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Meeting:	1250 meeting (8-10 March 2016) (DH)
Item reference:	Communication from the Secretariat (judgment of the Supreme Court of Azerbaijan concerning the case of Ilgar Mammadov – "courtesy translation") (27/01/2016) concerning the case of Ilgar Mammadov against Azerbaijan (Application No. 15172/13)

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Réunion :	1250 réunion (8-10 mars 2016) (DH)
Référence du point :	Communication du Secrétariat (Arrêt de la Cour Suprême de l'Azerbaïdjan concernant l'affaire Ilgar Mammadov - traduction de courtoisie) (27/01/2016) concernant l'affaire Ilgar Mammadov contre Azerbaïdjan (requête n° 15172/13) (***anglais uniquement***).

Case No. 1(102)-222/15

On behalf of the Republic of Azerbaijan
Decision of the Criminal Collegium
Of the Supreme Court of the Republic of Azerbaijan

13 October 2015 City of Baku

The judges of the Criminal Collegium of the Supreme Court of the Republic of Azerbaijan: Imran Teymurkhan Hajiqayibov (presiding judge and rapporteur), Gulnaz Latif Rzayeva and Farkhad Abdulkarim Karimov, with the participation of the secretary of the court session Fuad Vahid Ahmadov, state prosecutor Rasul Elchin Abbasov, prosecution counsel in the unit dealing with appeal and cassation cases of the Public Prosecution Department of the Prosecutor General's Office of the Republic of Azerbaijan, Agayev Fuad Arif, counsel for the convicted person M.I.E, practicing at the legal consultation office No. 13 of the city of Baku, and Karimli Nemat Aga, counsel for the counsel for the convicted person Y.T.R., practicing at the legal consultation office No. 3 of the city of Baku.

Considering the appeal on points of law lodged by Agayev Fuad Arif, counsel for the convicted person M.I.E.[1] and Karimli Nemat Aga, counsel for the convicted person Y.T.R.[2], against the decision of the Criminal Division of the Sheki Appeal Court dated 24 September 2014,

Determined as follows:

By decision of the Sheki Grave Crimes Court (composed of judges R. I. Huseynov (presiding judge and rapporteur), Kh. H. Samadov and A. Z. Suleymanov) dated 17 March 2014.

M.I.E, born on 14 July 1970 in Baku, a citizen of Azerbaijan, who is married, has gone through higher education, and is unemployed while working as Chairman of the REAL movement, with no previous criminal record, registered and residing at 5 Bashir Safaroglu St, flat 10, Yasamal District, Baku; was convicted of offences provided for in Articles 220.1 and 315.2 of the Criminal Code of the Republic of Azerbaijan and sentenced to 6 (six) years' imprisonment under Article 220.1 of the Criminal Code and 4 (four) years' imprisonment under Article 315.2 of the Criminal Code, and pursuant to Article 66.3 of the Criminal Code it was decided that the sentences would be served partially concurrently and a total of 7 (seven) years' imprisonment was decided upon, the sentence to be served in a general regime penitentiary institution and the date of commencement to be 4 February 2013.

Y.T.R, born on 6 February 1961 in the Bolnisi region of Georgia, a citizen of Azerbaijan, who is married, has gone through higher education and is Deputy Chairperson of the Musavat party, having worked as a writer and analyst at Yeni Musavat newspaper, with no previous criminal record, registered and residing at 15/11 E. Bakirli St., Qarachoukhour Settlement of Sourakhani District, Baku; was convicted of offences provided for in Articles 220.1 and 315.2 of the Criminal Code of the Republic of Azerbaijan and sentenced to 4 (four) years and 6 (six) months' imprisonment under Article 220.1 of the Criminal Code and 4 (four) years' imprisonment under article 315.2 of the Criminal Code, and pursuant to Article 66.3 of the Criminal Code it was decided that the sentences would be served partially concurrently and a total of 5 (five) years' imprisonment was decided upon, the sentence to be served in a general regime penitentiary institution and the date of commencement to be 4 February 2013.

