



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

FIRST SECTION

CASE OF ABBASOV v. AZERBAIJAN

(Application no. 24271/05)

JUDGMENT

STRASBOURG

17 January 2008

FINAL

17/04/2008

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Abbasov v. Azerbaijan,

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

Christos Rozakis, *President*,

Loukis Loucaides,

Nina Vajić,

Khanlar Hajiyeu,

Dean Spielmann,

Sverre Erik Jebens,

Giorgio Malinverni, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 11 December 2007,

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

PROCEDURE

1. The case originated in an application (no. 24271/05) 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 Elchin Nariman oglu Abbasov (*Elçin Nəriman oğlu Abbasov* – “the applicant”), on 30 May 2005.

2. The applicant, who had been granted legal aid, was represented by Mr E. Zeynalov. The Azerbaijani Government (“the Government”) were represented by their Agent, Mr C. Asgarov.

3. The applicant alleged, in particular, that his right to a fair hearing was breached as a result of the Supreme Court's failure to send him a summons to attend the hearing of his appeal.

4. On 24 October 2006 the Court declared the application partly inadmissible and decided to communicate the complaint concerning the applicant's absence from the appeal hearing to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the complaint at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicant's original conviction and release

5. The applicant was born in 1964 in Dashkesan, Azerbaijan, and currently lives in Russia.

6. The applicant was a unit commander in the Azerbaijani Army. On 7 October 1994 he was arrested in Ganja, Azerbaijan, due to his alleged participation in the *coup d'Etat* organised by S. Huseynov.

7. On 31 July 1996 the Supreme Court, sitting as a court of first instance for especially serious crimes, convicted the applicant for high treason, use of armed forces against the citizens and constitutional government authorities, creation of illegal armed units, and illegal possession of weapons. He was sentenced to thirteen years' imprisonment and confiscation of property. This judgment was final and not subject to appeal under the rules of criminal procedure applicable at that time.

8. Upon Azerbaijan's admission to the Council of Europe, the applicant's name was included in the lists of the “alleged political prisoners in Azerbaijan” submitted to the experts of the Secretary General.

9. Pursuant to a presidential pardon decree of 18 October 2002, the applicant's sentence was reduced by half.

10. Pursuant to another presidential pardon decree of 28 August 2003, the applicant was released from serving the remainder of his sentence. As the applicant was no longer imprisoned, no final opinion was adopted by the experts of the Secretary General on whether he could be considered as a political prisoner.

B. Cassation proceedings

11. In 2000 a new Code of Criminal Procedure (“the CCrP”) and new Criminal Code of the Republic of Azerbaijan were adopted. Before the new CCrP's entry into force on 1 September 2000, on 14 July 2000 Parliament passed a transitional law allowing the lodging of an appeal under the new CCrP against the final judgments delivered in accordance with the old criminal procedure rules (“the Transitional Law”).

12. On 11 August 2004 the applicant, using the opportunity granted to him by the Transitional Law, filed a cassation appeal against the judgment of 31 July 1996 with the Supreme Court. On 17 August 2004 the Supreme

Court refused to accept the appeal due to the applicant's failure to enclose a copy of the challenged judgment.

13. On 4 October 2004 the applicant again filed the cassation appeal, which was registered by the Supreme Court on 6 October 2004. In his appeal he noted that, although he had been pardoned and released from imprisonment, his conviction for high treason remained intact. He argued that his trial by the first-instance court had been unfair. He also argued that, under the new Criminal Code the actions for which he had been convicted could not be qualified as "high treason". He asked the court to quash the judgment of 31 July 1996.

14. According to the Government, on 15 October 2004 the Supreme Court "informed the applicant that the appeal hearings concerning his case would be held on 7 December 2004". According to the applicant, he did not receive any such summons and, in general, did not receive any information concerning his case for several months.

15. On 27 January 2005 the applicant wrote a letter to the Supreme Court inquiring about the status of the proceedings. He also requested to add an issue concerning the confiscation of property to his appeal. In reply, by a letter dated 15 February 2005, the Head of the Registry of the Supreme Court informed the applicant that the court had not received from him any documents in this respect.

