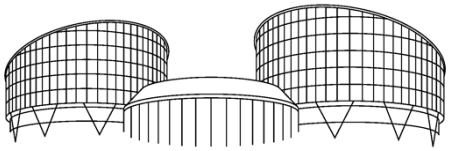

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF NATIG JAFAROV v. AZERBAIJAN

(Application no. 64581/16)

JUDGMENT

Art 18 and 5 § 1 (c) • Restrictions for unauthorised purposes • Lawful arrest or detention • Reasonable suspicion • Arrest and detention of opposition political activist to punish his engagement and to prevent his participation in referendum campaign

STRASBOURG

7 November 2019

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Natig Jafarov v. Azerbaijan,

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

Angelika Nußberger, *President,*
Ganna Yudkivska,
Yonko Grozev,
Síofra O'Leary,
Mārtiņš Mits,
Lətif Hüseynov,
Lado Chanturia, *judges,*
and Claudia Westerdiek, *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. 64581/16) 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 Mehman oglu Jafarov ("the applicant"), on 26 October 2016.

2. The applicant was represented by Mr J. Javadov, a lawyer based in Azerbaijan. The Azerbaijani Government ("the Government") were represented by their Agent, Mr Ç. Əsgərov.

3. The applicant alleged, in particular, that his detention in a metal cage in the courtroom had been in violation of Article 3 of the Convention and that his arrest and pre-trial detention had breached Articles 5, 11 and 18 of the Convention.

4. On 12 March 2018 the Government were given notice of the complaints under Articles 3, 5, 11 and 18 of the Convention 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

5. The applicant was born in 1972 and lives in Baku.

6. The facts of the case are similar to a large extent to those in the cases of *Rasul Jafarov v. Azerbaijan* (no. 69981/14, 17 March 2016), *Mammadli*

v. Azerbaijan (no. 47145/14, 19 April 2018), and *Aliyev v. Azerbaijan* (nos. 68762/14 and 71200/14, 20 September 2018) in that the applicant in the present case was arrested on the basis of similar criminal charges.

7. The applicant is a co-founder and member of the Board of Directors of the Republican Alternative Civic Movement (REAL). He is a political activist and is known for his critical articles published on Facebook concerning economic and social problems in the country.

8. On 22 April 2014 the Prosecutor General's Office instituted criminal proceedings under Articles 308.1 (abuse of power) and 313 (forgery by an official) of the Criminal Code in connection with alleged irregularities in the financial activities of a number of non-governmental organisations. The applicant was questioned as a witness in connection with those proceedings on several occasions.

9. In the context of those proceedings another member of the REAL Board, Mr Rasul Jafarov, was arrested on charges of illegal entrepreneurship, tax evasion and abuse of power (for further details, see *Rasul Jafarov,* cited above).

10. On 18 July 2016 the President of the Republic of Azerbaijan presented a draft Referendum Act, containing twenty-nine amendments to the country's Constitution. The proposed amendments were intended, in particular, to increase the presidential term of office from five years to seven, to introduce the position of Vice-Presidents and to give powers to the President to order early presidential elections and to dissolve Parliament.

11. On 26 July 2016 the Government announced that the referendum would be held on 26 September 2016 and that voters would be asked to vote separately on each of the twenty-nine constitutional amendments.

12. Following that announcement REAL decided to campaign against the amendments to the Constitution and started the process of collecting signatures in order to register a campaign group with the Central Election Commission (CEC). The applicant and Mr T.I. were appointed by REAL as its authorised representatives before the CEC for the purposes of collecting the required signatures and organising the campaign.

13. On 12 August 2016 the applicant was arrested and charged under Articles 192.1 (illegal entrepreneurship) and 308.2 (aggravated abuse of power) of the Criminal Code. The description of the charges was to a large extent similar to that used in the case of *Rasul Jafarov* (cited above, § 16), *Mammadli* (cited above, § 14) and *Aliyev* (cited above, § 21). The applicant was accused of committing those crimes by failing to register with the relevant executive authority the grants received from the United States of America's National Endowment for Democracy (NED) under various projects during the period between 2011 and 2014, placing the sums received under the relevant grant agreements in various bank accounts and making payments to himself and other people involved in the projects in the guise of salaries and service fees.

