



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

FOURTH SECTION

CASE OF MIKAYELYAN v. ARMENIA

(Application no. 1879/10)

JUDGMENT

STRASBOURG

31 August 2021

This judgment is final but it may be subject to editorial revision.

In the case of Mikayelyan v. Armenia,

The European Court of Human Rights (Fourth Section), sitting as a Committee composed of:

Tim Eicke, *President*,

Faris Vehabović,

Pere Pastor Vilanova, *judges*,

and Ilse Freiwirth, *Deputy Section Registrar*,

Having regard to:

the application (no. 1879/10) 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 Sasun Mikayelyan (“the applicant”), on 25 December 2009;

the decision to give notice to the Armenian Government (“the Government”) of the complaints concerning the admission of retracted pre-trial witness statements in evidence against the applicant, the applicant’s inability to question witnesses against him and to call a witness on his behalf, the alleged interference with the applicant’s right to freedom of expression and freedom of peaceful assembly and his alleged discrimination on the basis of his political opinion, and to declare inadmissible the remainder of the application;

the parties’ observations;

Having deliberated in private on 29 June 2021,

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

INTRODUCTION

1. The case concerns the applicant’s conviction for his involvement in the protest movement that followed the disputed presidential election of 19 February 2008 and raises issues under Articles 6 §§ 1 and 3 (d), 10, 11 and 14 of the Convention.

THE FACTS

2. The applicant was born in 1957 and lives in Yerevan. He was represented by Mr V. Grigoryan, Mr P. Leach, Ms J. Gavron and Ms J. Evans of the European Human Rights Advocacy Centre (EHRAC) based in London, and Mr M. Shushanyan, a lawyer practising in Yerevan.

3. 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.

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

I. THE 19 FEBRUARY 2008 PRESIDENTIAL ELECTION AND THE POST-ELECTION EVENTS

A. The presidential election and the demonstrations held between 20 February and 1 March 2008

5. On 19 February 2008 a presidential election was held in Armenia. The main contenders were the then Prime Minister, Mr Serzh Sargsyan, representing the ruling party, and the main opposition candidate, Mr Levon Ter-Petrosyan.

6. Immediately after the announcement of the preliminary results of the election, Mr Ter-Petrosyan called on his supporters to gather at Freedom Square in central Yerevan in order to protest against the irregularities which had allegedly occurred in the election process, announcing that the election had not been free and fair. From 20 February 2008 onwards, nationwide daily protest rallies were held by Mr Ter-Petrosyan's supporters, their main meeting place being Freedom Square and the surrounding park. It appears that the rallies at Freedom Square attracted at times tens of thousands of people, while several hundred demonstrators stayed in that area around the clock, having set up a camp.

7. The applicant, who at the material time was an opposition member of parliament and a supporter of Mr Ter-Petrosyan, regularly attended the ongoing demonstrations and occasionally gave speeches.

8. On 24 February 2008 the Central Election Commission announced that Mr Sargsyan had won the election with around 52% of all votes cast, while Mr Ter-Petrosyan received around 21% of votes.

9. On 29 February 2008 the rallies were still in full swing.

B. The events of 1-2 March 2008 and institution of criminal cases

10. On 1 March 2008, apparently at some point around 6-7 a.m., a police operation was conducted at Freedom Square where several hundred demonstrators were camping.

11. The applicant alleged that the police had violently attacked the demonstrators with rubber batons and electric shock devices and terminated the assembly.

12. The Government contested the applicant's allegations and claimed that the reason for the police operation at Freedom Square had been to verify the information obtained on the previous day by the Armenian Police and National Security Service, according to which a large number of weapons were to be distributed to the protesters to incite provocative actions and riots in Yerevan on 1 March 2008. As a result, clashes took place between the police and the demonstrators.

13. On the same date a criminal case was instituted under several Articles of the Criminal Code (“CC”), in connection with the events at Freedom Square, on account of organising and holding an unlawful assembly, incitement to disobedience of police orders to terminate the unlawful assembly, illegal possession of arms and ammunition, and life-threatening assaults on police officers. The decision to institute proceedings stated:

“After the announcement of the preliminary results of the presidential election of 19 February 2008, the presidential candidate, Mr Levon Ter-Petrosyan, members of parliament, [K.S. and S.M.], the chief editor of Haykakan Zhamanak daily newspaper, [N.P.], and others organised and held mass public events at Yerevan’s Freedom Square in violation of the procedure prescribed by law and made calls inciting to disobey the decisions ordering an end to the events held in violation of the procedure prescribed by law, while a number of participants in the mass events illegally possessed and carried illegally obtained arms and ammunition.

