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The present publication includes reports presented during the Conference devoted to the 85th Anniversary of the Faculty of Law of the Yerevan State University. Articles relate to different fields of jurisprudence and represent the main line of legal thought in Armenia. Authors of the articles are the members of the Faculty of Law of the Yerevan State University. The present volume can be useful for legal scholars, legal professionals, Ph.D. students, as well as others who are interested in different legal issues relating to the legal system of Armenia.

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Contents

JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS AS A BASIS FOR EXCEPTIONAL REVIEW IN CRIMINAL PROCEDURE IN A FORM OF NEW CIRCUMSTANCE

Armen Hovhannisyan[1]

Under Article 426.4 (1) of the Criminal Procedures Code of the Republic of Armenia (hereinafter – CPC) revisions of the final judicial act is carried out not only on the basis of the decisions of the Constitutional Court, but also in cases when the violation of a human right guaranteed under an international treaty has been confirmed by a final and lawful decision of an international court to which Armenia is a party.[2]

The Article 61(2) of the Constitution of the Republic of Armenia (with the amendments of 2015) enshrines that everyone, in line with the international treaties has the right to apply to international bodies of protection of rights and freedoms with the purpose of protecting his rights and freedoms.

The European Court of Human Rights (hereinafter referred to as – the European Court or ECtHR), which was established under Article 19 of the European Convention on Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter – the European Convention), which Armenia ratified, and which entered into force for Armenia on April 22, 2002.

In fact, the ECtHR, as an exceptional body for international and internal legal systems, has become available also for those individuals and legal entities of Armenia, which are of the view that their rights prescribed by the Convention have been violated. In other

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[2] Currently the provision coverers only those cases, when an ECHR judgment confirms the violation of human right prescribed under the Convention.

words, Article 34 of the Convention, being the one of the corner-stone guarantees for ensuring the effectiveness of the human rights protection system[1] availed an opportunity to initiate legal process on the international level.

At the same time the Convention enshrined necessary conditions, such as exhaustion of local remedies, 6 months term after the final decision of the national protection mechanism, which made the convention subsidiary, based on Article 13 of the Convention.[2]

However, the Convention would be merely declaratory, if there were no requirement for mandatory implementation of judgments adopted in the result of review of the applications submitted in line with the requirements, which is set by Article 46.

Parts 1 and 2 of the Article 46 prescribe:

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

The ECtHR mentions the following with regard to the above-mentioned clauses:

'*On the other hand, the Court considers it necessary to point out that a judgment in which it finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, if any, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and make all feasible reparation for its consequences in such a way as to restore as far as possible the*

[1]Mamatkulov and Askarov v. Turkey Judgment of ECtHR from February 4, 2005, para.100, Loizidou v. Turkey, ECtHR Judgement from March 23, 1995, para. 70.

[2] Selmouni v. France, 1999 July 28, para. 74; Kudła v. Poland 2000 October 26 para. 152.

situation existing before the breach"[1]*:*

"These obligations reflect the principles of international law whereby a State responsible for a wrongful act is under an obligation to make restitution, consisting in restoring the situation which existed before the wrongful act was committed, provided that restitution is not "materially impossible" and "does not in volve a burden out of all proportion to the benefit deriving from restitution instead of compensation" (Article 35 of the Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts – see paragraph 36 above). In other words, while restitution is the rule, there may be circumstances in which the State responsible is exempted – fully or in part – from this obligation, provided that it can show that such circumstances obtain.[2]

Based on the aforementioned, the Court of Cassation of the Republic of Armenia (hereinafter referred as Court of Cassation) in its judgment number *ì´-07/13* in the case of *Jirayr Sefilyan* dated 31 May 2014 mentions: "*... Under Article 46(1) High Contracting parties have the following obligations:*

1. to pay the decided compensation;

2. in case if it is necessary to undertake individual measures for the applicant, which includes:

a. cease the violation recognized by the ECtHR or the effects thereof;

b. restore the situation before the violation (restitutio in integrum) as much as it is possible, or in case if that is impossible, to undertake other measure compatible with the conclusions to induce the state to comply with its obligations

3. undertake measures of general charachter to prevent such violations in the future."

