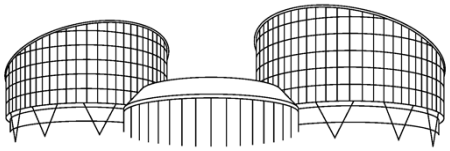

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF AVAGYAN v. ARMENIA

(Application no. 1837/10)

JUDGMENT

STRASBOURG

22 November 2018

FINAL

22/02/2019

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Avagyan v. Armenia,

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

Linos-Alexandre Sicilianos, *President,*
Ksenija Turković,
Aleš Pejchal,
Krzysztof Wojtyczek,
Armen Harutyunyan,
Tim Eicke,
Jovan Ilievski, *judges,*
and Abel Campos, *Section Registrar,*

Having deliberated in private on 10 July and 23 October 2018,

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

PROCEDURE

1. The case originated in an application (no. 1837/10) against the Republic of Armenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Armenian national, Mr Khosrov Avagyan ("the applicant"), on 28 December 2009.

2. The applicant was represented by Ms H. Harutyunyan and Mr A. Melkonyan, lawyers practising in Yerevan and by Ms H. Harutyunyan, a non-practising lawyer. The Armenian Government ("the Government") were represented by their Agent, Mr G. Kostanyan, Representative of the Government of Armenia to the European Court of Human Rights.

3. The applicant alleged, in particular, that he had been deprived of the possibility to have experts testifying against him examined in the criminal proceedings.

4. On 24 May 2016 the complaint concerning the applicant's inability to examine experts was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1946 and lives in Yerevan.

6. On 2 January 2007 M.G. and V.G., two elderly sisters, were found dead in V.G.'s apartment, where they lived together following which the prosecution started an investigation into their death. It appears that the applicant had known V.G., who had drawn up a will on 5 April 2006 according to which she had bequeathed her apartment to the applicant.

7. On the same day forensic medical examinations, including autopsies, were ordered to determine, *inter alia*, the cause of death of the two sisters.

8. On 2 February 2007 the expert A.D. issued two opinions (nos. 22 and 23). According to the first one, M.G. had died as a result of acute heart failure brought about by low body temperature while opinion no. 23 stated that V.G. had died as a result of hypothermia.

9. On 9 February 2007 the prosecutor decided to terminate the investigation. Relying on forensic medical opinions nos. 22 and 23, the prosecutor found that the sisters' death had not been intentional or caused by negligence.

10. On 14 February 2007 the applicant submitted V.G.'s will to the notary and gave his acceptance to inherit her apartment.

11. On 1 June 2007 M.G. and V.G.'s niece applied to the prosecutor's office, stating that although V.G. had bequeathed the apartment to her by the will certified by a public notary back in 1991, she had been informed that the applicant had submitted another will in respect of the same apartment according to which the apartment was to pass down to him. She alleged that her aunt's signature had been forged on that will.

12. It appears that on 11 July 2007 additional post-mortem forensic medical examinations following the exhumation of the bodies of M.G. and V.G. were ordered to determine, *inter alia*, whether forensic opinions nos. 22 and 23 had correctly determined the causes of their death and, if not, whether it was possible that they had died as a result of having been poisoned.

13. On 7 August 2007 the investigator decided to start an investigation on account of forgery.

14. It appears that at some point during the investigation the applicant stated that he had never visited the apartment where M.G. and V.G. had lived and did not know its location. Sometime in 2006 V.G., whom he knew, had visited him in his home to hand over some documents to him, namely a will and other documents from the notary informing him that she had bequeathed her apartment to him.

15. On 25 September 2007 G.H and A.B. delivered expert opinions nos. 13/631/K and 14/630/K according to which both sisters had died as a result of poisoning by compounds containing phosphorous.

16. On 26 September 2007 the applicant was charged with fraud and two counts of murder committed for gain. The following day he was detained.

17. On 21 December 2007 a forensic technical and toxicological examination was completed. The results of the applicant's psychiatric and psychological forensic inpatient examinations were received on 8 February 2008. Three experts G.H., A.D. and M.A. gave expert statements on 6 December 2007, 25 January and 5 February 2008 respectively.