On 1 March 2008 at around 6 a.m., when the police took measures aimed at forcibly ending the public events held in violation of the procedure prescribed by law, in compliance with the requirements of section 14 of the Assemblies, Rallies, Marches and Demonstrations Act, the organisers and participants in the events, disobeying the lawful orders of the [police officers], who were performing their official duties, committed a life- and health-threatening assault on them with clubs, metal rods and other adapted objects, which had been in their possession for that purpose, causing the police officers injuries of varied severity.”

14. It appears that, after Freedom Square was cleared of demonstrators, some of them relocated to the area near the French Embassy, the Yerevan Mayor’s Office and the Myasnikyan monument, situated about 1.7-2 km from Freedom Square, where they were joined by thousands of others who apparently poured into the streets of Yerevan in response to the events of the early morning in order to voice their discontent. It further appears that the applicant was also present in that area. The rallies continued there, as well as a number of adjacent streets, including Grigor Lusavorich, Mashtots, Leo and Paronyan streets, until the early morning of 2 March 2008, with tensions gradually escalating and resulting in clashes between some protesters and the law enforcement officers. As a result, ten persons, including eight civilians, died, numerous persons were injured, public and private property was damaged, and a state of emergency was declared by the outgoing President of Armenia.

15. The Government alleged, which the applicant disputed, that the disorder which had taken place in Yerevan on 1 and 2 March had been incited and organised by the applicant in conspiracy with several other active opposition supporters.

16. On 2 March 2008 another criminal case was instituted under, *inter alia*, Article 225 § 3 of the CC (organising mass disorder involving murder) in connection with the events of 1 and 2 March 2008. The decision stated:

“[Mr Ter-Petrosyan], the candidate running for president at the presidential election of 19 February 2008, and his followers and supporters, members of parliament [K.S. and S.M.], the chief editor of Haykakan Zhamanak daily newspaper, [N.P.], and others, not willing to concede defeat at the election, with the aim of casting doubt on the election, instilling distrust towards the results among large segments of the population, creating illusions of public discontent and revolt and discrediting the election and the authorities, from 1 March 2008 in the area of the Yerevan Mayor’s Office and central streets organised mass disorder involving murders, violence, massacre, arson, destruction of property and armed resistance to public officials, with the use of firearms, explosives and other adapted objects.”

17. On the same date the two criminal cases were joined and examined under no. 62202608.

II. THE CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

18. On 4 March 2008 the General Prosecutor applied to the Armenian parliament with a request to have the applicant’s parliamentary immunity lifted and for an authorisation to bring charges against him and to have him and three other members of parliament detained. The request described at the outset the events which had taken place in Yerevan between 20 February and the early morning of 2 March 2008 and stated that the evidence obtained in the case provided sufficient grounds to believe that the applicant and three other members of parliament had taken an active part in inciting the violence with the public calls they had made and organising the mass disorder through direct participation, instigation and various types of support, including the recruitment and arming of attackers. This was sufficient to bring charges against them under Articles 225 § 3 and 300 § 1 (usurpation of State power) of the CC for organising the mass disorder which had taken place in Yerevan between 20 February and 2 March 2008 with the aim of a violent usurpation of State power in breach of the Constitution. The request further stated that there was sufficient evidence justifying their detention, including the risk of absconding and obstructing justice.

19. On the same date the Armenian parliament adopted a resolution granting the General Prosecutor’s request.

20. On 5 March 2008 the applicant was formally charged under Articles 225 § 3 and 300 § 1 of the CC within the scope of criminal case no. 62202608. This decision stated that, after the opposition candidate lost at the presidential election of 19 February 2008, the applicant joined his group of supporters and, having conspired with them to usurp State power in violation of the constitutional order, actively participated in carrying out activities for that purpose, including discrediting the pre-election process and the conduct of the election, raising doubts among the international community regarding the legality of the election, instilling distrust towards the results among large segments of the population, creating illusions of

public discontent and revolt, thereby organising and holding unlawful demonstrations aimed at destabilising the internal political situation. During those events the applicant, three other members of parliament and a number of other opposition supporters incited and organised mass disorder which took place in Yerevan on 1 and 2 March 2008 and involved mass violence, massacre, arson, destruction and damage of public and private property, armed resistance to public officials and murder.

21. On 12 March 2008 the applicant was arrested by officers of the National Security Service and placed in detention on the basis of a court order, which was later extended throughout the investigation and the trial.

22. On 13 March 2008 the applicant was questioned by the investigator. He denied the charges under Articles 225 § 3 and 300 § 1 of the CC and refused to testify.

23. On the same day a search was conducted in several premises belonging to the applicant, including a restaurant where apparently various types of ammunition and explosives were found and seized.

24. On 12 June 2008 an additional charge was brought against the applicant under Article 235 § 2 of the CC for illegal possession of ammunition and explosives, with reference to the items seized in the above search.

25. On 1 December 2008 the prosecutor approved the bill of indictment against the applicant and six other opposition leaders (commonly known as the “Case of Seven”) and their criminal case, which had been disjoined from criminal case no. 62202608, was transferred for trial.

