



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

1959 · 50 · 2009

FIRST SECTION

CASE OF MAKSIMOV v. AZERBAIJAN

(Application no. 38228/05)

JUDGMENT

STRASBOURG

8 October 2009

FINAL

08/01/2010

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 Maksimov v. Azerbaijan,

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

Nina Vajić, *President*,
Anatoly Kovler,
Elisabeth Steiner,
Khanlar Hajiyeu,
Dean Spielmann,
Sverre Erik Jebens,
Giorgio Malinverni, *judges*,

and André Wampach, *Deputy Section Registrar*,

Having deliberated in private on 17 September 2009,

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

PROCEDURE

1. The case originated in an application (no. 38228/05) 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 Rahib Shaval oglu Maksimov (*Rahib Şaval oğlu Məhsimov* – “the applicant”), on 12 October 2005.

2. The applicant, who had been granted legal aid, was represented by Mr E. Osmanov, 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 his right to a fair trial had been breached as a result of the domestic courts' failure to send him a summons to attend the hearings of his cassation and additional cassation appeals.

4. On 1 February 2007 the Court declared the application partly inadmissible and decided to communicate the complaint concerning the applicant's absence from the appeal hearings to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicant's original conviction and commutation of death penalty to life imprisonment

5. The applicant was born in 1961 in Gusar, Azerbaijan, and is currently serving a life sentence in Gobustan Prison.

6. The applicant is an Azerbaijani national of Lezgi ethnic origin. He was a member of “Sadval” which was considered by its members a Lezgi welfare and cultural organisation. The organisation, however, has also been accused of harbouring extreme nationalist and separatist ideas.

7. In 1994 the applicant was arrested and brought to trial as one of the planners and perpetrators of a bomb attack in the Baku Metro (underground railway system), which had been carried out on 19 March 1994. As a result of this attack, fourteen people died and fifty people received bodily injuries of various degrees. The applicant was also accused of cultivating narcotic plants in his garden.

8. On 3 May 1996 the Supreme Court, sitting as a court of first instance for especially serious crimes, found that the applicant, together with the other accused persons, was guilty, *inter alia*, of creating an anti-government organised criminal group which had planned and carried out a bomb explosion in the Baku Metro which had resulted in numerous casualties among the civilian population. The court convicted the applicant under Articles 15, 17, 61, 65 and 227 of the Criminal Code of 1960, which was in force at that time, and sentenced him to death with confiscation of property. This judgment was final and not subject to appeal under the rules of criminal procedure applicable at that time.

9. On 10 February 1998 the Milli Majlis (Parliament) adopted the Law on Amendments to the Criminal Code, Code of Criminal Procedure and Correctional Labour Code of the Republic of Azerbaijan in Connection with the Abolition of the Death Penalty in the Republic of Azerbaijan (“the Law of 10 February 1998”). The Law of 10 February 1998 amended all the relevant domestic legal provisions, replacing the death penalty with life imprisonment. Pursuant to this law, the penalties of all convicts sentenced to death, including the applicant, were automatically commuted to life imprisonment.

B. Cassation proceedings in the Supreme Court

10. In 2000 a new Code of Criminal Procedure (“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 final first-instance judgments delivered in accordance with the old criminal procedure rules (“the Transitional Law”).

11. The applicant attempted to use the opportunity provided to him by the Transitional Law and on 4 August 2004 lodged a cassation appeal with the Supreme Court. He drafted this appeal himself, without any legal assistance. In his appeal, he claimed that his conviction on 3 May 1996 had been unfair.

12. According to the Government, on 22 March 2005 the Supreme Court “informed the applicant that the appeal hearing concerning his case would be held on 12 April 2005”. 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.

13. In the meantime, the applicant's relatives hired a lawyer who prepared a new draft of the cassation appeal on behalf of the applicant and submitted it to the Supreme Court on 26 May 2005.

14. However, by a letter of 14 June 2005, the Supreme Court informed the lawyer that on 12 April 2005 it had already held a hearing and examined the applicant's original cassation appeal of 4 August 2004.

