ARMENIA

DOC FOR DISSEMINATION-3

Ara Shahzadeyan
European Court of Human Rights
Council of Europe
67075 Strasbourg-Cedex
France

22 February 2006

Ref: ECHR –LEO.2R

Dear Sir,

MURAD BOJOLYAN v. Armenia (No: 23693/03)

We refer to the correspondence of 10 January 2006 in the case of **MURAD BOJOLYAN v. Armenia.**

The Applicant submits his written observations in reply to the Observations of the Government of the Republic of Armenia in *Appendix A.* The Applicant's claim for just satisfaction is submitted in *Appendix B.* The Applicant's position about the friendly settlement of the case is expressed in *Appendix C.*

Yours sincerely,

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Legal Guide

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Lyudmila Bojolyan
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Appendix A

Observations of the Applicant in Reply to the Government's Observations

A. Was it the case that the information provided by the applicant to the Turkish intelligence service (MIT) was in the public domain and contained no State secrets.

The Applicant makes the following submissions in reply to the Observations of the Government concerning the above question.

1. The Court is referred to Applicant's Statement in whole in Annex (1) submitted by Applicant in support to his submissions in this document. In particular, the Court is referred to Applicant's citation from the statement of Public Prosecutor Mr. Amirjanyan during trial session: *"We do not know whether Bojolyan informed state or military secret to special services of Turkey"*. Mr. Amirjanyan appeared before national courts in the Applicant's case in his capacity as a public prosecutor on behalf of the State. The citation is brought to support the Applicant's claim that the information provided to the Turkish intelligence service (MIT) contained no State and military secrets. In addition, the domestic courts failed to demonstrate that the Applicant cooperated with the Turkish special service (MIT).

2. The Court is referred to Government's submissions in paragraph 23 of Observations in which the Government provides the list of information the Applicant was claimed have provided to the Turkish Intelligence. In addition, the Government claims the Applicant collected *"additional"* information but was not able to use them since he was arrested (par 27). The Government also asserts that the information described in paragraphs 23 and 27 constitute *"a state and military secrets"* for which he was convicted (par 14 and 15). Further, the Government invoked the page 3 of the trail court judgment as basis that the information collected and used by Applicant *"caused immediate danger to the national security of the Republic of Armenia"* and that the fact of provision of the claimed secret information was proved by *"evidences in the case"* (par 24). It appears that the Government referred to the judgment of the First Instance Court of Kentron and Nork-Marash Community of Yerevan of 16 December 2002.

3. Thus, the Governments submissions were made under assumption that the Applicant provided *"secret"* information that actually *"harmed"* or *"potentially harmed"* the national security the Republic of Armenia.

4. The Applicant objects to the above contentions of the Government for the following reasons.

    a. The Article 60 of the former Criminal Code provides the definition of espionage. The element of potential "harm" is the coherent part of the object

and purpose of this article. However, the Government, including domestic courts, failed to demonstrate that the disputed information directly endangered the national security or could provide potential harm to the national security.

b. The Government, including domestic courts, failed to demonstrate that the information provided by Applicant *"contained"* state or military secret. In this connection the Applicant provides that the wording of the Governmen's citation from Article 60 of the former Criminal Code brought in paragraph 5 of the Observations does not provide the true wording, including the object and purpose of the Article 60. The original text of the Article 60 provides, *inter alia*, an *"information containing state or military secret"*, while in the Government's submission the term "*containing*" is missing. By using the word "containing" the legislator applies a higher standard of proof by defining that no information shall be deemed as *"secret"* unless shown clearly and sufficiently that the disputed information *"contains"* a secret data. The legislator applies this standard to avoid arbitrariness in interpreting the provision.

c. The page-3 of the judgment of the Kentron and Nork Marash court of Yerevan provides, among other things, that the claimed information was collected by Applicant from *"different sources"*. No further or any specific information is provided as to what are those sources from which the Applicant obtained the secret information mentioned in paragraphs 23 and 27 of the Observations. The Applicant would like to draw the attention of the Court to this fact as the core dispute of this case. Neither the national courts nor the Government demonstrated those sources from which the information mentioned in paragraphs 23 and 27 of the Observations was supposedly collected by the Applicant. Had the Government or the national courts provided the sources, it would have been clear to claim whether the disputed information was or was not in the public domain.

