



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

FIRST SECTION

CASE OF SALAYEV v. AZERBAIJAN

(Application no. 40900/05)

JUDGMENT

STRASBOURG

9 November 2010

FINAL

21/02/2011

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

In the case of Salayev v. Azerbaijan,

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

Christos Rozakis, *President*,

Nina Vajić,

Anatoly Kovler,

Khanlar Hajiyeu,

Dean Spielmann,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 18 October 2010,

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

PROCEDURE

1. The case originated in an application (no. 40900/05) against the Republic of Azerbaijan lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Azerbaijani national, Mr Eldar Salayev (“the applicant”), on 10 November 2005.

2. The applicant, who had been granted legal aid, was represented by Mr M. Mustafayev, a lawyer practising in Baku. The Azerbaijani Government (“the Government”) were represented by their Agent, Mr Ç. Asgarov.

3. The applicant alleged, in particular, that he had been deprived of his right to liberty under Article 5 of the Convention, as the period of his initial detention as a suspect had exceeded the statutory forty-eight-hour period.

4. On 28 November 2006 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1933 and lives in Baku.

6. The applicant was a member and former President of the National Academy of Sciences of Azerbaijan. He has been awarded a number of

Soviet and Azerbaijani prizes and honours for his scientific achievements in the fields of physics and mathematics. He was elected to the Supreme Soviet of the USSR several times and between 1995 and 2000 was a member of the Milli Mejlis (Parliament) of the Republic of Azerbaijan.

7. At the time of the events in question the applicant was in retirement.

8. On 27 October 2005 the applicant was summoned to the Ministry of National Security ("the MNS") as a witness in a criminal case concerning an attempted *coup d'état* by several incumbent and former high-ranking government officials, as well as the incumbent Ministers of Healthcare and Economic Development and the self-exiled former Speaker of the Milli Mejlis. The alleged means by which this attempted *coup d'état* were to be accomplished was to overthrow the current Government by organising mass disorder after the parliamentary elections of 6 November 2005.

A. The circumstances of the applicant's arrest

1. The applicant's version of the events

9. At approximately 10 a.m. on 27 October 2005 the applicant arrived voluntarily at the MNS building.

10. According to the applicant, he was forcibly kept inside the MNS building after his arrival there and was not allowed to leave it even for lunch. During this time he was not allowed to contact his family or a lawyer of his choosing and he was subsequently provided with a State-appointed lawyer.

11. At 8.15 p.m. the Chief Investigator of the Investigation Department of the MNS issued a record of the applicant's forty-eight-hour detention as a suspect (*tutma protokolu*) in the presence of the applicant and a State-appointed lawyer. The investigator noted that the applicant was suspected of the crimes of attempted organisation of mass disorder and attempted usurpation of state power by force, as provided by Articles 28, 220 and 278 of the Criminal Code.

12. According to the applicant, he wrote by hand on the second page of the document that he denied all the accusations. However, his lawyer was given only a copy of the first page of this two-page document.

2. The Government's version of the events

13. The applicant was summoned to the MNS as a witness within the framework of a criminal case and he arrived at the MNS building at approximately 10.45 a.m.

14. His questioning by an investigator began at 11.40 a.m. and lasted until 2.30 p.m. Following this questioning, the investigator decided to hold a face-to-face confrontation between the applicant and an accused person in

the criminal case in question. This confrontation began at 5.10 p.m. and continued until 6 p.m. The applicant's State-appointed lawyer entered the MNS building at 7.57 p.m. and the record of the applicant's forty-eight-hour detention as a suspect was issued at 8.15 p.m.

15. From the moment of the applicant's arrival at the MNS building to the end of the confrontation, there was no restriction on the applicant's liberty. He was not held in a special room or cell and he was not prohibited from leaving the MNS building. Moreover, he was in a room for witnesses in which there was a telephone line and, despite the investigator's explicit suggestion that he go for lunch after the end of questioning at approximately 2.30 p.m., the applicant did not want to go for lunch, noting that he was keeping a religious fast.