26. On 31 March 2009 the prosecutor replaced the charge under Article 225 § 3 of the CC with a charge under Article 225 § 1 of the CC and dropped the charge under Article 300 § 1 of the CC on the ground that, on 24 March 2009, Article 225 § 3 had been repealed, while Article 300 § 1 had been amended and could not be applied retroactively.

27. On 1 April 2009 the case against the applicant was disjoined into separate proceedings.

28. It appears that during the trial the Kotayk Regional Court called and heard at least thirteen prosecution witnesses, mostly demonstrators who had attended the assembly at Freedom Square, many from the applicant’s region. Five of those witness either fully or partially retracted the statements that they had given against the applicant during the investigation, claiming that they had been either guided or dictated by the investigator or extracted by ill-treatment or intimidation.

Two other prosecution witnesses, T.K. and V.S., failed to appear, while the testimony of a third one, G.A., was interrupted at one of the hearings and never resumed. It appears that the Regional Court failed to secure T.K. and V.S.’s appearance and decided to read out their pre-trial statements despite the applicant’s objections. As for G.A., he submitted that he had been intimidated by the applicant’s relatives and did not wish to continue

his testimony in court out of fear for his life. The Regional Court at first tried unsuccessfully to secure G.A.'s appearance but later decided to relieve him from that obligation and to rely on his pre-trial statement.

Lastly, it appears that the applicant requested that the Head of the Special Investigative Service be summoned as a witness and examined in court in connection with the charge of illegal possession of ammunition and explosives, which was rejected by the court.

29. On 22 June 2009 the Regional Court found the applicant guilty under Articles 225 § 1 and 235 § 2 of the CC, sentencing him to a total of eight years in prison. The Regional Court found it to be established as follows:

“After the preliminary results of the election held on 19 February 2008 were made public and it became clear that Serzh Sargsyan had won, [the applicant], together with a group of people, starting from 20 February 2008 carried out organisational activities for the purpose of creating discontent in the society and preparing the crowd gathered at the assembly held at Yerevan’s Freedom Square for use of violence and disobedience. In order to ensure the continuous presence of groups of people at those events, they bought for them household items and food and provided money. They distributed rods, clubs, armature, Molotov cocktails, metal structures considered projectile cold weapons, firearms and ammunition to some of those taking part in the demonstrations at Freedom square.

[The applicant], using his army commander’s experience and his standing acquired during the fight for liberation of Artsakh and his influence among the veterans of the [Nagorno Karabakh] war, declared during the demonstrations held at Freedom Square that he would struggle until the end, demanded to be ready anytime to take decisive steps and to struggle, to show to the authorities who are the real fighters, to show our strength and to prove it, to disobey the police and not to leave the area, inciting those recruited in the town of Hrazdan and adjacent villages to participate in the demonstrations held in violation of the law and being their personal commander and leader. In order to arouse the crowd even more, as a show of strength, he regularly circulated at Freedom Square accompanied by bodyguards and companions-in-arms.

Between 27 and 29 February 2008 [the applicant] organised the transportation of wooden and metal clubs, armature and Molotov cocktails to Freedom Square where they were hidden in the tents erected at the square and designated as “Hrazdan”, “Kotchor” and “Vanatur”.

On 29 February 2008 operative information was received by the Armenian Police and the National Security Service that a group of persons intended to instigate mass disorder in Yerevan on 1 March through provocations and that for that purpose a large quantity of clubs, metal rods, explosive substances, firearms and grenades were to be distributed among the participants of the assembly at Freedom Square.

In the early morning of 1 March 2008 the police, for the purpose of verifying the operative information regarding the illegal turnover of firearms, ammunition, explosive substances, explosive devices and various other objects adapted to cause physical injuries for the purpose of instigating mass disorder in Yerevan, tried to discover those items at Freedom Square and to prevent their use. As a result of the police operation part of the objects brought for the purpose of carrying out the mass disorder, including firearms and ammunition, were discovered at Freedom Square.

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Thereafter, participants of the assembly, led by [the group], gathered in the area adjacent to the Myasnikyan monument, which is an important intersection of several streets of Yerevan situated in the vicinity of specially guarded buildings such as the French, Italian and Russian embassies. At around 11 a.m. the participants of the mass disorder blocked Grigor Lusavorich street by placing trolleybuses along the carriageway and armed themselves with objects which were more suitable for causing physical injury and were found in their surroundings, including stones, rods and sticks, as well as explosive substances, explosive devices, firearms and Molotov cocktails which had been prepared beforehand and brought to the area of the mass disorder. The Molotov cocktails were filled with flammable liquid immediately behind the platform at Myasnikyan monument and in the nearby park.