[1] Mammadov Ilgar Eldar Oğlu, *transl.*
[2] *Yagublu Tofik Rashid Oglu, transl.*

Circumstances of the case

According to the decision of the first instance court, M.I.E and Y.T.R., both Baku residents, were convicted and sentenced because on 24 January 2013 they travelled to Ismayilli city in response to intentional acts of hooliganism perpetrated on 23 January 2013, at around 9.30 p.m., by a group of people in Ismayilli, which they organised with the participation of residents of the Ismayilli region, Agamaliyev Safdar Dadash, Hasanov Anar Rasim, Ibrahimov Vasif Adalat and others, who burned the 'Chirag' hotel located at 21 Nizami St, Ismayilli, a private house located at 8 R. Teyyubzada St, four cars and five other vehicles, using petrol, a flammable oil-based substance, and used force dangerous to life and health in order to resist police officers who were carrying out their duties of protecting private property from intentional destruction, damage and vandalism as well as safeguarding public order; caused these police officers less grave, light and unidentified levels of bodily harm and using mass disorder accompanied by other violence attempted to spread and continue the illegal acts described above, having in their false way of thinking considered them a "rebellion", so as to inflame artificial tension in the country and violate social and political stability so that it would have a continuous character.

Starting from 4 p.m. Y.T.R and M.I.E, together with and with the active participation of others, took advantage of the feelings of city residents Ismayilli Elshan Samad, Abdullayev Mirkazim Mirazim and others who had gathered in the square in front of an administrative building of the District Education Department, located across from the administrative building of the Ismayilli Region's Executive Authority on Nariman Narimanov Street, bringing them to voice unlawful demands in a public place and hinder the movement of people and vehicles in front of the administrative building of the Ismayilli Region Executive Authority, an authoritative body exercising executive powers of the Republic of Azerbaijan, cause damage and violence and disobey the lawful demands of the representatives of authority who were seeking to disperse the crowd and prevent their unlawful behaviour. With the objects they had obtained they applied force dangerous to the life and health of the uniformed police officers who were attempting to safeguard public order and carry out their duties in this regard, for a lengthy period they failed to leave the places where public order was being violated, interfered with the normal functioning of the Ismayilli Region Executive Authority, state bodies, departments and organisations, restaurants, trade and service entities, and impeded vehicle traffic in the central avenue and Nariman Narimanov Street and thus committed mass disorders. The same day at around 5 p.m. they played an active role in a mass movement of the people who had gathered there, Ismayilli Elshan Samad, Abduallayev Mirkazim Mirazim and others, who proceeded towards the administrative building of the Ismayilli Region Executive Authority and threw stones at the police officers who were lawfully commanding them to disperse; as a result violence, dangerous to life and health was committed in respect of Khalafov Bakir Khatir, the unit commander of the Ismayilli police patrol, as well as police officers Azizov Faraj Yusif, Ahmadov Rashad Shakir, Fakhtiyev Yunis Khamis, Soltanzada Valeh Taleh, and Mirzayev Vusal Adilshah.

On 24 September 2014 the Criminal Collegium of the Sheki Appeal Court (judges M. M. Huseynov (presiding judge and rapporteur), R. A. Aliyev and I. H. Shukurov) upheld the decision of the Sheki Grave Crimes Court dated 17 March 2014 in part relating to the convicted persons M.I.E and Y.T.R and dismissed the appeals lodged by Agayev Fuad Arif, counsel for M.I.E, and Karimli Nemat Aga, counsel for Y.T.R..

Agayev Fuad Arif, counsel for M.I.E, and Karimli Nemat Aga, counsel for Y.T.R, who were not satisfied with this decision of the Appeal Court submitted an appeal on points of law calling for the annulment of the decision of the Criminal Collegium of the Sheki Appeal Court of 24 September 2014 and for a decision to terminate the proceedings in relation to their clients.

Arguments in support of the appeal on cassation

Agayev Fuad Arif, M.I.E's lawyer, has submitted arguments in support of the appeal on points of law and stated that the judicial acts were totally biased, illegal and unjust and for this reason they must be annulled and the criminal proceedings in relation to M.I.E must be terminated.

The courts must observe the requirements of Article 6 §§ 1 and 3 (a) and (b) of the European Convention for the Protection of Human Rights and Fundamental Freedoms when considering criminal cases and also take account of M.I.E's right to liberty and freedom from discrimination (Articles 5 and 14 of the Convention).
According to the lawyer, the prosecution's behaviour during its investigation of the case and the behaviour and decisions of the lower courts during their examination of it constituted an example of a declarative approach to the provisions of Article 63§1 of the Constitution of the Republic of Azerbaijan.

