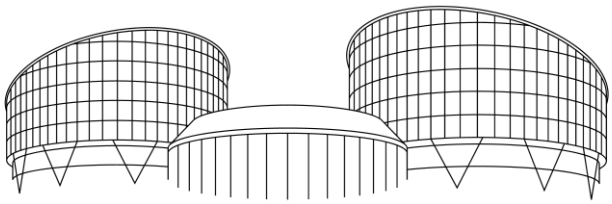

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 11721/04
by GERAGUYN KHORHURD PATGAMAVORAKAN AKUMB
against Armenia

The European Court of Human Rights (Third Section), sitting on 14 April 2009 as a Chamber composed of:

Josep Casadevall, *President,*
Elisabet Fura-Sandström,
Corneliu Bîrsan,
Boštjan M. Zupančič,
Alvina Gyulumyan,
Egbert Myjer,
Ann Power, *judges,*

and Stanley Naismith, *Deputy Section Registrar,*

Having regard to the above application lodged on 13 March 2004,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Geraguyn Khorhurd Patgamavorakan Akumb, is a non-governmental organisation ("the applicant organisation") which was established in 1997 and has its registered office in Yerevan. It was represented before the Court by its head, Mr R. Torosyan. The Armenian Government ("the Government") were represented by their Agent,

Mr G. Kostanyan, Representative of the Republic of Armenia at the European Court of Human Rights.

A. The circumstances of the case

2. The facts of the case, as submitted by the parties, may be summarised as follows.

3. On 25 May 2003 a parliamentary election was held in Armenia. The applicant organisation acted as an election observer during the election. According to the applicant organisation, in the pre-election stage it had disclosed numerous violations connected with the use of pre-election funds of certain parties which allegedly led to the free broadcast of the election campaign by certain TV companies being carried out mainly in favour of a number of parties.

4. The applicant organisation alleged that on 26 May 2003 its head had applied to the Central Election Committee (*ՀՀ կենտրոնական ընտրական հանձնաժողով* – "the CEC") with letter no. 191, sent by registered mail, having the following content:

> "To receive copies of documents
>
> To Central Election Committee
>
> Application
>
> Based on the requirements of Article 30 § 1 (2) of the Electoral Code of Armenia and Paragraph 9 of the Rules of Implementation of an Observer Mission, I request that an observer of our organisation [M.S.] be allowed, according to the established procedure, to receive copies of a number of documents related to the parliamentary election of 2003, in particular:
>
> 1. all decisions taken by the CEC after 12 March [2003];
>
> 2. all records of the meetings held by the CEC after 12 March [2003]; [and]
>
> 3. registers of voluntary payments to pre-election funds and expenses of the parties (unions of parties) participating in the parliamentary election through the proportionate ballot."

5. The applicant organisation further alleged that on 29 May 2003 the lawyer of the CEC verbally informed its head that the CEC still had time to reply to its request. It also alleged that on the same date its head addressed to the Chairman of the CEC letter no. 205, similarly by registered mail, which stated as follows:

> "...on 26 May [2003] we applied to the CEC requesting to be allowed to receive copies of a number of documents related to the parliamentary election of 2003.
>
> However, so far you have not satisfied our lawful request[. I]n this connection we once again request [that you] provide us with copies of the documents in question."

6. The Government contested these allegations and argued that the letters in question were never submitted to the CEC.

7. On 3 June 2003 the applicant organisation contested the CEC's alleged inaction before the courts, seeking to oblige it to provide copies of the requested documents.

8. On 13 June 2003 the Kentron and Nork-Marash District Court of Yerevan (*Երևան քաղաքի Կենտրոն և Նորք-Մարաշ համայնքների առաջին ատյանի դատարան*) held a hearing on the case.

9. On 19 June 2003 the Kentron and Nork-Marash District Court of Yerevan held another hearing and decided to dismiss the applicant organisation's application. The District Court found that the applicant organisation had failed to submit any evidence that it had applied to the CEC with a request for copies of documents and had been refused.

10. The applicant organisation alleged that it had not been notified about these hearings and its representative was therefore unable to attend.

11. On 1 July 2003 a copy of this judgment was served on the applicant organisation. On the same date, the head of the applicant organisation requested access to the materials of the case file. The applicant organisation alleged that no reply was received to this request, while the Government alleged that this request was never actually filed with the District Court.

12. On 2 July 2003 the head of the applicant organisation, in reply to another request, was granted access to the case file materials.

