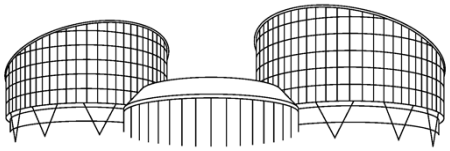

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF EFENDIYEV v. AZERBAIJAN

(Application no. 27304/07)

JUDGMENT

STRASBOURG

18 December 2014

FINAL

18/03/2015

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

In the case of Efendiyev v. Azerbaijan,

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

Isabelle Berro-Lefèvre, *President,*
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Paulo Pinto de Albuquerque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 25 November 2014,

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

PROCEDURE

1. The case originated in an application (no. 27304/07) 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 Natig Islam oglu Efendiyev (*Natiq İslam oğlu Əfəndiyev* - "the applicant"), on 19 June 2007.

2. The applicant was represented by Mr V. Khasayev, a lawyer practising in Azerbaijan. The Azerbaijani Government ("the Government") were represented by their Agent, Mr Ç. Asgarov.

3. The applicant alleged, in particular, that he had been denied a fair trial in the criminal proceedings against him, in that he had not been given an opportunity to cross-examine a key witness, R.M., and the domestic courts had failed to show the video recording of the search of his garden.

4. On 16 December 2009 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1957 and prior to his arrest lived in Ganja.

6. The applicant is a former head of the Ganja City Police Office and the Dashkasan District Police Office. On 11 January 2001 the Military Assize Court found him guilty of various crimes and sentenced him to life imprisonment.

7. Council of Europe experts considered the applicant to have been a political prisoner. The Parliamentary Assembly of the Council of Europe stated in its Resolution 1305 (2002) adopted on 26 September 2002 that it was profoundly disturbed by the fact that the applicant had neither been pardoned nor granted a retrial.

8. The applicant was dispensed from serving the remainder of his sentence by a presidential pardon decree of 20 March 2005.

A. The applicant's arrest and administrative detention

9. According to the applicant, on 16 October 2005, when he was dining at his friend's home in Baku, nine or ten plain-clothes police officers entered and arrested him. The applicant was taken to the Narimanov District Police Office, where a record on an administrative offence was drawn up by police officers.

10. On the same day the applicant was taken to the Narimanov District Court and appeared before a judge. The judge found the applicant guilty under Article 310.1 (obstructing the police) of the Code of Administrative Offences and sentenced him to fifteen days' administrative detention. The judge held that the police had arrested the applicant at around 7.30 p.m. on 16 October 2005 near the metro station Ganjlik in Baku, because he had failed to comply with a lawful request of the police to present his identity card.

11. On 21 October 2005 the Court of Appeal upheld the lower court's decision.

B. Institution of criminal proceedings against the applicant

12. By a letter of 29 October 2005, a certain R.M. informed the Ministry of National Security ("the MNS") about the applicant's unlawful activities, claiming that he had been conspiring to usurp State power by force. The author of the letter asked the MNS to carry out a search in the garden of the applicant's house where the applicant had buried weapons in order to use them for the purposes of the said crimes.

13. On 30 October 2005, the police and officers of the MNS carried out a search of the applicant's house and garden, situated in the village of Bayan in the Dashkasan region. According to the search record of 30 October 2005, some weapons and ammunitions, including different types of guns, an assault rifle, a pistol, cartridges and a grenade, were found buried in the garden. The search was carried out in the absence of the applicant, his lawyer or members of his family. The search record was signed by police officers, two attesting witnesses (*hal şahidi*) and two employees of the local executive authority. It appears from the case file that the search was carried out on the basis of a decision by the Ganja City Nizami District Court and

was filmed. However, despite the Court's explicit request to the Government to submit copies of all documents and materials relating to the criminal proceedings, including a copy of the video recording of the search, the Government failed to provide the Court with a copy of the video recording.

14. On 30 October 2005, while in administrative detention, the applicant was informed that he was being charged with the crimes of conspiring to organise mass disorder, illegal possession of weapons and conspiring to usurp State power by force under Articles 28 (preparation of a crime), 220 (mass disorder), 228 (illegal possession of weapons) and 278 (usurpation of state power by force) of the Criminal Code.