15. By a letter of 21 June 2005 the Supreme Court sent the applicant the full copy of the Supreme Court's decision of 12 April 2005. According to this decision the court found that the applicant's guilt had been duly established during the trial in the first-instance court. The court dismissed the applicant's appeal as unsubstantiated.

C. Additional cassation proceedings in the Plenum of the Supreme Court

16. On 8 July 2005 the applicant lodged an additional cassation appeal with the President of the Supreme Court, asking that the case be reopened and referred to the Plenum of the Supreme Court. This request was granted.

17. In his additional cassation appeal, the applicant argued, *inter alia*, that his conviction had been unfair and that his death penalty should have been commuted to a fixed-term prison sentence of up to fifteen years. He also claimed that his conviction under Article 61 (“Sabotage”) of the Criminal Code of 1960 should be “re-characterised” under Article 282 (“Sabotage”) of the Criminal Code of 2000, according to which the maximum sentence was fifteen years' imprisonment.

18. According to the Government, on 10 November 2005 the Supreme Court “informed the applicant and his lawyer that the hearing of the Plenum of the Supreme Court concerning this case would be held on 24 November 2005”. According to the applicant and his lawyer, they did not receive any such summons and, in general, did not receive any information concerning the case for several months.

19. On 24 November 2005 the Plenum of the Supreme Court dismissed the applicant's additional cassation appeal in the part concerning the fairness of his conviction and the lawfulness of commutation of the death penalty to life imprisonment. On the other hand, the Plenum accepted that, due to changes in the substance of certain criminal offences under the Criminal Code of 2000, the applicant's convictions should be “re-characterised”. However, the Plenum left his sentence of life imprisonment intact.

II. RELEVANT DOMESTIC LAW

20. 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.

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

22. 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).

23. When examining the merits of the appeal, the Supreme Court deals only with the points of law and checks whether the rules of criminal law and criminal procedure have 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).

24. 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).

25. Upon the request of the President of the Supreme Court, submissions, appeals or protests against decisions of the Supreme Court of the Republic of Azerbaijan may be reviewed by the Plenum of the Supreme Court of the Republic of Azerbaijan under the procedure of additional cassation. In the event of examination of a case under this procedure, the parties in the proceedings should be informed of the date and place of the Plenum's hearing at least ten days in advance (Article 427.2 of the CCrP).

26. After opening the hearing, the President of the Plenum announces which court decision will be examined and on what grounds 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 Plenum of the Supreme Court from deciding to proceed with the hearing in his or her absence (Article 427.3.2 of the CCrP).

27. According to Article 455 of the CCrP, finding of a violation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms by the European Court of Human Rights is a ground for reopening of the proceedings. Pursuant to Article 456, in this case, the Plenum of the Supreme Court examines this case exclusively on the points of law. After the examination of the case, the Plenum of the Supreme Court may decide to quash the lower courts' rulings and remit the case to the relevant lower court, or to vary the decision of the courts of cassation or additional cassation instances, or to quash the decision of the courts of cassation or additional cassation instances and deliver a new decision (Article 459 of the CCrP).

28. According to Article 83 of the Code on Execution of Sentences, letters addressed to the prisoners should be delivered to the concerned prisoners within three days after the receipt of these letters by the administration of the penitentiary establishment. The prisoners are notified of the telegrams immediately by the administration of the penitentiary establishment.

THE LAW

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

29. The applicant complained under Article 6 § 1 of the Convention that he had not been informed about the hearings of his cassation appeal on 12 April 2005 before the Supreme Court and of his additional cassation appeal on 24 November 2005 before the Plenum of the Supreme Court and that therefore he could not be present at these hearings. He also complained under Article 6 § 3 (c) of the Convention that he had been unable to defend himself in person or to seek to be represented by his lawyer during these hearings.

30. 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*, 12 February 1985, § 26, Series A no. 89). 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 (see *Abbasov v. Azerbaijan*, no. 24271/05, § 23, 17 January 2008), 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

31. The Court observes that the applicant's original trial was outside the Court's temporal jurisdiction (see the partial decision on admissibility of 1 February 2007) 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 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 reiterates its previous 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, and *Abbasov v. Azerbaijan*, cited above, § 24).

