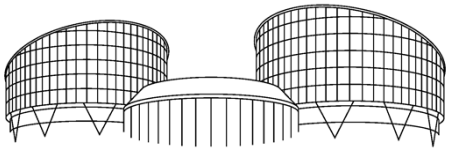

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF CHAP LTD v. ARMENIA

(Application no. 15485/09)

JUDGMENT

STRASBOURG

4 May 2017

FINAL

04/08/2017

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Chap Ltd v. Armenia,

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

Linos-Alexandre Sicilianos, *President,*
Kristina Pardalos,
Aleš Pejchal,
Robert Spano,
Armen Harutyunyan,
Tim Eicke,
Jovan Ilievski, *judges,*
and Abel Campos, *Section Registrar,*

Having deliberated in private on 4 April 2017,

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

PROCEDURE

1. The case originated in an application (no. 15485/09) 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 Chap Ltd, a private limited company incorporated under Armenian law ("the applicant company"), on 13 March 2009.

2. The applicant company was represented by Mr T. Tumanyan and Mr. E. Marukyan, lawyers practising in Vanadzor. The Armenian Government ("the Government") were represented by their Agent, Mr G. Kostanyan, Representative of the Republic of Armenia to the European Court of Human Rights.

3. The applicant company complained, in particular, that it had not been able to examine witnesses who had made statements or provided documents which had been used in tax proceedings against it.

4. On 11 September 2013 the complaint concerning the applicant company's inability to obtain the attendance and examination of witnesses against it was communicated to the Government and the remainder of the application, including the applicant company's complaint concerning the alleged inability to question the forensic accounting expert, was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant company, Chap Ltd, is a private Armenian company that was set up in 1999 and has its registered office in Gyumri.

6. In 2005 the applicant company established a regional television channel, Gala TV, with the intention of broadcasting in the local region.

7. On 23 February 2005 the applicant company was granted a licence by the National Television and Radio Commission ("the NTRC") permitting it to broadcast in Gyumri, the second largest town in Armenia, and the surrounding area. The licence was granted for a period of seven years. Gala TV was one of four television stations operating in Gyumri and, according to the applicant company, it was widely recognised as one of the few independent voices in television broadcasting in Armenia.

8. From 29 October to 12 November 2007 the State Revenue Service ("the SRS") conducted an inspection of the applicant company's accounts. As a result, on 12 November 2007 it issued a report stating that the applicant company had a high tax liability for the years 2005 to 2007 and ordered it to pay 25,665,100 Armenian drams (AMD) (approximately 51,000 euros (EUR)), including surcharges and fines. The report stated that the indicated amounts were payable to the State budget within a period of ten days.

9. The SRS established in its report that the applicant company had underreported its tax liability by hiding income earned from advertising. The report also stated that the applicant company had failed to include the prices for its services in its invoices or keep records, as required by the Television and Radio Broadcasting Act. Furthermore, it was alleged that the applicant company had manufactured and sold fireworks without a government licence.

10. The SRS's report was based, *inter alia*, on:

a) documents requested from and subsequently submitted by Gr.A., the head of the NTRC;

b) statements by the heads of companies and individual businessmen that they had placed advertisements on Gala TV but had not received any documents acknowledging payment to the applicant company for such services.

11. The applicant company objected to the allegations of tax evasion as fabricated and politically motivated as home-made advertisements that had a social function, which Gala TV had broadcast for free, had been taken into account by the authorities in calculating the tax arrears.

12. On an unspecified date the SRS instituted criminal proceedings against the applicant company's chief executive, K.H., for tax evasion. The

investigating authorities discontinued the proceedings after the required amount had been paid.

13. Having received no payment from the applicant company as regards the amounts stated in its report of 12 November 2007, on 26 November 2007 the SRS brought a claim with the Commercial Court to oblige the applicant company to pay AMD 25,212,800 (approximately EUR 50,000) in tax debt and to freeze its bank accounts and other assets in the amount of the alleged tax shortfall.

14. On 27 November 2007 the Commercial Court admitted the case to its proceedings and at the same time dismissed the application to freeze the applicant company's bank accounts.

15. On 3 December 2007 the Commercial Court approved a freezing order on the applicant company's assets as security for the claim.

16. On 17 December 2007 the applicant company brought a counterclaim against the SRS, challenging the results of the tax inspection. It argued, *inter alia*, that the relevant statements obtained from the heads of companies and individual businessmen, as well as the information obtained from Gr.A., could not be used as evidence to support the findings of the SRS in its report.

17. On 24 December 2007 the applicant company's case was transferred to the Administrative Court, which had been set up as part of a reform of the court system that year.

