



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

FIRST SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 2758/05
by Rahim GAZIYEV
against Azerbaijan

The European Court of Human Rights (First Section), sitting on 8 February 2007 as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,

Mr L. LOUCAIDES,

Mrs N. VAJIĆ,

Mr K. HAJIYEV,

Mr D. SPIELMANN,

Mr S.E. JEBENS,

Mr G. MALINVERNI, *judges*,

and Mr S. NIELSEN, *Section Registrar*

Having regard to the above application lodged on 28 December 2004,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Rahim Gaziyeu, is an Azerbaijani national who was born in 1943 and lives in Baku. He is represented before the Court by Mr E. Guliyev, a lawyer practising in Baku.

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

The applicant is a former Defence Minister. On 12 May 1995 the Supreme Court, sitting as a court of first instance for specially serious crimes, convicted the applicant of abuse of power during wartime, embezzlement of state funds and illegal possession of firearms. Pursuant to

the Criminal Code of 1960 which was in force at that time, he was sentenced to the death penalty with confiscation of property. Being a decision of the highest tribunal, this judgment was final and was not subject to appeal at the material time.

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

In 2000 a new Code of Criminal Procedure (“CCrP”) and new Criminal Code of the Republic of Azerbaijan were adopted. Before the new CCrP’s entry into force on 1 September 2000, on 14 July 2000 Parliament passed a transitional law allowing lodging an appeal under the new CCrP against the final first-instance judgments delivered in accordance with the old criminal procedure rules (the “Transitional Law”).

Shortly after this, at the time of Azerbaijan’s admission to the Council of Europe, the applicant was recognised as a “political prisoner” by independent experts of the Secretary General. Azerbaijan has made a commitment to either release or give a re-trial to all persons identified as “political prisoners” by these experts.

Pursuant to the Transitional Law, the applicant’s case was heard on appeal. The appellate hearings were held at Gobustan Prison where the applicant was serving his life sentence.

On 26 December 2003 the Court of Appeal upheld the applicant’s original conviction but reduced his sentence to 15 years’ imprisonment in accordance with the new Criminal Code of 2000.

On 26 October 2004 the Supreme Court upheld this judgment.

In March 2005 the applicant was released from serving the remainder of his sentence pursuant to a presidential pardon decree.

COMPLAINTS

1. The applicant complained under Article 3 of the Convention that he had spent three years on “death row” before the abolition of the death penalty in 1998.

2. The applicant complained under Article 5 of the Convention that the authorities had unlawfully deprived him of his liberty following institution of appellate proceedings. In particular, he claimed that he had been unlawfully held in “pre-trial detention” after the expiry of the maximum

seven-month detention period provided for by the domestic law for persons whose case was under examination by the Court of Appeal.

3. The applicant complained under Article 6 of the Convention about the unfairness of the proceedings in the first instance court.

4. The applicant complained under Article 6 of the Convention that the appellate proceedings had been held in Gobustan Prison. This prison was subject to a limited access regime, located outside of Baku and hardly accessible to the public.

5. The applicant complained under Article 7 of the Convention that the substitution of the death penalty with life imprisonment in 1998 as well as further reduction of his sentence to 15 years' imprisonment after the appellate and cassation proceedings constituted a retroactive application of new criminal law to his detriment.

6. The applicant complained under Article 10 of the Convention that he was convicted because he had criticised the President in his Parliament speech in 1993.

THE LAW

1. The applicant complained under Article 3 of the Convention that, until the abolition of death penalty in 1998, he had awaited his execution in prison for a period of three years. This situation allegedly caused him moral suffering and amounted to ill-treatment.

The Court notes that this complaint relates to the events that occurred prior to 15 April 2002, the date of the Convention's entry into force with respect to Azerbaijan. It follows that it 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 of the Convention.

2. Relying on Article 5 of the Convention, the applicant further contended that, according to the domestic law, the maximum length of the detention pending trial could not exceed seven months for persons accused of serious crimes. However, although the proceedings in the Court of Appeal lasted longer than seven months, he was not released from "detention".

The Court recalls that, in determining the length of detention pending trial, the period to be taken into consideration begins on the day the accused is taken into custody and ends on the day when the charge is determined, even if only by a court of first instance (see, for example, *Kalashnikov v. Russia*, no. 47095/99, § 110, ECHR 2002-VI). In the present case, the applicant's detention pending trial ended on 12 May 1995, when he was convicted and sentenced by the Supreme Court sitting in the first instance. Therefore, as from that date, the applicant was serving a sentence after his

conviction by a competent court, within the meaning of Article 5 § 1 (a) of the Convention.