B. The application of the preventive measure of remand in custody in respect of the applicant

16. On 29 October 2005, by a decision of the prosecutor of the Prosecutor General's Office, the applicant was formally charged with criminal offences under Articles 28, 220.1 and 278 of the Criminal Code.

17. On 29 October 2005 at 5.30 p.m. a judge of the Nasimi District Court, relying on the official charges brought against the applicant and the prosecutor's request to apply the preventive measure of remand in custody (*həbs qətimkan tədbiri*), remanded the applicant in custody for a period of three months. The judge gave as grounds for this measure the gravity of the applicant's alleged criminal acts and the possibility of his absconding and obstructing the investigation. The hearing concerning the application of the preventive measure of remand in custody was held in the MNS building.

18. On 31 October 2005 the applicant appealed against the Nasimi District Court's decision of 29 October 2005, complaining that he had been detained as a suspected person for several hours in excess of the maximum forty-eight-hour period prescribed by law. He further alleged that the holding of the hearing in the MNS building was a breach of the relevant law, and that the judge had merely relied on the prosecution's submissions and had not assessed any evidence independently in order to establish whether there was a reasonable suspicion that he had committed a criminal offence. He also noted that the court had not taken into consideration his age, state of health and other personal circumstances when it had ordered his detention.

19. On 2 November 2005 the Court of Appeal upheld the Nasimi District Court's order. The Court of Appeal upheld the applicant's detention, reiterating the first-instance court's findings concerning the gravity of the applicant's alleged criminal acts and the possibility that he would abscond from the investigation.

20. On 16 November 2005, at the request of the Prosecutor General's Office, the Nasimi District Court replaced the applicant's remand in custody with the preventive measure of police supervision pending trial.

21. In the meantime, as the applicant was suffering from a serious eye problem, he requested the Prosecutor General's Office to grant him permission to travel to the USA to receive urgent medical treatment which was not available in Azerbaijan. By a letter of 15 February 2006 the Prosecutor General's Office informed the applicant that he was prohibited from leaving Azerbaijan pending trial.

22. Following requests by several well-known scientists from Russia and Azerbaijan on the applicant's behalf to the Azerbaijani authorities, arguing that the applicant was at imminent risk of going blind, and asking the authorities to grant him permission to leave the country to receive medical treatment, by a letter of 26 May 2006 the Prosecutor General's Office informed the applicant that he was exceptionally granted permission to travel abroad for the purposes of receiving necessary medical treatment.

23. By the time of the most recent communication with the parties no information had been provided to the Court as to the subsequent stages of the criminal proceedings against the applicant.

II. RELEVANT DOMESTIC LAW

24. A suspect is a person detained with a view to criminal charges or on suspicion of committing of an offence or to whom the preventive measure of remand in custody is applied (Article 90.1 of the Code of Criminal Procedure ("CCrP")). A person who is aware of any important circumstances may be summoned and questioned as a witness by the prosecution during the investigation and the witness must, *inter alia*, participate in the investigation or other procedural actions at the request of the prosecuting authority and reply fully and correctly to questions on all matters known to him (Articles 95.1 and 95.1.4).

25. Chapter XVI of the CCrP deals with, *inter alia*, arrest on suspicion of a criminal offence (tutulma; hereinafter also referred to as "initial detention", sometimes also referred to as "police custody"). The following persons, *inter alia*, may be subject to arrest: (a) a person suspected of a criminal offence; or (b) a person to be officially charged with a criminal offence or an accused person breaching the terms of a preventive measure previously imposed on him or her (Article 147.1). Arrest and initial detention may be effected when, *inter alia*, a suspicion arises that a person has committed a criminal offence, or there already exists a relevant decision of the prosecuting authority to charge a person with a criminal offence (Article 147.2.1).