18. On 29 January 2008 the Administrative Court admitted the case.

19. On 12 March 2008 the applicant company's lawyer lodged an application to obtain and examine the tax records of the companies that had advertised on Gala TV and had been inspected by the SRS. He claimed that those tax records contained tax reports and other documents which could rebut the evidence submitted by the SRS. This application was rejected.

20. On the same day the applicant company's lawyer also asked the Administrative Court to summon, *inter alia*, the heads of the relevant companies and the businessmen, namely A.J., S.A., S.M., H.P., G.S., G.A. and H.M. to whose statements the SRS had referred in its report.

21. By another application submitted on the same date the lawyer asked the Administrative Court to summon Gr.A. to testify about the information and documents he had provided to the SRS and confirm the veracity of those documents.

22. The applicant company's applications were rejected by the Administrative Court, which considered the witness evidence in question as irrelevant.

23. On 19 March 2008 the Administrative Court granted the SRS's claim against the applicant company in part. It annulled the SRS's report in respect of a charge of AMD 96,000 (approximately EUR 190) imposed on the applicant company for the alleged illegal production and sale of fireworks. The Administrative Court decided to levy a total charge of

AMD 25,116,700 (approximately EUR 50,000) on the company, including AMD 14,291,300 (approximately EUR 28,400) for Value Added Tax (VAT), comprising arrears, a 60% fine and surcharges for late payment; AMD 8,338,300 (approximately EUR 16,600) for profit tax, comprising arrears, a 60% fine and surcharges for late payment; and AMD 2,487,100 (approximately EUR 5,000) for the tax authority's development fund. The Administrative Court referred to the relevant provisions of the Law on Value Added Tax and the Law on Taxes when imposing the surcharges and fines. In establishing the applicant company's VAT and profit tax liability, it relied, *inter alia*, on the documents provided by Gr. A. and the statements of A.J., S.A., S.M., H.P., G.S., G.A. and H.M. which had been referred to in the SRS's report. The amount of court fees to be paid by the applicant company was calculated at AMD 502,334 (approximately EUR 1,000).

24. On 18 June 2008 the applicant company lodged an appeal on points of law with the Administrative Court.

25. On 4 August 2008 the Court of Cassation returned the applicant company's appeal on the grounds that it had failed to pay the correct amount of State fee and set a deadline for resubmission.

26. After paying the required State fee, the applicant company resubmitted its appeal on 3 September 2008.

27. On 18 September 2008 the Court of Cassation declared the applicant company's appeal on points of law inadmissible for lack of merit.

II. RELEVANT DOMESTIC LAW

28. Under Article 29 of the Code of Administrative Procedure, a party which has lodged an application to summon a witness must indicate in respect of which fact or facts the witness is to be examined.

29. Article 180 states that final judgments and decisions may be reviewed on the grounds of newly discovered or new circumstances.

30. Article 182, which refers to reopening judicial proceedings on the basis of new circumstances, reads, in so far as relevant, as follows:

> "1. New circumstances shall be grounds for the review of a judicial act if:
>
> ...
>
> 2) it has been established by a judicial act of an international court of which the Republic of Armenia is a member that a violation of a person's right guaranteed by an international agreement to which the Republic of Armenia is a party has taken place in the given case."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (d) OF THE CONVENTION

31. The applicant company complained that it had not had the opportunity to examine the witnesses Gr.A., A.J., S.A., S.M., H.P., G.S., G.A. and H.M., in breach of its right to a fair trial as provided in Article 6 § 1 and 3 (d) of the Convention, which reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

32. The Government contested that argument.

A. Admissibility

33. The Government argued that the complaint was incompatible *ratione materiae* with the provisions of the Convention because Article 6 did not apply to the proceedings in question.

34. The applicant company argued that Article 6 applied to those proceedings because the fines and surcharges imposed by the SRS had had a punitive element, meaning the proceedings had concerned the determination of a criminal charge.

35. The Court observes that the applicant company had quite substantial penalties imposed on it, that is fines and surcharges amounting to more than 60% of the amounts of tax due (see paragraph 23 above).

36. In the case of *Paykar Yev Haghtanak* (see *Paykar Yev Haghtanak Ltd v. Armenia*, no. 21638/03, 20 December 2007), the Court, referring to the relevant principles established in its case-law on the matter (see *Jussila v. Finland* [GC], no. 73053/01, §§ 29-38, ECHR 2006-XIV for the analysis of the "*Engel* criteria" for the assessment of the applicability of the criminal aspect; also *Cecchetti v. San Marino* (dec.), no. 40174/08, 9 April 2013), found that Article 6 applied under its criminal head to proceedings concerning the imposition of fines and surcharges for unpaid or underpaid profit tax and VAT (ibid., §§ 32-37). The Court sees no reason to come to a different conclusion in the present case and therefore holds that Article 6 applies under its criminal head.