[The applicant] and the others, in order to bring their intention of instigating mass disorder to completion, rejected the offer made by the authorities to hold the assembly in another location for the purpose of preserving public order and ensuring the safety of the participants of the assembly. Moreover, with their speeches and orders they gave instructions to the gathered crowd with the aim of keeping it there as long as possible and derailing its move to another location.

As a result of all that, from 1 to 2 March 2008 mass disorder was perpetrated in the area of the Myasnikyan monument and the Yerevan Mayor's Office, as well as Grigor Lusavorich, Mashtots, Leo and Paronyan streets, with use of firearms, ammunition and explosive substances and devices, during which armed resistance was shown to the police and the servicemen of the Police Troops, bodily injuries of various severity were inflicted on the police officers and the servicemen of the Police Troops. A total of 187 persons, including 32 civilians, sustained injuries.”

The Regional Court proceeded to specify the number of persons injured and killed and vehicles damaged, as well as the pecuniary damage caused to the police, the city of Yerevan, the central district and private businesses. The Regional Court concluded that the mass disorder had stopped only after the declaration of a state of emergency and its prevention by the actions of the police.

As regards the charge of illegal possession of ammunition and explosives, the Regional Court found that the applicant had obtained the items in question at an unidentified time and illegally kept them in his restaurant's storage room.

30. In reaching its conclusions, the Regional Court relied, *inter alia*, on the statements of the witnesses who had appeared in court and the pre-trial statements of witnesses T.K., V.S. and G.A. As regards the pre-trial statements retracted in court, the Regional Court found that the witnesses in question, as the applicant's companions-in-arms, friends and residents of his area, had done so because of being familiar and close with the applicant and decided to give preference to their pre-trial statements.

31. On 22 July 2009 the applicant lodged an appeal against his conviction.

32. On 31 July 2009 the Criminal Court of Appeal dismissed the applicant's appeal and upheld the judgment of the Regional Court.

33. On 30 August 2008 the applicant lodged an appeal on points of law.

34. On 10 September 2009 the Court of Cassation declared the applicant's appeal on points of law inadmissible for lack of merit.

RELEVANT LEGAL FRAMEWORK

I. RELEVANT DOMESTIC LAW AND OTHER MATERIALS

A. Criminal Code (2003)

35. For Articles 225 and 300, see *Myasnik Malkhasyan v. Armenia* (no. 49020/08, §§ 44-46, 15 October 2020).

36. Article 235 § 1 prescribes a penalty for illegal acquisition, sale, possession, trafficking or carrying of firearms (except smoothbore firearms and their bullets), ammunition, rifled firearms cartridges or explosive substances or devices. Article 235 § 2 prescribes a penalty of two to six years' imprisonment for the same act if committed by a group of people acting in collusion.

B. Ad Hoc Public Report of Armenia's Human Rights Defender (Ombudsman): On the 2008 February 19 Presidential Election and the Post-Electoral Developments

37. For the relevant extracts of the Armenian Ombudsman's report regarding the presidential election and the post-election events, see *Mushegh Saghatelyan v. Armenia* (no. 23086/08, § 124, 20 September 2018) and *Myasnik Malkhasyan* (cited above, § 49).

II. RELEVANT INTERNATIONAL MATERIALS

38. In its Resolutions regarding the 19 February 2008 presidential election and the events that followed, the Parliamentary Assembly of the Council of Europe (PACE) condemned the arrest and continuing detention of scores of persons, including more than 100 opposition supporters and three members of parliament, among them the applicant, some of them on seemingly artificial and politically motivated charges, especially those under Articles 225 and 300 of the CC (for the relevant extracts, as well as a number of other relevant international materials, see *Mushegh Saghatelyan*, cited above, §§ 125-34, and *Myasnik Malkhasyan*, cited above, §§ 51-57).

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 10 AND 11 OF THE CONVENTION

39. The applicant complained that his prosecution and conviction had been in breach of his rights to freedom of expression and freedom of peaceful assembly as provided in Articles 10 and 11 of the Convention, which, in so far as relevant, read as follows:

Article 10

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...

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.”

Article 11

“1. Everyone has the right to freedom of peaceful assembly...

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others ...”

A. Admissibility

40. The Government submitted that the applicant lacked victim status since he had failed to present any fact or evidence in support of his allegations that his prosecution or conviction had been directly or indirectly connected to his rights of freedom of expression or freedom of peaceful assembly. The criminal proceedings had been instituted against the applicant only because there had been elements of a crime in his actions. In particular, he had been suspected of organising and inciting mass disorder and for illegal possession of arms and ammunition, for which he had been eventually found guilty, as well as an attempt to usurp power, a charge which had been dropped. None of those acts had had any connection to the rights guaranteed by Articles 10 and 11 of the Convention.

