].

[24] It should also be noted that in pre-trial proceedings, the right of the accused to cross-examine the person is ensured only if testimony has been deposed (Article 330), and this is carried out in court, with the participation of the accused and videotaped (Articles 306-309).

Other guarantees of interrogation of witnesses testifying against the accused

Article 65(2)(6) of the current Criminal Procedure Code defines the right of the accused to cross-examine persons who have testified against him/her. However, the same code imposes an obligation on the prosecuting authority to conduct a debate only if there are significant discrepancies in the testimony of the accused and the other person (Article 216(1)). The same provision is also set out in the new draft Criminal Procedure Code (Article 224). That is, the same right is not guaranteed by law in cases where the accused has not testified at all, or has testified, but on another subject, and they do not contradict the testimony of the person who testified against him/her. This issue, however, has been largely resolved by the RA Court of Cassation, which has established in legal practice the obligation to provide the defendant with the opportunity to cross-examine the person who testified against him, irrespective of any preconditions.

However, given the specifics of criminal proceedings in the RA, including face-to-face interrogation procedure, it cannot always be considered as an adequate guarantee in instances where a witness is not questioned in court. In particular, before asking questions to the opposing person, the accused has limited information both about the testimony of the witness him/herself and about other materials of the case, on which in many cases the effectiveness of the interrogation directly depends.

Prohibition of the Court of Appeals from relying on the testimony of witnesses unexamined in the Court of First Instance

Article 393(10) of the RA Criminal Procedure Code clearly states that in its decision the Court of Appeal may be based on the testimony of persons who were not summoned to the Court of Appeal hearing (the cases of summoning witnesses are defined by Article 382 of the Code[25]), but who were interrogated in the court of first instance.

Interrogation of an expert in court

Article 346 of the RA Criminal Procedure Code defines the purpose (accordingly, the basis) and procedure of interrogating an expert in court. According to it, after the publication of the opinion by the expert, he/she can be asked questions to clarify or supplement the opinion. In other words, the sole basis for interrogating an expert in court is a need to clarify or supplement the opinion given by him/her, which does not guarantee the right of the accused to interrogate an expert who has given a decisive opinion in the case.

[25] According to Article 382(3) of the RA Criminal Procedure Code "in exceptional cases the parties have the right to present new materials or request the court to summon their chosen witness or expert or to order expert opinion, if they substantiate that they did not objectively have the opportunity to present those materials, to call a witness or expert, or to petition for the appointment of an expert in the court of first instance, or they can substantiate that the submitted motion was unreasonably rejected by the court of first instance."
According to Article 385(2) of the RA Criminal Procedure Code, "(… .) the Court of Appeal shall review the judicial act based on existing testimony in the case, and in exceptional cases provided for in Article 382(3) of this Code, also based on additional evidence."

The draft of the new Criminal Procedure Code, in effect, provides this guarantee by stipulating: "In the event that a party has requested the questioning of an expert who has given his/her conclusion or opinion, that evidence may not be used without the questioning of that expert" (Article 332(3)).

Legal practice / issues

Compulsory appearance of a witness in court

According to the RA Law on Operative-Investigative Activities, one of the goals of operative-investigative activities is to find witnesses (Article 4). In practice, however, the Police sees the possibility of taking operative-investigative measures only if there is a decision of the body conducting the proceedings, including the court, to conduct operative-investigative measures, as can be concluded from the response by the RA Police to our inquiry. In practice, this means that the police do not consider it possible to apply operative-investigative measures to find a witness who is absent from their place of residence or work and bring them to the court, as the decision to detain them is not enough to do so; at the same time the court on the other hand, under the current legislation, does not have the right to make a decision to undertake such measures on the grounds of the need to find a witness.

At the same time, according to another response from the Police, in about 42.5% of cases (1546 cases) during the last year, the decisions made by the courts to detain persons for questioning remained unfulfilled, and in 1373 cases this was due to the absence of persons from their residence or workplace. In only 85 cases out of the 1373 did the Police make an "operative inquiry" or "acquisition of operative information". In only 14 out of the 85 cases were the sought persons found.

Ability to undertake remote interrogation of an absent witness

Along with insufficient legislative regulation (see section on *legislative issues*), in practice also the mechanism of remote interrogation of witnesses is hardly used. This is shown by data from a study of the judicial information system and the information provided by the RA Prosecutor General's Office.

According to the latter, in the period 2012-2020 only 6 cases were registered in which, on the grounds of absence from the country, prosecutors petitioned the court to interrogate the person via video link. The courts upheld 5 out of 6 motions; one was refused on the grounds that RA legislation did not establish a remote interrogation procedure. This is also the reason generally given by the courts when rejecting the motions of the defense[26].

Likewise, from the results of the study of the judicial information system, we record rare cases when the courts ignored the legislative gap and applied or tried to use telecommunications to interrogate witnesses in order to ensure the accused's right to challenge[27].

At the same time, none of the interviewed lawyers had such experience, which proves the extreme rarity of such practice.

[26] See case number TD1/0020/01/16 for example.
[27] See case numbers ARAD1/0010/01/14 and ShD/0030/01/17 for example.

Ensuring the attendance of a witness who is abroad

Despite a number of judgments against Armenia as described above, the Court found a breach on the ground that the courts did not make sufficient efforts to ensure the presence of witnesses at the trial and, as such, observed the failure to use international legal assistance mechanisms in respect of witnesses abroad; in case law however, the use of this mechanism has not been widespread.

According to the results of a study of the judicial information system, we record rare cases when the courts used the mechanisms of international legal assistance in connection with the summoning of the persons due to be interrogated to the Republic of Armenia for interrogation[28]. In some cases, courts have sent legal assistance requests to the competent authorities of another state asking them to interrogate witnesses/victims themselves[29]. In some cases, courts have not applied or have rejected international legal assistance mechanisms without sufficient reasoning (not in compliance with ECHR standards)[30], including on grounds that raise reasonable doubts as to whether individual judges were aware of those mechanisms[31]. In some cases, the RA Criminal Court of Appeals and the RA Court of Cassation registered breaches committed by lower courts on the grounds that they did not attempt to summon witnesses to the trial using international legal assistance mechanisms[32].

According to the information provided by the Ministry of Justice, during 2015-2019[33] the RA courts did not make any request to another state under the 1959 European Convention on Mutual Assistance in Criminal Matters regarding summoning persons to the RA to be interrogated. In 2020 alone six inquiries of this kind were made. And under the 1993 Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, no such request has been made to date.

Only one of the interviewed lawyers had such an experience: he tried to petition the court to request international legal assistance (to apply the Minsk Convention) to summon a witness whose testimony was crucial with respect to the person's conviction, but consideration of the petition was postponed until the end of the trial. And then the court did not address it. According to the interviewed lawyers, the courts avoid using these mechanisms.

Use of the testimony of a witness who was not questioned in court

Based on a study of the Judicial Information System, we find that in many cases the courts consider admissible as evidence and base their verdicts on unverified pre-trial testimony, without sufficient grounds to prove the impossibility of questioning a person in court (including, for example, instances where the

[28] See case numbers LD4/0027/01/15, ED/0773/01/18, ARAD1/0010/01/14 and ARAD1/0010/01/14.
[29] See case numbers KD3/0046/01/14, LD/0135/01/11, EKD/0067/01/13 and LD/0108/01/10.
[30] See case numbers EAQD/0021/01/16, ED/0060/01/19, TD/0018/01/19, EKD/0018/01/12, TD1/0020/01/16, ED/0853/01/18 and ED/0264/01/18.
[31] In case No. TD1/0020/01/16, the court rejected the motion, arguing that the RA Criminal Procedure Code does not provide for a procedure of summoning to court persons outside RA.
[32] In case No. TD1/0020/01/16 the RA Criminal Court of Appeal, and in case no. TD2/0037/01/15 and case no. TD2/0043/01/17 the RA Court of Cassation noted the problem of non-application of the mentioned conventions.
[33] Data for 2012-2015 have not been retained by the ministry.

witness is absent from their place of residence[34] or country[35]) or simply do not give grounds for such an impossibility[36]. In some cases, this breach is remedied by the Criminal Court of Appeal. For example, in the case TD/0018/01/19 the Court of Appeal stated that the court of first instance merely determined that the witness was not in the Republic of Armenia and had possibly left for Russia, which could not be considered sufficient, nor a reasonable conclusion as regards the lawfulness of the witness's testimony. The Court of Appeal also noted that the fact that the accused waived the right to cross-examine persons who testified against him during the preliminary investigation was not in itself sufficient to assess that the defendant had had a reasonable and sufficient opportunity during any stage of the criminal proceedings to exercise his right to publicly question the witness against him, because he was given that opportunity in circumstances when the preliminary investigation had not been completed, and he did not have the opportunity to familiarize himself with the materials of the criminal case; he did not know and could not have known who had testified against him, and with what substance[37].

However, there have been cases when the courts have shown progressive approaches in this matter. In particular, in some cases, the courts, even considering the possibility of identifying and/or interrogating any persons to be interrogated as reasonably exhausted, as well as the lack of procedural remedies to counterbalance this, found that it would be improper to use their pre-trial testimony, and excluded them from the incriminating evidence presented by the prosecution[38].

Most of the lawyers interviewed confirm that the publication of the pre-trial testimony of those who did not appear in court, and thereafter its use as a basis for the verdict, is widespread court practice. Some allege that most judges do not discuss whether the testimony of a witness who did not appear in court was the only or decisive one in the context of the indictment. The rest of the judges consider the issue and, accordingly, remove the pertinent testimony from the body of evidence.

Interrogation of an expert in court

As with unexamined pre-trial witness testimony in court, it is likewise common practice in Armenia to base judgments on the findings of experts who have not been examined in court. There are often cases when the courts reject the motions of the defense to summon the experts in order to clarify the conclusions upon which the indictment is based or to verify their credibility; however, most such motions are satisfied, a fact also confirmed by the data provided by the interviewed lawyers.

Conclusion

[34] For example, see cases no.s EADD/0001/01/12, EADD/0041/01/13, EADD/0022/01/14, EKD/0172/01/14, LD/0056/01/15 and TD/0018/01/19.

[35] For example, see cases no.s KD1/0023/01/13, EAKD/0268/01/15, AVD2/0016/01/16, EAKD/0153/01/16, ED/0264/01/18 and ED/0222/01/18.

[36] For example, see cases no.s KD3/0042/01/13, ARD/0016/01/14, EKD/0098/01/15, ESHD/0032/01/16, EKD/0010/01/17, LD4/0020/01/18, LD/0013/01/19, LD/0090/01/19, LD3/0011/01/20 and LD1/0020/01/20.

[37] See also the decision of the Criminal Court of Appeal in case No. TD1/0081/01/17.

[38] EMD/0126/01/15, ARAD1/0010/01/14 and ARAD/0029/01/16 (the position of the Court of First Instance in this case was also defended by the Criminal Court of Appeal, noting that to base the verdict on evidence which had not been subjected to the right of counterclaim (confrontation) will lead to a significant breach of criminal procedure law).

As a result of the research, we can state that the issue of implementation of general measures arising from *Gabrielyan v. Armenia* and the other similar ECHR judgments exists both at the legislative level and in legal practice.

In particular, the current legislation does not provide for sufficient procedural and other guarantees[39] related to: 1) bringing to court for interrogation those persons subject to questioning in order to ensure the accused's right to challenge; 2) if this is impossible, then ensuring remote interrogation of those persons, 3) misuse of untested testimony in court, and 4) obligation to interrogate an expert witness if the defendant requests. At the same time, the last three issues seem to be resolved by the new draft Criminal Procedure Code.

Practical problems consist of: 1) insufficient diligence of the Police in the context of insufficient regulation of the institution of apprehending absent witnesses, 2) the practice of remotely questioning witnesses on the basis of the rule of law is almost non-existent, 3) the lack of widespread use of international legal assistance mechanisms to ensure the presence of witnesses from abroad, 4) the widespread use of unexamined witness testimony as evidence, and 5) failure to fully ensure the accused's right to interrogate expert witnesses.

Gaspari v. Armenia (application no. 6822/10)[40]
Matevosyan v. Armenia (application no. 61730/08)[41]

Issue

In these cases, the Court found a breach of Article 6(1) of the Convention on the ground that the domestic courts, in the context of disputing the main facts on which the indictment was based (which were also based on contradictory evidence), had not used every reasonable opportunity to examine the allegations made by the police, who were the only witnesses to the alleged crime and played an active role in the disputed events.

[39] For example, as regards the institution of liability if a witness does not appear in court.
[40] Gaspari v. Armenia (application no. 6822/10, March 26, 2020), accessible at: http://hudoc.echr.coe.int/eng?i=001-201888
[41] Matevosyan v. Armenia (application no. 61730/08, February 12, 2013), accessible at: http://hudoc.echr.coe.int/eng?i=001-196375

Referring to its position previously expressed in a number of cases, the Court noted that, as in those cases[42], in the criminal cases against the applicants, the latter were charged with allegedly committing certain acts during a public event (in the cases under consideration, a gathering); exclusively on the testimony of police officers who were actively involved in the disputed events; moreover, their statements contained inconsistencies.

The Court noted that although national courts usually decide on the need or expediency of calling a witness, there may be exceptional circumstances which may lead the court to conclude that failure to do so was incompatible with Article 6.

In particular, if the defendant's motion to cross-examine witnesses does not cause unnecessary complications, is well-founded, is relevant to the subject matter of the indictment and may strengthen the defense or even lead to an acquittal, then the domestic authorities must provide appropriate reasons for rejecting the motion[43]. In the cases under discussion, however, the national courts did not use every reasonable opportunity – although they should have done in such cases – to examine the incriminating testimony of the police officers, who were the only witnesses to the prosecution and played an active role in the disputed events.

The Court noted that the unconditional confirmation of the police version of events, the failure to properly address the applicant's arguments and the refusal to cross-examine defense witnesses without properly examining the relevance of their testimony, restricted the defense's rights, which violates the guarantees to a fair hearing.

Government Action Plan (02.04.2020 թ.)[44]

(General measures)

In the case of Mushegh Saghatelyan and others (the Gaspari and Matevosyan cases are duplicative from the point of view of that case), in the action plan submitted to the Committee of Ministers, the Government specifies as general measures largely the same measures it indicated in the Gabrielyan group of cases, including:

- ✓ The 2015 amendments to the Constitution, as a result of which the right to a fair trial is regulated in more detail,
- ✓ The new code, which enshrines the right of the parties to have equal opportunities to defend their position and the obligation of a judicial act to be based only on evidence examined on an equal footing,
- ✓ Development of case law by the RA Court of Cassation, which pays special attention to the principle of equality of arms and the right of the defendant to have every reasonable opportunity to present his/her position in conditions that cannot put him/her in an unfavorable position in respect to his/her opponent, etc.

[42] Kasparov and Others v. Russia, no. 21613/07, § 64, Navalnyy and Yashin v. Russia, no. 76204/11, § 83, Frumkin v. Russia, no. 74568/12, § 165:
[43] Saghatelyan v. Armenia, No. 23086/08, §§ 202-204, Murtazaliyeva v. Russia, No. 36658/05, §§ 139-159:
[44] For details see: http://hudoc.exec.coe.int/eng?i=DH-DD(2020)301E:

Legislative regulations / issues

Article 23 of the RA Criminal Procedure Code (Article 21 of the new draft Criminal Procedure Code) enshrines the basic principle of competition. Accordingly, the court, while maintaining objectivity and impartiality, creates for the prosecution and defense parties the necessary conditions for a comprehensive and thorough examination of the circumstances of the case, and the parties have equal opportunities to defend their position, independently choosing the ways and means within the law. The court, through the party's petition, assists him/her in obtaining the necessary materials.

Pursuant to Article 65(2) of the RA Criminal Procedure Code (Article 43(1) of the new draft Criminal Procedure Code), the accused, among other actions, has the right to initiate motions, attach materials to the criminal case, and submit materials for examination. Article 340(3) of the RA Criminal Procedure Code (Article 326(3) of the new Code), which defines the procedure for questioning a witness, in its turn stipulates that a witness summoned to the court upon the motion of a party or called by a party is first interrogated by the party who submitted the motion or called the witness.

The right of the parties to the trial, including the defendant, to summon/present witnesses in court and to present materials/evidence derives from the above provisions of criminal procedure law. At the same time, the court's discretion in examining, satisfying or rejecting the motion of a party, including the accused, to call a witness is quite wide: the law does not provide criteria for resolving this issue.

As for the new draft Criminal Procedure Code, Article 319(1)&(2) provides that the issue of the volume of evidence to be examined is discussed during the preliminary hearings, where each of the parties is obliged to substantiate, in respect of each piece of evidence to be submitted for examination by him/her, the factual circumstance that it confirms or refutes relevant to reaching the verdict, and that in the event that a party's proposal to examine a piece of evidence is rejected, the court must make a decision. In effect, it turns out that the circumstances of justifying / not justifying the significance of the evidence is the criterion for the court to resolve the issue of examining that evidence.

Legal practice / issues

A study of the Judicial Information System shows that although the practice of convicting solely on the basis of the testimony of police officers is not widespread, however, it does exist, both subsequent to the verdicts in question and after the ECHR verdict in Matevosyan v. Armenia[45].
Only one of the interviewed lawyers had such an experience, moreover about 6 years ago.

Conclusion

As a result of the research, we can state that the issue of implementation of general measures arising from the ECHR judgments in the Matevosyan v. Armenia and Gaspari v. Armenia cases exists mainly at the level of legal practice. In particular, in court practice, there are cases when the court relies solely on the

[45] For example see cases no.s EKD/0084/01/16 and TD/0037/01/20.

testimony of police officers when making a guilty verdict (assessing whether a person's guilt or whether the factual circumstances determining his or her guilt were proven).

Harutyunyan v. Armenia (application no. 36549/03)[46]

Issue

In the present case the Court found a breach of Article 6(1) of the Convention on the ground that to convict the applicant the domestic courts had used testimony obtained from the applicant and two witnesses under the influence of violence, without expressing any doubt as to their authenticity, moreover disregarding the fact that the fact of ill-treatment had already been confirmed in the parallel proceedings instituted against the police officers.

There was compelling evidence that a person has been subjected to ill-treatment, including physical violence and threats, the fact that this person confessed – or confirmed a coerced confession in his later statements – to an authority other than the one responsible for this ill-treatment should not automatically lead to the conclusion that such confession or later statements were not made as a consequence of the ill-treatment and the fear that a person may experience thereafter. And the fact that the witnesses were later tortured and constantly threatened with revenge, while they were still in military service, could no doubt have frightened them even more, influencing their testimony. Therefore, the credibility of the testimony given during that period should be questioned, and they should not have been relied on to substantiate the credibility of the testimony given under the influence of torture.

The court found that, regardless of the effect of the testimony obtained through torture on the outcome of the applicant's criminal proceedings, the use of such evidence makes the whole trial unfair. There has accordingly been a breach of Article 6(1) of the Convention.

Report submitted by the Government (according to the Resolution of the Committee of Ministers dated 07.06.2011)[47]

(General measures)

The resolution on the implementation of the case under discussion, by which the Committee of Ministers decided to terminate its oversight of the case, states that the Government presented the following general measures:

- ✓ In the RA Criminal Procedure Code (Article 105) the existence of guarantees of inadmissibility of the use of evidence obtained through violence, threats, deception, mockery, as well as other illegal actions;

[46] Harutyunyan v. Armenia (application no. 36549/03, 28 June 2007),
Available at: http://hudoc.echr.coe.int/eng?i=001-81352.
[47] For details see: http://hudoc.exec.coe.int/eng?i=001-105615

- ✓ The fact that after the Harutyunyan case, no such similar case has been registered in RA case law.

Legislative regulations / issues

Article 11 of the RA Criminal Procedure Code defines the principle of physical and mental immunity of a person, thus guaranteeing that no one shall be subjected to torture, unlawful physical or mental violence, or other ill-treatment during a criminal trial. It is prohibited to extort testimony from persons through violence, threats, deception, violation of their rights, as well as through other illegal acts.

