



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Communicated on 17 December 2015

FIFTH SECTION

Applications nos. 65286/13 and 57270/14
Khadija ISMAYILOVA
against Azerbaijan
lodged on 26 September 2013 and 31 July 2014

STATEMENT OF FACTS

The applicant, Ms Khadija Ismayilova, is an Azerbaijani national who was born in 1976 and lives in Baku. She is represented before the Court by D. Groenevelt and J. Starmans of De Brauw Blackstone Westbroek, lawyers practising in Brussels, and Y.-O. Jansen and L. Talsma of Media Legal Defence Initiative, lawyers based in London.

The facts of the case, as submitted by the applicant, may be summarised as follows.

1. Background

The applicant has been a renowned investigative journalist since 2005. She worked as a staff reporter and director at the Azeri service of Radio Free Europe/Radio Liberty, whose broadcasts were often critical of the Azerbaijani government, covering topics of government corruption and violations of human rights. In addition, she worked as a regional coordinator for the Organised Crime and Corruption Reporting Project, where she trained journalists in investigation techniques and cross-border reporting.

The applicant conducted journalistic investigations into corruption in Azerbaijan. In 2010 and 2011 she published and contributed to several articles concerning corruption by the Azerbaijani presidential family. In early 2012 the applicant claimed that her research had uncovered that the presidential family was in the Azerbaijan International Mineral Resources Operating Company (AIMROC) mining consortium, which had just been awarded a lucrative extraction licence by the Azerbaijani government.

2. Threats against the applicant and publication of videos depicting her intimate life

After the publication of the articles and while she was investigating allegations of corruption relating to the mining consortium, the applicant

began receiving threats. On 7 March 2012 she received a letter enclosing a video taken in her bedroom with a hidden camera, showing her engaged in sexual intercourse with her then boyfriend. The letter had been sent by post from an address in Moscow. The message accompanying the video stated: “Whore, refrain from what you do, otherwise you will be shamed!”

The applicant responded in a public letter distributed through social media that she would not quit and would not be silenced, and continued her research concerning the mining consortium, which would eventually be published in an article in May 2012.

On 9 March 2012 the applicant reported the above-mentioned letter to the prosecution authorities and lodged a formal request for an investigation (see Section 3 below).

On 14 March 2012 a video was posted online on a webpage called “musavat.tv”, featuring scenes of a sexual nature involving the applicant and her boyfriend, taken with the same camera hidden in her bedroom. Musavat is a political opposition party, which indicated that it had nothing to do with the website and condemned the posting of the video. According to the applicant, the domain name “musavat.tv” was apparently chosen solely for the posting of the video, to create the suggestion of a link with the Musavat party.

Around the same time, newspapers *Yeni Azerbaijan*, *Iki Sahil* and *Ses* ran a number of opinion pieces referencing the threat letter and the video and criticising the applicant’s anti-government stance and her “lack of morality” (see Section 5 below).

In the summer of 2013 another video of the applicant and her boyfriend filmed in the applicant’s bedroom was posted on the Internet.

3. Criminal investigation

As noted above, on 9 March 2012 the applicant reported the threatening letter received on 7 March 2012 to the Ministry of Internal Affairs and the Prosecutor General’s Office, requesting them to ensure her safety, to investigate the matter and to hold those responsible for the threat and the video accountable.

On 15 March 2012, one week after the applicant’s formal complaint and a day after the video was first posted, the Prosecutor General’s Office launched criminal proceedings under Article 156 (breach of inviolability of private life) of the Criminal Code on the basis of the applicant’s request, and assigned the case to the Baku City Prosecutor’s Office.

On 17 March 2012 the applicant was questioned by an investigator of the Baku City Prosecutor’s Office who, according to the applicant, showed no sense of urgency in dealing with the case.

On 17 March 2012 the applicant found out, with the help of friends, that as well as the camera in the bedroom, there were multiple other hidden cameras installed in her flat. Moreover, they found newly installed telephone and data wires which had evidently been used for transmitting the footage shot with the hidden cameras.