14. On the same date the Nasimi District Court, relying on the official charges brought against the applicant and the prosecutor's request for application of the preventive measure of remand in custody, ordered the applicant's detention for a period of four months. The court justified the application of the preventive measure of remand in custody by reference to the gravity of the charges and the likelihood that if released the applicant might abscond and obstruct the investigation.

15. Meanwhile, on 15 August 2016, Mr T.I. and another member of REAL were arrested and sentenced to seven days' administrative detention under Article 310 (failure to comply with a lawful order of a police officer) of the Code of Administrative Offences.

16. On 15 August 2016 the applicant appealed against the decision of 12 August 2016, claiming that his detention was unlawful. He stated, in particular, that there was no reasonable suspicion that he had committed a criminal offence and that there was no justification for application of the preventive measure of remand in custody. The applicant further complained, relying on Article 18 of the Convention, that the charges brought against him were politically motivated and that the real purpose of his detention was to silence him.

17. On 17 August 2016 the Baku Court of Appeal dismissed the applicant's appeal and found the first-instance court's decision to be lawful. According to the applicant, during the court hearing he was confined in a metal cage in the courtroom. In support of his allegation he provided a photograph of his confinement.

18. On the same date the Spokesperson for the EU High Representative for Foreign Affairs and Security Policy issued the following statement:

> "The arrest of [the applicant], the Executive Secretary of the REAL party in Azerbaijan, comes just six weeks ahead of the referendum on constitutional amendments that his party opposes and campaigns against. His arrest and placement into pre-trial detention of four months come on top of worrying reports of additional arrests of people involved in campaigning."

19. On 18 August 2016 a number of international non-governmental organisations published a joint statement, the relevant parts of which read as follows:

> **Azerbaijan: Renewed Human Rights Crackdown Ahead of Referendum**
>
> **JOINT STATEMENT**
>
> "Less than six weeks ahead of a constitutional referendum, the Azerbaijani authorities have unleashed a new wave of repression to silence critical voices ...
>
> On 12 August, prominent Azerbaijani economist and Executive Secretary of the opposition Republican Alternative (REAL) movement [the applicant] was arrested on charges of illegal entrepreneurship and abuse of power, and sentenced to four months of pre-trial detention ...

> On 13 August, NIDA civic movement activist [E.G.] was arrested, held incommunicado over the weekend, charged on 15 August with drug possession, and sentenced to four months' pre-trial detention. Also on 15 August, REAL movement youth activists [T.I.] and [E.Gas.] were arrested and sentenced to seven days of administrative detention each on charges of resisting police. Authorities also harassed civic activist and former political prisoner [B. H.], calling him in for questioning and then subjecting him to a court hearing that dragged out over three days, before fining him 100 AZN on charges of 'minor hooliganism'..."

20. On 22 August 2016 the representatives of REAL announced during a press conference that they had decided not to participate in the referendum campaign and to stop collecting the required signatures because of political pressure and, in particular, owing to the arrests of some REAL members, including the applicant, who had been actively involved in the preparation of the referendum campaign on behalf of REAL.

21. On 3 September 2016 the referendum campaign was officially launched.

22. On 4 September 2016 the applicant applied to the Nasimi District Court, requesting the substitution of remand with either house arrest or release on bail.

23. On 6 September 2016 the Nasimi District Court dismissed his application.

24. On 9 September 2016 the applicant lodged an appeal against that decision.

25. On the same date the prosecutor in charge of the case applied to the Nasimi District Court and requested it to annul the preventive measure of remand in custody, as the grounds justifying the applicant's pre-trial detention no longer existed. On the same day the Nasimi District Court granted the prosecutor's request and ordered the applicant's immediate release. The applicant withdrew his appeal against the decision of 6 September 2016.

26. On 26 September 2016 the constitutional referendum took place as planned. According to the official final results, all twenty-nine constitutional amendments were approved by between 83% and 91% of voters.

