

**RADA FUNDACJI**

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**AZAD MURSALIYEV V. AZERBAIJAN**

**(Application no 66650/13)**

**and 10 other applications**

**WRITTEN COMMENTS**

**BY**

**HELSINKI FOUNDATION FOR HUMAN RIGHTS<sup>1</sup>**

**I. INTRODUCTION**

This third party intervention is submitted by the Helsinki Foundation for Human Rights, pursuant to the leave granted by the President of the Section of the European Court of Human Rights (Court) under Rule 44 § 2 of the Rules of the Court on 20 December 2017.

The communication in the case addresses the restrictions on the right to leave Azerbaijan imposed on the Applicants. According to the statement of facts, between 2012 and 2016 the Applicants learned that these restriction were imposed on them and that they were no longer allowed to leave the country. In all the cases, the restrictions were imposed by the investigating authorities, in the absence of any judicial decisions, within the framework of various criminal proceedings in which the Applicants were not convicted, accused or suspected persons, but were questioned as witnesses. The Applicants brought an action

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<sup>1</sup> The opinion was written by Jacek Białas, lawyer of the Helsinki Foundation for Human Rights.

claiming unlawfulness of the restrictions imposed on them, but the domestic courts dismissed the Applicant's complaints.

The observations contained in the following intervention provide a broader Azerbaijani context and present the government's systematic practice aimed at suppressing the environment for the functioning of the civil society in the country, including the functioning of independent media and other actors fulfilling the tasks of a "public watchdog" in Azerbaijan. We believe that it is relevant for the assessment of the instant case, as the Applicants are human rights defenders, lawyers, independent journalists, political activists and therefore may be targeted by the government for their activities. We would also like to refer to international standards concerning the right to leave any country, included in the UN International Covenant on Civil and Political Rights and in the Human Rights Committee views on Article 12 of the UN Covenant. We would also like to focus on the specific situation of the Applicants 'as witnesses' (being not charged with a criminal offence) and to present factors which are to be taken into consideration while assessing whether restrictions imposed on them were in accordance with the law and necessary in a democratic society.

## **II. ONGOING REPRESSIONS AGAINST HUMAN RIGHTS DEFENDERS, JOURNALISTS, LAWYERS AND POLITICAL ACTIVISTS IN AZERBAIJAN**

The pattern of systematic and systemic restriction of fundamental rights is well-documented in Azerbaijan, especially with respect to the right to freedom of association through arbitrary arrests and detentions. Despite this attention, however, the human rights situation has steadily been declining and has reached an unprecedented level.

The Court defined systemic human rights violations as those deriving from structural causes not addressed by authorities.<sup>2</sup> The Azerbaijani authorities' failure to execute judgements of the Court concerning human rights violations in itself shows that human rights abuses in the country have a systemic nature and derive from the approach and attitude of those in power.

Targeted actions against human rights defenders, journalists and activists do not constitute a new phenomenon in Azerbaijan. However, in recent years the situation has grown

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<sup>2</sup> E.g. Judgment in the case of Broniowski v. Poland of 28 September 2005, application no. 31443/96.

increasingly dire, as evidenced by the almost complete shut-down of independent human rights organisations, a striking expansion in scope and severity of specious criminal charges used against civil society leaders and the adoption of legislation regulating and controlling NGOs. Restrictions on the right to leave Azerbaijan are also used as an instrument of persecution against HRDs, lawyers and political activists. This information is reflected in reports of international organisations and non-governmental organisations.

The UN Special Rapporteur on the situation of human rights defenders in the Report on his mission to Azerbaijan concluded that “human rights defenders are increasingly at risk and do not feel safe because of increasingly restrictive legislation, criminalization of their actions and a lack of access to justice. They do not feel empowered owing to stigmatization, intimidation and excessive oversight and scrutiny.”<sup>3</sup> According to the Report “many human rights defenders and dozens of NGOs, their leaders and employees and their families have been subjected to administrative and criminal prosecution, including arbitrary detention, the seizure of their assets and bank accounts, travel bans and enormous fines and tax penalties. Significant challenges are connected to the existing legal framework governing the exercise of fundamental freedoms, such as the rights to freedom of expression, peaceful assembly and association. Legislation pertaining to national security can also have a restrictive impact on the environment in which defenders operate” (para 113). The Special Rapporteur also stated that weaknesses in the judicial system and flaws in the legal framework deprive human rights defenders of adequate access to justice. Therefore the Special Rapporteur urged the Government to implement recommendations by treaty bodies and the Venice Commission to ensure the judiciary can operate independently and effectively (paras 84 – 89).