32. As to the proceedings in the Plenum of the Supreme Court, the Court has previously found that the additional cassation procedure in the Plenum of the Supreme Court did not constitute a remedy which applicants were normally required to use within the meaning of Article 35 § 1 of the Convention (see *Babayev v. Azerbaijan* (dec.), no. 36454/03, 27 May 2004). However, the Court observes that in this case the applicant's additional

cassation appeal was declared admissible and examined on the points of law by the Plenum of the Supreme Court, which upheld the applicant's previous conviction (compare with *Ivanov v. Azerbaijan* (dec.), no. 34070/03, 15 February 2007). In such circumstances, whereas the Plenum examined the merits of the applicant's appeal (see, *a contrario*, *Babayev v. Azerbaijan*, cited above), the Court considers that in the present case Article 6 applied to these proceedings as well.

33. 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

34. The Government submitted that, in accordance with Articles 419.4 and 427.3.2 of the CCrP, if the applicant had been duly informed about the hearing, his failure to attend the hearings before the Supreme Court and the Plenum of the Supreme Court could not prevent them from taking place in his absence. The Government argued that the applicant had been duly informed about the date and place of the hearings. They produced a copy of the summons for the hearing before the Supreme Court signed by a judge of the Supreme Court, addressed to the applicant and dated 22 March 2005. The summons stated that the hearing would be held at 10 a.m. on 12 April 2005. The Government also produced a copy of the summons for the hearing before the Plenum of the Supreme Court signed by the Deputy President of the Supreme Court, addressed to the applicant and dated 10 November 2005. The summons stated that the hearing would be held at 10 a.m. on 24 November 2005.

35. 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

36. The Court notes that it was undisputed by the parties that on 12 April 2005 the Supreme Court and on 24 November 2005 the Plenum of the Supreme Court heard the applicant's cassation and additional cassation appeals in his absence. The parties, however, were in dispute whether the applicant had been duly informed about these hearings in advance.

37. Although the Government produced a copy of the summons issued on 22 March 2005 and on 10 November 2005, the Court notes that these summons were not postmarked and that 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 hearings or that the summons had otherwise been delivered to him (compare with *Abbasov v. Azerbaijan*, cited above, § 29, and *Metelitsa v. Russia*, no. 33132/02, § 33, 22 June 2006).

38. 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*, 28 August 1991, § 66-67, Series A no. 211).

39. 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, § 27, and *Stanford v. the United Kingdom*, 23 February 1994, § 26, Series A no. 282-A). It is difficult to see in the present case how the applicant could have exercised these rights without having prior notice of the hearing.

40. 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, checked whether the summons had indeed been served on the applicant. The decision of the Supreme Court was silent on the issue of the applicant's absence from the hearing.

41. The Court further observes that in certain cases it has 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*, 21 September 1993, Series A no. 268-B, and *Kamasinski v. Austria*, 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 opportunity to present his defence. In the present case, more fundamentally, the applicant was unable to do this because he had had no prior notice of the hearing (compare with *Ziliberg*

v. Moldova, no. 61821/00, § 41, 1 February 2005, and *Abbasov v. Azerbaijan*, cited above, § 33).

42. Likewise, the Court notes that the applicant was unable to exercise his rights under Article 6 of the Convention at the hearing before the Plenum of the Supreme Court, because he had not been duly informed of that hearing either.

43. It follows that the proceedings before the Supreme Court and the Plenum of 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. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. 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.”

45. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account.

