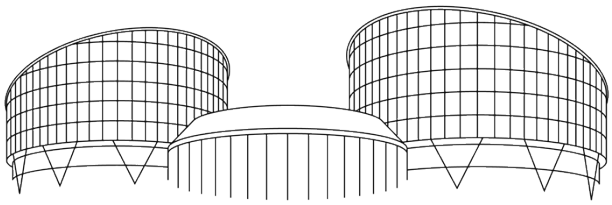

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF PASHAYEV v. AZERBAIJAN

(Application no. 36084/06)

JUDGMENT

STRASBOURG

28 February 2012

FINAL

28/05/2012

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

In the case of Pashayev 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 7 February 2012,

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

PROCEDURE

1. The case originated in an application (no. 36084/06) 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 Chingiz Amirhamza Oglu Pashayev ("*Çingiz Əmirhəmzə oğlu Paşayev* - the applicant"), on 4 August 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 the conditions of his detention were harsh and that he had been denied adequate medical assistance in prison. He argued that domestic proceedings concerning the alleged lack of medical assistance had been held in his absence. The applicant further alleged that his right of access to court and right of appeal in criminal matters had been violated by the domestic courts' failure to examine the appeal against his criminal conviction.

4. On 24 September 2009 the Court declared the application partly inadmissible and decided to communicate the complaint to the Government concerning the conditions of the applicant's detention, lack of medical assistance, unfairness of the civil proceedings and the domestic courts' failure to examine the applicant's appeal against his criminal conviction. It 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 1957 in Baku and is currently serving a life sentence in Gobustan Prison.

A. The applicant's criminal conviction and commutation of his sentence

6. The applicant was a member of an organised criminal group which committed a series of robberies and murders in the Azerbaijan SSR, Russian SFSR and Georgian SSR between 1987 and 1989.

7. On 12 November 1991 the Supreme Court of Azerbaijan, sitting as the court of first instance, convicted the applicant of involvement in organised crime and premeditated murder. By way of a merger of sentences, the applicant was sentenced to death and confiscation of property. Being a decision of the highest tribunal, this judgment was final and was not subject to appeal at the material time.

8. Following the conviction, the applicant was transferred to the 5th wing of Bayil Prison, designated for convicts sentenced to death. Despite the existence of the death penalty as a form of punishment under the criminal law applicable at that time, the Azerbaijani authorities had pursued a *de facto* policy of a moratorium on the execution of the death penalty from June 1993 until the abolition of the death penalty in 1998.

9. On 10 February 1998 Parliament passed 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"), which amended all the relevant domestic legal provisions, replacing the death penalty with life imprisonment. The penalties of all convicts sentenced to death, including the applicant, were to be automatically commuted to life imprisonment.

B. The applicant's attempts to have his conviction reviewed

10. In 2000 a new Code of Criminal Procedure ("the CCrP") and new Criminal Code were enacted. 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 judgments delivered in accordance with the old criminal procedure rules ("the Transitional Law").

11. On 24 January 2005 the applicant lodged an appeal, together with a "petition to restore the missed appeal period" (without specifying which appeal period), with the Court of Appeal under the Transitional Law. He noted in particular that when he was convicted in 1991 there was no possibility of appeal against his conviction.

12. By a letter of 15 March 2005 a clerk of the Court of Appeal replied that "the applicant could apply to the Supreme Court with an appeal against his criminal conviction".

13. The applicant complained about the letter of 15 March 2005 to the Supreme Court, asking it to examine the appeal against his conviction. By a letter of 19 May 2005, a deputy president of the Supreme Court replied that, since the applicant's appeal concerned solely the issue of the alleged unlawfulness of commuting the death penalty to life imprisonment (instead of fifteen years' imprisonment, as claimed by the applicant), the issue was outside the jurisdiction of the courts, as the applicant's conviction had been final and the commutation of the sentence had been effected by a legislative act. The deputy president of the Supreme Court also stated that "the relevant law had been misinterpreted in the Court of Appeal's letter of 15 March 2005 according to which the Supreme Court can deal with this issue".

14. In August 2005 the applicant lodged a new appeal with the Court of Appeal, challenging his conviction in 1991. In August 2005 the applicant also lodged a new appeal with the Supreme Court, reiterating his previous requests.