27. On 17 August 2017 the prosecuting authorities decided to terminate the criminal proceedings against the applicant.

II. RELEVANT DOMESTIC LAW AND PRACTICE

28. A detailed description of the relevant provisions of the Criminal Code and the Code of Criminal Procedure, as well as of the relevant international reports, may be found in *Rasul Jafarov* (cited above, §§ 50-84).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

29. Relying on Article 3 of the Convention the applicant complained that his confinement in a metal cage in the courtroom during the appeal hearing of 17 August 2016 had violated his human dignity and amounted to degrading treatment. Article 3 reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Admissibility

1. The parties' submissions

30. The Government submitted that the applicant had not exhausted domestic remedies in respect of his complaint. They argued that the applicant had failed to bring this issue to the attention of the court which heard the case and that he had not demonstrated that it would have been impossible to request the court to take him out of the metal cage. Furthermore, the applicant had withdrawn the appeal in which he had complained about the conditions of his detention in the courtroom.

31. The Government also argued that the applicant's complaint was unsubstantiated because there was nothing to demonstrate that the photo he had provided had been taken during the appeal hearing of 17 August 2016. The Government also noted that court hearings concerning pre-trial detention were held, as a rule, in camera and that the source of the photo was therefore disputable.

32. The applicant disagreed with the Government and noted that the photo submitted clearly showed that he had been confined in a metal cage under the supervision of a convoy officer. He further submitted that the confinement of defendants in a metal cage in the courtroom was an established practice. In this context he provided a copy of a photo published in the media showing another defendant confined in a metal cage in the same courtroom of the Baku Court of Appeal during a hearing which had taken place on 11 September 2018. In view of the general nature of the practice, the applicant also argued that there was no domestic remedy to be exhausted.

2. The Court's assessment

33. Inasmuch as the Government argued that the applicant had not complied with the rule on exhaustion of domestic remedies, the Court finds that they did not specify with sufficient clarity the type of action which would have been an effective remedy in their view, nor did they provide any

further information as to how such action could have prevented the alleged violation or its continuation or provided the applicant with adequate redress. As to the Government's argument that the applicant had failed to bring this issue to the attention of the court hearing the case, they did not show on the basis of domestic law or practice that there was a specific procedure to be followed for a person who wished to be released from the cage, in view of the existing practice (compare *Čalovskis v. Latvia*, no. 22205/13, § 91, 24 July 2014). Furthermore, the Government did not dispute the fact that placing defendants in metal cages when they appeared before a court in criminal proceedings was still a general practice, as argued by the applicant (see *Svinarenko and Slyadnev v. Russia* [GC], nos. 32541/08 and 43441/08, § 75, ECHR 2014 (extracts) regarding the use of a "metal cage" in courtrooms in the member States of the Council of Europe). This is also confirmed by a copy of the photo submitted by the applicant concerning the confinement of a defendant in a metal cage during a recently held court hearing. In this context, turning to the Government's further argument that the applicant's complaint was unsubstantiated, the Court notes that there is nothing in the materials before it to support that conclusion. As the Court has previously held, in certain situations, such as in conditions-of-detention cases, the respondent Government alone have access to information capable of corroborating or refuting these allegations. They are required, in particular, to collect and produce relevant documents (see *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, § 123, 10 January 2012). However, in the present case the Government did not produce any evidence to refute the applicant's allegation.

34. For the above reasons, the Court finds that this complaint cannot be rejected for non-exhaustion of domestic remedies. The Court also concludes that it 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

35. The Government submitted that the press and the public had been absent during the court hearing of 17 August 2016 and that only the applicant, his lawyers, the prosecutors, a court clerk and a judge had been present.

36. The applicant reiterated his complaint.

37. The Court reiterates that treatment is considered to be "degrading" within the meaning of Article 3 when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or when it arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance (see *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 220, ECHR 2011, and *El-Masri v. the former*

Yugoslav Republic of Macedonia [GC], no. 39630/09, § 202, ECHR 2012). The public nature of the treatment may be a relevant or an aggravating factor in assessing whether it is "degrading" within the meaning of Article 3 of the Convention. However, the absence of publicity will not necessarily prevent a given treatment from falling into that category: it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others (see *Tyrer v. the United Kingdom*, 25 April 1978, § 32, Series A no. 26; *Erdoğan Yağız v. Turkey*, no. 27473/02, § 37, 6 March 2007; and *Kummer v. the Czech Republic*, no. 32133/11, § 64, 25 July 2013).

