

## RASUL JAFAROV v. AZERBAIJAN

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### ADVICE

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#### A. INTRODUCTION

1. I am asked to advise the European Human Rights Advocacy Centre ('EHRAC') in connection with the case of Jafarov v. Azerbaijan.<sup>1</sup> The EHRAC supports NGOs and lawyers litigating cases before the European Court of Human Rights ('ECtHR') against Armenia, Azerbaijan, Georgia, Russia and Ukraine.
2. In the Jafarov case the ECtHR found violations of Articles 5 and 18 of the European Convention on Human Rights ('the Convention') in relation to the prosecution and pre-trial detention of Mr Jafarov, who is a prominent human rights defender. He complained under Article 18 of the Convention that his Convention rights had been restricted for purposes other than those prescribed in the Convention. In particular, he argued that his arrest and detention for alleged criminal offences had had the purpose of punishing him as a government critic, silencing him as an NGO activist and human rights defender, discouraging others from such activities, and paralysing civil society in the country.
3. The ECtHR found violations of his rights under Article 5 and 18: It concluded that the charges against Mr Jafarov had not been based on a 'reasonable suspicion' within the meaning of Article 5(1)(c) of the Convention, and that in regards to Article 18 (paras 162 - 163):

162. The totality of the above circumstances indicates that the actual purpose of the impugned measures was to silence and punish the applicant for his activities in the area of human rights.

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<sup>1</sup> <http://hudoc.echr.coe.int/eng?i=001-161416>.

In the light of these considerations, the Court finds that the restriction of the applicant's liberty was imposed for purposes other than bringing him before a competent legal authority on reasonable suspicion of having committed an offence, as prescribed by Article 5(1)(c) of the Convention.

163. The Court considers this sufficient basis for finding a violation of Article 18 of the Convention, taken in conjunction with Article 5.

4. Since the judgment on 17<sup>th</sup> March 2016, the EHRAC has made two submissions to the Committee of Ministers, dated 1<sup>st</sup> November 2016 ([http://hudoc.exec.coe.int/eng?i=DH-DD\(2016\)1228E](http://hudoc.exec.coe.int/eng?i=DH-DD(2016)1228E)) and 25<sup>th</sup> January 2017 ([http://hudoc.exec.coe.int/eng?i=DH-DD\(2017\)88E](http://hudoc.exec.coe.int/eng?i=DH-DD(2017)88E)).

5. I am asked to advise on the impact of a finding by the ECtHR of a violation of Article 18 of the Convention. Article 18 provides:

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

6. The ECtHR has emphasised that Article 18 of the Convention does not have an autonomous role. It can only be applied in conjunction with other Articles of the Convention (see Gusinskiy v. Russia, Application No. 70276/01). The Court has said that the whole structure of the Convention rests on the general assumption that public authorities in the member States act in good faith. However, the Court has also recognised that any public policy or individual measure may have a 'hidden agenda', and so the presumption of good faith is rebuttable. However, an applicant alleging that his rights and freedoms were being limited for an improper reason must convincingly show that the real aim of the authorities was not the same as that proclaimed or which could be reasonably inferred from the context. A mere suspicion that the authorities used their powers for some other purpose than those defined in the Convention is not sufficient to prove that Article 18 has been breached: see Khodorkovskiy v. Russia, No. 5829/04 (31<sup>st</sup> May 2011) and Khodorkovskiy and Lebedev v. Russia, Nos. 11082/06 and 13772/05 (25<sup>th</sup> July 2013).

7. The EHRAC has pointed out that politically-motivated proceedings are a problem in a number of the countries in which it operates. For example, it recently represented the former Prime Minister of Georgia, Mr Merabishvili, in his Grand Chamber hearing at the ECtHR on whether his pre-trial detention was politically motivated. The Fourth Section of the Court found violations of Articles 5 and 18 (<http://hudoc.echr.coe.int/eng/?i=001-163671>) and the judgment of the Grand Chamber is pending.
8. However, as the Jafarov judgment makes clear at para 154, findings of Article 18 violations are very rare and it is unclear what the impact of such a finding should be at the domestic level.
9. Where the ECtHR finds a violation of Article 6 there is, in general, an expectation that domestic proceedings will be re-opened. The question I have been asked to consider is whether, given the Court's conclusion that the actual purpose of the impugned measures was to silence and punish Mr Jafarov for his activities in the area of human rights, there should be an equivalent obligation to re-open the domestic proceedings in this case, where there has been a finding of a violation of Article 5 together with Article 18.

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10. My opinion, in summary, is that there will be many cases, including Mr Jafarov's, in which a finding of an Article 5 violation, together with an Article 18 violation, in the context of a case where there has been a criminal conviction, should lead to the criminal proceedings being reopened. Not every such violation might justify such a course – for example, where the violation is 'cured' by later events in the proceedings - but the circumstances of Mr Jafarov's case, and the reasons why the ECtHR upheld his complaint, do justify the reopening of the proceedings.
11. Under Article 46 of the Convention the Contracting Parties have accepted the obligation to abide by the final judgment of the ECtHR in any case to which they are parties, and it then falls to the Committee of Ministers to supervise its execution. In

certain circumstances this obligation may entail the adoption of measures, other than just satisfaction awarded by the ECtHR in accordance with Article 41 of the Convention and/or general measures, which ensure that the injured party is put, as far as possible, in the same situation as he or she enjoyed prior to the violation of the Convention (*restitutio in integrum*). It is for the competent authorities of the respondent State to decide what measures are most appropriate to achieve *restitutio in integrum*, taking into account the means available under the national legal system.

