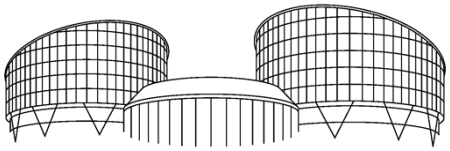

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF MAKEYAN AND OTHERS v. ARMENIA

(Application no. 46435/09)

JUDGMENT

Art 6 § 1 (criminal) • Fair hearing • Conviction based on pre-trial witness statements retracted in court • Sufficient reasons given by domestic courts for attaching more weight to pre-trial statements

STRASBOURG

5 December 2019

FINAL

05/03/2020

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

In the case of Makeyan and Others v. Armenia,

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

Ksenija Turković, *President,*
Aleš Pejchal,
Pere Pastor Vilanova,
Tim Eicke,
Jovan Ilievski,
Raffaele Sabato, *judges,*
Anna Margaryan, ad hoc *judge,*
and Renata Degener, *Deputy Section Registrar,*

Having deliberated in private on 5 November 2019,

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

PROCEDURE

1. The case originated in an application (no. 46435/09) against the Republic of Armenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Armenian nationals, Mr Petros Makeyan ("the first applicant"), Mr Shota Saghatelyan ("the second applicant") and Mr Ashot Zakaryan ("the third applicant") ("the applicants"), on 26 August 2009.

2. The applicants were represented by Ms C. Vine, Mr Kerim Yildiz, Mr Mark Muller, Ms Ajanta Kaza, Ms Saadiya Chaudary, lawyers of the Kurdish Human Rights Project (KHRP) based in London, and Ms Narine Gasparyan, a lawyer practising in Yerevan. The Armenian Government ("the Government") were represented by their Agent, Mr G. Kostanyan, and subsequently by Mr Y. Kirakosyan, Representative of the Republic of Armenia to the European Court of Human Rights.

3. The applicants alleged, in particular, that the admission of pre-trial witness statements in evidence against them had been in breach of their right to a fair hearing.

4. On 5 June 2012 notice of the complaint under Article 6 § 1 concerning the admission of pre-trial witness statements in evidence against the applicants was given to the Government and the remainder of the application was declared inadmissible.

5. Mr Armen Harutyunyan, the judge elected in respect of Armenia, was unable to sit in the case (Rule 28 §§ 2 and 3 of the Rules of Court). Accordingly, the President of the Chamber appointed Ms Anna Margaryan to sit as an *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The first applicant was born in 1954 and lives in Yerevan. The second and third applicants were born in 1947 and 1966 respectively and live in Gyumri.

7. On 19 February 2008 a presidential election took place in Armenia. During the pre-election campaign the first and the second applicants were the heads of the regional and municipal electoral headquarters of the main opposition candidate, Mr Levon Ter-Petrosyan. On election day, all three applicants acted as the candidate's proxies.

8. On 21 February 2008 criminal proceedings were instituted on account of the fact that on election day on 19 February 2008 the applicants visited in turn polling station no. 34/06 in Gyumri. It was alleged that there they had an argument with the chairperson and members of the electoral commission at the polling station concerning the stamping of voters' passports and threatened them, thus obstructing for about thirty minutes the work of the commission and interfering in their carrying out their official duties by persons participating in the elections.

9. According to the applicants, in reality they visited separately the above polling station at different times during election day, voiced their concerns to the head of the polling station's election commission about different violations of the voting process in that polling station, including ballot-box stuffing and the wrong passports being stamped, and left.

10. On 25 February 2008 the first and third applicants were arrested in connection with the instituted criminal case.

11. On 26 February 2008 the second applicant was arrested in connection with the same criminal case.

12. On 27 February 2008 the first applicant was charged with obstructing the work of the electoral commission and other persons involved in the elections. On the same day he was detained following a decision of the Kentron and Nork-Marash District Court of Yerevan ("the District Court").

13. On 28 February 2008 the third applicant was charged with the same offence as the first applicant and on the same day detained following a decision of the District Court.

