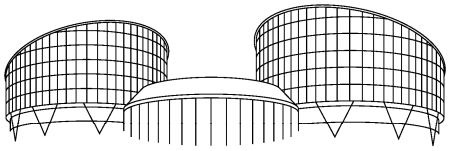

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF GHULYAN v. ARMENIA

(Application no. 35443/13)

JUDGMENT

STRASBOURG

24 January 2019

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

In the case of Ghulyan v. Armenia,

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

Ksenija Turković, *President,*
Armen Harutyunyan,
Pauliine Koskelo, *judges,*
and Renata Degener, *Deputy Section Registrar,*

Having deliberated in private on 18 December 2018,

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

PROCEDURE

1. The case originated in an application (no. 35443/13) 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, Ms Voskehat Ghulyan ("the applicant"), on 28 May 2013.

2. The applicant was represented by Mr K. Mezhlumyan, a lawyer practising in Yerevan. The Armenian Government ("the Government") were represented by their Agent, Mr G. Kostanyan, Representative of the Government of Armenia to the European Court of Human Rights.

3. On 16 November 2016 the complaint concerning the alleged lack of impartiality of the District Court judge was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1973 and lives in Glendale, California, the United States of America.

5. The applicant worked in the British Council's Armenia office (hereinafter "the British Council") as a project manager on a full-time, permanent contract starting from 25 November 2002.

6. In the course of her employment the applicant had two children, born on 27 March 2008 and 7 May 2010. The applicant spent her maternity leave in the United States and regularly sent requests to extend that leave every six months for the duration of her absence. In particular, she sent such requests in March and September 2009 as regards her first child and then in April and September 2010 as regards her second child. It appears that the applicant's maternity leave was extended, based on those requests. In March 2011 her leave was further extended until 1 September 2011.

7. According to the applicant, on 19 August 2011 she requested another extension of her maternity leave. She handed an envelope with her written request to that effect to her friend H.K., who was to return to Armenia on 17 August 2011 after a visit to the United States. Upon arrival, H.K. gave the envelope to R.O., a driver, who then handed it to A.K., a security guard at the British Council.

8. On 30 September 2011 the applicant received notice of termination of her employment contract prior to its term. The notice referred to the change in volume and conditions of work at the British Council, as well as the need to reduce the number of staff. In addition, the notice stated the following:

> "... [your] employment contract shall be terminated based on [the relevant provisions] of the Labour Code of the Republic of Armenia.
>
> We also inform you that your employment contract shall be terminated ... considering the fact that you did not return to work after the completion of your unpaid maternity leave, which was to end on 1 September 2011, as indicated in your letter sent to us by fax on 17 March 2011.
>
> The employment contract shall be considered terminated as of 1 December 2011."

9. It appears that the applicant sent emails to the management of the British Council in relation to the early termination of her employment.

10. On 30 November 2011 Ar.M., a lawyer and a representative of Prudence, a law firm which provided legal services to the British Council, replied to the applicant on behalf of that body. In particular, the email stated that the termination of the applicant's employment had been in full compliance with domestic law and the terms and conditions of the British Council.

11. By an order of 1 December 2011, issued by the director of the British Council, the applicant's employment contract was terminated.

12. On 30 December 2011 the applicant brought a claim against the British Council before the Kentron and Nork-Marash District Court of Yerevan, contesting the order of 1 December 2011 and seeking reinstatement.

13. By a decision of 11 January 2012, Judge A.M. of the District Court took over the examination of the applicant's case and scheduled the preparatory hearing.

14. According to a power of attorney executed by a notary public in London on 12 January 2012, the British Council authorised, *inter alia*, Ar.M. and K.B., another lawyer with Prudence, to represent jointly or separately its interests before courts of all instances in Armenia.

15. On 16 January 2012 the British Council was notified by the District Court of its taking over of the examination of the case and the judge appointed.

16. On 31 January 2012 K.B. applied to the District Court to represent the British Council before the said court, also asking the court to postpone the hearings. On 1 February 2012 Ar.M. informed the District Court that he would not be representing the interests of the British Council in the instant case. It appears that during the whole trial before the District Court, K.B. alone represented the British Council.

