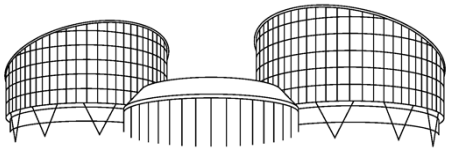

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF GASPARI v. ARMENIA (No. 2)

(Application no. 67783/13)

JUDGMENT

Art 10 • Freedom of expression • Criminal conviction of a civic activist for hooliganism for remarks directed at a public official during a demonstration, not "necessary in a democratic society" • Impugned remarks, an immediate emotional reaction, intended as harsh criticism of the official's attitude towards the protesters and did not amount to wanton denigration • Failure of domestic courts to adequately assess underlying facts or provide specific reasons for decision • Failure of domestic authorities to carry out balancing exercise to demonstrate conviction met a "pressing social need"

STRASBOURG

11 July 2023

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Gaspari v. Armenia (no. 2),

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

Gabriele Kucsko-Stadlmayer*, President*,
Tim Eicke,
Branko Lubarda,
Armen Harutyunyan,
Anja Seibert-Fohr,
Ana Maria Guerra Martins,
Anne Louise Bormann*, judges*,
and Andrea Tamietti, *Section Registrar,*

Having regard to:

the application (no. 67783/13) 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 Vartgez Gaspari ("the applicant"), on 9 October 2013;

the decision to give notice to the Armenian Government ("the Government") of the complaint concerning the alleged violation of the applicant's right to freedom of expression and to declare the remainder of the application inadmissible;

Having deliberated in private on 20 June 2023,

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

INTRODUCTION

1. The case concerns the applicant's conviction for utterances directed at a public official during a small demonstration and raises issues under Article 10 of the Convention.

THE FACTS

2. The applicant was born in 1957 and lives in Yerevan. He was represented by Mr M. Shushanyan and Mr R. Revazyan, lawyers practising in Yerevan.

3. The Government were represented by their Agent, Mr Y. Kirakosyan, Representative of the Republic of Armenia on International Legal Matters.

4. The facts of the case may be summarised as follows.

5. On 20 October 2011 the applicant, who is a well-known civic activist, took part in a small demonstration held by a few dozen people in front of the seat of the Government to protest against non-combat deaths in the Armenian army and the alleged lack of proper investigation into such incidents.

6. According to the findings of the domestic courts, at one point during the demonstration the then Chief of the Armenian Police ("the Chief of Police"), A.S., had exited the building and approached the gathered crowd

intending to pass through it in order to get to his car. He had asked one of the female protesters to let him pass and had made his way through, touching the hand of the woman in question in the process. At that moment, the applicant had started yelling at the Chief of Police, calling him a "Hooligan", "Fool", "Brute" and "Scum". Some of those present, including civilians and police officers, had reacted critically to the applicant's behaviour.

7. The applicant contested some of the above findings, alleging that other officials who had left the Government building before the Chief of Police had walked round the gathered crowd in order not to cause disruption, whereas the Chief of Police had deliberately ploughed through it and, in doing so, had pushed one of the female demonstrators, thereby provoking an angry reaction from the crowd. The demonstrators had shouted "hooligan" and "criminal" at the Chief of Police, while the applicant also yelled: "Don't push, you brute! Scum!".

8. The applicant was arrested at the site of the demonstration and later charged with hooliganism under Article 258 § 1 of the former Criminal Code ("the CC") (see paragraph 16 below) in connection with the above events.

9. The transcripts of several video clips examined during the trial, in so far as relevant, may be summarised as follows. After the Chief of Police approached the protesters and began to make his way through them (see paragraph 6 above), the applicant started shouting "Hooligans!", "Brutes!", "Don't push!", "Get your hands off, you brute!", "Fool!", "Hooligan!" and "Scum!". Two other women can be heard shouting "Murderer!" and "Traitors to the nation!". Then the Chief of Police stopped to speak with some of the police officers on duty and, addressing one of them, said "Every worthy-unworthy person is here, [what is] the point? The point?" and the applicant shouted "[A.S.] is a hooligan!". The Chief of Police then approached his car, while the crowd yelled "Shame on you!". At some point, the protesters can also be heard shouting "Hooligans!" and "Murderers!".