The mere fact that, pursuant to the Transitional Law, the applicant acquired a right to appeal against his conviction on 12 May 1995 did not change the applicant's status of a person serving a sentence after conviction, because the judgment of 12 May 1995 remained in force and there had been no judicial decision invalidating that judgment or otherwise acquitting the applicant before the case was examined by the Court of Appeal (see *Hummatov v. Azerbaijan* (dec.), nos. 9852/03 and 13413/04, 18 May 2006).

Accordingly, during the period of examination of the applicant's case by the Court of Appeal, the applicant was already serving a sentence after his conviction by a competent court, within the meaning of Article 5 § 1 (a) of the Convention, and was not detained on remand within the meaning of Article 5 § 1 (c) of the Convention. Therefore, no issue arises as to the excessive length of pre-trial detention.

It follows that the 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 6 of the Convention that the trial by the first instance court, which resulted in his conviction on 12 May 1995, had been unfair.

The Court notes that the first-instance proceedings took place prior to 15 April 2002, the date of Azerbaijan's ratification of the Convention. Therefore, even though the applicant's case was later re-examined on appeal after the Convention's entry into force with respect to Azerbaijan, the Court has no competence to examine the alleged unfairness of the first instance proceedings which gave rise to the appellate and cassation proceedings (see, for example, *Abbasov v. Azerbaijan* (dec.), no. 24271/05, 24 October 2006).

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.

4. The applicant complained under Article 6 of the Convention that his right to a fair and public hearing during the appellate proceedings had been restricted, because the hearings of the Court of Appeal took place in Gobustan Prison.

The Court considers that it cannot, on the basis of the case file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

5. The applicant complained under Article 7 of the Convention that the substitution of the death penalty with life imprisonment in 1998 had been to his detriment because, at the time he committed the acts of which he was convicted, the heaviest alternative to the death penalty was the fixed-term imprisonment of up to 15 years. Moreover, he contended that, pursuant to

the new domestic criminal law, at the outcome of the appellate proceedings, his sentence should have been reduced to 12 years' imprisonment instead of 15 years' imprisonment.

As to the applicant's argument that the penalty of life imprisonment was imposed retroactively to his detriment, the Court notes, at the outset, that the applicant's death penalty was commuted to life imprisonment in February 1998, prior to the date of Azerbaijan's ratification of the Convention. However, even assuming that the complaint falls within the Court's competence *ratione temporis*, the Court notes that a similar complaint has been raised previously before the Court and has been declared inadmissible as manifestly ill-founded within the meaning of Article 35 § 3 of the Convention (see *Hummatov*, cited above). It finds no particular circumstances in the present case which would require it to depart from its findings in the *Hummatov* case.

Furthermore, as to the applicant's argument that the Court of Appeal should have further reduced the term of his prison sentence to 12 years instead of 15 years, the Court is not concerned with the question whether application of this new sentence of 15 years' imprisonment was appropriate, because it is not its task to determine the applicant's criminal responsibility and the gravity of the crime or assess the appropriate penalty (see *Hummatov*, cited above; see also, *mutatis mutandis*, *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V, and *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 51, ECHR 2001-II). For the purposes of the present complaint under Article 7 of the Convention, the Court's task is limited to ensuring whether this new sentence was not heavier than the one applicable at the time the criminal offence was committed.

The applicant was sentenced to the death penalty on 12 May 1995. It is undisputed that this penalty was applicable to the acts of which he was convicted at the relevant time. This sentence was later commuted to life imprisonment. Following the appellate and cassation proceedings, the domestic courts changed the applicant's sentence to 15 years' imprisonment. The Court finds that this new sentence was not heavier than the death penalty (later commuted to life imprisonment). Accordingly, no heavier penalty was imposed on the applicant than the one that was applicable at the time the criminal offence was committed.

Moreover, the Court notes that, in any event, the applicant was released from imprisonment in March 2005, having served a total sentence of approximately 10 years.

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

6. The applicant complained under Article 10 of the Convention that he had been arrested and convicted in "revenge" for his speech criticising the President.

In the light of all the material in its possession, and in so far as the matters complained of were within its competence, the Court finds that this complaint does not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Decides to adjourn the examination of the applicant's complaints concerning the alleged lack of a public hearing during the appellate proceedings;

Declares the remainder of the application inadmissible.

Søren NIELSEN
Registrar

Christos ROZAKIS
President