15. By a letter of 1 September 2005 a clerk of the Supreme Court noted that the applicant "requested that his sentence be changed by way of lodging complaints under various procedures". He further noted that the applicant should apply to a first-instance court under the procedure for complaints regarding execution of sentences. There was no information in the letter about the applicant's appeal against his criminal conviction of 1991.

C. Proceedings concerning the alleged unlawfulness of the commutation of the sentence

16. On 9 August 2005 the applicant lodged an action with the Garadagh District Court, complaining that the new sentence of life imprisonment had been applied retroactively, to his detriment. He argued that his sentence should have been commuted to fifteen years' imprisonment, which had been the only alternative to the abolished death penalty at the time when he had committed the criminal offences. He also asked the court to lift the criminal sentences imposed under the Criminal Codes of the Georgian SSR and Russian SFSR because, according to him, they did not apply in Azerbaijan.

17. On 12 October 2005 the Garadagh District Court confirmed the commutation of the applicant's sentence from the death penalty to life imprisonment.

18. On 25 November 2005 the Court of Appeal and on 22 March 2006 the Supreme Court rejected the applicant's appeal and upheld the commutation of the applicant's sentence under the Law of 10 February 1998.

D. The conditions of the applicant's detention

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

19. Following his conviction on 12 November 1991 the applicant was transferred to the 5th wing of Bayil Prison, where he spent approximately seven and a half years.

20. After the commutation of his sentence to life imprisonment, in late March 1998 the applicant was transferred to Gobustan Prison, located outside Baku, where he has been detained ever since.

21. The applicant is being held, together with one other inmate, in a cell measuring 9-10 sq. m. 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 inadequate.

22. The window, which has metal bars, has no glass in it and in winter is covered 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 allowed only about half an hour's outdoor exercise a day.

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

23. After his transfer to Gobustan Prison, the applicant was detained in six different cells. All of these cells have two prisoners assigned to them and their area is at least 12 sq. m.

24. 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 lights, a ventilator and a radio set.

25. Since June 2008 the prisoners have had the right to watch TV for four hours a day and six hours a day at weekends and on holidays. The prison has a library the prisoners can use. The sanitary conditions are acceptable and the food served is of good quality. The applicant has the right to one hour's outdoor exercise a day.

E. The applicant's medical treatment during his imprisonment

1. The applicant's version of his medical treatment

26. The applicant was in good health before his arrest. In the summer of 1991, when the applicant was in pre-trial detention in Bayil Prison, he fell ill and was examined by a prison doctor. An X-ray examination revealed a shadow on the upper part of his right lung. The doctor recommended some treatment, of which details have not been given, but the prison warden did not allow it.

27. After being transferred to the 5th wing of Bayil Prison, the applicant was placed in a cell in which two of his cellmates were suffering from tuberculosis. These two inmates later died of the disease, in 1993 and 1994 respectively. At around this time the applicant started coughing up blood. In the period between 1992 and 1998 the applicant tried to treat himself in his cell by taking antibiotics purchased with his own money.

28. According to the applicant, during that period inmates of the 5th wing of Bayil Prison suffering from tuberculosis were generally not transferred to any specialised medical facilities, but received treatment in their cells. There was a high mortality rate among inmates with tuberculosis.

29. Upon his transfer to Gobustan Prison in 1998, the applicant was examined by a doctor, but it was not a full examination and was based only on the applicant's submissions. In August 1998, the applicant was again examined by a doctor and was diagnosed with bronchitis.

30. On 12 November 1999 the applicant was examined for the first time by a tuberculosis specialist and was diagnosed with tuberculosis.

31. On 20 November 2004 he was transferred for in-patient treatment to the Specialised Medical Establishment for Prisoners with Tuberculosis ("the SME"), where he was diagnosed with pulmonary tuberculosis. However, the doctors ultimately found that his state of health did not require treatment based on the World Health Organisation's DOTS (Directly Observed Treatment, Short Course) programme. Thereafter, following seven days' in-patient treatment, he was transferred back to Gobustan Prison.

32. On 29 January 2005 the applicant was again transferred to the SME. From 3 February to 29 March 2005 he received, for the first time, treatment based on the DOTS programme. According to the applicant, the conditions of treatment were not adequate in the SME and that is why he refused treatment.