10. According to the testimony of the police officers who were present, including the arresting officers, and of two witnesses to the incident, the applicant had, *inter alia*, displayed aggressive and disrespectful behaviour by uttering insults directed at, among other officials, the Chief of Police. He had continued with such behaviour despite remarks made by the officers and others.

11. Two participants in the protest, including the female protester mentioned in paragraph 6 above, submitted that the Chief of Police and his aides had pushed them while forcing their way through the protesters despite the latter's demands to go round the group.

12. On 29 October 2012 the Kentron and Nork-Marash District Court of Yerevan found the applicant guilty as charged, finding that his actions had amounted to hooliganism within the meaning of Article 258 § 1 of the CC and sentencing him to a fine in the amount of 30,000 Armenian drams[1]. The

[1] This corresponded roughly to the fixed minimum monthly wage which at the time was 35,000 Armenian drams (around 67 euros (EUR) at the material time).

trial court held that the applicant had grossly violated public order by shouting the utterances in question (see paragraph 6 above) at the Chief of Police in the presence of numerous people. Moreover, his behaviour had provoked indignation among those present, as demonstrated by the fact that they had made critical remarks about his actions. The Chief of Police had not done anything immoral or unlawful during the protest. Consequently, the applicant had wished to stand out from the crowd and to underline, in an unjustified manner, his superiority over public officials, in this case the Chief of Police whom he had singled out by chance.

13. The applicant appealed against his conviction, arguing, *inter alia*, that it had breached his right to freedom of expression and freedom of peaceful assembly. He and others had been protesting peacefully until the moment when the Chief of Police had pushed through the demonstrators, thereby disrupting the peaceful protest. The purpose of the demonstration had been to present publicly their concerns to public officials, and the expressions uttered in such a context could often involve potentially insulting elements referring to the actions of public officials. Not only had the Chief of Police not shown the tolerance required in such situations of a public official, but he had himself provoked the incident. Lastly, if the Chief of Police had considered the applicant's remarks to be insulting, he could have pursued a civil action.

14. On 15 January 2013 the Criminal Court of Appeal dismissed the applicant's appeal and endorsed the reasons given by the trial court.

15. The applicant appealed further, and on 27 March 2013 the Court of Cassation declared his appeal on points of law inadmissible for lack of merit in a decision which was notified to him on 9 April 2013.

RELEVANT LEGAL FRAMEWORK

16. The relevant part of Article 258 § 1 of the former Criminal Code (in force from 1 August 2003 until 1 July 2022) provided as follows:

> "1. Hooliganism, [namely] a gross and intentional violation of public order manifested through an expressly disrespectful attitude towards society, is punishable by a fine of up to fifty times the fixed minimum wage or detention of up to one month".

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

17. The applicant complained that his criminal conviction for the remarks he had made during a demonstration had violated his right to freedom of expression as provided for in Article 10 of the Convention, which reads as follows:

> "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."

18. The Government did not submit any observations on the admissibility and merits of this complaint.

A. Admissibility

19. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

The Court's assessment

(a) Whether there was an interference

20. The Court considers that the applicant's criminal conviction constituted an interference with his right to freedom of expression (compare *Janowski v. Poland* [GC], no. 25716/94, § 22, ECHR 1999-I).

21. The interference will not be justified under the terms of Article 10 of the Convention unless it is "prescribed by law", pursues one or more of the legitimate aims set out in paragraph 2 of the Article and is "necessary in a democratic society" for the achievement of that aim or those aims.

(b) Whether the interference was lawful and pursued a legitimate aim

22. The Court notes that the applicant's conviction was based on Article 258 § 1 of the Criminal Code. In the absence of any specific argument on the applicant's part regarding the lawfulness of the interference of which he complained, the Court considers that his conviction had a sufficient legal basis in domestic law and thus met the requirement of lawfulness.