15. On 31 October 2005, relying on the official charges brought against the applicant and the prosecutor's request to apply the preventive measure of remand in custody in respect of the applicant, the Nasimi District Court ordered the applicant's detention for a period of three months.

16. According to the applicant, during the night of 31 October to 1 November 2005 he was subjected to electric shocks twice in the temporary detention facility of the Organised Crime Unit of the Ministry of Internal Affairs.

17. It appears from the case file that on 22 November 2005 an expert examination was carried out in order to establish the ballistic, technical and chemical characteristics of the weapons and ammunition allegedly found on 30 October 2005. The Government failed to provide the Court with a copy of the report of the expert examination of 22 November 2005.

18. On 27 January 2006 the Nasimi District Court extended the applicant's pre-trial detention until 30 May 2006.

19. On 24 May 2006 the Nasimi District Court extended the applicant's pre-trial detention until 30 October 2006.

20. On 4 July 2006 the investigator questioned R.M. as a witness. R.M. stated that he had known the applicant since 1992 when the latter was the head of the Dashkasan District Police Office. When they had resided in Turkey between June 1998 and January 2000 the applicant had informed him about his intention to organise a *coup d'état* in Azerbaijan. R.M. further stated that the applicant had also informed him at that time about weapons buried in the garden of his house situated in the Dashkasan region. He did not know how the applicant had obtained those weapons.

21. On 4 August 2006 the investigator questioned Z.M., a police officer, and E.A. and N.G., employees of the local executive authority, who had participated in the search. They stated that they had been present, together with two attesting witnesses, when the weapons buried in the garden had been found.

22. On 5 August 2006 the investigator questioned R., who had participated in the search as an attesting witness. He stated that he had seen

the weapons which had been buried in the garden and had signed the search record.

23. By a decision of 11 August 2006, the investigator severed the original criminal case (no. 76586) and opened a new criminal case (no. 76811) against the applicant. In the context of the new criminal case, the applicant was charged only under Article 228.1 (illegal possession of weapons) of the Criminal Code.

24. On 14 August 2006 the investigator issued a final bill of indictment in criminal case no. 76811 under Article 228.2.2 (illegal possession of weapons committed repeatedly) of the Criminal Code and filed it with the Dashkasan District Court. It appears that the original criminal case (no. 76586), which still carried the charges against the applicant under Articles 28, 220.1 and 278 of the Criminal Code, was not sent for trial, but was not terminated either.

25. In their observations lodged with the Court, the Government submitted a copy of the record on the applicant's familiarisation with the materials of the criminal case ("*cinayət işinin materialları ilə tanış etmə protokolu*"), dated August 2006 (the exact date of the record is illegible), which was signed by the investigator, the applicant and his lawyer. The relevant part of the record reads as follows:

> "[the applicant] I have become completely acquainted with the materials of the criminal case without any time restriction. As the criminal investigation was biased (*qeyri-obyektiv*) and ... [this part is illegible], we will raise our questions in the proceedings before the court. I have also become acquainted with the video recording."

C. The applicant's trial

26. In the course of the proceedings before the Dashkasan District Court the applicant claimed his innocence, insisting that the criminal case against him had been fabricated and that the weapons in question did not belong to him. The court heard Z.M., a police officer, and E.A. and N.G., employees of the local executive authority, who reiterated the statements they had made during the investigation. The statements which R.M. and R. had made during the investigation were read out at the hearing.

27. On 7 September 2006 the Dashkasan District Court found the applicant guilty under Article 228.2.2 of the Criminal Code and sentenced him to five years' imprisonment. The court held that the applicant's guilt had been proven by the real evidence (different types of weapons) found during the search of his garden. The part of the judgment concerning the applicant's conviction reads as follows:

> "Assessing all the evidence, the court considers that the statement of the accused, Efendiyev Natig Islam oglu [the applicant], made before the court, having a defensive character and being an attempt to escape responsibility, may not be accepted as

evidence and that his statement was contradicted by the objective evidence examined by the court.

The court considers that the investigation has correctly qualified the action of Efendiyev Natig Islam oglu under Article 228.2.2. of the Criminal Code and that he should be sentenced to a sanction within the framework of this article ...”