According to joint information issued by the Prosecutor General's Office and the Ministry of Internal Affairs of the Republic of Azerbaijan on 29 January 2013, M.I.E and Y.T.R travelled to Ismayilli and called upon local inhabitants to resist the police, to take no orders from anyone and to block the roads with vehicles, which were calls aimed at creating a violation of social and political stability. This meant that these state law-enforcement bodies had practically already convicted them on 29 January 2013. The defence has nonetheless proven without doubt that M.I.E. is not guilty.

The lawyer pointed out that the lower courts rejected the vast majority of his applications, which included requests for the audio and video recording of the proceedings, release from custody, exclusion of unacceptable evidence, admission of new evidence, that persons who had suffered no injuries should not be accorded the status of recognised victims, etc.. The requests were rejected without any explanations, whereas they had to be accepted.

Moreover, although the lower court had unlawfully banned the audio and video recording of the proceedings, the defence was not permitted to familiarise itself with the records of the trial, which lasted five months. The court did not even create the conditions necessary for obtaining some relevant case materials and copies of some video materials. In addition, during the appeal stage the defence's requests concerning the audio and video recording of the proceedings, release of M.I.E. from custody, the exclusion of unacceptable evidence, the termination of victim status for persons who had suffered no injuries, etc., were rejected. Here again, it is clear that at the very least there have been violations of Articles 5, 6 (§§ 1 and 3 'b') and in relation to M.I.E. also Articles 14 and 18 of the Convention.

The lawyer also notes that for a person to be found guilty under Article 220.1 of the Criminal Code of the Republic of Azerbaijan, that person has to be either the organiser of or a participant in mass disorder; moreover, the disorder has to be accompanied by: 1) violence; 2) plunder; 3) arson; 4) destruction of property; 5) use of firearms or explosive substances or devices; or 6) armed resistance to representatives of authority. In order for an offence under the said article to exist, there has to have been mass disorder as well as at least one of the enumerated circumstances.

The lawyer maintains that when M.I.E. was in Ismayilli there was no disorder at all, nor were any actions taken which severely violated public order. According to the verdict, M.I.E. and Y.T.R. are accused of organising mass disorder that did not exist, i.e. of having planned and prepared mass disorder, established unlawful groups to take illegal actions and distributed roles and duties among the participants. During the single hour he was present in Ismayilli city (including some 15 minutes in the city centre) M.I.E. would have had to make all these plans and distribute roles and tasks. It was on the contrary theoretically impossible for him to organise all of this in an unknown place and amidst people unfamiliar to him. However, if there was no mass disorder, this means there was no offence coming under Article 220.1 of the Criminal Code. This is also relevant to the charges brought under Article 315.2 of the Criminal Code. The lawyer considers that there is no relevant evidence to prove that M.I.E. committed the offences provided for in the said articles.

The lawyer also indicates that throughout the proceedings they brought to the attention of the prosecution and the court the fact that none of the many journalists (from news agencies, TV, radio and the mass media) who covered the Ismayilli events ever mentioned that there was any mass disorder during M.I.E.'s presence in Ismayilli; in addition, from the TV and other video materials submitted to the prosecution it is evident that between 3.35 and 5 p.m. and even until 8 p.m. there were no clashes in Ismayilli. The defence requested the courts to look at the information placed on the web pages of the pro-governmental APA and Trend news agencies for that day, but these requests were rejected.

The lawyer considers that the bias and the non-objective and partial attitude of the lower courts violated a number of M.I.E.'s rights under the European Convention on Human Rights, including the rights to an impartial and unbiased tribunal, a fair trial, the right to a defence, equality of arms and the adversarial principle, the right to a reasoned court decision (Article 6 of the Convention), an effective remedy (Article 13 of the Convention), protection against discrimination (Article 14 of the Convention), and no restrictions on rights and freedoms for a purpose not prescribed therein (Article 18 of the Convention).

Karimli Nemat Afa, counsel for Y.T.R., submits in support of the appeal on points of law that the court decision was unlawful and unfounded because the preliminary investigation body violated the presumption of innocence in the case of both Y.T.R and M.I.E., as guaranteed by Article 7 of the European Convention on Human Rights and Article 63 of the Constitution of the Republic of Azerbaijan, by stating, even before questioning them as witnesses, that a legal assessment would be made after thorough and detailed investigation of unlawful acts.