13. On 3 July 2003 the applicant organisation lodged an appeal. Attached to its appeal the applicant organisation submitted copies of its letters of 26 and 29 May 2003 and of front pages of two post office receipts.

14. On 19 August 2003 the Civil Court of Appeal (*ՀՀ քաղաքացիական գործերով վերաքննիչ դատարան*), with reference to Articles 48 and 49 of the Code of Civil Procedure, decided to dismiss the applicant organisation's appeal on the ground that it had failed to submit evidence that it had sent its letter of 26 May 2003 to the CEC. The Court of Appeal found that the copy of the post office receipt attached to the appeal could not serve as such proof because there was no postmark on it certifying that the letter had been handed in at the relevant post office.

15. The applicant organisation submitted that its representative refused to participate in this hearing because of allegedly having previously been denied access to the case file materials.

16. On 1 September 2003 the applicant organisation lodged an appeal on points of law. Attached to its appeal the applicant organisation submitted copies of the same post office receipts with postmarks dated 26 and 29 May 2003 photocopied on their reverse.

17. On 12 December 2003 the Court of Cassation (*ՀՀ վճռաբեկ դատարան*) dismissed the applicant organisation's appeal. The Court of Cassation, having recapitulated the findings of the Court of Appeal, stated, *inter alia*:

"As regards the argument raised in the appeal that letters nos. 191 and 205 have been sent, the [post office] receipts submitted as proof are not proper evidence since they bear no postmarks."

B. Relevant domestic law

1. The Electoral Code (in force from 28 February 1999)

18. The relevant provisions of the Electoral Code, as in force at the material time, read as follows:

Article 7: Publicity of elections

"1. Elections are prepared and conducted publicly. ..."

Article 28: The right to an observer mission

"1. [The following physical and legal persons] have the right to an observer mission during an election: (1) international organisations; (2) representatives of foreign states; [and] (3) those [domestic] and foreign non-governmental organisations whose statutory aims include questions of democracy and human rights protection and which do not support [any of] the candidates or the parties.

2. The procedure for carrying out an observer mission shall be established by the Central Election Committee."

Article 29: Accreditation of observers

"1. Organisations and persons mentioned in Article 28 of this Code may carry out an observer mission after having been accredited by the Central Election Committee.

...

6. The powers of persons carrying out an observer mission shall terminate ten days after the end of an election."

Article 30: Rights, obligations and guarantees of activity of an authorised election assistant, a local and international observer (hereafter, observer), and a representative of mass media

"1. An authorised election assistant, an observer and a representative of mass media have the right: ... (2) to have unimpeded access to the election documents, samples of ballot papers, decisions of an election committee and records of its meetings, as well as to receive their copies and to take extracts.

...

5. No limitations can be placed on the rights of an authorised election assistant, an observer and a mass media representative. ..."

2. The Code of Civil Procedure (in force from 12 January 1999)

19. The relevant provisions of the Code of Civil Procedure, as in force at the material time, read as follows:

Article 48: Duty of proving

"Any party to the proceedings must prove the circumstances on which his [or her] claims and objections are based."

Article 49: Procedure for producing and requesting evidence

"1. Evidence shall be produced by the parties to the proceedings. ..."

Article 159: Grounds for annulling unlawful acts of public authorities, local self-government bodies and their officials or for contesting their actions (inaction)

"Unlawful acts of public authorities, local self-government bodies and their officials can be annulled or their actions (inaction) can be contested (hereafter, annulling the unlawful act) if the act in question contradicts the law and if there is evidence that the applicant's rights and (or) freedoms guaranteed by the Armenian Constitution and laws have been violated."

Article 160. An a**pplication seeking to annul unlawful acts of public authorities, local self-government bodies and their officials**

"1. An application seeking to annul unlawful acts of public authorities, local self-government bodies and their officials shall be submitted to a court dealing with civil cases or the Commercial Court, pursuant to their jurisdiction over cases. ..."

Article 206: The court that examines cases on appeal

"Cases on appeals lodged against judgments of the first instance courts, which have not entered into force, are examined by the Civil Court of Appeal (hereafter, Court of Appeal)."

Article 217: Scope of examination of a case by the Court of Appeal

"1. The Court of Appeal is not bound by the appeal and shall examine the case anew on the basis of the existing and newly produced evidence. ..."