In accordance with this principle, Article 105 of the Code prohibits the use of material obtained in the above-mentioned ways as a grounds for indictment, or its use as evidence. The inadmissibility of the use of factual data as evidence, as well as the possibility of their limited use in the proceedings, shall be confirmed on its own initiative by the body conducting the proceedings or through the mediation of a party (Article 106).

According to Article 126 of the Code, the evidence gathered in a case is subject to a comprehensive and objective examination by analyzing the evidence obtained, comparing it with other evidence, gathering new evidence and checking the sources of evidence, and according to Article 127(1), each piece of evidence is subject to evaluation, including in terms of admissibility.

Thus, the law establishes the obligation of the procedural authorities, including the courts, to examine the evidence and determine whether it is admissible. At the same time, however, it is prohibited to question as a witness in the given criminal case the investigator or an employee of the investigative body who has exercised his/her judicial powers in connection with that criminal case[48]. In other words, when obtaining information about "extorting" testimony at the pre-trial stage, the court does not have the opportunity to check and evaluate it (evidence) independently, directly during the trial by listening to all the alleged actors in the matter. At the same time, even if a criminal case is instigated on the basis of such a statement by the person giving the testimony, it does not in itself provide sufficient guarantees to check the statement and to recognize the relevant testimonies as inadmissible evidence, for a number of reasons:

1) The vast majority of criminal proceedings initiated on the basis of allegations of torture end in practice with a decision to dismiss the criminal case, for example, on the grounds of insufficient evidence to prove the guilt of an official[49],
2) There is no legal regulation according to which the court is obliged to postpone or suspend the trial until the statement of the person testifying is examined in a separate criminal proceeding,
3) Finally, even if we ignore the above issues, even if the prosecuting authority has sufficient evidence to prosecute the official, it is possible that the original trial court will wait years for the verdict in the evidence extortion trail to be reached and enter into force, which would undermine the process of administering justice in the original court case, including the right of the parties to a trial within a reasonable time. At the same time, there may be situations when the accused, or the person to be

[48] They may be questioned as part of an investigation into errors or abuses committed in the course of the proceedings (Article 86(2)(4)).

[49] This assertion was based on the data from the judicial information system, according to which, especially under Article 309.1 of the RA Criminal Code, no official has been convicted to date.

subpoenaed as the accused, hides from the investigation, or the statute of limitations for initiating a criminal case in the issue has expired.

It should be noted, however, that this legislative issue is effectively addressed by the new draft Criminal Procedure Code, which does not prohibit the interrogation of the representative of an investigative body and although it imposes a general prohibition on the investigator[50], there is an exception in cases where a party disputes the admissibility of evidence, or the court has reasonable doubts as to its reliability[51].

Legal practice / issues

A study of the judicial information system revealed that after the ECHR judgment under consideration, the RA courts nevertheless rendered guilty verdicts which, among other evidence, were based on the testimony during the preliminary investigation of defendants and/or witnesses who stated that they were obtained as a result of torture or other ill-treatment, threats, or coercion, and those statements were not comprehensively evaluated during the trial[52]. There has even been a case where that testimony was the sole evidence or at least the decisive one[53].

Most of the lawyers interviewed had experience of such cases. According to them, the courts try very hard not to give an independent assessment to the allegations of testimony in conditions of ill-treatment, bypassing the issue or relying on the fact that the criminal case was not opened based on the materials prepared on the basis of that statement or that the mentioned circumstances were not established in the criminal case. Only one of the lawyers had a case where the court independently assessed the mentioned evidence, deemed it to be testimony obtained in violation of the law, and removed it from the body of evidence.

Conclusion

As a result of the research, we can state that there is a problem of implementing general measures arising from the decision of the ECHR in the case of Harutyunyan v. Armenia, both at the level of the shortcomings of current legislation and in legal practice.

In particular, the courts in some cases use the confessions given by the defendants during the pre-trial investigation, not having the legal possibility of giving a proper and comprehensive assessment (by comparing with the explanations of the preliminary investigator or investigator) to the declarations that they were given as a result of torture or pressure. As for the legislative issues, they will most likely be resolved by the entry into force of the relevant provisions of the new draft Criminal Procedure Code.

Recommendations

[50] See Article 57(3)(5) of the new Code.
[51] See Article 331(4) of the new Code.
[52] For example see case nos. AVD/0059/01/16, EKD/0353/01/16, LD4/0031/01/17 and LD4/0006/01/18
[53] For example see case no. ED/0016/01/19

1. Make additions to the Administrative and Criminal Procedure Codes, enabling, if necessary, to summon and interrogate a witness already questioned in the Court of First Instance as part of the examination of a complaint in the Court of Appeal.
2. Make amendments to the Criminal Procedure Code and/or the RA Law on the Police, defining the scope of actions that the Police is obliged to take to ensure the presence in court of a person due to be questioned.
3. Make an addition to the RA Administrative Offenses Code, establishing administrative liability for failure of a witness, victim or expert to appear in court without a valid reason.
4. To issue an instruction to the Chief of Police, instructing police officers to show diligence in the execution of the decision to detain a person, not limited to simply visiting the place of residence or workplace, but to pursue the matter, including using operative-investigative measures, to find out his/her whereabouts and to bring him/her to the court.
5. By supplementing Academy of Justice training programs for candidates for the position of judge and refresher courses for judges, develop the skills of applying international legal assistance mechanisms to ensure the presence of witnesses who are abroad.
6. By supplementing Academy of Justice training programs and adding to refresher training modules for judges, develop the skills of incumbent judges and candidates for the position of judge in connection with the examination of facts in cases similar to the facts in the *Matevosyan v. Armenia* and *Gaspari v. Armenia* cases, to rectify the practice of convicting a person solely on the basis of police testimony.

PART 2

Problems related to the observance of reasonable time and compulsory execution of judicial acts

Aganikyan v. Armenia (application no. 21791/12)[54]
Grigoryan v. Armenia (application no. 3627/06)[55]

[54] Aganikyan v. Armenia (application no. 21791/12, April 5, 2018), accessible at: http://hudoc.echr.coe.int/eng?i=001-181859
[55] Grigoryan v. Armenia (application no. 3627/06, July 10, 2012), accessible at: http://hudoc.echr.coe.int/eng?i=001-112103

Issue

In its judgments in these cases, the European Court of Human Rights (hereinafter also *the Court, ECHR*) found a violation of Article 6(1) of the Convention on the grounds of a violation of the requirement of a reasonable time for the case to be heard.

Aganikyan v. Armenia

In the present case, the Court noted that the calculation of the period under consideration began on 30 December 2004, when the investigator opened criminal proceedings against the applicant, and ended on 21 November 2011, when the Court of Cassation rendered a final decision in the case. The period was almost six years and eleven months, comprising three court levels, and although the Government asserted that the case was complex because of the nature of the charges against it and the number of victims and witnesses to be questioned[56], and that there was no period of inactivity, the ECHR noted that the pre-trial proceedings in this case, as well as the appeals, ended quite quickly, but the trial in the Administrative District Court lasted about four and a half years. Although there were no particularly long periods of inactivity in the District Court during the trial, the problem was that the case was adjourned 136 times and the trial resumed one year and three months later with the charges changed or new ones nominated at that stage of the proceedings. The Court found that the overall length of the proceedings was not justified.

Grigoryan v. Armenia

In this case the Court, referring to the issue of calculation of the period of criminal proceedings, considered as the beginning of the period under scrutiny not the day of the person's arrest (October 7, 2005), but the day the criminal case was initiated (June 10, 2005), taking into account that although the applicant was formally involved as a witness from the start of the criminal case until his arrest, nevertheless, he was clearly in the role of suspect. Then, taking into account that the proceedings were suspended on August 10, 2006 and were still at the procedural stage on September 10, 2010, the day when the Government's last objection was presented in this case, the Court found that the proceedings had been ongoing for at least five years and three months, and it is possible that it will continue for seven years. Referring to the complexity of the case, the ECHR noted that the period of at least five years and three months, during which the case remained at the preliminary investigation stage, could not be explained solely by the complexity of the case, also noting that nothing in the case file suggested that after suspension of the proceedings (i.e. for a period of at least four years) any legal action was taken.

[56] There were eight victims, and thirty-four individuals were questioned as witnesses during both the pre-trial proceedings and the trial. According to the Government, the participation of a large number of victims and witnesses in the trial was possible only after the application of coercive measures imposed by the Administrative District Court; moreover, several forensic examinations were required to investigate the case, and the amount of evidence gathered was extremely large.

(24.07. Government Action Report (24.07.2019)[57]

(General measures)

- ✓ Back in 2006, the RA Council of Court Chairmen adopted a decision on the observance of a reasonable time for the examination of the case, which instructed the court chairmen to exercise supervision over the observance by judges of a reasonable time for the trial, the organization of the trial and enforcement discipline, and if breaches were revealed, to inform the Council of Court Chairmen.
- ✓ In some cases, the Council of Justice made decisions to discipline judges when the reasonable time requirement of the case had been violated (including in the applicant's case).
- ✓ The RA Presidential decree "On approving the Legal and Judicial Reforms Strategic Plan of the Republic of Armenia for 2012-2016 and the list of measures arising therefrom" set out the provision of effective legal protection measures in case of violations of reasonable time limits.
- ✓ In 2018, the new Judicial Code was adopted, which set out the criteria for assessing the reasonableness of the length of proceedings, and the RA Court of Cassation clarified them in its decisions in accordance with the requirements of the European Court.
- ✓ Examination of the case and issuance of judicial acts within a reasonable time are taken into account in assessing the effectiveness of the judge's activity.
- ✓ Under the new Judicial Code, a judge engaged on a particularly complex case is given the opportunity to apply to the Supreme Judicial Council to temporarily remove his or her name from the distribution list or to set a percentage of cases to be distributed to be assigned to him/her.
- ✓ Under the RA Government decree "On approving the 2019-2023 Judicial and Legal Reform Strategy of the Republic of Armenia and the action plans arising from it", it has been decided to introduce an e-justice system, which will allow for digital communication between the bodies in the field of justice.
- ✓ The draft of the new Criminal Procedure Code provides the ability to appoint a reserve judge, contains an exhaustive list of grounds for postponing hearings, and improves the judicial sanctions mechanisms in case of obstruction of court proceedings or abuse of defined rights.
- ✓ Measures have been taken to establish prosecutorial control over the deadlines in the investigation, as well as to improve the quality and effectiveness of the prosecution in court.
- ✓ Since 2016, the Armenian Civil Code has established the right to compensation for non-pecuniary damage in case of violations of fundamental rights and freedoms, including the right to a fair trial. The civil case no. EAKD/0008/02/14 was referred to, the investigation of which was carried out in breach of reasonable time requirements, and on this basis violation of the fundamental rights to a fair trial and to effective defense was found, and it was decided to confiscate 500,000 AMD from the Republic of Armenia, etc.

Government Action Report (03.05.2016)[58]

(General measures)

[57] For details see: http://hudoc.exec.coe.int/eng?i=DH-DD(2019)829E
[58] For details, see: http://hudoc.exec.coe.int/eng?i=DH-DD(2016)609E

The new draft Criminal Procedure Code sets out a number of mechanisms that can prevent similar violations in the future, including setting deadlines for public prosecutions (Articles 12, 194 and 196), etc.

- ✓ Back in 2006, the decision of the RA Council of Court Chairmen "On observance of reasonable time limits in cases" was adopted.
- ✓ The Prosecutor's Office of the Republic of Armenia has the authority to oversee the legality of the preliminary investigation and investigation, and thus the relevant subdivisions of the Prosecutor's Office are regularly instructed to investigate the reasons for overruns in the preliminary investigation deadlines, to take measures to exclude any unreasonable delays in the preparation of materials, and to strengthen the control over the preliminary investigation deadlines.

Legislative regulations / issues

Article 9 of the Judicial Code stipulates the requirement to carry out the examination and resolution of a case within a reasonable time, as well as the criteria for determining the reasonableness of the length of the examination of the case in court, which are:
1) the circumstances of the case, including the legal and factual complexity, the conduct of the participants in the proceedings and the consequences of a lengthy examination of the case for the participant,

2) the actions taken by the court to carry out the investigation and settlement of the case as soon as possible, and their effectiveness,

3) the overall length of the examination of the case,

4) The average guideline length of examination of a case as defined by the Supreme Judicial Council.

Although according to the schedule approved by the decision of the RA Supreme Judicial Council no. BDK-1-O-1 dated 09.04.2018[59], the decision defining the guidelines for the average length of the examination of cases was due to be adopted by November 1, 2020, it has not been adopted to date. It should also be noted that the RA Constitutional Court, in decision no. SDO-1585[60] of March 16, 2021, conditioned the increase of the level of efficiency of observing reasonable time for the examination of cases with setting out the average guideline length for examining cases by the Supreme Judicial Council.

Article 19 of the Judicial Code of the Republic of Armenia defines the requirements for judicial statistics, in particular, the following indicators are envisaged regarding the time limits for examination of a case:

- The average length of examination of those cases completed during the reporting period, according to the number of hearings,

- The average length of the examination of those cases completed during the reporting period, according to the time period (unit of calculation: hours).

The cited statistics do not allow one to have a true picture of the average length of the hearing, as they do not include the time between hearings. It is obvious that data on the number of hearings and the duration

[59] For details, see: http://www.irtek.am/views/act.aspx?aid=98353
[60] For details, see: https://www.concourt.am/armenian/decisions/common/2021/pdf/sdv-1585.pdf

of the hearings[61] alone are not enough to assess the reasonableness of the examination period. In addition, the need to collect statistics on the overall length of cases is also in line with international standards, in particular the *Guidelines on Judicial Statistics*[62] approved by the Council of Europe's European Commission for the Efficiency of Justice (CEPEJ).

A consequence of the incomplete legislative regulation is the fact that the current RA Criminal Procedure Code does not set a *short maximum deadline* for the proceedings of challenging a pre-trial act. In view of this, the Foundation has proposed to the Government that the new draft Criminal Procedure Code set short deadlines for such proceedings, as most of them relate to the rights of individuals, especially private participants in the proceedings, including restrictions on the exercise of fundamental rights or issues requiring urgent intervention. In practice, examinations on the above-mentioned issues, which last even as long as a year, often render meaningless the subsequent examination of those cases, even if the court upholds the applicant's complaint; the preliminary investigation in such cases becomes ineffective and obsolete. In the amended version of the draft RA Criminal Procedure Code, the maximum term for conducting the pre-trial act challenge proceedings is set at one month[63].

Also problematic in the context of the issue of violation of a reasonable time limit is the effectiveness of the legislative regulation – as defined by Article 162.1 of the RA Civil Code – ensuring the right to compensation for non-pecuniary damage in case of violation of the right to a fair trial[64]. Thus, a claim for non-pecuniary damages may be brought to court both with a claim for confirmation of the violation of the right to a fair trial from the moment the person becomes aware of the violation, and within one year after the entry into force of the judicial act confirming the violation[65]. In view of the fact that the Civil, Administrative and Criminal Procedure Codes do not provide grounds for a procedure for filing a complaint in a superior court to recognize a violation of a person's right to a trial within a reasonable time, in the context of the powers of the Court of Cassation, violation of a person's right can be recognized only by a court of first instance in a separate proceeding. In such circumstances, the court of first instance examines the issue of violation of the right to a fair trial on the grounds of a reasonable time requirement, other than in the framework of the case before the same instance court or superior court, which, in our opinion, cannot be considered lawful in the context of the hierarchy of courts and the principle of independence of the judge. The RA Constitutional Court, in its decision no. SDO-719 of 28.11.2007, considered problematic the possibility for a judge of equal or lower official level to examine the actions (or

[61] As a unit of calculation: hours.

[62] "Every court should collect data regarding the timeframes of proceedings that are taking place in the court. Pending and completed cases within the period (e.g. calendar year) should be separately monitored, and the data on their duration should be split in the groups according to the periods of their duration, i.e. cases pending or completed in less than one month, 1-3 months, 4-5 months, 7 to 12 months, 1-2 years, 2-3 years, 3-5 years and more than 5 years. In addition to the spread of cases according to periods of their duration, the average and mean duration of the proceedings have to be calculated, and an indication of minimum and maximum timeframes should be given as well...". For details see CEPEJ GUIDELINES ON JUDICIAL STATISTICS (GOJUST) adopted by CEPEJ at its 12th plenary meeting (Strasbourg, 10 - 11 December 2008), https://rm.coe.int/1680747678#_ftnref5.

[63] For details, see: http://www.parliament.am/reading1_docs7/K-637_R1.pdf

[64] A study of the case law reveals that there is a judgment in one case (ED/4961/02/18), which partially upheld the claim and confirmed the violation of the plaintiff's fundamental rights to a fair trial and an effective remedy, and a decision was made to award against the Republic of Armenia and in favor of the plaintiff five hundred thousand AMD as compensation for non-pecuniary damage caused by the breach of fundamental rights (currently this decision has been overturned by the Court of Appeal, and the case has been sent for a new trial).

[65] Civil Code, Article 1087.2(9).

inaction) of the same court chairman or judges of higher courts[66] (the possibility of examining the violation of the relevant right by a court of the same level is also not provided by the legislation of other countries[67]). We consider that from the point of view of both a) the jurisdiction to recognize the violation of the right to a fair trial on reasonable time grounds and b) the lack of regulation of the specifics of the relevant proceedings, the remedy of non-pecuniary damages cannot in practice be considered effective in cases of violation of the right to a trial within reasonable time.

The establishment through RA legislation of legislative provisions on measures to prevent violations of the reasonable time of the case and to eliminate the consequences of the violations should be one of the key steps aimed at the systemic solution of the problem. The need to ensure these legislative guarantees was also enshrined in the RA Constitutional Court Decision No. SDO-1585 of 16.03.2021 in the context of the positive responsibilities of the state[68], as it follows directly from the judgments of the European Court of Human Rights[69].

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[66] For details, see the decision no. SDO-719 of the RA Constitutional Court, dated 28.11.2007, https://www.arlis.am/documentview.aspx?docID=40651

[67] According to the Federal Law of the Russian Federation "On compensation for violation of the right to a trial within a reasonable time or the right for execution of a judicial act within a reasonable time", an application for compensation for a violation of the right to a trial within a reasonable time shall be submitted to a court of general jurisdiction or arbitration. At the same time, in terms of the application of federal law, the courts of general jurisdiction are: 1) the Supreme Court of the Republic, the district court, the court of a city of federal significance, the court of the autonomous region, etc., 2) the Supreme Court of the Russian Federation in cases where the case is heard by the federal court, etc. 3) the district arbitration court. For details, see: Федеральный закон от 30.04.2010 N 68-ФЗ (ред. от 19.12.2016) "О компенсации за нарушение права на судопроизводство в разумный срок или права на исполнение судебного акта в разумный срок", http://www.consultant.ru/document/cons_doc_LAW_99919/fd96d06d384a6803f937d319155dfc29a26aa8cc/, Article 3. See also the legislation of Croatia, Montenegro and Poland, which was referred to in the extraordinary public report of the RA Human Rights Defender in 2020 "On the lack of mechanisms for restoration of the right to a trial within a reasonable time".https://ombuds.am/images/files/e722139fe25348c1076dae0df9496c55.pdf?fbclid=IwAR2yGNDGQqkEgifcsQKWG9CFZToURqiH1jMd1poR8K6j2uksYa5gstSigis:

[68] For details, see: https://www.concourt.am/armenian/decisions/common/2021/pdf/sdv-1585.pdf

[69] With regard to the "effectiveness" of remedies in cases of lengthy proceedings, the Court finds that the best solution, as in many fields, unequivocally is prevention. Under Article 6(1), the Contracting States undertake to organize their judicial systems in such a way that their courts can satisfy each of the requirements set out therein, including the conduct of hearings within a reasonable time. If the judicial system is flawed in this regard, the most effective solution to prevent trials of excessive length is to provide for remedial action to expedite the proceedings. Such a remedy has an undeniable advantage over a remedy that provides only compensation, as it not only eliminates the violation a posteriori (hereafter), as in the case of a compensation remedy, but also prevents subsequent breaches of the same type of proceedings. Therefore, this type of legal remedy is "effective" insofar as it expedites the decision of the relevant court. At the same time, the remedy to expedite the proceedings may not be sufficient to settle a situation in which the proceedings were obviously too long. In such a situation, the infringement can be properly solved by providing a variety of remedies, including compensation (see Scordino v. Italy (no. 1) [GC]; No. 36813/97, §§ 183-187, ECHR 2006 V and Cocchiarella v. Italy [GC], No. 64886/01, §§ 74-78, ECHR 2006 V and Fil LLC v. Armenia, application no. 18526/13, 31/01/2019]).
According to the report of the Venice Commission of the Council of Europe on the effectiveness of domestic legal protection in connection with lengthy trials, in order for the reasonable time limit laid down in Article 6(1) of the Convention to be fully complied with in accordance with Article 13 of the Convention, the Member States of the Council of Europe should provide, first and foremost, expeditious measures designed to prevent any (future) unnecessary delay at any time up until the end of the investigation. In addition, they should provide compensation for any breaches of the reasonable time requirement that have already arisen in the course of the investigation (before effective remedies are enforced), for details see CDL-AD (2006) 036rev, 03/04/2007, accessible at: https://www.venice.coe.int/webforms/documents/CDL-AD(2006)036rev-e.aspx.

