CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 151/03
by Eyyub KERIMOV
against Azerbaijan

The European Court of Human Rights (First Section), sitting on 28 September 2006 as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mr L. LOUCAIDES,
Mrs F. TULKENS,
Mrs E. STEINER,
Mr K. HAJIYEV,
Mr D. SPIELMANN,
Mr S.E. JEBENS, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having regard to the above application lodged on 28 November 2002,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Eyyub Zakir oglu Kerimov (*Eyyub Zakir oğlu Kərimov*), is an Azerbaijani national who was born in 1958 and lives in Baku. He was represented before the Court by Mr I. Aliyev, a lawyer practising in Baku. The respondent Government was represented by Mr C. Asgarov, Agent of the Republic of Azerbaijan before the Court.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

On 28 July 2001 an article called "The Nasimi District Deputy Prosecutor – A KGB Agent" was published in a local newspaper *Femida*, of which the applicant was the chief editor. The article depicted the prosecutor, T.K., as an incompetent and unprofessional prosecutor who was able to hold high-ranking posts in the prosecution authorities only due to his good personal contacts with top-level officials. The article stated, *inter alia*, that T.K. "had no idea of the working methods of the prosecutor's office, and his work was limited to wandering around corridors".

On 5 September 2001 T.K. filed a lawsuit against the newspaper, claiming that the article was defamatory and damaging his reputation. He asked the court to close the newspaper, order it to pay compensation and institute criminal proceedings against the persons responsible for the article's publication.

The newspaper, represented by the applicant, filed a counterclaim, contending that T.K., by filing an allegedly abusive and frivolous lawsuit against the newspaper, damaged the newspaper's professional reputation.

On 1 October 2001 the Yasamal District Court partially upheld T.K.'s claim and dismissed the newspaper's counterclaim. The court held that the article contained defamatory material and that the newspaper had been unable to prove its truthfulness. It ordered the newspaper to pay compensation to T.K. and to "terminate the publication and distribution" of the newspaper in accordance with the Law *On Mass Media*.

The applicant, on behalf of the newspaper, filed an appeal. He claimed that the termination of the newspaper's publication in fact amounted to a liquidation of the newspaper as a legal entity. He further claimed that such closure of the newspaper was unlawful, because the court could not order a liquidation of a legal entity based on a defamation complaint made by an individual. Instead, in accordance with Article 59.3 of the Civil Code, the court could order such liquidation only upon an application by the relevant government or local authority.

By a judgment of 6 December 2001, the Court of Appeal dismissed the applicant's appeal and upheld the first-instance judgment as lawful. At this point, in accordance with the domestic civil procedure law, the judgment entered into legal force and the enforcement proceedings were instituted. On 26 December 2001 the Head of the Yasamal District Bailiff's Office (*Yasamal Rayon Məhkəmə Nəzarətçiləri və Məhkəmə İcraçıları Şöbəsi*) sent a letter to the applicant, requesting the newspaper to comply with the judgment voluntarily within a five-day period. It appears that the newspaper's management complied with this request in a timely manner. Accordingly, the production and distribution of the newspaper was

terminated and the moral compensation was paid to T.K. by the end of 2001.

On 8 May 2002 the applicant, on behalf of the newspaper's editorial board, filed a cassation appeal with the Supreme Court. He claimed that the Court of Appeal had committed the same errors of fact and law as the district court. On 31 July 2002 the Supreme Court dismissed the applicant's appeal and upheld the Court of Appeal's judgment.

According to the Government, although the production and distribution of the *Femida* newspaper had been terminated, the newspaper's editorial staff continued their activities through *Femida*'s legal successor, a newspaper called *Femida 007*. The applicant noted that *Femida 007* was simply an addendum to the newspaper and not its legal successor.

B. Relevant domestic law

1. Code of Civil Procedure of 2000

Article 233. [First-instance] judgment's entry into legal force

"233.1. A [first-instance] judgment enters into legal force after one month from the date of its delivery, unless an appeal has been filed against it [with the appellate court].

233.2. A judgment, which [has been appealed but] has not been quashed on appeal, enters into legal force upon the delivery of the appellate court's judgment [upholding the first-instance judgment]. ..."

Article 234. Execution of a judgment

"A judgment is subject to execution after its entry into legal force ..."

Article 393. Appellate-instance judgment's entry into legal force

"A judgment of the appellate-instance court enters into legal force from the moment of its delivery."