Article 224: The court that examines appeals on points of law

"Appeals on points of law lodged against judgments of the first instance courts, the Commercial Court and the Court of Appeal, which have entered into force, and judgments of the Commercial Court and the Court of Appeal, which have not entered into force, are examined by the Civil Chamber of the Court of Cassation (hereafter, Court of Cassation)."

Article 225: Grounds for lodging an appeal on points of law

"An appeal on points of law can be lodged on the ground of ... a substantive or a procedural violation of the parties' rights..."

Article 238: The decision of the Court of Cassation

"3. The Court of Cassation is not entitled to establish or consider as proven facts which have not been established by the contested judgment or have been rejected by it, to determine whether or not this or that piece of evidence is reliable, to resolve the issue as to which piece of evidence has more weight or the issue as to which norm of substantive law must be applied and what kind of judgment must be adopted upon the new examination of the case."

3. Decision no. 10/8-N of the Central Election Committee of 28 August 2002 Approving the Rules of Implementation of an Observer Mission (ՀՀ կենտրոնական ընտրական հանձնաժողովի 28 օգոստոսի 2002 թ. N 10/8-Ն որոշում դիտորդական առաքելություն իրականացնելու կարգը հաստատելու մասին)

20. The relevant provisions of the Rules, in force at the material time, read as follows:

III: Rights and obligations of an observer

"9. An observer has the right: ... to have unimpeded access to the election documents, samples of ballot papers, decisions of an election committee and records of its meetings, as well as to receive their copies and to take extracts; ...to give press conferences and to address mass media in accordance with the legislation of Armenia.

...

12. An observer shall submit copies of the reports on the summarising of the election results and on the conduct of the election to the Central Election Committee..."

IV. Guarantees of activity of an observer

"14. The material and financial costs of an observer's activities shall be borne by the party commissioning the observer or by [the observer's] own financial means.

15. The relevant election committees shall provide the necessary assistance to an observer in the implementation of the rights envisaged by Paragraph 9 of these Rules."

COMPLAINTS

a) The applicant organisation complained under Article 6 § 1 of the Convention that the trial had been unfair. In particular, it had no access to the materials of the case file and was not notified of the court hearings. Furthermore, the courts ignored the evidence adduced by it, such as the post office receipts with the relevant postmarks on their reverse.

b) The applicant organisation complained under Article 10 of the Convention that its right to receive and impart information had been violated by the actions of the CEC.

c) The applicant organisation complained under Article 3 of Protocol No. 1 that numerous provisions of the Electoral Code had been violated by the actions of the CEC, such as those related to the publicity of elections and to the rights of election observers.

THE LAW

a) The applicant organisation complained that the trial had been unfair. It invoked Article 6 of the Convention which, in so far as relevant, provides:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

21. The Government submitted that Article 6 was not applicable to the proceedings in question. The applicant organisation instituted proceedings against a public authority which acted in its sovereign capacity. The outcome of these proceedings was not decisive for the applicant organisation's civil rights and obligations in private law. The applicant organisation contested the alleged violation of certain rights deriving from its status as an election observer. Furthermore, these rights were of a temporary nature, arising only in the period surrounding the elections, and did not have a universal application, being limited only to a specific group, namely election observers. However, civil rights and obligations within the meaning of Article 6 are guaranteed to everyone and cannot depend on a special status.

22. Even assuming that Article 6 was applicable, the complaint about not having access to the case file materials was ill-founded since the applicant organisation itself admitted that it was granted such access on 2 July 2003. Furthermore, it failed to exhaust the domestic remedies in respect of the complaint about the alleged non-notification about the court hearings, by not raising this issue in its appeal on points of law. Finally, as regards the assessment of evidence adduced by the applicant organisation, the evidence in question was not produced either before the District Court or the Court of Appeal, which were called upon to establish the facts of the case, and was produced for the first time only before the Court of Cassation. However, the Court of Cassation was not authorised to examine the case on the merits, including any new evidence.

23. The applicant organisation submitted that the proceedings in question were decisive for its rights guaranteed by the Freedom of Information Act and the Code of Civil Procedure. Furthermore, its claim was examined by the courts of general jurisdiction as a civil claim. Thus, the proceedings in question determined its civil rights and obligations within the meaning of Article 6.

24. The applicant organisation further submitted that it did not have an opportunity to receive and comment on certain materials of the case file and was not notified of a number of hearings. Furthermore, the courts failed to carry out a proper assessment of the evidence produced by it, namely of the postal receipts which had the necessary postmarks photocopied on their reverse.

25. The Court notes that it is in dispute between the parties whether the proceedings in question determined the applicant organisation's civil rights and obligations within the meaning of Article 6 § 1.

