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Communication from Armenia concerning the case of GABRIELIAN v. Armenia (Application No. 8088/05)

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Communication de l'Arménie concernant l'affaire GABRIELIAN c. Arménie (Requête n° 8088/05)
(anglais uniquement)

DGI

11 JUIL. 2018

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

**The Government of the Republic of Armenia
Action Plan¹**

GABRIELYAN GROUP OF CASES

(Supervised by the Committee of Ministers under the standard procedure)

Department for Relations with the European Court of Human Rights
Ministry of Justice of the Republic of Armenia
11 July 2018

¹ This is the updated version of the Action Plan submitted on 10 October 2017.

DGI

11 JUL. 2018

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH**EXECUTION OF THE GABRIELYAN GROUP JUDGMENTS**

Case of Gabrielyan v. Armenia	(no. 8088/05, judgment of 10/04/2012, final on 10/07/2012)
Case of Ter-Sargsyan v. Armenia	(no. 27866/10, judgment of 27/10/2016, final on 27/01/2017)
Case of Avetisyan v. Armenia	(no. 13476/11, judgment of 10/11/2016, final on 10/02/2017)
Case of Manucharyan v. Armenia	(no. 35688/11, judgment of 24/11/2016, final on 24/02/2017)
Case of Asatryan v. Armenia	(no. 3571/09, judgment of 27/04/2017, final on 27/07/2017)
Case of Chap LTD v. Armenia	(no. 15485/09, judgment of 04/05/2017, final on 04/08/2017)

I. INTRODUCTORY CASE SUMMARY

1. The *Gabrielyan* group of cases concerns unreasonable restriction of the applicants' right to examine witnesses whose testimony played a decisive role in securing their conviction in court proceedings (violation of Article 6 § 3 (d) taken together with Article 6 § 1 of the Convention). The case of *Chap LTD* concerns the administrative proceedings initiated against the applicant company on the basis of tax debt, during which the applicant company has been deprived of a proper opportunity to cross-examine witnesses whose testimonies and provided documents had been admitted in evidence against it in the proceedings before the Administrative court. The case of *Ter-Sargsyan* also concerns the failure of the domestic courts to examine the video recordings that were relied on as evidence substantiating the applicant's guilt (violation of Article 6 § 1).

II. INDIVIDUAL MEASURES*(i) Payment of Just Satisfaction*

<i>Case of</i>	<i>Pecuniary Damage</i>	<i>Non-Pecuniary Damage</i>	<i>Costs and Expenses</i>	<i>Total</i>
<i>Gabrielyan</i>	--	EUR 2,500	EUR 1,600	EUR 4,100

Paid within time limit

<i>Ter-Sargyan</i>	---	EUR 3,100	---	EUR 3,100
Paid within time limit				
<i>Avetisyan</i>	---	EUR 2,400	EUR 500	EUR 2,900
Paid within time limit				
<i>Manucharyan</i>	---	EUR 2,400	---	EUR 2,400
Paid within time limit				
<i>Asatryan</i>	---	EUR 2,400	EUR 1,700	EUR 4,100
Paid within time limit				
<i>ChapLTD</i>	---	EUR 2,400	EUR 1,500	EUR 3,900
Paid within time limit				

(ii) *Other Individual Measures*

2. All the applicants applied to the Court of Cassation of Armenia for the reopening of their cases on the grounds of new circumstance. The appeals of **Gabrielyan**² and **Avetisyan**³ were granted by the Court of Cassation and the cases were sent to the first instance courts for re-examination, as a result of which *the applicants Artak Gabrielyan and Davit Avetisyan were acquitted*. The appeals of **Ter-Sargsyan**⁴, **Manucharyan**⁵, **Asatryan** and **Chap LTD** were also granted by the decisions of the Court of Cassation and *the proceedings were reopened*. The cases were remitted to the first instance courts and are in the examination process now.

GENERAL MEASURES

A. *Publication and Dissemination of the Judgments*

² For more details see http://datalex.am/?app=AppCaseSearch&case_id=1125899906872986

³ For more details see http://www.datalex.am/?app=AppCaseSearch&case_id=35747322042254571

⁴ For more details see http://datalex.am/?app=AppCaseSearch&case_id=44754521296994361,

⁵ For more details see http://datalex.am/?app=AppCaseSearch&case_id=30962247438186656

3. All the judgments of this group were translated into Armenian and published on the official websites of the Ministry of Justice (www.moj.am), the Armenian Government Representation before the European Court of Human Rights (agent.echr.am) and the Armenian Legal Informational System (www.arlis.am). Considering the importance of preventing further similar violations and effective implementation of the Court's judgments, the relevant authorities were duly informed about the judgments and provided with the corresponding translation.