33. Since 2006 the applicant has been regularly examined by a doctor, however as he was not provided with adequate medical assistance from 1998 to 2004 he is suffering from residual symptoms of tuberculosis.

2. The Government's version of the applicant's medical treatment

34. The Government submitted that it was doubtful that the applicant had contracted tuberculosis in Bayil Prison, and that his version of events was contradictory. In this regard, the Government accepted that the applicant had shared a cell with an inmate suffering from tuberculosis, however, according to the Government, this could not be the reason for his contracting it, because the other inmate's tuberculosis was not contagious.

35. The applicant was provided with adequate medical assistance in Gobustan Prison and thus recovered.

36. On arrival at Gobustan Prison, on 29 March 1998 the applicant was examined by the prison doctor. During this examination, the applicant stated that he had been treated for pulmonary tuberculosis before and that there had been no worsening of the condition in recent years. No serious illness was identified by the doctor.

37. The applicant was subsequently examined on 5 April and 21 May 1998, and had expressed no complaint about his state of health. On 12 August 1998 the applicant was diagnosed with bronchitis and respiratory problems. He was prescribed medication and recovered.

38. On 12 November 1999 the applicant was examined by a tuberculosis specialist. During this examination, the applicant stated that he had contracted tuberculosis ten years before, and that having had treatment he felt well. Examining the applicant, the doctor found no worsening of the tuberculosis, and prescribed antibiotics.

39. Subsequently, the applicant was examined on 19 November 1999, on 7 February, in May and on 23 August 2000, and on 17 March 2001, by a doctor and no worsening of the tuberculosis was identified.

40. From 2002 to 2004 the applicant was regularly examined by a doctor and treated for several conditions.

41. In November 2004 the applicant was sent to the SME to establish whether the tuberculosis had reactivated. According to the clinic laboratory and X-ray results, the applicant had focal pulmonary tuberculosis and there was no reactivation of the tuberculosis. The examination was carried out in the presence of a representative of the International Committee of the Red Cross. It was decided that the applicant's state of health was satisfactory and there was no need for in-patient treatment.

42. In January 2005, at the applicant's request, he was again examined by doctors: the result was negative. However, in order to prevent the reactivation of the tuberculosis the applicant was assigned to the SME. He received in-patient treatment based on the DOTS programme of the WHO from 3 February to 29 March 2005. This treatment was stopped because the applicant refused to continue with it.

43. In January 2006 the applicant was assigned to the SME for examination. The applicant was examined on 11, 12 and 13 January 2006 and all the results were negative. He had clinical, laboratory and X-ray

examinations in the presence of an ICRC representative. In November 2006 he was again assigned to the SME and had clinical, laboratory and X-ray examinations. The results of the examinations were negative and he was prescribed vitamins.

44. In 2007 and 2008 the applicant's state of health was satisfactory and he was prescribed medication.

45. In November 2009, the applicant was again examined. According to this examination, the medical treatment he was receiving for his tuberculosis was adequate and efficacious and the applicant had only limited residual symptoms of tuberculosis.

46. The Government submitted that the conditions of treatment in the SME met all the WHO standards. In this respect, they refered to the WHO Green Light Committee's reports of 2005 and 2007.

F. The civil proceedings concerning the alleged lack of adequate medical assistance in Bayil Prison

47. On 23 February 2007 the applicant lodged a civil action against the Bayil Prison authorities, seeking compensation for damage to his health. He claimed that the prison authorities were directly responsible for his having contracted tuberculosis, taking into account the poor conditions of detention and the fact that he had been held in the same cells as inmates with tuberculosis.

48. In support of his claim, he submitted written statements by other inmates who had previously been detained in Bayil Prison. He also asked the court to hear some former inmates detained in Bayil Prison at the hearings. The applicant further asked the court to ensure his presence at the hearings.

49. On 29 May 2007 the Sabail District Court dismissed the applicant's claim, finding that the applicant had failed to prove that he had been deliberately placed in a cell with inmates who were ill and had contracted tuberculosis as a result. The court further held that, in such circumstances, the Bayil Prison authorities could not be considered to have ill-treated the applicant in any way. The applicant was not personally present at the hearing, but was represented. The judgment was silent as to the applicant's request on his attendance at the hearing.

