



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

FIFTH SECTION

CASE OF MEHDIYEV v. AZERBAIJAN

(Application no. 59090/12)

JUDGMENT

STRASBOURG

31 October 2019

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

In the case of Mehdiyev v. Azerbaijan,

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

André Potocki, *President*,

Mārtiņš Mits,

Lətif Hüseynov, *judges*,

and Milan Blaško, *Deputy Section Registrar*,

Having deliberated in private on 8 October 2019,

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

PROCEDURE

1. The case originated in an application (no. 59090/12) 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 Hakimeldostu Bayram oğlu Mehdiyev (*Hakimeldostu Bayram oğlu Mehdiyev* – “the applicant”), on 26 July 2012.

2. The applicant was represented by Mr R. Mustafazade and Mr A. Mustafayev, lawyers based in Azerbaijan. The Azerbaijani Government (“the Government”) were represented by their Agent, Mr Ç. Əsgərov.

3. On 23 June 2016 notice of the complaint under Article 6 §§ 1 and 3 (d) of the Convention was given to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1961 and lives in Nakhchivan.

5. On an unspecified date in January 2010 the applicant opened a carwash facility next to his house.

6. On 13 July 2011 representatives of the Sharur District Electricity Network (“the electricity company”) inspected the electricity usage in the carwash facility (“the facility”) and found that the applicant had unlawfully connected his facility to the main (public) electricity supply line and had been using electricity without paying for it.

7. On an unspecified date criminal proceedings were instituted against the applicant and he was charged under Article 189-1.1 (unlawful consumption of electricity causing serious damage) of the Criminal Code. The total amount of damage caused was determined by an expert at 1,050.18 Azerbaijani manats (AZN – approximately 977 euros (EUR) at the time). The calculation was based on the assumption that on average fifteen cars were washed at the facility per day and that the facility had been operational thirty days per month for fourteen months.

8. In the course of the proceedings before the trial court, the applicant claimed his innocence. He stated that he had tried to obtain an electricity-consumption meter for the facility from the electricity company, and that having failed to do so, he had decided to connect the facility to the electricity-consumption meter in his house. He also stated that he had been operating the facility for around one year and had serviced on average two or three cars per day. He further stated that he had paid around AZN 5 (approximately EUR 5) per month for the total amount of electricity consumed at the facility and at his house.

9. The applicant further argued that if, owing to weather conditions, the facility had been operational not thirty days a month, as assumed in the expert's opinion, but twenty-eight days, the total cost of the damage would be AZN 75 less, in which case the alleged offence could not be considered as a criminal offence.

10. The applicant's son testified that he was in charge of the facility and that on average he serviced two or three, and occasionally five or six, cars per day.

11. During the trial nine witnesses called by the prosecution testified that whenever they passed by the facility or had their cars washed there, they saw three or four cars queuing to be washed. Some of them stated that they paid AZN 3 (approximately EUR 3) for their cars to be washed.

12. Two more witnesses for the prosecution stated that they estimated the average number of cars washed at the facility at fifteen to twenty per day. Three witnesses, who were employees of the electricity company, gave evidence concerning the applicant's unauthorised connection to the main electricity supply.

13. The applicant applied to the court for the attendance of four witnesses on his behalf who would give statements as to the real number of cars actually washed in the facility per day. He stated that the prosecution witnesses had deliberately given statements exaggerating the number of cars serviced daily at the facility so that the quantity of electricity used would make him criminally liable for his acts.

14. According to the transcript of the hearing, having heard the prosecutor, who stated that in total eighteen witnesses were scheduled to be heard during the proceedings and that there was no need for additional ones,

the trial court dismissed the applicant's request without providing any reasons.

15. On 23 September 2011 the Sharur District Court found the applicant guilty as charged and sentenced him to a fine in the amount of AZN 1,000 (approximately EUR 930). The finding of guilt was based on the expert opinion and witness statements (see paragraphs 7 and 12 above).

16. On an unspecified date the applicant lodged an appeal against that judgment, complaining, *inter alia*, that he had been deprived of the right to obtain the attendance of witnesses on his behalf as required by Article 6 of the Convention because the trial court had unreasonably rejected his request.

17. According to the transcript of the hearing, the applicant argued that he had asked the trial court to hear several witnesses who were neighbours and who could give more reliable evidence concerning the number of cars serviced at the facility.

18. On 10 November 2011 the Supreme Court of the Nakhchivan Autonomous Republic, acting as a court of appeal, upheld the first-instance judgment but remained silent on the particular complaint raised by the applicant.

19. On an unspecified date the applicant lodged a cassation appeal, complaining that the lower courts had dismissed all of the applications lodged by his lawyer, including the one concerning the attendance of witnesses on his behalf, without giving any reasoning, and had thus breached his right to a fair trial.

20. On 22 February 2012 the Supreme Court of the Republic of Azerbaijan upheld the decision of the appellate court without examining the applicant's particular complaint.