4. In addition, the training curricula of the Justice Academy⁶, the Police Academy⁷ as well as the Law Institute of the Ministry of Justice⁸ include training courses on the Convention and the Court's case-law in general, and judgments delivered in respect of Armenia, in particular. Furthermore, special courses are dedicated to the right to a fair trial including the requirements of article 6 § 3 (d) in the context of criminal proceedings. It is also worth mentioning that relevant courses on the Convention and the Court's jurisprudence are included in the academic programmes of higher education institutions of Armenia. A new course on "Contemporary issues of international legal assistance during criminal procedure" has been elaborated and is currently taught at the Justice Academy. This course is aimed at raising the awareness of acting judges and candidates for judges about the practical implementation of international conventions and agreements about international legal assistance and the process of seeking that assistance, *inter alia*, regarding the examination of the witnesses at trial.

B. Legislative and Practical Measures

(i) Cases of Gabrielyan, Ter-Sargsyan, Avetisyan, Manucharyan, Asatryan

5. The Government would like to emphasise that although the violations found by the Court have mostly derived from the practice, both legal and practical developments have taken place to ensure effective application of the guarantees of Article 6 § 3 (d) and to prevent similar violations in the future.

The amended Constitution

6. The Constitution of the Republic of Armenia amended as of 6 December 2015, in contrast to the previous edition regulates the right to a fair trial in more detailed manner. In particular,

⁶ The Justice Academy provides trainings for acting judges and candidates for judges, prosecutors and candidates for prosecutors, investigators as well as other public officials.

⁷ The relevant materials are taught at the Police Academy, particularly within the Bachelor's, Master's and Distance Learning Programmes of the Faculty of Law, as well as in the College and the Faculty of Trainings and Qualification of the Police Academy in the framework of subjects "Human Rights and the Police", "The Major Problems of the Theory of Human Rights".

⁸ The Law Institute provides trainings for penitentiary officials and civil servants.

Article 67 of the Constitution reads as follows: “*Everyone accused of a crime shall have (...) the right to question persons testifying against him or her, or have these persons questioned, as well as have the persons testifying in his or her favour to be summoned and interrogated under the same conditions as those for the persons having testified against him or her*”.

The Code of Criminal Procedure

7. The Code of Criminal Procedure (CCP) in force guarantees the right of an accused to examine a person who has testified against him in both pre-trial and trial stages. Firstly, CCP stipulates the obligation of the investigator to carry out a confrontation if there are substantial contradictions between the statements of an accused and some other person⁹. It is to be mentioned that confrontation is the sole procedural measure, which enables the investigator not only to discover the circumstances of the case during the investigation, but also is a procedural guarantee for the right to protection of the accused. Secondly, the Code enables investigative authorities as well as domestic courts to compel a witness by a reasoned decision to attend proceedings if he/she fails to appear upon summons without valid reasons. Furthermore, a witness is obliged (a) to notify the investigative authority about the change of his/her residence, (b) to inform the summoning authority about the reasons of his/her failure to appear within time-limit set in the summons.¹⁰

The draft Code of Criminal Procedure

8. The new draft Code of Criminal Procedure (draft CCP) is aimed at further clarifications of legislation and provides several new mechanisms for securing the right to confrontation both during pre-trial and judicial stages¹¹. Furthermore, in contrast to the existing code, which only defines the obligation of investigator to carry out a confrontation if there are substantial contradictions between the statements of the accused and some other person, the draft CCP establishes completely new principle of criminal proceedings – “Proper proof”, according to which the conviction of the accused cannot be solely or predominantly based on the testimony of a person whom the accused or his defence council or representative had no possibility of cross-examining¹².