26. Article 148 of the CCrP concerns arrest of a person on suspicion of having committed a criminal offence (*cinayət törətməsinə şübhə yarandıqda*

şəxsin tutulması). A preliminary investigator, investigator or prosecutor may arrest a person if, *inter alia*: the person was caught in the process of committing a criminal offence or at the crime scene immediately after committing a criminal offence; a victim of the criminal offence or a witness to it specifically referred to that person as the one who had committed the offence; or in other circumstances when the person, his appearance, his belongings, his home or his vehicle bear clearly visible signs of his having committed a criminal offence (Article 148.2.1).

27. Article 148.4 states as follows:

“148.4. In cases stipulated in Articles 148.1 and 148.2 of this Code, the arrest can be carried out prior to institution of the relevant criminal proceedings. If a decision on institution of criminal proceedings is not issued within twenty-four hours of the person's arrest, the arrested person must be immediately released. Even if such a decision is issued, the arrested person may not be so detained for a period longer than forty-eight hours. Within forty-eight hours of the moment of his or her arrest the arrested person must be charged with a criminal offence and, in the event the prosecutor requests his or her further detention, must be brought before a court; the court must examine the case without delay and issue a decision on imposition of the preventive measure of remand in custody or [the arrested person's] release.”

28. According to Article 153, in order to ensure the rights of the arrested person, the relevant prosecuting authorities shall carry out the following actions, *inter alia*: immediately after the arrest, to inform the arrested person about the reasons for the arrest and his rights to remain silent and to receive legal assistance (Article 153.2.1); without delay, to take the arrested person to the relevant detention facility, to draw up a record of the arrest and to allow the arrested person to familiarise himself with this record (Article 153.2.2); immediately after the arrest, to ensure that the arrested person can exercise his right to inform his relatives about the arrest (Article 153.2.4); from the moment of the arrest, to allow the arrested person effective access to a lawyer (Articles 153.2.5-153.2.8), etc.

29. Articles 153.3-153.4 state as follows:

“153.3. The arrested person shall be released by the prosecuting authority in the following cases:

153.3.1. if the suspicion that this person has committed a criminal offence is not confirmed;

153.3.2. if there is no necessity to detain the person further;

153.3.3. ([by a legislative amendment of 2 July 2001])

153.3.4. ... if no court order on the arrested person's remand in custody is issued within forty-eight hours of his or her arrest.

153.4. In cases stipulated in Articles 153.3.1 and 153.3.2 of this Code, the arrested person may be released by the preliminary investigator, investigator or prosecutor supervising the preliminary investigation, while in a case stipulated in Article 153.3.4

of this Code [he or she] may also be released by the head of the temporary detention facility [where he or she is detained].”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

30. The applicant complained that he had been unlawfully deprived of his liberty because he had been detained in excess of the maximum forty-eight-hour period permitted by the domestic law prior to being brought before a judge. The relevant part of Article 5 § 1 (c) of the Convention reads as follows:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

A. Admissibility

31. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 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

32. The Government contested the applicant's allegations. They noted that the applicant arrived at the MNS building at 10.45 a.m. and was questioned as a witness by the investigator in charge from 11.40 a.m. to 2.30 p.m. Subsequently the applicant participated in another investigative action (face-to-face confrontation) from 5.10 p.m. to 6.00 p.m. According to the Government, the applicant was free to leave the MNS building and he had the opportunity to make contact freely with the outside. However, the

Government accepted that the applicant's liberty might be restricted before the issue of the official record at 8.15 p.m., as following the end of the confrontation at about 6 p.m. the applicant was not free to leave the MNS building. The Government further submitted that even assuming that the applicant's detention had begun at 6 p.m., the forty-eight-hour period permitted by law had been respected, because the applicant had been brought before a judge on 29 October 2005 at 5.30 p.m.