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[1] Gabrielyan v. Armenia, 2012 April 10, para. 103; Scozzari and Giunta v. Italy, 2000 July 13, para. 249; Assanidze v. Georgia, 2004 April 8, para. 198.

[2] Verein Gegen Tierfabriken Schweiz (vgt) v. Switzerland) (N 2) 2009 June 30, para. 86:

Important to note that in accordance with the ECtHR, if *restitutio in* integrum is not possible the High Contracting party is free to choose any other measures for implementing the judgment,[1] provided that those are compatible with the conclusions of the judgment.[2]

When the applicant's claims have been sustained, the ECtHR declares the violations of the Convention, as well as it can provide compensation for damages and expenses, however the ECtHR cannot eliminate decisions of the national bodies and courts (including judgement)[3]. The court does not alter or cancel internal legal acts[4]: The mentioned simply means that the ECtHR decides on the international legal violations of countries[5].

At the same time, it is important to note that the ECtHR in some exceptional cases tries to guide the High Contracting party in the process of selecting the measure for the purpose of securing the compliance with Article 46 of the Convention, which can help to solve a systemic problem[6]. In some other cases the ECtHR concluded that the violations of the Convention are of such a nature that do not allow to select any measure to address the violations[7].

The ECtHR has expressed number of legal positions with regard to re-commencement of the proceedings in the internal legal system as a means for achieving *restitutio in integrum.*

For example, in some cases the ECtHR has directly mentioned,

[1] Seljuk and Asker v. Turkey, 1998 April 24, para. 125.
[2] Scozzari and Giunta v. Italy, 2000 July 13, para. 249.
[3] Schmautzer v. Austria, 1995 October 23, paras. 42-44.
[4] Lundevall v. Sweden, 2002 November 12, para. 44.
[5] Philip Leach, Taking a case to the European Court of Human Rights, Second edition, Oxford University Press, Incorporated, 2005, p. 353:
[6] Ocalan v. Turkey, 2005 May 12, para. 210; Broniowski v. Poland, 2004 June 22, para. 194.
[7] Assanidze v. Georgia, 2004 April 8, para. 202.

that it does not have the power to order re-initiation of proceedings[1]. In other extraordinary cases, the ECtHR concluded that if there is a violation of the right to fair trial under Article 6, then the reinitiation of the proceedings is an accepted measure for eliminating consquences of the violation[2]. It is now accepted practice by the Court to include the provisions on opening a new trial in the judgment[3].

Thus, according to the ECtHR, especially in cases ralating to violations of fair trial considers the reopening of a trial or review of the final decision as a necessary measure.

The ECtHR has adopted 87 judgments against Armenia as of 2017, 79 of which have recognized violations, and 34 of those include violations of the right to fair trial[4].

Thus, although the ECtHR does not directly oblige High Contracting parties to pass such legislative regulations, which will make the opennig of the trials possible, nevertheless, the ECtHR is of the view, that in cases when countries have the legislative basis for opening a new trial, then the effective measure for restoring the protected right under Article 6 of the Convention is the opening of a new trial.

One of the examples of opening a new trial in the result of recognizing the violation of Article 6 of the Convention is the decision No. *ì´-04/13* of the Court of Cassation in the case of *Artak Gabrielyan*, dated on 23 September 2013.[5]

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[1] *Saidi v. France*, 1993 September 20, Judgment, para. 47; *Pelladoah v. Netherlands*, 1994 September 22, Judgment, para. 44.

[2] Gencel v. Turkey, 2003 October 23, Judgement, para. 27; *Claes and others v. Belgium*, 2005 June 2, Judgment, para. 53.