A review of international experience shows that various preventive measures can be taken to ensure that the case is heard within a reasonable time to avoid unjust delays in the trial. For example:

- opportunities to file an appeal for supervision, setting a deadline by the superior court[70],
- filing an application to a higher court against an act or omission which has unreasonably delayed the execution of a court action[71],
- in case of delay of the trial, submitting an appeal to the Court Chairman with a request to expedite the trial[72],
- setting deadlines for specific proceedings or reducing the length of court procedures and increasing efficiency[73], etc.

It should be noted that RA legislation does not define effective measures to prevent violations of the reasonable length of a case, including acceleration of the proceedings.

Legal practice / issues

Although the RA Constitution and all the Judicial and Procedural Codes stipulate the right of every person to have their case examined within a reasonable time, however, the study of case law proves that violations of the reasonable time for hearing a case are widespread in the Republic of Armenia[74].

According to the annual report of the Supreme Judicial Council (2019), for years there have been delays in criminal, civil and administrative cases; in the case of certain judges, 50% or more of sessions have been scheduled but then cancelled, and in Yerevan 155 criminal and 1628 civil cases have experienced delays of two or more years (reportedly, there are cases that have not been concluded after 10 years or more)[75].

In the framework of this research, based on the data posted in the online "Datalex" judicial information system, statistical data related to the time of the appointment of the first court session in the Administrative Court of Appeal were revealed. Thus, out of the cases submitted to the Administrative Court in 2018-2020, 7730 appeals were filed. Out of these cases, 5,294 were isolated, in which appeals on the merits against decisions of the Administrative Court were examined. The study showed that the average time elapsed

[70] For details, see the Law of the Republic of Slovenia "On the Protection of the Right to a Trial Without Unlawful Delays", which entered into force on 27 May 2006, accessible at: http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4726.

[71] For details, see the provisions of Article 91 of Law No. 217/1896 of the Republic of Austria "On the Organization of the Judicial System", accessible at: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000009.

[72] For details, see Article 6.1 of the Code of Civil Procedure of the Russian Federation, accessible at: http://www.consultant.ru/document/cons_doc_LAW_39570/8fd248bf68414ef74042e4f3ff0e46e249f78047/.

[73] For details, see the Czech Civil Procedure Code and the Law "On Social and Legal Protection of Children", respectively accessible at: https://www.zakonyprolidi.cz/cs/2012-89, https://www.zakonyprolidi.cz/cs/1999-359.

[74] In addition to the statistical data presented in this study, see the 2020 ad hoc public report of the RA Human Rights Defender: "On the lack of mechanisms for restoration of rights in cases of violation of the requirements to trial within a reasonable time", accessible at: https://ombuds.am/images/files/e722139fe25348c1076dae0df9496c55.pdf?fbclid=IwAR2yGNDGQqkEgifcsQKWG9CFZToURqiH1jMd1poR8K6j2uksYa5gstSigis:

[75] For details, see the annual report of the Supreme Judicial Council, Yerevan, 2019. http://new.court.am/storage/uploads/files/service-page/T63G7RkWdVgDqUNjPVQM5ddAQiTGmCyQJhrhWaXm.pdf, Մարդու իրավունքների պաշտպանի հայտարարություն՝ https://www.ombuds.am/am/site/ViewNews/1057:

between the moment of filing an appeal and scheduling the first court session in the Administrative Court of Appeal is 12.1979 months.

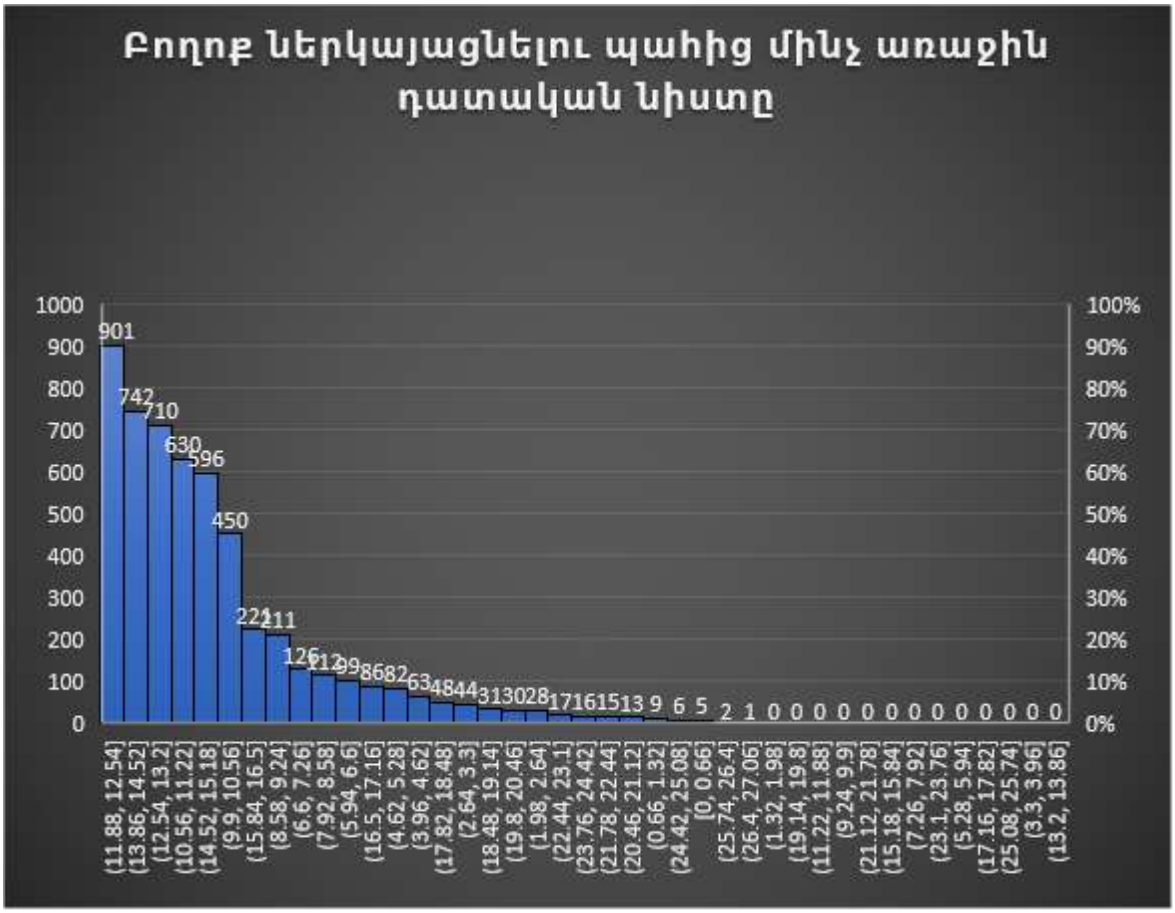
As shown in the chart below, in 265 administrative cases the period from the filing of an appeal to the scheduling of the first court hearing ranged from 16.5 to 27 months. In only 20 of these cases was the new coronavirus not cited as a reason for the postponement or late scheduling of hearings; in the remaining cases the delays were due to the spread of the virus: either the judges were self-isolating, or there was an emergency situation.

Based on the analysis, we note that 4250 out of 5294 administrative cases examined took 10-16 months from the moment of submitting the appeal to the appointment of the first court session.

Thus:

- In 901 cases: 11-12 months
- In 742 cases: 13-14 months
- In 710 cases: 12-13 months
- In 630 cases: 10-11 months
- In 596 cases: 14-15 months
- In 450 cases: 10 months
- In 221 cases: 15-16 months
- In 211 cases: 8-9 months
- In 126 cases: 6-7 months
- In 112 cases: 7-8 months
- In 99 cases: 5-6 months
- In 86 cases: 16-17 months
- In 82 cases: 4-5 months
- In 63 cases: 3-4 months
- In 48 cases: 17-18 months
- In 44 cases: 2-3 months
- In 31 cases: 18-19 months
- In 30 cases: 19-20 months
- In 28 cases: 1-2 months
- In 17 cases: 22-23 months
- In 16 cases: 23-24 months
- In 15 cases: 21-22 months
- In 14 cases: 0-1 months
- In 13 cases: 20-21 months
- In 6 cases: 24-25 months
- In 2 cases: 25-26 months
- In 1 case: 27 months

From the date of lodging the appeal until the first court session



It should be noted that although Article 19 of the RA Judicial Code defines the requirements for maintaining judicial statistics, in practice, data is not published on the average length[76] of trials completed in the reporting period, according to the number and time of hearings, and statistics on this are not maintained on the grounds of lack of technical software[77]. Nevertheless, keeping statistics on the length of the examination is essential from the point of view of maintaining a reasonable period of examination in practice and ensuring adequate preventive measures.

A review[78] of case law shows that in the case of disputes over a refusal to provide information, some trials alone lasted 1-4 years in the Administrative Court, and in some instances even exceeded that period[79]. It is obvious that such legal practice makes the right to freedom of information worthless and deprives the person of the possibility of an effective remedy in case of violation of the right to freedom of information, because the effective implementation of the right to information access primarily depends on providing the information within short deadlines. Pursuant to Article 8(1)&(2) of the Convention on Access to Official Documents[80] adopted by the Council of Europe on 18 June 2009, as well as paragraphs 64 and 66 of its Explanatory Report, a person whose request was rejected in whole or in part, must have the

[76] Clauses 6 and 7 of Article 19(7) of the RA Judicial Code.
[77] This fact was reaffirmed by the Judicial Department, in response to an inquiry, by letter ref. E-266 dated 26.01.2021.
[78] The analysis was carried out on the basis of court case data published on www.datalex.am website.
[79] For details, see the report "Freedom of Information Issues in the Republic of Armenia", 2020, accessible at: https://bit.ly/2PSZgjQ.
[80] On June 24, 2020, the Republic of Armenia signed the Council of Europe Convention on Access to Official Documents.

opportunity to have that decision reviewed in a **court of law** or out of court by an impartial, independent body in a **quick**, inexpensive procedure.

Conclusion

From the research, we can state that there is a problem of applying general measures arising from the rulings of the European Court of Human Rights in cases related to the violation of the reasonable time limit for the examination of a case, both at the legislative level and in law enforcement practice. Thus, the RA legislation has not established a system of necessary preventive and compensatory measures, together with the legal defense procedures arising from it, aimed at ensuring the right to a trial within a reasonable time. The Supreme Judicial Council has not yet set guidelines for the average length of proceedings, which could also help ensure a reasonable time requirement in practice.: The requirements of the judicial statistics defined by Article 19 of the RA Judicial Code do not allow one to form a real picture of the average length of the examination of cases, as they do not include the period between court hearings, and in practice no statistics are kept on the defined indicators. As for legal practice, the results of the study show that violations of the reasonable time for the examination of cases in the Republic of Armenia are widespread.

"FIL" LLC v. Armenia (application no. 18526/13)[81]
Olimp Producers' Cooperative v. Armenia (application no. 47012/15)[82] cases

Issue

In these cases, the European Court of Human Rights has found a violation of Article 6(1) of the Convention on the grounds of violation of the requirement of a reasonable time for the examination of the case (in the context of appointed expert examinations).

"FIL" LLC v. Armenia

The calculation of the period under consideration in this case began on 18 January 2008, when the applicant company instituted compensation proceedings in the Yerevan Civil Court, and ended with the decision of the Civil Court of Appeal of 23 March 2017. So it lasted nine years and two months: the courts of first instance and the appellate courts each heard the case twice. The ECHR noted that the longest delay, lasting seven years and five months, occurred between 23 April 2009 and 10 October 2016, when the case was pending in the Administrative District Court, with the parties waiting to receive an expert opinion.

[81] "FIL" LLC v. Armenia (application no. 18526/13, January 31, 2019), accessible at: http://hudoc.echr.coe.int/eng?i=001-189589

[82] Olimp Producers' Cooperative v. Armenia (application no. 47012/15, July 30, 2020), accessible at: http://hudoc.echr.coe.int/eng?i=001-203974

The ECHR emphasized that the delays in the case could not be attributed to the applicant company; instead, they were attributable to the domestic courts, which over the course of nine years had ordered five technical examinations to resolve the case but failed to ensure four of them were completed.

The ECHR also noted that the case was not particularly complicated, and a letter from the Ministry of Justice dated May 20, 2015 stated that the required technical examination would take only one day and five days to draft the expert opinion. However, the expert opinion originally scheduled for February 20, 2008 was summarized and submitted to the Administrative District Court only on June 30, 2015.

Olimp Producers' Cooperative v. Armenia

The ECHR noted that the length of the proceedings did not meet the requirements of a reasonable time: the total duration was 10 years, 2 months and 17 days. The issues noted in this case were similar to the issues noted in "Fil" LLC v. Armenia, in connection with which the Court had already recognized a violation.

Government Action Report (06.05.2020)[83]

(General measures)

- ✓ A process of improving expert judicial examinations has been undertaken. At present, expert judicial examinations in Armenia are carried out by private organizations, as well as by the Expertise Center of the RA Ministry of Justice and the National Bureau of Expertises of the RA National Academy of Sciences, which are equipped with modern equipment and have experienced and skilled staff. At present, the problem of not having an expert in the field of technical expertise is practically ruled out.
- ✓ The 2019-2023 Judicial and Legal Reform Strategy of the Republic of Armenia envisages that expertise institutions established by the state and operating under the auspices of a state body or institution will be merged into a single expert institution.
- ✓ A working group has been set up to draft a law on forensic activities.
- ✓ The new Civil Procedure Code provides for the possibility of removing obstacles to the judicial examination process.

  The remaining measures have been mentioned in the Government action report in the case of Aganikyan v. Armenia.

Legislative regulations / issues

The RA Criminal Procedure and Administrative Procedure Codes do not stipulate the duty of an expert to immediately inform the court if there are circumstances hindering the expertise, and there is no procedure outlined for requiring the elimination of obstacles, although Article 88 of the RA Civil Procedure Code does set out relevant regulations. According to the latter, if there are circumstances hindering the examination process, as well as in other cases when it is not possible to ensure the normal course of the

[83] For details, see: http://hudoc.exec.coe.int/eng?i=DH-DD(2020)422E

examination, the expert is obliged to immediately inform the court of first instance. The latter, without convening a court session, shall immediately make a decision in order to ensure the examination process. The decision shall specify all the measures to be taken to eliminate the above-mentioned obstacles, as well as to ensure the normal course of the examination, and the deadline for their implementation. If the decision is not voluntarily implemented, the writ of execution drawn up on the basis of the decision is immediately sent for compulsory execution. It is carried out immediately in the manner specified in the law of the Republic of Armenia "On Compulsory Execution of Judicial Acts"[84].

In addition, the RA Criminal Procedure Code also does not stipulate the obligation of the expert to immediately inform the court if it is impossible to perform the examination or specific issues because they do not belong to his/her field of expertise.

At the same time, the RA Criminal Procedure Code does not provide for flexible regulations related to the choice of an expert's form of opinion, which would allow for the provision of an expert opinion in a shorter period of time. In the professional literature, for example, it is recommended to leave the choice of form of the expert's opinion to the court at the trial stage, which will help to avoid delays in the forensic examination process in cases where there is no need for lengthy and complex research to clarify issues that require special knowledge, and the expert could, after examining the materials during the trial, come to certain conclusions and express them orally in court, which would be included in the minutes of the court session and used as evidence (the legislation of Germany, France and the Netherlands was cited as examples of international experience substantiating this proposal)[85]. RA legislation also does not provide for tools to set a maximum period for the performance of examinations[86].

Legal practice / issues

Within the framework of this research, the terms of conducting forensic examinations in the context of ensuring the right to a case examination within a reasonable time have been the subject of a separate study.

Data on the duration of forensic examinations in about 200 civil cases were examined and analysed, which shows that the length of the expert examination in 100 cases was 1-4 months, in 49 cases: 5-8 months, in 37 cases: 9-14 months, and in 14 cases: 15-23 months.

According to the RA Prosecutor's Office official data[87], as at March 25, 2019, there were 916 examinations, comprising 146 types of examination, had been underway for more than 2 months, in criminal cases under the proceedings of all the criminal prosecution bodies of the Republic of Armenia; 261 of these were in

[84] RA Civil Procedure Code, Article 88(4)

[85] For details, see Vahe Yengibaryan, "Perspectives of Institutional Improvement of Judicial Expertise in the Context of RA Criminal Procedure Legislation", Proceedings of the Conference of YSU Faculty of Law, 1(1) 2018, Yerevan-2018, accessible at: http://ysu.am/files/19Vahe_Yengibaryan.pdf?fbclid=IwAR2jNkACG7pxWTi2LPYiV_WrjMs-RF-uEp3_z5Uhn1UKpMRKkB4ElEy_pq8

[86] Սանդղակման տե՛ս Establishment of such a toolkit is envisaged, for example, in the Russian Federation, where it is proposed that the head of a forensic medical institution limit the period of forensic medical examination to 30 calendar days. It is also envisaged that the said period may be extended for a period not exceeding 60 days, and in case of a commission or complex examination, for a period not exceeding 180 days. For details, see: https://regulation.gov.ru/projects#npa=112058.

[87] For details, see: http://www.prosecutor.am/am/mn/7455/

criminal cases under the control of RA Military Prosecutor (the remaining amounted to 655). Of these 146 types, 25 concern one area of expertise and 121 are complex examinations. Forensic medical commission examinations made up a significant part of the 146 mentioned types: if out of 916 examinations one type (calculated as 146) accounts for 15.9%, then the forensic medical commission examinations are 196, or 21.4% of the total of 916 examinations.

Quantitatively, the second were forensic vehicle technical examinations: 78, or 8.5%, then forensic accounting (51 or 5.6%), then forensic medical (41 or 4.5%), and then complex forensic psychological and psychiatric (40 or 4.4%).

Out of 916 examinations as of 25.03.2019, the lengths were as follows:

2-4 months: 110 or 12%

4-6 months: 323 or 35.6%

6-8 months: 199 or 21.7%

8-12 months: 150 or 16.4%

12 months or more: 69 or 7.5%.

Length in months	-4	-6	-8	-12	12 and more	Unclear	Total
Quantity	10	23	99	50	69	65	916
Percentage of total	2	5,3	1,7	6,4	7,5	7,1	100

Forensic accounting examinations make up the majority of examinations lasting more than 1 year: 20.3% of examinations lasting 14 months or more than 1 year[88].