16. On 5 April 2005 the applicant was sent a copy of the Supreme Court decision concerning his case, dated 7 December 2004. The applicant was informed that on 7 December 2004 the Supreme Court had examined his cassation complaint in the presence of a public prosecutor but in the absence of the applicant. The judgment was silent as to the reasons for holding the hearing in the applicant's absence. During the hearing, the prosecutor asked the court to dismiss the appeal. The court found that the applicant's guilt had been duly established during the trial in the first-instance court and that his actions had been properly qualified under the criminal law. Accordingly, the court dismissed the applicant's appeal as being unsubstantiated.

II. RELEVANT DOMESTIC LAW

17. In accordance with the Law of 14 July 2000 on the Adoption and Entry into Force of the Code of Criminal Procedure of the Republic of Azerbaijan ("the Transitional Law"), judgments and other final decisions delivered by first instance courts under the old CCrP before the entry into force of the new CCrP, may be reconsidered by an appellate court or the Supreme Court in accordance with the relevant provisions of the new CCrP.

18. In accordance with Article 415.0.3 of the new CCrP, the Supreme Court may leave the cassation appeal unexamined if the person lodging the appeal fails to attach to his appeal a copy of the disputed judgment or decision.

19. A cassation appeal lodged with the Supreme Court is transmitted to one of the judges of the relevant chamber of the Supreme Court for preliminary examination (Article 418.1 of the CCrP). Within three days of receiving the appeal, the judge carrying out the preliminary examination of the appeal must, *inter alia*, inform the public prosecutor, the convicted (or acquitted) person and other parties to the case or interested parties about the time and place of examination of the merits of the appeal (Articles 418.2 and 418.2.7 of the CCrP).

20. When examining the merits of the appeal, the Supreme Court deals only with the points of law and verifies whether rules of criminal law and criminal procedure had been applied correctly (Article 419.1 of the CCrP). The examination on the merits is carried out by a chamber composed of three judges. The persons having a right to lodge an appeal and the public prosecutor representing the prosecution before the Supreme Court have the right to be present at the court hearing (Article 419.2 of the CCrP).

21. The Supreme Court hearing is opened by the president of the chamber who announces which court decision will be examined and on what grounds, the composition of the chamber examining the case, and which of the parties to the criminal proceedings are present at the hearing. The absence of the person who has lodged the appeal, if he has been duly informed about the hearing, does not prevent the Supreme Court from deciding to proceed with the hearing in his or her absence (Article 419.4 of the CCrP).

THE LAW

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

22. The applicant complained under Article 6 § 1 of the Convention that he had not been informed about the hearing of his cassation appeal on 7 December 2004 before the Supreme Court and that, therefore, he could not be present at the hearing. He also complained under Article 6 § 3 (b) and (c) of the Convention that, in such circumstances, he had been unable to organise a proper defence, to defend himself in person or to seek to be represented by a State-appointed lawyer during the hearing.

23. The Court reiterates that the guarantees contained in Article 6 § 3 are constituent elements, among others, of the general notion of a fair trial (see *Colozza v. Italy*, judgment of 12 February 1985, Series A no. 89, p. 14, § 26). In the circumstances of the present case, the Court considers that, while also having regard to those guarantees, it should examine the complaint under Article 6 § 1, which provides as follows:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal...”

A. Admissibility

24. The Court observes that the applicant's original trial was outside the Court's temporal jurisdiction (see the partial decision on admissibility of 24 October 2006) and that, at the time of his conviction, there was no appeal available to him under the old rules of criminal procedure. The new CCrP and the Transitional Law, adopted after the applicant's conviction, afforded the applicant the possibility to file an appeal under the new rules of criminal procedure against the final judgment delivered under the old rules of criminal procedure. In this connection, the Court recalls its finding that Article 6 of the Convention is applicable to appeals in criminal cases lodged in accordance with the Transitional Law (see *Hajiyev v. Azerbaijan*, no. 5548/03, § 32, 16 November 2006).

25. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It is not inadmissible on any other grounds and must therefore be declared admissible.

