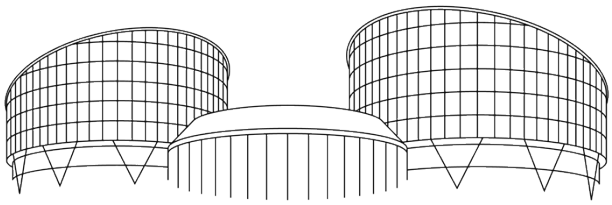

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF KHANHUSEYN ALIYEV v. AZERBAIJAN

(Application no. 19554/06)

JUDGMENT

STRASBOURG

21 February 2012

FINAL

21/05/2012

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

In the case of Khanhuseyn Aliyev v. Azerbaijan**,**

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

Nina Vajić, *President,*
Peer Lorenzen,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges,*

and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 31 January 2012,

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

PROCEDURE

1. The case originated in an application (no. 19554/06) 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 Khanhuseyn Gulhuseyn oglu Aliyev (*Xanhüseyn Gülhüseyn oğlu Əliyev* – "the applicant"), on 2 May 2006.

2. The applicant was represented by Mr E. Zeynalov. The Azerbaijani Government ("the Government") were represented by their Agent, Mr Ç. Asgarov.

3. The applicant alleged, in particular, that his right to stand for election, as guaranteed by Article 3 of Protocol No. 1 to the Convention, had been infringed.

4. On 19 June 2008 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1958 and lives in Baku.

6. The applicant stood for the elections to the National Assembly of 6 November 2005 as a candidate of the opposition bloc YeS (*Yeni Siyasət*). He was registered as a candidate by the Constituency Electoral Commission

("the ConEC") for the single-member Hajiqabul-Kurdamir Electoral Constituency no. 58.

7. On 24 October 2005 the ConEC decided to apply to the Court of Appeal with a request to cancel the applicant's registration as a candidate owing to the reports of his alleged involvement in activities incompatible with the requirements of the Electoral Code. According to the minutes of the ConEC meeting, seven members of the ConEC participated in the meeting. The applicant was not informed about this meeting in advance and was not invited to it. In support of its decision, the ConEC relied on three grounds, summarised below.

8. Firstly, the ConEC noted that it had received written statements from four voters claiming that the applicant had either promised or given them money in exchange for their promise to vote for him. Two of them claimed that they had each received 100,000 old Azerbaijani manats (at that time, a sum equivalent to slightly less than 20 euros) in cash from the applicant and, as a proof of this claim, handed in this cash to the ConEC. None of these voters were heard in person by the ConEC. The ConEC considered that such actions by the applicant were contrary to Article 88.4.1-5 of the Electoral Code concerning the illegal means of gaining voter support.

9. Secondly, relying on unspecified reports, the ConEC noted that the applicant had made public statements "against the constitutional foundations of the State" by advocating for the return to power of the Chairman of the Social Democratic Party and former President A. Mutalibov (who had been in exile for several years).

10. Thirdly, the ConEC noted that on 24 October 2005 the applicant was planning to organise a demonstration in front of the ConEC building in order to protest against the cancellation of the registration of another candidate from the same constituency, which had taken place earlier.

11. On 26 October 2005 the Court of Appeal examined the case and cancelled the applicant's registration as a candidate, in accordance with Articles 88.4 and 113.2.3 of the Electoral Code. During the hearing, the applicant denied all the accusations and argued that the case had been fabricated and that the allegations of bribery had not been proven. Having regard to the ConEC's submissions, the written statements of the four voters, and several banknotes sealed in plastic bags (as "material evidence"), the Court of Appeal found that the applicant had offered money to voters in exchange for their votes in his favour, thus breaching Article 88.4 of the Electoral Code. It appears that the court considered that this was a sufficient ground for the cancellation of the applicant's registration and did not examine the other two grounds mentioned in the ConEC's request.

12. According to the applicant, four members of the ConEC (two of whom had allegedly participated in the meeting of 24 October 2005) wrote affidavits, addressed to the Court of Appeal, in which they claimed that the

alleged ConEC meeting of 24 October 2005 had actually not taken place and that the minutes of that meeting, submitted to the Court of Appeal, constituted a false document. These affidavits were not accepted by the Court of Appeal because they had not been notarised. Subsequently, three of the above ConEC members wrote similar notarised affidavits addressed to the Supreme Court, while one of them retracted his earlier statement.