The list of expert examinations lasting more than 1 year by types is presented in the table below:

Type of expert examination:	**Total**	**More than 1 year**
Forensic accounting	51	14
Forensic-psychiatric-military-medical	11	8
Forensic medical commission	196	7
Forensic-military-medical	11	7
Forensic psychology-psychiatry	27	3
Forensic construction-engineering	11	3
Forensic accounting, forensic economics	5	3
Forensic video	16	2
Forensic biology-forensic commodities science	2	2
Forensic vehicle mechanical	78	1

[88] Response of the RA General Prosecutor's Office No. 20.2/20.2/563-2021, dated 22.01.2021

Forensic medical	40	1
Forensic handwriting	25	1
Forensic construction-commodity science	13	1
Forensic vehicle mechanics-traceology-materials science	7	1
Forensic medical-firearms	5	1
Forensic commodity-materials science	5	1
Forensic video-face recognition	5	1
Forensic handwriting-documentary	5	1
Forensic accounting-commodity science	4	1
Forensic economics	2	1
Forensic traceology-medicine-commodity science	2	1
Forensic vehicle mechanics-traceology-chemistry-medicine	2	1
Forensic construction-accounting-commodity science	2	1
Economic-accounting-commodity-construction	2	1
Forensic accounting-documentary	1	1
Forensic soil-ecology-accounting	1	1
Forensic vehicle mechanics-medical-microscopics	1	1
Forensic cultural-construction-commodity science	1	1
Forensic materials-traceology-medical	1	1

According to data provided by the "Expert Center of the Republic of Armenia" SNCO, in 2018, 327 expert conclusions were issued in civil cases, 29 in administrative cases and 2284 in criminal cases. In 2019, 209 expert conclusions were issued in civil cases, 18 in administrative cases and 2120 in criminal cases, and in 2020: 98 in civil cases, 16 in administrative cases and 2019 in criminal cases. The conduct of expert examinations usually lasted from **1 week to 18 months, sometimes longer**, depending on the time required to satisfy the application and the complexity of the case[89].

The initiative of the RA Prosecutor's Office to toughen the penalties[90] for illegal mining crimes testifies to the systemic nature of issues related to the length of expert examinations. It was based on the length of the complex-commission examinations (it was stressed that the forensic examination can take 7-8 months, even up to 1 year) and the issue of expiry of the statute of limitations in criminal liability cases[91].

It should be noted that the issue was in particular emphasized by the 2019-2023 Strategy[92] of judicial and legal reforms of the Republic of Armenia, approved by the decision of the RA Government N 1441-L of

[89] Answer of the Director of the "Expertise Center of the Republic of Armenia" SNCO, No. 0058-2021 dated 19.02.2021.
[90] Clauses 1 and 2 of Article 291 of the RA Criminal Code (violation of the rules of subsoil protection and use).
[91] For details, see: https://www.prosecutor.am/am/mn/7843/
[92] In particular, the strategy proposes that those expertise institutions established by the state and operating under the auspices of a state body or institution will be merged into a single expert institution in order to ensure the results and deadlines of expertise conducted during the pre-trial and trial proceedings. In order to increase the efficiency of forensic activity, it has also been proposed to develop a draft law on forensic expertise, which should regulate the legal status of forensic institutions and forensic experts, and regulate legal and organizational issues related to forensic activity, which are insufficiently regulated by the current legislation, while certain issues are not regulated at all.

10.10.2019, in which, specifically, the following was mentioned: "The length and effectiveness of court cases are greatly influenced by the lengths of expert examinations and their vague and untrustworthy conclusions."

Conclusion

As a result of the research, we can state that the problems of applying the general measures arising from the judgments of the European Court of Human Rights in the cases included in this section mostly arise in legal practice, due to unreasonably long deadlines for conducting expert examinations.

The case of Avakemyan v. Armenia (39563/09, 03.10.2017)[93]
The case of Nikoghosyan v. Armenia (75651/11, 04.10.2019)[94]
The case of Dngikyan v. Armenia (66328/12, 30.11.2020)[95]
The case of Fidanyan v. Armenia (62904/12, 04.10.2019)[96]
The case of Papoyan v. Armenia (7205/11)[97]
The case of Khachatryan v. Armenia (31761/04, 01.12.2009)[98]

Issue

In this group of cases, the European Court of Human Rights found a violation of Article 6(1) of the Convention, as well as a violation of Article 1 of Protocol No. 1 on the grounds of failure to comply with or delaying judgments in favor of the applicants. In the case of *Avakemyan v. Armenia*, there was also a violation of Article 13 of the Convention for lack of effective remedies for compensation for damage resulting from expediting or delaying enforcement proceedings.

Avakemyan v. Armenia

The Court noted that the judgments of 3 May 2005, 24 October 2007 and 1 December 2008 were in the applicant's favor and remained unenforced from 24 October 2007 to 13 February 2012, thus failure to enforce the domestic verdicts persisted for four years and three months.

The Government did not submit any argument to substantiate that delay, and the Court found that the Armenian authorities, by failing to take the necessary measures to enforce the final judgments for several years, did not allow the provisions of Article 6(1) to be fully effective in this case, accordingly there was a

[93] Avakemyan v. Armenia (application no. 39563/09, 30 March 2017), accessible at: http://hudoc.echr.coe.int/eng?i=001-172361
[94] Nikoghosyan v. Armenia (application no. 75651/11, May 18, 2017), accessible at: http://hudoc.echr.coe.int/eng?i=001-173500
[95] The case of Dngikyan v. Armenia (application no. 66328/12, July 15, 2017), accessible at: http://hudoc.echr.coe.int/eng?i=001-174418
[96] The case of Fidanyan v. Armenia (application no. 62904/12, January 11, 2018), accessible at: http://hudoc.echr.coe.int/eng?i=001-179861
[97] The case of Papoyan v. Armenia (application no. 7205/11, January 11, 2018), accessible at: http://hudoc.echr.coe.int/eng?i=001-179854
[98] The case of Khachatryan v. Armenia (application no. 31761/04, December 1, 2009), accessible at: http://hudoc.echr.coe.int/eng?i=001-95905

breach of Article 6(1) of the Convention. The Court also found that the applicant did not have an effective legal remedy in order to expedite the enforcement proceedings or to obtain compensation for any damage caused by the delay.

Dngikyan v. Armenia

The Court noted that the judgments which entered into force in favor of the applicant on 22 August 2003 and 22 December 2006, as well as the judgment which entered into force on 22 October 2004, remain unenforced at the time of the judgment, hence the failure to execute those domestic judgments has persisted for about thirteen years and four months. The Court found that the Armenian authorities, having for several years failed to take the necessary measures to enforce the judgments which had entered into force, have not allowed the full effect of the provisions of Article 6(1) in this case, and accordingly there has been a violation of Article 6(1) of the Convention.

Nikoghosyan v. Armenia

The court noted that an August 11, 2009 verdict made in the applicant's favor remained unenforced from March 2010 to June 2015, i.e. almost five years and four months. The Government has not presented any argument to justify the delay, therefore the Court found on the same grounds that the Armenian authorities, through failure over several years to take the necessary measures for enforcement of the final decision, have not allowed the full effect of the provisions of Article 6(1) in this case.

Papoyan v. Armenia

The ECHR noted that the judgment of 30 July 2008 in favor of the applicant in this case had remained unenforced since October 2008, i.e. for more than eight years and eleven months. On the same grounds, the Court found a violation of Article 6(1) of the Convention.

Fidanyan v. Armenia

The Court noted that the judgment of 17 September 2009 in favor of the applicant remained partially unenforced from November 2009 to the present, i.e. for almost seven years and eight months. The justifications were identical to the justifications of the previous cases.

Khachatryan v. Armenia

The court noted that the case concerned the enforcement of a decision to confiscate employees' unpaid salaries and other payments from a private organization. It was not possible to execute the judgment, due to the private organization's lack of financial resources. The Court noted that in this case the Government had assumed certain liability for the debts of the private organization, so the lack of financial resources could not be cited as an excuse for non-enforcement of the judgment. The court noted that the judgment remained partially unenforced (eight years and four months).

Government Action Plan (03.10.2017)[99]

(General measures)

[99] For details, see: http://hudoc.exec.coe.int/eng?i=DH-DD(2017)1129E

✓ In the field of enforcement of judicial acts, the Government intends to take measures to ensure effective cooperation between the Judicial Acts Compulsory Enforcement Service and the Cadastre Committee, excluding possible delays in enforcement proceedings, for example, by ensuring direct access of the RA Ministry of Justice Judicial Acts Compulsory Enforcement Service to the database of the Cadastre Committee.
✓ On the instructions of the Prime Minister of Armenia, two legislative packages concerning the Law on Compulsory Execution of Judicial Acts have been prepared in respect of the cases of this group; one of them relates to the violations registered by the Court (*Avakemyan v. Armenia*), and the other is mainly aimed at improving the effectiveness of enforcement proceedings, including expedited procedures and remedies.
✓ For comprehensive disclosure of the practical aspects of the implementation of the judgments under discussion, working meetings with members of civil society and representatives of the applicants, etc. are planned.

Government Action Reports (Khachatryan v. Armenia, 18.11.2014, 16.02.2015)[100]

(General measures)

✓ The e-government system has been modernized since 2013, as a result of which the e-government systems of the judiciary and the Judicial Acts Enforcement Service are interconnected, so there will be no need to receive a writ of execution for the execution of a judicial act and submit the court decision to the Enforcement Service. One of the goals is to speed up and simplify the execution of judicial acts.
✓ Work has been done to increase the transparency and efficiency of public auctions, thereby enabling more people to participate.
✓ Funds from the state budget are allocated to the Judicial Acts Compulsory Enforcement Service to reduce the potential risks of non-enforcement of judicial acts.
✓ Reforms have been implemented in order to create an effective mechanism of judicial defense against the actions and inaction of state and local self-government bodies.

Legislative regulations / issues

In the *Avakemyan v. Armenia* case, the European Court of Human Rights found a violation of Article 13 of the Convention for lack of effective remedies to expedite enforcement proceedings or to receive compensation for any damage arising from delays to those proceedings.

In order to assess the domestic legislation on existing compensation mechanisms in case of delays in enforcement proceedings or non-execution of a judicial act, let us first refer to the regulations related to compensation of non-pecuniary damage as defined by Article 162.1 of the RA Civil Code. This article establishes the right to compensation for non-pecuniary damage in the event of a violation of the fundamental rights of a person (including the right to a fair trial) as a result of a decision, action or inaction of a state or local self-government body or its official. Pursuant to clause 5 of the same Article, non-pecuniary damage caused by unlawful administrative action is subject to compensation in accordance with

[100] For details, see: http://hudoc.exec.coe.int/eng?i=DH-DD(2014)1419E, http://hudoc.exec.coe.int/eng?i=DH-DD(2015)207E

the procedure established by the Law of the Republic of Armenia "On the Fundamentals of Administration and Administrative Procedure".

The RA Court of Cassation, in the decision[101] made on 07.04.2018 in the case no. EKD/0441/02/16, expressed the following legal position on the procedure of compensation for non-material damage. "…. as a general rule, compensation for non-pecuniary damage occurs in a judicial procedure. In other words, a person with a right to claim compensation for non-pecuniary damage caused by illegal actions or inaction of state and local self-government bodies and officials, as a general rule, can immediately go to court. At the same time, in Article 162.1(5) of the RA Civil Code the legislature made an exception to that general rule (...). If the non-pecuniary damage was caused by the unlawful administration of state or local self-government bodies, then the rules of the RA Law "On the Fundamentals of Administration and Administrative Proceedings" shall apply, regulating the relations arising between the administrative bodies and individuals related to the compensation of the damage caused by the administration."

By the same decision, the RA Court of Cassation referred to its stable precedent position, according to which, in the claim for compensation for damage due to unlawful administrative acts, it must first of all be recognized as unlawful the legal act, action or inaction of the administrative body that harmed the person. Only after that is the person obliged to apply with a claim of unlawful administration to the administrative body that caused the damage, and if the body completely or partially rejects the claim for compensation or does not consider the application, then the person can appeal the administrative act, action or inaction to the supervisory body or to the court.

Summing up the legal analysis set out above, the Court of Cassation noted that the right to compensation for non-pecuniary damage caused by unlawful administrative acts may be exercised through the following procedure:

1) First of all, the action, inaction or administrative act of the state, local self-government bodies and officials that has caused non-material damage shall be recognized as unlawful upon the application (administrative or judicial) of the affected person.

2) Thereafter, the affected person must apply with a claim for compensation for non-pecuniary damage to the administrative body that has committed an unlawful act or has manifested an unlawful inaction or has adopted an unlawful administrative act,

3) In case of full or partial rejection of the application for compensation for non-pecuniary damage, the affected person may, through an administrative procedure, appeal the administrative act on the rejection of that application, or apply to the Administrative Court through an appropriate lawsuit under the RA Administrative Procedure Code with the demand to oblige the administrative body which committed the unlawful act or manifested the unlawful inaction or adopted the unlawful administrative act to adopt an administrative act on compensation of non-material damage,

4) In case of non-consideration of the application for compensation for non-pecuniary damage, there shall operate the institute of legal fiction envisaged by Article 48 of the RA Law on "Fundamentals of Administration and Administrative Proceedings" (if all the necessary conditions are met), within which the affected person can exercise his/her right to compensation for non-pecuniary damage by applying to the Administrative Court with a request for performance of an action, as defined by Article 68(2) of the RA Administrative Procedure Code.

[101] For details, see HHPT 2018.07.04/51(1409).1 Article 780.21 https://www.arlis.am/DocumentView.aspx?DocID=123646

With regard to compensation for monetary damage, in court practice the above procedure is considered applicable to the exercise of the right to compensation for material damage caused by unlawful administrative acts[102].

In case of violation of the right to a fair trial under Article 162.1 of the Civil Code of the Republic of Armenia, if the issue of non-pecuniary damage is interpreted and applied in accordance with the provisions of the European Convention on Human Rights, then the ability to receive compensation for non-pecuniary damage arising from the failure to enforce, or delays in enforcing a judicial act, should be assumed under the same provisions. However, a study of the case law has not revealed any cases against the RA MoJ Compulsory Enforcement Service on the above grounds related to compensation for non-pecuniary damage.

As regards cases related to the compensation of monetary damage caused by the Compulsory Enforcement Service, a study of the case law shows that the claims for compensation of monetary damage are permitted to proceed only after the expiration of the established procedure[103].

We consider that the procedure for compensation[104] of material and non-material damage caused by non-execution or delayed execution of judicial acts, which within the framework of the legal positions expressed by the RA Court of Cassation excludes the simultaneous submission of a claim for damages in relation to the recognition as unlawful of the actions (inaction, administrative act) of the Compulsory Enforcement Service, does not ensure the exercise of the rights of a person to a fair trial, and cannot be considered sufficient in terms of the effectiveness of the implementation of general measures stemming from the ECHR decisions in the above group of cases. Remedies directly stemming from Article 6 of the Convention concerning a violation of the right to enforcement without unreasonable delay cannot be considered effective if it presupposes the need, for no good reason, to exhaust additional administrative and judicial proceedings, and also results in indefinite delays in the provision of compensation.

In the judgment in *Avakemyan v. Armenia*, the Court also found that the applicant did not have an effective remedy to expedite enforcement proceedings, which constituted grounds to register a violation of Article 13 of the Convention. It should be noted that under the regulations set out in the RA Administrative Procedure Code, the actions and inaction of the Compulsory Enforcement Service, as well as administrative acts can be appealed to the Administrative Court. However, the Code does not provide for specific provisions to expedite enforcement proceedings in the Administrative Court. In other words, a lawsuit against the inactivity of the Compulsory Enforcement Service can be considered for a long period of time in the Administrative Court, after which the court's decision can be appealed by the Service to higher courts, which inevitably leads to the pointlessness of this process, rendering the remedy ineffective. Based on the above, we think that clear and concise deadlines should be established in the Administrative Procedure Code for the examination of cases related to the inactivity of the Compulsory Enforcement Service, as well as other regulations aimed at increasing the effectiveness of their examination.

[102] See the decision of the RA Administrative Court on returning the lawsuit in case VD/2986/05/20.

[103] The process of recognition of the action/inaction of the Compulsory Enforcement Service as unlawful, the subsequent submission of a claim for compensation for monetary damage and the rejection of the claim in an administrative process. For example, administrative cases no.s VD/0832/05/16 and VD/0587/05/16.

[104] In case of violation of the right to a fair trial defined by Article 162.1 of the RA Civil Code, if one interprets or applies the regulation related to compensation of non-pecuniary damage in accordance with the provisions of the European Convention on Human Rights.

It should be noted that in the context of supervising the implementation of the *Gerasimov and Others v. RF* case[105], in the context of assessing the measures aimed at speeding up the enforcement proceedings, the European Council's Committee of Ministers referred to the provisions of the RF Administrative Procedure Code (2015), on the basis of which the RF Government attempted to justify the availability of remedies, also citing deadlines for hearings on claims against compulsory enforcement actions, regulations related to the entry into force of a judicial act, and other tools.

As a factor contributing to delays in the compulsory execution of judicial acts, one can single out the mechanisms of administrative liability in the case of intentional non-execution of a judicial act or intentional obstruction of the duties of a compulsory executor. Thus, Article 206.9 of the RA Administrative Offenses Code establishes administrative liability for citizens who intentionally fail to execute a judicial act, and Article 206.5 provides for liability for intentionally obstructing the performance of the legally prescribed obligations of a compulsory executor. At the same time, examination of cases regarding these breaches is undertaken by the Administrative Court under Article 223 of the Code, upon the lawsuit of the relevant body. We consider that in order to increase the efficiency of enforcement proceedings and to reduce the timeframe for the execution of judicial acts, it is necessary to give the Compulsory Execution Enforcement Service the power to impose administrative liability on persons in breach of Articles 206.9 and 206.5 of the RA Administrative Offenses Code, thereby combining the functions of detecting offenses and imposing administrative liability. It should be noted that by the decision of the RA Constitutional Court No. SDO-1578 of February 23, 2021, it was mentioned that, under article 88(2) of the Constitution, both the reservation of the authority to subject to administrative responsibility to the court and the termination – through legislative changes – of such authority are within the jurisdiction of the legislature. Specifically, the Constitutional Court found that giving the court the power to impose administrative liability, or terminating such an existing power, does not lead to a violation of any constitutional principle or right; that choice is fully compatible with the exercise of legislative power under Article 88(2) of the Constitution within the limits of discretion reserved for the National Assembly.

Legal practice / issues

A study of legal practice shows that a large number of judicial acts remain unenforced or are enforced with such delays, that it leads to a violation of the essence of the right to a fair trial. Thus, according to the data provided by the Compulsory Enforcement Service in response to an inquiry, in 2019 on the basis of Article 41(1)(3) of the RA Law on Compulsory Enforcement of Judicial Acts (*the debtor has no property or income that can be confiscated, and the search of the compulsory executor in accordance with the procedure set out in Article 40(3) of the Law, and/or all the legal measures taken by the claimant to search the debtor's property were in vain*) 581,353 enforcement proceedings were concluded, and in 2020: 440,091 enforcement proceedings.

Based on Article 41(1)(2) of the RA Law on Compulsory Enforcement of Judicial Acts (*it is impossible to find out the location of the debtor, and all the legal measures taken by the compulsory executor and/or the claimant were in vain*) in 2019 31,005 enforcement proceedings were concluded during the year and 40,036 during 2020.

[105] 1288th meeting, 6-7 June 2017 (DH), H46-25 Gerasimov and Others v. Russian Federation (Application No. 29920/05), Supervision of the execution of the European Court's judgments, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168070eb9e.

On the basis of Article 42(1)(1) of the RA Law on Compulsory Enforcement of Judicial Acts (*the writ of execution was actually executed*), 427,574 enforcement proceedings were terminated in 2019, and 376,950 in 2020[106].

According to the 2019 and 2020 annual reports[107] on the results of the main work done by the Compulsory Enforcement Service, at the end of 2019 the balance of enforcement proceedings was 5,061, and 15,061 of the enforcement proceedings conducted in 2020 were transferred from previous years.

