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Communication from an NGO (Election Monitoring and Democratic Studies Centre) (11/10/2021) in the case of Mammadli v. Azerbaijan (Application No. 47145/14).

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1419e réunion (décembre 2021) (DH)

Communication d'une ONG (Election Monitoring and Democratic Studies Centre) (11/10/2021) relative à l'affaire Mammadli c. Azerbaïdjan (requête n° 47145/14) ***[anglais uniquement].***

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

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Mammadli v. Azerbaijan (47145/14)
Submission under Rule 9.2 of the Committee of Ministers' Rules

1. This submission is submitted by the Election Monitoring and Democratic Studies Centre (EMDS) to the Committee of Ministers of the Council of Europe on Mammadli group of cases v. Azerbaijan, (application no. 18705/06, leading case, enhanced procedure) in accordance with Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

2. This briefing is aimed to inform the Committee of Ministers about the recent developments on implementation of the judgments in the Mammadli group of cases by the Azerbaijani Government.

I. The organization

3. The EMDS is a non-governmental organization working for holding free and fair elections, as well as development of civil society and democracy in Azerbaijan.
4. Since 2001, EMDS has implemented programs on civil education and political rights (such as electoral rights, right of appeal, freedom of peaceful assembly and freedom of association), citizen participation in public policy, increasing accountability of local and central administrative bodies, as well as protection of political rights. At present, EMDS also deals with protection and promotion of human rights in Azerbaijan.

II. Brief summary of a group of cases

5. The ten applicants in this group are opposition politicians, human-rights defenders, civil society activists and a journalist. They were all the subject of arrests and detention between 2013-2016 that the European Court found to constitute a misuse of criminal law, intended to punish and silence them.

6. The Court concluded that the actual purpose of the criminal proceedings was to punish the applicants for their activities or prevent their further work and that the restriction of the applicants' rights was applied for purposes other than those prescribed by the Convention. Therefore, the Court found violations of Article 18 taken in conjunction with Article 5 in respect of all applicants and violation of Article 18 taken in conjunction with Articles 5 and 8 in respect of Aliyev.

7. This group of cases was formerly named Ilgar Mammadov group. Since the Supreme Court of Azerbaijan issued a decision in respect of Ilgar Mammadov and Rasul Jafarov recognizing the violation of their rights and awarded them with the compensation in April 2020, the Committee of Ministers, at its 1377bis meeting in September 2020, closed the supervision of the execution of the judgments in respect of them. Therefore, the oldest judgment – Mammadli case became the new leading case in the group.

III. **Individual measures**

8. The Committee, in its decisions, reiterated that restitutio in integrum in each case in this group can only be achieved through the quashing of all the applicants' convictions, their erasure from their criminal records and the elimination of all other consequences of the criminal charges brought against them, including by fully restoring their civil and political rights. The Committee of Ministers at its 1369th meeting on 5 March 2020, adopted interim resolution urging the Azerbaijani authorities to ensure that all the necessary individual measures are taken in respect of each of the applicants in the group without any further delay and to report to the Committee by 30 April 2020 at the latest.

9. Though the Supreme Court adopted the decision on 23 April 2020 quashing the convictions of Ilgar Mammadov and Rasul Jafarov and awarding them compensation for non-pecuniary damage resulting from their unlawful arrest and imprisonment, other applicants' cases remain unheard pending a decision whereas the three judgments from the group (Mammadli, Rashad Hasanov and Others and Aliyev), involving six applicants, were transmitted to the Supreme Court for reconsideration in September 2020. A year passed after the Committee's 30 April 2020 decision and the Supreme Court has not taken any action in respect of other applicants. Nevertheless, the Supreme Court of Azerbaijan were active and functioning during last year.