The UN Human Rights Committee (HRC) in the concluding observations on the fourth periodic report of Azerbaijan expressed its concern that journalists, opposition politicians, human rights defenders and lawyers are allegedly subjected to travel bans in retaliation for engaging in their professional activities.<sup>4</sup> HRC reiterated its previous recommendation (see CCPR/C/AZE/CO/3, para. 18) that Azerbaijan should ensure that any travel ban is justified under article 12 (3) of the Covenant and lift bans not in compliance with that article, refrain from imposing travel bans arbitrarily against journalists, opposition politicians,

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<sup>3</sup> Human Rights Council, Thirty-fourth session, 27 February-24 March 2017, Report of the Special Rapporteur on the situation of human rights defenders on his mission to Azerbaijan.

<sup>4</sup> United Nations, Human Rights Committee, Concluding observations on the fourth periodic report of Azerbaijan, 16 November 2016.

human rights defenders and lawyers and guarantee full respect for their freedom to leave the country (paras 30-31). The HRC also expressed its concerns on independence and safety of lawyers. It stated that it is concerned about reports of physical attacks, politically motivated criminal charges and other adverse repercussions, such as disbarment against lawyers who make critical statements about State policies and State officials and against lawyers representing victims of torture, human rights defenders, activists and journalists. It is further concerned about the alleged practice of calling lawyers as witnesses in cases in which they are representing a defendant with a view to removing them from the case for alleged conflict of interest (para. 28). HRC also remained concerned about extensive restrictions on freedom of expression in practice, arbitrary interference with media freedom, restrictive legislation negatively affecting the exercise of freedom of association. HRC is also concerned about threats against NGO leaders, the high number of criminal investigations against NGOs, the freezing of their assets and those of their members and the significant number of NGOs that have been closed (paras 36-40).

Human Rights Watch in its World Report stated that the Azerbaijani government continued its thorough crackdown on dissenting voices in 2016, leaving a wide gap in Azerbaijan's once vibrant independent civil society<sup>5</sup>. According to the report authorities released 17 human rights defenders, journalists, and political activists imprisoned on politically motivated charges. But at least 25 government critics remained wrongfully imprisoned, including political activists and bloggers arrested in 2016. Restrictive laws continue to prevent nongovernmental organizations (NGOs) from operating independently. HRW stated that in March 2016 President pardoned 13 journalists, human rights defenders, activists, and bloggers who had been prosecuted on politically motivated charges in previous years. Their convictions have not been quashed, and some former detainees continued to face travel and work restrictions and risk detention if they resume their work. Some led NGOs, and these groups remained closed. According to the HRW report, in March 2016 courts converted the prison sentences of journalist Rauf Mirgadirov and human rights lawyer Intigam Aliyev to suspended terms and released both. In May 2016, the Supreme Court similarly converted investigative journalist Khadija Ismayilova's prison term and released her. All three retain a criminal record and two faced foreign travel restrictions.

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<sup>5</sup> Human Rights Watch. World Report 2017, available at <https://www.hrw.org/world-report/2017/country-chapters/azerbaijan>

Freedom House in its 2017 report stated that Constitutional guarantees for press freedom are routinely and systematically violated in Azerbaijan.<sup>6</sup> According to the Freedom House independent and opposition papers struggle financially and have faced heavy fines and other pressures as retaliation for critical coverage. Journalists are threatened, harassed, intimidated, and assaulted with impunity, and many have been detained or imprisoned on fabricated charges. The Freedom House underlined the Azerbaijani government has increasingly restricted freedom of movement, particularly foreign travel, for opposition politicians, journalists, and civil society activists. Courts denied several appeals by such individuals against their travel bans in 2016.

United States Department of State in its Human Rights 2016 report stated that the Azerbaijani authorities continued pressure on independent media outlets outside the country and those associated with them in the country<sup>7</sup>. The Prosecutor General's Office investigated more than 15 individuals in the case for alleged illegal entrepreneurship, tax evasion, and abuse of power. Official pressure on journalists also included the incarceration of relatives of journalists in exile, including Azadliq editor in chief Ganimat Zahidov's nephew and cousin, and bans on an increasing number of journalists and some relatives of journalists in exile from traveling outside the country. The United States Department of State claim that the Azerbaijani law places some restrictions on the freedom of association and amendments enacted during 2014 severely constrained NGO activities. Citing these amended laws, authorities conducted numerous criminal investigations into the activities of independent organizations, froze bank accounts, and harassed local staff, including incarcerating and placing travel bans on some NGO leaders. Consequently, a number of NGOs were unable to operate. According to the US Department of State report the Azerbaijani government limited freedom of movement for an increasing number of activists and journalists. The number of activists and journalists whom the authorities prevented from traveling outside the country increased compared to the previous year. Examples included Popular Front Party chairman Ali Kerimli (since 2006), blogger Mehman Huseynov, investigative journalist Khadija Ismayilova, lawyers Intigam Aliyev and Asabali Mustafayev, opposition REAL members Natig Jafarli and Azer Gasimli<sup>8</sup>, Emin Milli's brother-in-law Nazim Agabeyov, and at least