At the same time, when the decision to charge them was made, the preliminary investigation body also violated the requirements of Articles 223.1 and 223.2 of the Code of Criminal Procedure of the Republic of Azerbaijan.

According to the case-law of the European Court of Human Rights, a reasonable suspicion presupposes the existence of facts and information that can convince an objective observer. However, the investigator's decision did not reflect the totality of the preliminary evidence and was not grounded, in other words, there were no facts or information showing that all the constituent elements of the offence which was the basis for the accusation existed. According to Article 15 of the Law of the Republic of Azerbaijan "On operational search activities", operational search activities are to be launched on the basis of a decision as provided for in Article 11§3 of that Law and this must be notified to a subject of an operational search activity. The outcomes of operational search measures must be reflected and systemised in the operational registration of the information on the case. In both court proceedings the defence accordingly requested that the operational registration records be obtained from the Ministry of National Security and Ministry of Internal Affairs but these requests were rejected without any explanation.

The lawyer points out that the prosecution took the testimonies of the police officers as evidence of Y.T.R.'s criminal intent and failed to carry out a comparative analysis. It failed to carry out a comparative assessment of the testimonies of the police officers and others versus the testimonies of Mehman Karimli and Qalandar Moushtarli, which were in his favour.

The lawyer contends that the actions of Y.T.R. (visiting Ismayilli as a journalist) were devoid of any object linked to the offences of mass disorder, resistance to a representative of authority or application of force, neither were there any objective and subjective elements to substantiate the accusation against him, which was founded only on assumptions.

The lawyer points out that his client submitted numerous requests to take cognisance of the records but they were dismissed on the ground that "familiarisation with the records had to take place after the court examination and when the decision had been made" as well as by reference to Article 310.7 of the Code of Criminal Procedure.

According to Article 121.2 of the Code of Criminal Procedure of the Republic of Azerbaijan, a decision concerning an application or request must be reasoned and there has to be an assessment of the applicant's arguments in the said decision. According to Article 323.6 of that Code, if the court dismisses an application it has to give a reasoned decision on the matter. The lawyer considers that the vast majority of the defence's applications were rejected unlawfully and groundlessly without any comments and thus the principle of equality of arms was violated.

The Court Collegium, having studied the case materials, having examined the arguments in support of the appeal on points of law, having heard Rasul Abbasov, public prosecutor, who asked it to reject the

appeal, having heard the arguments of lawyers Fuad Agayev and Natig Karimli in support of the appeal, considers that the appeal on points of law must be partially allowed for the reasons set out below.

The Law

According to Article 419 of the Code of Criminal Procedure of the Republic of Azerbaijan, the cassation instance court, when considering a complaint or an appeal on points of law can only examine whether the rules on points of law of criminal law and the Code of Criminal Procedure have been applied correctly. Since, at the cassation stage, the Court examines judicial acts that have entered into force, in this instance the merits of the case are not examined, new evidence is not submitted and no legal assessment is made of the existing evidence. The purpose of cassation proceedings is to check the legality of a judgment or decision, in other words whether the first or appeal instances observed the material or procedural rules, i.e. the rules of criminal law and of the Code of Criminal Procedure, when forming a judgment or a decision in respect of the case under consideration.

According to Article 419.11 of the said Code, the court of cassation may not determine facts which were not the subject of a judicial examination at the first instance or appeal courts, nor can it consider them as proven.

In accordance with the above legal requirements, the Court Collegium, having verified the observance of the rules by the courts which dealt with the case, finds that those courts, when examining the criminal case of M.I.E. and Y.T.R., violated a number of provisions of the Code of Criminal Procedure.

Thus, during the first instance proceedings, F. A. Agayev, counsel for convicted person M.I.E., in an application dated 18 November 2013 requested the court to ensure that Goyushov Altay Rashid, Qasimli Azar Agaqasim and Ismayilov Zohrab Neyman were summoned as witnesses for questioning.

However, the court did not ensure that those witnesses were questioned.

It emerges from the case-file that Qasimli Azar Agaqasim is a member of the Board of the REAL movement. In the testimony he gave during the preliminary investigation, he stated that on 24 January 2013, while he was in Moscow, he exchanged phone calls with M.I.E. with the purpose of obtaining information on what M.I.E. had seen of the events in Ismayilli. There was no indication that, while in Ismayilli, M.I.E. made any public speeches; he does not believe that M.I.E. took such actions and gave such speeches.