   The witness testimonies and exhibits of the case, on the basis of which the Applicant was convicted, do not demonstrate that the Applicant accessed or took information from *"secret"* sources. To be more specific, the Applicant provides below the list of all evidences -- witnesses and exhibits -- from pages 9 and 10 of the judgment of Kentron and Nork Marash First Instance Court of 16 December 2003:

   i. Mr. Ivan Ghukasov – witnessing that the Applicant served to USSR Intelligence services from 1966 until 1981, describing the Applicant as an officer of Intelligence services and stating he held contact with the Applicant until 1981.
   ii. Mrs. Jhenya Amiryan – witnessing that she is the Deputy Chairman of Armenian Kurdish Friendship organization, that she knew the Applicant as an interpreter of Turkish language and that she saw him in the above office.
   iii. Mr. Mahamad Kahraman – witnessing that he is the Manager of the above organization, met the Applicant in 2000 and that the Applicant visited their office.
   iv. Mr. Yusuf Halfi – witnessing that he works in the above office, met the Applicant in 2000 when the latter visited his office when the Applicant was invited to do translations from Turkish language.

v. Mr. Mahsum Ali – witnessing that he works as a journalist in the above office, knows the Applicant from 2000 as an interpreter and that the Applicant was usually invited to their office for translations.
vi. Tape recorder Sony M-100MTs.
vii. A blue color paper page with handwritings made by Applicant by pencil.
viii. A notebook confiscated at the border that has MIT[1] contact telephone numbers.
ix. A notebook confiscated during search of apartment with contact telephone numbers.
x. Western Union bank transfer papers of 14.09.2000, 19.09.00, 25.09.00 and 16.01.01.
xi. Xerox machine model No. 7238.
xii. "Gabriel 100" model typewriter
xiii. "Silver Read" SR280 De Luxe model typewriter
xiv. Economic map of Armenian SSR printed in 1988 procured from school textbook
xv. Written notices from RA MNA 2nd Department about information provided from Russian Federal Service of Security.

In addition to the above, the Court is also referred to the texts of the self-incriminatory testimonies of the Applicant of 27 January 2002, 29 January 2002 and 01 February 2002 (sent to Court previously with his main submissions) which also played basis for conviction of the Applicant. In this statement the Applicant didn't make any statement that he possessed or transferred State secret information to Turkish intelligence services.

f. Finally, the Applicant asserts that the Government failed to demonstrate that the disputed information was *"protected"* by the State. Under Article 2(2) of RA Law on State and Official Secret (also invoked by Government in paragraph 17 and of the Observations), any information classified as "s*tate secret"* must be protected by the State, otherwise, the information cannot be classified as *secret*. (see also the paragraph 32 of the Observations).
Further, a similar conclusion shall be made if examining the same issue in the context of Decision No.173 of the Government of Armenia of 13.03.1998 invoked also by the Government repeatedly in its Observations. This Decision provides the list of *State secret"* which is not subject to *"promulgation"* (see par 47 of the Observations). Similarly, as long the Government claims the disputed information was confidential, then the Applicant must have procured it from secured sources, otherwise, the disputed information could not be considered "secret" under Decision 173.

5. The Court is referred to paragraph 1 of page 6 of the Application to Court in which the Applicant informed to Court about media sources that he used for his analytical reporting for Turkish media. The Applicant made annotations about these sources on a blue sheet of paper which was subsequently used by Prosecution as a "key evidence" against Applicant (Section III of Application). However, the family members of the Applicant led by instructions of the Applicant searched and found the newspaper articles (see Annex 2) that the Applicant used or was going to use as source materials for preparing media reporting for Turkish partner media outlets with

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which the Applicant was cooperating (see paragraph 2 of Section B below). The materials in the above Annex are taken from "Haykakan Zhamanak" daily, "Golos Armenii" daily.
The above is not the full packet of copies of source materials. The rest of the materials was provided to court to include in the case file. Unfortunately, the Applicant was unable to get all the papers from the case file. In November 9, 2005 the Applicant's domestic attorney Mr. Arsenyan applied to the Chief of Court of Cassation of RA Mr. H. Manukyan for permission to copy materials from Applicant's case file from court archive (Annex 3). No written answer followed this letter. However, Mr. Arsenyan repeatedly called the Secretariat of the office of Mr. Manukyan for an answer. Finally, he was informed by telephone that the case file was not available at the Court of Cassation or in judicial archives.

6. Given the above, the Applicant provides that all contentions of the Government that the Applicant possessed and provided secret harming or capable of potentially harming the national security lack factual basis and were made on the basis of undue generalizations.

B. Did Applicants' conviction comply with the guarantees of Article 10 of the Convention

The Applicant makes the following submissions in reply to the Observations of the Government concerning the above question.

Necessary in a Democratic Society

1. The Applicant reiterates that he was convicted for actions that he committed while acting in his capacity as a journalist (Annex 3A).

2. As an analytic-journalist and translator, the Applicant worked for various media companies since 1980. In particular, the Applicant worked for State Radio and Television Company of Armenian SSR from 1980 until 1991 (Annex 4), "Azg" daily in Armenia between 1994 and 1996 (Annex 5), for "Hayastani Hanrapetutyun" daily between 1994 and 1998, (Annex 4), "Hayk" weekly from 1994 until 1996 "Yerkrapah" weekly from 1998 until 1999. In addition, the Applicant was acting as analytical journalist for "Radikal" newspaper of Istanbul, Turkey in 1996 (see Annex 6 providing Applicant's reprinted by Armenian "Aravot" daily, "Oran" daily and "Aybfe" daily newspapers from "Radikal") , for "Anadolu Ajansi" Turkish news agency branch office in Moscow, Russia (see the letter of Remzi Ozkan attached with employment papers from Anadolu Ajansi in Annex 7), for BBC World Service Turkish Section (Annex 8), for NTVMSNBC of Istanbul, Turkey (Annex 9).