18. On 26 May 2008 further post-mortem forensic medical examinations on additional exhumation of the bodies of M.G. and V.G. were ordered, and they were completed on 27 June 2008. Expert opinions nos. 12/525/K and 13/526/K delivered by S.H. and S.S. confirmed the presence of phosphorous compounds in the bodies of the two victims.

19. On 8 July 2008 the applicant's case was transferred to the Yerevan Criminal Court for trial.

20. At the hearing of 26 August 2008, the opinions of all expert witnesses were read out aloud. The applicant then orally requested for a possibility to have examined, in court, the expert witnesses A.D., S.H. and S.S., who had delivered the conflicting opinions, in order to clarify a number of issues that required specialist knowledge. The court decided to adjourn the case.

21. At the hearing of 25 September 2008, the applicant's representative requested again the examination of the expert witnesses but his request was orally rejected by the trial court judge. The judge reasoned this decision by stating that as the subsequent expert opinions already explained the content of the first opinion issued by A.D., it was not necessary to call the expert witnesses.

22. On 21 October 2008 the Yerevan Criminal Court found the applicant guilty of two counts of aggravated murder committed for gain and sentenced him to life imprisonment. In doing so, it mostly relied on the trial statements of the victims' relatives and neighbours, who confirmed that the applicant had visited the sisters in their apartment several times; on the expert opinions; and on material evidence seized from the applicant's apartment, namely the originals of the ownership certificate in respect of V.G.'s apartment, V.G.'s will drawn up on 5 April 2006 and a duplicate of V.G.'s death certificate. In finding the applicant guilty, the trial court also took into account the fact that he had previously been convicted of murder carried out for financial gain for killing an elderly woman to obtain possession of her apartment.

23. The applicant lodged an appeal arguing, *inter alia*, that he had been deprived of the opportunity to examine the experts with regard to their contradictory opinions.

24. On 12 February 2009 the Criminal Court of Appeal rejected the applicant's appeal without addressing the complaint about his inability to have the experts examined during his trial.

25. On 2 July 2009 the applicant lodged an appeal on points of law, raising similar complaints as before.

26. On 28 July 2009 the Court of Cassation declared the applicant's appeal inadmissible for lack of merit.

II. RELEVANT DOMESTIC LAW

Code of Criminal Procedure (in force from 12 January 1999)

27. Under Article 114 § 2, an expert may be questioned with a view to clarifying his or her opinion. The record of the expert's questioning cannot replace his or her opinion (Article 114 § 3).

28. In accordance with Article 243, an expert examination is carried out on the basis of a decision of the investigating authority.

29. Article 247 § 1 sets out a list of the rights of the suspect and the accused when an expert examination has been ordered, including the right to become conversant with the decision to order an examination before it is carried out, the right to request an additional forensic examination in the event of disagreement with the opinion delivered by the expert, and the right to participate in the questioning of the expert if that is done on the basis of his or her request.

30. Under Article 252 § 1, if the expert opinion is not sufficiently clear and contains gaps which may be filled without additional examination, or if there is a need to clarify the methods applied and terminology used, the investigator may question the expert in accordance with the rules applicable to the questioning of witnesses.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (D) OF THE CONVENTION

31. The applicant complained that he had been deprived of the possibility to examine the experts in order to challenge the credibility of their opinions while these were considered as decisive evidence in securing his conviction.

32. Article 6 § 1 and 6 § 3 (d) of the Convention reads, in the relevant parts, as follows:

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

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

..."

A. Admissibility

33. The Court notes that the application 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 applicant

34. The applicant maintained that he had not been able to question, at any stage of the proceedings, the experts whose opinions were used as evidence against him. He had not been provided with an opportunity to put questions to the experts concerning, *inter alia*, when and how the pesticides causing the poisoning had been introduced to the victims' bodies, whether they had been administered on one or several occasions, what amount of pesticide was capable of causing death and whether there had been a causal link between the death and the administered amount of pesticide. As a result of this failure, the applicant had been deprived of sufficient and adequate opportunity to contest the accusations against him. Such an opportunity would have been important also for the reason that during the pre-trial investigation only two experts had been interviewed and none of them had been questioned during the trial.