17. On 14 February 2012, in its reply to the applicant's claim signed by K.B., the British Council denied that the applicant had submitted a request to extend her maternity leave for another six months as of 1 September 2011.

18. On 9 July 2012 Judge A.M. rejected the applicant's claim, finding that her dismissal had been lawful.

19. After the proceedings before the District Court, it was discovered that Judge A.M. and the lawyer Ar.M. were twin brothers. Furthermore, the law firm Prudence, of which Ar.M. and K.P. were senior associates, had been founded by D.M., A.M.'s and Ar.M.'s elder sister, and was managed by her husband, E.M.

20. On 6 August 2012 the applicant lodged an appeal arguing, *inter alia*, that Judge A.M. had lacked impartiality when deciding her case owing to his close family ties to the legal representatives of her opponent in the proceedings. The Government claimed that no such issue had been raised, nor had any evidence to support such a claim been provided.

21. On 28 September 2012 the Civil Court of Appeal upheld the District Court's judgment. In doing so, the Court of Appeal did not

address the applicant's arguments regarding the alleged lack of impartiality of Judge A.M. in the proceedings before the District Court.

22. The applicant lodged an appeal on points of law, raising similar arguments to those submitted in her previous appeal.

23. On 28 November 2012 the Court of Cassation declared the applicant's appeal on points of law inadmissible for lack of merit.

II. RELEVANT DOMESTIC LAW

A. Code of Civil Procedure

24. Article 21 §§ 1 and 2 provide that the grounds for a judge's disqualification are laid down in Article 91 of the Judicial Code. A judge must recuse him or herself of his or her own motion or upon the application of a party to the proceedings.

25. Pursuant to Article 22 § 1, a judge should recuse him or herself if the grounds provided in Article 21 pertain.

26. In accordance with Article 219, the Court of Appeal reviews a judicial decision within the frame of the grounds and substantiations of the appeal. The Court of Appeal must not accept new evidence and must base its decision solely on the evidence which was presented to the first-instance court.

B. Judicial Code

27. Article 91, in so far as relevant, provides:

> "1. A judge should recuse him or herself if he or she is aware of any fact or circumstances which may cast reasonable doubt on his or her impartiality in the given case. Grounds for recusal include, *inter alia*, cases where:
>
> ...
>
> 4) a judge is aware that he or she, or his or her spouse or their relatives up to the third degree, have pecuniary interest in relation to the dispute or one of the parties thereof."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

28. The applicant complained that that she had not received a hearing by an impartial tribunal within the meaning of Article 6 § 1 of the Convention, given that Judge A.M. of the District Court had had close family ties to the representatives of her opponent in the proceedings.

29. Article 6 § 1 of the Convention reads as follows:

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

A. Admissibility

30. The Government argued that the applicant had failed to exhaust all the domestic remedies available to her. She had never requested the withdrawal of Judge A.M. from the trial during the District Court proceedings, although the domestic legislation had provided for such a possibility. It was true that the applicant had claimed that she had not had any knowledge of the alleged grounds of partiality during the District Court proceedings but that she had learned about it only after those proceedings had been concluded. However, she had not mentioned when, how and in what circumstances she had discovered this information and why she could not have known about it beforehand. Although the applicant had noticed that Judge A.M. and Ar.M., the British Council's counsel, had had the same last name, this had not necessarily indicated anything regarding family ties as their last name had been particularly common in Armenia.

31. The Government further argued that the applicant had never explicitly challenged the impartiality of Judge A.M. before the Civil Court of Appeal either. In her appeal to the Civil Court of Appeal, the applicant had raised numerous allegations of substantive and procedural violations of several legal provisions but had not specifically addressed the impartiality of Judge A.M. Pursuant to Article 219 of the Code of Civil Procedure, the Court of Appeal did not have the authority to go beyond the appeal and was obliged to review the judicial decision within the framework of the grounds and substantiations of the appeal, which had been exactly how the Court of Appeal had acted in the instant case.

The applicant could thus not have reasonably expected the Court of Appeal to have made any assessment of the said allegation since such an allegation had simply not been appropriately raised before it.