23. Furthermore, the Court is prepared to accept that the interference in question pursued the legitimate aim of the prevention of disorder (see paragraph 12 above).

(c) Whether the interference was "necessary" in a democratic society

(i) Applicable general principles

24. The general principles for assessing whether an interference with the exercise of the right to freedom of expression was "necessary in a democratic society" are well established in the Court's case-law and have been reiterated in a number of cases. The Court has stated, in particular, that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to Article 10 § 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society" (see, among many authorities, *Morice v. France* [GC], no. 29369/10, § 124, ECHR 2015, and *Sanchez v. France* [GC], no. 45581/15, § 145, 15 May 2023).

25. The adjective "necessary" implies the existence of a "pressing social need", which must be convincingly established (see, for instance, *Erdoğdu v.Turkey*, no. 25723/94, § 53, ECHR 2000-VI). Admittedly, it is first of all for the national authorities to assess whether there is such a need capable of justifying an interference and, to that end, they enjoy a certain margin of appreciation. However, the margin of appreciation is coupled with supervision by the Court both of the law and the decisions applying the law, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see, among many other authorities, *Karataş v. Turkey* [GC], no. 23168/94, § 48, ECHR 1999-IV).

26. The Court's supervisory function is not limited to ascertaining whether the national authorities exercised their discretion reasonably, carefully and in good faith. It has rather to examine the interference in the light of the case as a whole and to determine whether the reasons adduced by the national authorities to justify it were "relevant and sufficient" and whether the measure taken was "proportionate" to the legitimate aim pursued. In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10 of the Convention (see, among many authorities, *Morice*, cited above, § 124).

(ii) Application of the above principles in the present case

27. In the case at hand, the applicant was prosecuted in criminal proceedings for statements which, as the domestic courts subsequently found, had grossly breached public order and aroused indignation among those present (see paragraph 12 above). The Court notes that the applicant

used mostly derogatory language in his utterances directed at a high-ranking public official. It reiterates that a clear distinction must be made between criticism and insult. If the sole intent of any form of expression is to insult, an appropriate punishment would not, in principle constitute a violation of Article 10 of the Convention (see, among other authorities, *Skałka v. Poland*, no. 43425/98, §§ 34 and 41, 27 May 2003, and *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06 and 3 others, § 67, ECHR 2011). However, not every remark which may be perceived as offensive or insulting by particular individuals or groups justifies a criminal conviction. While such sentiments are understandable, they alone cannot set the limits of freedom of expression. It is only by a careful examination of the context in which the offending, insulting or aggressive words appear that one can draw a meaningful distinction between shocking and offensive language which is protected by Article 10 of the Convention and language which amounts to wanton denigration – for example, where the sole intent of the offensive statement is to insult – thereby falling outside the protection of freedom of expression (compare *Rujak v. Croatia* (dec.), no. 57942/10, §§ 4-6 and 27-32, 2 October 2012).

28. It is noteworthy that the applicant uttered the impugned remarks during a protest which concerned a highly sensitive matter for Armenian society (see paragraph 5 above). It transpires from the transcripts of the video material examined by the trial court (see paragraph 9 above) that the attitude of the Chief of Police aroused indignation among some of the protesters who responded critically to his behaviour. The applicant, for his part, submitted before the domestic courts that his utterances had been made in response to the provocative attitude of the said official, who could have simply walked round the gathering without disrupting it.

29. Seen from this perspective, the Court considers that the applicant's remarks can be understood as his immediate emotional reaction to what he saw as an instance of abusive conduct by an important public official who had knowingly entered into confrontation with the protesters and had exposed himself to their criticism. Therefore, considering the context and the wider circumstances, the Court is of the view that the disputed expressions, although provocative, offensive and aiming to agitate, were intended as harsh criticism of the attitude of a high-ranking public official, namely the Chief of Police, towards the protest and the participants, and thus did not amount to wanton denigration (see, *mutatis mutandis*, *Eon v. France*, no. 26118/10, §§ 6-7 and 57, 14 March 2013 (concerning the expression "Get lost, you sad prick!" displayed on a placard brandished by that applicant during a presidential procession on a public roadway, lampooning the French President); *Oberschlick v. Austria (no. 2)*, 1 July 1997, § 33, *Reports of Judgments and Decisions* 1997-IV (concerning the word "idiot" used by a journalist in respect of a politician); and *Ömür Çağdaş Ersoy v. Turkey*, no. 19165/19, §§ 56-57, 15 June 2021 (concerning the expression "rabid

dog" used by that applicant during a speech delivered at the site of a protest and targeting the then Prime Minister of Turkey)).