41. The applicant contested the Government’s submissions as regards the alleged lack of victim status and argued that there had been an

interference with his Article 10 and 11 rights since he had been prosecuted and convicted for his role and active participation in the peaceful and lawful post-election rallies. His behaviour which had been found criminally prohibited and characterised as “organising mass disorder” had amounted to nothing but organisation of a mass public action.

42. The Court notes that by contesting the applicant’s victim status the Government in essence disputed the existence of an interference with the applicant’s rights guaranteed under Articles 10 and 11 of the Convention. This question, however, is closely linked to the substance of the applicant’s complaints and must be joined to the merits.

43. The Court notes that these complaints are neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared admissible.

B. Merits

1. The parties’ submissions

44. The applicant submitted that he had been prosecuted and convicted for being an opposition politician and for having availed himself of his right to freedom of expression and freedom of peaceful assembly by participating in a political debate, making political speeches critical of the authorities and supporting the opposition presidential candidate. The nine-day uninterrupted assembly at Freedom Square had been a lawful, spontaneous and entirely peaceful event through which thousands of Armenians, including him, had shown their opposition and protest against the outcome of the presidential election. The criminal case instituted in respect of the events of 1 March 2008 had from the outset been a political case whereby the authorities unleashed a widescale crackdown against members and supporters of the opposition like himself. This fact had been obvious from the vague wording of the decision instituting the criminal case and had been confirmed by the Armenian Ombudsman, the PACE and the Council of Europe Commissioner for Human Rights. The charges against him had been fabricated as was also demonstrated by their constantly changing nature and the numerous inconsistencies. They had eventually been rubberstamped by the courts which lacked independence.

45. The interference with his right to freedom of expression and freedom of peaceful assembly had not been prescribed by law since both Articles 225 and 300 of the CC had lacked clarity and foreseeability. Furthermore, it had not been necessary in a democratic society. The rallies in question had been part of a wider post-election protest movement in response to the largescale election fraud at the presidential election of 19 February 2008. Those rallies had therefore enjoyed strong protection under Articles 10 and 11 and he, being one of Mr Ter-Petrosyan’s key supporters and a member of parliament, had availed himself of his right to

freedom of expression by taking part in them. Even if some people had committed acts of violence on 1 March 2008, those whose intentions had been entirely lawful and fell within scope of protection of Articles 10 and 11 could not be held responsible for such acts. Thus, imprisonment of a politician within the context of the post-election protests for the violent actions causing disorder that had neither been committed by him nor had had any established link to him had been entirely disproportionate to any legitimate aim, including the prevention of disorder and crime or the protection of the health, morals or the rights of others. The Government's assertion that the rallies had not been peaceful were similarly groundless since none of the participants in the events of 1 March 2008 had been found guilty of an attempted usurpation of power. The applicant also referred to the continuous calls of the international community and the Armenian Ombudsman to drop the charges against the leaders of the opposition under Articles 225 and 300 of the CC since such charges had been considered politically motivated and those facing such charges had been identified as "political prisoners".

46. The Government did not comment on the applicant's submissions other than arguing that he lacked victim status (see paragraph 40 above).

2. *The Court's assessment*

(a) **The scope of the applicant's complaints**

47. The Court notes that, in the circumstances of the case, Article 10 is to be regarded as a *lex generalis* in relation to Article 11, which is a *lex specialis*. The Court therefore finds that the applicant's complaints should be examined under Article 11 alone (see *Ezelin v. France*, 26 April 1991, § 35, Series A no. 202, and *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, § 85, ECHR 2015).

48. On the other hand, notwithstanding its autonomous role and the particular sphere of application, Article 11 must, in the present case, also be considered in the light of Article 10. The protection of personal opinions, secured by Article 10, is one of the objectives of freedom of peaceful assembly as enshrined in Article 11 (see *Ezelin*, cited above, § 37; *Kudrevičius and Others*, cited above, § 86; and *Navalnyy v. Russia* [GC], nos. 29580/12 and 4 others, § 102, 15 November 2018).

(b) **Whether there has been an interference with the exercise of the right to freedom of peaceful assembly**

49. The Court reiterates that an interference does not need to amount to an outright ban, legal or *de facto*, but can consist in various other measures taken by the authorities. The term "restrictions" in Article 11 § 2 must be interpreted as including both measures taken before or during an assembly, such as a prior ban, dispersal of the rally or the arrest of participants, and

those, such as punitive measures, taken afterwards, including penalties imposed for having taken part in a rally (see *Navalnyy and Yashin v. Russia*, no. 76204/11, § 51, 4 December 2014, and *Kudrevičius and Others*, cited above, § 100).