50. The applicant lodged an appeal reiterating his complaints and his request to attend the hearing personally.

51. On 30 November 2007, having examined the case in the absence of the applicant but in the presence of his representative, the Baku Court of Appeal dismissed the applicant's appeal, finding that his arguments were unsubstantiated. The appellate court judgment was however silent as to the applicant's specific request to attend the hearings.

52. On 18 March 2008 the applicant lodged a cassation appeal, reiterating his previous complaints.

53. On 20 June 2008 the Supreme Court dismissed the applicant's appeal and upheld the Baku Court of Appeal judgment. The Supreme Court noted that there was no violation of material or procedural law which could be a reason to quash the impugned judgment. The proceedings before the Supreme Court had been held in the applicant's absence, but in the presence of his lawyer. The Supreme Court's decision was silent as to the applicant's request for leave to appear.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Law of 14 July 2000 on the Enactment and Entry into Force of the Code of Criminal Procedure of the Republic of Azerbaijan and Related Legal Regulatory Issues ("the Transitional Law") and the Code of Criminal Procedure (CCrP)

54. Article 7 of the Transitional Law reads as follows:

> "Judgments and other final decisions delivered by first-instance courts under the [old] Code of Criminal Procedure ... before the entry into force of this [new] Code, may be reconsidered by an appellate court or the Supreme Court of the Republic of Azerbaijan in accordance with Articles 383-407, 409-427 or 461-467 of the [new] Code of Criminal Procedure."

55. Articles 383-407 of the CCrP provide for general rules for lodging an appeal against the first-instance courts' judgments with the appellate courts. In this respect, Article 384 of the CCrP provides that an appeal is lodged by a person who is entitled to lodge an appeal within 20 days following the delivery of the first-instance court's judgment. As to Articles 409-427 and 461-467, they establish the procedure for lodging a cassation appeal and the reopening of the domestic proceedings on the basis of newly discovered facts. Article 410 of the CCrP establishes different time-limits for lodging a cassation appeal depending on the gravity of the crime for which the accused person was convicted and the content of the claim of the accused person. Article 410.1.4 provides that when a cassation appeal is against a conviction on the grounds of the innocence of the convicted person or the need to apply the law on a less serious offence, it should be lodged within 18 (eighteen) months following the delivery of the court judgment.

56. The appellate courts have a competence to examine criminal cases and other matters related to criminal prosecution based on appellate complaints or protests against judgments and other decisions of first-instance courts (Article 72 of the CCrP). The Supreme Court is a court

of cassation instance concerning criminal cases and other matters related to criminal prosecution (Article 73 of the CCrP).

57. Upon the receipt of an appeal lodged with the Supreme Court, a judge of the Supreme Court examines the appeal in question within three months. If the cassation appeal was lodged in accordance with the procedural requirements, the Supreme Court examines the appeal on merits and delivers a decision in which it should provide full reasons for upholding or quashing of the lower court's judgment or decision (Article 419 of the CCrP). However if the procedural requirements for lodging a cassation appeal are not complied with (e.g. the applicant is not entitled to lodge a cassation appeal, the applicant did not attach to his application a copy of the judgment or decision against he appeal etc.), the Supreme Court can leave the cassation appeal without examination (Article 415 of the CCrP). In this case, the judge of the Supreme Court delivers either a decision on "leaving without examination" the cassation appeal or gives an additional period of from 10 to 20 days to the applicant to comply with the procedural requirements (Article 418 of the CCrP).

B. The applicant's participation in civil proceedings

58. Parties to civil proceedings may appear before a court in person or act through their representative (Articles 47, 49 and 69 of the Code of Civil Procedure ("the CCP")).

59. The Code on Execution of Punishments ("the CEP") provides that a convicted person may be transferred from a prison to an investigative unit if his participation is required as a witness, suspect or accused in connection with certain investigative measures (Article 69-1). The CEP is silent as to the possibility for a convicted person to take part in civil proceedings, whether as a plaintiff or a defendant.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION IN RESPECT OF THE APPLICANT'S ABSENCE IN THE CIVIL PROCEEDINGS

60. The applicant complained under Article 6 of the Convention that the domestic courts had not ensured his attendance at the hearings in the proceedings concerning his complaint of lack of adequate medical assistance in Bayil Prison. He maintained that his presence would have been particularly important having regard to the fact that the domestic courts had

ignored the written statements of former inmates and had not heard some former inmates detained in Bayil Prison at those hearings. The relevant part of Article 6 § 1 of the Convention reads as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

61. 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

62. The Government submitted that the applicant had been represented at the hearings before the domestic courts by his representative and that the adversarial principle of the proceedings had been respected. The Government further noted that the written statements on behalf of the applicant made by other prisoners had not been duly notarised and therefore, these statements could not be considered as evidence.