9. Additionally, the draft CCP gives a more precise regulation concerning equality of parties and adversarial proceedings, in particular, the parties shall have equal possibilities for presenting and defending their position and a judicial act may be based only on the evidence that are examined in equal conditions for all parties.. The draft CCP further stipulates that as a result of judicial review, the appealed judicial act shall be quashed or changed if there is a violation of any

⁹ Article 216 of CCP

¹⁰ Article 153 of CCP

¹¹ See Action Plan on *Gabrielyan* case, submitted on 23 April 2013 – Reference Document: [DH-DD\(2013\)493E](#)

¹² Article 22 of draft CCP

principle of the Criminal Proceedings. According to the draft CCP *a judgment is considered substantiated when (a) the court's inferences are based only on the examined permissible evidence; (b) factual circumstances established by the court shall correspond to the evidence examined in court; and (c) all the inferences stated in the judgment and the decisions are properly reasoned*¹³.

10. Another step forward in the draft CCP is the establishment of special procedure of questioning, according to which in exceptional cases when the presence of a person subject to questioning at the court is impossible or can undermine such person's security or the credibility of his/her testimonies, or when it is necessary to protect the legitimate interests of a minor victim or witness, the court, based on a motion of a party to the proceedings or at its initiative, may use the technical means of telecommunication (video conferencing). For this purpose the draft CCP obligates witnesses when travelling to another place, give the body conducting the criminal proceedings prior notice of their new whereabouts and the means of communication with them.

Developments in domestic case-law

11. Turning to the steps taken to improve the practice, it is important to note that since 2011 the Court of Cassation exercising its constitutional power of ensuring uniform application of law has systematically touched upon the issues of confrontation. It gradually developed its case-law and established new guarantees for ensuring the right of the accused to examine a person testifying against him in compliance with the Court's standards. In particular, while according to the CCP in force the judges are free to assess the evidence upon their personal conviction which in fact means to decide whether the judgment can be based on some evidence or not, the Court of Cassation in its recently adopted decision (dated 27 February 2015) directly determined that the judgment cannot be based on untested evidence¹⁴.

12. Furthermore, guided by the case-law of the Court, the Court of Cassation by its decision of 20 October 2011¹⁵ held that the requirements of the criminal procedural legislation would be considered to be breached if a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined.

13. The Court of Cassation during re-examination of the **Gabrielyan's** case¹⁶, reiterating the Court's established case-law, stated that even where the evidence of an absent witness was not

¹³The draft CCP provisions, among the others, can be considered an effective measure for addressing the issue of the case of *Ter-Sargsyan* regarding the failure of the domestic courts to examine the video recordings that were relied on as evidence substantiating the applicant's guilt.

¹⁴ Decision no. SHD/0172/01/12 (ՇԴ/0172/01/12)

¹⁵ Decision no. LD/0212/01/10 (ԼԴ/0212/01/10)

¹⁶ Decision no. VB-04/13 (ՎԲ-04/13)

sole or decisive, it still could bring to a violation of the right to confrontation when no good reason was shown for the failure to have the witness examined.

14. Further developing its case-law, the Court of Cassation in its decision of 31 May 2014¹⁷ concluded that the criminal procedure legislation, in general, contains the required legislative mechanisms to guarantee the right of the defence to confrontation also during the pre-trial stage of the proceedings. Based on this conclusion it strictly defined that: *(a) it is not permissible to refrain from holding a confrontation in cases when an accused refuses to testify, making use of his/her respective constitutional right; (b) in any stage of the proceedings the defence should be given a proper opportunity to examine a person who has testified against the accused.*

Other practical measures

15. The Government emphasise that given the violations found by the Court, the shortcomings identified are in the spotlight of the Armenian authorities' attention. In this context, in the light of the *Gabrielyan group of cases*, and with the aim of taking active steps to improve the investigative authorities' practice, a special working group was created by the Prosecutor General for examining the existing situation and developing concrete recommendations in that respect. On 4 August 2017 the Collegium of the Prosecutor's Office, with the participation of other state stakeholders, discussed the results of the survey performed by the working group and summarised the practical implementation of the mandatory¹⁸ instructions of the Prosecutor General derived from that survey.

16. The Collegium of the Prosecutor's Office decided that in case of the suspect's or the accused's initiative, the cross-examination should be ensured consistently and without exceptions as a guarantee of their right to cross-examination. Moreover, it should be guaranteed that every witness who has given any decisive information shall be cross examined. In case such witnesses are absent from Armenia, certain measures should be taken to find out their whereabouts via application of international legal aid instruments with the intention to ensure their presence or at least their questioning by technical means of telecommunication.