35. The applicant emphasised that there had not been any good reason to refuse the examination of the experts. Their testimonies had been decisive for the fair conclusion of the case since the cause of death of the victims had not been clarified. The other admitted evidence had not been enough to establish the applicant's guilt since it had been mostly indirect evidence and based on statements by subjective witnesses.

(b) The Government

36. The Government maintained that the applicant had been able to examine the experts whose opinions had been used against him during the trial. On 26 August 2008 the applicant had requested to examine the experts A.D., S.H. and S.S., who had delivered conflicting opinions nos. 22-23 and nos. 13/525/K-13/526/K. On 25 September 2008 the Criminal Court had granted the parties equal opportunities to present their submissions in this regard. The applicant's representative had sought only to clarify the contradictions between the expert opinions. This issue had already been examined and clarified in the opinions of additional post-mortem forensic medical examinations nos. 14/630/K and 13/631/K. From these opinions it had appeared that the findings in earlier opinions nos. 22-23 had been typical also to poisoning by compounds containing phosphorus. No issues raised in the applicant's application had thus remained uncovered. The experts G.H., A.D. and M.A., who had given the above-mentioned expert statements, had also been interviewed during the pre-trial investigation.

37. The Government stressed that questioning the experts at the trial would not have had an effect on the outcome of the case. Moreover, the additional post-mortem forensic medical examinations had clearly explained the results of the first expert's conclusions. There had thus been a good reason for the non-attendance of the experts. The Criminal Court's judgment had been based on a number of different pieces of evidence. The applicant's conviction had thus not been based solely or to a decisive degree on particular expert opinions, which had not even been capable of showing, on their own, who had poisoned the victims. In the present case there had been also sufficient counterbalancing factors to compensate for the handicaps the defence laboured under. The applicant had had the opportunity during the confrontations conducted within the investigation to question the witnesses who had previously testified against him but he had been content to not to challenge the credibility of their testimonies.

2. The Court's assessment

(a) General principles

38. The Court reiterates that the key principle governing the application of Article 6 is fairness. The right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting the guarantees of Article 6 § 1 of the Convention restrictively (see *Moreira de Azevedo v. Portugal*, 23 October 1990, § 66, Series A no. 189, and *Gregačević v. Croatia*, no. 58331/09, § 49, 10 July 2012).

39. The Court further reiterates that as a general rule, Article 6 §§ 1 and 3 (d) requires that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (see *Al-Khawaja and Tahery*

v. the United Kingdom [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011, and *Poletan and Azirovik v. the former Yugoslav Republic of Macedonia*, nos. 26711/07, 32786/10 and 34278/10, § 81, 12 May 2016).

40. The term "witnesses" under Article 6 § 3 (d) of the Convention has an autonomous meaning which also includes expert witnesses (see *Gregačević*, cited above, § 67, and *Constantinides v. Greece*, no. 76438/12, §§ 37-38, 6 October 2016). However, the role of expert witnesses can be distinguished from that of an eye-witness who must give to the Court his personal recollection of a particular event (see *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 711, 25 July 2013). In analysing whether the personal appearance of an expert at the trial was necessary, the Court will therefore be primarily guided by the principles enshrined in the concept of a "fair trial" under Article 6 § 1 of the Convention, and in particular by the guarantees of "adversarial proceedings" and "equality of arms". That being said, some of the Court's approaches to the personal examination of "witnesses" under Article 6 § 3 (d) are no doubt relevant in the context of examination of expert evidence and may be applied *mutatis mutandis*, with due regard to the difference in their status and role (see *Bönisch v. Austria*, 6 May 1985, § 29, Series A no. 92, with further references, and *Matytsina v. Russia*, no. 58428/10, § 168, 27 March 2014).

41. The admissibility of evidence is primarily a matter for regulation by national law. 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 many other authorities, *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 50, *Reports of Judgments and Decisions* 1997-III). In particular, "as a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce ... Article 6 § 3 (d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses" (see *Vidal v. Belgium*, 22 April 1992, § 33, Series A no. 235-B).