The case-file materials show that A. Qasimli attended the court hearing on 27 January 2014, but the public prosecutor petitioned the court not to question him as a witness and to have him removed from the court room, as he had been present at the previous court hearing of 10 December 2013 and he was hindering the conduct of the hearing. The court allowed this request and decided that A. Qasimli would not be questioned as a witness.

The Court Collegium considers that this decision was unfounded, since A. Qasimli's presence in the court room on 10 December 2013 was a result of the court's own inattention. It is clear from the records that the presiding judge did not check who had been summoned to the court hearing on 10 December 2013. According to Article 322.1.3 of the Code of Criminal Procedure of the Republic of Azerbaijan, the presiding judge at the court hearing shall instruct the court bailiff to accompany witnesses to a room set aside for them. Since the court failed to observe this provision of the law, A. Qasimli was present at the court hearing on 10 December 2013 and this was accepted as a ground for rejecting his questioning at the hearing on 27 January 2014. As a result, the questioning of an important witness for the defence was hindered.

Another witness mentioned by the lawyer is Goyushov Altay Rashid, a member of the Board of the REAL movement. In the testimony he gave during the preliminary investigation he stated that, on 24 January 2013, he contacted M.I.E. by phone and the latter gave him some brief information about the events, but

said nothing about having made a speech in front of people in Ismayilli city. He added that he had no information indicating that he spoke before the people and that he did not believe that M.I.E. took such actions and gave such speeches.

The other witness Ismayilov Zohrab Neyman is a director of a non-governmental organisation "Assistance to the free economy". It is clear from his testimony during the preliminary investigation that he met with M.I.E. a few days after M.I.E. returned from Ismayilli and he was informed that, together with Natiq Jafarov, M.I.E. had travelled to Ismayilli after the events in order to obtain more information about what had taken place in Ismayilli, and upon their arrival they had observed the tensions in the city but had met only with journalists there before returning to Baku with Nijat Malikov, a correspondent for the "Zerkalo" newspaper.

It is clear from the case file that Natig Karimli, counsel for the convicted person Y.T.R., petitioned the appeal court to summon Nizami Qocayev, chief of the police unit in Ismayilli, as a witness for questioning, but the court rejected this petition at its hearing on 3 September 2014.

The Court considers it necessary to assess the failure of the courts to summon and question the aforementioned witnesses from the angle of the requirements of Article 6 of the European Convention on Human Rights, as described below.

Article 6§3 (d) of the European Convention on Human Rights states: "3. Everone 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."

In a number of judgments under Article 6 §§ 1 and 3 (d) of the European Convention on Human Rights, particularly in Al-Khawaja and Tahery v. the United Kingdom (15 December 2011), Matisina v. Russia (27 March 2014), Scholer v. Germany (18 December 2014), Yevgeniy Ivanov v. Russia (25 April 2013), and Efendiyev v. Azerbaijan (18 December 2014), the European Court has held that observance of the rights of the defence and ensuring the accused is given a fair trial are indispensable conditions.

According to the legal position of the European Court on admitting the testimony of a witness who testified against the accused and using that testimony in grounding a court decision, three criteria have to be observed so that the rights of the defence are not violated and the standard of a fair trial is met.

Firstly, admitting the testimony of an absent witness given during the preliminary investigation should be an unavoidable necessity, there must be a good reason for the witness's absence at the court hearing, the reason's existence must be determined with certainty by the court by reference to the relevant materials and it must be set out in the court's decision.

Regardless of the reason for a witness's failure to attend court, the court examining the case must make sufficient efforts to ensure that the witness appears at the court hearing. This requirement was reiterated in the judgment of the European Court in Yevgeniy Ivanov v. Russia and it is a standard closely linked to the first criterion.

The second criterion is to what extent the court uses the testimony of a witness not examined in court in grounding the accusation and the role of such testimony in determining the case. According to the legal position of the European Court, even if there is a good reason for a witness's failure to appear at the hearing, if the accusation is solely or to a great extent based on the testimony of a witness not questioned in court, which was given during the preliminary investigation, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by the right to a fair trial.