[3] *Gabrielyan v. Armenia*, 2012 April 10, Judgment, paras. 103-104.

[4] See http://www.echr.coe.int/Documents/Stats_violation_1959_2017_ENG.pdf

[5] See also the decisions of the Court of Cassation with regard to cases Asatryan v. Armenia, 2017 December 20, no. ՎԲ-04/12; Avetisyan v. Armenia, 2017 August 21, no. ՍԴ3/0088/01/09; Manucharyan v. Armenia, 2017 August 21, no. ԼԴ/0108/01/10; Ter-Sargsyan v. Armenia, 2017 August 21, no. ԷՔՐԴ1/0057/01/08;

In particular, considering the above-mentioned circumstances, as well as considering that the ECtHR has recognized violation of Article 6(1) and Article 6(3)(d) in *Gabrielyan v. Armenia*, referering to the absence of the opportunity for Gabrielyan to cross-examine witnesses of the adversary party. Based on the above-mentioned judgment of the ECtHR, the Court of Cassation has reviewed it's early decision, repealed the judgement of the lower court and ordered a new trial.

At the same time important to note that the position of the ECtHR does not require new trial in all cases of violation of the right to fair trial.[1] At the same time it would be wrong to state that violations of other rights cannot create necessity for a new trial. We are of teh view that the possibility of a new trial in each case depends on the nature of violation and it's impact on the outcome of the case.

Important to cite here the recommendation of the Committee of Minister of Council of Europe "On the opening of new trials at national level based on the decisions of the European Court of Human Rights", which stresses the necessity of individual measures in the following two circumstances, the procedural or material violation should be of such nature as to cast doubt on the outcome of the national legal proceedings, and the applicant should still bear the negative consequences of the national decision in question, which cannot be satisfactorily restored by just satisfaction and cannot be eliminated in another manner than review of the judicial act or

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Nalbandyan v. Armenia, 2016 June 24, no. ՎԲ-04/15; Misha Harutyunyan v. Armenia, 2009 April 10, no. ՀՔԴ 2/0028/01/08.

[1] For example, it is very hard to imagine that there will be an opening of a trial in case of violation of the of reasonable time requirement of the right to fair trial. As the Court of Cassation rightly notes, in such case the reopening of the trial and starting a new inquiry in a situation when the investigation has been conducted by a violation of the requirement of reasonable time will potentially lead to a repeated similar violation (see the Decision of the Court of Cassation in Ararat Muradkhanyan case from 13 September 2013 case number ՎԲ/01/13, para. 20).

openning of the trial. [1]

Based on aforementioned we can conclude that in case if it is impossible to restore status quo ante through new trial, then based on Article 426.9 of the CPC there can be no opening of a trial, and on the contrary, if the most effective way of reaching *restitution in integrum* is opening of trial, then it should take place disregarding of the type of the violation of the Convention.[2]

Decisions of the Court of Cassation of Armenia ´/01/13, ì´-07/13, ì´/05/13, ì´-06/15, ì´-02/16 ¨ 1-81/2005 (¼-139/06, ìø´-195/06, ¼-510/06) based respectively on *Muradkhanyan v. Armenia, Sefilyan v. Armenia, Virabyan v. Armenia, Zalyan v. Armenia, Muradyan v. Armenia* confirm the above mentioned.

In particular, the Court of Cassation has reviewed it's past positions based on the judgment by the ECtHR.[3] The Court of Cassation has reviewed its positions based on new circumstance, however evetually has rejected the cassation appeal, noting: "(...) violations pointed out by the ECtHR are of such nature that could not have any effect on the outcome of the case. In particular, as a violation the ECtHR has indicated, that the detention of A. Muradkhanyan between 2005 December 14 and December 29 was not in line with the requirements of legality enshrined by the Convention, and that A. Muradkhanyan has been kept under detention in violation of the "reasonable time" requirement". At the same time, the gult of A. Muradkhanyan has been approved by the evidence obtained and studied in the case, and he has been convicted to life imprisonment. The European Court did not find any violation pertaining to legality of the court proceedings and the judgment, moreover the ECtHR concluded that the violations which took place

[1] See para. 27 of the Decision of the Court of Cassation number ՎԲ-07/13 from 31 May 2014.