32. Moreover, the Government argued that the applicant had lost her victim status since the Civil Court of Appeal had examined the case and had found no violation. Therefore, the Government claimed that the application should be declared inadmissible.

33. The applicant noted that she had learned about the family connection between Judge A.M. and Ar.M., the representative of the British Council, only when she had received the District Court's judgment. Since the applicant had been living in the United States, she had not received all the court documents received by her representative in Armenia. Only when receiving the judgment had she noticed that the judge's last name had been the same as that of the British Council's representative with whom she had been communicating. Therefore she could not have raised the issue before the District Court.

34. The applicant argued that she had raised the issue of partiality in the Civil Court of Appeal in the context of the admission of evidence, claiming that Judge A.M. had not passed either the subjective or the objective test and that such a judgment would deprive her of her fair-trial rights. She argued that she had exhausted all domestic remedies and that she was still a victim.

35. The Court notes that, while in the context of the legal machinery for the protection of human rights the rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism, it does not require merely that applications should be made to the appropriate domestic courts and that use should be made of remedies designed to challenge impugned decisions which allegedly violate a Convention right. It normally requires also that the complaints intended to be made subsequently at the international level should have been raised before those same courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see, among many other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, § 37, ECHR 1999-I, and *Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III).

36. The Court accepts that, in the present case, the applicant did not learn about the possible partiality of the deciding judge A.M. during the District Court proceedings but only when she received the District Court

judgment. She could not therefore have raised the issue of possible lack of impartiality during the District Court proceedings. As concerns the proceedings before the Civil Court of Appeal, the Court considers that the applicant raised the issue of alleged lack of impartiality in a sufficient manner in order to satisfy the requirements of Article 35 of the Convention. It follows that the Government's objections must be rejected.

37. As regards the question of whether the Civil Court of Appeal proceedings were capable of lifting the applicant's victim status, the Court considers that it should be joined to the merits of the case and be examined at a later stage.

38. Therefore, the Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

39. The applicant argued that the Government had not denied the family ties between Judge A.M. and the lawyer Ar.M. Nor had the Government denied that K.B., who had represented the British Council at the trial, had been employed by the law firm Prudence, or that E.M. – the managing partner of Prudence – had been the husband of D.M. and brother-in-law of Judge A.M. and Ar.M. It was obvious that Prudence, which had been chosen by the British Council for pre-trial representation, had continued to provide services throughout the court proceedings. Pursuant to domestic law, only physical persons could be representatives in court. That was why the power of attorney issued by the British Council had not mentioned Prudence but instead had mentioned other counsel. Although Ar.M. had told the District Court that he had no longer been the representative of the British Council in the present case, he had still been authorised by that organisation to represent it since the power of attorney of 12 January 2012 had never been withdrawn. As Judge A.M. had had connections to Prudence, which had provided services to the British Council, he could not be considered as having been impartial.

(b) The Government

40. The Government argued that the applicant had had a fair hearing in the determination of her civil rights and obligations, in accordance with Article 6 § 1 of the Convention. Even if Ar.M. had provided legal services to the British Council, it had been prior to the proceedings at the District Court and those legal services had not had any connection with the trial. The British Council had not signed a contract with the law firm Prudence. Instead it had authorised only four lawyers, including Ar.M. and K.B., to jointly or separately represent its interests in relations with the applicant and before the domestic courts. Moreover, the power of attorney authorising Ar.M. to represent the British Council had been issued on 12 January 2012, specifically before the British Council had been notified by the District Court of the appointment of Judge A.M. After the receipt of this information, the British Council had been represented in the proceedings before the District Court solely by K.B. The Government averred that it had also been crucial that Ar.M. had informed the District Court that he would not be representing the British Council in the instant case. These facts showed that there had been no lack of impartiality on the part of Judge A.M. due to family ties to the representatives of the respondent.