26. The Court reiterates that the concept of "civil rights and obligations" has an autonomous meaning and cannot be interpreted solely by reference to the domestic law of the respondent State (see *König v. Germany*, 28 June 1978, § 88, Series A no. 27). The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc.) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) are therefore of little consequence (see *Ringeisen v. Austria*, 16 July 1971, § 94, Series A no. 13). Whether or not a right is to be regarded as civil within the meaning of this expression in the Convention must be determined by reference to the substantive content and effects of the right – and not its legal classification – under the domestic law of the State concerned (see *König*, cited above, § 89).

27. The Court further reiterates that for Article 6 § 1 to be applicable to a case it is not necessary that both parties to the proceedings should be private persons (see *Ringeisen*, cited above). Furthermore, if the case concerns a dispute between an individual and a public authority, whether the latter had acted as a private person or in its sovereign capacity is not conclusive. Accordingly, in ascertaining whether a case concerns the determination of a civil right, only the character of the right at issue is relevant (see *König*, cited above, § 90).

28. In the present case, the proceedings instituted by the applicant organisation concerned the alleged failure of the CEC to provide copies of various election related documents to which the applicant organisation enjoyed access due to its status of an election observer. This status was conferred on it under the electoral legislation and was valid for the period of the parliamentary election in question. The right of access to election-related documents enjoyed by the applicant organisation in the context of the parliamentary election therefore constituted a part of a wider public function performed by election observers which pursued the aim of ensuring the publicity of an election and thereby contributing to its proper conduct and outcome. Thus, the documents which the applicant organisation sought to obtain through the court proceedings in question (for details see paragraph 4 above) did not even contain any information concerning the applicant organisation and were necessary for its performance of the abovementioned public function, which was not even remunerated. In such circumstances, the Court considers that the outcome of the proceedings in question was not decisive for the applicant organisation's rights in private law but rather for the effective performance of its public function of an election observer. The Court therefore concludes that the proceedings in question did not concern the determination of the applicant organisation's

"civil rights and obligations" and fall outside the scope of Article 6 § 1 of the Convention.

29. It follows that this part of the application is incompatible *ratione materiae* with the provisions of the Convention and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

b) The applicant organisation complained about a violation of its right to receive and impart information. It invoked Article 10 of the Convention which, in so far as relevant, provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to ... receive and impart information ... without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

30. The Government submitted that Article 10 was not applicable to the circumstances of the case. According to the Court's case-law, this Article prohibited a Government from restricting a person from receiving information that others wished or might be willing to impart to him. It did not impose a positive obligation on public authorities to impart or disclose information against their will. Nor did it guarantee the right of access to information.

31. The Government further argued that the applicant organisation had not in fact applied to the CEC with a request for information on either 26 or 29 May 2003. The applicant organisation did not adduce any evidence either before the domestic courts or the Court to show that it had lodged the alleged requests with the CEC. In reality neither letter no. 191 nor letter no. 205 was actually submitted to the CEC. The copies of these letters submitted to the Court contained only the signature of the head of the applicant organisation but did not have such indispensable requisites as the incoming seal of the state body and incoming number which would show that the letters had actually entered the CEC.

32. The Government finally submitted that, even assuming that the applicant organisation had applied to the CEC with the letters in question, its request, namely to allow one of its employees, M.S., to receive copies of certain documents, was not refused, taking into account that M.S. had never appeared at the CEC despite being entitled to go there at any time and to receive copies of any election-related documents. Furthermore, the alleged failure of the CEC to provide information did not violate the guarantees of Article 10 since the information allegedly requested by the applicant organisation was already in the public domain.

33. The applicant organisation submitted that its complaint concerned a violation of its right to receive information, a right which was guaranteed by law, namely Article 30 of the Electoral Code. Therefore Article 10 was directly applicable to the circumstances of the case.

34. The applicant organisation further argued that its freedom to receive and impart information was not respected in the conduct of the parliamentary election since the CEC had failed to provide the necessary assistance and, in fact, refused to provide copies of the requested documents. The courts, having ignored the evidence substantiating its claims, dismissed its application seeking to oblige the CEC to provide the requested information. Such evidence, namely two postal receipts with postmarks on their reverse dated 26 and 29 May 2003, contrary to the Government's claim, were actually presented to the domestic courts and were in the case file. Furthermore, the Government's allegation that a seal and an incoming number were required but were missing from the letters in question was not based on any legal provisions.

