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Freedom of expression in Azerbaijan under test: challenges and prospects

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In the recent case of *Fatullayev v Azerbaijan* (No. 40984/07) 22/4/10,¹ the ECtHR found violations of the applicant's rights to freedom of expression and to a fair trial. Fatullayev was the founder and chief editor of two newspapers in Azerbaijan well known for their harsh criticism of the Azerbaijani Government. This judgment is of great importance for Azerbaijan as it addresses topical issues under Art.10 ECHR (freedom of expression), as well as for

ECtHR case law in terms of Art. 46 (execution of judgments).

Fatullayev is the second case in which the ECtHR has found a violation of Art.10 as a result of the use of criminal defamation in Azerbaijan.² Charges of criminal defamation (under Art.147) and also other provisions of the Criminal Code (CC) against journalists who criticise the Government are common in Azerbaijan.³ Fatullayev was convicted for publishing two separate articles and Internet forum postings and as a result of two sets of proceedings instituted against him on charges of defamation, the threat

of terrorism, incitement to ethnic hostility and tax evasion.

In respect of criminal defamation, the ECtHR ruled that Fatullayev's conviction for having published an article conveying the views of people living in Nagorno-Karabakh about the Khojaly tragedy⁴ and Internet forum postings was not justifiable as they could not be considered as defamatory for having reflected views contradictory to the commonly accepted version of these tragic events.

The article did not contain any statements directly accusing the Azerbaijani

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military or specific individuals of committing the massacre and deliberately killing their own civilians. The ECtHR found that the article had not directly accused the two plaintiffs (soldiers) of having committed grave war crimes and had not undermined the dignity of the Khojaly victims and survivors in general and, more specifically, the four private prosecutors (who were Khojaly refugees). In the absence of any justification for the imposition of a severe prison sentence (two years and six months) there was a violation of Art.10 in respect of Fatullayev's first criminal conviction.⁵

The second set of criminal proceedings was brought by the Azerbaijani Ministry of National Security on the grounds that an article in which the applicant expressed his views on the Government's foreign policy and proposed his scenario of a US-Iranian war potentially involving Azerbaijan constituted a threat of terrorism. He also listed strategic facilities in Azerbaijan that would be attacked by Iran if such a scenario developed. The ECtHR deemed this article to form part of a political debate on a matter of public interest. It found that the severity of the penalties imposed on Fatullayev and the lack of relevant reasons for his conviction amounted to a violation of Art. 10.⁶

Furthermore, the ECtHR held that there had been a violation of Art. 6(1) ECHR (fair hearing) because the applicant had objectively justifiable fears about the judge's impartiality. The same judge heard both the civil and criminal cases based on the same claims against Fatullayev and in both cases issued the decisions against the applicant.⁷ The presumption of innocence was also infringed due to the Prosecutor General's statement that the applicant's article contained a threat of terrorism, before he had been proven guilty according to law.⁸

Also of importance in the judgment is that the ECtHR ordered the applicant's immediate release, invoking Art. 46

ECHR. It is rare for the ECtHR to use this individual measure. It was first used in 2004 in two cases to order the release of persons who were being arbitrarily detained in breach of Art. 5 (right to liberty and security).⁹

The immediate release order sparked speculation as to whether the State was obliged to release the applicant even before the ECtHR judgment entered into force. The Azerbaijani Government did not execute this order on these grounds and several days before the judgment would have entered into force it requested that the case be referred to the Grand Chamber. The non-execution of the immediate release order was not caused by an absence of legal grounds in Azerbaijani legislation. Art. 12(2) of the Constitution of the Republic of Azerbaijan states that the human rights and fundamental freedoms stipulated in the Constitution should be applied in compliance with international conventions. Furthermore, the Code of Criminal Procedure (Arts. 455-460) contains mechanisms for the implementation of ECtHR judgments at the national level. Although this legislation does not mention immediate release it could have been used to secure the applicant's release within a few days.

The ECtHR's recourse to immediate release as an individual measure in *Fatullayev* highlights the importance of international advocacy campaigns con-

ducted in parallel to the strategic litigation of ECtHR cases. Depending on the case, such tactics can have negative results at the national level as the national authorities may react overly defensively. However, it is very important for the ECtHR to be made aware of the international context and the wider extent of the problem at the national level. International reports, statements and appeals can therefore influence the ECtHR's decision-making (including in relation to measures of redress). Of course, in *Fatullayev* the ECtHR was also led by the case's particular circumstances and the ongoing violations against the applicant, but the advocacy campaign was also very helpful.