10. In its communication of 22 February 2021, the Government informed the Committee that the judgments were still under the review of the Supreme Court and linked the delay in hearing of the case to the COVID-19 pandemic. The EMDS doesn't find the Government's argument convincing for the following reasons:

    a) the Supreme Court heard the cases of Ilgar Mammadov and Rasul Jafarov in the course of the pandemic-related quarantine regime;
    b) while the quarantine regime affected the work of the judiciary this does not mean the judiciary didn't work at all, but simply that certain restrictions were brought to the

functioning of the national courts and these restrictions did not necessarily hinder the Supreme Court from reconsideration. Furthermore, electronic court system of the Ministry of Justice indicates that there have been at least 2300 cases heard by the Supreme Court of Azerbaijan since April 2020 up today.[1]

11. Recalling that a Article 18 violation is a consequence of the political will rather than the deficiencies in the judiciary, the Supreme Court must give priority to this type of cases. Even assuming that the pandemic-related delay may be understandable, one-year lapse of time led to vanishing of such justification.

12. Accordingly, while welcoming the quashing of the convictions of Ilgar Mammadov and Rasul Jafarov by the decision of Supreme Court, EMDS deplores that such selective justice and attitude will never contribute to ensuring a rapid restitutio in integrum in respect of each applicant and is not consistent with the spirit of the European Convention and the CoE core principles as a result of which 9 applicants still remain convicted and deprived of their civil and political rights - Intigam Aliyev is still under travel ban, just satisfaction which still hasn't been paid to some of the applicants – (Giyas Ibrahimov and Khadija Ismailova), and potentially other individual measures such as unfreezing of bank accounts.

IV. **General measures**

13. In the judgments of this group the Court established three main aspects that led to violation of the Convention rights:

a) the arrest and detention of each applicant took place in the absence of any reasonable suspicion that he or she had committed an offence;
b) the domestic courts had not conducted a genuine review of the lawfulness of the detention;
c) a misuse of criminal law intended to punish them and to prevent their further work in the respective field.

14. In order to prevent these patterns from being repeated, both the judiciary and the legal framework on regulation of civil society should be subjected to tangible reforms addressing systemic problems.

Judiciary

15. In its communications, referring to the presidential executive acts and legislative amendments the Government informed the CM that some actions were taken at the executive, legislative and judiciary level that addressed questions raised by the Court in the judgments of the group: penal policies were humanized, certain acts were decriminalized, sanctions alternative to imprisonment were introduced, early release was simplified, the number of judges in the judicial system increased that will reduce the workload of judges, etc. However, it appears these amendments don't address issues identified by the Court and elaborated by the CM since

[1] https://e-mehkeme.gov.az/Public/Cases

there is no single provision in these statements contributing to protecting judiciary from the executive's influence and making it independent in theory and practice. Thus, the government does not only fail to carry out fundamental reforms to prevent the recurrence of similar violations identified by the Strasbourg Court in the Mammadli group of cases but explicitly refuses to restore the rights of those whose rights have been violated in this group cases.

16. Though the amendments didn't target systemic problems in the judicial system, a few provisions in the acts adopted would have had a positive impact on the fairness, transparency, and effectiveness of the judiciary. For instance, by the Presidential Decree "On deepening of reforms in the judicial legal system", dated 3 April 2019, envisages that amendments to the relevant legislative acts aimed at ensuring continuous audio recording of court hearings in order to increase the objectivity of legal proceedings.[2] On 25 June 2020, new provision was added to Article 51 of the Code of Criminal Procedure. The new provision reads: *"the presiding judge provides uninterrupted recording of trials… the records of the trial are drafted in consistent with the audio recording… In case of discrepancies between audio recording and the record of the trial, audio recording will prevail."* This provision can be regarded as a necessary step as to transparency that gives necessary chance to the parties to challenge the case before higher domestic courts and international tribunals in an effective manner. However, the provision doesn't go beyond being on paper. As it appears from the provision, it is the obligation of judges to provide audio recording of trials. However, judges are not only reluctant to conduct it on their own initiative, but also reject such requests made by lawyers and parties of the trials. This is, in particular, observed in politically motivated cases.[3] Despite the period of time that has passed after the provision was added to the Code of Criminal Procedure, judges reject such requests with the excuse that there is a lack of technical capacity.