38. The Court has previously found that holding a person in a metal cage in a courtroom constituted in itself – having regard to its objectively degrading nature, which is incompatible with the standards of civilised behaviour that are the hallmark of a democratic society – an affront to human dignity, and amounted to degrading treatment in violation of Article 3 of the Convention (see *Svinarenko and Slyadnev*, cited above, §§ 122-39; *Urazov v. Russia*, no. 42147/05, §§ 82-83, 14 June 2016; and *Vorontsov and Others v. Russia*, nos. 59655/14 and 2 others, § 31, 31 January 2017).

39. The Court notes that, unlike the previous cases in which it found a violation of Article 3 of the Convention on account of the applicants' confinement in metal cages during public hearings, in the present case the applicant was confined in the metal cage during a hearing concerning his pre-trial detention, which, according to the Government, was held in camera. The Government may thus be understood to be arguing that, even though the applicant's lawyers, the prosecutors and a court clerk had been present during the hearing, it was closed to the public and the applicant had not therefore been publicly exposed in the metal cage. The Court reiterates, however, that the absence of publicity will not necessarily prevent a given treatment from falling into the category of degrading treatment (see paragraph 37 above).

40. In such circumstances, having regard to the objectively degrading nature of holding a person in a metal cage, the Court considers that the applicant's confinement in a metal cage during the appeal hearing concerning his pre-trial detention amounted to degrading treatment (compare *Karachentsev v. Russia*, no. 23229/11, § 53, 17 April 2018).

41. There has therefore been a violation of Article 3 of the Convention.

II. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION

42. The applicant complained under Article 5 §§ 1, 3 and 4 of the Convention that his arrest and detention had been unlawful and unjustified, that there had been no reasonable suspicion that he had committed a criminal offence and that the domestic courts had failed to carry out an effective judicial review of his detention and to justify it by relevant and

sufficient reasons. The relevant parts of Article 5 of the Convention read as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> ...
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. Admissibility

43. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. Alleged breach of Article 5 §§ 1 (c) and 3 of the Convention on account of the lack of reasonable suspicion and the domestic courts' failure to give relevant and sufficient reasons for continued detention

(a) The parties' submissions

44. Relying on the Court's judgment in the case of *R Rasul Jafarov v. Azerbaijan* (no. 69981/14, 17 March 2016), the applicant submitted that he had been charged with similar crimes in similar circumstances and that, for the reasons set out in that judgment, there had been no "reasonable suspicion" that he had committed a criminal offence. He also complained that the domestic courts had failed to provide "relevant and sufficient" reasons justifying his pre-trial detention.

45. The Government argued that there was sufficient evidence, facts and information to justify a reasonable suspicion that the applicant might have

committed the offences under Articles 192.1 and 308.2 of the Criminal Code. In support of their submissions, they provided a copy of a financial expert opinion of 29 June 2015 prepared by the Forensic Examination Centre of the Ministry of Justice. The Government further stated that the applicant's pre-trial detention had been justified and had been based on relevant and sufficient reasons.

(b) The Court's assessment

46. The Court notes that the issues raised by the applicant's complaints are the subject of well-established case-law of the Court. The Court will examine these complaints on the basis of the relevant general principles set out, in particular, in the case of *Rasul Jafarov* (cited above, §§ 114-18).

47. The Court observes that the charges brought against the applicant in relation to the grants received are similar to a large extent to those brought against the applicants in the cases of *Rasul Jafarov*, *Mammadli v. Azerbaijan* (no. 47145/14, 19 April 2018), and *Aliyev v. Azerbaijan* (nos. 68762/14 and 71200/14, 20 September 2018). In the present case, as in *Rasul Jafarov*, the charges of illegal entrepreneurship and abuse of power stemmed from the applicant's failure to register the grants received, which, according to the authorities, resulted in a *de facto* commercial activity. In *Rasul Jafarov*, the Court concluded as follows:

> "128 ... Having regard to the relevant legislation (see paragraphs 69 and 71 above), the Court notes that the requirement to submit grants for registration to the Ministry of Justice was merely a reporting requirement, and not a prerequisite for legal characterisation of the received financial assistance as a 'grant'. Failure to meet this reporting requirement was an administrative offence specifically proscribed by Article 223-1.1 of the CAO and punishable by a fine (only after February 2014 in the case of individual recipients). Non-compliance with this reporting requirement had no effect on the nature of a grant agreement defined and regulated by Articles 1.1 and 4.1 of the Law on Grants (see paragraphs 68-69 above), or on the characterisation of the activities for which the grant was used as non-commercial.
>
> 129. However, from the documents in the case file it appears that, apart from relying on the applicant's alleged failure to comply with the reporting requirement to register the grants, which in itself was not criminalised under the domestic law, the prosecuting authorities never demonstrated the existence of any information or evidence showing that the applicant might have used the money for generating profit or for purposes other than those indicated in the grant agreements, or that the purposes indicated in the grant agreements were both commercial and illegal ...
>
> 130. In such circumstances, the Court finds that the applicant could not have been reasonably suspected of having committed the criminal offence of 'illegal entrepreneurship' under Article 192.2.2 of the Criminal Code, because there were no facts, information or evidence showing that he had engaged in commercial activity... Furthermore, the above-mentioned facts were not sufficient to give rise to a suspicion that the applicant had sought to 'obtain unlawful advantage for himself or for third parties', which was one of the constituent elements of the criminal offence of 'abuse of power' under Article 308 of the Criminal Code ..."

48. The Court has no reason to hold otherwise in the present case as the facts relied on by the domestic authorities in bringing the charges at issue were similar in nature and there is nothing in the Government's submissions that would enable the Court to reach a different conclusion.

49. As to the Government's argument that the reasonable suspicion against the applicant was supported by the expert opinion of 29 June 2015, the Court notes firstly that it has not been demonstrated that this piece of evidence was ever presented by the prosecuting authorities to the domestic courts ordering the applicant's pre-trial detention (see *Mammadli*, cited above, § 62). Secondly, the Court observes that the expert opinion submitted by the Government mainly concerned the amount of profit made by the applicant and the amount of simplified tax he owed under Articles 218, 219 and 220 of the Tax Code as a result of his failure to register the grants received. However, as noted above, there was no information or evidence showing that the applicant might have used the money received under the grant agreements in order to generate a profit and that he thus engaged in commercial activity.

50. Having regard to the above considerations and the Court's case-law on the matter, the Court finds that the material put before it does not meet the minimum standard set by Article 5 § 1 (c) of the Convention for the reasonableness of a suspicion required for an individual's arrest and continued detention. The Court therefore concludes that during the period under consideration the applicant was deprived of his liberty in the absence of a "reasonable suspicion" of his having committed a criminal offence.

51. There has accordingly been a violation of Article 5 § 1 of the Convention.

52. The above finding makes it redundant to assess whether the reasons given by the domestic courts for the applicant's continued detention were based on "relevant and sufficient" grounds, as required by Article 5 § 3 of the Convention. Therefore, the Court does not consider it necessary to examine separately the applicant's complaints under Article 5 § 3 of the Convention (see *Rasul Jafarov*, cited above, § 135).

2. Alleged breach of Article 5 § 4 of the Convention on account of the lack of an effective judicial review of the lawfulness of the applicant's detention

53. The submissions made by the applicant and the Government were identical to those made by the parties in respect of the same complaint raised in the case of *Rasul Jafarov* (cited above, §§ 138-39).

54. In the case of *Rasul Jafarov* (cited above §§ 140-44), having examined a similar complaint based on the similar facts, the Court found that the applicant had not been afforded proper judicial review of the lawfulness of his detention. Having regard to the material in its possession, the Court notes that the Government have not put forward any fact or

argument capable of persuading it to reach a different conclusion in the present case.

55. There has, accordingly, been a violation of Article 5 § 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 5

56. Relying on Article 18 of the Convention, the applicant complained that his right to liberty had been restricted for purposes other than those prescribed in the Convention. Article 18 provides:

> "The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

A. Admissibility

57. The Court notes that this part of the application 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

(a) The applicant

58. The applicant submitted that he was a political activist and was known for his critical articles published on Facebook concerning economic and social problems in the country. He was also a representative of REAL in the campaign group, but had been unable to carry out his activities because of his arrest and detention, which had ultimately resulted in REAL being obliged to end their participation in the referendum campaign. After the applicant's release it had no longer been possible to participate in the referendum campaign because of the expiry of the statutory deadlines. Therefore, the specific circumstances of his case demonstrated that his arrest and pre-trial detention had been intended to punish and silence him for his political activities and to prevent him from carrying out his activities as a representative of REAL in the campaign group in respect of the constitutional referendum of 26 September 2016.