II. RELEVANT DOMESTIC LAW

21. Article 189-1.1 (Misappropriation of natural gas, electricity or heating energy) of the Criminal Code ("the CC"), as in force at the material time, provided that unlawful interference with the electricity network resulting in misappropriation of a substantial sum is punishable by a fine of from AZN 1,000 to 3,000 or by correctional work for a term of up to two years or by restriction of liberty for a term of up to two years. The second explanatory note to Article 177 of the CC applicable, *inter alia*, to Article 189-1.1, defines "substantial sum" as between AZN 1,000 and 7,000.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

22. The applicant complained under Article 6 §§ 1 and 3 (d) of the Convention of the unfairness of the criminal proceedings against him on account of his inability to obtain the attendance and examination of witnesses on his behalf. The relevant parts of Article 6 read 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 and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”.

A. Admissibility

1. *The parties' submissions*

23. The Government submitted that the applicant had not sustained any significant disadvantage on account of the fine imposed on him, which was comparable to payment for the unlawfully consumed electricity. Moreover, the domestic courts had not imposed on him the available heavier punishment for the offence committed, and he had not been imprisoned.

24. The applicant argued that the fine had been more than five times higher than his monthly income at the time, and had had a significant impact on him and his family.

2. *The Court's assessment*

25. As to the Government's objection that the applicant had not suffered any significant disadvantage, the Court holds that the severity of a violation should be assessed taking into account both the applicant's subjective perceptions and what is objectively at stake in a particular case (see *Korolev v. Russia (dec.)*, no. 25551/05, 1 July 2010, and *Kangers v. Latvia*, no. 35726/10, § 39, 14 March 2019). The absence of any significant disadvantage can be based on criteria such as the financial impact of the matter in dispute or the importance of the case for the applicant (see *Ionescu v. Romania (dec.)*, no. 36659/04, § 34, 1 June 2010, and *Muić v. Croatia*, no. 79653/12, § 33, 30 May 2017).

26. In the present case, the applicant was involved in criminal proceedings, in which he was sentenced to a fine of AZN 1,000 (EUR 930).

27. The Court notes that none of the parties submitted clear information concerning the financial status of the applicant. Nevertheless, it observes that the applicant was self-employed at the time, and that according to the State Committee for Statistics of the Nakhchivan Autonomous Republic, the average gross salary in Nakhchivan in 2010, when the applicant was sentenced to the fine, was AZN 100 (approximately EUR 91).

28. The Court also notes that the domestic proceedings, which are the subject of the complaint before it, had a public-interest component in that they were aimed at determining the applicant's guilt or innocence in respect of an offence he had allegedly committed and resulted in his criminal conviction. Therefore, in addition to the pecuniary nature of the fine he was ordered to pay, it is also necessary to take into account the fact that the proceedings concerned a question of principle for the applicant, namely his right to a fair trial in determination of the criminal charge against him (compare *Zeynalov v. Azerbaijan*, no. 31848/07, § 22, 30 May 2013).

29. Furthermore, the applicant complained that his case had not been properly examined by the domestic courts. It also notes that neither the appellate court nor the Supreme Court dealt with the applicant's complaints concerning an alleged breach of the guarantees of Article 6 (see paragraphs 18 and 20 above). In this connection, the Court reiterates that it must continue the examination of the application even in the absence of any significant disadvantage suffered by the applicant, if respect for human rights as defined in the Convention and the Protocols thereto so requires or if the case has not been duly considered by a domestic tribunal. Such are the requirements of the two safeguard clauses embedded in Article 35 § 3 (b) of the Convention (see *Flisar v. Slovenia*, no. 3127/09, § 28, 29 September 2011, and *Maravić Markeš v. Croatia*, no. 70923/11, § 50, 9 January 2014).

30. The foregoing considerations are sufficient to enable the Court to conclude that, owing to the significant financial impact and substantive nature of the matter at stake, the applicant has suffered a significant disadvantage as a result of the alleged violation of the Convention. Furthermore, the case has not been duly examined by a domestic tribunal.

31. The Court accordingly dismisses the Government's objection. The complaint is not inadmissible on any other grounds; it must therefore be declared admissible.

B. Merits

1. The parties' submissions

32. The Government submitted that having heard fifteen out of eighteen available witnesses, the trial court had had sufficient reason to reject the applicant's request that four more witnesses be questioned. Therefore, their

decisions were reasoned, fair and based on lawful and comprehensively assessed evidence.

33. The applicant argued that it was his right, under Article 6 of the Convention, to have the opportunity to examine defence witnesses. Their statements could have clarified whether his acts were to be classified as a criminal offence. Although he had made written and oral submissions before the trial court to obtain the attendance of witnesses on his behalf, they had been rejected without reasoning.

2. *The Court's assessment*

34. The applicable general principles concerning the right to obtain the attendance and examination of "witnesses on behalf" of the defence have been recently clarified and re-stated in *Murtazaliyeva v. Russia* ([GC], no. 36658/05, §§ 139, 144-49 and 158-67, 18 December 2018).