46. However, the Court reiterates that when an applicant has been convicted despite a potential infringement of his rights as guaranteed by Article 6 of the Convention, he should, as far as possible, be put in the position in which he would have been had the requirements of that provision not been disregarded (see *Piersack v. Belgium* (Article 50), 26 October 1984, § 12, Series A no. 85). As was found above, the proceedings before the Supreme Court and the Supreme Court's Plenum did not comply with the requirements of fairness, as the applicant was deprived of the opportunity to exercise any of his rights under Article 6. In such circumstances, the most appropriate form of redress would, in principle, be the reopening of the cassation appeal proceedings provided by the Transitional law in due course, in order to guarantee the examination of his appeal in accordance with the requirements of Article 6 of the Convention (see, *mutatis mutandis*, *Somogyi v. Italy*, no. 67972/01, § 86, ECHR 2004-IV; *Shulepov v. Russia*, no. 15435/03, § 46, 26 June 2008; and *Abbasov*, cited above, §§ 41-42). The Court notes, in this connection, that Articles 455 and 456 of the Code of Criminal Procedure of the Republic of Azerbaijan provide that criminal proceedings may be reopened by the Plenum of the Supreme Court if the Court finds a violation of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;
2. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds*, by four votes to three, that the respondent State must take all measures to reopen the cassation appeal proceedings provided by the Transitional law;
4. *Holds*, unanimously, that there is no call to award any just satisfaction.

Done in English, and notified in writing on 8 October 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach
Deputy Registrar

Nina Vajić
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Judges Kovler, Steiner and Hajiyeu is annexed to this judgment.

N.A.V
A.M.W

PARTLY DISSENTING OPINION OF JUDGES KOVLER, STEINER AND HAJIYEV

We share the conclusions of the Chamber concerning the admissibility of the application and a violation of Article 6 § 1 of the Convention. However we do not agree with point 3 of the operative provisions for the following reasons.

On many occasions the Court, when declaring a violation of Article 6 § 1, has mentioned in its reasoning for the application of Article 41 of the Convention the possibilities afforded by national law of reopening criminal proceedings, leaving it to the discretion of the respondent State, but also of the applicant, to decide how to arrange this issue. Take, for example, two recent judgments delivered by the Chamber. In the *Abbasov* case the Court stated: “*As it was found above, the proceedings before the Supreme Court did not comply with the 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. 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)*” (*Abbasov v. Azerbaijan*, no. 24271/05, § 41-42, 17 January 2008).

In the *Shulepov* case similar conclusions were reached: “*The Court further reiterates that when an applicant has been convicted despite a potential infringement of his rights as guaranteed by Article 6 of the Convention, he should, as far as possible, be put in the position in which he would have been had the requirements of that provision not been disregarded, and that the most appropriate form of redress would, in principle, be trial de novo or the reopening of the proceedings, if requested (see Somogyi v. Italy, no. 67972/01, § 86, ECHR 2004-IV). The Court notes, in this connection, that Article 413 of the Code of Criminal Procedure of the Russian Federation provides that criminal proceedings may be reopened if the Court finds a violation of the Convention*” (*Shulepov v. Russia*, no. 15435/03, § 46, 26 June 2008).

We are satisfied that the Chamber followed this tradition in the present case (see the conclusions in paragraph 46).

The present case is not a “pilot judgment”, unlike *Broniowski*, *Hutten-Czapska*, *Burdov-2* and some others where the Court dealt with so-called “structural problems” and indicated specific measures to the respondent States to remedy those problems (see, for example, *Broniowski v. Poland*, no. 31443/96 [G.C.], § 4 of the operative provisions, 22 June 2004, ECHR 2004-V). In another category of cases, concerning detention, the Court called for the immediate release of the applicants (see, for example, *Assanidze v. Georgia*, no. 71503/01 [G.C.], § 14 of the operative provisions, 8 April 2004, ECHR 2004-II). Lastly, in the operative provisions of judgments in so-called non-enforcement cases the Court has required the respondent States “to secure by appropriate means the enforcement of the award made by the domestic court” (see, for example, *Poznakhizina v. Russia*, no. 25964/02, 24 February 2005). The *Maksimov* case does not fall into any of the above-mentioned categories.

In the present case the Chamber overstepped existing practice concerning only a restricted number of cases, broadening it to a wide category of “fair trial” cases, a step which only a Grand Chamber judgment should endorse. For these reasons we are not ready “to run before the train”.