41. The Government claimed that, under the subjective test, there was no proof that Judge A.M. had displayed any type of hostility or ill will at all, let alone for personal reasons. As for the objective test, the applicant had failed to demonstrate that the fear that the judge had lacked impartiality had been objectively justified. On the contrary, the applicant had, without raising her concerns before the domestic courts, made inappropriate and unsubstantiated assumptions as to the impartiality of Judge A.M. The British Council had been represented only by K.B. for the duration of the trial. Ar.M., whom the applicant alleged had had family ties to Judge A.M., had refrained from representing the respondent in the proceedings before the District Court, thus eliminating any possible doubts regarding the impartiality of the presiding judge.

2. The Court's assessment

(a) General principles

42. The Court reiterates that impartiality normally denotes the absence of prejudice or bias, and that its existence or otherwise can be tested in various ways. According to the Court's settled case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to (i) a subjective test, where regard must be had to the personal conviction and behaviour of a particular judge – that is to say whether the judge held any personal prejudice or bias in a given case, and (ii) according to an objective test – that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see *Morice v. France* [GC], no. 29369/10, § 73, ECHR 2015, with further references).

43. As to the subjective test, the principle that a tribunal must be presumed to be free of personal prejudice or partiality is long-established in the Court's case-law. The personal impartiality of a judge must be presumed until there is proof to the contrary. As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill will for personal reasons (ibid., § 74).

44. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his or her impartiality. This implies that, in deciding whether in a given case there was a legitimate reason to fear that a particular judge or bench lacked impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (ibid., § 76).

45. The objective test mostly concerns hierarchical or other links between the judge and other protagonists in the proceedings or the exercise of different functions within the judicial process by the same person (see *Kyprianou v. Cyprus* [GC], no. 73797/01, § 121, ECHR 2005-XIII). It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (see *Morice*, cited above, § 77).

46. In this connection, even appearances may be of a certain importance or, in other words, "justice must not only be done, it must

also be seen to be done". What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see *Micallef v. Malta* [GC], no. 17056/06, § 98, ECHR 2009).

47. Moreover, in order that the courts may inspire in the public the confidence which is indispensable, account must also be taken of questions of internal organisation. The existence of national procedures for ensuring impartiality, namely rules regulating the withdrawal of judges, is a relevant factor. Such rules manifest the national legislature's concern to remove all reasonable doubts as to the impartiality of the judge or court concerned and constitute an attempt to ensure impartiality by eliminating the causes of such concerns. In addition to ensuring the absence of actual bias, they are directed at removing any appearance of partiality and so serve to promote the confidence which the courts in a democratic society must inspire in the public. The Court will take such rules into account when making its own assessment as to whether a tribunal was impartial and, in particular, whether an applicant's fears can be held to be objectively justified (ibid., § 99).

(b) Application of these principles to the present case

48. At the outset, the Court notes that the applicant did not question Judge A.M.'s subjective impartiality. The case will therefore be examined only from the standpoint of the objective impartiality test.

49. In the present case, the first-instance proceedings were adjudicated by Judge A.M., who was the twin brother of Ar.M., one of the opposing party's legal team, and the brother of the founder of the law firm Prudence, for which the lawyers worked. The Court finds it established that Ar.M. did not directly participate in the court proceedings, but the British Council was represented by K.B., another Prudence lawyer. Although Ar.M. was absent from the trial, he had nevertheless been in contact with the applicant prior to the court proceedings.

50. To the extent that the applicant's fear of impartiality on the part of Judge A.M. stemmed from the family tie between that judge and Ar.M., the Court notes that they have a very close family relationship as they are twin brothers. Although Ar.M. withdrew from the case once the judge's identity became known and K.B. represented the British Council

throughout the proceedings, the fact still remains that Ar.M. worked for the law firm Prudence, which represented the British Council. Moreover, the law firm was founded by the sister of Judge A.M. and managed by his brother-in-law.