13. According to the Government, on 26 October 2005 one of the above-mentioned ConEC members, S.Q., wrote another affidavit in which he retracted his previous statement and maintained that he had been forced by the applicant and his representatives to write a statement that there had been no ConEC meeting.

14. The applicant lodged an appeal with the Supreme Court, arguing that the allegations against him had been fabricated and that the evidence used against him had been tenuous, uncorroborated and wrongly assessed. In support of his submissions he attached, *inter alia*, the above-mentioned affidavits by the ConEC members.

15. On 2 November 2005 the Supreme Court dismissed the applicant's appeal and upheld the Court of Appeal's judgment of 26 October 2005. It refused to admit the documents submitted by the applicant, finding that the factual circumstances of the case had been duly established by the lower court and that it could examine the case only on points of law.

II. RELEVANT DOMESTIC LAW

A. Electoral Code

16. Article 88.4 of the Electoral Code of 2003 provides as follows:

> "88.4. Candidates ... are prohibited from gaining the support of voters in the following ways:
>
> 88.4.1. giving money, gifts and other valuable items to voters (except for badges, stickers, posters and other campaign materials having nominal value), except for the purposes of organisational work;
>
> 88.4.2. giving or promising rewards based on the voting results to voters who were involved in organisational work;
>
> 88.4.3. selling goods on privileged terms or providing goods free of charge (except for printed material);
>
> 88.4.4. providing services free of charge or on privileged terms;
>
> 88.4.5. influencing the voters during the pre-election campaign by promising them securities, money or other material benefits, or providing services that are contrary to the law."

17. In accordance with Articles 113.1 and 113.2.3 of the Electoral Code, the relevant electoral commission may request a court to cancel the registration of a candidate who engages in activities prohibited by Article 88.4 of the Code.

18. Complaints concerning decisions of electoral commissions must be examined by the courts within three days (unless the Electoral Code provides for a shorter period). The period for lodging an appeal against a court decision is also three days (Article 112.11).

B. Code of Civil Procedure

19. Chapter 25 of the Code of Civil Procedure sets out rules for the examination of applications concerning the protection of electoral rights (or the right to participate in a referendum). According to Article 290, such applications must be submitted directly to the appellate courts in accordance with the procedure established by the Electoral Code.

20. Applications concerning the protection of electoral (referendum) rights must be examined within three days of receipt of the application, except for applications submitted on election day or the day after election day, which must be examined immediately (Article 291.1). The court must hear the case in the presence of the applicant, a representative of the relevant electoral commission and any other interested parties. Failure by any of these parties to attend the hearing after due notification does not preclude the court from examining and deciding the case (Article 291.2).

21. The appellate court's decision can be appealed against to the higher court (the court of cassation) within three days. This appeal must be examined within three days, or immediately if submitted on election day or the next day. The decision of the court of cassation is final (Article 292).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1 TO THE CONVENTION

22. Relying on Article 3 of Protocol No. 1 to the Convention and Articles 11 and 13 of the Convention, the applicant complained that his registration as a candidate for the parliamentary elections had been cancelled arbitrarily. The Court considers that this complaint falls to be examined only under Article 3 of Protocol No. 1 to the Convention, which reads as follows:

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

A. Admissibility

23. 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

24. The Government submitted that the aim of Article 88.4 of the Electoral Code was to ensure equal and fair campaign conditions for all candidates. Disqualification of candidates who engaged in various forms of illegal vote-buying had the legitimate aim of protecting the free expression of the opinion of the people in elections.

25. The Government maintained that the applicant had been disqualified because he had attempted to bribe voters. According to the Government, this fact had been sufficiently proved by the written statements made by four voters. They maintained that the applicant had been afforded an opportunity to fully and effectively defend his position in the relevant proceedings.

26. The Government further contested the veracity of the applicant's allegation that the ConEC minutes of 24 October 2005 had been falsified and that no actual ConEC meeting had been held on that day. In this regard, the Government relied on the statement by ConEC member S.Q. (see paragraph 13 above).

27. The applicant submitted that the decision to disqualify him had been arbitrary and based on tenuous, insufficient, unreliable and even fabricated evidence. Relying on the affidavits of several ConEC members (see paragraph 12 above), he insisted that no formal ConEC meeting had been held on 24 October 2005 and that the ConEC decision to request his disqualification had been nothing more than a sham.