35. The applicant organisation finally submitted that it had made a clear request aimed at familiarising itself with a number of election-related documents and been refused. The information requested, contrary to the Government's claim, was not in the public domain.

36. The Open Society Justice Initiative, which had been given leave to intervene in the proceedings (Article 36 § 2 of the Convention and Rule 44 § 2 of the Rules of Court), submitted that the right of access to information was well-established in both European and international law and practice. Furthermore, the right of access to government information was an integral element of freedom of expression and an actual prerequisite for the meaningful exercise of other political rights in a modern democracy.

37. The Court notes at the outset that it is in dispute between the parties whether Article 10 is applicable to the present case. The Court, however, does not find it necessary to rule on this issue since this complaint is in any event inadmissible for the following reasons.

38. The Court reiterates that, according to Article 35 § 1 of the Convention, it may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law (see, among other authorities, *Karadžić v. Croatia*, no. 35030/04, § 36, 15 December 2005). The purpose of the exhaustion rule is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions. Consequently, States are dispensed from answering for their acts before an international body before they have had an opportunity to put matters right through their own legal system. That rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system. In this way, it is an

important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. Thus the complaint intended to be made subsequently to the Court must first have been made – at least in substance – to the appropriate domestic body, and in compliance with the formal requirements and time-limits laid down in domestic law (see, among other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V).

39. The Court observes that in the present case the applicant organisation's application lodged with the courts was dismissed on the ground that it had failed to substantiate the fact that it had actually applied to the CEC with a request for information. In particular, no relevant evidence whatsoever was produced before the District Court, while the evidence produced before the Court of Appeal, namely the copies of two post office receipts, did not have postmarks on them. In this respect the Court reiterates that as a general rule it is for the domestic courts to assess the evidence before them (see, *mutatis mutandis*, *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 50, *Reports of Judgments and Decisions* 1997-III). Having regard to the evidence produced before the Court of Appeal, the Court notes that these were copies of the front pages of two post office receipts which contained a zip code and the name of the addressee but had no postmarks on them which would certify that the mail had been actually received by the outgoing post office. In such circumstances, it cannot be said that the Court of Appeal acted in an arbitrary manner by not accepting the copy of the post office receipts in question as proper evidence.

40. It is true that the applicant organisation appears to have submitted a copy of two postmarks, which were allegedly applied on the reverse of the post office receipts in question, to the Court of Cassation. However, this court's jurisdiction extended only to points of law and did not include the examination of evidence or making findings of fact (see, in particular, Articles 225 and 238 of the Code of Civil Procedure in paragraph 19 above), these questions falling within the sole jurisdiction of the first instance and appeal courts. Thus, as a result of the applicant organisation's failure to substantiate its case properly, its complaint about the CEC's alleged failure to respond to its request for information was not examined by the domestic courts on the merits.

41. In such circumstances, the Court concludes that the applicant organisation has failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention, and that this part of the application must be rejected pursuant to Article 35 § 4 of the Convention.

c) The applicant organisation complained about a failure to conduct a free election and invoked Article 3 of Protocol No. 1, which provides:

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

42. The Government submitted that Article 3 of Protocol No. 1 guaranteed the subjective rights to vote and to stand for election and was therefore not applicable to the circumstances of the present case. Furthermore, while the Court had previously accepted an interrelation between the rights guaranteed by that provision and Article 10 of the Convention, such interrelation was found to exist only in the pre-election period in terms of guaranteeing the free circulation of information and freedom of political debate, which was not the case in the present application.

43. The applicant organisation submitted that its case concerned the pre-election campaign period and the issues raised in it should therefore fall within the scope of Article 3 of Protocol No. 1.

44. The Court does not find it necessary, similarly to the complaint under Article 10 of the Convention, to rule on the applicability of Article 3 of Protocol No. 1 to the present case since this complaint is in any event inadmissible for the following reasons.

45. The Court observes that the complaint under Article 3 of Protocol No. 1 is also based on the allegation of the CEC's failure to provide the applicant organisation with copies of a number of election-related documents. This issue, as already indicated above, was not examined by the domestic courts on the merits for the failure of the applicant organisation to substantiate the fact of applying with such request to the CEC.

46. It follows that this part of the application must also be rejected pursuant to Article 35 § 4 of the Convention for the failure to exhaust domestic remedies as required by Article 35 § 1 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Stanley Naismith	Josep Casadevall
Deputy Registrar	President