B. Merits

1. The parties' submissions

26. The Government submitted that, in accordance with Article 419.4 of the CCrP, if the applicant had been duly informed about the hearing, his failure to attend the hearing could not prevent it from taking place in his absence. The Government argued that the applicant had been duly informed about the date of the hearing. They produced a copy of the summons signed by the Deputy President of the Supreme Court, addressed to the applicant and dated 15 October 2004. The summons stated that the hearing would be held at 10 a.m. on 7 December 2004.

27. The applicant maintained that he had not received the summons. He argued that, as a result of this, he had been deprived of the right to adversarial proceedings.

2. The Court's assessment

28. The Court notes that it was undisputed by the parties that on 7 December 2004 the Supreme Court heard the applicant's cassation appeal in his absence. The parties, however, were in dispute whether the applicant had been duly informed about this hearing in advance.

29. Although the Government produced a copy of the summons issued on 15 October 2004, the Court notes that this summons was not post-marked and the Government put forward no other evidence that it had actually been sent to the applicant or otherwise delivered to him. In these circumstances, the Court is not persuaded by the evidence submitted by the Government in support of their contention that the applicant had been duly summoned to the hearing (compare with *Metelitsa v. Russia*, no. 33132/02, § 33, 22 June 2006).

30. The Court reiterates that the concept of a fair trial includes the principle of equality of arms and the fundamental right that criminal proceedings should be adversarial. This means that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence presented by the other party (see *Brandstetter v. Austria*, judgment of 28 August 1991, Series A no. 211, p. 27, §§ 66-67).

31. Moreover, Article 6 of the Convention, taken as a whole, guarantees that a person charged with a criminal offence should, as a general principle, be entitled to be present and participate effectively in the hearing concerning the determination of criminal charges against him. This right is implicit in the very notion of an adversarial procedure and can also be derived from the guarantees contained in sub-paragraphs (c), (d) and (e) of paragraph 3 of Article 6 (see *Colozza*, cited above, p. 14, § 27, and *Stanford v. the United Kingdom*, judgment of 23 February 1994, Series A no. 282-A, pp. 10-11, § 26). It is difficult to see in the present case how the applicant could have exercised these rights without having prior notice of the hearing.

32. Furthermore, the Court notes that a public prosecutor was present at the appeal hearing and made oral submissions to the court. These submissions were directed at having the applicant's appeal dismissed and his conviction upheld. In such circumstances and having regard to the fact that the applicant was not legally represented, it was incumbent on the Supreme Court to take measures aimed at ensuring the applicant's presence in order to maintain the adversarial character of the proceedings. However, there is no indication that the Supreme Court, while deciding to proceed with the hearing in the applicant's absence, verified whether the summons had indeed been served on the applicant. The Supreme Court's decision was silent on the issue of the applicant's absence from the hearing.

33. The Court further recalls that, in certain cases, it found that the presence in person of the accused at a hearing of an appeal where only points of law were considered was not crucial (see, for example, *Kremzow v. Austria*, judgment of 21 September 1993, Series A no. 268-B, and *Kamasinski v. Austria*, judgment of 19 December 1989, Series A no. 168). The Court considers, however, that the present case is distinguishable from the *Kremzow* and *Kamasinski* cases, where the accused persons were represented by lawyers and in principle each had the possibility to organise

his defence. In the present case, more fundamentally, the applicant was unable to do this because he had no prior notice of the hearing (compare with *Ziliberberg v. Moldova*, no. 61821/00, § 41, 1 February 2005).

34. It follows that the proceedings before the Supreme Court did not comply with the requirement of fairness. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. ARTICLES 46 AND 41 OF THE CONVENTION

A. Article 46 of the Convention

35. Article 46 of the Convention provides:

“1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.”

36. The Court reiterates that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention (see, among other authorities, *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV, and *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII).

37. However, exceptionally, with a view to helping the respondent State to fulfil its obligations under Article 46, the Court will seek to indicate the type of measure that might be taken in order to put an end to a systemic situation it has found to exist. In such circumstances, it may propose various options and leave the choice of measure and its implementation to the discretion of the State concerned (see, for example, *Broniowski v. Poland* [GC], no. 31443/96, § 194, ECHR 2004-V). In other exceptional cases, the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate only one such measure (see, for example, *Assanidze v. Georgia* [GC], no. 71503/01, § 202, ECHR 2004-II).