28. The applicant further asserted that he had been informed of this ConEC decision only on 26 October 2005, a very short time before the Court of Appeal hearing concerning this matter. For this reason, he had no time to prepare for the hearing, to hire a lawyer, to collect necessary documents and, in general, to effectively participate in the proceedings. The applicant further maintained that the Court of Appeal had relied on

uncorroborated allegations and had failed to summon either the voters who had accused him of bribing them or any other witnesses. Neither had it summoned any of the ConEC members who had made claims about irregularities in connection with the alleged ConEC meeting of 24 October 2005.

29. Lastly, the applicant contended that the Supreme Court had also failed to independently examine any relevant evidence and witnesses.

2. The Court's assessment

30. The Court notes that the summary of its case-law on the right to effectively stand for election, as guaranteed by Article 3 of Protocol No. 1 to the Convention, can be found in, among many other judgments, *Orujov v. Azerbaijan* (no. 4508/06, §§ 40-42, 26 July 2011). On a more specific note, the Court also reiterates that, while the Contracting States enjoy a wide margin of appreciation in imposing conditions on the right to vote and to stand for election, it is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate or arbitrary (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 52, Series A no. 113; *Gitonas and Others v. Greece*, 1 July 1997, § 39, *Reports of Judgments and Decisions* 1997-IV; and *Yumak and Sadak v. Turkey* [GC], no. 10226/03, § 109 (iii), 8 July 2008).

31. The Court notes that in the present case the applicant was disqualified as a candidate in accordance with Articles 88.4 and 113 of the Electoral Code, which provide for the possibility of the disqualification of candidates who resort to unfair and illegal means of gaining voter support. Given that Article 3 of Protocol No. 1 does not contain a list of "legitimate aims" capable of justifying restrictions on the exercise of the rights it guarantees and does not refer to those enumerated in Articles 8 to 11 of the Convention, the Contracting States are free to rely on an aim not mentioned in those Articles, provided that it is compatible with the principle of the rule of law and the general objectives of the Convention (see, for example, *Ždanoka v. Latvia* [GC], no. 58278/00, § 115, ECHR 2006-IV). The Court accepts the Government's argument that the conditions set out in the above-mentioned provisions of the Electoral Code pursue the legitimate aim of ensuring equal and fair conditions for all candidates in an electoral campaign and protecting the free expression of the opinion of the people in elections.

32. It remains to be determined whether there was arbitrariness or a lack of proportionality in the authorities' decisions.

33. The Court reiterates that its competence to verify compliance with domestic law is limited and that it is not its task to take the place of the domestic courts in such issues as the assessment of evidence or the interpretation of the domestic law. Nevertheless, for the purposes of supervision of the compatibility of the interference with the requirements of Article 3 of Protocol No. 1, the Court must scrutinise the relevant domestic procedures and decisions in detail in order to determine whether sufficient safeguards against arbitrariness were afforded to the applicant and whether the relevant decisions were sufficiently reasoned (see, *mutatis mutandis*, *Melnychenko v. Ukraine*, no. 17707/02, § 60, ECHR 2004-X).

34. Furthermore, the Court notes that a finding that a candidate has engaged in unfair or illegal campaigning methods could entail serious consequences for the candidate concerned, in that he or she could be disqualified from running for the election. As the Convention guarantees the effective exercise of individual electoral rights, the Court considers that, in order to prevent the arbitrary disqualification of candidates, the relevant domestic procedures should contain sufficient safeguards protecting the candidates from abusive and unsubstantiated allegations of electoral misconduct, and that decisions on disqualification should be based on sound, relevant and sufficient proof of such misconduct (see *Orujov*, cited above, § 46).

35. In the present case, the decision to disqualify the applicant was based on the written statements by four voters and "physical evidence" consisting of several banknotes. For the reasons specified below, the Court considers that this material, and the manner in which it was examined, did not amount to sound, relevant and sufficient proof of the allegation that the applicant had attempted to bribe voters.

36. As to the banknotes, the Court notes that, in the absence of any special marks or a forensic report on the examination of fingerprints, these random banknotes, by themselves, could not constitute any kind of proof that they had been used as an instrument of bribery and had been given by the applicant to the voters. Accordingly, this so-called "physical evidence" was irrelevant.