The *Fatullayev* judgment reflects the poor state of freedom of expression in Azerbaijan. In addition to harassment and intimidation against the media, an environment of impunity exists in Azerbaijan. In general the courts are not effective in addressing these problems, especially in respect of journalists who criticise the Government. According to the Media Rights Institute, in the last five years only three out of 350 cases relating to violations against journalists were investigated by the law enforcement bodies.¹⁰ Thus, *Fatullayev* is a clear example of politically motivated abuse of the justice system. It should be noted that one of the applicant's main arguments that there had been a violation of the right to freedom of expression was the lack of independence of the courts – that political pressure was exerted on the courts by the executive authorities. However, this is a difficult point to prove in the ECtHR and was not successful in this case.

At the time of writing, Fatullayev is still in prison under both the old and new sentences. Four months prior to the delivery of the ECtHR judgment he was charged with drug possession and on 6 July 2010, was sentenced to two and a half years' imprisonment. The national and international human rights communities asserted that these new charges were fabricated to prevent the effective implementation of the ECtHR judg-

ment. If the judgment of 6 July 2010 enters into force and is upheld by the higher courts, Fatullayev must remain in prison for a further two and a half years even if he were released from the previous sentences due to the execution of the ECtHR judgment.

However, even the legal status of Fatullayev's imprisonment is still doubtful and confusing because of the court's decision on the new charge. In the new case the first instance court found that Fatullayev had been imprisoned unlawfully under the original convictions. In so doing it made direct reference to the ECtHR's *Fatullayev* judgment, which is very unusual in domestic case law. However, the court did not rule on the con-

sequences of the unlawful imprisonment under the old charges for Fatullayev in general and for the new case. It seems that the court was merely making a declaration or a statement, which gives rise to many questions about the way the national justice system will deal with Fatullayev's past three years of unlawful imprisonment. However, the Supreme Court of Azerbaijan is obliged to review cases decided by the ECtHR and

to identify the consequences of unlawful imprisonment.

Nevertheless, the first instance court, which committed many violations of fair trial standards, held that Fatullayev should be imprisoned as a result of his conviction for drug use and that this period of imprisonment runs from the date of its judgment (6 July 2010). According to domestic legislation, Fatullayev's new term of imprisonment should begin at the very least from the date of his trans-

fer to a pre-trial detention facility under the new charges (December 2009). Fatullayev has appealed against the 6 July 2010 judgment to the Baku Appellate Court (the case was returned to the first instance court due to procedural violations) and he intends to submit further applications to the ECtHR about the drug case and the ill-treatment to which he has been subjected in prison, in order to realise the justice that was achieved in the ECtHR's first judgment.

1 The judgment entered into force on 4.10.10.

2 The first case was *Mahmudov & Agazade v Azerbaijan* (No. 35877/04), 18.12.08.

3 Over the period 2006-10, 34 journalists were imprisoned for criminal defamation in Azerbaijan. See the annual reports of the Media Rights Institute at www.mediarights.az for further details.

4 *Fatullayev v Azerbaijan* (No. 40984/07) 22.4.10, paras. 59-62. The events in Khojaly of 26 February

1992, during which hundreds of Azerbaijani civilians were killed by Armenian armed forces with the reported assistance of the Russian (formerly Soviet) 366th Motorised Rifle Regiment, during the Nagorno-Karabakh conflict.

5 *Supra* note 4, para. 103.

6 *Supra* note 4, paras. 127-128.

7 *Supra* note 4, para. 140.

8 *Supra* note 4, paras. 162-163.

9 *Asanidze v Georgia* (No. 71503/01) GC 8.4.04 and *Ilaçcu & Others v Moldova & Russia* (No. 48787/99) 8.7.04.

10 Media Rights Institute, 2009. *Legal Status of the Mass Media in Azerbaijan: Annual Report 2009*. [Online]. Available at: <http://www.mediarights.az/index.php?lngs=eng&cid=25>, page 4.