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<sup>6</sup> Freedom House. Freedom in the World 2017. Azerbaijan profile, available at: <https://freedomhouse.org/report/freedom-world/2017/azerbaijan>

<sup>7</sup> United States Department of State. Human Rights Report 2016, available at: <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265396>

<sup>8</sup> One of the Applicants in present case, Application No 21246/17

15 freelance journalists who filed material with Meydan TV. According to the US Department of State report in 2016 the Azerbaijani government continued to limit severely the operations of domestic and international human rights groups. Application of restrictive laws to constrain NGO activities, and other pressure continued at the high level of recent years. Leading human rights NGOs faced a hostile environment for investigating and publishing their findings on human rights cases. As a result, some activists left, others stayed outside the country, and a number of NGOs remained unable to operate. While authorities released at least four human rights defenders, their ability to work was constrained by the overall restrictions on NGO activities. In addition, authorities imposed restrictions such as travel bans on some of the defenders, including on prominent human rights lawyer Intigam Aliyev, and had not returned Aliyev's case files or his organization's office equipment as of year's end.

### **III. UNITED NATIONS STANDARD ON RIGHT TO LEAVE ANY COUNTRY**

Article 12(2) and (3) of the International Covenant on Civil and Political Rights states that "Everyone shall be free to leave any country, including his own... the above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant." This article served as a basis for the drafting of Article 2 of Protocol No. 4 to the Convention.<sup>9</sup>

UN Human Rights Committees' General Comment No 27 (1999) contains some interpretation of this provisions. According to the HRC article 12 (3), clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected. The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law. States should ensure that any proceedings relating to the exercise or

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<sup>9</sup> ECtHR, case of *Riener v. Bulgaria*, Application no. 46343/99, para. 81.

restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided. (paras 14-15).<sup>10</sup>

According to the HRC the application of the restrictions permissible under article 12, paragraph 3, needs to be consistent with the other rights guaranteed in the Covenant and with the fundamental principles of equality and non-discrimination. Thus, it would be a clear violation of the Covenant if the rights enshrined in article 12, paragraphs 1 and 2, were restricted by making distinctions of any kind, such as political or other opinion (para. 18).

The HRC issued number of views on restrictions of the right to leave any country. In the communication No. 263/1987, *M. González del Río v. Peru* the HRC stated that “pending judicial proceedings may justify restrictions on an individual’s right to leave his country. But where the judicial proceedings are unduly delayed, a constraint upon the right to leave the country is thus not justified. In this case, the restriction on Mr. González’ freedom to leave Peru has been in force for seven years, and the date of its termination remains uncertain. The Committee considers that this situation violates the author’s rights under article 12, paragraph 2...” In the communication No 1883/2009, *Orazova v. Turkmenistan* the HRC dealt with case of Turkmen citizen who was prevented by border officials of Turkmenistan from boarding an international flight, without being provided with any explanation. In its view, the HRC recalls its general comment No. 27 on freedom of movement. It noted that the rights covered by article 12, paragraph 2, are not absolute and may be restricted in conformity with the permissible limitations set out in article 12, paragraph 3. The HRC was of the view that the author’s right under article 12, paragraph 2, of the Covenant, has been violated in this case.

It must be noted that limitation of the right to leave country is often imposed by undemocratic regimes against which might be also a case in the present application<sup>11</sup>. In number of communications the Committee dealt with cases where unlawful limitations of the rights enshrined in the article 12 of the ICCPR which were imposed on opposition activists (*Communication No 052/1979, Lopez Burgos v. Uruguay, Communication No 077/1980, Samuel Lichtensztejn v. Uruguay, Communication No 468/1991, Olo Bahamonde v. Equatorial Guinea*).

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<sup>10</sup> Human Rights Committee. General Comments adopted by the Human Rights Committee under Article 40, paragraph 4, of the International Covenant On Civil And Political Rights. Addendum, General Comment No. 27 (67)\* Freedom of movement (article 12).

<sup>11</sup> Council of Europe Commissioner of Human Rights. The right to leave a country. Issue paper October 2013, p. 9.

It must be also noted that the present application concerns persons engaged in human rights, civil society and political activities. Limitation on the right to leave country imposed on them might be based on their political or other opinion, and then it would create violation of the art. 12 of the ICCPR.