In the framework of this research, data on the progress of about 120 court cases posted in the "Datalex" judicial information system were studied, of which 118 were administrative cases launched in the Administrative Court by the Compulsory Enforcement Service with a claim to subject to administrative liability for intentional non-execution of a judicial act, and 2 were claims to subject to administrative liability on the grounds of intentional obstruction of the duties of the compulsory executor. According to the results of the study:

- 29 out of the 120 court cases were in the process of being examined,
- Proceedings in another 21 cases were suspended until the conclusion of the examination of the Constitutional Court of the Republic of Armenia of proceedings pursuant to decision no. SDAO-72 of 31.03.2020, concerning determination of the issue of compliance with the Constitution of Article 3(2)(1) and Chapter 29 of the Administrative Procedure Code of the Republic of Armenia and Article 223 of the Administrative Offenses Code of the Republic of Armenia[108],
- 1 court case was suspended on other grounds,
- 7 lawsuits were returned,
- The admission to trial of 3 lawsuits was rejected[109],
- Proceedings in 13 administrative cases were terminated.
- Out of 46 decisions made following examination of the case, in only 20 cases did the Administrative Court uphold the claims of the Compulsory Enforcement Service (the examination period of those 20 cases ranged from 3 to 11 months in the first instance)[110].

According to the data provided by the Special Investigation Service in response to an inquiry, from December 1, 2016 to January 14, 2020, 11 criminal cases under Article 353 of the RA Criminal Code were investigated by the RA Special Investigation Service investigators, of which 10 proceedings were terminated due to lack of a crime, and in 1 criminal case the preliminary investigation was still in progress.

[106] This information could not be provided by the Compulsory Enforcement Service in respect of 2018, as this toolkit in the report module of the enforcement proceedings database was introduced at a later date.

[107] For details, see: https://bit.ly/2OFADqJ

[108] The proceedings of these cases resumed following the decision of the RA Constitutional Court No. SDO-1578 of February 23, 2021.

[109] Two of the three administrative cases concerned intentional obstruction of the compulsory enforcement officer's duties (based on Article 206.5 of the RA Administrative Offenses Code), and the trials of these administrative cases were terminated on the grounds of violation of the two-month period prescribed in Article 37(1) of the RA Administrative Offenses Code.

[110] According to the information provided by the Compulsory Enforcement Service, the Compulsory Enforcement Service does not have accurate statistics related to the inquiry. Nevertheless, from January 1, 2016 to date, on the basis of Article 206.9 of the RA Administrative Offenses Code, the Compulsory Enforcement Service has submitted approximately 178 lawsuits for intentional non-enforcement of a judicial act, of which 37 were upheld, 14 were suspended. 22 were terminated, 43 were rejected, and 62 are in progress.

As regards files prepared and criminal cases initiated under Article 353(2)&(3) of the RA Criminal Code in the period from 01.01.2016 to 31.12.2020, and under Article 353.1 of the RA Criminal Code from 01.01.2018 to 31.12.2020, the information is presented in the tables below.

Files prepared and criminal cases initiated under Article 353(2)&(3) of the RA Criminal Code in the period from 01.01.2016 to 31.12.2020

Number of files prepared.	The initiation of a criminal case was rejected		Number of criminal cases	Sent to the court	Suspended under Article 31(1)(1) of the Criminal Procedure Code	Discontinued under Article 35(1)(1) of the Criminal Procedure Code.	Discontinued under Article 35(1)(2) of the Criminal Procedure Code.	Discontinued under Article 35(1)(6) of the Criminal Procedure Code.	Discontinued under Article 37(1) of the Criminal Procedure Code.	In progress
	Rejected. under Article 35(1)(1) of the Criminal Procedure Code.	Rejected. under Article 35(1)(2) of the Criminal Procedure Code.								
20	15	5	36	4	1	1	21	1	5	3

Files prepared and criminal cases initiated under Article 353.1 of the RA Criminal Code in the period from 01.01.2018 to 31.12.2020

Number of files prepared.	The initiation of a criminal case was rejected		Number of criminal cases	Sent to the court	Suspended under Article 31(1)(1) of the Criminal Procedure Code	Discontinued under Article 35(1)(1) of the Criminal Procedure Code.	Discontinued under Article 35(1)(2) of the Criminal Procedure Code.	Discontinued under Article 35(1)(6) of the Criminal Procedure Code.	Discontinued under Article 37(1) of the Criminal Procedure Code.	In progress	Number of criminal cases
	Rejected. under Article 35(1)(1) of the Criminal Procedure Code.	Rejected. under Article 35(1)(2) of the Criminal Procedure Code.									
6	1	5	92	42	1	16	1	4	3	2	23

Statistics on the execution of judicial acts, as well as the application of sanctions to improve enforcement, clearly show the inadequacy of the measures taken, and consequently the ineffectiveness of the system of legal liability aimed at ensuring the proper execution of judicial acts. The low rate of enforcement of judicial acts is also due to the RA Compulsory Enforcement Service's insufficient array of tools, including

the lack of necessary powers to discover an individual's property or actual income/salary, as well as the necessary tools to ensure two-way communication with the competent state bodies.

According to the information provided by the Compulsory Enforcement Service, the tax authority provides information to the Compulsory Enforcement Service if there is a relevant request and, in order to obtain additional information, the compulsory executor conducting the proceedings must re-apply to the tax authority. According to the information provided by the RA Cadastre Committee, at present the exchange of information is carried out on the basis of inquiries, but a new electronic system for data exchange with the Compulsory Enforcement Service has been developed, which once implemented will work in real time and, if the debtor acquires any property, the information will be transferred to the Compulsory Enforcement Service. It should also be noted that, according to the RA Law on Compulsory Enforcement of Judicial Acts, enforcement proceedings end if the debtor does not have property or income that can be confiscated and all legal search measures to find property by the compulsory enforcer and/or the creditor were in vain. It follows that after the end of the enforcement proceedings the Compulsory Enforcement Service is not obliged to make periodic inquiries on its own initiative to obtain information on the debtor's property and income.

Conclusion

As a result of the research, it is evident that there is a problem of applying the general measures arising from the judgments made by the ECHR in the cases included in this section, both at the legislative level and in law enforcement practice. In particular, the procedures established for the purpose of compensation for monetary and non-pecuniary damage caused as a result of non-execution or delayed execution of judicial acts unlawfully restrict the rights of a person to a fair trial and an effective remedy. In addition, the Administrative Procedure Code does not set clear and tight deadlines for the examination of cases related to the inactivity (as well as challenge of actions and administrative acts) of the Compulsory Enforcement Service, as well as other regulations aimed at increasing the efficiency of their examination. The mechanisms for imposing administrative liability for intentional non-execution of a judicial act or intentional obstruction of the performance of a bailiff's duties are not effective, because of the requirement to submit to administrative liability through a court procedure. In law enforcement practice, a large number of judicial acts remain unenforced or are executed after serious delays, which, among other things, is the result of insufficient measures taken and insufficient tools for exercising the powers of the RA Compulsory Enforcement Service.

Recommendations

1. To establish under RA legislation a system of necessary preventive measures (including accelerated proceedings) to ensure the right to a fair trial within a reasonable time, as well as a special procedure for acknowledging a violation of the right to a fair trial on the grounds of a reasonable time requirement, taking into account the specifics of the proceedings (including defining tight trial deadlines).
2. By the decision of the Supreme Judicial Council, to set the guidelines for the average length for examination of cases.

3. Within the scope of the requirements for judicial statistics, the RA Judicial Code should also provide for the average length of the examination of cases completed in the reporting period according to the complete period of the examination (including the period between court hearings).
4. Ensure in practice the compilation and publication of statistical data according to the defined indicators.
5. Establish in the RA Criminal Procedure Code a short, maximum term for proceedings for challenging the pre-trial act.
6. Prescribe in the RA Criminal Procedure and Administrative Procedure Codes the obligation of the expert to immediately inform the court of any circumstances hindering the expertise, and provide the necessary toolkit for the elimination of the relevant obstacles by the court.
7. Establish in the RA Criminal Procedure Code an obligation for the expert to immediately inform the court if it is impossible to perform the examination or specific issues because they do not belong to his/her field of expertise.
8. To provide in the RA Criminal Procedure Code flexible regulations regarding selection of the form of expert's opinion, which will ensure the provision of the expert's conclusion in a shorter period of time.
9. Take practical and effective measures to exclude in law enforcement practice unreasonably long deadlines for the provision of expertise.
10. Review the procedure for compensation[111] of monetary and non-pecuniary damage arising from non-execution or delayed execution of judicial acts, by providing the ability to file a claim for compensation together with the claim against the unlawful actions (inaction, administrative act) of the Compulsory Enforcement Service.
11. In the Administrative Procedure Code, establish clear and concise deadlines for the examination of cases appealing against the inactivity of the Compulsory Enforcement Service, as well as other regulations aimed at increasing the effectiveness of such cases.
12. Review the mechanisms for applying administrative liability for intentional non-execution of a judicial act or intentional obstruction of the performance of the duties of a compulsory executor, giving the Compulsory Enforcement Service the authority to subject a person to administrative liability for such offenses.
13. Increase the effectiveness of liability measures to ensure the proper enforcement of judicial acts, as well as review the scope of powers and tools of the RA Compulsory Enforcement Service, including the powers necessary to identify the person or the actual income/salary, as well as provision of sufficient tools to ensure two-way communication with competent state bodies.

[111] If the regulation regarding compensation for non-pecuniary damage in cases of violation of the right to a fair trial as defined by Article 162.1 of the RA Civil Code is interpreted in accordance with the provisions of the European Convention on Human Rights.

PART 3

Issues related to specific court procedures and the requirement for reasoning of judicial acts

Ghulyan v. Armenia (application no. 35443/13)[112]

Issue

In *Ghulyan v. Armenia*, the Court found a violation of Article 6(1) of the Convention on the ground that the participation of a particular judge in the case had made the proceedings before the Court of First Instance biased, and this shortcoming was not remedied by the appeal.

Ghulyan v. Armenia

The court noted that in this case the applicant found himself in a situation where the law firm representing his opponent had been established and was managed by the sister and son-in-law of the presiding judge, and the latter's twin brother, Ar. M., was working there as a senior specialist. It is not known whether the sister and son-in-law were actively involved in the case, or whether or not they had a financial interest in the outcome of the case, but it is clear that Ar. M. was actively involved in the preparation of the case. Accordingly, the Court found that an external element of bias had been created.

The Court also noted that in this case the Civil Court of Appeal did not address at all the applicant's arguments concerning the alleged lack of objectivity of the judge during the District Court proceedings. As the complaint was not examined, the external feature of bias in the first instance was not eliminated in the appeal proceedings.

It is important to note that in this case the applicant raised the issue of the Court of First Instance judge's bias only in the Civil Court of Appeal, and only in the context of admitting evidence[113]. The Government argued that the applicant had not exhausted all domestic remedies, also because his appeal to the Civil Court of Appeal had not addressed the issue of impartiality of the judge, citing Article 219 of the Civil Procedure Code, according to which the Court of Appeal has no jurisdiction to go beyond the scope of the appeal and is obliged to review the judicial act within the scope of the basis and justifications of the appeal.

However, the Court rejected the Government's objection on the ground that the applicant had not been aware of the possible bias of the judge who ruled during the District Court proceedings, as he had learned of it only after receiving the District Court decision, and therefore he could not have raised the issue of possible lack of objectivity of the judge during the District Court proceedings. With regard to the

[112] Ghulyan v. Armenia (application no. 35443/13, 24 January 2019), accessible at:http://hudoc.echr.coe.int/eng?i=001-189420

[113] This issue was also not raised in the appeal.

proceedings before the Civil Court of Appeal, the Court considered that the applicant had raised the issue of alleged lack of impartiality sufficiently to comply with the requirements of Article 35 of the Convention.

Government Action Plan (06.05.2020)[114]

(General measures)

✓ First and foremost, the Government stated that there was no reason to believe that the violations in this case were in any way related to policy or legislative shortcomings, or widespread practice.
✓ Both the 2015 constitutional amendments (related to the judiciary) and the new Judicial Code adopted as part of the judicial reforms are based on the principle of judicial independence and impartiality of judges.
✓ The ethics rules set out in the Judicial Code oblige the judge to be impartial and to refrain from expressing bias or discrimination in his/her speech or conduct or from making such an impression on a reasonable, impartial observer.
✓ On December 21, 2018, the General Assembly of Judges adopted a new edition of the Code of Judicial Ethics, which regulated in more detail the behavior which is incompatible with the position of a judge, with a special emphasis on impartiality.
✓ The Government has approved the 2019-2023 Judicial and Legal Reform Strategy and the action plan arising therefrom.
✓ The RA Court of Cassation, in its decision made on 10.06.2019 in case no. AVD/1405/02/14, referred to the issue of a judge's impartiality in the context of subjective and objective criteria; although there were no facts concerning the judge's family ties in that case, the Court of Cassation referred to the decision in the case of *Ghulyan v. Armenia* in the context of an objective criterion. A violation of the right to a trial by an unbiased court was registered in this case.

Legal regulations / issues

As an issue concerning the RA Civil Procedure Code and arising from the verdict in the case of *Ghulyan v. Armenia*, we note the lack of jurisdiction of a superior court, regardless of the grounds for appeal, to examine the issue of the existence of grounds for self-recusal of a lower court judge.

Thus, in accordance with Article 379(1) of the RA Civil Procedure Code, the Court of Appeals reviews the judicial act within the limits of the grounds and substantiation of the appeal, except for the cases provided for in Article 365(3) of the Code. Pursuant to Article 404 of the same Code, during the examination of an appeal under the cassation procedure, the Court of Cassation reviews the judicial act on the case only within the limits of the grounds and substantiation of the cassation appeal, except for the cases provided for in Article 365(3) of this Code.

[114] For details, see: http://hudoc.exec.coe.int/eng?i=DH-DD(2020)423E

According to Article 365(3) of the Civil Procedure Code, regardless of the basis for and substantiation of the appeal, a judicial act is subject to reversal if the grounds for unconditional reversal of a judicial act as set out in part 2, paragraphs 3, 4, 5, 7, 9 and 11 of the same article exist.

According to Article 365(2) of the Code, a judicial act is subject to reversal in all cases, if:

1) The court examined the case unlawfully, including by a judge who should have recused him/herself;

2) The court examined the case in the absence of the claimant, who, within the meaning of this Code, is not deemed to have been notified of the time and place of the court hearing;

3) The judicial act has not been signed or sealed;

4) The judicial act is not signed or sealed by the judge who made it;

5) The judicial act was made by a judge who was not included in the composition of the court which examined the given case;

6) The minutes of the court session are missing from the case;

7) The court session minutes were made with such flaws, that it is impossible to clarify the existence or absence of circumstances significant for the examination of the appeal;

8) During the trial of the case, the right of a person participating in the case to have an interpreter was not ensured.

9) The judicial act has no ratio decidendi;

10) The judicial act affects the rights and obligations of persons who did not participate in the case, except in those instances, when the court notified the person about the case under consideration, but he/she did not want to be involved in the case;

11) There was a reason to terminate the case in the lower court;

12) In the lower court, there were grounds to leave the claim or application without examination;

Thus, in accordance with the provisions of the RA Civil Procedure Code, neither the Court of Appeals nor the Court of Cassation have the power to go beyond the grounds of and justifications for appeal, even if the case was heard in a lower court by a judge who should have recused him/herself. Although the mentioned ground leads to the unconditional reversal of the judicial act, it cannot be the subject of examination, independently from the grounds and justifications of the complaint. Whereas, in the case of a number of other grounds under the same article, the judicial act is subject to reversal, regardless of the grounds for appeal.

The RA Court of Cassation, by the decision[115] made on 12.05.2020 in the civil case No. EAKD/3724/02/17, referring to the grounds of unconditional reversal of the judicial act, reaffirmed its position related to the above-mentioned regulations, noting: "Moreover, the registration of the violations defined in paragraphs 3, 4, 5, 7, 9 & 11 Article 365(2) of the RA Civil Procedure Code ipso facto leads to the reversal of the

[115] For details, see: http://www.irtek.am/views/act.aspx?aid=106638

reviewed judicial act, regardless of the grounds mentioned in the appeal. The nature of the mentioned violations is such that in all events they lead to the reversal of the judicial act, without consideration of the grounds or justifications of the relevant appeal."

Consequently, in the future event of a violation the same as or similar to that noted in the *Ghulyan v. Armenia* case, if the grounds for the judge's recusal were not known to the party in the court of first instance and were raised only during the hearing in the Court of Appeal, then there will be the same issue, due to the provisions of Article 365(3) of the RA Civil Procedure Code.

As for the RA criminal procedure legislation, the grounds for unconditional overturning of the verdict are defined by Article 398(3) of the Criminal Procedure Code, which also includes the grounds of unlawful composition of the court making the verdict.

The RA Court of Cassation, in its decision[116] made on 13.07.2011 in the criminal case no. EKD/0211/01/10, interpreted the mentioned provision, noting as follows: "The Court of Cassation finds that by choosing the wording "in all cases" in Article 398(3) of the RA Criminal Procedure Code, the legislator has expressed a will to make this rule imperative, regardless of the rules determining the boundaries of proceedings in superior courts (Articles 404(2) and 415(1) of the RA Criminal Procedure Code). In other words, if the superior court finds any of the circumstances set out in Article 398(3) of the RA Criminal Procedure Code, it has the right to correct that judicial error, without being constrained by the rules on the limits of judicial review." The same position was expressed in the decision made by the Court of Cassation in criminal case no. EAKD/0065/01/11 on 08.06.2012. Thus, the requirement to assess the existence of grounds for recusal of a lower court judge independently of the grounds for appeal also arises from the precedent decisions of the Court of Cassation, and so in criminal proceedings this issue can be considered resolved.

With regard to administrative proceedings, the provisions of Articles 144 (the Court of Appeal reviews the judicial act within the limits of the demands set forth in the appeal) and 152[117] of the RA Administrative Procedure Code permit one to conclude that the issue noted does not exist at the legislative level. However, taking into account the positions expressed in the decisions of the RA Court of Cassation in various administrative cases, we find that they have, in fact, expanded the scope of legislative restrictions as regards the limits of review. Thus, for example, in the decision made on November 30, 2018 in the administrative case no. VD/2976/05/15, the Court of Cassation expressed the following legal position: "The Court of Appeal must take the necessary measures to examine all the grounds of appeal on the merits, regardless of whether this or that ground referred to in the appeal was discussed in the administrative court or not. In cases where the appeal does not refer to a ground which has not been examined by the administrative court, the appellate court may not go beyond the scope of the case in the administrative court and make a judicial act on grounds which were not referred to in the appeal and not heard in the administrative court."

Therefore, in order to exclude the risk of possible recurrence of the noted violation, we consider it necessary to enshrine in the Administrative Procedure Code the jurisdiction of the superior court to examine the ground defined in Article 152(2)(1) and to reverse the judicial act, regardless of the grounds and justifications for appeal.

Conclusion

[116] For details, see HHPT 2011.10.21/57(860).1 Art.1465.5, https://www.arlis.am/documentview.aspx?docID=71517;

[117] The grounds for unconditional reversal of a judicial act are defined.

As a result of the research, we can state that the issue of application of general measures arising from the ECHR decision made in *Ghulyan v. Armenia* exists both at the legislative level and in legal practice. In particular, the application of *examination of the case by an unlawfully composed court*, being one of the grounds set out in the RA Civil Procedure Code for unconditional reversal of a judicial act, is wholly dependent on the grounds and justifications for appeal. In administrative court procedures, taking into account legal practice, there is a risk of interpreting and applying this principle in the same way.

Tamrazyan v. Armenia (application no. 42588/10)[118]

Issue

In the case of *Tamrazyan v. Armenia*, the Court found a violation of Article 6(1) of the Convention on a number of grounds, including failure by the Court of Cassation to properly state the applicable legal norm, failure to address important arguments presented by the applicant and failure to explain why it did not apply its own case law.

The RA Administrative Court upheld the applicant's claim, affirming that the land, which the applicant had occupied in good faith and openly for more than ten years in a row, but without legal registration of his/her rights, was then sold by the regional administration through auction to another person in breach of Article 72 of the Land Code (right of pre-emption). The RA Court of Cassation, however, had overturned the decision of the Administrative Court and rejected B. Tamrazyan's claim.