[2] This is stipulated in Article 426.4 (1) (2) of the CPC.

[3] In the mentioned case the ECtHR has recognized violations of rights prescribed in of Article 5(1) and 5(2).

during the detention of A. Muradkhanyan did not have any effect on the final judgment in the case. Apart from that, having a convicting judgment the overturning of the detention decision would not restore the situation before the violation, moreover it is legally unenforceable, since discussing the issue of legality of the detention decision of the person serving an imprisonment based on a convicting judgment would entail legal uncertainty*."* [1]

A judicial act of the Court of Cassation was reviewed based on *Sefilyan v. Armenia*, however the cassation appeal was rejected by the Court of Cassation. In case of *Sefilyan v. Armenia*, a past judicial act was reviewed on the basis of new circumstance, however the appeal was rejected by the Court of Cassation.

Thus, in the mentioned case the ECtHR has recognized violations of rights enshrined in parts 1, 2, 3, 4 and 8 of Article 5.

The Court of Cassation has justified the rejection of the appeal brought for the violations of rights prescribed in Article 5 based on a case with similar circumstances with the one in question – the above-mentioned legal positions expressed in case of *Muradkhanyan.*

With regard to violation of the right protected under Article 8 of the Convention the Court of Cassation has emphasized: "Information obtained in the result of wiretapping of phone calls and other communications of J. Sefilyan was not used as evidence *per se*, and have not been used for reasoning of any procedural activity or decision taken with regard to J. Sefilyan" *(...)*

(...) information obtained through activities contrary to Article 8 of the European Convention, i.e. those obtained through wiretapping of phone calls and other communications of J. Sefilyan were used neither for justifying the decision to initiate criminal proceedings, nor for the request to obtain search warrant. In other words, the procedural decisions discussed have been made based on information received independent from activities non-compliant with

[1] Decision ՎԲ/01/13 of 13 September 2013, Cassationn Court of RA, para 22.

the requirements of the Convention, and from an independent source. And the searches in the apartment and office of J. Sefilyan, have been conducted and respective protocols were composed in line with the procedures prescribed by law." (para. 34)

Moreover, the Court of Cassation has stressed: *"... Even for declaring an evidence , which is based on an information received through illegal means can be considered as impossible only when there is the possibility of obtaining that evidence through reasonable efforts: In other words, the criterion of "absence of causation" should be considered here along with the criterion of "effect", which technically means that the evidence can be recognized permissible, if the state could obtain such information through reasonable efforts." (para. 35):* Based on the materials of the case, the Court of Cassation has concluded, that competent bodies could obtain the primary information on which the evidence is based through reasonable efforts.

Analyzing the legal positions of ECtHR in *Khan v. United Kingdom* and PG and JH v. United Kingdom the Court of Cassation has expressed the following position: "The ECtHR does not find any violaiton of Article 6 of the Convention the use of evidence obtained in line with the national legislation, even if the requirements of Article 8 were not met. If the use of the mentioned evidence is not considered as violaiton of the fundamental right to fair trial, hence the arguments for possible inadmissibility and leaving out of evidentiary materials of the facts obtained through procedural activities having nothing to do with the mentioned evidence are illegal". *(para. 36)*:

The Court of Cassation has concluded, that the violation of the appellee's right guaranteed under Article 8 cannot in any way influence on the array of evidence, hence cannot also impact the outcome of the case. Based on the aforementioned the Court of Cassation rejected the cassation appeal.