37. The Government's objection that the applicant company's complaint is incompatible *ratione materiae* with the provisions of the Convention should therefore be dismissed.

38. The Court notes that this complaint 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

39. The Government argued that even if Article 6 applied to the proceedings in question there had not been a breach of that provision. They submitted that the Administrative Court had dismissed the applicant company's request to examine the witnesses in question since it had failed to substantiate its argument about the relevance of their evidence for the examination of the case.

40. The applicant company submitted that its requests to examine the witnesses in question had been unreasonably rejected while their evidence had been used against it in the proceedings.

2. The Court's assessment

(a) General principles

41. The Court reiterates that notwithstanding the consideration that a certain gravity attaches to criminal proceedings, which are concerned with the allocation of criminal responsibility and the imposition of a punitive and deterrent sanction, there are criminal cases which do not carry any significant degree of stigma. There are clearly "criminal charges" of differing weight. What is more, the autonomous interpretation adopted by the Convention institutions of the notion of a "criminal charge" by applying the *Engel* criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law (see *Jussila*, cited above, § 43). Thus, having established that tax-surcharge proceedings could fall within the protection of Article 6, the Court acknowledged that tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees would not necessarily apply with their full stringency (ibid.).

42. The guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of that provision (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011). The Court will therefore consider the

applicant's complaint under both provisions taken together (see *Windisch v. Austria*, 27 September 1990, § 23, Series A no. 186).

43. The Court reiterates that all the evidence in a case must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to that principle, but they must not infringe the rights of the defence. As a general rule, Article 6 §§ 1 and 3 (d) require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (see *Al-Khawaja and Tahery*, cited above, §§ 119-147; *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 707, 25 July 2013 and *Schatschaschwili v. Germany* [GC], no. 9154/10, §§ 111 – 131, ECHR 2015).

(b) Application of those principles to the present case

44. In view of the above finding that Article 6 was applicable under its criminal head to the proceedings concerning the imposition of fines and surcharges on the applicant company (see paragraph 36 above), the Court will proceed to examine whether the tax-surcharge proceedings complied with the requirements of Article 6, having due regard to the facts of the present case, including the specific features of the taxation context.

45. As noted above, the way in which the guarantees of Article 6 apply in the context of tax-surcharge proceedings may be different from that applied in the hard core criminal law (see paragraph 41 above). In the above-cited *Jussila* case, §§ 47 and 48, the Court found compatible with Article 6 § 1 to have dispensed with an oral hearing where it was not persuaded that there were any issues of credibility in the proceedings which required oral presentation of evidence or cross-examination of witnesses. In the present case, however, the applicant company did dispute the factual findings of the tax authorities which were based on the witness statements that were not supported by relevant documentation (see paragraphs 10 and 16 above).

46. Although it was not specifically disputed between the parties, the Court considers it necessary to address the question of whether Gr. A. was a "witness" within the meaning of Article 6 § 3 (d) of the Convention in view of the fact that, in contrast to A.J., S.A., S.M., H.P., G.S., G.A. and H.M., he had not made any statements against the applicant company.

47. The Court reiterates in this respect that the term "witness" has an "autonomous" meaning in the Convention system (see *Vidal v. Belgium*, 22 April 1992, § 33, Series A no. 235-B). The guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention apply to a deposition which may serve to a material degree as the basis for a conviction (see *Lucà v. Italy*, no. 33354/96, § 41, ECHR 2001-II).

48. In the present case, Gr.A. provided certain documents concerning the applicant company's broadcasting activity in his capacity as head of the

NTRC following a request by the SRS (see paragraph 10 above). It is true that Gr.A. never made any oral or written statements in relation to the applicant company and that he provided the relevant documents in his official capacity as he had been requested by the tax authorities to do so. Nevertheless, the documents provided by him were used against the applicant company in the SRS's report with a view to establishing its tax liability and were later referred to in the Administrative Court's judgment (see paragraphs 10 and 23 above). Furthermore, in its application to summon Gr.A., the applicant company's representative clearly stated that he intended to put questions to him strictly about the information and documents provided by him. He also appeared to challenge the veracity of the information provided by Gr.A. In those circumstances, the fact that Gr.A. did not make any statements against the applicant company is of no relevance. Rather, the information contained in the documents provided by Gr.A. constituted evidence for the tax authorities and the courts to which the guarantees of Article 6 §§ 1 and 3 (d) of the Convention apply.