17. In the context of the targeted dissemination of the judgments, and with the aim to reveal the shortcomings concerning the identification of the place of residence of the witness, the Judicial Department of the Republic of Armenia upon the request of the Ministry of Justice, requested practical information on the actions of all the domestic courts. This survey revealed the need to continue the improvement of the existing means. In addition, working meetings and discussions with national stakeholders as well as the relevant Council of Europe authorities are being organised.

¹⁷ Decision no. EAQD/0189/01/12 (ԵԱԳԴ/0189/01/12)

¹⁸ Article 32 of the Law on the Prosecutor's Office

18. It's worth to note that the Government is actively involved in the negotiation phase of the possible inclusion of this issue in the Council of Europe Action Plan for Armenia 2019-2022. Taking into account the Armenian authorities' priorities in this respect, the Council of Europe expressed its commitment to support Armenia in broadening and accelerating these reforms.

(ii) Case of Chap LTD

19. The Government would like to emphasise that the national legislation ensures compliance with the guarantees of Article 6 of the Convention including in the field of administrative proceedings, as well as those before administrative bodies. In particular, according to the Law on Fundamentals of Administrative Action and Administrative Proceedings *for the purpose of protection of their rights, one shall have the right to appeal through administrative or judicial procedure the administrative acts, actions or inactions of the administrative body.*

20. The Government would like to note that on 1 January 2018 the new Tax code of the Republic of Armenia¹⁹ entered into force. The code establishes a new system of appeal against actions or omissions of a tax officer ensuring the right of taxpayer to question witnesses during such proceedings. According to Article 440 of the code, *the individual legal act adopted by the tax authority, as well as the actions or omissions of a tax officer may be appealed against to the Appeal Commission of the tax authority or the court as prescribed by the Code.* It is to be noted that all the guarantees of Article 6 are ensured during extrajudicial type of protection of taxpayer's rights.

21. It is to be mentioned that the taxpayer may apply to court at any stage of the appeal submitted to the Appeal Commission of the tax authority. As a result of comprehensive reforms implemented by the Armenian authorities in the field of administrative legislation and justice, a new Code of Administrative Procedure²⁰ (hereinafter CAP) has been adopted by which the whole system was changed and additional safeguards have been introduced. This code regulates all the legal relations arising from administrative court proceedings and guarantees the following fundamental procedural rights of the parties: *(a) to have their case heard; (b) to submit evidence in their own defence; (c) to make motions of self-challenge; (d) to present evidence and take part in its examination; (e) to question each other, the other participants of the trial, witnesses, experts and interpreters, (f) to make motions, as well as give explanations to the court; (g) to present their position, proposals, objections and arguments in respect of all the issues arising during the process of the examination of the case; (h) to benefit from the free assistance of an interpreter, if they cannot understand the language used in court, and prove the fact of not having sufficient financial means.*

22. As regards the violation found by the Court in the case Chap LTD v. Armenia due to the failure of the previous CAP to provide the Administrative Court with an adequate and proper

¹⁹ Adopted on 4 October 2016

²⁰ Adopted on 5 December 2013

opportunity to challenge and question a witness against the respondent, either when he makes his statements or at a later stage, the current CAP explicitly states that the Administrative Court shall demand from the parties:

- to submit explanations on facts, circumstances or legal issues,
- to submit evidence necessary for the resolution of the case (*ex officio* principle).

23. Further insuring the parties' right to question a witness, the current CAP stipulates that *the witness may be questioned in the place of their residency by the Administrative Court's assignment in exceptional cases, when (a) it will contribute to the unveiling of the truth, (b) the presence of the witness in the context of the information that they are to provide is not expedient due to a long distance, (c) because of an illness, an ailment or any other reason that renders them incapable of or makes them ineligible to leave their place of residency.*

24. In contrast to the previous code, the current CAP specifies in a separate article that the parties have right to question each other, the other participants, witnesses, experts and translators. Moreover, contrary to the previous CAP the current CAP provides that the Administrative Court is now entitled to invite witnesses on his own initiative, as well as based on the motions of the parties.

C. Conclusion

In the light of the aforementioned the Government would like to note that all individual measures taken have restored the consequences of the violations of all the applicants' rights of ***Gabrielyan group of cases***. Thus, the Government kindly invite the Committee of Ministers to close the supervision of individual measures in *Gabrielyan* group of cases.