On 19 March 2012 the applicant went to the Baku City Prosecutor’s Office to request an inspection of her flat. The investigators visited her flat, but refused to comment on the meaning or implications of the wires, indicating that they did not possess the technical expertise to do so. They

also refused to arrange for an inspection by an expert, but agreed that the applicant would herself contact the Automatic Telephone Station (ATS), operated by a State-owned communications company, which was responsible for the telephone box outside the flat to which the wires were connected.

The applicant managed to track down a service engineer, Mr N.J., employed by the ATS, who admitted, in the presence of the investigators, the applicant and her lawyer, that in June 2011 he had connected the wires to the telephone box outside the flat on the instructions of his employer, and had witnessed other engineers at work with the wires inside the flat. During the conversation, the investigators appeared to be recording the engineer's statements. However, despite the applicant's objections, those statements were never included in the investigation case file.

On 13 April 2012 the applicant lodged a complaint with the Prosecutor General's Office against the officials of the Baku City Prosecutor's Office, complaining that the latter were refusing to take obvious and simple investigative steps.

The applicant also spoke on her radio show about the alleged lack of effective investigation, and issued a press release concerning the matter.

The Prosecutor General's Office did not act on the applicant's complaint. Instead, on 26 April 2012 the Prosecutor General's Office and the Baku City Prosecutor's Office published a joint public statement on the status of the investigation ("the Status Report"). Among other things, the Status Report disclosed the address of the applicant's flat, the identity of the flat's owner, the identities of the other tenants and subtenants of the flat, and the financial arrangements between the applicant and the subtenants to whom she had sublet the flat during various periods, the identity of the man with whom the applicant was in a sexual relationship, and the identities and occupations of those questioned as part of the criminal investigation, including members of her family and other people who had visited her flat, and the nature of their relations with the applicant.

According to the applicant, she herself had reluctantly provided much of the above information to the investigators at the request of a prosecutor, in order to assist the investigation, expecting that the information would be kept confidential. She had been promised by officials of the Baku City Prosecutor's Office that the information would remain confidential.

On 27 April 2012 an official of the Baku City Prosecutor's Office indicated in an interview that the Status Report had been released in response to the applicant's public complaints about the lack of effective investigation. He also stated that there was nothing unlawful in the contents of the Status Report.

On 21 June 2012 the applicant lodged a separate civil action against the prosecuting authorities in connection with the Status Report (see Section 4 below).

On 12 November 2012 the applicant wrote to the Prosecutor General's Office and the Baku City Prosecutor's Office, requesting information on the status of the investigation and to be sent copies of any decisions taken.

According to the applicant, on 14 and 21 November 2012 the Baku City Prosecutor's Office responded with two letters, stating that the investigation was being conducted and that decisions on the applicant's various requests

had been taken on 31 March and 3 April 2012 (no copies of these letters are available in the case file). Since the applicant had not received those decisions, on 28 November 2012 she asked for copies of them (no copy of this letter is available in the case file).

Having received no further replies, on 2 April 2013 the applicant again requested information from the prosecuting authorities on the status of the investigation.

On 4 April 2013 the Baku City Prosecutor's Office replied that a number of investigative steps, including various expert examinations, had been taken and that the investigation was under way.

On 30 April 2013 the Prosecutor General's Office gave a similar reply, stating that a number of investigative steps had been taken and that the investigation was under way.

On 12 August 2013 the applicant lodged a complaint against the prosecuting authorities with the Sabail District Court under the procedure of judicial supervision, noting that there had been no effective investigation for over a year, and that the prosecuting authorities had limited themselves to vague answers that the investigation was ongoing. She requested the court to find the prosecuting authorities' inactivity unlawful and sought monetary compensation.

By a decision of 13 August 2013 the Sabail District Court refused to examine the complaint, finding that it had no competence to examine it under the procedure of judicial supervision, because the matter complained of was not among the exclusive list of types of decisions and steps by the prosecuting authorities, established by Articles 449.3.1 to 449.3.7 of the Code of Criminal Procedure, that could be challenged under the procedure of judicial supervision. The court noted that a complaint concerning the alleged inactivity of the prosecuting authorities should be made under the rules of administrative procedure.