(b) The Government

59. Relying on the cases of *Khodorkovskiy v. Russia* (no. 5829/04, 31 May 2011) and *Khodorkovskiy and Lebedev v. Russia* (nos. 11082/06 and 13772/05, 25 July 2013) the Government submitted that the restrictions imposed by the State in the present case under Article 5 of the Convention had not been applied for any purpose other those envisaged by that provision, and strictly for the proper investigation of the serious criminal offences allegedly committed by the applicant. In their view, none of the accusations against the applicant had been political. The acts which had been imputed to him had not been related to his participation in political life, real or imaginary; he had in fact been prosecuted for common criminal offences.

60. The Government further submitted that the applicant had been arrested on 12 August 2016 and that the domestic courts had ordered his pre-trial detention for a period of four months. However, less than a month later, on 9 September 2016, the prosecutor in charge of the case had requested the court to order the applicant's release, as the grounds justifying his continued detention had ceased to exist, and the court had granted the prosecutor's request. These facts demonstrated that in arresting the applicant the authorities had not had any ulterior motives, such as silencing the applicant for his political activities. The applicant had been released before the referendum date and had been able to continue his activities in the campaign group.

2. The Court's assessment

61. The Court will examine the applicant's complaint in the light of the relevant general principles set out by the Grand Chamber in its judgment in *Merabishvili* ([GC], no. 72508/13, §§ 287-317, 28 November 2017).

62. The Court notes at the outset that it has already found that the applicant's arrest and pre-trial detention were not carried out for a purpose prescribed under Article 5 § 1 (c) of the Convention, as the charges against him were not based on a "reasonable suspicion" within the meaning of Article 5 § 1 (c) of the Convention (see paragraph 50 above). Therefore, no issue arises in the present case with respect to a plurality of purposes, where a restriction is applied both for an ulterior purpose and a purpose prescribed by the Convention (compare *Merabishvili*, cited above, §§ 318-54).

63. However, the mere fact that the restriction of the applicant's right to liberty did not pursue a purpose prescribed by Article 5 § 1 (c) is not in itself a sufficient basis to conduct a separate examination of a complaint under Article 18 unless the claim that a restriction has been applied for a purpose not prescribed by the Convention appears to be a fundamental aspect of the case (see *Merabishvili*, cited above, § 291). Therefore, it

remains to be seen whether there is proof that the authorities' actions were actually driven by an ulterior purpose.

64. In this connection, the Court points out that in the case of *Aliyev* (cited above, § 223) it found that its judgments in a series of similar cases reflected a pattern of arbitrary arrest and detention of government critics, civil society activists and human-rights defenders through retaliatory prosecutions and misuse of the criminal law in breach of Article 18.

65. For the reasons set out below the Court finds that the present case constitutes a part of this pattern since the combination of the relevant case-specific facts in the applicant's case is similar to that in the previous ones, where proof of an ulterior purpose derived from a juxtaposition of the lack of suspicion with contextual factors.

66. Firstly, as regards the applicant's status, the Court notes that it is not disputed between the parties that the applicant is a political activist and was actively involved in the campaign concerning the constitutional referendum of 26 September 2016.

67. Secondly, the applicant's situation should be viewed against the backdrop of arrests of other notable civil society activists and human-rights defenders who have been detained and charged to a large extent with similar criminal offences in relation to the "alleged illegal activities of some non-commercial organisations" (see paragraphs 9 and 13 cited above).

68. Thirdly, and still bearing in mind that there is nothing in the case file to show that the prosecuting authorities had any objective information giving rise to a reasonable suspicion against the applicant at the material time, the Court attaches particular weight to the timing of the institution of criminal proceedings against the applicant, his arrest and detention. The applicant was arrested during the active phase of the registration process for the referendum campaign in which he officially represented REAL, which campaigned against the draft amendments to the Constitution (compare *Mammadli*, cited above, § 102). He was released following the prosecutor's request and only after REAL officially announced that it had decided to end its participation in the campaign because of the arrest of some of its members, including the applicant, and after the official launch of the referendum campaign. Thus, having regard to the chain of events in the case, the Court cannot accept the Government's submission that the prosecuting authorities did not have any ulterior motives and that the applicant's arrest and detention did not prevent him from participating in the campaign.