The judgment made no mention of the reason for the absence of R.M. and R. from the hearing. In their observations submitted to the Court, the Government produced a copy of two telegrams, the texts of which were illegible. According to the Government, by those telegrams R.M. and R. had informed the first-instance court that they could not be present at the hearing for health reasons.

28. The applicant appealed against the judgment, claiming his innocence. He alleged that all the evidence had been fabricated and that the weapons found in his garden did not belong to him. In this connection, he submitted that the house had been uninhabited and the weapons found in his garden could easily have been planted there. He also noted that it had been impossible for him to have buried those weapons in the garden as he had been in prison until 20 March 2005 and following his release from prison he had been under strict police surveillance. He pointed out in this connection that the investigation and the first-instance court had failed to establish how he had obtained the weapons or when he had buried them in the garden. Moreover, when the weapons had been found they had been clean and there had been no trace of soil on them. The applicant further complained that the lower court had failed to show the video recording of the search. He also complained that despite his request, the first-instance court had not heard at the hearing one of his neighbours, N.M., who had been present during the entire search. Lastly, the applicant complained that, in spite of his explicit request, R.M., the person who had reported the existence of the weapons to the MNS, had never given evidence before the court. In this connection, he noted that there was a clear bias in R.M.’s statement against him, since according to the latter’s letter the MNS had already conducted a fruitless search of the garden in 1999.

29. On 20 November 2006 the Court of Appeal upheld the first-instance judgment and dismissed the applicant’s appeal. The Court of Appeal’s judgment made no mention of the applicant’s request to show the video recording of the search. It also failed to reply to the question how the applicant had obtained the weapons and when he had buried them in the garden. Nor did the appellate court hear R.M., the police officers or the two attesting witnesses who had signed the search record. It did not provide any explanation as to the absence of R.M. However, the applicant’s neighbour did give evidence in the proceedings. The relevant part of the Court of Appeal’s judgment reads as follows:

“The witness, Mammadova Najiba Isa gizi, heard at the Court of Appeal at the request of the defence, stated that ... her house was near Natig Efendiyev’s [the

applicant] house. On the morning of 30 October 2005 when she went out she saw some people that she did not know next to the gate of Natig Efendiyev's garden. As the gate was closed they asked her whether someone lived there. She told them that the house was uninhabited and then these persons entered the garden by breaking the lock of the gate. At that time there were about 15-16 persons in the garden; 3-4 of them were searching the surroundings of the house and the garden and some of the others were drawing up a record. She was in the vicinity of the latter. Later, those who were searching the garden shouted 'we have found weapons'. She went with these people to the place where the weapons were found and they showed a blue plastic bag in which there were some weapons, saying that they had found them by digging the land. As the hole in which the weapons had allegedly been buried was smaller than the weapons, she remarked to the policemen that this hole was small and asked how these weapons could have been placed there. Moreover, the weapons and the blue plastic bag containing the weapons were clean. Then a record on the fact that the weapons had been found was drawn up. Her presence was not noted in the record.

The witness N. Mammadova also stated that she had not seen that the persons who had searched Natig Efendiyev's house had brought with them bags containing weapons and other belongings ...

The panel of the court considers that the submissions of the witness, Mammadova Najiba Isa gizi, heard at the court at the request of the defendant, did not refute the fact that the weapons and other ammunition were found during the search in the garden of Natig Efendiyev's house, situated in the village of Bayan ...

The panel of the court finds that the Dashkasan District Court's judgment in respect of Natig Efendiyev, which is lawful and justified, should be left unchanged and the defendant's appeal should not be granted."

30. The applicant lodged a cassation appeal reiterating his previous complaints. In particular, relying on Article 6 of the Convention he complained that the Court of Appeal had failed to hear evidence from R.M. at the hearing and to show the video recording of the search. He further complained that the search had not been carried out in accordance with the domestic law, since despite the fact that his neighbour had been present during the search, her presence had not been noted in the record. He also complained that the appellate court had not taken into consideration his neighbour's statement that the weapons found in the garden were new and clean.

31. On 17 April 2007 the Supreme Court upheld the Court of Appeal's judgment. The Supreme Court's decision made no mention of the particular complaints raised by the applicant in his cassation appeal.