50. The Court notes that the Government disputed the existence of an interference, arguing that the assembly at Freedom Square and the applicant's actions had not been peaceful. In this connection, the Court is mindful that it has already scrutinised the circumstances of the assembly at Freedom Square and found that it had been peaceful, without any incitement to violence or acts of violence (see *Mushegh Saghatelyan*, cited above, § 245, and *Myasnik Malkhasyan*, cited above, § 72). The Court further notes that the applicant's conviction for "organising mass disorder" concerned his involvement in the post-election protest movement, including his participation and speeches made at the assembly at Freedom Square, and therefore amounted to an interference with his right to freedom of peaceful assembly. For the same reason, the Court rejects the Government's objection as regards the lack of victim status.

(c) Whether the interference was justified

51. An interference will constitute a breach of Article 11 unless it is "prescribed by law", pursues one or more legitimate aims under paragraph 2 and is "necessary in a democratic society" for the achievement of those aims (see *Galstyan v. Armenia*, no. 26986/03, § 103, 15 November 2007).

52. In the present case, the Court does not consider it necessary to decide whether the interference was prescribed by law and pursued a legitimate aim having regard to its conclusions set out below, regarding the necessity of the interference (see, *mutatis mutandis*, *Christian Democratic People's Party v. Moldova*, no. 28793/02, §§ 49-54, ECHR 2006-II, and *Mushegh Saghatelyan*, cited above, § 237).

53. The Court reiterates at the outset that the right to freedom of assembly, one of the foundations of a democratic society, is subject to a number of exceptions which must be narrowly interpreted and the necessity for any restrictions must be convincingly established. When examining whether restrictions on the rights and freedoms guaranteed by the Convention can be considered "necessary in a democratic society" the Contracting States enjoy a certain but not unlimited margin of appreciation. It is, in any event, for the Court to give a final ruling on the restriction's compatibility with the Convention and this is to be done by assessing the circumstances of a particular case (see *Kudrevičius and Others*, cited above, § 142, and *Mushegh Saghatelyan*, cited above, § 238).

54. When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review under Article 11 the decisions they took. This does not mean that it has to confine itself to ascertaining whether the State exercised its discretion

reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine, after having established that it pursued a “legitimate aim”, whether it answered a “pressing social need” and, in particular, whether it was proportionate to that aim and whether the reasons adduced by the national authorities to justify it were “relevant and sufficient”. In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see *Kudrevičius and Others*, cited above, § 143, and *Mushegh Saghatelyan*, cited above, § 239).

55. The Court also reiterates that a criminal conviction for actions inciting to violence at a demonstration can be deemed to be an acceptable measure in certain circumstances (see *Osmani and Others v. the former Yugoslav Republic of Macedonia* (dec.), no. 50841/99, ECHR 2001-X). However, peaceful participants may not be held responsible for reprehensible acts committed by others. The freedom to take part in a peaceful assembly is of such importance that a person cannot be subject to a sanction – even one at the lower end of the scale of disciplinary penalties – for participation in a demonstration which has not been prohibited, so long as that person does not himself commit any reprehensible act (see *Ezelin*, cited above, § 53, and *Galstyan*, cited above, § 115). Similarly, the organisers of the event should not be held responsible for the conduct of its participants as long as they themselves do not commit, incite or condone any reprehensible acts (see *Mesut Yıldız and Others v. Turkey*, no. 8157/10, § 34, 18 July 2017). This is true even when the demonstration results in damage or other disorder (see *Taranenko v. Russia*, no. 19554/05, § 88, 15 May 2014).

56. The Court lastly reiterates that it has consistently emphasised in its case-law the importance of freedom of expression for members of parliament, this being political speech *par excellence*. While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament call for the closest scrutiny on the part of the Court (see, among other authorities, *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, § 242, 22 December 2020).

57. In the present case, the Court notes at the outset that the applicant contested the factual basis for his conviction, alleging that the criminal case against him and other leaders and supporters of the opposition had been politically motivated. The Court, however, has emphasised on many occasions that it is sensitive to the subsidiary nature of its role and recognises that it must be cautious in taking on the role of a first-instance

tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case. As a general rule, where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and it is for the latter to establish the facts on the basis of the evidence before them, although there may be circumstances in which the Court will depart from the findings of fact reached by the domestic courts, including in cases concerning Article 10 and 11 rights (see *Jhangiryan v. Armenia*, nos. 44841/08 and 63701/09, §§ 114 and 123, 8 October 2020, and *Smbat Ayvazyan v. Armenia*, no. 49021/08, §§ 119 and 129, 8 October 2020, both of which concerned the same protest movement as in the present case).