17. Independence of judges is a precondition for achieving tangible reforms in the judiciary as courts are a control mechanism over, among other things, the prosecuting authorities and the law enforcement agencies. Judgments of the Court in this group clearly reveal that violations of Article 5 of the Convention are triggered by the actions of the law enforcement agencies and prosecuting authorities since the arrests are carried out and remand in custody measures are requested by these bodies, respectively. The Government, in its action report, notes that independence of the judiciary and judges was improved by the judicial reforms referring to the fact that powers of the Judicial Legal Council were increased and presented it as a "self-governing body of the judiciary".
    Necessary judicial reform is needed to improve the composition and structure of the Judicial Legal Council in a bid to transfer its whole power to the judiciary. In particular, in regard to the criminal proceedings against government critics, the influence of the executive over the judiciary is obviously noticed in the prosecuting authorities' and court's decisions.

18. Since the changes in the judicial system that the government presents as "reform" did not result in the elimination of the structural deficiencies that are the main barrier to judicial

[2] Presidential Decree "On deepening of reforms in the judicial legal system", 3 April 2019, https://president.az/articles/32587 , para 3.7
[3] 'Why is audio recording not permitted In the trials', Radio 'Liberty', https://bit.ly/3aIA3A9

independence, it is not surprising that since March 2020 there has been a new wave of arrests launched against government critics that repeated the same pattern of the violations identified in this group of cases.[4]

19. In his address to the nation of 19 March 2020 on the occasion of Nowruz Holiday, Azerbaijani President called the opposition a "fifth column" and "traitors", touched on the COVID-19 pandemic and said that the isolation of representatives of the fifth column would become a historical necessity in case of the emergency situation.[5] His speech was followed by the statements of the ruling party's top officials with similar content.[6][7] On 22 March, after the speech of the president and ruling party officials, new arrests began. At least 5 oppositionists faced criminal proceedings, out of which 4 were remanded in custody. More than 30 activists, mostly members of oppositional Popular Front Party were sentenced to administrative detentions for a period of up to 30 days. [8]

20. On 12-14 July 2020, the military clashes between Azerbaijan and Armenian left several military and civil persons dead including one mayor general of the Azerbaijani army. The attack raised public outrage in Azerbaijan and people took to the streets, marched and shouted slogans demanding military recruitment as a support to the military forces. On the night of 14 to 15 July, a small group of participants entered the administrative building of the National Assembly (Milli Majlis), damaged a small part of inventory and turned a police car upside down. The riot police dispersed the rally by using water cannons and tear gas. Some participants were beaten up with truncheons and injured by the police. On 15 and 21 July 2020, the president of the state spoke about the rally and directly blamed the Popular Front Party of Azerbaijan. The President argued that the Popular Front Party had tried to incite people to unlawful actions, warned that they wouldn't compromise with them and the lesson to them this time will be the last one.[9][10] The statement of the president was followed by the arrests of the oppositional activists mostly being members of PFPA. At least 37 activists were subjected to criminal charges and remanded in custody; at least 31 persons were sentenced to administrative detentions.[11]

21. The Working Group on Unified List of Political Prisoners reviewed the cases mentioned in paragraphs 19-20, in particular the decisions of the first instance courts ordering pre-trial detention.[12] The Working Group concluded that the arrests were conducted without reasonable suspicion that they may have committed a crime.[13] Some of those arrested were held