14. On 29 February 2008 the second applicant was charged with the same offence and placed in detention.

15. During the investigation several witnesses were questioned, including S.H., the chairperson of the polling station's electoral commission, K.H., her deputy, L.M., S.V., L.Mel., V.G., N.H., H.K., L.S., G.G. and S.P., members of the electoral commission stationed at the polling station and proxies of the presidential candidates. All eleven witnesses made

similar statements according to which on election day the applicants appeared in turn at the polling station and disrupted the voting by arguing with, shouting at and threatening the members of the electoral commission.

Confrontations were held between S.H. and the first and the second applicants; L.M. and the first applicant; and S.V. and the second applicant. The witnesses confirmed their previous statements during those confrontations.

16. In March 2008 the investigation was concluded and the applicants were committed to stand trial before the Shirak Regional Court ("the Regional Court").

17. All the above-mentioned witnesses, except G.G. and S.P., were summoned to appear before the trial court.

18. In April 2008 the witnesses N.H., S.V., L.M. and L.S. submitted written requests to the presiding judge in the applicants' trial seeking permission not to attend the relevant hearings for fear of being pressurised, insulted or harassed by groups of people supporting the applicants. Another witness, L.Mel., invoked health reasons for non-attendance. These witnesses all eventually attended the trial.

19. At the hearing of 7 May 2008 the witnesses K.H., L.M., S.V., L.Mel., N.H., H.K. and L.S. retracted their pre-trial statements, claiming that these had been either guided or dictated by the investigator and that no incident involving the applicants had in fact taken place.

At the same time, S.H., a witness, stated that she was not able to mention any difference between her pre-trial depositions and testimony given in court, while another witness, V.G., asserted that his pre-trial statements had not been guided or dictated by the investigator.

20. On 13 June 2008 the Regional Court found the applicants guilty as charged under Article 149 § 2 ((3) and (5)) of the Criminal Code and sentenced the first applicant to three years' imprisonment and the third applicant to two and a half years' imprisonment. In doing so, the Regional Court found that the applicants had acted as a group with a prior plan. As to the second applicant, the Regional Court decided to impose a suspended sentence of two and a half years' imprisonment and released him from detention.

In substantiation of the applicants' guilt, the Regional Court listed the following evidence in its judgment: the pre-trial statements of all eleven witnesses in the case, and the records of the polling station which confirmed that no ballot-box stuffing had taken place. The judgment further reads as follows:

> "... Witnesses [K.H., L.M., S.V., L.Mel., N.H., H.K. and L.S.], who were questioned in court during the examination of the criminal case, entirely retracted their above-mentioned pre-trial statements incriminating [the applicants] with the common reasoning that their statements had been guided or dictated by the investigator and [stated] that the work of the electoral commission at the polling station had not been

obstructed [or] impeded; the accused persons had not shouted, threatened, restricted the free voting rights of voters and so on [see the record of the court hearing].

During the trial the witnesses [S.H.] and [V.G.] made conflicting ... statements; the former failed to mention any difference between her pre-trial and trial statements while the latter partly [did so], mentioning that his statement had neither been guided nor dictated by another person ...

Having analysed the reasons and motives behind the retraction by the witnesses of their pre-trial statements and the change of their positions, the court does not accept them as credible because they are not based on other factual circumstances of the case, evidence incriminating [the applicants] and also taking into account that some of the witnesses in question, before being questioned in court, had lodged applications with the trial court whereby they had maintained their pre-trial statements and had asked not to be questioned in court due to the fear of testifying in the presence of a big audience gathered in the courtroom or the fact of being exposed to moral and psychological pressure and so on.

The court, considering the above-mentioned arguments put forward by the witnesses as justification for retraction of their pre-trial statements, finds therefore that those retractions were conditioned by external influences and are not credible since it is obvious that the witnesses have the intention to help [the applicants] escape criminal liability. Hence the court concludes that the pre-trial statements of those witnesses were credible and well-founded."

21. The applicants lodged appeals against the judgment of the Regional Court claiming, *inter alia*, that no grounds or proper justification for relying on pre-trial statements of the witnesses had been provided and that the Regional Court, by not admitting into evidence the testimonies of the witnesses given during the trial, had violated their right to a fair trial.