49. As regards the witnesses Gr.A., A.J., S.A., S.M., H.P., G.S., G.A. and H.M., the Administrative Court refused to grant the applicant company's application to summon them, considering that their evidence was not relevant, and thus the question of whether there were good reasons for their not appearing did not even arise (see paragraphs 21 and 22 above).

50. The Court further notes that the documents provided by Gr.A. and the statements made by A.J., S.A., S.M., H.P., G.S., G.A. and H.M. were admitted in evidence against the applicant company in the proceedings before the Administrative Court. The evidence of those witnesses was without a doubt not the only evidence against the applicant company. However, it was relied on by the Administrative Court in establishing the applicant company's tax liability and in accepting the SRS's calculations in its report following the inspection of the applicant company's accounts (see paragraph 23 above). It can therefore be considered that the evidence of the witnesses in question was decisive for the determination of the applicant company's tax surcharges.

51. Lastly, the Court notes that there were no procedural safeguards to compensate for the handicaps caused to the applicant company as a result of its being unable to examine the witnesses in question. The Administrative Court, which was the only court to examine the case on the merits, refused to grant the applicant company's application to summon those witnesses, finding their evidence was not relevant despite the fact that the very same evidence was later relied on in its judgment (see paragraphs 22 and 23 above). What is more, the Administrative Court rejected the applicant company's request to examine the tax records of companies and individual businessmen who had claimed not to have received properly-documented services from the applicant company (see paragraph 19 above) which could have allowed to assess the credibility of their statements.

52. The foregoing considerations are sufficient to enable the Court to conclude that the applicant company was unreasonably restricted in its right to examine the witnesses Gr.A., A.J., S.A., S.M., H.P., G.S., G.A. and H.M. in the proceedings against it.

53. There has accordingly been a violation of Article 6 § 1 read in conjunction with Article 6 § 3 (d) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

54. 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

55. The applicant company claimed 64,003 euros (EUR) in respect of pecuniary damage, including the judgment debt (EUR 55,634), enforcement fees (EUR 2,646), additional penalties (EUR 3,173), the VAT penalty (EUR 209), the Court of Cassation fee (EUR 1,643), the forensic expert fee (EUR 78) and legal fees incurred during the domestic proceedings (EUR 620). It also claimed EUR 10,000 in respect of non-pecuniary damage.

56. The Government requested that the claims under this head be rejected, arguing, *inter alia*, that there was no causal link between the pecuniary and non-pecuniary damage suffered by the applicant and the alleged violation of Article 6 of the Convention.

57. The Court notes at the outset that it finds it appropriate to consider the part of the applicant company's claims relating to the court and legal fees (EUR 2,263 in total) for the domestic proceedings under the head of costs and expenses. Therefore, the Court will consider the applicant company's claims in respect of pecuniary damage without the amounts claimed for court and legal fees. That said, the Court does not discern any causal link between the violation found and the pecuniary damage alleged and therefore rejects that claim. On the other hand, it awards the applicant company EUR 2,400 in respect of non-pecuniary damage.

B. Costs and expenses

58. The applicant company also claimed EUR 888 for the costs and expenses incurred before the Court. In support of its claim the applicant company submitted a copy of a contract for the provision of legal services concluded on 7 July 2014 with the Arni Consult law firm under which the

firm's legal officer, Ara Ghazaryan, was to draft the applicant company's response to the Government's observations and its just satisfaction claims. The applicant company also submitted an invoice dated 9 July 2014 showing that the amount claimed had been transferred to Arni Consult.

59. The Government pointed out that the applicant company's response to their observations and its just satisfaction claims had been signed by the applicant company's representative K.Tumanyan and had been submitted by him to the Court on 11 July 2014. The Government asked that the claims under this head be rejected because the applicant company had failed to demonstrate that representatives of Arni Consult had in fact provided it with legal assistance in the proceedings before the Court.

60. According to the Court's case-law, an applicant company is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. The Court agrees with the Government that the applicant company has failed to substantiate its submission that Arni Consult did indeed provide it with legal services worth EUR 888 in the proceedings before the Court. It therefore rejects that claim. On the other hand, as already noted, the Court will consider the applicant company's claims for the court and legal fees incurred before the domestic courts under this head (see paragraph 57 above). Regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,500 for costs and expenses in the domestic proceedings.

C. Default interest

61. 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 read in conjunction with Article 6 § 3 (d) of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant company, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following

amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 2,400 (two thousand four hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable to the applicant company, in respect of costs and expenses;

(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;

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

Done in English, and notified in writing on 4 May 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos
Registrar

Linos-Alexandre Sicilianos
President