#### **IV. WHETHER RESTRICTION WAS IN ACCORDANCE WITH THE LAW AND NECESSARY**

##### **1. Whether restriction was imposed in accordance with the law**

Article 2 § 3 of Protocol no. 4 to the Convention states that restriction on the right to leave any country should be in accordance with law. The Court consistently held that the expression “in accordance with the law” requires firstly that the impugned measure should have a basis in domestic law, but also refers to the quality of the law in question, requiring that it 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 (*Lupsa v. Romania*, application no 10337/04, § 32).

According to the Court’s jurisdiction measure, which seeks to restrict a person charged with a criminal offence from travelling abroad, pursues the legitimate aims of maintenance of public order and prevention of crime (*Kerimli v. Azerbaijan*, application no. 3967/09, § 49). The Court in its jurisprudence did not excluded that such restriction may be imposed on witness and other person involved in the criminal proceedings (*Baumann v. France*, application no. 33592/96, § 66).

Therefore it seems to necessary to examine within present proceedings whether Azerbaijani law provides basis for imposing restriction on right to leave country in respect of witnesses’ and whether this law is of proper quality.

However it must be noted how the Applicants “learned” that restrictions on their right to leave Azerbaijan were imposed on them. It may bring to conclusion that no formal decision was



delivered to them. This creates doubts if the imposed restriction was in accordance with the law.

## **2. Whether restriction was proportionate**

Article 2 § 3 of Protocol no. 4 to the Convention states that restrictions on the right to leave any country should be necessary in a democratic society. According to the Court's jurisprudence maintaining a restriction on the individual's freedom of movement automatically over a lengthy period of time may become a disproportionate measure violating the individual's rights (*Riener v. Bulgaria*, application no. 46343/99, § 121). The Court also stated that the authorities are not entitled to maintain over lengthy periods a restriction on the individual's freedom of movement without a regular re-examination of its justification (*Kerimli*, § 56, *Földes and Földesné Hajlik v. Hungary*, application no. 41463/02, § 36). In the *Hajibeli* judgment the Court stated that the comparative duration of the restriction, in itself, cannot be taken as the sole basis for determining whether a fair balance was struck between the general interest in the proper conduct of the criminal proceedings and the applicant's personal interest in enjoying freedom of movement. This issue must be assessed according to all the special features of the case. The restriction may be justified in a given case only if there are clear indications of a genuine public interest which outweigh the individual's right to freedom of movement (§ 63). The Court also stated that it follows from the principle of proportionality that a restriction on the right to leave one's country can only be justified as long as it serves its aim (*Riener*, § 122).

It must be noted that the Applicants are witnesses, so they are not charged with criminal offence. Therefore it should be thoroughly examined whether it was necessary to impose such restriction on them at all (whether there were indications that they might abscond criminal proceedings). It may appear that it was necessary to impose such limitation on them. But according to the proportionality principle they should be interrogated as soon as possible and then the restrictions should be immediately lifted.

It must be noted that in present case the Applicants' learned that on the restrictions on their right to leave Azerbaijan between 2012 and 2016 (which suggests that decision in this respect might be issued earlier). Therefore there is need also to take into consideration, whether the authorities re-examined restrictions imposed on the Applicants and what steps were

undertaken towards the Applicants by the authorities within frames of the criminal proceedings - whether the applicants were already questioned or about expected hearing time.

In case when the government did not undertake any significant activities in respect of the Applicants within criminal proceedings and not re-examine imposed restriction then it may be treated as not proportionate and not in accordance with article 2 § 2 of the Protocol no 4 to the Convention.


## VI. CONCLUSIONS

We believe that Azerbaijani context presented in the intervention is relevant for the assessment of the instant case. The restrictions imposed on the Applicants (lawyers, journalists, political activists) should not be seen as isolated, but rather as constituting an element of a systematic practice aimed at suppressing the environment for the functioning of the civil society in the country, including the functioning of independent media and other actors fulfilling the tasks of a “public watchdog” in Azerbaijan. These actions by the Azerbaijani authorities stand in clear opposition to the Convention and the Court has denounced these actions in a number of judgments. However, the Azerbaijani authorities have continued unabated; targeting NGOs leaders. The ongoing crackdown demonstrates the impunity of the Government and the lack of respect towards international obligations.

In the present case specific individual circumstances of the Applicants, as the witnesses, not persons charged with criminal offence, should be taken into consideration. Therefore the necessity test of the imposed restrictions should be rigorous. It is necessary to examine if such restriction were based on domestic law and whether this law was of proper quality. Moreover it is important to examine whether restriction was justified as long as it serves its aim and whether it was re-examined by the authorities.

On behalf of the Helsinki Foundation for Human Rights,



  
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President of the Board