63. The applicant maintained his complaints noting that despite his request his attendance at the hearings before the domestic courts had not been ensured. He also submitted that the courts' failure to examine the written witness statements and to hear witnesses on his behalf proved the necessity of his presence.

2. The Court's assessment

64. The Court reiterates that the principle of adversarial proceedings and equality of arms, which is one of the elements of the broader concept of a fair hearing, requires that each party be given a reasonable opportunity to have knowledge of and comment on the observations made or evidence adduced by the other party and to present his case under conditions that do not place him or her at a substantial disadvantage *vis-à-vis* his or her opponent (see *Krčmář and Others v. the Czech Republic*, no. 35376/97, § 39, 3 March 2000, and *Dombo Beheer B.V. v. the Netherlands*, 27 October 1993, § 33, Series A no. 274). The Court also reiterates that Article 6 of the Convention does not guarantee the right to attend a civil court in person, but rather a more general right to present one's case effectively before a court and to enjoy equality of arms with the opposing side. Article 6 § 1 leaves to the State a choice of the means to be used in guaranteeing litigants these

rights (see *Steel and Morris v. the United Kingdom*, no. 68416/01, §§ 59-60, ECHR 2005-II).

65. The Court notes that it has previously found a violation of Article 6 in a case where a court refused leave to appear to an imprisoned applicant who had wished to make oral submissions on his claim in the civil proceedings. In that case, despite the fact that the applicant was represented, the Court considered it relevant that his claim concerning ill-treatment had largely been based on his personal experience and that his submissions would therefore have been "an important part of the plaintiff's presentation of the case and virtually the only way to ensure adversarial proceedings" (see *Kovalev v. Russia*, no. 78145/01, § 37, 10 May 2007). The Court has adopted the same approach in other cases underlining the importance of the applicant's personal experience for his attendance at hearings when the proceedings concern the conditions of detention in prison, ill-treatment or unlawful detention of the applicants (see, *inter alia*, *Shilbergs v. Russia*, no. 20075/03, § 111, 17 December 2009).

66. Turning to the circumstances of this case, the Court observes that the Azerbaijani CCP provides for the plaintiff's right to appear in person before a civil court hearing his claim. However, neither the CCP nor the CEP makes special provision for the exercise of that right by individuals who are in custody, whether they are in pre-trial detention or are serving a sentence.

67. In the present case the applicant's requests for leave to appear were ignored by the domestic courts without any explanation. In this connection, the Court cannot lose sight of the fact that the domestic courts had also ignored the request of attendance of former inmates at the hearings and the written statements made by other inmates who had first-hand knowledge and shared to some extent the applicant's personal experience. In these circumstances, the Court considers it necessary to reiterate that the effect of Article 6 § 1 is, *inter alia*, to place a "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence, without prejudice to its assessment or to whether they are relevant for its decision, given that the Court is not called upon to examine whether arguments are adequately met (see *Buzescu v. Romania*, no. 61302/00, § 63, 24 May 2005, and *Grădinar v. Moldova*, no. 7170/02, § 107, 8 April 2008).

68. Moreover, the Court is not convinced by the Government's argument that the appearance of the applicant's representative before the domestic courts had secured the effective, proper and satisfactory presentation of the applicant's case. In this respect, the Court observes that the applicant's claim for compensation resulting from the alleged lack of medical assistance during his detention in prison was, to a large extent, based on his personal experience. The Court considers that his testimony describing the conditions relating to his medical treatment of which the applicant himself had first-hand knowledge, would have constituted an indispensable part of the plaintiff's presentation of the case. Only the applicant could, by testifying in

person, substantiate his claim for compensation and answer the judges' questions, if any (see, *mutatis mutandis*, *Kovalev*, cited above, § 37).