The European Court of Human Rights noted that the Court of Cassation, in concluding that Article 187 of the RA Civil Code is not applicable to the present case, as it does not apply to state- and community-owned lands, did not specify which legal provision ultimately applies to the applicant. Thus, on the one hand the Court of Cassation found that Article 187 of the RA Civil Code was not applicable, on the other hand it did not state that Article 72 of the Land Code should have been applied instead. In view of the fact that the land in question was state-owned, **the presumed decision of the Court of Cassation that Article 72 of the Land Code was not applicable to the applicant's case contradicted its own conclusions presented in decision No. 3-1835 (A) of 12 December 2007, and at the same time no explanation was given for such a deviation from its own case law.**

The ECHR also noted that the disputed decision of the Court of Cassation did not contain any reference to its judgments 3-1835 (A) and 3-537 (VD), and moreover there was no analysis of the facts of the applicant's case in the light of the findings in those judgments, although the latter's case particularly concerned state-owned lands. The Court noted that the Court of Cassation, in its decision of March 30, 2007 no. 537 (VD), came to a conclusion on the principle of determining the basis of the pre-emptive right to acquire property by virtue of adverse possession for a statutory period. In particular, the Court of Cassation found that the fact that a person had owned the property openly and in good faith for ten consecutive years outweighed the evidence that another person owned the property.

[118] Tamrazyan v. Armenia (application no. 42588/10, 19 March 2020), accessible at: http://hudoc.echr.coe.int/eng?i=001-201738

In respect of the applicant, however, the Court of Cassation took the opposite approach, giving preference to the fact that the land was state-owned as it was outside the administrative boundaries of the community, while the applicant had paid rent to the community budget. Thus, **the Court of Cassation did not refer to all the evidence examined by the lower court and the arguments given in the response to the cassation appeal** that he had openly and in good faith possessed the land for more than ten years in a row: these are questions which were important in determining whether an applicant could claim a pre-emptive right under domestic law. In these circumstances, **the Court found that the Court of Cassation did not address the applicant's arguments, which were specific, relevant and important to the resolution of the case.**

Government Action Plan (11.12.2020)[119]

(General measures)

✓ The Government stated, first of all, that there was no reason to believe that the violations in this case were in any way related to legislative deficiencies or widespread practice. The domestic legislation sufficiently regulates the relations in question. The existing case law on adverse possession (which is analyzed in the same document) reaffirms the consistent application of the relevant legal provisions.

✓ ***Case law on the acquisition of property rights by virtue of adverse possession***

- Prior to the decision of the Court of Cassation on April 2, 2010, the Court of Cassation, by its decision No. 3-1435 (VD) of 10.10.2007, had discussed the mandatory conditions for adverse possession and, applying them in the case in question, had recognized a person's right of ownership on the basis of adverse possession. Then, by its decisions of 13.02.2009, 05.04.2013 and 25.03.2019, it firmly developed and reaffirmed its position that, if all the conditions are present, persons should be recognized as the owner of the relevant property, even if their property rights are not legally registered. The case law of domestic courts demonstrates the continued application of the established practice of the Court of Cassation.
- In 2019-2020, domestic courts heard more than 220 cases regarding adverse possession, in 174 of which the courts upheld the plaintiffs' claims, recognizing property rights by virtue of adverse possession. Thus, the analysis of the relevant case law shows that the domestic courts, applying the relevant legislation, have consistently recognized adverse possession as a legal means of acquiring ownership of a property.

✓ **Regarding the right to a reasoned judicial act**

- As a result of the amendments to the Judicial Code, the bi-level judicial system in administrative proceedings was replaced by the tri-level one.
- These legislative changes also established the courts' obligation of justify all decisions, even those on inadmissibility.

[119] For details, see: http://hudoc.exec.coe.int/eng?i=DH-DD(2020)1184E

- By the decision of the RA Constitutional Court no. SDO-690 of 09.04.2007, it was established that the normative obligation to state the reasons in a judicial act is an important guarantee of the court's user-friendliness and the effectiveness of the right to judicial remedies.
- In the RA Court of Cassation decisions 3-54 (VD) of 27.03.2008 and 27.11.2015, as well as in other decisions of the Court of Cassation, the obligation to properly reason judicial acts was stressed as an aspect of Article 6(1) of the Convention.
- The Civil Procedure Code adopted in 2018 expanded the requirements for the reasoning of a judicial act by setting out a separate article on the structure of a judicial act.
- The Supreme Judicial Council, whilst exercising its authority to discipline a judge, has considered several cases related to failure to reason a judicial act. Various disciplinary measures were taken by the Council for the disciplinary violations registered in those cases.

Legislative regulations / issues

Regarding the reasoning of a judicial act

The general requirements for substantiation and reasoning of judicial acts adjudicating on the case on its merits are defined by the RA Criminal, Civil and Administrative Procedure Codes, which, if properly applied, do not require additional legal regulations.

The Government Action Plan also referred to the decision of the RA Constitutional Court No. SDO-690 of 09.04.2007, which concerned the requirement of the Court of Cassation to justify a decision on the inadmissibility of the appeal (decision on returning the cassation appeal according to the regulations in force at that time). There are special legal regulations in the procedural codes regarding the reasoning of a decision to return a cassation appeal without examining it.

Thus, according to Article 397 of the RA Civil Procedure Code, the decision to reject a cassation appeal must meet the requirements set forth in Article 200 of the same Code. These also include the following: justifications by which the court came to a conclusion, with reference to laws and other legal acts.

At the same time, by the decision[120] of the panel of justices of the RA Constitutional Court No. SDDKO-6 dated 10.02.2020, the examination of the case concerning an individual application on challenging the constitutionality of the aforesaid provisions of the RA Civil Procedure Code was rejected. In particular, the decision states that the existence of the relevant legislative regulations of the RA Civil Procedure Code and the existence of the position of the Constitutional Court refutes the applicant's arguments on legal uncertainty. Referring to the applicant's question as regards substantiating the conclusion on the lack of grounds for admissibility of the cassation appeal or simply stating the absence of grounds for admission of the cassation appeal without substantiation, the panel of justices of the Constitutional Court noted that the Constitutional Court had expressed its legal position on the issue in the relevant decision, no. SDO-765 of October 8, 2008, noting in particular: “In its decision no. SDO-690, the Constitutional Court links the mandatory requirement of reasoning not to this or that specific ground for the admissibility of an appeal, but to all grounds, without exception.” The decision states that the issue of legality of the judicial act is in fact heightened by an individual application.

[120] For details, see: https://www.concourt.am/armenian/decisions/judicial/2020/pdf/sddkv-6.pdf

The RA Constitutional Court by its decision no. SDO-765 of 08.10.2008 stated that due to the existence of decision no. SDO-690 the RA National Assembly is not endowed with the discretion to place any of the grounds for returning the cassation appeal in a "privileged" category, **and cannot prescribe that a reference to that ground is "self-sufficient" and there is no need to substantiate its existence. Therefore, regardless of what grounds the legislature will prescribe for the admissibility of an appeal, all of them are subject to reasoning.**

It should be noted that by decision no. SDO-690 of the RA Constitutional Court, Article 231.1(2) of the RA Civil Procedure Code (as amended on July 7, 2006), in so far as it did not prescribe that reasoning should be a mandatory condition in a decision to return a cassation appeal, was declared unconstitutional and invalid.

Meanwhile, the provisions in the RA Criminal Procedure and Administrative Procedure Codes related to the reasoning of the decisions on rejecting the cassation appeal to some extent contradict the requirements of decisions SDO-690 of 09.04.2007, SDO-691 of 11.04.2007, SDO-765 of 08.10.2008 and SDO-818 of 28.07.2009 of the RA Constitutional Court.

Thus, according to Article 414.3(2) of the RA Criminal Procedure Code, the decision to reject as inadmissible the cassation appeal must be reasoned. In the decision to reject the appeal, the Court of Cassation **must substantiate the absence of each of the grounds referred to in the cassation appeal for accepting an appeal and provided for in Article 414.2(2), paragraphs 1 and 2 of the Code.**

According to Article 162(2) of the RA Administrative Procedure Code, the decision to reject the cassation appeal as inadmissible must be reasoned. In the decision to reject the appeal, the Court of Cassation must substantiate **the absence of each of the grounds** referred to in the cassation appeal for accepting an appeal and **provided for in Article 161(2), paragraphs 1 and 2 of the Code.**

It follows from the aforementioned legal regulations that the requirement to substantiate the lack of grounds for admissibility of the cassation appeal has been partially ensured, but does not include the following two grounds for admissibility:

- There is a fundamental breach of human rights and freedoms,
- There is a problem of law development[121] in connection with the norm of substantive or procedural law applied by the court.

The same problem exists in the draft RA Criminal Procedure Code as adopted in the first reading[122].

The established exceptions directly contradict the requirements of the RA Constitutional Court decision no. SDO-765 of 08.10.2008, according to which, regardless of what grounds the legislature will prescribe for the admissibility of a cassation appeal, each and all of them are subject to reasoning.

Legal practice / issues

[121] Within the framework of the following grounds for admissibility: the decision of the Court of Cassation on the issue raised in the appeal may be essential for the uniform application of the law or other normative legal acts.

[122] K-637-04.06.2020-PI-011/1, Article 383(3), for details, see: http://www.parliament.am/reading1_docs7/K-637_R1.pdf

Regarding the reasoning of the judicial act

In court practice, we can state that the non-reasoning of decisions to reject as inadmissible appeals to the Court of Cassation is a systemic problem.

Notwithstanding the existence of RA Constitutional Court decisions no.s SDO-690 of 09.04.2007, SDO-691 of 11.04.2007, SDO-765 of 08.10.2008 and SDO-818 of 28.07.2009, however, no substantive change has been noted as regards the reasoning of these judgments, and in a situation where the majority of the appeals submitted are in practice not accepted by the Court of Cassation[123].

Although there are special provisions in the RA Criminal Procedure and Administrative Procedure Codes that oblige the RA Court of Cassation to substantiate the absence of each of the grounds set out in the appeal to the Court of Cassation, as envisaged in the relevant provisions[124], in practice these provisions have not had any substantive effect on changing legal practice.

In this research there have been examined numerous decisions of the RA Court of Cassation in criminal, civil and administrative cases, in which appeals were refused as inadmissible. The study found that these decisions did not provide any substantive reason for rejecting the appeal; instead, the Court of Cassation stated that it considered the grounds set out in the appeal to be insufficient to consider justified the existence of this or that condition(s) of admissibility of the appeal, or that existence of the condition(s) of admissibility of the appeal was not substantiated by the appellant.

It should be noted that in decisions no.s SDO-1322 of 22.11.2016 and SDO-1334 of 27.12.2016 of the RA Constitutional Court, important positions were expressed on the application of preconditions for the admissibility of cassation appeals. Thus, by RA Constitutional Court decision no. SDO-1322 of 22.11.2016, the term "performing comparative analysis" of Article 158(2)(4)[125] of the RA Administrative Procedure Code was recognized as corresponding to the Constitution of the Republic of Armenia in the framework of the legal positions expressed in the same decision, according to which, the comparative analysis of the discrepancy between an appealed judicial act and the judicial act of the Court of Cassation with the same factual circumstances, or the fact of their discrepancy as a result of their comparison, is in itself a justification to the effect that the interpretation of any norm in the appealed judicial act, according to the appellant, contradicts the interpretation of the given norm in the decision of the Court of Cassation. By assessing on the merits the nature of such analysis at the stage of admission, the appeal cannot be rejected, hindering access to the court[126]. Accordingly, by assessing on the merits the nature of the above-mentioned analysis at the stage of resolving the issue of admission of the cassation appeal, the admission of the cassation appeal cannot be rejected. However, the above-mentioned decisions of the RA Constitutional Court also did not lead to any substantive change in the case law, while the decision no. SDO-1322 directly stated that in legal practice it is unacceptable to interpret this provision in such a way, as a result of which, quoting contradictory parts and the comparative analysis of the existing contradiction are necessary but not sufficient conditions.

[123] For details, see the annual reports on appeals received by the Court of Cassation, accessible at: https://court.am/hy/statistic

[124] See the previous section on the justifications regarding the incompleteness of the grounds for admissibility from the point of view of the reasoning envisaged in the RA Administrative Procedure and Criminal Procedure Codes.

[125] Article 158(2)(2) of the Administrative Procedure Code, as amended.

[126] For details, see: https://www.concourt.am/armenian/decisions/common/2016/pdf/sdv-1322.pdf.

Thus, in the above two decisions[127] of the RA Constitutional Court, the fact of assessment on the merits at the stage of admission of the appeal[128] by the Court of Cassation of the comparative analysis (proving incompatibility as a result of comparing them) regarding the existing contradiction between the judicial act subject to appeal and the case having similar facts was proved. Consequently, in all those cases where the cassation appeals are submitted with a comparative analysis of the dispute and on relevant grounds[129], the rejection of admission of the appeals without substantive reasoning results in a failure to examine the important arguments put forward by the appellant and leads to the refusal to provide a reason for the alleged deviation from one's own case law.

In the context of the above-mentioned substantiation, we consider it necessary to refer to the RA Constitutional Court's decision[130] no. SDO-1453 of 16.04.2019, which proved the fact that the Court of Cassation arbitrarily deviated from its expressed positions without the necessary justifications as a result of unlawful rejection of the cassation appeal. In particular, the following was noted in the decision. "In this case, the Court of Cassation, in not admitting the applicant's appeal, ignored the apparent contradiction of the decisions of the Court of First Instance and Court of Appeal with the legal positions expressed in its own decisions; **in other words it arbitrarily deviated from its positions without the necessary justifications**, which led to a breach of the applicant's rights under Article 27(1)(4) as well as Article 61(1) of the Constitution." The Constitutional Court also held that the freedom to assess a cassation appeal within the scope of its mandatory jurisdiction to admit a cassation appeal is limited by the longstanding practice of the Court of Cassation existing prior to the examination of the appeal, which constrains the Court of Cassation and requires appropriate reasoning in the event of rejection or amendment, and also presumes that in such cases in future the Court of Cassation will have to be consistently guided by its new legal positions; **"Therefore, any unreasonable, arbitrary deviation from previous practice is inadmissible."**

By the decision[131] of the Constitutional Court of the Republic of Armenia no. SDO-1321 of 15.11.2016, reference was made to the issue of the lawfulness of the non-admission of the appeal by the RA Court of Cassation in a civil case, noting that the analysis of the judicial acts attached to the application shows that the RA Civil Court of Appeals made the application of Article 1226(3) of the Code conditional upon the application of the provisions of Article 1226(1) of the Code, applying interpretations differing from the case law of the RA Court of Cassation.

Regarding the pre-emptive right to acquire land plots from state or community lands

Judicial acts cited in the Government Action Plan and judicial practice at both the Court of Cassation and lower courts concern cases of recognition of property rights by virtue of adverse possession in accordance with Article 187 of the RA Civil Code, while the *Tamrazyan v. Armenia* case concerned, in accordance with Article 72 of the Land Code, the right of pre-emption to acquire land plots through the fact of possession of state or community lands for more than ten years in a row, in good faith and openly, but

[127] Decisions no.s SDO-1322 of 22.11.2016 and SDO-1334 of 27.12.2016.

[128] The final judgments in respect of the applicants were assessed as subject to review on the basis of new circumstances, as the relevant provisions were applied to them with an interpretation different from the constitutional content, as revealed by the decisions.

[129] In accordance with the criteria set out in the RA Constitutional Court decisions no.s SDO-1322 of 22.11.2016 and SDO-1334 of 27.12.2016.

[130] Մանրամասն տե՛ս ՀՀԴՏ 2019.04.26/27(1480) Հոդ.327, For details, see HHPT 2019.04.26/27(1480) Article 327 https://www.arlis.am/DocumentView.aspx?docID=129918

[131] Մանրամասն տե՛ս ՀՀԴՏ 2016.11.23/84(1264) Հոդ.1122, For details, see HHPT 2016.11.23/84(1264) Article 1122 https://www.arlis.am/DocumentView.aspx?DocID=109026

without the legal formulation of their rights. In other words, the cited case law did not relate to the remedies arising from the judgment in this case, as it concerned cases of recognition of property rights by virtue of adverse possession as opposed to cases of pre-emptive rights to state or community-owned land.

As for judicial practice related to the exercise of the pre-emptive right to acquire a state- or community-owned land plot, we believe that the content of the good faith requirement set forth in Article 72(2) of the RA Land Code has not been sufficiently disclosed in court practice in the context of the possession of state- or community-owned land without the legal registration of their rights.
The RA Court of Cassation's decision of 27.12.2017 in civil case no. KD3/0042/02/13 made reference to the requirement of good faith; this was interpreted by the Court of Cassation as follows: "The use of land belonging to the state or community must be honest. The user must have the conviction that he/she is using the property on a legal basis." However, this interpretation is clearly not sufficient to ensure the application of the cited provision in line with the requirements of legal certainty, given the existence of a simultaneous condition for the use of the relevant land plots without the legal registration of the rights of individuals[132]. At the same time, the comments made by the Court of Cassation on the precondition of good faith in possession as set out in Article 187 of the RA Civil Code cannot be applicable from the point of view of revealing the nature of good faith use of state or community land. Due to insufficient reasoning, the decision of the case VD/3691/05/09 also did not reveal the nature of the precondition of good faith in the context of relevant factual circumstances, and it also did not reason the presumed conclusion that there was a lack of grounds for applying Article 72(2) of the RA Land Code.
The Court of Cassation found that Article 72(1) of the RA Land Code is not applicable in this case, as the relevant land was alienated through direct sale and not handed over for use. That is, the land was not provided to another person under the same conditions.

At the same time, the decision of the Court of Cassation did not include any reasoning regarding the possible unlawfulness of the administrative act of the Mayor of Yerevan to alienate the land, on the basis of Article 72(2) of the RA Land Code, although the plaintiff also challenged the alienation of the land on this ground[133].

Conclusion

As a result of the research, we can state that there is a problem of applying the general measures arising from the ECHR decision made in *Tamrazyan v. Armenia*, both at the legislative level and in law enforcement practice. In particular, the regulations in the RA Administrative Procedure and Criminal Procedure Codes concerning the reasoning of decisions to reject the admission of cassation appeals do not apply to all the grounds of admissibility. In law practice, however, the admissibility of cassation appeals is rejected without any substantive reasoning, which, if there are necessary grounds, leads as a result to an unjustified deviation from one's own practice[134].

[132] Also, the meaning of the term "without the legal formulation of their rights" is not clarified.
[133] According to the decision made by the RA Administrative Court on 15.02.2010 in case VD/3691/05/09, accessible at: http://www.datalex.am/?app=AppCaseSearch&page=default&tab=administrative:
[134] In those cases where the interpretation of a norm in the appealed judicial act contradicts the interpretation of the given norm in the decision of the Court of Cassation. For details, see decision no. SDO-1453 of 16.04.2019.

Karapetyan v. Armenia (application no. 22387/05)[135]
Galstyan v. Armenia (application no. 26986/03)[136]
Ashughyan v. Armenia (application no. 33268/03)[137]

Issue

In the present group of cases, the Court found a violation of Article 6(3) of the Convention in conjunction with Article 6(1), on the ground that the applicants' right to a fair trial had been violated, in particular due to lack of time and resources to prepare their defense.

Karapetyan v. Armenia

The ECHR found a violation of Article 6(3) of the Convention in conjunction with Article 6(1) on the following grounds:

The administrative case against the applicant (10 days of administrative detention under Article 182 of the Administrative Offenses Code for malicious refusal to obey a police officer's lawful request) was examined in an expedited manner in accordance with Article 227 of the RA Administrative Offenses Code. The applicant in this case was taken into custody, detained at the police station without access to the outside world, where he was charged, and a few hours later taken to court and convicted. The court found that the applicant's right to a fair trial had been violated, specifically: he had not been given adequate time and opportunity to prepare his defense. It should be noted that similar facts and complaints have already been

[135] Karapetyan v. Armenia (application no. 22387/05, 27 October 2009), accessible at: http://hudoc.echr.coe.int/eng?i=001-95283
[136] Galstyan v. Armenia (application no. 26986/03, 15 November 2007), accessible at: http://hudoc.echr.coe.int/eng?i=001-83297
[137] Ashughyan v. Armenia (application no. 33268/03, 17 July 2008), accessible at: http://hudoc.echr.coe.int/eng?i=001-87642

examined by the ECHR in other cases against Armenia, in particular, *Galstyan v. Armenia* and *Ashughyan v. Armenia*, which addressed in more detail the nature of the violations.