22. On 20 August 2008 the Criminal Court of Appeal upheld the judgment of 13 June 2008. As regards the reliance by the Regional Court on the witness statements given at the investigation stage, the Court of Appeal found it lawful on the same grounds as those referred to by the Regional Court.

23. The applicants lodged an appeal on points of law against the judgment of the Court of Appeal, complaining, *inter alia*, that the Court of Appeal had admitted into evidence the statements of the witnesses made to the investigating authority despite the fact that those witnesses had retracted them at the trial stage.

24. On 27 February 2009 the Court of Cassation declared the applicants' appeals inadmissible for lack of merit.

25. On 22 June 2009 the first and the third applicants were released under an amnesty.

II. RELEVANT DOMESTIC LAW

26. Article 149 § 2 ((3) and (5)) of the Criminal Code provide that obstructing the work of a pre-election commission, if such an act is

accompanied with a threat of violence and committed by a group of persons, is punishable by deprivation of liberty for a term from two to five years.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

27. The applicants complained that the criminal proceedings against them had been unfair since the domestic courts had disregarded the crucial witness testimonies made on oath before the trial court in favour of the pre-trial statements which the witnesses claimed to have been made under duress. They relied on Article 6 § 1 of the Convention which, in so far as relevant, reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

28. The Government denied that there had been any such violation.

A. Admissibility

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

B. Merits

1. The parties' submissions

(a) The applicants

30. The applicants maintained that their trial had not been fair because they had been convicted of obstructing the work of members of the election commission on the basis of witness evidence in circumstances where seven of the witnesses, having been successfully challenged by the applicants, had retracted their pre-trial statements claiming that these had either been guided or dictated by the investigator and that no incident involving the applicants had taken place.

31. The applicants contested the Government's assertion that the pre-trial statements of K.H., L.M., S.V., L.Mel., N.H., H.K. and L.S. had been voluntarily given, referring to their respective declarations submitted to the Court whereby they confirmed that their pre-trial statements had not been authentic and insisted on their evidence given at court.

32. As regards the applications submitted by several witnesses seeking not to appear in court that had been mentioned by the Government, the applicants claimed that the law-enforcement authorities had forced the

relevant witnesses to write them. The applicants referred in this connection to the written statement of S.P., who had not attended the trial, submitted to the Court where he stated that the investigator had told him that it would be better for him not to come to the court and give evidence in order to avoid problems. In any event, the applications in question had been rejected by the trial court allegedly for the applicants to be provided with an opportunity to adequately challenge the witnesses in question. Nevertheless, the trial court had effectively dismissed the retractions of the same witnesses, concluding that they had been conditioned by the same external influences that had led those witnesses to unsuccessfully request not to give evidence at trial, a result that was both absurd and unfair to the applicants.

33. In sum, the applicants argued that they had been convicted solely on the basis of witness evidence. Although the Regional Court had had regard to the records of the ward polling station, those records did not constitute probative evidence that the applicants had obstructed the work of the electoral commission. It was their contention that the opportunity afforded to them to challenge witnesses against them at trial had been rendered meaningless when the resulting evidence had been effectively ignored by the Regional Court and the Court of Appeal, which had unfairly preferred the pre-trial statements of the witnesses K.H., L.M., S.V., L.Mel., N.H., H.K. and L.S. to their retraction of those statements at trial.

(b) The Government

34. The Government submitted that the pre-trial statements at issue, all which had been made voluntarily, had been properly examined by the trial court while the applicants, who had been represented by counsel, had had an adequate opportunity to cross-examine the witnesses in question. The trial statements of the seven witnesses in question had contradicted considerably their statements made during the investigation and the latter statements had been duly admitted into evidence, having been carefully considered by the judge.

35. The Government pointed out that in the course of the investigation K.H., L.M., L.Mel. and S.V. had made more than one statement incriminating the applicants. In addition, L.M., N.H. and S.V. had confirmed their previous statements once again when questioned anew by a different investigator who had taken over the case in March 2008. Furthermore, the first and second applicants had had an opportunity to cross-examine L.M. and S.V. during confrontations held in the course of the investigation. L.M. and S.V., however, had reiterated their initial statements again during those confrontations.