69. Finally, as to the fact that the applicant was serving a prison sentence, the Court is mindful of other possibilities which were open to the domestic courts as a way of securing the applicant's participation in the proceedings. They could for example have secured a hearing in the establishment where the applicant was serving his sentence (see, *mutatis mutandis*, *Shilbergs*, cited above, § 109). However, the domestic courts did not consider these options.

70. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION IN RESPECT OF THE DOMESTIC COURTS' FAILURE TO EXAMINE THE APPLICANT'S APPEAL AGAINST HIS CRIMINAL CONVICTION

71. Relying on Article 6 of the Convention and Article 2 of Protocol No. 7 to the Convention, the applicant complained that the domestic courts' failure to examine his appeal against his criminal conviction, lodged under the Transitional Law, had violated his right of access to court and right of appeal in criminal matters. The Court has examined the applicant's complaint under Article 6 of the Convention, which in the relevant parts reads as follows:

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

A. Admissibility

72. The Government alleged that the applicant's complaint concerning the domestic courts' refusal to examine his appeal against his conviction had been submitted out of time. In this regard, the Government submitted that the Supreme Court's letter of 1 September 2005 was an official refusal by the domestic courts to examine the applicant's appeal. Therefore, the applicant had not complied with the six-month rule, because he lodged his application with the Court only in August 2006.

73. The applicant contested the Government's objections and reiterated his complaints. In particular, he argued that he had not considered the Supreme Court's letter of 1 September 2005, signed by a court clerk, to be a court decision, and he had waited for a formal decision of the Supreme Court.

74. The Court observes that the Government's objection relating to the compliance of the applicant's complaint with the six-month rule is

inextricably linked to the merits of the complaint under Article 6 § 1 of the Convention and that it could not be detached from it. Accordingly, the Court will examine the Government's objection in the context of the applicant's complaint under Article 6 § 1 and will address that complaint first.

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

B. Merits

1. The parties' submissions

76. The Government submitted that the applicant lodged his appeal with the domestic courts without respecting the time limits defined by the CCrP. The applicant lodged his appeal for the first time in January 2005, however the Transitional Law and the CCrP were adopted in 2000. In this respect, the Government argued that an appeal lodged in accordance with the Transitional Law should be filed immediately after the entry into force of the CCrP which was on 1 Sepetmeber 2000. Therefore, the time limits established in the CCrP for lodging an appeal should be calculated from 1 September 2000.

77. As to the examination of the cases of certain other convicted persons who were in a position similar to the applicant's, notably those of Mr I. Gamidov, Mr A. Hummatov and Mr R. Gaziyev, the Government submitted that their cases were re-examined in 2002.

78. The applicant rejected the Government's interpretation of the Transitional Law. In particular, he argued that the law was not clear on this issue and relied on different cases of certain other convicted persons who were in a position similar to the applicant's, noting that the cases of some of them (R. Gaziyev and A. Hummatov) were re-examined in 2002, other's (E. Amiraslanov and S. Poladov) in 2004 and another's (R. Maksimov) in 2005.

2. The Court's assessment

79. The Court reiterates that the right to court, of which the right of access constitutes one aspect, is an element which is inherent in the right stated by Article 6 § 1 of the Convention (see *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, p. 18, § 36). This right is not absolute but may be subject to limitations permitted by implication, particularly regarding the conditions of admissibility of an appeal (see *Ashingdane v. the United Kingdom*, judgment of 28 May 1985,

Series A no. 93, pp. 24-25, § 57). Nevertheless, the limitations applied must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. They must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, among other authorities, *Khalfaoui v. France*, no. 34791/97, § 35, ECHR 1999-IX; *Fayed v. the United Kingdom*, judgment of 21 September 1994, Series A no. 294-B, pp. 49-50, § 65; and *Bellet v. France*, judgment of 4 December 1995, Series A no. 333-B, p. 41, § 31).

80. The Court observes that in the present case it is not disputed by the parties that the applicant had the right to lodge an appeal in accordance with the Transitional Law against his previous conviction and he lodged an appeal in this respect in 2005. However, the parties are in dispute as to the question whether the applicant's appeal was considered by the Supreme Court and the latter's letter of 1 September 2005 could be considered as a final decision. The other question disputed by the parties is whether the applicant respected the time limits applicable for lodging an appeal under the Transitional law, when he had lodged his appeal.