33. The applicant contested the Government's submissions. In particular, he alleged that he had had no opportunity to contact members of his family or a lawyer of his own choosing and that he had not been permitted to leave the MNS building after his arrival there. In support of this claim, the applicant submitted a signed statement by the State-appointed lawyer who represented him before the domestic courts. In that statement, the State-appointed lawyer stated that he had been invited to the MNS on 27 October 2005 at about 6 p.m. as a lawyer on duty, that he had not known the applicant before and that the applicant had not been allowed to call members of his family or a lawyer that he knew. He also stated that the applicant's mobile phone had been taken away.

2. The Court's assessment

34. The Court reiterates that the expressions “lawful” and “in accordance with a procedure prescribed by law” in Article 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. While it is normally in the first place for the national authorities, notably the courts, to interpret and apply domestic law, it is otherwise in relation to cases where, as under Article 5 § 1, failure to comply with that law entails a breach of the Convention. In such cases the Court can and should exercise a certain power to review whether national law has been observed (see, among other authorities, *Douiye v. the Netherlands* [GC], no. 31464/96, §§ 44-45, 4 August 1999).

35. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness. What is at stake here is not only the “right to liberty” but also the “right to security of person” (see, among other authorities, *Bozano v. France*, 18 December 1986, § 54, Series A no. 111, and *Wassink v. the Netherlands*, 27 September 1990, § 24, Series A no. 185-A). It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of “arbitrariness” in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 67, ECHR 2008-...).

36. In so far as the applicant complained that he had been brought before a judge after the expiry of the maximum forty-eight-hour period allowed by the domestic law and had not been released at the expiry of that period as required by the domestic law, the Court notes that this complaint does not as such raise a question whether the applicant was “brought promptly before a judge” within the meaning of Article 5 § 3 of the Convention. Rather, the primary question raised is whether the applicant's detention during the period before the court's detention order had been in compliance with the specific requirements of domestic law applicable to that period of detention. Therefore, in so far as the complaint concerns the “lawfulness” of the applicant's detention during that period, it falls to be examined under Article 5 § 1 of the Convention.

37. In this regard, the Court will therefore firstly determine when exactly the applicant entered the MNS building. Secondly, it will determine whether he was in fact “deprived of his liberty” during the period in question. If so, lastly, it will determine whether such deprivation conformed to the requirements of “lawfulness”.

38. The parties appeared to agree that the applicant came voluntarily to the MNS building in the morning of 27 October 2005. However, the parties were in dispute as to the exact time the applicant entered the MNS building, with the applicant maintaining that he entered at 10 a.m. and the Government arguing that he entered at 10.45 a.m.

39. In determining the time of the applicant's entry into the MNS premises, the Court considers that, in the absence of any official document in support of the Government's position, the benefit of the doubt should be given to the applicant, as it falls primarily to the Government to provide a detailed hour-by-hour account supported by relevant and convincing evidence. The Court notes that despite its explicit request in this regard the Government failed to produce any copies of the relevant documents, such as summons to the applicant for questioning at the MNS building, the record of interview and the confrontation in question, the full copy of the record of the applicant's detention as a suspected person, or any other document relating to the applicant's detention. Accordingly, in view of the Government's inability to provide convincing and relevant evidence in support of their factual claim, the Court accepts that the applicant in fact entered the MNS building at about 10 a.m. on 27 October 2005.

40. It is to be determined next whether he was “deprived of his liberty” during this period. In this connection, the Court reiterates that, in order to determine whether there has been a deprivation of liberty, the starting point must be the specific situation of the individual concerned, and account must be taken of a whole range of factors arising in a particular case, such as the type, duration, effects and manner of implementation of the measure in question (see *Guzzardi v. Italy*, 6 November 1980, § 92, Series A no. 39). The Court must look behind appearances and investigate the realities of the

situation complained of (see *Van Droogenbroeck v. Belgium*, 24 June 1982, § 38, Series A no. 50). The right to liberty is too important for a person to lose the benefit of the protection of Article 5 even if he or she has given himself or herself up to be taken into detention (see *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 65, Series A no. 12).