30. The Court further notes that the present case does not as such concern the discharge of the State's positive duty, under Article 8 of the Convention, to protect the right to reputation of the Chief of Police, and thus does not necessitate the striking of a fair balance between two Convention rights deserving equal protection. Rather, the task of the domestic courts was to determine, in the light of the circumstances of the case, whether the applicant's remarks could be considered to have breached public order and thus justified a criminal sanction. The Court, however, observes that the judgments of the domestic courts contain no specific reasoning leading to the conclusion that the applicant's statements had grossly and intentionally breached public order. The domestic courts failed to provide any explanation of how, in the specific circumstances of the case, the interests of society in the protection of public order "overrode" the applicant's interest in expressing his criticism of the public behaviour of a State official who had knowingly put himself in the limelight (see paragraph 9 above). In fact, the domestic courts appear to have ruled out altogether the possibility that the disputed remarks could be considered to have been an expression of the applicant's opinion, without even addressing his arguments in that respect. In this connection, the Court would reiterate the importance of the obligation to provide reasons for decisions concerning a restriction of the right to freedom of expression, an obligation which offers an important procedural safeguard against arbitrary interferences with this right (see, *mutatis mutandis*, *Nur Radyo ve Televizyon Yayıncılığı A.Ş. v. Turkey (no. 2)*, no. 42284/05, §§ 49-50, 12 October 2010, and *Cumhuriyet Vakfı and Others v. Turkey*, no. 28255/07, §§ 67-68, 8 October 2013). In the Court's view, such a limited assessment of the underlying facts deprived the national authorities of the possibility to establish whether there was a pressing social need to prosecute the applicant (contrast *Janowski*, cited above, §§ 14 and 31-34, and *Gaunt v. the United Kingdom* (dec.), no. 26448/12, §§ 58 and 61-62, 6 September 2016).

31. This was all the more important as the proceedings at issue were of a criminal nature and led to the applicant's conviction. The Court reiterates, in this connection, that a criminal conviction is a serious sanction, having regard to the existence of other means of intervention and rebuttal. Even when the sanction is the lightest possible, such as a guilty verdict with a discharge in respect of the criminal sentence and an award of only a "token euro" in damages, it nevertheless constitutes a criminal sanction and, in any event, a mild sanction cannot suffice, in itself, to justify the interference with the applicant's freedom of expression. The Court has emphasised on many occasions that interference with freedom of expression may have a chilling effect on the exercise of that freedom – a risk that the relatively moderate nature of a fine would not suffice to negate (see *Ömür Çağdaş Ersoy*, cited

above, §§ 59-60, *Athanasios Makris v. Greece*, no. 55135/10, § 38, 9 March 2017, and *Dickinson v. Turkey*, no. 25200/11, § 57, 2 February 2021).

32. The foregoing considerations are sufficient to enable the Court to conclude that the domestic authorities failed to carry out any balancing exercise to show that the applicant's criminal conviction met a "pressing social need" and was proportionate to the legitimate aim pursued. The interference was thus not "necessary in a democratic society".

33. There has accordingly been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

34. 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."

35. The applicant did not make any claims in respect of damage under Article 41 or in respect of legal costs. He stated that the finding of a violation of Article 10 would constitute sufficient compensation.

36. The Court agrees with the applicant and considers that there is no call to award him any sum by way of just satisfaction.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

Done in English, and notified in writing on 11 July 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti Registrar	Gabriele Kucsko-Stadlmayer President