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EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF ALIYEV AND OTHERS v. AZERBAIJAN

(Application no. 28736/05)

JUDGMENT

STRASBOURG

18 December 2008

FINAL

18/03/2009

This judgment may be subject to editorial revision.

In the case of Aliyev and Others v. Azerbaijan,

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

Christos Rozakis, *President,*
Nina Vajić,
Khanlar Hajiyev,
Dean Spielmann,
Sverre Erik Jebens,
Giorgio Malinverni,
George Nicolaou, *judges,*

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 27 November 2008,

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

PROCEDURE

1. The case originated in an application (no. 28736/05) 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 ten Azerbaijani nationals, Messrs Intiqam Aliyev, Rashid Hajili, Annagi Hajibeyli, Shahbaz Aliyev, Farman Huseynov, Alovsat Aliyev, Ayyub Kerimov, Vidadi Mirkamal, Akif Alizade and Namizad Safarov ("the applicants"), on 30 July 2005. Mr I. Aliyev, the first applicant, who was a lawyer practicing in Baku, represented the other nine applicants.

2. The Azerbaijani Government ("the Government") were represented by their Agent, Mr C. Asgarov.

3. The applicants alleged that the significant delay in the state registration of the association of which they were founders had amounted to a violation of their right to freedom of association, that the domestic proceedings had been unreasonably lengthy, and that the domestic courts were not independent and impartial in lawsuits against the Ministry of Justice of Azerbaijan.

4. On 9 November 2006 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. On 24 May 2003 the applicants founded an association named "Azerbaijani Lawyers Forum" (*"Azərbaycan Hüquqşünaslarının Forumu" İctimai Birliyi*). This was a non-profit organisation established with the purpose of carrying out various activities aimed at further democratisation of society, the formation of a state governed by the rule of law, liaison between lawyers, and the protection of their professional interests.

6. On 23 June 2003 the applicants lodged a request for the association's state registration with the Ministry of Justice (hereafter also referred to as "the Ministry"), the government authority responsible for the state registration of legal entities. In accordance with the domestic law, a non-governmental organisation acquired the status of legal entity only upon its state registration by the Ministry of Justice.

7. Under the Law on State Registration of Legal Entities of 6 February 1996 ("the Old State Registration Act"), applicable at that time, the Ministry was obliged to respond to the applicants' registration request within ten days after receipt of the request. However, the applicants did not receive any response for several months.

8. In March 2004 the applicants lodged an action with the Yasamal District Court, complaining that the Ministry had "evaded" registering their organisation and asking the court to compel the Ministry to register it. They claimed that the delay in state registration constituted a violation of their right to freedom of association under Article 58 of the Constitution and Article 11 of the Convention, and demanded compensation for non-pecuniary damage.

9. In its pleadings submitted to the court in reply to the applicants' claim, the Ministry of Justice argued that on 18 February 2004 it had sent an official response to the association's legal address. However, the postal service had not been able to deliver it because there had been a mistake in the recipient's address printed on the envelope. The Ministry re-sent the official response to the correct address on 28 June 2004. In that response, the Ministry noted that it was returning the registration documents to the applicants "without taking any action", that is to say without issuing a state registration certificate or an official refusal to register the association. The reason was the applicants' failure to include the description of the association's activity in its name, as required by Article 3.1 of the Law on Non-Governmental Organisations (Associations and Funds), and to approve the association's charter, by signing it, as required by Article 47.1 of the Civil Code.

10. On 24 January 2005 the Yasamal District Court dismissed the applicants' claim. The court found that the Ministry had issued a formal response to the applicants' registration request on 18 February 2004, although the applicants did not receive it at that time owing to an unintentional mistake in the recipient's address. The court further dismissed the applicants' claim that the Ministry had failed to comply with the ten-day time-limit laid down by the Old State Registration Act. The court noted that, in the meantime, on 9 January 2004 a new Law on State Registration and the State Register of Legal Entities ("the New State Registration Act") had entered into force and superseded the Old State Registration Act. In accordance with the New State Registration Act, the time-limit for the Ministry's formal response to a registration request was extended to 40 working days after the receipt of the request. The court reasoned that, since the Old State Registration Act was no longer in force, the time-limits set by it no longer applied, and that a new time-limit of 40 days had been applicable since 9 January 2004, the date of entry into force of the New State Registration Act. Accordingly, the court ruled that the Ministry had responded within the statutory time-limit and that the applicants could re-apply for state registration after rectifying the deficiencies found by the Ministry in their registration documents.