38. Furthermore, in a number of cases concerning an infringement of the right to take part in the trial, the Court has held that the most appropriate form of redress for a breach of the fairness requirements of Article 6 would be for the applicant to be given a retrial (see, among other authorities, *Somogyi v. Italy*, no. 67972/01, § 86, ECHR 2004-IV, and *Sejdovic v. Italy* [GC], no. 56581/00, § 126, ECHR 2006-...). A similar position was adopted in cases concerning an infringement of the right to examine prosecution

witnesses (see *Bracci v. Italy*, no. 36822/02, § 75, 13 October 2005) and cases where the applicants had been convicted by courts that did not meet the Convention requirements of independence and impartiality (see, among other authorities, *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003; *Tahir Duran v. Turkey*, no. 40997/98, § 23, 29 January 2004; and *Öcalan*, cited above, § 210).

39. The Court observes that in the present case, unlike the cases cited in the above paragraph, the breach of Article 6 was found to take place at the appeal stage of the proceedings and not at the trial stage when the applicant was originally convicted. However, in the particular circumstances of the present case, the Court finds, for the following reasons, that this distinguishing element is not of major importance.

40. The Court reiterates that the issue of the fairness of the applicant's trial by the first instance court was found to fall outside the Court's competence *ratione temporis*. However, despite being precluded from deciding on that issue, the Court cannot ignore the fact that the applicant was included in the list of "alleged political prisoners" submitted to the experts of the Secretary General upon Azerbaijan's accession to the Council of Europe, indicating that there were certain doubts as to the fairness of the applicant's conviction in 1996. The subsequent amendments to the Azerbaijani law on criminal procedure granted the applicant a right of appeal and it became the only procedural option available to the applicant at the domestic level to have his conviction reviewed and to advance his arguments concerning its alleged unfairness. As the applicant lodged such an appeal after the Convention's entry into force, the domestic authorities, and in particular the Supreme Court, must have been especially diligent in ensuring that all the fairness guarantees of Article 6 be observed during the examination of his appeal.

41. As it was found above, the proceedings before the Supreme Court did not comply with requirement of fairness as the applicant was deprived of the opportunity to exercise any of his rights under Article 6 of the Convention. In such circumstances, the Court considers that a retrial or the reopening of the case, if requested, represents in principle an appropriate way of redressing the violation in the present case.

42. It is not for the Court to indicate how any new trial (or re-examination of the applicant's appeal) is to proceed and what form it is to take. The respondent State remains free, subject to monitoring by the Committee of Ministers, to choose the means by which it will discharge its obligation to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded (see *Piersack v. Belgium* (Article 50), judgment of 26 October 1984, Series A no. 85, p. 16, § 12), provided that such means are compatible with the conclusions set out in the Court's judgment (see *Assanidze*, cited above, § 202, with further references).

B. Article 41 of the Convention

43. 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.”

1. Damage

44. The applicant claimed 2,500 euros (EUR) in respect of pecuniary damage. He assessed this to be the value of the property confiscated from him pursuant to the judgment of 31 July 1996. He argued that a fair examination of his appeal by the Supreme Court would have resulted in a “re-characterisation” of his conviction under the relevant provisions of the new Criminal Code of 2000 which, unlike the old Code, did not prescribe confiscation of property as a criminal punishment. The applicant also claimed EUR 3,000 in respect of non-pecuniary damage.

45. The Government did not comment.

46. As to the claim in respect of pecuniary damage, the Court cannot speculate as to what the outcome of the proceedings at issue might have been if the violation of the Convention had not occurred. It therefore rejects this claim.

47. With regard to non-pecuniary damage, the Court considers that the violation of the applicant's right to a fair trial must have been frustrating for him. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant EUR 1,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on this amount.

2. Costs and expenses

48. Being satisfied with the amount of the legal aid received from the Council of Europe, the applicant did not make a claim in respect of costs and expenses. Accordingly, there is no call to award him any amount under this head.

3. Default interest

49. The Court considers it appropriate that the default interest 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 remainder of the application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,000 (one thousand euros) in respect of non-pecuniary damage, to be converted into the national currency at the rate applicable at the date of settlement, plus any tax that may be chargeable on this amount;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 17 January 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President