II. RELEVANT DOMESTIC LAW

32. The following are the relevant provisions of the Code of Criminal Procedure ("the CCrP") concerning the participation of the witness in the criminal proceedings and the rules on search and seizure:

Article 95: Witness

"95.1. A person who is aware of any important circumstances of the case may be summoned and questioned as a witness by the prosecution during the investigation or the court hearing and by the defence during the court hearing.

...

95.4. The witness shall fulfil the following duties in accordance with this Code in the circumstances provided for by it:

95.4.1. attend and participate in the investigation and other procedures as required by the prosecuting authority and answer questions fully and correctly on all facts known to him;

...

95.4.6. comply with the instructions of the preliminary investigator, investigator, prosecutor and court president;

95.4.7. be at the disposal of the court, and not go elsewhere without the permission of the court or without notifying the prosecuting authority of his whereabouts ..."

Article 178: Forcible appearance

"178.1. Forcible appearance shall entail bringing a person by force to the authority conducting criminal proceedings and forcibly ensuring his participation in investigative or other procedures.

178.2. This measure may be applied to a person participating in criminal proceedings and summoned by the authority conducting criminal proceedings only in the following circumstances:

178.2.1. if he fails to attend in response to a compulsory summons of the authority conducting criminal proceedings without good reason;

178.2.2. if he evades receipt of the summons from the authority conducting criminal proceedings;

178.2.3. if he hides from the authority conducting criminal proceedings;

178.2.4. if he has no permanent place of residence.

178.3. Children under the age of fourteen, pregnant women, persons who are seriously ill and victims bringing a private criminal prosecution may not be forcibly brought before the authority conducting criminal proceedings ..."

Article 242: Conduct of a search or seizure

"242.1. Where the available evidence or materials obtained following an investigation give rise to a reasonable suspicion that a residential, service or industrial building or other place contains, or that certain persons are in possession of, items or documents of potential significance to a case as evidence, the investigator may conduct a search ..."

Article 243: Grounds for conducting a search or seizure

"243.1. As a rule, the search and seizure shall be carried out by a court decision. The court shall deliver a decision on conducting a search or seizure following a reasoned

request from the investigator and the submissions from the prosecutor in charge of the investigation ...”

Article 244: Participants in the search or seizure

“244.1. During a search or seizure the presence of at least 2 (two) attesting witnesses is obligatory.

244.2. Counsel for the suspect or accused is entitled to participate in the conduct of a search or seizure concerning him or her. If counsel for the defence, having been informed by the investigator that this investigative measure will be carried out, expresses the wish to participate in the search and seizure, the investigator shall take steps to guarantee his right.

...

244.4. During a search or seizure steps shall be taken to guarantee the presence of the person concerned by the search and seizure, adult members of his family or those who represent his legal interests. If it is impossible to secure the participation of the above-mentioned people, a representative of the relevant housing organisation or local executive authority shall be invited ...”

33. The following are the relevant provisions of the CCrP concerning the review of domestic judicial decisions and the reopening of domestic proceedings following a finding by the Court of a violation of the Convention:

Article 455: Grounds for review of judicial decisions in connection with the violation of rights and freedoms

“455.0. The following are grounds for review of judicial decisions in connection with the violation of rights and freedoms:

...

455.0.2. a finding by the European Court of Human Rights of a violation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms in the criminal proceedings, simplified pre-trial proceedings or proceedings involving a complaint under the private prosecution procedure, conducted by courts of the Republic of Azerbaijan; ...”

Article 456: Procedure for review of judicial decisions in connection with the violation of rights and freedoms

“456.1. The Plenum of the Supreme Court of the Republic of Azerbaijan is vested with the competence to review judicial decisions in connection with the violation of rights and freedoms.

456.2. Where grounds exist under Articles 455.0.1 and 455.0.2 of this Code, the Plenum of the Supreme Court examines the cases only on points of law, in connection with the execution of judgments of the Constitutional Court of the Republic of Azerbaijan and the European Court of Human Rights. After a judgment of the Constitutional Court or the European Court of Human Rights is received by the Supreme Court, the President of the Supreme Court assigns the case to one of the [Supreme Court] judges for preparation and presentation of the case at the Plenum [of the Supreme Court]. The case shall be reviewed at a hearing of the Plenum of the

Supreme Court no later than three months after the judgment of the Constitutional Court or the European Court of Human Rights is received by the Supreme Court ..."