81. As to the first question which constitutes at the same time the Government's preliminary objection, the Court observes that the act complained of by the applicant, namely the domestic courts' refusal to examine his appeal against his criminal conviction, took place for the first time on 15 March 2005 when the Court of Appeal refused, by a letter, to hear the applicant's appeal, noting that he should apply to the Supreme Court. The applicant complained to the Supreme Court about this letter. By a letter of 19 May 2005, the Supreme Court ignored the applicant's appeal against his conviction, noting that the Court of Appeal had misinterpreted the relevant law. Following a further complaint by the applicant, by a letter of 1 September 2005 the Supreme Court noted that the applicant should apply to a first-instance court regarding the commutation of the death penalty. However, the letter was silent as to his appeal against his criminal conviction in 1991.

82. In these circumstances, the Court cannot accept the Government's argument according to which the Supreme Court's letter of 1 September 2005 was an official refusal by the domestic courts to examine the applicant's appeal and that therefore, the applicant had not complied with the six-month rule. In this connection, the Court notes that there was no formal judicial decision on the applicant's appeal against his conviction. In particular, the Court has already found that under the domestic law a letter signed by a court clerk does not constitute a formal and binding judicial decision of a court (see *Hajiyev v. Azerbaijan*, no. 5548/03, § 36, 16 November 2006). Under the Azerbaijani law, a cassation appeal lodged with the Supreme Court can be rejected or adopted by a reasoned decision of the Supreme Court and not by a letter signed by a clerk (see paragraph 57

above). Moreover, the Supreme Court's letter of 1 September 2005 was silent as to the applicant's appeal against his conviction.

83. In consequence, the Court considers that the Supreme Court's letter of 1 September 2005 cannot be considered as a final decision of the Supreme Court in the present case and the applicant had had reasonable grounds to wait for an official decision of the Supreme Court on his complaint.

84. As to the question that the applicant's appeal against his conviction was not lodged within the time-limits for lodging of an appeal under the Transitional Law, the Court reiterates that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. This applies in particular to the interpretation by courts of rules of a procedural nature such as the prescribed manner and prescribed time for lodging appeals. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see *Platakou v. Greece*, no. 38460/97, § 37, ECHR 2001-I).

85. In the present case, however, as stated above, there was no formal judicial decision in the applicant's case that would interpret the relevant provision of the Transitional Law. Furthermore, the Government have not submitted any other publicly available domestic judicial interpretation of the relevant provision of the Transitional Law concerning the time-limits for lodging an appeal under the Transitional Law, which would make the applicant aware of the fact that he had possibly made a procedural error in filing his appeal. The Court further does not lose sight of the fact that the cases of certain other convicted persons who were in a position similar to the applicant were re-examined by the Supreme Court under the Transitional Law in different years without any consideration in respect of the ordinary time-limits for lodging of an appeal (see paragraphs 77-78 above).

86. In any event, the Court notes that under Azerbaijani law if an appeal lodged with the Supreme Court fails to comply with the procedural rules concerning lodging of an appeal, the Supreme Court must issue a decision on refusal to admit the appeal in question. However, in the present case the domestic courts failed to either deal with the applicant's appeal and institute appellate proceedings or formally reject the appeal due to non-compliance with the procedural requirements for lodging of an appeal. As noted above, the letter of 1 September 2005 signed by a clerk working in the Supreme Court does not constitute, under the domestic law, a formal judicial decision of that court.

87. The Court reiterates that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial

(see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, pp. 12-13, § 24).

88. In the light of the foregoing considerations, the Court concludes that the applicant was denied access to a court in order to have his conviction reviewed in accordance with the provisions of the Transitional Law. Accordingly, the Court dismisses the Government's preliminary objection and holds on the merits that there has been a violation of Article 6 § 1.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

A. Complaint concerning the applicant's conditions of detention in Gobustan Prison

89. The applicant complained that the conditions of his detention in Gobustan Prison were harsh and amounted to ill-treatment. Article 3 of the Convention reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

90. The Government submitted that the applicant had failed to exhaust domestic remedies in respect of his complaint concerning the conditions of detention in prison. In particular, he had the possibility to complain against an act or omission of the penitentiary authorities under the procedure established by the Law On Complaints against Acts and Omissions Infringing Individual Rights and Freedoms, the Civil Code or the Code on Enforcement of Punishments. The Government also rejected the applicant's allegation, noting that the conditions of detention in Gobustan Prison met the standards established by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

91. The Court recalls at the outset that the part of this complaint which relates to events that occurred prior to 15 April 2002, the date of the Convention's entry into force with respect to Azerbaijan, has already been declared inadmissible by the Court by its partial decision of 24 September 2009.