Galstyan v. Armenia

The ECHR found a violation of Article 6(3) of the Convention in conjunction with Article 6(1), on the following grounds:

In the present case the Court found that the applicant's case had been examined under an expedited procedure: pursuant to Article 277 of the RA Administrative Offenses Code, cases of petty hooliganism are examined within one day. The Court held that the existence and application of expedited criminal proceedings do not in themselves conflict with the requirements of Article 6 of the Convention, as long as they provide all the necessary safeguards provided by the Article. The Court also noted that the Government argued that if the applicant considered the time allotted to him was not sufficient to prepare his defense, he had the right to request an adjournment of the proceedings, which he did not do. The court found that the RA Administrative Offenses Code does not provide for any exception to the rule in Article 277. Nor was the right to adjourn a hearing clearly listed among the rights of the accused during administrative proceedings. Neither the applicant's administrative case file nor the Government substantiated that the applicant had been informed of such a possibility at the police station or in court. In such circumstances, the Court found that the Government had failed to provide convincing arguments that the applicant had, in law and in practice, the right to request adjournment of the case in order to prepare his defense, or that such a motion would have been granted, had the applicant submitted it. The Court noted that the parties could not agree on a specific length for the pre-trial proceedings, but in all cases it was clear that the period was no more than a few hours. The ECHR noted that, even if we accept that the applicant's case was not complex, it is not certain that the conditions under which the applicant was prosecuted, from his arrest to his conviction, were such as to enable him to properly to get acquainted with the charges and the evidence presented against him, to evaluate them and develop a viable legal strategy in his defense. The Court concluded that the applicant had not been given adequate time and resources to prepare his defense.

Ashughyan v. Armenia

The ECHR found a violation of Article 6(3) of the Convention in conjunction with Article 6(1). The Court reiterated that similar facts and complaints had already been discussed in the Galstyan case, where it found that there had been a violation of Article 6(3)(b) in conjunction with Article 6(1). The facts of this case were practically the same. Both administrative cases against the applicant were heard under the expedited procedure provided for in Article 277 of the Administrative Offenses Code. In both cases the applicant was also taken to a police station, deprived of any contact with the outside world, where he was charged and within hours was taken to court and found guilty. Accordingly, the Court found no reason to reach a different decision in the present case and concluded that in both trials, on 7 and 9 April 2003, the applicant did not have a fair trial, specifically due to the lack of sufficient time and resources to prepare his defense.

In the decisions in *Mkhitaryan v. Armenia* (application no. 22390/05)[138], *Tadevosyan v. Armenia* (application no. 41698/04)[139], *Kirakosyan v. Armenia* (application no. 31237/03)[140], *Hakobyan and others v. Armenia* (application no. 34320/04)[141] and *Gasparyan v. Armenia* (no. 2) (application no. 22571/05)[142] in which there were similar circumstances, the ECHR found a violation of Article 6(3) of the Convention in conjunction with Article 6(1) on the same grounds.

Government Action Report (16.04.2015[143], 02.05.2016[144] and 09.06.2016[145])

(General measures[146])

- ✓ As a result of the amendments made to the RA Administrative Offenses Code on 16.12.2005, the problematic regulation on administrative detention was abolished.
- ✓ The Administrative Procedure Code, adopted on 5 December 2013, provides all the guarantees of a fair trial, which are in line with the requirements of the Convention.
- ✓ Cases related to administrative offenses are currently heard under the general procedure, but the current legislation provides for an exception in the form of an expedited trial, which can be carried out only in the following cases: 1. an application was submitted for correction of the voter lists, 2. the claim is obviously well-founded, 3. the claim is obviously unfounded.
- ✓ If during the issuance of a judicial act resolving a case on the merits, circumstances arise which, in order to clarify, it is necessary to conduct the case orally, the court shall decide to reopen the case and shall send this decision to the participants within three days.
- ✓ Decision no. 9 of the Council of Court Chairmen states that the claim is considered to be obviously well-founded if it is based on indisputable evidence, and is considered obviously unfounded if the claim submitted to the court is not substantiated by evidence and cannot be substantiated by any other evidence.
- ✓ By the decision of the Constitutional Court no. 1022 of 17.04.2012, the phrase "obvious" was clarified, explained as being beyond doubt.
- ✓ All necessary measures have been taken to establish legislative guarantees to ensure the right to an oral hearing in an administrative proceeding. According to the RA Administrative Procedure Code, administrative cases are examined orally. The examination of a case on the papers may be carried out only in the cases defined by the Code: the only such case specified is examination of the case on the papers where the parties have given written consent.

Legislative regulations / issues

[138] Mkhitaryan v. Armenia (appliction no. 22390/05, 2 December 2008), accessible at: http://hudoc.echr.coe.int/eng?i=001-89966
[139] Tadevosyan v. Armenia (application no. 41698/04, 2 December 2008), accessible at: http://hudoc.echr.coe.int/eng?i=001-89969
[140] Kirakosyan v. Armenia (application no. 31237/03, 2 December 2008), accessible at: http://hudoc.echr.coe.int/eng?i=001-89959
[141] Hakobyan and Others v. Armenia (application no. 34320/04, 10 April 2012), accessible at: http://hudoc.echr.coe.int/eng?i=001-110263
[142] Gasparyan v. Armenia (No. 2) (application no. 22571/05, June 16, 2009), accessible at: http://hudoc.echr.coe.int/eng?i=001-92963
[143] For details, see: http://hudoc.exec.coe.int/eng?i=DH-DD(2015)434E
[144] For details, see: http://hudoc.exec.coe.int/eng?i=DH-DD(2016)610E
[145] For details, see: http://hudoc.exec.coe.int/eng?i=DH-DD(2016)745E
[146] In relation to the violation of Article 6(3) of the Convention in conjunction with Article 6(1).

We consider that the legal regulations defined by the RA Administrative Procedure Code do not exclude the risks of repeating similar violations for the following reasons: according to Article 119 of the RA Administrative Procedure Code, expedited trial is applied in cases when: 1) an application has been submitted for correction of the voter lists, 2) the claim is obviously well-founded, 3) the claim is obviously unfounded.

Two of the above grounds for the application of an expedited trial, namely: "1. The claim is obviously well-founded, and 2. the claim is manifestly ill-founded", are highly subjective, and an assessment at the filing stage that the claim is manifestly well-founded or unfounded will inevitably lead to the risk of violating the guarantees of a fair trial. As for the decision of the Constitutional Court no. 1022 of 17.04.2012, it, on the contrary, reaffirms the fact that the above-mentioned two grounds of the RA Administrative Procedure Code are problematic. In that decision, the Constitutional Court ruled that Article 79(1)(4) of the Code of Administrative Procedure of the Republic of Armenia ("The Administrative Court rejects the acceptance of a lawsuit, if ... the person who filed the claim is obviously not entitled to file the lawsuit") is in compliance with the Constitution of the Republic of Armenia, on the constitutional jurisprudence grounds that, at the stage of examining the admissibility of a lawsuit in an administrative proceeding, it cannot be perceived or interpreted as a requirement or discretion under law to confirm the existence or absence of a violation of a substantive right. The Constitutional Court found that the use of the word "obviously" at the admissibility stage of the application **precluded the question of the existence or absence of a violation of a substantive right to ascertain the right to apply to the Administrative Court without making the relevant proceedings subject to examination**. In the disputed provision of the Code, the word "obviously" implies that without revealing the fact of violation of the substantive right, **there is no doubt that this right does not belong to the plaintiff**. By stipulating the word "obviously" in the disputed provision of the Code, the legislator aimed to verify, at the admission stage of the lawsuit, **not the violation of the substantive right, but the fact that the allegedly violated right belongs to the person**, i.e. whether the plaintiff is an "interested person".

On the other hand, making a decision immediately after admission of the claim is accepted and without holding a court session in itself presupposes the assessment of the existence or absence of a violation of the substantive right, without judicial procedures and without ensuring the guarantees of the right to a fair trial. It is clear that an assessment that the lawsuit is obviously well-founded, without conducting a court hearing, deprives the person of the opportunity to present evidence as prescribed by the RA Administrative Procedure Code, which can be done right up to the end of the trial. It is also not clear how the court can find the claim to be obviously unfounded or obviously founded when the claimant has the right not to present any evidence at all at the filing stage (this right is retained by the claimant right up to the end of the trial).

We consider that, especially in court cases concerning administrative liability[147], where the proceedings are expedited on the above grounds, a person may be deprived of the right, as guaranteed by Article 6(3)(b) of the Convention, to have sufficient time and opportunities to prepare his/her defense. Therefore, the

[147] Including cases where the decision of the administrative body is being appealed.

legislative right to conduct expedited trials using these two grounds, even in administrative liability cases, is inadmissible.

It is also problematic that the enumerated grounds for an expedited trial are in no way related to the assessment of the need to hear an expert or to question witnesses, to conduct an examination or to give court orders. There is also no correlation with the parties agreeing to hear the case expeditiously.

It should be noted that expedited trial procedures are directly related to the right to a *public trial* guaranteed by Article 6(1) of the Convention, which presupposes the right to an *oral hearing* (Döry v. Sweden, § 37). According to the ECHR, the principle of an oral and public trial is especially important in a criminal context, where a person accused of committing a criminal offense (note that, according to the Court's precedents, the concept of *criminal offense* often includes *administrative offense*) must generally be present at the trial in the court of first instance (Tierce and Others v. San Marino, § 94, Jussila v. Finland [Grand Chamber], § 40). Without being present, it is difficult to imagine how a person could exercise the special rights set out in Article 6(3)(a)(b)&(c) of the Convention, namely, the right to "defend himself in person", "to examine or have examined witnesses against him", and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court". Only exceptional circumstances can justify the non-conduct of an oral hearing (Hesse-Anger and Anger v. Germany (dec.)). The exceptional significance of such circumstances stems from the nature of the issues under consideration (for example, in cases where the investigation concerns **only legal or highly technical issues** (Koottummel v. Austria, § 19) and the frequency of such issues (Miller v. Sweden, § 29; Mirovni Inštitut v. Slovenia, § 37)[148].

We consider that the issues raised in the above-mentioned group of cases are also somewhat relevant in the context of the written procedure of examination of cases defined by the RA Administrative Procedure Code Particularly problematic is the application of the written procedure in trials concerning challenges to the fact-based conclusions of the Corruption Prevention Commission.

Conclusion

As a result of the research, we can state that the issue of implementing general measures arising from the judgments made by the ECHR in the cases included in this section exists mostly at the legislative level. Particularly problematic is the existence of two grounds for expedited trial as set out in the RA Administrative Procedure Code, which are based on the assessment of the merits of the claim, as well as the application of the written procedure in trials concerning challenges to the fact-based conclusions of the Corruption Prevention Commission.

Recommendations

1. Review the regulations set out in the RA Civil Procedure Code, namely, as one of the grounds for unconditional overturning of a judicial act, that the case was heard by an unlawfully composed

[148] Guideline on Article 6 of the European Convention on Human Rights: the right to a fair trial (civil law perspective), Guide to Article 6 of the European Convention on Human Rights: the right to a fair trial (criminal law perspective).

court: in order to enable application of this ground independently of the other grounds of the appeal. Discuss the need to establish the same guarantees in the RA Administrative Procedure Code.

2. Review the regulations in the RA Administrative Procedure and Criminal Procedure Codes related to the reasoning of the decisions on the rejection of cassation appeals according to, with the aim of extending them to cover all grounds for admissibility of an appeal.
3. In order to exclude unjustified deviations from its own precedent positions (if the required grounds exist), ensure in law enforcement practice proper reasoning of the decisions on the refusal of the RA Court of Cassation to accept admission of appeals.
4. Review the two grounds for the application of expedited trials as set out in paragraphs 2 & 3 of Article 119(1) of the RA Administrative Procedure Code, which are based on an assessment of the merits of the claim. Review the regulation in the RA Administrative Procedure Code regarding the application of the written procedure in trials concerning challenges to the fact-based conclusions of the Corruption Prevention Commission.

PART 4

Effectiveness of free legal aid mechanisms in the context of access to justice: problems of access to justice for persons recognized as lacking legal capacity

Shamoyan v. Armenia (application no. 18499/08)[149]
Ghuyumchyan v. Armenia (application no. 53862/07)[150]
Tovmasyan v. Armenia (application no. 11578/08)[151]

Issue

In its judgments in these cases, the European Court of Human Rights found a violation of Article 6(1) of the Convention in the context of lack of access to legal aid, taking into account the requirement that cassation appeals may only be filed by accredited advocates.

Shamoyan v. Armenia

[149] Shamoyan v. Armenia (application no. 18499/08, 7 July 2015), accessible at: http://hudoc.echr.coe.int/eng?i=001-155811
[150] Ghuyumchyan v. Armenia (application no. 53862/07, 21 January 2016), accessible at: http://hudoc.echr.coe.int/eng/?i=001-160090
[151] Tovmasyan v. Armenia (application no. 11578/08, 21 January 2016), accessible at: http://hudoc.echr.coe.int/eng?i=001-160091

The Court noted that, given the special role of the Court of Cassation, which is limited to ensuring uniform application of the law and its correct interpretation, the ECHR is prepared to accept that the requirement that appeals may only be filed through an accredited lawyer presumably pursued a lawful aim of ensuring the high quality of such appeals. However, due to the lack of access to legal aid which was needed to comply with such a procedural requirement, the applicant's access to the Court of Cassation was dependent on his financial situation.

The ECHR considered that the lack of access to legal aid, taking into account the procedural requirement that appeals be lodged only through attorneys accredited by the Court of Cassation, disproportionately restricted the applicant's right of effective access to justice.

In the *Ghuyumchyan v. Armenia* and *Tovmasyan v. Armenia* cases, the Court found a violation of Article 6(1) of the Convention on similar grounds.

Government Action Report (April 5, 2016)[152]

(General measures)

- ✓ On October 8, 2008, the Constitutional Court of the Republic of Armenia, in its decision[153] no. SDO-765, declared Article 223(1)(1) of the Criminal Procedure Code and Article 29.1 of the Law of the Republic of Armenia "On Advocacy" unconstitutional. In particular, the Constitutional Court found that in the absence of any mechanism for the provision of free legal aid by attorneys accredited to the Court of Cassation, the rule of filing a cassation appeal only through accredited attorneys disproportionately restricts access to the Court of Cassation, in practice rendering its accessibility dependent on the financial standing of appellants.
- ✓ In 2015, the RA Constitutional Court examined the constitutionality of another procedural provision, according to which a person could apply to the Court of Cassation only through a lawyer. According to the decisions SDO-1192[154], SDO-1196[155] and SDO-1220[156], the relevant provisions of the RA Administrative, Civil and Criminal Procedure Codes which envisaged restrictions were recognized as unconstitutional and invalid.

Legislative regulations / issues

Although the legal issues arising directly from the ECHR judgments in the cases included in this section have been resolved as a result of the cited decisions of the RA Constitutional Court, we consider it necessary to address certain issues related to free legal aid, which are interrelated with effective judicial remedies and access to justice.

Thus, according to Article 5 of the RA Law on Advocacy, court representation or its organization as a service provided on a regular or paid basis may only be performed by an advocate, except for the cases

[152] For details, see: http://hudoc.exec.coe.int/eng?i=DH-DD(2016)453E:
153 SDO-765, accessible at: https://www.concourt.am/armenian/decisions/common/2008/pdf/sdv-765.pdf
154 SDO-1192, accessible at: https://www.concourt.am/armenian/decisions/common/2015/pdf/sdv-1192.pdf
155 SDO-1196, accessible at: https://www.concourt.am/armenian/decisions/common/2015/pdf/sdv-1196.pdf
156 SDO-1220, accessible at: https://www.concourt.am/armenian/decisions/common/2015/pdf/sdv-1220.pdf

defined by the same article. Article 5 of the law was supplemented on 09.02.2018 with the following paragraph: "6. In civil proceedings, cases of court representation by persons who are not advocates are defined by the Civil Procedure Code of the Republic of Armenia." At the same time, Article 52 of the RA Civil Procedure Code stipulates the requirement that representation in court may only be through advocates. Paragraph 2 of the same article envisages the circle of persons who can appear in court as a representative, instead of the reservation made in Article 5 of the RA Law on Advocacy in the circumstances of the previous legal regulation.

As a result, on February 9, 2018, with the adoption of the new RA Civil Procedure Code, the possibility of exercising court representation on a non-regular, non-paid basis was excluded in civil proceedings. We consider that the introduction of this restriction is problematic in the context of the legal positions expressed by the RA Constitutional Court in its decision no. SDO-1263 of 05.04.2016, as well as in the context of ensuring the right to effective judicial remedies. Thus, by the above-mentioned decision of the RA Constitutional Court, the provision of Article 40(1)[157] of the RA Civil Procedure Code "except for the cases provided for in Article 5 of the RA Law on Advocacy" was recognized as in compliance with the Constitution, within the scope of the legal positions expressed in the decision. Article 5(3)[158] of the RA Law on Advocacy was also recognized as conforming to the RA Constitution within the framework of the legal positions expressed in the decision.

In the above decision, the RA Constitutional Court registered the following position. "…. The main purpose of the current legal regulation of the disputed issue is the clear regulation of the institution of providing paid legal services to people in the field of civil justice, **prohibiting persons from regularly appearing in court on a paid basis without a license to practice**. Similar legal regulations exist in many countries, and it stems from the essence of the constitutional principle of guaranteeing the rule of law. **It is another matter that in legal practice the scope of legal aid in civil cases should not be so narrowed as to exclude the possibility of non-paid and occasional legal aid."**

Referring to the relation between the legal requirement that regular court representation on a paid basis be exercised only through a lawyer and the right of access to justice, the Constitutional Court in its decision no. SDO-1263 of 05.04.2016 stated that such a relation may be dependent exclusively on the financial capabilities of the person seeking representation. The Constitutional Court then referred to the guarantees provided by the legislature in the context of ensuring the right of access to justice for a person seeking court representation but without adequate financial means, also noting the possibility of court representation being exercised by a non-lawyer if the representation is not regular or is not on a paying basis. Therefore, it is obvious that the exclusion of the possibility of court representation on a non-regular, non-paid basis in civil proceedings is not in line with the positions expressed by the RA Constitutional Court's decision SDO-1263 of 05.04.2016, and is also problematic from the point of view of guarantees of effective judicial remedies and the right of access to justice, in a situation where there is no possibility for the Public Defender's Office to provide the necessary volume and quality of legal aid.

According to Article 41 of the RA Law on Advocacy, the state guarantees free legal aid through the Public Defender's Office, within the framework of which free legal aid is provided to a number of groups of people, amongst which are impecunious individuals who can present reliable proof of their inability to

[157] RA Civil Procedure Code adopted on June 17, 1998 (HO-247).
[158] The version in force until 09.02.2018.

pay. An individual is considered impecunious, if he/she does not have sufficient income, is not cohabiting with a working member of the family, and, apart from his/her place of residence, does not own any other real estate or a vehicle worth more than a thousand times the minimum wage.

According to the information provided by the Public Defender's Office during this research, in order to interpret the term *sufficient income* mentioned in Article 41(5)(11) of the RA Law on Advocacy, in practice the following guidelines are accepted: a person's monthly income, the minimum statutory salary, and the size of the minimum consumer basket. At the same time, however, an individual approach is taken in each case, in particular, the number of people in the care of the person, the circumstance of rented accommodation and the health status of the applicant and family members are taken into account.

Although the criteria set out in Article 41(5)(11) of the RA Law on Advocacy envisage that a rather large circle of persons can enjoy access to free legal aid, and the above-mentioned criteria are broadly interpreted in legal practice, nevertheless, we find that the terms *sufficient income* and *cohabiting working family member* need to be clarified at the level of the law in order to exclude possible arbitrary and unlawful interpretation and application.