Article 413. Suspension [by the Supreme Court] of the judgment's execution

"413.0. Upon a petition by a party to the case, the cassation-instance court may suspend, until the end of the cassation proceedings, the execution of the appellate court's judgment and the related judgment of the first-instance court ..."

COMPLAINTS

1. The applicant complained under Article 10 of the Convention that the closing of the newspaper for publishing an allegedly defamatory article amounted to a violation of the freedom of expression.

2. The applicant further complained under Article 6 § 1 of the Convention that the domestic proceedings had been unfair because the courts had misapplied the domestic law. Specifically, he claimed that the courts had no competence to close the newspaper upon a demand made by T.K. as a private person. On the contrary, the courts could order to terminate the newspaper's production only upon an application by the relevant governmental authority and only in case the newspaper had been found to publish defamatory material three times within one year.

3. The applicant finally complained of a violation of Article 13 in conjunction with Article 6 of the Convention in that the domestic remedies in this case had been ineffective. He submitted that this case was similar to many other examples where newspapers publishing articles criticising government officials lost their case in civil defamation proceedings in domestic courts.

THE LAW

1. The applicant complained that the judicial order to terminate the production and distribution of the *Femida* newspaper had been in breach of Article 10 of the Convention, which provides as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The Government argued that the Court had no competence *ratione personae* to examine this application because it had been filed in the name of the applicant himself, and not that of the newspaper. The applicant was not the founder or owner of the newspaper and he could not be considered a victim of the alleged interference with the newspaper's rights.

The Government also submitted that the complaint fell outside the Court's competence *ratione temporis*, because the judicial order to terminate the production and distribution of the newspaper had entered into legal force and had been executed before 15 April 2002, the date of the Convention's entry into force with respect to Azerbaijan.

The applicant argued that he, as the newspaper's chief editor, had been authorised by law to represent the newspaper. Moreover, as a chief editor, he managed the newspaper and was responsible for its activities. In such circumstances, the closure of the newspaper directly affected his rights and freedoms. The applicant has not submitted any specific reply to the Government's objection concerning the Court's competence *ratione temporis*.

The Court finds that it is unnecessary to decide whether the applicant can be considered a victim of the alleged violation because, even assuming this to be the case, the present complaint is inadmissible for the following reasons.

The Court recalls that, in accordance with the generally recognised rules of international law, the Convention only governs, for each Contracting Party, facts subsequent to its entry into force with regard to that Party (see e.g. *Kazimova v. Azerbaijan* (dec.), no. 40368/02, 6 March 2003). The Convention entered into force with respect to Azerbaijan on 15 April 2002. Accordingly, the Court is not competent to examine applications against Azerbaijan in so far as the alleged violations are based on facts that occurred prior to 15 April 2002.

The Court further recalls that its competence *ratione temporis* is to be determined in relation to the facts constitutive of the alleged interference. In cases where the alleged interference pre-dates ratification while the refusal to remedy it post-dates ratification, to retain the date of the latter act in determining the Court's temporal jurisdiction would result in the Convention being binding for that State in relation to a fact that had taken place before the Convention entered into force in respect of that State. However, this would amount to giving retroactive effect to the Convention which would be contrary to general principles of international law. At the same time it would render Azerbaijan's declaration recognising the Court's competence to receive individual applications nugatory (see *Blečić v. Croatia* [GC], no. 59532/00, § 77-79, ECHR 2006-...; *Kadikis v. Latvia* (dec), no. 47634/99, 29 June 2000; *Stamoulakatos v. Greece (no. 1)*, judgment of 26 October 1993, Series A no. 271, § 33).

In the present case, the fact constitutive of the alleged interference was the termination of the newspaper's production and distribution. It therefore remains to be determined when this termination occurred.

Having regard to the circumstances of the case, the Court considers that the alleged interference with the applicant's freedom of expression took place on 6 December 2001, when the Court of Appeal upheld the first-instance court's order to terminate the production and distribution of the newspaper. Under the domestic civil procedure law, this order entered into legal force and became enforceable upon delivery of the Court of Appeal's judgment (see Articles 233, 234 and 393 of the Code of Civil Procedure). Although the applicant later filed a cassation appeal with the Supreme

Court, the domestic law did not provide for an automatic suspension of the judgment's execution pending the outcome of the cassation proceedings (see Article 413 of the Code of Civil Procedure). The newspaper's production and distribution was in fact terminated by the end of 2001 pursuant to the enforceable judgment of the Court of Appeal of 6 December 2001. Therefore, it was at that moment – neither before nor afterwards – that the interference took place (compare with *Blečić*, cited above, § 84).