37. As to the written statements by four voters, the Court notes that none of those four persons were invited to be questioned in the relevant hearings by the electoral commission or the courts and no attempt was made to obtain any further information corroborating those statements. Given that there were so few complainants and that their brief written statements were the only relevant evidence used against the applicant, the questioning of those voters in person during the relevant hearings was crucial for the assessment of their personal integrity and the truthfulness of their statements. It would also have given the applicant an opportunity to fully exercise his right to defend himself against their accusations by means of confronting them in person and cross-examining them. In such

circumstances, the Court considers that the evidence used against the applicant was not corroborated by further examination and was not assessed in a manner that would remove serious doubts as to its reliability.

38. Furthermore, the Court takes the view that the applicant was not afforded sufficient procedural safeguards against arbitrariness.

39. In particular, the ConEC did not inform the applicant about its hearing of 24 October 2005, did not invite and hear the complainants or otherwise attempt to carry out a comprehensive assessment of the situation, and took the decision to request the applicant's disqualification in very questionable circumstances given that several members of the ConEC subsequently claimed that there had been no ConEC meeting on that date at all.

40. Subsequently, upon the examination of the ConEC request by the Court of Appeal, the applicant was afforded little time to examine the material in the case file and to prepare arguments in his defence, as he learned about the forthcoming judicial hearing shortly before it took place. The Court reiterates that considerations of expediency and the necessity for tight time-limits designed to avoid delaying the electoral process, although often justified, may nevertheless not serve as a pretext to undermine the effectiveness of electoral procedures (see, *mutatis mutandis*, *Namat Aliyev v. Azerbaijan*, no. 18705/06, § 90, 8 April 2010) or to deprive the persons concerned by those procedures of the opportunity to effectively contest any accusations of electoral misconduct made against them (see *Orujov*, cited above, § 56). In the present case, it appears that the examination of the issue of the applicant's disqualification took place without any reasonable advance notice, and as such caught him by surprise and left him unprepared for the hearing.

41. Lastly, the Court observes that, in addition to the above-mentioned failure to summon and hear the four voters who had accused the applicant in writing, the domestic courts failed to assess the relevance of the applicant's submissions, such as the affidavits by several ConEC members concerning the alleged irregularities in the manner the ConEC decision of 24 October 2005 had been reached, and failed to invite and question those ConEC members without any explanation.

42. The foregoing considerations are sufficient to enable the Court to conclude that the interference with the applicant's electoral rights fell short of the standards required by Article 3 of Protocol No. 1. In particular, the applicant's disqualification from running for election was not based on sufficient and relevant evidence, the procedures of the electoral commission and the domestic courts did not afford the applicant sufficient guarantees against arbitrariness, and the domestic authorities' decisions lacked sufficient reasoning and were arbitrary.

43. There has accordingly been a violation of Article 3 of Protocol No. 1 to the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

44. In conjunction with the above complaint, the applicant complained that his disqualification was a discriminatory measure based on his affiliation with the political opposition. He relied on Article 14 of the Convention, which provides as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

45. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

46. However, having regard to its above finding in relation to Article 3 of Protocol No. 1, the Court considers that it is not necessary to examine whether in this case there has been a violation of Article 14.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. 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

48. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

49. The Government considered that the amount claimed was excessive.

50. The Court considers that the applicant suffered non-pecuniary damage which cannot be compensated solely by the finding of the violation of Article 3 of Protocol No. 1. Ruling on an equitable basis, the Court awards him the sum of EUR 7,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

51. The applicant also claimed EUR 1,000 for the costs and expenses incurred before the Court.

52. The Government contested this claim, noting that it was not supported by any documentary evidence.

53. The Court points out that under Rule 60 of the Rules of the Court, any claim for just satisfaction must be itemised and submitted in writing

together with the relevant supporting documents, failing which the Court may reject the claim in whole or in part. The applicant failed to submit any documents in support of his claim for costs and expenses, such as a contract for legal services or invoices relating to other expenses. Therefore, the Court makes no award in respect of costs and expenses.

C. Default interest

54. 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 3 of Protocol No. 1 to the Convention;

3. *Holds* that there is no need to examine separately the complaint under Article 14 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Azerbaijani manats at the rate applicable at the date of settlement;
   (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;

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

Done in English, and notified in writing on 21 February 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Nina Vajić
Registrar	President