On 16 August 2013 the Baku City Prosecutor's Office, ruling on a request by the applicant, refused to allow her access to the investigation case file until the investigation was complete. On the same day, it refused her request for the investigated criminal offence to be redesignated under Article 163.1 of the Criminal Code.

On 28 August 2013 the applicant lodged another complaint with the Sabail District Court under the judicial supervision procedure, with the same content as the previous complaint of 12 August 2013. On 30 August 2013 the Sabail District Court rejected the complaint for the same reasons as in the decision of 13 August 2013. On 9 September 2013 the applicant appealed. On 18 September 2013 the Baku Court of Appeal upheld the Sabail District Court's inadmissibility decision.

On 18 September 2013 the applicant lodged a third complaint with the Sabail District Court under the judicial supervision procedure, which was again rejected by that court on 30 September 2013, and by the Baku Court of Appeal on 17 October 2013.

In the meantime, as recommended by the Sabail District Court, on 28 August 2013 the applicant lodged a complaint against the prosecuting authorities with the Baku Economic Administrative Court no. 1 under the rules of administrative procedure.

On 19 September 2013 the Baku Economic Administrative Court no. 1 refused to hear the complaint, finding that under the Code of Administrative Procedure it had no competence to examine complaints concerning the activities of criminal prosecution authorities in criminal proceedings.

On 14 October 2013 the applicant appealed, stating that she had been instructed to pursue the administrative procedure by the Sabail District Court.

On 4 December 2013 the Baku Court of Appeal rejected the applicant's appeal and upheld the decision of the Baku Economic Administrative Court no. 1.

On 20 December 2013 the applicant lodged a further appeal with the Supreme Court, which was rejected on 6 February 2014.

4. Civil proceedings against the prosecuting authorities

On 21 June 2012 the applicant lodged a civil action with the Sabail District Court against the Prosecutor General's Office, the Baku City Prosecutor's Office, Mr N.A. (an investigator at the Baku City Prosecutor's Office) and Mr A.A. (the Baku City Deputy Prosecutor). She argued that the publication of detailed information concerning her private life in the Status Report of 26 April 2012 constituted an unlawful and unjustified interference with her right to respect for private life and freedom of expression, arguing that the Status Report was an integral part of the public "slander campaign" against her, which also included the release of the "sex video" and the newspaper articles (described in Section 5 below). She sought compensation for distress in the amount of 40,000 Azerbaijani manats (AZN) and a public apology by the defendants.

By a judgment of 27 July 2012 the Sabail District Court dismissed the applicant's claims, finding that the purpose of the Status Report had been to counter the possibility of the public forming a negative opinion about the investigating authorities as a result of the applicant's public complaints about ineffectiveness of the investigation. The court found that the information in the Status Report was of a "general character" and had not breached the requirements of the domestic law concerning individuals' privacy. The court also held that the applicant had been unable to demonstrate that she had suffered any distress.

On 24 September 2012 the applicant appealed, reiterating her arguments and complaining further that the first-instance court had ignored her legal and factual arguments and had failed to rely on any legal provisions in arriving at its decision.

On 20 November 2012 the Baku Court of Appeal dismissed the applicant's appeal and upheld the first-instance court's judgment.

On 29 March 2013 the Supreme Court dismissed the applicant's appeal on points of law and upheld the lower courts' judgments.

5. Articles concerning the applicant

On 13 March 2012 the newspaper *Yeni Azerbaijan* (the official newspaper of the ruling Yeni Azerbaijan Party) published an article titled 'Khadija Ismayilova as she seems and as she is' which, among other things, insinuated that the applicant was a person of immoral behaviour who

regularly held all-night parties and “orgies” with her friends in her office at Radio Liberty.

On 15 March 2012 the same article was published in the newspaper *Iki Sahil* and on 20 March 2012 again in the *Yeni Azerbaijan*.

On 16 March 2012 the newspaper *Ses* published an article titled “Not surprising” where, among other things, it was stated that it was not surprising that many opposition-oriented individuals were involved in “sex scandals”.

On 5 April 2012 *Ses* published another article titled ‘Who should Khadija sue?’ attacking the applicant for “immoral behaviour” and insinuating that the video scandal had been created by her friends at “musavat.tv”.