It follows that the alleged interference with the applicant's right occurred upon entry into force of the Court of Appeal's judgment on 6 December 2001 and is therefore outside the Court's temporal jurisdiction. The subsequent cassation proceedings in the Supreme Court are to be seen as the exercise of the available domestic remedy aimed at redressing the alleged interference and cannot bring it within the Court's temporal jurisdiction (see *Blečić*, cited above, §§ 77-78). Furthermore, as to the cassation proceedings in the Supreme Court, insofar as they do fall within the Court's competence *ratione temporis*, the applicant did not make any separate complaint as to their compatibility with Article 10 of the Convention.

It follows that this complaint is incompatible *ratione temporis* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

2. The applicant complained under Article 6 of the Convention that the domestic courts erred in assessing the facts and misapplied the domestic law. Specifically, he claimed that the courts had no competence to order the termination of the newspaper's production and distribution, because the petition to close the newspaper had been lodged by a private person. Moreover, the newspaper could not be closed unless it had been found to publish defamatory material three times within one year. Article 6 of the Convention provides as follows:

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

The Government argued that the first-instance and appellate proceedings fell outside the Court's competence *ratione temporis*. As for the cassation proceedings in the Supreme Court, the Government submitted that the applicant failed to present any evidence of unfairness of the proceedings. In any event, the Government argued that the domestic law did not prevent the courts to order the closure of a newspaper upon a petition by a private victim of defamation. The Government also noted that, within the year of 2001, five defamation lawsuits had been filed against the *Femida* newspaper, and in three of those lawsuits the newspaper had been found to have published information of defamatory character. This was the lawful ground to order the termination of the newspaper's production.

The applicant did not address the issue of the Court's competence *ratione temporis*. He reiterated his arguments concerning this complaint,

specifically pointing out that the newspaper had only been held liable for defamation twice in 2001 and that the domestic courts failed to determine this fact correctly.

The Court recalls that, where the facts consist of a series of legal proceedings, the date of entry into force of the Convention in respect of the Contracting State in question has the effect of dividing the period into two, the earlier part falling outside the Court's jurisdiction *ratione temporis* (see e.g. *Klimentyev v. Russia* (dec.), no. 46503/99, 17 September 2002; *Jacq v. Finland*, no. 22470/93, Commission decision of 18 October 1995, unreported; and *Mitap and Müftüoğlu v. Turkey*, judgment of 25 March 1996, *Reports of Judgments and Decisions* 1996-II, § 26-27). The Court observes that the proceedings in the Yasamal District Court and the Court of Appeal were concluded prior to the Convention's entry into force with respect to Azerbaijan on 15 April 2002. Therefore, the Court finds that the part of the complaint relating to the first-instance and appellate proceedings falls outside the scope of its competence *ratione temporis*.

On the other hand, the Court has competence to examine the part of the complaint relating to the cassation proceedings in the Supreme Court, which were instituted after 15 April 2002 and ended with the final decision of 31 July 2002.

The Court observes that the applicant's present complaint essentially relates to the alleged errors of fact and law committed by the domestic courts in general. The applicant has not, however, adduced any specific evidence concerning the unfairness of the cassation proceedings or arbitrariness of their outcome. In this respect, the Court reiterates that, according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of the rights or freedoms protected by the Convention (see e.g. *Schenk v. Switzerland*, judgment of 12 July 1988, Series A no. 140, § 45; and *Kazimova*, cited above).

It follows that this complaint is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 § 4 of the Convention.

3. The applicant complained under Article 13 of the Convention that the domestic remedies in his case had been ineffective, because there was a domestic court practice to always rule in favour of government officials who sued newspapers for defamation. Article 13 provides as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Court notes that the mere fact that the outcome of the domestic proceedings was unfavourable to the applicant cannot lead to a conclusion that the remedy was ineffective. The Court also finds that the applicant's allegation that the domestic courts always ruled against newspapers in defamation proceedings is not supported by sufficient evidence.

It follows that this complaint is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 § 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Søren NIELSEN
Registrar

Christos ROZAKIS
President