36. The Government noted that N.H., S.V., L.M. and L.S. had submitted written requests to the presiding judge seeking permission not to attend the relevant hearings for fear of being insulted and harassed by groups of people supporting the applicants. In the Government's submission, the trial court

had found that the witnesses had retracted their previous statements as a result of psychological pressure exerted by the applicants and their followers and had not considered those retractions as credible. Furthermore, the judgment of the Regional Court had referred to, *inter alia*, the statements of S.H. and V.G., who had confirmed their pre-trial incriminatory statements before it, and the pre-trial statements of V.G. and G.G., which had been read out.

2. The Court's assessment

(a) General principles

37. The Court reiterates that, while Article 6 § 1 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or on the way in which evidence should be assessed, these being primarily matters for regulation by national law and the national courts (see, among other authorities, *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, § 61, ECHR 2015; and *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 83, 11 July 2017).

38. Normally, issues such as the weight attached by the national courts to particular items of evidence or to findings or assessments submitted to them for consideration are not for the Court to review. The Court should not act as a fourth-instance body and will therefore not question under Article 6 § 1 the national courts' assessment, unless their findings can be regarded as arbitrary or manifestly unreasonable (see *Moreira Ferreira (no. 2)*, cited above, § 83, and the cases cited therein).

39. The Court also reiterates that according to its established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based (ibid., § 84).

40. As regards the question of assessment of witness evidence in particular, the Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among other authorities, *Doorson v. the Netherlands*, 26 March 1996, § 67, *Reports* 1996-II, and *Edwards v. the United Kingdom*, 16 December 1992, § 34, Series A no. 247-B).

The Court has previously emphasized that the notion of a fair and adversarial trial presupposes that, in principle, a tribunal should attach more weight to a witness's testimony given at the trial hearing than to a record of his or her pre-trial questioning produced by the prosecution, unless there are good reasons to find otherwise. Among other reasons, this is because pre-trial questioning is primarily a process by which the prosecution gather information in preparation for the trial in order to support their case in court, whereas the tribunal conducting the trial is called upon to determine a

defendant's guilt following a fair assessment of all evidence actually produced at the trial, based on the direct examination of evidence in court. The Court is therefore required to review whether the domestic courts gave reasons for their decisions in respect of any objections concerning the evidence produced (see, in particular, *Huseyn and Others v. Azerbaijan*, nos. 35485/05 and 3 others, § 211, 26 July 2011).

(b) Application of these principles to the present case

41. The Court notes at the outset that the circumstances of the present case are different from a number of cases where it has previously examined whether or not principles related to absent witnesses apply in a situation when a witness retracts a statement made at the pre-trial stage of the proceedings or claims to no longer have recollection of the facts when cross-examined at trial (see, for example, *Vidgen v. the Netherlands* (dec.), no. 68328/17, §§ 34-43, 8 January 2012, and *Bondar v. Ukraine*, no. 18895/08, §§ 74-82, 16 April 2019 with further references).

The crucial difference is that the applicants in the present case had in fact the opportunity to cross-examine the witnesses in question during the trial but the courts eventually based the applicants' conviction on the pre-trial statements of those witnesses although they had retracted them in court. Therefore, the present case is not about a person's conviction based on a retracted statement of an absent witness but the question before the Court is whether the criminal proceedings were fair overall having regard to the use of the retracted pre-trial statements in evidence against the applicants.

42. The Court observes that the applicants' conviction was based on the statements made at the pre-trial stage by the following eleven witnesses: S.H., K.H., L.M., S.V., L.Mel., V.G., N.H., H.K., L.S., G.G. and S.P. Although the Regional Court's judgment also mentioned the records of the polling station, those records did not contain any information about the offence imputed to the applicants but rather contained relevant entries with regard to the electoral process (see paragraph 20 above).

43. The Court notes that that nine of the above-mentioned witnesses – namely S.H., K.H., L.M., S.V., L.Mel., V.G., N.H., H.K. and L.S. – were summoned to attend the applicants' trial, which they all did. The Court also notes that when questioned in court K.H., L.M., S.V., L.Mel., N.H., H.K. and L.S. retracted their pre-trial statements whereby they had previously incriminated the applicants, stating that those statements had been either guided or dictated by the investigator (see paragraphs 17 and 19 above).