3. The Applicant objects to the submission of the Government in paragraph 45 that the necessity of interference is assessed by legitimate aims under Article 10(2) of the Convention. The Government did not invoke other Convention principles for assessing the "*necessary to democratic society*" test. The Applicant provides that the Convention and the ECHR case law provide more standards and principles for assessing whether the interference was "necessary in a democratic society". For example, to decide whether the particular measure is proportionate, the Court examines whether the reasons advanced by State to establish proportionality are "*relevant and sufficient*". In **Jersild v. Denmark (1995) 19 EHRR 1**, the Court defined:

> *The Court will look at the interference complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are relevant and sufficient and whether the means employed were proportionate to the legitimate aim pursued (par 31)*

In **Vereniging Weekblad Bluf! v. the Netherlands (1995)** the Court found the protection of information as a State secret was no longer justified and the ban on the publication not a sufficient means because the information was already in public domain. A similar decision was reached in **Observer and Guardian v. United Kingdom (1995)** where the Court ruled that once the information on national security is in the public arena, the punishment of authors of dissemination is irrelevant and unjustified to reach the legitimate aim sought.

The Principle 15 of **Johannesburg Principles (1995)** prohibits the punishment of a person on grounds of

> *National security for disclosure of information if the disclosure does not actually harm and is not likely to harm a legitimate national security interest*

The Applicant provides that the Government failed to demonstrate "*sufficient and relevant*" reasons for justifying the punishment of the Applicant, in particular, that the information possessed or provided by Applicant to MIT

a) "contained" a state or military secret in the meaning of Article 60 of the former Criminal Code
b) caused potentially harm to the national security (par 49)
c) caused immediate danger to the national security
d) was protected by the State as a state secret
e) was obtained in the result of access and use of confidential sources

4. The Applicant objects to Government's finding in paragraph 53 providing that by Hadjinastassiou case the Court defined a principle according to which it grants *"significantly wider margin of assessment"* to the states in cases involving a national security issue. The Government did not make a reference to the source of such finding, nor did the Applicant find any such assessment from the text of the judgment. We assume that it was an assumption that the Government made on its own on the basis of the text of the judgment. However, if by above expression the Government meant the ECHR principle of the "margin of appreciation", the Applicant stresses that the Government was formally obliged to make a proper referral to Court's case law in order to justify an existence of such principle under ECHR jurisprudence. Otherwise, the Applicant finds the above finding of the Government irrelevant to Applicant's case.

5. As mentioned in the previous section, the findings of the national courts and the contentions of the Government that the Applicant possessed and provided secret information causing harm or potential harm to national security lacked factual basis and were made on the basis of undue generalizations. Such approach is in conflict with the approach shown by Court in the cases of conflict between "national security" and the freedom of expression. In **Vereniging Weekblad Bluf! v. the Netherlands (1995), Observer and Guardian v. United Kingdom (1995), Hadjinastassiou v.**

Greece (1992), the Court closely examined the factual basis of each disputed publication or an action and applied the "necessity" test to those factual basis.

For example, in **Vereniging Weekblad Bluf!** case the Court took into examination the sufficiency of sensitiveness of disputed publication for causing damage to national security. In this connection, the Court, among other things, closely examined the "factual basis" such as that the *"document in question was 6 years old at the time of interference…it was of a fairly general nature, the head of the security service having himself admitted that in 1987 the various items of information, taken separately, were no longer State secrets (see paragraph 9 above). Lastly, the report was marked simply "Confidential", which represents a low degree of secrecy. It was in fact a document intended for BVD staff and other officials who carried out work for the BVD…"(par 41).*

Further, in **Observer** case the Court examined that the publication of the book in the United States changed the situation as (a) its contents ceased to be a matter of speculation and their confidentiality was destroyed and (b) it could be imported into the United Kingdom without restriction; that, while further publication of material from W's book could still have been prejudicial to the claim for a permanent injunction against him, the interest in maintaining its confidentiality in order to protect the attorney general's rights as a litigant had ceased to exist for ECHR purposes.

Finally, in **Hadjinastassiou** case, the Court examined closely the factual basis of the disputed information to establish whether the project of manufacture of guided missile constituted a military secret. For this purpose, the Court even referred to the finding of experts appointed by national appeal court that *"some transfer of technical knowledge [had] inevitably occurred"* (paragraph 41).

Given the above, the Applicant is asking the Court to closely scrutinize the factual basis of Applicant's assertions mentioned in paragraph 1-6 of Section A and paragraphs 3 (a-e) of Section B of theses submissions, namely, that the disputed information did not cause harm or potential harm to national security because as a journalist the Applicant used information in a public domain that did not constitute State or military secret.

The Applicant also requests the Court to send a fact-finding mission to Armenia if it decides that a further and on-spot examination of the facts of this case is necessary.