More articles of a similar nature were published later in *Ses*.

6. The applicant's arrest and criminal proceedings against her

In December 2014 the applicant was arrested and detained on the charge that she had incited a former colleague to commit suicide. In February 2015 she was additionally charged with the criminal offences of large-scale misappropriation, illegal entrepreneurship, large-scale tax evasion and abuse of power in connection with her activity as the director of the Azeri service of Radio Free Europe/Radio Liberty during the period from 1 July 2008 to 1 October 2010. The events relating to her arrest and detention are the subject of a separate application (no. 30778/15).

On 1 September 2015 the applicant was sentenced to seven and a half years' imprisonment.

COMPLAINTS

1. The applicant complains under Article 8 of the Convention that:

(a) the respondent State has failed to meet its positive obligation to protect her right to respect for her home and private life, which includes her physical and moral integrity, by failing to conduct an effective investigation in order to identify those responsible for the secret installation of hidden cameras in her flat and disseminating secretly filmed videos depicting her intimate life; and

(b) the dissemination of the information concerning her private life in the Status Report published by the authorities on 26 April 2012 constituted an unlawful and unjustified interference with the right to respect for her private and family life.

2. Relying on Article 10 of the Convention, the applicant complains that:

(a) the threats and attacks against her and the interference with her privacy were clearly linked to her journalistic work and the respondent State failed to protect her right to freedom of expression and to create a favourable environment where journalists like her could participate in public debate; and

(b) the publication of the Status Report constituted an unjustified interference with her right to freedom of expression, because it constituted both retribution for her publicly stated critical opinions about the prosecuting authorities and part of the active effort by the authorities to

create an environment where the applicant could not freely work as an investigative journalist.

3. The applicant complains under Article 6 of the Convention that in the civil proceedings concerning the Status Report the domestic courts failed to address essential issues raised by her and failed to provide sufficient reasons for their decisions.

4. The applicant complains under Article 13 of the Convention, in conjunction with the complaints 1 (a) and 2 (a) above, that she was not afforded an effective remedy against the prosecuting authorities' inactivity.

QUESTIONS TO THE PARTIES

1. In respect of the threats against the applicant, installation of hidden cameras and wires in her flat, publication of secretly filmed videos, related press articles, and other related incidents (complaint raised in application no. 57270/14), has there been a violation of the applicant's right to respect for her private life and home, contrary to Article 8 of the Convention?

In particular, has there been an interference by the State with the applicant's right, within the meaning of Article 8 § 1 of the Convention, and if so was that interference in accordance with the law and necessary in terms of Article 8 § 2? Did the situation give rise to the State's positive obligations under Article 8 of the Convention and if so have they been complied with?

2. In respect of the publication of the Status Report of 26 April 2012 (complaint raised in application no. 65286/13), has there been an interference with the applicant's right to respect for her private and family life, within the meaning of Article 8 § 1 of the Convention? If so, was that interference in accordance with the law and necessary in terms of Article 8 § 2?

3. In connection with the complaints raised in both applications, has there been an interference by the State with the applicant's freedom of expression, in particular her right to receive and impart information and ideas, within the meaning of Article 10 § 1 of the Convention? If so, was that interference prescribed by law and necessary in terms of Article 10 § 2? Did the situation give rise to the State's positive obligations under Article 10 of the Convention and if so have they been complied with?

4. In respect of the civil proceedings concerning the Status Report of 26 April 2012 (complaint raised in application no. 65286/13), did the applicant have a fair hearing in the determination of her civil rights and obligations, in accordance with Article 6 § 1 of the Convention?

5. Did the applicant have at her disposal an effective domestic remedy for her Convention complaints raised in application no. 57270/14, as required by Article 13 of the Convention?

6. The parties are requested to provide substantiated comments, supported by relevant evidence, in respect of the applicant's assertion that the newspapers *Yeni Azerbaijan*, *Iki Sahil* and *Ses* were controlled by the Government.

7. The Government are requested to provide an update as to the current status of the criminal investigation launched on 15 March 2012 and a detailed summary of the investigative steps taken and/or results of the investigation, and to submit a copy of the investigation file.