11. On 19 April 2005 the Court of Appeal upheld the first-instance court's judgment.

12. On 29 June 2005 the Supreme Court upheld the Court of Appeal's judgment.

II. RELEVANT DOMESTIC LAW

A. State registration of associations

13. Article 58 of the Constitution of the Republic of Azerbaijan of 12 November 1995 provided as follows:

> "I. Everyone has a right to freedom of association with others.
>
> II. Everyone has the right to form any association, including political parties, trade unions or other public associations, or join existing associations. Free functioning of all associations shall be guaranteed. ..."

14. Article 47.1 of the Civil Code of 2000 provided as follows:

"The charter of a legal entity approved by its founders is the legal entity's foundation document. ..."

15. Article 9 of the Law on State Registration of Legal Entities of 6 February 1996, in force until 9 January 2004, provided as follows:

"Upon receipt of an application for state registration from a legal entity or a branch or representative office of a foreign legal entity, the authority responsible for state registration [i.e. the Ministry of Justice] shall:

– accept the documents for review;

– within ten days, issue the applicant with a state registration certificate or a written notification of refusal to register; or

– review the documents re-submitted after rectification of the deficiencies previously existing therein and, within five days, take a decision on state registration."

16. Article 8.1 of the Law on State Registration and the State Register of Legal Entities of 12 December 2003, effective from 9 January 2004, provided as follows:

"State registration of a non-commercial organisation wishing to obtain legal-entity status, or of a branch or representative office of a foreign legal entity, shall, as a rule, be carried out within 40 days. ..."

17. Article 3.1 of the Law on Non-Governmental Organisations (Public Associations and Funds) of 13 June 2000 provided as follows:

"The non-governmental organisation shall have a name indicating its organisational-legal form and the nature of its activities. ..."

B. Non-retrospective effect of law

18. The general presumption under Azerbaijani law is that new legal acts apply prospectively and not retrospectively, subject to specified exceptions. In particular, Article 149 (VII) of the Constitution provides that only legal acts improving the legal situation of individuals and legal entities or eliminating or mitigating their legal responsibility can have retrospective effect; other legal acts have no retrospective effect.

19. Article 42 of the Law on Normative Legal Acts of 26 November 1999 provides that the retrospective application of legal acts is regulated by Article 149 (VII) of the Constitution. Article 7.1 of the Civil Code provides that, except in the situations provided for by Article 149 (VII) of the Constitution, provisions of civil legislation have no retrospective effect and apply prospectively to events taking place after their entry into force.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

20. The applicants complained that the failure by the Ministry of Justice to register their association in a timely manner constituted a violation of their right to freedom of association. As the Ministry had evaded registering the organisation by significantly delaying the examination of their registration request and breaching the statutory time-limit for the official response, their organisation could not acquire legal status. Moreover, they complained that the founders' failure to include the description of the association's activity in its name, as well as to sign its charter, could not be a ground for refusal to register the association. Article 11 of the Convention provides as follows:

"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."

A. Admissibility

21. The Government submitted that the applicants had not specifically complained of an infringement of their right to freedom of association under Article 11 of the Convention. Moreover, they had failed to exhaust all available domestic remedies because they had not lodged a complaint with the Constitutional Court challenging the Supreme Court's final decision of 29 June 2005.

22. The applicants maintained that they had exhausted all ordinary domestic remedies.

23. The Court finds that the applicants' court action against the Ministry of Justice, in which they complained of an unlawful delay in the state registration of the association, amounted in substance to a complaint of an alleged violation of their right to freedom of association. Moreover, they had specifically relied on Article 11 of the Convention in their appeals.

24. Furthermore, the Court refers to its previous finding, made in a similar case concerning delays in state registration of an association, that a complaint to the Constitutional Court was not one of the remedies to be exhausted prior to lodging an application with the Court. Specifically, the Constitutional Court lacked adequate accessibility because, in order to exercise a right of individual petition before the Constitutional Court, individuals were required on a domestic level to have had recourse to another remedy (additional cassation procedure before the Plenum of the Supreme Court) which was ineffective within the meaning of Article 35 § 1 of the Convention (see *Ismayilov v. Azerbaijan*, no. 4439/04, §§ 39-40, 17 January 2008). The Court finds no reason to depart from that finding in the present case.

25. For these reasons, the Court rejects the Government's objection.

26. The Court further notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

27. The Government argued that there had been no interference with the applicants' freedom of association, noting that the Ministry had not formally refused to register the association. Instead, it had merely returned the association's foundation documents to the founders so that the latter could rectify the deficiencies and ensure that they complied with the requirements of the domestic law. The Government contended that, although "a refusal to register a public association might be regarded as a violation of the right to freedom of association, a delayed response to [an application for state registration] is not a violation of that right". Even if the Ministry had committed procedural errors, they had not amounted to a violation of the applicants' rights under Article 11.

28. Moreover, the Government argued that the lack of the status of legal entity did not prevent the association from continuing its activities.

29. Lastly, the Government submitted that the founders "did not comply with the duty of diligence" during the registration process, as the association's constituent documents had not been

prepared in accordance with the requirements of the law. The applicants could have rectified those deficiencies and re-submitted their registration request.

30. The applicants argued that the delay in responding to the founders' registration request, which had been significantly outside the time-limits laid down by the domestic law, had constituted an interference with, and a violation of, their right to freedom of association. The applicants maintained that such a delay was in breach of the domestic law.

31. The applicants further argued that the grounds cited by the Ministry for refusal to register the association had been unlawful. They also noted that, without acquiring the status of legal entity through state registration, the association had been unable to function properly and to engage in its primary activities, as it was unable to obtain funding, enjoy tax benefits and engage in a number of financial and other activities.

2. The Court's assessment

32. The Court notes that the present case is essentially similar to *Ramazanova and Others v. Azerbaijan* (no. 44363/02, 1 February 2007), *Nasibova v. Azerbaijan* (no. 4307/04, 18 October 2007) and *Ismayilov* (cited above).

33. In particular, in those cases the Court found that the failure by the Ministry of Justice to reply, within the statutory time-limits, to requests for state registration of an association established in Azerbaijan, amounted to a *de facto* refusal to register the association. Without the state registration the association lacked the status of legal entity and, as such, its legal capacity was not identical to that of state-registered non-governmental organisations, even assuming that it could engage in certain limited activities. The significant delays in the registration procedure, if attributable to the Ministry of Justice, amounted to an interference with the exercise of the right of the association's founders to freedom of association (see, for example, *Ramazanova and Others*, cited above, §§ 54-60, with further references). Accordingly, in the present case, where the applicants were the founders of the association, there has been an interference with the exercise of their right to freedom of association.

34. Such interference will not be justified under the terms of Article 11 of the Convention unless it was "prescribed by law", pursued one or more of the legitimate aims set out in paragraph 2 of that Article and was "necessary in a democratic society" for the achievement of that aim or aims (see, for example, *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 104, ECHR 1999-III).

35. The Court reiterates that the expression "prescribed by law" requires that the impugned measure should have some basis in domestic law and refers to the quality of the law in question. The law should be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, for example, *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004-I; *Adalı v. Turkey*, no. 38187/97, § 272, 31 March 2005; and *Rekvényi v. Hungary* [GC], no. 25390/94, § 34, ECHR 1999-III). For domestic law to meet these requirements, it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise (see *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 84, ECHR 2000-XI, and *Maestri*, cited above, § 30).

36. One notable difference between the present case and the *Ramazanova and Others*, *Nasibova* and *Ismayilov* cases is that, in the present case, several months after the applicants had made their request for state registration, the New State Registration Act entered into force on 9 January 2004 and superseded the old rules on state registration of legal entities. Therefore, to assess whether the

interference was "prescribed by law", it is necessary to determine what domestic law regulated the registration proceedings in the present case.

37. The Court notes, first of all, that the applicants submitted their registration request on 23 June 2003, at the time when the Old State Registration Act was in force. Article 9 of that act set a ten-day time-limit for the Ministry to issue a decision on the state registration of a legal entity or refusal to register it. In the event the legal entity's foundation documents contained rectifiable deficiencies, the Ministry could return the documents to the founders within the same ten-day time-limit with instructions to rectify those deficiencies. After the registration request was re-submitted following such rectification, the law provided for a five-day time-limit for an official response. It therefore follows that, pursuant to the Old State Registration Act, the Ministry had to issue at least an initial decision on the applicants' request by 3 July 2003, long before the entry into force of the New State Registration Act. However, in the present case, the Ministry delayed its response by almost eight months.

38. The domestic courts decided that, since at the time of examination of the applicants' court claim against the Ministry the Old State Registration Act was no longer in force, only the procedural requirements of the New State Registration Act applied. They also found that the new time-limit of 40 days started to run from 9 January 2004, the date of entry into force of the New State Registration Act. Since the Ministry of Justice sent its formal response to the applicants on 18 February 2004, the courts concluded that it was sent within the time-limit currently applicable under the New State Registration Act.

39. However, such a conclusion, in its essence, constituted an implicit finding that the mere fact of entry into force of a new act superseding the previous act somehow absolved the Ministry of Justice from responsibility for breaches of procedural requirements of the superseded law committed at the time when the latter was still in force. In the Court's view, such a finding is arbitrary and incompatible with the interests of justice and legal certainty. The domestic courts failed to make any legal assessment of the Ministry's lengthy failure to act during the period from 23 June 2003, when the registration request was submitted by the applicants, until 9 January 2004, when the New State Registration Act entered into force.

40. The domestic courts have not established, and it has not been argued by the Government, that the provisions of the New State Registration Act had any retrospective effect. Having regard to the relevant provisions of the domestic law concerning the retrospective effect of legal acts (see paragraphs 18-19 above), the Court is also of the opinion that the New State Registration Act had no retrospective effect. Therefore, since in the present case the applicants submitted their registration request on 23 June 2003, the applicable state registration procedure was as provided in the Old State Registration Act, which was in force at that time.

41. As noted in paragraph 37 above, the Court cannot but conclude that, by failing to take any action in response to the applicants' registration request for almost eight months, the Ministry breached the ten-day procedural time-limit set by the Old State Registration Act. There was no basis in the domestic law justifying such an unreasonable delay in the registration proceedings. Moreover, in the circumstances of the present case, the Ministry's alleged heavy workload cannot be considered a good excuse for such a long delay, as there is no evidence as to whether, during the relevant period, any remedial measures had been taken by the State in order to allow the Ministry's practices to be brought into compliance with the time-limits imposed by the State's own law (see *Ramazanova*, cited above, §§ 64-65).

42. Furthermore, as to the quality of the Old State Registration Act, the Court reiterates its finding that it did not establish with sufficient precision the consequences of the Ministry's failure to take action within the statutory time-limits. In particular, the law did not provide for an automatic registration of a legal entity or any other legal consequences in the event the Ministry failed to take any action in a timely manner, thus effectively defeating the very object of the procedural deadlines. Without such safeguards, the Ministry was able arbitrarily to prolong the whole registration procedure for an indefinite period of time. Accordingly, the law did not afford

the applicants sufficient legal protection against the arbitrary actions of the Ministry of Justice (ibid, § 66).

43. Having found that the Ministry of Justice breached the statutory time-limit for issuing the formal response to the applicants' state registration request and that the domestic law applicable at the relevant time did not afford sufficient protection against this type of delay, the Court concludes that the interference was not "prescribed by law" within the meaning of Article 11 § 2 of the Convention.

44. Having reached that conclusion, the Court does not need to satisfy itself that the other requirements of Article 11 § 2 (legitimate aim and necessity of the interference) have been complied with.

45. There has accordingly been a violation of Article 11 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

46. The applicants complained under Articles 6 and 13 of the Convention that the domestic judicial proceedings had not complied with the "reasonable time" requirement and that the domestic courts lacked independence and impartiality in the proceedings involving the Ministry of Justice as a party.

47. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

48. It follows that these complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. 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."

50. The applicants did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award them any sum on that account.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the applicants' right to freedom of association admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 11 of the Convention.

Done in English, and notified in writing on 18 December 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President