However, this criterion, entitled the "decisive rule", is not absolute and in a number of judgments, including Al-Khawaja and Tahery v. the United Kingdom and Matisina v. Russia, the European Court found that in order to compensate the defence for the inability to question a witness there have to be

counterbalancing means, including when testimonies given during the preliminary investigation by a sole or decisive witness who was not questioned in court are used in grounding a verdict, subject to the condition that effective procedural safeguards are present permitting a just and thorough study of the reliability of the testimony.

Thus, the third criterion for assessing the issue of basing a verdict on the testimony of a witness who did not appear in court is the effectiveness of a counterbalancing measure taken by the court in order to compensate for the difficulties on the defence side. In other words, it has to be assessed whether the court has taken sufficient measures to create conditions conducive to an adversarial hearing between the parties based on equal conditions by compensating the difficulties on the defence side stemming from the court's acceptance as evidence of the testimony of a prosecution witness who did not appear in court.

The European Court, in its judgment in Efendiyev v. Azerbaijan noted that Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence. Even where the evidence of an absent witness had not been sole or decisive, the Court still found a violation of Article 6 § 3 (d) when no good reason had been shown for the failure to have the witness examined (see Lüdi v. Switzerland, 15 June 1992; Mild and Virtanen v. Finland, 26 July 2005; Bonev v. Bulgaria, 8 June 2006; and Pello v. Estonia, 12 April 2007).

As a result, "taking into consideration that no good reason has been shown for the failure to have R.M. examined", the European Court found that the applicant's defence rights were limited to an extent incompatible with the guarantees of a fair trial, i.e. that there was accordingly a violation of Article 6 §§ 1 and 3 (d), taken together.

The European Court of Human Rights also found a violation of Article 6§3 (d) of the Convention in Soin Seydiyev v. Azerbaijan (20 May 2010) and Shamsaddin Jamiyev v. Azerbaijan (30 September 2010) since the court refused to question a defence witness who had given or could give a testimony in the accused's favour.

Hence, the Court Collegium concludes that the failure of the courts that dealt with the cases of M.I.E. and Y.T.R to ensure that the defence witnesses were summoned and questioned led to a violation of the duty of objectivity, impartiality and justice of criminal proceedings, as laid down in Article 28 of the Code of Criminal Procedure of the Republic of Azerbaijan.

One of the arguments in support of the appeal on cassation advanced by lawyers Fuad Agayev and Nemat Karimli is that the courts rejected the vast majority of the applications they submitted.

In this connection, the Court Collegium notes that, according to Article 121.2 of the Code of Criminal Procedure of the Republic of Azerbaijan, a decision concerning an application or request has to be reasoned and there has to be an assessment of the applicant's arguments. Applications and requests directed at the thorough, full and objective examination of all matters connected with a criminal prosecution within the relevant legal proceedings, as well as the restoration of any violated rights and legal interests of parties to criminal proceedings cannot be rejected.

As can be seen from the case file, the courts dealing with the criminal proceedings took decisions on rejecting a number of applications submitted by the defence.

This included: applications by lawyer Fuad Agayev requesting the submission of a detailed statement reflecting incoming and outgoing calls from cell phones used by M.I.E., Y.T.R. and Nijat Malikov; a review of materials taken from the mass media dated 24 January 2013; and a review of information drawn from the web pages of the Faktxabar, Dayarlar, "Azadliq" radio stations and the APA and Trend news agencies of 24 January 2013. At the same time, applications by lawyer Natiq Karimli concerning requests for submission of a detailed statement reflecting incoming and outgoing calls from the cell phones (051 944

58 67 and 070 544 10 43) used by Y.T.R. on 4 November 2013 during his visit to Ismayilli; antenna data; information about the owners of the phones contacted as well as copies of video records made by the Ministry of National Security and Ministry of Internal Affairs of the Republic of Azerbaijan on 24 January 2013 in Ismayilli were all rejected.

The Court notes that the courts which dealt with the case failed to sufficiently justify the decisions on rejecting the applications lodged by the defence. The arguments on this matter advanced in support of the appeal on cassation must hence be deemed founded.

According to Article 349.3 of the Code of Criminal Procedure of the Republic of Azerbaijan, a court's judgment has to be lawful and well-founded.