When talking about the decisions of the Cassation Court's rulings after cases of *Virabyan, Nalbandyan, Zalyan, Muradyan v. Armenia* it important to note that the mentioned cases are important not only for the Article 6 of the Convention, but also for opening of trials in cases of violations of other articles.

For example, in *Virabyan v. Armenia* the ECtHR has recognized violation of Article 6(2), substantive violation of Article 3, and procedural violations of Articles 3 and 14. And the Court of Cassation, taking into account the nature of the violations recognized by the European Court, has reviewed its prior decision, and rescinded the judicial acts of lower courts and reverted the cases to the lower courts for new trials with regard to violations recognized by the ECtHR.

It is clear from the abovementioned judicial act, that reopening of a trial has taken place not only in case of violation of Article 6 (2) of the Convention, but also on the part of substantive violation of Article 3 and procedural violations of Articles 3 and 14.

The Court of Cassation has expressed the following legal positions in the framework of cases *Nalbandyan and Zalyan:* "*The European Court has accumulated sustainable precedent on the part, that in case of violation of Article 3 of the Convention countries are taking up obligation to ensure effective investigation in the framework of their commitments under Article 1.* The investigation will be effective, if it will lead to the confirmation of the disputed facts, and if possible, to the revelation and punishment of those responsible. (see, *mutatis mutandis, Jeronovičs v. Latvia [GC] 2016 July 5, Judgment, Application no. 44898/10, para. 103).* In particular the European Court has emphasized, that the f willful ill-treatment the breach of Article 3 cannot be remedied only by an award of compensation to the victim. If the authorities could confine their reaction to incidents of willful ill-treatment by State agents to the mere payment of compensation, while not doing enough to prosecute

and punish those responsible, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity, and the general legal prohibition of torture and inhuman and degrading treatment, despite its fundamental importance, would be ineffective in practice *(see, mutatis mutandis, Jeronovičs v. Latvia [GC] 2016 July 5, Judgment, Application no. 44898/10, Gafgen v. Germany, 2010 June 1, Judgmenet, Application no. 22978/05, Krastanov v. Bulgaria 2004 September 30-Ç, Judgment Application no. 50222/99)."*

The analysis of the mentioned decisions witnesses, that the arguments raised by the European Court were used as a basis for reopening of trial on the part of violation fo Article 3.

As for the decision of the Court of Cassation in case of *Muradyan*, it should be mentioned that reopening of the trial was initiated in case of violation of Article 2 of the Convention (both substantive and procedural). Important to note that the Court of Cassation has adopted the following legal positions of the European Court: "(…)*the main purposes of the of criminal punishment is compensation, as a means for justice for the victims, and overall prevention, which is directed at preventing future violations and preservation of the rule of law. None of the mentioned purposes can be secured without bringing the supposed criminal before the court. The failure of the authorities to conduct investigation against the supposed direct perpetrators distorts the effectiveness of the criminal mechanism, which is directed at preventing, restraining and punishing illegal killings. The observance of the procedural commitments under Article 2 of the Convention requires the internal legal system to illustrate it's ability and willingness to enforce the criminal justice against those who have illegally deprived another person of life*" (see, *mutatis mutandis, Nachova and Others v. Bulgaria* ` 2005 July 6, Judgment (applications no. 43577/98 and 43579/98, para. 160), *Ghimp and Others v. the Republic of Moldova*,

2012 October 30, Judgment (Application no. 32520/09, para. 43), *Jelić v. Croatia* 2014 June 12, Judgment (Application no. 57856/11, para. 90), *M. and Others v. Croatia*, 2017 May 2, Judgment (Application no. 50175/12, para. 88):

Summarizing our study of the ECtHR judgments as basis for new circumstances, we can conclude that the judgment against the Republic of Armenia is considered as a new circumstance for reviewing the final judicial act, and as a consequence of that the possibility of reopening of the trial in each case depends on the nature of the violation, and on the degree of impact the violation had on the outcome of the case.