69. At this point, the Court considers it appropriate to have regard to the nature and degree of reprehensibility of the ulterior purpose, bearing in mind that the Convention was designed to maintain and promote the ideals and values of a democratic society governed by the rule of law (see *Navalnyy v. Russia* [GC], nos. 29580/12 and 4 others, § 173, 15 November 2018). The Court notes that during preparations for the referendum

campaign the applicant acted as a representative of REAL, which as a result of the arrest of some of its members, including the applicant, had been forced to stop the collection of signatures required for participation in this campaign. The intimidation of a campaigning member of the opposition in the run-up to the constitutional referendum had serious potential to discourage opposition supporters from participating in open political debate. At the core of the applicant's Article 18 complaint is his alleged persecution, not as a private individual, but as an opposition politician committed to playing an important public function through democratic discourse. As such, the restriction in question did not merely affect the applicant alone, or his fellow opposition activists and supporters, but the very essence of democracy as a means of organising society, in which individual freedom may only be limited in the general interest (see *Navalnyy*, cited above, § 174).

70. Thus, the totality of the above factors indicates that the actual ulterior purpose of the impugned measures was to punish the applicant for his active political engagement and to prevent him from participating as a representative of the opposition in the referendum campaign. In the light of these considerations, the Court finds that the restriction of the applicant's liberty was imposed for purposes other than those prescribed by Article 5 § 1 (c) of the Convention.

71. There has accordingly been a violation of Article 18 of the Convention taken in conjunction with Article 5.

IV. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

72. The applicant further complained that his arrest and detention had also been in breach of Article 11 of the Convention, which provides:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

73. 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.

74. However, having regard to its conclusions under Article 5 §§ 1 and 4 of the Convention and Article 18 of the Convention with regard to the same

set of facts, the Court considers that it is unnecessary to examine separately the complaint under Article 11 of the Convention (compare *Rasul Jafarov*, cited above, § 170).

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

75. 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

76. The applicant claimed 30,000 euros (EUR) in respect of non-pecuniary damage.

77. The Government submitted that the amount claimed by the applicant was unsubstantiated and excessive.

78. 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 15,000 under this head, plus any tax that may be chargeable on this amount.

B. Costs and expenses

79. The applicant claimed EUR 5,245 for the costs and expenses incurred in the domestic proceedings and before the Court. In support of his claim, the applicant submitted a contract between himself and his lawyer detailing the specific legal services to be provided in the domestic proceedings and before the Court. According to that contract, the amounts due were to be paid in the event that the domestic court or the Court granted the applicant's claims for just satisfaction. The applicant asked that the compensation in respect of costs and expenses be paid directly into his representative's bank account.

80. The Government considered that the claim was unsubstantiated and excessive. In particular, the Government submitted that the costs and expenses related to the legal services in the domestic proceedings and before the Court had not actually been incurred, because the amounts claimed had not been paid by the applicant. They also noted that a number of legal services stipulated in the contract had not been provided at all.

81. 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 were actually and necessarily incurred and are reasonable as to quantum. The Court notes that, although the applicant has not yet actually paid the legal fees stipulated in the contract, he is bound to pay them pursuant to a contractual obligation. Accordingly, in so far as the lawyer is entitled to seek payment of his fees under the contract, those fees were "actually incurred" (see *Pirali Orujov v. Azerbaijan*, no. 8460/07, § 74, 3 February 2011). Having regard to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,000, plus any tax that may be chargeable to the applicant on that amount, to be paid directly into the applicant's representative's bank account.

C. Default interest

82. 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 3 of the Convention;

3. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

4. *Holds* that there is no need to examine separately the complaint under Article 5 § 3 of the Convention;

5. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

6. *Holds* that there has been a violation of Article 18 of the Convention taken in conjunction with Article 5 of the Convention;

7. *Holds* that there is no need to examine separately the complaint under Article 11 of the Convention;

8. *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, the following amounts, to be converted

into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 2,000 (two thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be paid directly into his representative's 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;

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

Done in English, and notified in writing on 7 November 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Angelika Nußberger
President