According to Article 349.5.1 of the said Code, the conclusions arrived at by a court are well-founded only if they are based on evidence examined during the court's investigation of the case. As is clear from the recommendations of paragraph 4 of Decision No. 4 of the Supreme Court of the Republic of Azerbaijan "On judicial decisions" dated 27 December 1996, a verdict cannot be based on assumptions in accordance with Article 351.2 of the Code of Criminal Procedure. A verdict must be based on reliable evidence after analysing all versions and giving an assessment of all contradictions that have been clarified.

In its decision "On the interpretation of Article 244.1 of the Criminal Code of the Republic of Azerbaijan" dated 17 March 2011, the Constitutional Court held that the classification of a crime shall be based on a criminal-law assessment reflected in the relevant procedural document and which leads to criminal-law results by identifying whether the features of a criminal action are consistent with the features of the elements laid down in the relevant criminal law provisions.

The classification of a crime has an important social and legal value. From the point of realisation of the duties envisaged in the Criminal Code, the classification is an important logical process carried out by the respective officials authorised to apply criminal law and its result is to give a legal assessment of a specific social incident caused by human behaviour dangerous to society. This requires, first of all, a thorough study of the factual circumstances of the case, correct application of the norm of criminal law and explanation of its substance.

The above decision also emphasised that when examining a criminal action the aim has to be to determine and classify correctly its constituent elements, checking whether the actions concerned are indeed criminal, ascertaining whether the accused is guilty or not, as well as verifying whether the punishment to be applied to the accused for the said offence is just. Otherwise, an innocent person will be found guilty or a guilty person will not be held liable; this can also lead to wrongful punishment. In turn, this can result in a violation of the principles of lawfulness, equality before the law, responsibility for guilt, justice and humanism as well as the aforementioned constitutional principles, as referred to in the Criminal Code.

The European Court of Human Rights dealt with the question of final judicial decisions in Bratyakin v. Russia (9 March 2006), Fadin v. Russia (27 July 2006), Lenskaya v. Russia (29 January 2009), and Radchikov v. Russia (24 May 2007) and stated that one of the main principles of a Rule of Law is legal certainty, which covers the requirement that the final judgments of courts shall not raise questions. The authority of upper courts to quash legal decisions shall lie specifically in correcting serious defects. This authority shall be applied in such a way as to enable the fairest possible balance between the interests of the individual and the need to ensure the efficiency of the criminal justice system. In a number of judgments, when analysing the notion of a "serious defect", the Court ruled that a serious defect can be deemed to exist when the handling of a case is incomplete and lacking impartiality, when it leads to a wrong result, when there are mistakes such as serious violations of court process, misuse of power, and errors as to the scope of application of the law, as well as other deficiencies that affect the interests of justice. The Convention in principle permits the review of final court decisions in order to rectify mistakes that took place during criminal proceedings in relation to the aforementioned. Keeping those mistakes as they are seriously affects justice, objectivity and the public image of the judiciary.

The Court Collegium concludes that the courts which dealt with the case failed to properly fulfill the duties laid down in the Code of Criminal Procedure for judicial proceedings in criminal matters. As a result, the court of appeal committed the violations mentioned in Article 416.0.1 of the Code of Criminal Procedure, which condition the setting aside or amendment of the court's decision at the cassation stage.

The contested proceedings on appeal accordingly do not correspond to the concept of a fair hearing as provided for in paragraph Article 6 § 1of the European Convention and the judicial examination has to be carried out anew by quashing the decision of the appeal instance court and by observing the requirements of Article 19.4 of the criminal-procedure law and of Article 6 §3 (d) of the European Convention.

The Court Collegium does not see a need to take position on the arguments concerning the convicted person's innocence, as advanced by the lawyers in the appeal on points of law, since it has determined that, in relation to M.I.E. and Y.T.R., the courts dealing with the criminal proceedings infringed the procedural norms described above, and for this reason the decision, in the parts related to them, has to be quashed and reviewed anew in the appeal instance.

Based on the aforementioned and in conformity with Articles 416.0.1 and 419.10.2 of the Code of Criminal Procedure of the Republic of Azerbaijan, the Court Collegium

DECIDES:

To quash the decision of the criminal collegium of the Sheki Appeal Court of 24 September 2014 in the part related to convicted persons M.I.E. and Y.T.R. and to order the re-examination on appeal of the criminal case in the said part.

To partially allow the appeal on points of law.