

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

FIRST SECTION

CASE OF MAMMADOV v. AZERBAIJAN

(Application no. 959/15)

JUDGMENT

STRASBOURG

26 September 2024

This judgment is final but it may be subject to editorial revision.



In the case of Mammadov v. Azerbaijan,

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

Krzysztof Wojtyczek*, President*,
Lətif Hüseynov,
Erik Wennerström*, judges*,
and Liv Tigerstedt, *Deputy Section Registrar,*

Having regard to:

the application (no. 959/15) 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") on 24 December 2014 by an Azerbaijani national, Mr Hilal Alif oglu Mammadov (*Hilal Əlif oğlu Məmmədov* – "the applicant"), who was born in 1959, lives in Baku and was represented by Mr K. Bagirov and Mr J. Javadov, lawyers based in Azerbaijan;

the decision to give notice of the complaints concerning Articles 6 and 10 of the Convention to the Azerbaijani Government ("the Government"), represented by their Agent, Mr Ç. Əsgərov, and to declare the remainder of the application inadmissible;

the decision of the President of the Section to give Mr K. Bagirov leave to represent the applicant in the proceedings before the Court (Rule 36 § 4 (a) *in fine* of the Rules of Court);

the parties' observations;

Having deliberated in private on 5 September 2024,

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

SUBJECT MATTER OF THE CASE

1. The case concerns the criminal proceedings against the applicant, in which he was convicted of drug dealing, high treason, and incitement to ethnic and religious hatred and hostility.

2. The circumstances relating to the applicant's arrest and detention are described in *Hilal Mammadov v. Azerbaijan* (no. 81553/12, §§ 7-16, 4 February 2016).

3. In particular, at around noon on 21 June 2012, the applicant was arrested by plain-clothed police officers near the Neftchilar metro station in Baku and taken to the Narcotics Department of the Ministry of Internal Affairs ("the NDMIA"), where he was searched in the presence of three police officers and two attesting witnesses. According to the record of the search, it was carried out from 1.45 to 2 p.m. on 21 June 2012 and the applicant was not represented by a lawyer. During the search, 5 grams of a substance similar to heroin were found in the right pocket and two USB devices were found in the left pocket of the applicant's trousers.

4. At 2 p.m. on 21 June 2012 a police investigator drew up a record of the applicant's arrest.

5. On the same day a search was carried out in the applicant's flat without a court order. According to the search record, it was conducted from 6.10 to 7.55 p.m. on 21 June 2012 in the presence of the applicant, six police officers and two attesting witnesses. It appears from the record that the applicant was not represented by a lawyer and that the two attesting witnesses were the same individuals who had previously participated in the search at the NDMIA. During the search, narcotic substances similar to heroin were found. The applicant noted in the record that the narcotic substances did not belong to him.

6. On 22 June 2012 the applicant was charged under Article 234.4.3 (illegal preparation, production, possession, storage, transportation and sale of a large quantity of narcotic substances) of the Criminal Code.

7. On 28 June 2012 forensic psycholinguistic opinion no. 10626/27 was drawn up, which stated that the texts in the files discovered on the applicant's USB device contained information aimed at inciting ethnic and religious hostility.

8. On 30 June 2012 the investigator questioned as a witness E.G., who had previously approached the Prosecutor General claiming that the applicant had been recruited by the Iranian intelligence services. In his testimony, E.G. stated that he had met with the applicant once in 2006. During that private meeting the applicant had admitted to working with the Iranian intelligence services with a view to fostering ethnic hostility in Azerbaijan.

9. On 3 July 2012 the applicant was charged *de novo*. In addition to the original charges, he was further charged under Articles 274 (high treason) and 283.2.2 (incitement to ethnic and religious hatred and hostility) of the Criminal Code.

10. On 13 August 2012 the Ministry of National Security ("the MNS") provided operational information (*əməliyyat məlumatı*), stating that the applicant had conspired with a member of the Iranian intelligence services with a view to engaging in hostile activity against the Republic of Azerbaijan.

11. On 10 October 2012 an additional forensic psycholinguistic opinion was drawn up (no. 14958), which confirmed the findings of the initial opinion, also stating that the texts found on the applicant contained information aimed at inciting ethnic and religious hostility.

12. On 20 December 2012 the investigator issued a bill of indictment under Articles 234.4.3, 274 and 283.2.2 of the Criminal Code and filed it with the Baku Court of Serious Crimes ("the BCSC"). It appears that in addition to the above-mentioned evidence, the investigator also referred to the statements given by several witnesses as part of an unrelated criminal case against A.H. on charges of high treason and the use of armed force against the constitutional institutions of the State (for further details see *Hummatov*

v. Azerbaijan, nos. 9852/03 and 13413/04, §§ 7-9, 29 November 2007), without specifying the relevance of that case to the present one.