Article 459: Decision taken after review in connection with the finding by the European Court of Human Rights of a violation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms in the criminal proceedings conducted by courts of the Republic of Azerbaijan

"459.0. Having conducted a review in cases stipulated by Article 455.0.2 of this Code, the Plenum of the Supreme Court has competence to deliver one of the following decisions:

459.0.1. to quash, fully or partially, judicial decisions of the first-instance, appellate and cassation courts, as well as judicial decisions delivered under the procedure of additional cassation ... and to remit the criminal case, the case materials of simplified pre-trial proceedings, or the case materials of proceedings involving a complaint under the private prosecution procedure, for re-examination by the relevant first-instance or appellate court;

459.0.2. to amend a decision of the court of cassation and/or additional cassation in situations stipulated in Articles 421.1.2 and 421.1.3 of this Code;

459.0.3. to quash a decision of the court of cassation and/or additional cassation and to deliver a new decision."

If the accused retracts his statements made during the investigation in court, the court must examine the reasons for [the retraction] ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (D) OF THE CONVENTION

34. The applicant complained that the criminal proceedings against him had been unfair, since he had not been given an opportunity to hear evidence from R.M. at any of the hearings and the domestic courts had failed to show the video recording of the search of his garden. The relevant part of Article 6 reads as follows:

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

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him ..."

A. Admissibility

35. 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

36. The Government submitted that the applicant had been convicted following criminal proceedings which had been fair and adversarial. In this connection, the Government submitted that the applicant's conviction had been based on the search record; the weapons and ammunitions found in the garden; the ballistic, technical and chemical examination of those weapons and the submissions of the witness who had informed the domestic authorities about the illegal possession of weapons; and the witnesses who had participated in the search. The Government further submitted that the applicant's neighbour had also stated that she had not seen the police officers bring bags containing weapons with them.

37. As to the video recording of the search, the Government submitted that they could not provide the Court with that recording because it had been lost in July 2007 during a reorganisation of the Court of Appeal. They further noted that in any event the applicant and his lawyer had been familiarised, in August 2006 before the trial, with the materials of the case file to which the recording in question had been attached. Lastly, the Government submitted that the domestic courts had not heard R.M. and R. because they had sent telegrams to the Dashkasan District Court informing it that they could not participate in the proceedings for health reasons. However, they confirmed the submissions they had made during the investigation. In this connection, the Government noted that under the domestic law a witness who is seriously ill could not be compelled to appear before the court. In any event, the applicant's conviction was not based solely, or in a decisive manner, on the statements of R.M., but mainly on the real evidence and the statements of other witnesses who participated in the search.

38. The applicant maintained his complaint, submitting that he had been arbitrarily convicted of a crime that he had not committed. In particular, he complained that, despite his repeated requests, R.M. had never been heard by the domestic courts. He pointed out that the Government had failed to submit any evidence proving R.M.'s illness. He further disputed the Government's submissions that the video recording of the search had been lost during the reorganisation of the Court of Appeal, noting that that explanation was illogical because the recording could not have been lost

"separately" from other materials of the criminal case file since it had been attached to it. Lastly, he argued that the weapons found in his garden had had nothing to do with him and that they had been planted there. He noted that the domestic courts had not taken into consideration the submissions of his neighbour that the hole in which the weapons had allegedly been buried was smaller than the weapons, and that the weapons had been clean.

2. The Court's assessment

39. The Court reiterates that the guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision which must be taken into account in any assessment of the fairness of proceedings. In addition, the Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011). Therefore, the Court will examine the complaints under Article 6 §§ 1 and 3 (d) taken together (see, among many other authorities, *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 49, *Reports of Judgments and Decisions* 1997-III, and *Lucà v. Italy*, no. 33354/96, § 37, ECHR 2001-II).

40. The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among other authorities, *Doorson v. the Netherlands*, 26 March 1996, § 67, *Reports* 1996-II, and *Van Mechelen and Others*, cited above, § 50).

41. Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of the proceedings (see *Al-Khawaja and Tahery*, cited above, § 118). In particular, the rights of the defence are restricted to an extent that is incompatible with the requirements of Article 6 if the conviction is based solely, or in a decisive manner, on the depositions of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial (see *Solakov v. the former Yugoslav Republic of Macedonia*, no. 47023/99, § 57, ECHR 2001-X). However, the requirement that there be a good reason for admitting the evidence of an absent witness is a preliminary question which must be examined before any consideration is

given as to whether that evidence was sole or decisive. Even where the evidence of an absent witness has not been sole or decisive, the Court has still found a violation of Article 6 §§ 1 and 3 (d) when no good reason has been shown for the failure to have the witness examined (see, for example, in *Lüdi v. Switzerland*, 15 June 1992, Series A no. 238; *Mild and Virtanen v. Finland*, no. 39481/98 and 40227/98, 26 July 2005; *Bonev v. Bulgaria*, no. 60018/00, 8 June 2006; and *Pello v. Estonia*, no. 11423/03, 12 April 2007).

42. Turning to the circumstances of the present case, the Court notes that the applicant alleged a violation of Article 6 §§ 1 and 3 (d) of the Convention on essentially two grounds: that his trial had been unfair in that he had been unable to cross-examine R.M., whose statements had served as the basis for his conviction, and that the domestic courts had failed to show the video recording of the search.

43. In assessing the overall fairness of the criminal proceedings against the applicant, the Court cannot at the outset overlook the fact that although the applicant was convicted for illegal possession of weapons, it transpires from the case file that neither the investigation nor the domestic courts established how the applicant had obtained the weapons in question or when he had buried them in the garden. The Court further notes that the investigation did not order a forensic examination of the weapons for the purposes of establishing when they had been buried in the garden and whether the applicant's finger prints were on them. Such a measure could have clarified the question whether the weapons belonged to the applicant. Instead, the investigation contented itself with ordering a forensic examination of the weapons in order to establish their ballistic, technical and chemical characteristics. The Court also observes that the search of the applicant's uninhabited house and garden was conducted without the knowledge or presence of the applicant, his lawyer or members of his family, despite the explicit and clear requirements of the domestic law in this respect (see paragraph 32 above). Moreover, in spite of the Court's specific request, the Government failed to provide it with a copy of the video recording of the search, submitting that it had been lost during a reorganisation of the Court of Appeal in July 2007.

44. Turning to the applicant's particular complaint concerning the domestic courts' failure to hear evidence from R.M. at the hearings, the Court observes that when convicting the applicant the domestic courts relied on the statements which R.M. had made during the investigation and that neither the applicant nor his lawyer was given an opportunity at any stage of the proceedings to question him. The domestic courts ignored the applicant's specific requests and did not provide any explanation in that respect.

45. As to the Government's argument that R.M. informed the first-instance court of his illness and that under the domestic law a witness who is seriously ill cannot be compelled to appear before the court, the Court notes

at the outset that neither the first-instance court's judgment, nor the higher courts' decisions referred to R.M.'s illness, and that the courts made no mention of it. The Court further points out that the provisions of the domestic law apply only to witnesses who are seriously ill (see paragraph 32 above). However, the Government failed to provide any element of proof that R.M. had been seriously ill but relied on a telegram that R.M. had sent to the first-instance court. Moreover, it does not appear from the documents submitted to the Court that the domestic courts took any step in order to establish whether R.M.'s health problems were such as to prevent him from appearing before the court.

46. The Court further considers that the Government's argument that the applicant's conviction was not based solely, or in a decisive manner, on the statements of R.M., but mainly on the real evidence and the statements of other witnesses who participated in the search, is irrelevant in the present case. In this connection, the Court reiterates that even where the evidence of an absent witness has not been sole or decisive, the Court has still found a violation of Article 6 §§ 1 and 3 (d) when no good reason has been shown for the failure to have the witness examined (see paragraph 41 above). Moreover, the Court observes that in the present case the applicant's right to cross-examine R.M. was crucial for establishing the applicant's guilt, because although the weapons and ammunition were found in the garden of the applicant's uninhabited house following a search, the only evidence which directly incriminated the applicant for illegal possession of weapons was the statement that R.M. had made during the investigation, according to which the applicant had told him when they were in Turkey that he had buried weapons in his garden.