[4] Azerbaijan: Crackdown on Critics Amid Pandemic, HRW, https://bit.ly/3eAcieK
[5] Message of congratulation of President Ilham Aliyev to the people of Azerbaijan on the occasion of Novruz holiday, Azertag, https://bit.ly/3nhBlqU
[6] https://bit.ly/3tWzY3u
[7] https://bit.ly/32JPWlw
[8] Measures against the COVID-19 pandemic in Azerbaijan: Deepening pressure on freedoms and Political Crisis, Chapter IV, EMDS, https://bit.ly/3sTdL57
[9] https://bit.ly/32Kvt03
[10] Ceremony to give out apartments and cars to families of martyrs and war disabled was held in Baku, President.az, https://en.president.az/articles/39923
[11] https://bit.ly/3gBVKWw
[12] The Working Group on a Unified List of Political Prisoners in Azerbaijan brings together human rights defenders, lawyers, journalists and experts.
[13] https://bit.ly/3gBaB3s

incommunicado and alleged that during their detention they were subjected to torture and inhuman treatment.[14] However, allegations were not effectively examined by the prosecuting authorities and law enforcement agencies. The Council of Europe Parliamentary Assembly's rapporteur on reported cases of political prisoners in Azerbaijan, and co-rapporteurs on monitoring of Azerbaijan condemned the arrests and called on the Azerbaijani authorities "to ensure full respect for the freedoms of expression and assembly, the prohibition of torture, and the rights to liberty and security and to a fair trial when dealing with these detainees."[15]

22. Most of the Government's critics who were arrested and remanded in custody in the period of March-July, 2020 were released and their pretrial detention was replaced by the house arrest by the appellate courts in October.[16] While welcoming replacement of their pretrial detention with house arrest, it is worthwhile to note that their release is a clear expression of political will rather than a result of the proper administration of the judiciary.

23. The Government, in its action plan of 20 September 2019, informs the CM that electronic tracking bracelets had started to be applied to accused persons following the establishment of the Probation Service within the Ministry of Justice.[17] However, the government critics who were detained in April-July and later put under house arrest couldn't benefit from new devices. They are tracked by old tracking devices fastened on their feet that are very large and need to be charged often. These devices are not only uncomfortable to carry but also regarded as degrading treatment by the accused.[18]

Legal profession

24. Independent legal advocacy is an indispensable element of an independent judiciary. However, the pressure against independent lawyers that has been intensified since 2017 has been continuing. Though the number of members of the ABA has increased in recent years, punitive measures against human rights lawyers discouraged others to defend government critics and take on high profile cases. Since another human rights lawyer Yalchin Imanov's legal practice was suspended upon the request of the Penitentiary Service after he had informed local media of torture allegations of his client and he was finally disbarred by a court decision on 22 February 2019,[19] lawyers refrain from informing the public about torture allegations even though their clients ask to do so.
25. In September 2020, the Presidium also deprived another well-known lawyer Elchin Sadigov of this status, securing him at the law office No 14 of Baku City. These decisions were taken without the consent of the lawyers themselves, as is required by law. The ABA's claim against

[14] 2020 Country Reports on Human Rights Practices: Azerbaijan, US Department of State, https://bit.ly/2RXbDMK , Part C
[15] Rapporteurs respond to reports of mass arrests of demonstrators in Azerbaijan, PACE, https://bit.ly/3eqRnuC
[16] Azerbaijan
Events of 2020, 'Prosecuting Political Opposition', HRW, https://bit.ly/2Pss1nK
[17] Communication from Azerbaijan concerning the Ilgar Mammadov group of cases v. Azerbaijan, Action Plan, http://hudoc.exec.coe.int/eng?i=DH-DD(2019)1033E
[18] https://www.youtube.com/results?search_query=Ayaz+M%C9%99h%C9%99rr%C9%99mli
[19] Ibid

Sadigov was that he provided services in Baku, while being registered at his place of residence in Goygol district, yet the law does not establish such a restriction.[20]

In such circumstances, the Azerbaijan Bar Association doesn't play its statutory role to protect its lawyers but as a tool to punish them.[21] Systemic problems within the bar association (the decisive power to receive new members to the bar association doesn't rest on the ABA) undermines independence of legal advocacy in the country.