58. The Court considers it necessary first to have regard to the general context of the facts of this particular case. It notes that the applicant was an opposition member of parliament and an active supporter of Mr Ter-Petrosyan who took part in the rallies which gripped the Armenian capital following the allegedly unfair presidential election of 19 February 2008 and culminated in the events of 1 and 2 March 2008 (see *Mushegh Saghatelyan*, cited above, §§ 226-55; *Ter-Petrosyan v. Armenia*, no. 36469/08, §§ 61-65, 25 April 2019; *Myasnik Malkhasyan*, cited above, §§ 70-82; *Jhangiryan*, cited above, §§ 112-28; and *Smbat Ayvazyan*, cited above, §§ 117-34). The response of the authorities that followed, including the arrests and detention of scores of opposition leaders and supporters, was condemned by the PACE as a “*de facto* crackdown on the opposition”, while the charges brought against many of them, especially those under Articles 225 and 300 of the CC, were suspected to have been “artificial and politically motivated”. Repeated concerns were expressed by both the PACE and the Council of Europe Commissioner for Human Rights about the nature of the charges under those Articles, mentioning the applicant's specific case on several occasions (see paragraph 38 above and, more specifically, *Myasnik Malkhasyan*, cited above, §§ 55 and 56). While the Court is not called upon to give a judicial assessment of the general context, it nevertheless considers that this background information is extremely relevant to the present case and calls for particularly close scrutiny of the facts giving rise to the applicant's conviction (see, *mutatis mutandis*, *ibid.*, § 70, in which the applicant was also one of the seven prominent opposition figures who stood trial in the so-called “Case of Seven” together with the applicant in the present case before their cases were disjoined (see paragraphs 25 and 27 above)). Furthermore, as noted above, the Court has already examined a number of applications alleging violations of Articles 10 and 11 of the Convention and politically motivated prosecutions in connection with the post-election protests in Armenia in February-March 2008. The present case appears to follow a pattern of criminal prosecutions of opposition supporters, which the Court finds alarming, all the more so as the applicant was a member of parliament. Nevertheless, as stated in the case of *Mushegh*

Saghatelyan, the Court is not in a position, nor is it its duty, to determine whether the charges against the applicant were substantiated and it was the duty of the domestic courts to check the veracity of the underlying facts (see *Mushegh Saghatelyan*, cited above, § 252). The Court reiterates in this connection the obligation of the domestic courts to provide reasons for their decisions which, in the context of the present case, translates into specific obligations under Articles 10 and 11 by requiring the courts to provide “relevant” and “sufficient” reasons for an interference.

59. The Court notes in this connection that the applicant was found guilty, *inter alia*, under Article 225 § 1 of the CC, as one of the leaders of the opposition, of organising mass disorder in connection with the post-election protests which had taken place in Yerevan from 20 February 2008 onwards, including the assembly at Freedom Square. However, as already noted above, the demonstrations held at Freedom Square were found by the Court to constitute a peaceful assembly and in fact a platform for expression on a matter of major political importance directly related to the functioning of a democracy and of serious concern to large segments of the Armenian society (see *Mushegh Saghatelyan*, cited above, §§ 230-33 and 246, and *Myasnik Malkhasyan*, cited above, § 72). While stating that the applicant had prepared the crowd gathered at Freedom Square for use of violence and disobedience, the examples of such behaviour provided by the domestic courts in a very summary manner, including the applicant’s alleged calls to struggle against the authorities, are not sufficient for the Court to characterise them as incitement to violence or to conclude that they were anything but examples of legitimate exercise by the applicant of his right to freedom of peaceful assembly and expression of opinions in the context of the public debate surrounding the conduct of the presidential election, including the criticism voiced in that respect (see paragraph 29 above; compare *Myasnik Malkhasyan*, cited above, § 73). Even the finding that the applicant called on the protesters to disobey the police was not supported by any quotes of such calls or specific details of the circumstances in which those calls had been allegedly made.

60. As regards the finding that the group of people, with whom the applicant had allegedly conspired to usurp power, had distributed arms to some protesters at Freedom Square and that the applicant himself had transported and hidden some makeshift arms in several tents erected at the square, the Court is mindful that it has already established that there was no convincing evidence to suggest that there had been a build-up of arms at Freedom Square and has rejected the allegations that the police were deployed at the square in order to carry out an inspection for weapons, finding that the main, if not only, purpose of the police operation in the early morning of 1 March 2008 was to disperse the assembly (see *Mushegh Saghatelyan*, cited above, §§ 230 and 245, and *Myasnik Malkhasyan*, cited above, § 80).

61. It is undisputed that, after nine days of peaceful protests, violence erupted in Yerevan on 1 and 2 March 2008 after the demonstrators had been ejected from Freedom Square and large crowds had gathered in the area of the Myasnikyan monument and a number of adjacent streets where it appears that clashes between some protesters and law-enforcement officers took place and public and private property was damaged (see paragraph 14 above). However, the findings of the domestic courts regarding the applicant's alleged responsibility for the violence in question were drafted in very general and abstract terms, without any specific factual details which would convincingly point to any wrongdoing by the applicant. It is notable in this connection that, while finding the applicant guilty under Article 235 § 2 of the CC of illegal possession of ammunition and explosives, there was no indication in the domestic judgments that this act, which appears to have been examined as a separate offence, was anyhow linked to the charges of organising mass disorder brought against the applicant. Nor is there anything in the case file or the Government's observations that would prompt the Court to assume that such link was implicit in the domestic findings.