92. 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 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).

93. The Court observes that the applicant has never raised the complaint concerning the conditions of his detention in Gobustan Prison before any domestic authority. Moreover, the applicant did not make a submission as to 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 this respect, the Court notes that, in similar cases against Azerbaijan, it has already found that the Law On Complaints against Acts and Omissions Infringing Individual Rights and Freedoms provides for a judicial avenue for challenging any act or omission by a public authority infringing an individual's rights or freedoms. Both Article 46 of the Constitution of the Republic of Azerbaijan and Article 3 of the Convention, which is directly applicable in the domestic legal system, prohibit inhuman and degrading treatment. Therefore, relying on these provisions, the applicant could complain about the conditions of his detention. However, the applicant has not attempted to do so. In this connection, the Court reiterates 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).

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

B. Complaint concerning the lack of medical assistance in Gobustan Prison

95. The applicant complained that he had contracted tuberculosis in detention and had not been provided with adequate medical assistance in Gobustan Prison. Article 3 of the Convention reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

96. The Government submitted that the applicant had failed to exhaust domestic remedies in respect of his complaint concerning the alleged lack of medical assistance in Gobustan Prison, in which he has been detained since 1998. The Government also noted that the applicant's complaint was unsubstantiated, because he had in fact been provided with adequate medical treatment during his detention in prison.

97. The Court recalls that the part of the complaint concerning the alleged lack of medical assistance in Gobustan Prison prior to 15 April 2002, was declared incompatible *ratione temporis* with the provisions of the

Convention within the meaning of Article 35 § 3 and rejected in accordance with Article 35 § 4 by the Court's partial decision of 24 September 2009.

98. As to the events concerning the provision of adequate medical assistance to the applicant occurred after 15 April 2002, the Court reiterates its view as set out in § 92 above. The Court notes that the applicant has never raised a complaint of lack of medical assistance in Gobustan Prison before any domestic authority. The Court further observes that the applicant did not state whether there were special circumstances in the present case which would dispense him from the obligation to complain about the alleged lack of medical assistance in Gobustan Prison to the domestic authorities or courts. The Court reiterates again 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,* cited above, § 52, and *Kunqurova v. Azerbaijan* (dec.), no. 5117/03, 3 June 2005).

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

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

100. 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

1. Pecuniary damage

101. The applicant claimed a total of 21,600 euros (EUR) in respect of pecuniary damage. He submitted in this regard that he had spent money on tuberculosis medicine and food products for his medical treatment in prison.

102. The applicant also claimed an annual EUR 1,200 pecuniary damage for his future provision with special food and appropriate treatment.

103. The Government contested the claim, noting that the applicant had failed to substantiate his claims.

104. The Court does not discern any causal link between the violation found and the damage alleged by the applicant. Therefore, the Court rejects the applicant's claim in respect of pecuniary damage.

2. Non-pecuniary damage

105. The applicant claimed EUR 20,000 in respect of non-pecuniary damage.

106. The Government submitted that the applicant's claim was unsubstantiated and excessive.

107. The Court considers that the applicant has suffered non-pecuniary damage which cannot be compensated solely by the finding of violations, 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 EUR 4,800 under this head, plus any tax that may be chargeable on this amount.

B. Costs and expenses

108. 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.

109. The Government submitted that the applicant's claim was unsubstantiated and lacked the documentary evidence.

110. 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

111. 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 complaints under Article 6 § 1 concerning the applicant's absence from the domestic proceedings concerning the alleged lack of medical assistance in Bayil Prison and under Article 6 § 1 concerning the domestic courts' failure to examine the applicant's appeal against his criminal conviction admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention in respect of the applicant's absence from the domestic proceedings concerning the alleged lack of medical assistance in Bayil Prison;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention in respect of the domestic courts' failure to examine the applicant's appeal against his criminal conviction;

4. *Holds*
(a) that the respondent State is to pay the applicant, within three months of 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;

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

Done in English, and notified in writing on 28 February 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Nina Vajić
Registrar	President