(b) Application of these principles to the present case

42. The Court observes that the Criminal Court found the applicant guilty of two counts of aggravated murder and sentenced him to life imprisonment. The case file consisted of six expert opinions which, *inter alia*, determined the cause of the victims' deaths. While the two initial opinions issued by the expert A.D. indicated that the two sisters had died as a result of acute heart failure and hypothermia (see paragraphs 8-9 above), the additional opinions issued by experts G.H. and A.B. and two further opinions issued by experts S.H. and S.S. revealed that the victims had been poisoned (see paragraphs 15 and 18 above). The applicant asked to have the experts A.D. S.H. and S.S. summoned to appear before the trial court to be

able to question them in relation to their controversial opinions but the trial court dismissed his request considering that it was unnecessary to call in these experts. Neither the trial court nor the Criminal Court of Appeal addressed this issue in their judgments (see paragraphs 22 and 24 above).

43. As the Court has held on many occasions, one of the requirements of a fair trial is the possibility for the accused to confront the witnesses in the presence of the judge who must ultimately decide the case, because the judge's observations on the demeanour and credibility of a certain witness may have consequences for the accused (see *Hanu v. Romania*, no. 10890/04, § 40, 4 June 2013 with further references). The same also applies to expert witnesses (see *Gregačević*, cited above, § 67): it is the Court's well-established case-law that the defence must have the right to study and challenge not only an expert report as such, but also the credibility of those who prepared it, by direct questioning (see, amongst other authorities, *Brandstetter v. Austria*, 28 August 1991, § 42, Series A no. 211; *Doorson v. the Netherlands*, 26 March 1996, §§ 81-82, *Reports of Judgments and Decisions* 1996-II; *Mirilashvili v. Russia*, no. 6293/04, § 158, 11 December 2008; and *Matytsina v. Russia*, cited above, § 177).

44. In the present case, the applicant clearly indicated to the trial court that he wanted to have the expert witnesses examined before the court in order to clarify a number of issues that required specialist knowledge (see paragraph 20 above). For the Court, this request was sufficiently clearly formulated in order to explain why it was important for the applicant to hear the witnesses concerned.

45. The trial court dismissed the applicant's request by finding that the subsequent expert opinions already explained the content of the first opinion issued by A.D. and therefore it was not necessary to call in the expert witnesses. As a result, the expert witnesses A.D., S.H. and S.S. were not heard by the trial court, nor were any of the three other expert witnesses heard in court. Apparently only the expert witnesses A.D., G.H. and M.A. were interviewed during the pre-trial investigation. However, there is no indication that the applicant ever had the possibility to confront these expert witnesses and to challenge their opinions during the investigation phase.

46. The Court considers that the applicant's request to have A.D., S.H. and S.S. heard by the trial court was not unreasonable. On the contrary, the Court finds that these expert opinions were of fundamental relevance for the case. On the basis of this evidence, the domestic courts needed to decide whether the death of the sisters was an accident or an intentional homicide. The applicant's request was not unreasonable either when taking into account that he was facing a life sentence. Failing to call the expert witnesses and to examine them during the trial, the trial court was basing its conclusions on expert witness evidence which was never examined during the hearing (contrast *Kashlev v. Estonia*, no. 22574/08, § 47, 26 April 2016).

47. In these circumstances, the omission of the Criminal Court to hear in person the expert witnesses whose statements were later used against the applicant was capable of substantially affecting his fair trial rights, in particular the guarantees for "adversarial proceedings" and "equality of arms". There has accordingly been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. Article 41 of the Convention provides:

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

A. Damage

49. The applicant claimed 15,000 euros (EUR) in respect of non-pecuniary damage.

50. The Government considered that the applicant's claim for non-pecuniary damage was unsubstantiated and exaggerated and should therefore be rejected. The non-pecuniary damage claimed by the applicant could be compensated for by finding of a violation.

51. The Court awards the applicant EUR 900 in respect of non-pecuniary damage.

B. Costs and expenses

52. The applicant also claimed EUR 7,200 for the costs and expenses incurred before the Court, to be payable directly to the account of his representatives.

53. The Government considered that the amount claimed by the applicant was exaggerated and based on a very high rate of lawyer's fees. The applicant had failed to substantiate his claim by not submitting any agreement concluded with the representatives.

54. Regard being had to the documents in its possession and to its case-law, the Court rejects the claim for costs and expenses for lack of adequate supporting documentation.

C. Default interest

55. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 900 (nine hundred euros), to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 22 November 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos Registrar	Linos-Alexandre Sicilianos President