Legal practice / issues

We also consider it necessary to address certain issues related to free legal aid in practice in the context of ensuring the rights to effective judicial remedies and legal aid, taking into account the legal restrictions on the exercise of court representation.

Thus, the only state-funded body providing free legal aid is the Public Defender's Office, therefore fulfillment of the state's obligation to provide quality legal aid is directly dependent on its efficiency. Consequently, a lack of ability by the Public Defender's Office to provide the required volume and quality of legal aid will inevitably lead to the unlawfulness of legislative restrictions on the exercise of court representation.

Based on an enquiry conducted during this research, the Public Defender's Office provided statistical data related to the workload of the Public Defenders for the previous three years, as well as information on existing problems in practice. Thus:

- The average burden on one fulltime Public Defender was:
  - ✓ In 2018: 152 criminal cases
  - ✓ In 2019: 169, and
  - ✓ In 2020: 160 cases.
- The number of civil and administrative cases for each fulltime employee was 702, 748 and 609 in 2018, 2019 և 2020, respectively.

According to the information provided by the Office, although the list of measures [159] arising from the 2009-2011 Judicial Reforms Strategic Action Plan approved by the RA President's Order NK-59-N of April 21, 2009 envisaged the expansion of free legal aid, according to which it was planned to increase the number of public defenders to at least 75 by the end of March 2010, to date the funds allocated to the Chamber of Advocates has been sufficient for only 59 public defenders.

[159] For details, see HHPT 2009.04.25/21(687) Article 438, https://www.arlis.am/DocumentView.aspx?docid=50926

In response to an enquiry made during this research, the First Deputy Head of the Public Defender's Office stated that, against a background of a rising number of cases in recent years, ensuring the timely implementation of decisions of the criminal procedure bodies and the provision of quality free legal aid to all citizens applying to the Public Defender's Office in civil, administrative and criminal cases will become impossible in the near future. The Public Defender's Office will not be able to wholly fulfill its mission of providing quality legal aid.

Conclusion

Although the legal issues directly arising from the ECHR judgments[160] in the cases included in this section have been resolved by the RA Constitutional Court in its relevant decisions, there are significant issues related to ensuring a person's right to effective judicial remedies in the context of free legal aid.

Nikolyan v. Armenia (application no. 74438/14)[161]

Issue

In its judgment in the present case, the European Court of Human Rights found a violation of Article 6(1) of the Convention on the ground that the applicant had not been able to pursue his divorce and eviction application, as well as to pursue a court case to restore his legal capacity, because the law imposed an unconditional ban on access to justice for persons lacking legal capacity. The conflict of interest situation was exacerbated by the appointment of the applicant's son as his guardian. The decision to declare the applicant incapacitated was based on a "out-of-date" psychiatric examination, without considering the extent of the mental disorder.

Nikolyan v. Armenia

The ECHR found, among other violations, a violation of Article 6(1) of the Convention on the ground of a violation of the applicant's right of access to justice in divorce and eviction proceedings. The Court noted in particular that domestic law had placed an unconditional prohibition on the applicant's right of access to justice in all areas of life. Moreover, the domestic legal system did not differentiate between different degrees of incapacity for persons with mental disabilities, and did not provide remedies tailored to the specific needs of the individual. There was therefore no reference or answer to the questions of whether the applicant could understand the significance of the divorce or eviction, and whether he could act

[160] Decisions no.s SDO-765, SDO-1192, SDO-1196 and SDO-1220.

[161] Nikolyan v. Armenia (application no. 74438/14, 3 October, 2019), accessible at: http://hudoc.echr.coe.int/eng?i=001-196149

independently in that area of life, including defending his rights in court without hindering or undermining the proper administration of justice or harming himself or others. The court found that in any case the restriction of access to justice was not justified by the specific circumstances of the case.: In this context, the Court also referred to the issue of appointing a guardian in the event of a conflict of interest, noting that, being completely incapacitated and therefore also deprived of his right of access to the court, the only appropriate and effective way to defend his legal interests in the courts would be conflict-free guardianship. The court noted that the domestic court had not carried out the necessary examination and oversight when deciding on the applicant's claim for rejection of the suit, and therefore terminating the divorce and eviction proceedings was not justified.

The ECHR found that the presence of mental illness, even in the case of a serious illness, cannot be the only reason to justify complete deprivation of legal capacity: for that, mental illness must be deemed to be of a "kind and degree" for that remedy. The Court noted that Armenian law did not provide for borderline or tailored solutions to the situation, as in the applicant's case, and in this case a distinction was made only between full legal capacity and complete legal incapacity. Therefore, the questions put to the doctors by the judge similarly did not refer to the "kind and degree" of the applicant's mental illness. As a result, the degree of incapacity of the applicant was not analyzed in sufficient detail in the psychiatric expert opinion, and the conclusion did not explain what actions the applicant could not understand or control. The applicant's degree of mental illness is unclear, as are the possible consequences of the illness on his social life, health and material interests. The Court also found a number of other violations in this case, including under Article 8 of the Convention.

Government Action Report (16.11.2020)[162]

(General measures)

- ✓ The government is continuously implementing comprehensive measures to ensure in particular that persons with disabilities are involved in all decision-making processes concerning them.
- ✓ By the decision of the RA Constitutional Court dated 07.04.2015, Article 173(1) of the RA Civil Procedure Code was declared unconstitutional, as a result of which persons without legal capacity have acquired the right to apply to court to restore their legal capacity. A number of important principles for guaranteeing the rights of persons without legal capacity were set out in the Constitutional Court's decision.
- ✓ The right of persons declared as lacking legal capacity to apply to court to restore their legal capacity was enshrined in the RA Civil Procedure Code, which came into force on April 9, 2018. The provisions of the current Civil Procedure Code stipulate that when the court of first instance of general jurisdiction examines the application for declaring a citizen legally incapable, the participation of the person lacking legal capacity, his/her lawyer and guardianship and trusteeship body is mandatory, which in turn ensures the possibility to appoint a guardian free of conflict of

[162] RA Government Action Report in the Nikolyan v. Armenia case, application no. 74438/14, accessible at: http://hudoc.exec.coe.int/eng?i=DH-DD(2020)1061E

interest, since mandatory participation of the guardianship and trusteeship body allows the latter to assess the nature of the relationship between the person lacking legal capacity and his/her potential guardian. Other safeguards provided by the Civil Procedure Code have been presented in the context of examination of these cases.

- ✓ Within the framework of the Comprehensive Program for Social Inclusion of Persons with Disabilities (2017-2021), a draft law on the Rights of Persons with Disabilities was developed, which sets out the basic principles of the state policy on ensuring, promoting and protecting the rights of persons with disabilities.
- ✓ Other measures to strengthen the protection of the rights of persons with disabilities were also presented.

Legislative regulations / issues

Based on the reasons given in the *Nikolyan v. Armenia* judgment, we consider it necessary to state that the provisions of the RA Civil Code on the recognition of legal incapacity are still incompatible with the requirements of the Convention insofar as they only make a differentiation between declaring a person wholly legally incapable or wholly capable, excluding the choice of any intermediate form of limitation of capacity, based on the type and degree of mental disorder.

Thus, according to Article 31 of the RA Civil Code, a citizen who, due to a mental disorder, cannot understand the significance of his/her actions or control them, may be declared legally incapable by a court in accordance with the procedure established by the Civil Procedure Code of the Republic of Armenia. Guardianship is established for him/her[163]. However, the ECHR judgment in this case emphasized the fact that **the applicant's condition required some form of protection for him, so the domestic court had no choice but to apply and maintain his full incapacity; this is the strictest measure, and it means a complete loss of independence in almost all spheres of life.**

It is important to note in the applicant's divorce and eviction case that the European Court of Human Rights, in finding a violation of the right of access to justice (violation of Article 6(1) of the Convention), held decisive the fact that in domestic law there was no provision foreseen for tailoring protection measures to the varying degrees of legal incapacity of the mentally disordered and to the needs of the individual. Therefore, provision in RA legislation of an intermediate form of limitation of a person's legal capacity, depending on the type and degree of mental disorder, directly follows from the general measures aimed at the implementation of the judgment in *Nikolyan v. Armenia*[164].

[163] With regard to the limitation of a citizen's legal capacity under Article 32 of the Code, these grounds are based solely on the following circumstances: abuse of alcohol or drugs, as well as putting his/her family in a difficult financial situation due to gambling.

[164] Moreover, the decision of the RA Constitutional Court no. SDO-1197 of 07.04.2015 defined the need to exclude disproportionate interference with the legal capacity of persons during future legislative amendments by making the grounds for recognizing a person "incapable" or "partially incapable" more complete. It should be noted that already on February 27, 2014, Clause 70 of the RA Government decision no. 303-N “On approving the program of measures arising from the National Human

The absence of intermediate forms of limitation of legal capacity becomes more problematic in the context of the legal framework governing access to justice for persons lacking legal capacity. Thus, according to Article 2 of the RA Civil Procedure Code, the rights and legal interests of juveniles and partially or wholly legally incapable persons are represented in court by their parents (or adoptive parents), guardians or trustees respectively, and in cases provided by law they can represent their own interests in court. In cases provided by law, they have the right to be heard during the proceedings on matters relating to their interests. At the same time, persons declared legally incapable may apply to the court independently only in cases provided by the same Code[165]. It follows from the regulations of the RA Civil Procedure Code that those are the cases of applying to the court to recognize a citizen as legally capable. Therefore, except in the above cases, the RA Civil Procedure Code does not provide the right of persons recognized as legally incapable to apply directly to court, which in the absence of the possibility to take an individual approach to intermediate forms of limitation of capacity, types and degrees of mental disorder, again leads to the issue of disproportionate restriction of the right of access to justice under Article 6 of the Convention.

As for the RA Code of Administrative Procedure, it establishes the following legal regulations regarding the provision of the right of access to justice for persons recognized as legally incapable. The rights and freedoms of minors under the age of fourteen, as well as persons recognized as lacking legal capacity, are represented in court proceedings by their legal representatives: the parent, guardian or other persons having such a right by law. The court may grant a person declared legally incapable the right to be heard during the examination of the case. Based on the above-mentioned legal regulations, we note that in the administrative proceedings the issue of disproportionate restriction of the right of a person recognized legally incapable to personally apply to court also exists, and for the same reasons.

At the same time, we consider it necessary to refer to the decision made by the RA Court of Cassation in administrative case No. VD/0477/05/15[166], as a result of which certain guarantees were created in case law for a person declared legally incapable, when appealing the decision to appoint a guardian over him/her. The Court of Cassation held that a person with a mental disorder should have the right to be heard in person to express his/her views on cases of establishment of guardianship as a result of being declared legally incapable, as this decision is no less important to the latter, taking into account that thereafter the protection of his/her rights and interests must be carried out exclusively through a guardian. At the same time, in the same decision, the Court of Cassation stated that in situations where the legally incapable person has not been included in the group of people who have the possibility to appeal against the appointment of a guardian, in practice it is not excluded that there are cases when those people, due to certain objective or subjective factors, do not challenge the appointment of a guardian, although the interests of the legally incapable person directly dictate such an appeal.

We also consider it necessary to note that, both at the level of legislation and legal practice, there are significant issues related to the exercise of other fundamental rights of persons recognized as legally incapable, which we do not address in this study.

Rights Strategy" envisaged clarification of the grounds for declaring a person legally incapable on mental health and/or mental disorder grounds and development of differentiated criteria for assessing lack of legal capacity.

[165] RA Civil Procedure Code, Article 2, paragraphs 7, 8 & 9.

[166] G. Nikolyan v. the guardianship and trusteeship body of Shengavit administrative district of Yerevan.

Legal practice / issues

Within the framework of this study, research[167] on court practice from the date of the judgment of the European Court of Human Rights in the case of *Nikolyan v. Armenia* on 03.10.2019 up to 16.02.2021, to assess the existence/absence of certain issues registered in the judgment.

Thus, in its judgment, the European Court of Human Rights found, among other things, that the questions sent by the court to the doctors did not relate to the "kind and degree" of the applicant's mental illness. As a result, the degree of incapacity of the applicant was not analyzed in the necessary detail in the psychiatric expert opinion, and the conclusion did not explain what actions the applicant could not understand or conduct.

Thus, during the period studied, the courts received 338 applications requesting to declare a person legally incapable. Upon reviewing those applications, 166 cases were singled out, in which there is a published decision or note regarding the appointment of an expert opinion, as well as decisions on admitting applications in which the courts referred to the issue of providing legal aid to a person recognized incapable and/or ensuring his/her mandatory participation. In 141 of the 166 aforementioned cases, forensic psychiatric or complex forensic psychiatric-forensic psychological examination was appointed. Relevant decisions were published in 108 cases; in the other 33 cases there are decisions to suspend the proceedings on the basis of appointing an expert examination, or other equivalent notes on a separate line.

Examination of those 108 decisions revealed that the court raises two main questions, variously formulated:

1. Does the person to be declared incapable have a mental disorder (mental illness) or not?

2. If yes, then as a result is the person able to understand the significance of his/her actions or to conduct them?

In 12 of the studied cases, the question clearly asks whether the person is incapable or not / can be recognized as incapable or not. Only one of the two mentioned questions is raised in 5 of the studied cases.

Thus, we can state that from the point of view of the issues raised by the court to experts, there has been no change in the case law, which is partly due to the fact that the RA legislation does not provide for intermediate forms of limitation of capacity.

As for the issue of ensuring the participation in the trial of a person recognized as lacking legal capacity, in 49 out of 166 cases there are decisions which prescribe the mandatory participation of a person recognized as incapable and/or the provision of legal assistance to him/her. This, of course, does not mean that in the other cases the persons lacking capacity are not involved in the proceedings. The information on the persons involved in the case is often published only in the verdict, and so those 49 cases are distinguished by the fact that, when admitting the suit, the court at the same time, or in a parallel decision, chose to provide legal aid to the persons recognized as incapable and/or to ensure their mandatory participation in the trial.

[167] Based on the information and acts included in the Datalex judicial information system.

Study of the case law has identified a problem regarding the non-uniform interpretation and application of the term *family member* by persons entitled to apply for a declaration of incapacity. Thus, a number of cases were initiated on the basis of an application submitted by a relative of the interested person, on the grounds of living with him/her[168]. There are cases in which the application was rejected due to the provisions of the RA Family Code, as only the parents or children were considered family members of a person recognized as legally incapable, and indeed the court gave detailed reasoning for its decision[169] not to consider cohabitation of another relative (sister) as a sufficient condition. Different interpretations and application of the notion of *family member* is problematic from the point of view of the legality of the procedure for declaring a person incapacitated, as well as from the point of view of full protection of the individual's rights and legitimate interests.

Conclusion

As a result of the research, we show that there is a problem of applying the general measures arising from the judgments made by the ECHR in the cases included in this section, both at the legislative level and in law enforcement practice. Thus, the provisions of the RA Civil Code concerning the recognition of incapacity do not comply with the requirements of the Convention insofar as they distinguish only the possibility of recognizing a person to have full capacity or to be fully incapacitated, excluding the choice of any intermediate form based on the type and degree of mental disability. The RA Civil Procedure and Administrative Procedure Codes do not provide for the right of persons recognized as lacking legal capacity to apply directly to court[170], which in the absence of the possibility to take an individual approach to intermediate forms of incapacity and type and degree of mental disorder, leads to disproportionate limitation of the right of access to justice under Article 6 of the Convention. Since the decision was adopted, there has been no change in case law as regards the issues raised by the court to experts, which is partly due to the fact that the RA legislation does not define intermediate forms of limitation of capacity.

Recommendations

1. Clarify the terms *sufficient income* and *cohabiting working family member* set out in Article 41(5)(11) of the RA Law on Advocacy, in order to exclude possible arbitrary and unlawful interpretation and application.
2. Ensure the effectiveness of free legal aid mechanisms to safeguard the legality of legislative restrictions on court representation.
3. Review the regulations defined by the RA Civil Code concerning the grounds for recognition of legal incapacity, establishing the possibility of choosing intermediate forms of incapacity based on the type and degree of mental disorder.
4. Review the provisions on the right of access to justice for persons recognized as lacking legal capacity, excluding disproportionate restrictions on the right to apply to court or be heard concerning their rights or on other matters relating to their interests.

[168] LD/4358/02/19, AVD2/1976/02/19:
[169] ED/42573/02/19, ED/8053/02/20, ED/31478/02/20:
[170] Except for very limited cases defined by law.

5. Ensure in legal practice the uniform interpretation and application of the circle of persons entitled to apply for a declaration of incapacity, as well as the individualization of issues to be examined within the scope of the expert opinion.

Abstract

The purpose of this study is to identify issues related to the execution of the judgments of the European Court of Human Rights against Armenia in the cases where the Court found a violation of Article 6 of the European Convention on Human Rights.

Within the scope of the research a number of judgments[171] delivered[172] in respect of Armenia (as of October 2020) were highlighted, and general measures undertaken by the state, as well as relevant legislation, law enforcement practice and responses to the inquiries referred to the competent authorities were analyzed. In a number of cases lawyers, as well as several judges were interviewed in order to undertake a more comprehensive assessment of the implementation issues.

The study revealed problems at the level of legislation and law enforcement practice which lead to the recurrence of similar violations and hinder the proper execution of ECHR judgments by the state. More importantly, summaries of the analysis of the situation and the description of the problems include proposals for specific recommendations which should contribute to preventing similar violations in the future.

Keywords: European Court of Human Rights, Convention, Article 6, right to fair trial, reasonable time.

Համառոտագիր

[171] The analysis of the state of execution of judgments was carried out regardless of whether the oversight procedures by the Committee of Ministers were completed or ongoing.
[172] As of October 2020.

Սույն հետազոտության նպատակն է բացահայտել և վեր հանել Հայաստանի նկատմամբ կայացված՝ Մարդու իրավունքների եվրոպական դատարանի վճիռների կատարմանն առնչվող խնդիրները այն գործերով, որոնցով Դատարանը ճանաչել է Մարդու իրավունքների եվրոպական կոնվենցիայի 6-րդ հոդվածի խախտում:

Հետազոտության շրջանակներում առանձնացվել են Հայաստանի նկատմամբ կայացված[173] մի շարք վճիռներ[174], ուսումնասիրվել են դրանց կատարման ուղղությամբ պետության ձեռնարկած ընդհանուր միջոցները, վեր են լուծվել վերաբերելի օրենսդրությունը և համապատասխան իրավակիրառ պրակտիկան, հետազոտության շրջանակներում իրավասու մարմիններին ուղարկված հարցումների պատասխանները: Առանձին դեպքերում հարցազրույցներ են անցկացվել փաստաբանների, ինչպես նաև որոշ դատավորների հետ՝ իրավակիրառ բնույթի խնդիրների համապարփակ վերլուծության շրջանակներում: Իրականացված ուսումնասիրության արդյունքում բացահայտվել են օրենսդրության և իրավակիրառ պրակտիկայի մակարդակում առկա այն խնդիրները, որոնք նպաստում են նույնաբովանդակ խախտումների կրկնմանը, խոչընդոտում են ՄԻԵԴ վճիռների պատշաճ կատարմանը պետության կողմից: Առավել կարևոր է այն, որ իրավիճակի վերլուծությունն ու խնդիրների նկարագրությունն ամփոփվում են կոնկրետ առաջարկություններով, որոնք պետք է նպաստեն ապագայում համանման խախտումների կանխարգելմանը:

Բանալի բառեր՝ Մարդու իրավունքների եվրոպական դատարան, Կոնվենցիա, 6-րդ հոդված, արդար դատաքննության իրավունք, ողջամիտ ժամկետ:

[173] 2020 թվականի հոկտեմբերի դրությամբ:

[174] Վճիռների կատարման վիճակին առնչվող վերլուծությունը կատարվել է անկախ Նախարարների կոմիտեի կողմից վերահսկողական ընթացակարգերի ավարտված կամ ընթացիկ լինելու հանգամանքներից: