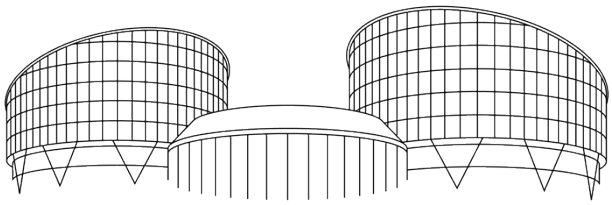

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF MAMMAD MAMMADOV v. AZERBAIJAN

(Application no. 38073/06)

JUDGMENT

STRASBOURG

11 October 2011

FINAL

11/01/2012

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

In the case of Mammad Mammadov v. Azerbaijan**,**

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

Nina Vajić, *President,*
Anatoly Kovler,
Peer Lorenzen,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Erik Møse, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 20 September 2011,

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

PROCEDURE

1. The case originated in an application (no. 38073/06) 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 Mammad Ali Oglu Mammadov ("*Məmməd Əli oğlu Məmmədov* – the applicant"), on 6 September 2006.

2. The applicant was represented by Mr E. Zeynalov, 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 Supreme Court's failure to send him a summons to attend the hearing of his cassation appeal. The applicant also complained about his absence from the hearing before the Court of Appeal. He further complained that the conditions of his detention in Gobustant Prison had amounted to ill-treatment.

4. On 17 November 2009 the President of the First Section decided to give notice of the application 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 1983 and lives in Baku.
6. He is currently serving a life sentence in Gobustan Prison.

A. The applicant's criminal conviction

7. In the period from March to December 2001 the applicant, as a member of a small group of "volunteers" from Azerbaijan, underwent military training organised by Chechen militants based in Georgia's Pankissi Gorge. The aim of this training was subsequent participation in insurgent operations against the Russian Federal forces in Chechnya.

8. The applicant returned to Baku in December 2001. On 27 December 2001 he was arrested. On 17 May 2002 the Assize Court convicted him of forming an illegal armed group under Article 279.1 of the Criminal Code and gave him a suspended sentence of four years' imprisonment.

9. On 12 August 2003 the applicant was arrested again. On 12 April 2004 he was indicted in the Assize Court on charges of premeditated aggravated murder, firearms smuggling, illegal possession of firearms, creation of an illegal armed group, and illegal border crossing under Articles 29, 120, 206, 228, 279 and 318 of the Criminal Code.

10. On 17 June 2004 the Assize Court found the applicant guilty as charged and sentenced him to life imprisonment.

11. On 6 July 2004 the applicant appealed against this judgment. He complained, in particular, that the facts of the case had not been assessed correctly, that he had not intended to kill law-enforcement officers and that the Assize Court had erred in applying and interpreting the criminal law.

12. On 20 August 2004 the Court of Appeal dismissed his appeal and upheld the first-instance judgment. The appeal hearing was held in the applicant's absence. His lawyer was present.

13. On 24 December 2005 the applicant lodged a cassation appeal. He reiterated his previous complaints claiming the misapplication of the relevant criminal law. He did not complain about his absence from the hearing before the Court of Appeal.

14. On 14 March 2006 the Supreme Court held a hearing in the presence of the public prosecutor. The applicant and his lawyer had not been summoned to that hearing. The Supreme Court upheld the lower courts' judgments.

B. The conditions of the applicant's detention in Gobustan Prison

1. The applicant's version of the conditions of his detention

15. The applicant is held, together with one other inmate, in a cell measuring 5.25 x 2.80 metres. The cell has two beds, a small bedside cupboard, and one small table and two chairs fixed to the cell floor. The toilet area is separated from the rest of the cell. The floor and ceiling are made of stone and concrete respectively. The temperature inside the cell is very high in summer and very low in winter. Central heating is available, but insufficient.

16. The window with metal bars has no windowpane in it and, in winter, is closed with a transparent polyethylene film. The air inside is stale and the cell cannot be naturally ventilated. The food served in the prison is often of poor quality and lacks sufficient meat and vitamins, and the menu is unvaried and monotonous. The inmates are only allowed thirty to forty minutes of outdoor exercise per day.

2. The Government's version of the conditions of the applicant's detention

17. The applicant's cell is assigned to two inmates and measures 5.25 x 2.80 metres. The conditions of the applicant's detention meet all national and international requirements and standards. The window of the cell can be opened from the inside. The window is large enough and does not prevent natural light and fresh air from coming in. The cell is also equipped with electric lamps, a ventilator and a radio set.

18. Since June 2008 the prisoners have had the right to watch TV for four hours per day and for six hours per day at weekends and on holidays. The prison has a library accessible to the prisoners. Sanitary conditions are normal and the food served is of good quality. The applicant has the right to one hour of outdoor exercise per day.

II. RELEVANT DOMESTIC LAW

19. The relevant provisions of domestic law concerning proceedings before the Supreme Court are described in detail in the Court's judgments in *Maksimov v. Azerbaijan* (no. 38228/05, §§ 22-24, 8 October 2009) and *Abbasov v. Azerbaijan* (no. 24271/05, §§ 19-21, 17 January 2008).

THE LAW

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

20. The applicant complained under Article 6 § 1 of the Convention that he had not been informed of the hearing of his cassation appeal on 14 March 2006 before the Supreme Court. He also complained that the hearing before the Court of Appeal on 20 August 2004 had been held in his absence. The relevant part of Article 6 § 1 of the Convention reads as follows:

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

A. Admissibility

21. The Government argued that the applicant had failed to exhaust domestic remedies in respect of his complaint concerning his absence from the hearing before the Court of Appeal. In particular, the Government alleged that the applicant had not raised this complaint in his cassation appeal to the Supreme Court. The Government did not comment on the applicant's and his lawyer's absence from the hearing before the Supreme Court.

22. The applicant disagreed with the Government and maintained his complaints.

23. As to the applicant's complaint concerning his absence from the hearing before the Court of Appeal, the Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 of the Convention obliges those seeking to bring their case against the State before the Court to first use the remedies provided by the national legal system, thus dispensing the States from answering before an international body for their actions before they have had an opportunity to put matters right through their own legal systems. In order to comply with this rule, normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged (see *Aksoy v. Turkey*, 18 December 1996, §§ 51-52, *Reports of Judgments and Decisions* 1996-VI, and *Akdivar and Others v. Turkey*, 16 September 1996, §§ 65-66, *Reports* 1996-IV).

24. In the present case, the Court observes that the applicant's lawyer did not raise a complaint in this regard at the hearing before the Court of Appeal. The applicant also failed to raise such a complaint in his cassation appeal to the Supreme Court, which upheld the Court of Appeal's judgment

on 14 March 2006. Moreover, he has never properly raised this complaint before any other domestic authority at any other time.

25. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

26. As to the applicant's complaint concerning the Supreme Court's failure to inform him of the hearing of his cassation appeal, 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

27. The Government did not comment on the applicant's complaint.

28. The applicant maintained that he and his lawyer had not been informed of the date and place of the hearing before the Supreme Court.

2. The Court's assessment

29. The Court notes that it was undisputed by the parties that on 14 March 2006 the Supreme Court heard the applicant's cassation appeal in his and his lawyer's absence.

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

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 the 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 v. Italy*, 12 February 1985, § 27, Series A no. 89, 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.

32. Furthermore, the Court notes that a public prosecutor was present at the hearing before the Supreme Court and made oral submissions to that 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's lawyer was not present, 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 applicant and his lawyer had been informed of the hearing. The decision of the Supreme Court was silent on the issue of the applicant's absence from the hearing.

33. The Court further observes that in certain cases it has found that the personal presence 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 cases of *Kremzow* and *Kamasinski*, where the accused persons were represented by lawyers and where, 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 *Ziliberberg v. Moldova*, no. 61821/00, § 41, 1 February 2005; *Maksimov*, cited above, § 41; and *Abbasov*, cited above, § 33).

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. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

A. Article 3 of the Convention

35. The applicant complained that the conditions of his detention had been harsh and had amounted to ill-treatment.

36. The Government submitted that the applicant had failed to exhaust the domestic remedies in respect of his complaint concerning the conditions of his detention in prison. The Government also rejected the applicant's allegations concerning the conditions of his detention in Gobustan Prison as unsubstantiated.

37. The Court reiterates its view as set out in § 23 above. The Court observes that the applicant has never raised the complaint concerning the conditions of his detention before any domestic authority. Moreover, the applicant did not submit whether there were special circumstances in the present case which would dispense him from the obligation to complain about the conditions of his detention before the domestic authorities or courts. In similar cases concerning the conditions of an applicant's detention, the Court has already found that mere doubts about the

effectiveness of a remedy are not sufficient to dispense with the requirement to make normal use of the available avenues for redress (see *Mammadov v. Azerbaijan*, no. 34445/04, § 52, 11 January 2007, and *Kunqurova v. Azerbaijan* (dec.), no. 5117/03, 3 June 2005).

38. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

B. Articles 3, 5, 6, 13 and 14 of the Convention

39. The applicant complained that he had been ill-treated following his arrest by law-enforcement officers and that he had been arrested in an unlawful manner. The applicant also complained that the domestic courts had been biased and that the hearings in his case had not been public. He further complained that domestic remedies had been ineffective and that he had been discriminated against.

40. 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 (a) as manifestly ill-founded and must be rejected pursuant to Article 35 § 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. 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

42. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

43. The Government did not comment on the applicant's claim.

44. The Court considers that the applicant has suffered non-pecuniary damage which cannot be compensated solely by the finding of a violation and that compensation should thus be awarded. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant the sum of 4,800 EUR under this head, plus any tax that may be chargeable on this amount.

45. 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 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 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; *Maksimov*, cited above, § 46; 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.

B. Costs and expenses

46. The applicant also claimed EUR 2,000 for costs and expenses incurred before the Court. This claim was not itemised or supported by any documents.

47. The Government did not comment on the applicant's claim.

48. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, having regard to the fact that the applicant failed to produce any supporting documents, the Court dismisses the claim for costs and expenses.

C. Default interest

49. 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 complaint under Article 6 § 1 concerning the applicant's absence from the hearing before the Supreme Court admissible and the remainder of the application inadmissible;

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 4,800 (four thousand and eight hundred euros) in respect of non-pecuniary damage, plus any tax that may be chargeable to the applicant on that amount, which is to be converted into new Azerbaijani manats at the rate applicable on 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;

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

Done in English, and notified in writing on 11 October 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Nina Vajić
Registrar	President