35. As the transcript of the hearing and the text of the applicant's request indicate, he asked the trial court to summon four witnesses in addition to those who had been called by the prosecution. He argued that the requested witnesses could give evidence concerning the exact number of cars serviced at the facility on average and that that, in turn, might affect the classification of his actions (see paragraph 13 above).

36. The Court notes that although the applicant did not provide detailed factual or legal arguments in his application to the trial court, he nevertheless sufficiently explained in concrete terms how the testimony of the witnesses to be summoned could reasonably be expected to strengthen the case for the defence.

37. The Court also notes that the transcript of the hearing does not mention the reasons given by the trial court for dismissing the applicant's request for defence witnesses to be summoned (see paragraph 14 above). The applicant's specific complaint in this respect, raised both in his appeal and during the hearing, was not addressed by the Court of Appeal in its decision (see paragraphs 16-18 above). Likewise, the Supreme Court did not make any mention of the applicant's particular complaints relating to the failure of the lower courts to provide reasons for dismissing his requests for the examination of witnesses on his behalf (see paragraphs 19-20 above).

38. As to the question whether the domestic courts' decision not to examine the witnesses on behalf of the applicant undermined the overall fairness of the proceedings, the Court notes that in the present case, the applicant was convicted for illegal consumption of electricity in the amount of AZN 1,050.18. The Court further notes that this amount marginally exceeded the sum of AZN 1,000 defined by domestic law as substantial enough to carry criminal liability (see paragraph 21 above).

39. The evidence supporting the accusations against the applicant, on which his conviction rested to a decisive degree, consisted of statements given by witnesses who stated that they had observed fifteen to twenty cars

being washed per day at the facility. It also consisted of the expert's calculation of the damage, based on an assumption that on average fifteen cars were washed at the facility per day and that the facility was operational for not less than thirty days per month (see paragraphs 7, 12 and 15 above).

40. The Court notes that the purpose of the defence's request for additional witnesses to be summoned was to determine the correct average number of cars washed per day at the applicant's facility. Moreover, an accurate assessment of the circumstances in which the applicant's facility operated was necessary in order to make a precise legal classification of the applicant's acts.

41. In the Court's view, given the nature and substance of the request lodged by the defence, the trial court was required to give reasons for the decision to reject it in accordance with its general duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties and to provide an adequately reasoned judgment (see *Ilgar Mammadov v. Azerbaijan (no. 2)*, no. 919/15, §§ 207 and 217, 16 November 2017). In view of the silence on the part of the higher domestic courts in respect of the applicant's specific complaint concerning the trial court's failure, the Court finds the manner in which they examined his appeals insufficient and the overall fairness of the proceedings affected.

42. The above considerations are sufficient to enable the Court to conclude that the proceedings, considered as a whole, were not in conformity with the guarantees of a fair hearing under Article 6 §§ 1 and 3 (d) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

43. 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

44. The applicant claimed 1,000 Azerbaijani manats (AZN – approximately 930 euros (EUR) at the time) in respect of pecuniary damage on account of the fine he had incurred in the criminal proceedings, and EUR 15,000 in respect of non-pecuniary damage.

45. The Government argued that there was no appearance of a violation of the applicant's rights, and therefore no award should be made. They suggested, however, that if the Court should find a violation, the most appropriate form of redress would be to put the applicant in the same

position as he had been in before the alleged violation had occurred, and to give him a retrial.

46. The Court does not discern any causal link between the violation found and the pecuniary damage alleged. It notes that in the present case an award of just satisfaction can only be based on the fact that the applicant did not have the benefit of the guarantees of Article 6 of the Convention. It cannot speculate, however, as to what the outcome of proceedings compatible with Article 6 might have been, had the requirements of this provision not been violated (compare *Menchinskaya v. Russia*, no. 42454/02, § 46, 15 January 2009, and *Shaykhatarov and Others v. Russia* [Committee], nos. 47737/10 and 4 others, § 46, 15 January 2019). It therefore rejects the applicant's claims for pecuniary damage. However, the Court considers that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation, and that compensation should thus be awarded. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant the sum of EUR 1,000 under this head, plus any tax that may be chargeable on this amount.

B. Costs and expenses

47. The applicant also claimed EUR 10,000 for the legal fees incurred before the domestic courts and before the Court. In support of his claim, he submitted a contract, dated 15 June 2012, for legal and translation services.

48. The Government argued that the claims were excessive and could not be regarded as reasonable as to quantum. In particular, the contract submitted by the applicant did not prove that he had made the payment. Moreover, in the domestic proceedings the applicant had been represented by a different lawyer.

49. The Government also submitted that, taking into account the above considerations, the applicant's claim for legal fees should be dismissed. In any event, an award of EUR 800 would constitute sufficient just satisfaction for any costs and expenses incurred by the applicant.

50. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,000 to cover costs to be paid directly into his representatives' bank account.

C. Default interest

51. 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 application admissible;
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, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 1,000 (one thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be paid directly into his representatives' bank account;
 - (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;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 31 October 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Deputy Registrar

André Potocki
President