47. Therefore, taking into consideration that no good reason has been shown for the failure to have R.M. examined, the Court finds that the applicant's defence rights were limited to an extent incompatible with the guarantees of a fair trial. In these circumstances, the Court does not deem it necessary to examine the applicant's further complaint about the domestic courts' failure to show the video recording of the search.

48. There has accordingly been a violation of paragraphs 1 and 3 (d) of Article 6, taken together.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

49. The applicant complained that he had been tortured during the night of 31 October to 1 November 2005 by the police in the temporary detention facility of the Organised Crime Unit of the Ministry of Internal Affairs.

50. The Court, however, observes that the applicant did not bring a complaint concerning his alleged ill-treatment before the domestic authorities. In particular, he did not lodge a criminal complaint with the police or the prosecution authorities in this respect. He also failed to raise

this complaint during the criminal investigation (see *Akif Mammadov v. Azerbaijan* (dec.), no. 46903/07, § 29, 13 May 2014). Moreover, the applicant did not state whether there were special circumstances in the present case which would dispense him from the obligation to exhaust domestic remedies (see *Muradova v. Azerbaijan*, no. 22684/05, § 131, 2 April 2009).

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

III. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

52. The applicant complained that his pre-trial detention had been unlawful.

53. The Court points out that the date of the "final decision" for the purposes of Article 35 § 1 of the Convention in connection with a period of pre-trial detention is to be taken as the date on which the charge is determined by a court at first instance, not the date on which a conviction becomes effective (see, among many other authorities, *Maltabar and Maltabar v. Russia* (dec.), no. 6954/02, 28 June 2007). In the present case, the applicant was convicted on 7 September 2006, and consequently the six-month time-limit concerning this complaint started running on that date. As the application was lodged with the Court on 19 June 2007, the Court notes that this complaint was lodged out of time and does not comply with the six-month rule.

54. Accordingly, this complaint must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLES 13 AND 14 OF THE CONVENTION

55. Relying in a general manner on Article 13 of the Convention, the applicant complained that he had had no effective remedies in respect of his complaints. He also complained under Article 14 of the Convention that he had been discriminated against without specifying any ground of discrimination.

56. The Court has examined the complaints as submitted by the applicant. However, having regard to all the material in its possession and in so far as these complaints fall within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

57. 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

58. The applicant claimed EUR 30,000 in respect of pecuniary damage, noting that his family had spent that sum on sending food to him in prison.

59. The Government contested the applicant's claim, submitting that he had failed to substantiate his allegations.

60. The Court does not find any causal link between the damage claimed and the violations found (see *Fatullayev v. Azerbaijan*, no. 40984/07, § 186, 22 April 2010). Accordingly, it rejects the applicant's claims in respect of pecuniary damage.

2. Non-pecuniary damage

61. The applicant claimed EUR 500,000 in respect of non-pecuniary damage.

62. The Government submitted that the applicant's claim was unsubstantiated and excessive. They considered that, in any event, a finding of a violation would constitute sufficient just satisfaction.

63. The Court considers that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by the finding of violations and that compensation should thus be awarded. However, the amount claimed is excessive. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant the sum of EUR 4,500 under this head, plus any tax that may be chargeable on this amount.

64. 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 has been found above, the criminal proceedings in the present case did not comply with the requirements of fairness. In these circumstances, the most appropriate form of redress would, in principle, be the reopening of the proceedings in order to guarantee the conduct of the trial 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 v. Azerbaijan*, no. 38228/05, § 46, 8 October 2009; and *Abbasov v. Azerbaijan*, no. 24271/05, §§ 41-42, 17 January 2008). The Court notes in this connection that the Code of Criminal Procedure of the Republic of Azerbaijan provides for a review of domestic criminal proceedings by the Plenum of the Supreme Court and remittal of the case for re-examination, if the Court finds a violation of the Convention (see paragraph 33 above).

B. Costs and expenses

65. The applicant did not submit a claim for costs and expenses. Accordingly, the Court considers that there is no call to award him any sum on that account.

C. Default interest

66. 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 and 3 (d) admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (d) 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 4,500 (four thousand five hundred euros), in respect of non-pecuniary damage, plus any tax that may be chargeable to the applicant on this amount, to be converted into Azerbaijani manats at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. Dismisses unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 18 December 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Registrar	Isabelle Berro-Lefèvre President