Current situation with applicants in the Mammadli Group

26. In this group of cases the Court concluded that the applicants' arrest and imprisonment was carried out by misusing the criminal code, for the purpose of punishing them and preventing their further work in their respective field.[22]

We should remind that the restrictions imposed on the operation of CSOs since 2013 still remain unchanged. The restrictions that paralyzed the civil society sphere are related to registration of CSOs, their financing and hefty fines in case of violation of CSO legislation. Given the fact that several prominent CSO leaders of the country are the applicants in this group and their arrests followed by imprisonment were directly related to their professional activities in CSOs, amendments to liberalize CSO legislation would be priority for the Government if they were willing to implement general measures.

27. Former political prisoners find themselves in very difficult situations after spending their time in prison. Despite the expungement of the conviction, political prisoners are unlikely to be employed easily at the public institutions and private companies. Being a political "*criminal*" in Azerbaijan is a very tough situation and it cannot be solved through the expungement of convictions. Furthermore, after the expungement of the conviction, not all rights and freedoms are restored.

28. For your information, most of applicants' convictions would be expunged in March-May 2022. The government is waiting to apply the same unjustified arguments in their cases too, trying to establish that "expunging convictions" is an acceptable alternative for acquittal in all Article 18 cases.

29. We should also regretfully inform you that Mr. Bayram Mammadov who is one of applicants as a former political prisoner has been found dead in Istanbul in an apparent drowning. Mammadov's body was pulled from the sea on May 2, 2021 hours after he disappeared into the water on Istanbul's Asian side. According to Istanbul police, a friend later identified the body of the 25-year-old on May 4. Turkish Police reported an investigation had been launched but still there are some concerns about Bayram's suspicious death. It should be noted that two weeks after his release in March 2019, he has been re-arrested in Azerbaijan due to his critical writings about ruling political elite. That time, Mammadov was charged with

[20] IBAHRI Azerbaijan Report AUGUST 2021. The Bar and lawyers in Azerbaijan by Intigam Aliyev. Available (in English) at: https://www.ibanet.org/document?id=IBAHRI-The-Bar-and-Lawyers-in-Azerbaijan-English

[21] Ibid

[22] Detailed description of the difficulties faced by NGOs as a result of the recent legislative amendments can be found in the case of Rasul Jafarov v. Azerbaijan (Application no. 69981/14, §§ 99-113).

resisting police and sentenced to 30 days in jail by the Baku District Court. But he and his lawyers stated that he was beaten and tortured by police in police department. We do believe that quashing of his conviction by the Supreme Court will be valuable moral support for his family and friends for remembrance his memory.

V. **Recommendations**

30. Having regard to the facts mentioned above, the EMDS calls on the Committee of Ministers to urge the Government to take the following steps to fully implement the Court's judgments in this group:

a) Restitutio in integrum should be ensured in respect of all the applicants by paying of just satisfaction in full where still required and the quashing of all the applicants' convictions and the restoring of their civil and political rights;

b) Structural reforms should be prioritized targeting preventing the influence of the executive over the judiciary; judges should be elected or appointed by judges;

c) Top state officials should refrain from statements undermining the objectivity of prosecuting authorities and judges that may lead to the violation of the principle "presumption of innocence" that is guaranteed by Article 6.2 of the Convention;

d) Decisions of prosecuting authorities should be subjected by courts to a close scrutiny not only in theory but also in practice;

e) Restrictive amendments to the CSO legislation that impeded the effective operation of CSOs should be repealed, groundless restriction for funding of CSOs in particular, the norms and regulations limiting foreign funding and requiring state registration of grants should be lifted.

f) Considering a repeated absence of progress & the apparent refusal of the government to implement the ECtHR judgments, the Committee of Ministers should use a so-called "toolbox" of measures available to the Committee of Ministers, which the Committee is able to draw on in order to promote the implementation of judgments of the European Court of Human Rights.

Yours Sincerely,

Anar Mammadli, 

Chairperson,
Election Monitoring and Democracy Studies Center/Azerbaijan