12. ‘Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights’ recorded that that the practice of the Committee of Ministers in supervising the execution of the ECtHR’s judgments shows that in exceptional circumstances the re-examination of a case or a reopening of proceedings has proved the most efficient, if not the only, means of achieving *restitutio in integrum*. The Recommendation went on:

The Committee of Ministers:

I. Invites, in the light of these considerations the Contracting Parties to ensure that there exist at national level adequate possibilities to achieve, as far as possible, *restitutio in integrum*;

II. Encourages the Contracting Parties, in particular, to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention, especially where:

(i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and

(ii) the judgment of the Court leads to the conclusion that

(a) the impugned domestic decision is on the merits contrary to the Convention, or

(b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of.

13. The language in (b) strongly points towards, and supports, the requirement that a case be re-opened where the Article 5 and Article 18 violations lead to the conclusion that

serious doubt is cast on the outcome of the domestic proceedings, which, in this case, means Mr Jafarov's conviction and sentence.

14. The question of whether this test is met or not will require close examination of the precise basis of the ECtHR's findings. Not every Article 5 and Article 18 violation will necessarily meet the test. For example, it might be the case that an initial arrest was improper, but that evidence later emerged which properly justified the bringing of criminal charges and the defendant's eventual conviction. In such a case, it might be difficult to argue that the eventual conviction was 'based' on the initial violation, so as to justify the re-opening of the criminal proceedings.
15. However, in my opinion there is no doubt that the test is met in Mr Jafarov's case. The findings of the Court make clear that the whole criminal case against him was politically motivated, and the Court said this conclusion was not undermined by the fact that he had been taken to trial and convicted. Having recited the facts and law relating to the criminal allegations against him, the Court said at paras 130 – 134 (emphasis added):

130. In such circumstances, the Court finds that the applicant could not have been reasonably suspected of having committed the criminal offence of "illegal entrepreneurship" under Article 192.2.2 of the Criminal Code, because there were no facts, information or evidence showing that he had engaged in commercial activity or the offence of "tax evasion" under Article 213 of the Criminal Code, as in the absence of such commercial activity there could be no taxable profit under the simplified regime. Furthermore, the above-mentioned facts were not sufficient to give rise to a suspicion that the applicant had sought to "obtain unlawful advantage for himself or for third parties", which was one of the constituent elements of the criminal offence of "abuse of power" under Article 308 of the Criminal Code (compare, *mutatis mutandis*, *Lukanov v. Bulgaria*, 20 March 1997, § 44, Reports of Judgments and Decisions 1997-II).

131. As for the additional charges under Articles 179.3.2 and 313 of the Criminal Code, brought against the applicant on 12 December 2014, the Court notes that they were brought after the latest domestic court order of 23 October 2014 extending the applicant's pre-trial detention. As such, all previous decisions ordering and extending the applicant's pre-trial detention had been based solely on the original charges under Articles 192.2.2, 213 and 308 of the Criminal Code, and therefore the new charges were of no significance to the assessment of the reasonableness of the suspicion underpinning the applicant's detention during the period falling within the scope of the present case, and the Government have not expressly argued otherwise.

132. In any event, the Court notes that, as with the original charges, the description of the new charges essentially remained the same and lacked a sufficient level of coherence. There was additional information regarding alleged deficiencies in some service contracts concluded by the applicant and amounts paid under these contracts. Presumably, this was the basis for the suspicion that the applicant had committed the offence of “forgery by an official” under Article 313 of the Criminal Code. However, the Government again failed to produce before the Court any specific evidence or information which could constitute the basis for the prosecuting authorities’ suspicions in this regard. As for the charge of embezzlement under Article 179.3.2 of the Criminal Code, the Court cannot characterise it as anything other than spurious, given that the money was given to the applicant voluntarily by donors under grant agreements and that the donors expressed complete confidence that the money had been spent properly for the purposes for which it had been allocated. Taking into account the manifest unreasonableness of the original three charges against the applicant (see paragraph 130 above) and the heightened level of scrutiny required by the specific context of the present case (see paragraph 120 above), the Court considers that the respondent Government also failed to satisfy the Court that the applicant was reasonably suspected of having committed the alleged offences under Articles 179.3.2 and 313 of the Criminal Code.

133. The Court is mindful of the fact that the applicant’s case has been taken to trial. That, however, does not affect the Court’s findings in connection with the present complaint, where it is called upon to consider whether the deprivation of the applicant’s liberty during the pre-trial period was justified on the basis of the information or facts available at the relevant time. In this respect, having regard to the above analysis, the Court finds that the material put before it does not meet the minimum standard set by Article 5 § 1 (c) of the Convention for the reasonableness of a suspicion required for an individual’s arrest and continued detention. Accordingly, during the period the Court is considering in the present case, the applicant was deprived of his liberty in the absence of a “reasonable suspicion” of his having committed a criminal offence.

134. Accordingly, there has been a violation of Article 5 § 1 of the Convention.

16. For these reasons, in my opinion there is no question but that Mr Jafarov’s conviction was based on procedural errors or shortcomings - namely the bringing of a politically motivated case resulting in his detention - of such gravity that a serious doubt is cast on the legitimacy of his conviction. Quite simply, without the case being brought, and without his detention, there could have been no conviction. Hence in my opinion in order to achieve *restitutio in integrum* in this case, the re-opening of the criminal proceedings is called for.

17. I would be happy to advise further if asked.

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**JULIAN B. KNOWLES QC**

Matrix Chambers

Gray's Inn

17<sup>th</sup> August 2017

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**ADVICE**

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**EHRAC  
School of Law  
Middlesex University  
The Burroughs  
London  
NW4 4BT**