41. The Court notes that the applicant had voluntarily appeared for questioning. As to the events that occurred after the applicant's arrival at the MNS building, the Court observes that, in the absence of any records of the applicant's questioning and confrontation or documents relating to any other procedural actions carried out after his arrival at the MNS building, it is difficult to determine the exact circumstances of these events.

42. The Court further notes that although the applicant was not handcuffed, placed in a locked cell or otherwise physically restrained after entering the MNS premises, it appears that he had no opportunity to contact members of his family or lawyer of his own choosing. In this regard, the Court cannot accept the Government's argument that the applicant had been placed in a witness room in which there was a telephone line. This version of the events contradicts the fact that he was provided with a State-appointed lawyer and the latter lawyer's submissions concerning the applicant's situation (see paragraph 33 above). Moreover, the Government did not submit any evidence in support of their argument. The Court also finds unrealistic the Government's submission that the applicant was free to leave the MNS building before the issuance of the record of the applicant's forty-eight-hour detention as a suspect. In particular, the Government did not provide a reasonable explanation as to why the applicant stayed in the MNS building without any reason from 2.30 p.m. to 5.10 p.m. (the period of time between the end of the questioning and the beginning of the confrontation, according to the Government's version of the events) if he was really free to leave the MNS building.

43. Accordingly, the Court considers that from about 10 a.m. on 27 October 2005 the applicant was "deprived of his liberty" within the meaning of Article 5 § 1.

44. That being so, it remains to be seen whether, during the period prior to the judicial order remanding him in custody issued on 29 October 2005, the applicant's arrest and initial detention complied with the "lawfulness" requirements of Article 5 § 1.

45. The Court notes that, where there existed a suspicion that a person had committed a crime, the domestic law authorised the law-enforcement authorities to arrest and detain a suspected or accused person in the absence of a judicial order, with a purpose of instituting criminal proceedings and bringing him or her before a judge authorised to decide on his or her continued detention. The law stated that within forty-eight hours of his or her arrest a person so detained must be brought before a judge, who should either remand the person in custody or order their immediate release

(see paragraphs 27-29 above). Furthermore, Article 153.3.4 of the CCrP unequivocally required the arrested person's release, if no court order on his or her remand in custody was issued within forty-eight hours of arrest. Accordingly, beyond the initial forty-eight-hour period, an arrested person could be detained only on the basis of a judicial order remanding him or her in custody. It does not appear that this period could be extended under any circumstances, or that it was simply a non-mandatory indicative deadline and the Government did not demonstrate or argue the opposite (contrast, *mutatis mutandis*, *Kaiser v. Switzerland*, no. 17073/04, §§ 20 and 33, 15 March 2007).

46. In the present case, the applicant was *de facto* deprived of his liberty at around 10 a.m. on 27 October 2005, while the judicial hearing on his remand in custody took place at about 5.30 p.m. on 29 October 2005. Accordingly, prior to being taken before the judge, the applicant was detained for approximately fifty-five hours, about seven hours in excess of the maximum period permitted by the domestic law.

47. Thus, the applicant's continued detention without a judicial order for a time period exceeding the forty-eight-hour period prescribed by Articles 148 and 153 of the CCrP was incompatible with the domestic law and therefore not "lawful" within the meaning of Article 5 § 1 of the Convention.

48. There has accordingly been a violation of Article 5 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

49. Relying on Articles 5 and 6 of the Convention, the applicant complained in a general manner that his arrest and detention had been unlawful and that the domestic proceedings concerning his detention had not been fair. He further complained under Articles 13 and 14 of the Convention that the domestic remedies had been ineffective and that he had been discriminated against due to his political opinions.

50. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court considers that this part of the application does not disclose any appearance of a violation of the Convention. It follows that it is inadmissible under Article 35 § 3 as manifestly ill-founded and must be rejected pursuant to Article 35 § 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

51. 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.”

52. The applicant did not submit a claim for just satisfaction in the manner required by Rule 60 of the Rules of Court. Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 5 § 1 admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 5 § 1 of the Convention.

Done in English, and notified in writing on 9 November 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President