44. The Court observes that there is nothing in the case file as it stands to substantiate that the investigator had exerted unlawful influence on K.H., L.M., S.V., L.Mel., N.H., H.K. and L.S. during the pre-trial stage of the proceedings other than their statements both made before the trial court and before the Court as well as the written statements of S.P., which were also submitted to the Court by the applicants (see paragraphs 19, 31 and 32

above). The Court further observes that there is equally nothing in the material submitted to it to indicate that the seven witnesses at issue had ever raised any complaints at the domestic level that their pre-trial statements had been obtained unlawfully (see, by contrast, *Huseyn and Others*, cited above, §§ 208-210). Notably, L.M. and S.V. had confirmed their earlier statements when cross-examined by respectively the first and the second applicants during the investigation (see paragraph 15 above).

45. It is also to be noted that the applicants were able to challenge the admission of the pre-trial statements of the seven witnesses in question and to put forward arguments to exclude that evidence as unreliable (see *Sahakyan and Mkrtchyan v. Armenia* (dec.), nos. 57687/09, 63452/09 and 63455/09, §§ 106 and 107, 1 October 2013; and *Cutajar v. Malta* (dec.), no. 55775/13, 23 June 2015). It cannot therefore be said that the rights of the defence were not secured at the trial. The fact that the disputed evidence was eventually not excluded does not alter this conclusion.

46. In the circumstances where K.H., L.M., S.V., L.Mel., N.H., H.K. and L.S had retracted their pre-trial statements – some of which had earlier been confirmed during the cross-examinations at the stage of the investigation – while at least one witness, namely V.G., had confirmed the content of his pre-trial statement under oath (see paragraph 19 above), the Regional Court had to make a choice between conflicting versions of the events at the polling station. It had the advantage of hearing the oral testimony of all the above seven witnesses and observing their demeanour when cross-examined by the parties. Having made its own assessment of the evidence before it, including the requests previously lodged by some of the witnesses in question who sought not to attend the trial for fear of repercussions by the applicants' supporters (see paragraph 18 above), the Regional Court, in its free assessment of the evidence, found their pre-trial statements to be more credible. In particular, it considered that the fact that those witnesses had retracted their earlier statements was conditioned by external influences and their being exposed to psychological pressure by the applicants' supporters (see paragraph 20 above).

47. The Court reiterates in this respect that the assessment of evidence is in the first place a matter for the jurisdiction of the national courts. The Court will therefore not question under Article 6 § 1 the national courts' assessment, unless their findings can be regarded as arbitrary or manifestly unreasonable (see *Moreira Ferreira (no. 2)*, cited above, § 83). Furthermore, the Court has on previous occasions found that where the domestic judicial authorities are confronted by several conflicting versions of the truth offered by the same person, the final preference for a statement given at the pre-trial stage over one given in an open court does not in itself raise an issue as regards the overall fairness of the proceedings where that preference is substantiated and the statement itself was given of the person's own volition (see *Camilleri v. Malta* (dec.), no. 51760/99, 16 March 2000).

Having regard to the fact that none of the witnesses had complained at the domestic level about any form of pressure let alone ill-treatment by the investigative authorities and that certain witnesses had invoked the fear of pressure from the applicants' supporters as justification not to attend the trial while at least one of the witnesses had fully confirmed the version of the events submitted in his earlier statement, the Court accepts that the reasons given by the trial court for attaching more weight to the pre-trial statements of the seven witnesses in question was sufficient to satisfy the relevant criteria established in the Court's case-law (see paragraph 40 above).

Against this background and assessing the material before it as a whole, the Court is not convinced that the findings of the Regional Court, as upheld by the Criminal Court of Appeal, can be regarded as arbitrary or manifestly unreasonable. The Regional Court convicted the applicants based on its discretion in assessing the entirety of evidence put before it, having provided, as noted above, reasons behind its decision. Consequently, the Court concludes that the applicants' trial overall met the standard of fairness required by Article 6 § 1 of the Convention.

48. There has accordingly been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 5 December 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener	Ksenija Turković
Deputy Registrar	President