51. The Court finds that when a judge has blood ties to an employee of a law firm representing a party in any given proceedings, this does not in and of itself disqualify the judge (see *Ramljak v. Croatia*, no. 5856/13, § 29, 27 June 2017). An automatic disqualification on the basis of such ties is not necessarily required. It is, however, a situation or affiliation that could give rise to misgivings as to the judge's impartiality. Whether such misgivings are objectively justified would very much depend on the circumstances of the specific case, and a number of factors should be taken into account in this regard. These should include, *inter alia*, whether the judge's relative has been involved in the case in question, the position of the judge's relative in the firm, the size of the firm, its internal organisational structure, the financial importance of the case for the law firm, and any possible financial interest or potential benefit (and the extent thereof) on the part of the relative (see *Nicholas v. Cyprus*, no. 63246/10, § 62, 9 January 2018). Given the importance of appearances, however, when such a situation (which can give rise to a suggestion or appearance of bias) arises, that situation should be disclosed at the outset of the proceedings and an assessment should be made, taking into account the various factors involved in order to determine whether disqualification is actually necessitated in the case. This is an important procedural safeguard which is necessary in order to provide adequate guarantees in respect of both objective and subjective impartiality (ibid., § 64).

52. In the present case, no such disclosure took place and the applicant discovered the connection between the opposition counsel and the judge only after the first-instance judgment had been given. She was thus faced with a situation in which the law firm which had represented the British Council had been founded and managed by the sister and brother-in-law of Judge A.M., and had his twin brother, Ar.M., working there as a senior associate. It is not known whether the sister and brother-in-law were actively involved in the case (compare *Huseyn and Others v. Azerbaijan*, nos. 35485/05 and 3 others, § 168, 26 July 2011, and *Bellizzi v. Malta* (dec.), no. 8162/13, § 61, 21 June 2011) and whether they had a financial interest connected to its outcome, but it was clear

that Ar.M. was actively involved in preparing the case. An appearance of partiality was thus created.

53. It needs to be examined next whether the Civil Court of Appeal was capable of remedying any lack of impartiality of the first-instance court. It is well established in the Court's case-law that a defect at first instance may be remedied on appeal, so long as the appeal body has full jurisdiction. Where a complaint is made of a lack of impartiality on the part of the decision-making body, the concept of "full jurisdiction" means that the reviewing court not only considers the complaint but has the ability to quash the impugned decision and either to take the decision itself, or to remit the case for a new decision by an impartial body (see *De Haan v. the Netherlands*, 26 August 1997, §§ 53-54, *Reports of Judgments and Decisions* 1997-IV, and *Ranson v. the United Kingdom* (dec.), no. 14180/03, 2 September 2003).

54. The Court notes that, in the present case, the Civil Court of Appeal did not address at all the applicant's arguments regarding the alleged lack of impartiality of Judge A.M. during the proceedings before the District Court (see paragraph 21 above). Since no consideration of the complaint was made, the appearance of partiality at first instance was not remedied on appeal.

55. The foregoing considerations are sufficient to enable the Court to conclude that the participation of Judge A.M. in the case rendered the first-instance court proceedings partial and this defect was not remedied on appeal. It accordingly rejects the Government's preliminary objection as to the applicant's victim status (see paragraph 32 above).

56. There has therefore been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

57. 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

58. The applicant claimed 62,700 euros (EUR) in respect of pecuniary damage and EUR 19,000 in respect of non-pecuniary damage.

59. The Government considered that the claim for pecuniary damage was based on a mere speculation on the connection between the wages lost and the alleged violation of Article 6 § 1. As to the non-pecuniary damage, the Government considered that the amount claimed was excessive and argued that a mere finding of a violation was sufficient just satisfaction for any non-pecuniary damage suffered by the applicant.

60. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 3,600 in respect of non-pecuniary damage.

B. Costs and expenses

61. The applicant also claimed EUR 1,400 for the costs and expenses incurred before the domestic courts and EUR 4,880 for those incurred before the Court, consisting of a lawyer's fee of EUR 4,630, translation costs of EUR 150 and postal costs to the Court of EUR 100.

62. The Government considered that the claim concerning costs and expenses before the domestic courts should be rejected as there was no proof that those costs and expenses had actually incurred or that the applicant was bound to pay them. As to the costs and expenses before the Court, the Government noted that the lawyer's fee and the translation costs had not been documented adequately and that they should therefore be rejected.

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

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, EUR 3,600 (three thousand six hundred euros), to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 24 January 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener	Ksenija Turković
Deputy Registrar	President