13. On 10 January 2013 the BCSC held a preliminary hearing and, as regards the charges under Articles 274 and 283.2.2 of the Criminal Code, decided that the trial would be held in camera in order to prevent the potential disclosure of State secrets.

14. In the course of the proceedings in the first-instance court, the applicant maintained his innocence, insisting, *inter alia*, that the drugs had been planted on him and in his flat by the police and that it had been unlawful to use the texts found on his USB device, witness statements from the criminal case against A.H. and unverified operational information from the MNS in order to incriminate him.

15. On 27 September 2013 the BCSC found the applicant guilty as charged and sentenced him to five years' imprisonment. The court found the applicant guilty under Article 234.4.3 of the Criminal Code on the basis of the narcotic substances found on his person and in his flat. As to the charges under Articles 274 and 283.2.2 of the Criminal Code, the court found the applicant guilty primarily because of the forensic opinions concerning the texts found on his USB device, E.G.'s statement, witness statements from the criminal case against A.H. and the operational information provided by the MNS. The judgment made no mention of the applicant's specific complaints about the lawfulness of the evidence used against him.

16. The applicant appealed, reiterating his arguments. In addition, he complained that he had not been given a public hearing before the BCSC.

17. On 16 December 2013 the Baku Court of Appeal held a preliminary hearing and decided that the trial would be held in camera because the applicant had been found guilty under Articles 274 and 283.2.2 of the Criminal Code.

18. On 25 December 2013 the Baku Court of Appeal upheld the judgment of the first-instance court, summarily rejecting the applicant's appeal. That court's judgment made no mention of the applicant's specific complaints concerning the lawfulness of the evidence used against him.

19. On 25 June 2014 the Supreme Court upheld the judgment of the Court of Appeal.

20. The applicant complained under Article 6 of the Convention that the proceedings against him had been unfair and that he had been deprived of a public hearing. He also complained under Article 10 of the Convention that his texts had been used against him as evidence to convict him.

THE COURT'S ASSESSMENT

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION (FAIRNESS OF THE CRIMINAL PROCEEDINGS)

21. The applicant complained under Article 6 of the Convention that the criminal proceedings against him had been unfair since his conviction had been based on unlawfully obtained evidence and the domestic courts had failed to provide reasons for their decisions. He also complained that he had not been provided with adequate time or the means to prepare his defence; that he had not been allowed immediate access to legal assistance of his own choosing; and that the domestic courts had arbitrarily refused to examine witnesses on behalf of the defence.

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

23. The Court refers to the general principles established in its case-law set out in *Ilgar Mammadov v. Azerbaijan (no. 2)* (no. 919/15, §§ 205-10, 16 November 2017), and *Fatullayev v. Azerbaijan (no. 2)* (no. 32734/11, §§ 76-83, 7 April 2022), which are equally pertinent to the present case.

24. The Court notes that throughout the criminal proceedings the applicant consistently argued that the criminal case against him had been fabricated and that the drugs found on his person and in his flat had in fact been planted by the police.

25. In this connection, the Court observes that the search of the applicant was not carried out immediately following his arrest at noon on 21 June 2012. It took place at 1.45 p.m. on the same day at the NDMIA, nowhere near his place of arrest. The time lapse of around two hours between the arrest and search of the applicant raises legitimate concerns about the possible "planting" of the evidence, because he was completely under the control of the police during that time. Moreover, there is nothing to suggest that there had been any special circumstances rendering it impossible to carry out a search immediately after the applicant's arrest (see *Layijov v. Azerbaijan*, no. 22062/07, § 69, 10 April 2014).

26. In addition, the Court cannot overlook the fact that the applicant's arrest was not immediately documented by the police. That is to say, although he was arrested by the police at noon on 21 June 2012, an official record of the arrest was not drawn up until 2 p.m. on that day (see paragraph 4 above). Moreover, it appears that the applicant was not represented by a lawyer during his arrest and the search at the NDMIA. Nor was he represented by a lawyer during the later search in his flat, and the presence of the two attesting witnesses participating in both of those searches could not have remedied the above-mentioned shortcomings (see *Savalanli and Others v. Azerbaijan*, nos. 54151/11 and 3 others, § 91, 15 November 2022).

27. Having regard to the above, the Court considers that the quality of the physical evidence, on which the applicant's conviction under Article 234.4.3 of the Criminal Code was based, is questionable because the manner in which it was obtained casts doubt on its reliability.

28. As to the question whether the applicant was given the opportunity to challenge the reliability of this evidence and its use in the domestic proceedings, the Court cannot but conclude that the applicant was not given such an opportunity as the domestic courts did not consider his complaints in that respect and gave no reason for that failure.