62. In sum, the domestic courts failed to provide sufficiently specific examples of any reprehensible acts attributable to the applicant, including incitement or instigation of violence, in the course of his involvement in the protest movement and the rallies which gripped Armenia in the aftermath of the presidential election (compare *Mushegh Saghatelyan*, cited above, §§ 249-53, and *Myasnik Malkhasyan*, cited above, §§ 71-79). As such, the applicant appears to have been sanctioned for being an active member of the opposition and for having availed himself of his right to freedom of peaceful assembly rather than committing any reprehensible acts (compare *Mushegh Saghatelyan*, cited above, § 250).

63. Lastly, the Court is mindful that, as noted in the case of *Myasnik Malkhasyan*, serious doubts have been voiced by the PACE Monitoring Committee regarding the version, according to which the events of 1 and 2 March 2008 had been part of a planned and organised attempt by the leaders of the opposition to seize violently State power or, in other words, to carry out a coup, and in fact such prosecutions were deemed highly likely to be politically motivated. Moreover, a number of credible reports suggested that the gathering of people in the area of the Myasnikyan monument, including their later being armed, had been spontaneous and unorganised developments and that the escalation of violence later that day might have been a response to the earlier dispersal of demonstrators from Freedom Square, including its heavy-handed nature, as well as a number of other similar or uncontrollable events which had happened later that day (*ibid.*, § 80). The Court notes that the Government have not produced any evidence in the present case which would prompt it to doubt the above reports or the findings reached in that case.

64. In the light of the above, the Court concludes that the domestic courts failed in their duty to provide reasons for their decisions and that the reasons adduced to justify the interference with the applicant's right to freedom of peaceful assembly were not "relevant and sufficient".

65. There has accordingly been a violation of Article 11 of the Convention.

II. ALLEGED VIOLATION OF ARTICLES 6 AND 14 OF THE CONVENTION

66. The applicant also alleged a violation of Article 6 §§ 1 and 3 (d) and of Article 14 of the Convention, in conjunction with Articles 6, 10 and 11 of the Convention. He argued that the admission of retracted pre-trial witness statements in evidence, the denial of an opportunity to examine witnesses G.A., T.K. and V.S. in court and the refusal to call a witness on his behalf had breached the fair trial guarantees and that he had fallen victim to discrimination on the basis of his political opinion because the true reason behind his prosecution and conviction had been his adherence to the political opposition.

67. The Government contested those allegations.

68. Having regard to the facts of the case, the submissions of the parties and its findings under Article 11 of the Convention, the Court considers that it has examined the main legal question raised in the present application and that there is no need to give a separate ruling on these complaints (see, *mutatis mutandis*, *Kamil Uzun v. Turkey*, no. 37410/97, § 64, 10 May 2007, and *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

69. 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

70. The applicant claimed 35,000 euros (EUR) in respect of non-pecuniary damage.

71. The Government argued that this claim was groundless and asked the Court to reject it.

72. The Court considers that the applicant has undoubtedly suffered non-pecuniary damage and awards him EUR 9,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

73. The applicant also claimed EUR 3,233 and 3,375 pounds sterling (GBP) for the legal costs incurred before the Court, and a further GBP 2,505.25 for translation expenses.

74. The Government argued that the claim was not duly substantiated and was exorbitant. Furthermore, part of the applicant's initial complaints had been declared inadmissible and not all the costs claimed had been necessary.

75. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, the Court considers that the applicant failed to show that all the costs claimed had been necessarily and reasonably incurred. Regard being had to the documents in its possession and the above criteria, the Court awards the sum of EUR 3,800 for costs and expenses in the proceedings before the Court, plus any tax that may be chargeable to the applicant, to be paid in GBP into his representatives' bank account in the United Kingdom.

C. Default interest

76. 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. *Decides* to join to the merits the preliminary objection concerning lack of victim status and *dismisses* it;
2. *Declares* the complaints concerning the interference with the applicant's right to freedom of expression and freedom of peaceful assembly admissible;
3. *Holds* that there has been a violation of Article 11 of the Convention;
4. *Holds* that it is not necessary to examine the admissibility and merits of the complaints under Article 6 §§ 1 and 3 (d) and Article 14 of the Convention;
5. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months, the following amounts:

- (i) EUR 9,000 (nine thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 3,800 (three thousand eight hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into GBP at the rate applicable on the date of settlement and to be paid into the applicant's representatives' bank account in the United Kingdom;
- (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 31 August 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth
Deputy Registrar

Tim Eicke
President