29. As regards the applicant's conviction under Article 283.2.2 of the Criminal Code, the Court observes that although it was based on two texts discovered on his USB device, which were characterised as inciting ethnic and religious hostility, it appears that those texts had never been published or made public in any other way. The Court notes that, given that the constituent element of the criminal offence provided for in Article 283.2.2 of the Criminal Code at the material time required for it to be committed openly or via the mass media (*aşkar surətdə və ya kütləvi informasiya vasitələrindən istifadə olunmaqla*), it does not see how the applicant could have been convicted for texts which had never been made public.

30. As to the applicant's conviction under Article 274 of the Criminal Code, it is unclear how the witness statements made in separate criminal proceedings against another person (A.H.), in which the applicant had not been a suspect or an accused, could have been used as evidence to convict him in the present case. It is also unclear how the operational information provided by the MNS could have been used to convict the applicant. The courts accepted that evidence at face value and dismissed the applicant's arguments concerning the information's reliability without any serious attempt to verify it. As to E.G.'s statement, the Court notes that the domestic courts failed to address the applicant's arguments regarding the facts presented by E.G. or to provide reasons as to why they considered those arguments groundless.

31. The foregoing considerations are sufficient to enable the Court to conclude that the criminal proceedings against the applicant, taken as a whole, did not comply with the guarantees of a fair trial.

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

33. In view of the above findings, the Court considers that it is not necessary to examine the remainder of the applicant's grievances under this head (see paragraph 21 above, and compare *Rustamzade v. Azerbaijan (no. 2)*, no. 22323/16, § 44, 23 February 2023).

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION (PUBLIC HEARING)

34. The applicant further complained under Article 6 of the Convention that public access to his trial had been restricted.

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

36. The general principles concerning the right to a public hearing have been summarised in *Hummatov v. Azerbaijan* (nos. 9852/03 and 13413/04, §§ 140-41 and 144, 29 November 2007).

37. The Court notes that in the present case both the first-instance court (BCSC) and the Baku Court of Appeal referred to the protection of State secrets as the basis for holding the trial in camera. The Court reiterates in this connection that the mere presence of classified information in a case file does not automatically imply a need to close a trial to the public, without balancing the principle of openness with national security concerns. It may be important for a State to preserve its secrets, but it is of infinitely greater importance to surround justice with all the requisite safeguards, of which one of the most indispensable is publicity. Before excluding the public from criminal proceedings, courts must make specific findings that closure is necessary to protect a compelling governmental interest and limit secrecy to the extent necessary to preserve such an interest (see *Pichugin v. Russia*, no. 38623/03, § 187, 23 October 2012).

38. There is no evidence to suggest that any of the conditions indicated in the paragraph above were satisfied in the present case. The domestic courts and the Government failed to indicate what documents in the case file, if any, were considered to contain State secrets or how they related to the nature and character of the charges against the applicant. Moreover, the domestic courts did not take any measures to counterbalance the detrimental effect that the decision to hold the trial in camera must have had on public confidence in the proper administration of justice for the sake of protecting the State's interest in keeping its secrets. In addition, the Government did not argue that it was not open to the trial court to hold the trial publicly, subject to clearing the courtroom for a single or, if need be, a number of non-public sessions to deal with classified documents or information (compare *Dadashbeyli v. Azerbaijan* [Committee], no. 11297/09, § 28, 3 December 2020).

39. Having regard to these considerations, the Court concludes that there has been a violation of Article 6 § 1 of the Convention owing to the lack of a public hearing in the applicant's case.

III. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

40. The applicant also complained that the use of his texts as evidence for his criminal conviction had amounted to a violation of his right to freedom of expression under Article 10 of the Convention.

41. Having regard to the facts of the case, the submissions of the parties, and its findings above (see paragraphs 32 and 39 above), the Court considers that it has dealt with the main legal questions raised by the case and that there is no need to examine the admissibility and merits of this complaint (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

APPLICATION OF ARTICLE 41 OF THE CONVENTION

42. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage, EUR 5,000 in respect of costs and expenses incurred before the Court and EUR 1,295 in respect of translation costs.

43. The Government contested the amounts as excessive and unsubstantiated.

44. The Court awards the applicant EUR 4,700 in respect of non-pecuniary damage, plus any tax that may be chargeable.

45. Having regard to the documents in its possession, the Court considers it reasonable to award EUR 1,500 covering costs under all heads, plus any tax that may be chargeable to the applicant, to be paid directly to the applicant's representative, Mr K. Bagirov.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints concerning the fairness of the criminal proceedings and the lack of a public hearing under Article 6 § 1 of the Convention admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the unfairness of the criminal proceedings;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the lack of a public hearing;

4. *Holds* that there is no need to examine the admissibility and merits of the complaint under Article 10 of the Convention;

5. *Holds*

(a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 4,700 (four thousand seven hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be paid directly to the applicant's representative, Mr K. Bagirov;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 26 September 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Liv Tigerstedt Deputy Registrar	Krzysztof Wojtyczek President