

AZERBAIJAN: Azerbaijani authorities failed to investigate serious invasion of well-known investigative journalist's privacy

European Court of Human Rights (10.01.2019) – <https://bit.ly/2sqr2VZ> – In today's Chamber judgment[1] in the case of Khadija Ismayilova v. Azerbaijan (application no. 65286/13) the European Court of Human Rights held, unanimously, that there had been:

two violations of Article 8 (right to respect for private and family life, home and correspondence) of the European Convention on Human Rights, and

a violation of Article 10 (freedom of expression) of the European Convention.

The case concerned an alleged smear campaign against a well-known journalist, Khadija Rovshan qizi Ismayilova. In particular, she was sent a letter threatening her with public humiliation if she did not stop her investigative reporting. When she refused, a "sex video" filmed without her knowledge of her and her then boyfriend was posted on the Internet. Around the same time, newspapers ran stories accusing her of anti-government bias and immoral behaviour. She later discovered hidden cameras all over her flat.

The Court found that such acts had been an affront to Ms Ismayilova's human dignity which the State had had a duty to investigate.

However, there had been significant flaws and delays in the investigation, even though there had been obvious leads. For example, no formal statement had been taken from a telephone engineer with State-owned Baktelekom who had admitted that he had been instructed to install a second telephone line in Ms Ismayilova's flat and to trace wires to it. Most importantly, no line of inquiry had been developed to see if there had been a link between Ms Ismayilova's being a well-known investigative journalist highly critical of the Government and the criminal acts against her.

That situation had been compounded by the articles published in allegedly pro-government newspapers and by the authorities' public disclosure of a report on the status of the investigation which had, for no apparent reason, included information on Ms Ismayilova's private life.

The Court took particular note of reports of journalists in Azerbaijan being persecuted and the perceived climate of impunity for such acts.

Principal facts

The applicant, Khadija Rovshan qizi Ismayilova, is an

Azerbaijani national who was born in 1976 and lives in Baku. She has worked as an investigative journalist since 2005, reporting in particular for Azadliq Radio (Radio Free Europe/Radio Liberty). Her work has often been highly critical of the Government. In particular between 2010 and 2012 she investigated and reported on alleged corruption by the Azerbaijani President's family.

In March 2012 Ms Ismayilova received a threatening letter with still pictures taken from a video of her and her then boyfriend having sexual intercourse. The video had been filmed in the bedroom of her flat with a hidden camera. The letter, posted from Moscow, stated "Whore, refrain from what you are doing, otherwise you will be shamed!".

Soon after, the video was posted on the Internet. Another two intimate videos were disseminated in 2013. Around the same time as the posting of the first video three State-controlled newspapers ran stories accusing her of a lack of professionalism, anti-government bias and immoral behaviour.

Ms Ismayilova discovered many hidden cameras in her flat, a newly installed second telephone line and data wires used to transmit footage from the cameras.

The prosecuting authorities launched criminal proceedings over the threatening letter and the covert filming. Several procedural steps were taken, including questioning Ms Ismayilova and granting her request to take a formal statement from the telephone engineer (an employee of Stateowned Baktelekom) who admitted that he had been ordered to install a

second telephone line in Ms Ismayilova's flat and to trace wires to it. Between April 2012 and August 2013, the authorities also ordered an expert examination of the threatening letter's postal packaging, the pictures it contained and the wires found in the flat.

In response to Ms Ismayilova's public complaints about the alleged ineffectiveness of the investigation, the prosecuting authorities published a status report in April 2012 noting that they had questioned a number of witnesses, including Ms Ismayilova's boyfriend, friends, colleagues and members of her family.

Ms Ismayilova immediately lodged a civil claim, arguing that the report had disclosed information on her private life, namely the full names and occupations of her friends, colleagues and family, as well as her home address and the identity of the boyfriend who had featured in the video.

Her claim was dismissed, as were all her subsequent appeals. The courts found in particular that the purpose of the report had been to counter the possibility of people forming a negative opinion about the prosecuting authorities on account of Ms Ismayilova's complaints in public about the ineffectiveness of their investigation into her case.

Between 2013 and 2014, Ms Ismayilova lodged a number of unsuccessful complaints with the domestic courts, alleging that the prosecuting authorities were delaying the investigation and, in response to her enquiries, had only vaguely indicated that the investigation was still ongoing.

Ms Ismayilova has another application (no. 30778/15) with the European Court concerning her arrest and detention in 2014 for large-scale misappropriation and tax evasion as well as abuse of power when working for Azadliq Radio. She was partially acquitted in 2016 and released.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life, home and correspondence), Ms Ismayilova alleged that the State had either been directly responsible for the very serious intrusions into her private life, namely the threatening letter, the hidden cameras in her bedroom and the posting of intimate video recordings online, or, in any event, had not complied with its duty to take measures to protect her privacy rights by failing to conduct an effective investigation and identify those responsible. She further alleged under the same article that the status report had disclosed an excessive amount of sensitive personal information collected during the course of the investigation, which had added to her feeling of being in danger.

Lastly, relying on Article 10 (freedom of expression), she argued that the State had either been directly involved in or had failed to take steps to prevent the systematic smear campaign against her. She submitted in particular that the harassment in her case was part of a pattern of politically motivated smear campaigns against journalists in Azerbaijan.

The application was lodged with the European Court of Human

Rights on 26 September 2013.

Judgment was given by a Chamber of seven judges, composed as follows:

Angelika **Nußberger** (Germany), *President*,

André **Potocki** (France),

Síofra **O’Leary** (Ireland),

Mārtiņš **Mits** (Latvia),

Gabriele **Kucsko-Stadlmayer** (Austria),

Lətif **Hüseynov** (Azerbaijan),

Lado **Chanturia** (Georgia),

and also Claudia **Westerdiek**, *Section Registrar*.

Decision of the Court

Article 8 (concerning the threatening letter, secret filming and posting of intimate videos online)

The Court found, on the one hand, that it had not been possible to establish “beyond reasonable doubt” that the State itself had been responsible for the very serious invasion of Ms Ismayilova’s privacy. Her arguments had been based on circumstantial evidence or on assertions requiring corroboration and further investigation.

On the other hand, the State had had a duty under Article 8 of the Convention to investigate acts which had been an affront to Ms Ismayilova's human dignity. Her receipt of a threatening letter, the unauthorised entry into her flat to install wires and video cameras, the covert filming of the most intimate aspects of her private life in the sanctity of her home and the subsequent public humiliation through the dissemination of the video footage, had constituted a serious, flagrant and extraordinarily intense invasion of her private life.

However, there had been significant flaws and delays in the manner in which the authorities had investigated the case. That was despite the fact that the offences committed against Ms Ismayilova had been the result of an apparently carefully planned and executed operation involving a coordinated effort by a number of individuals, giving several obvious leads.

First, the Government had only submitted copies of decisions ordering procedural steps, without showing whether those steps had actually been carried out. Nor did they submit any formal record of the questioning of a very important witness, the Baktelekom engineer, who could have shed light on who had been giving him orders. Indeed, according to Ms Ismayilova, the investigator present at an encounter she had arranged with the engineer at her flat, just after she had discovered the hidden cameras and wires, had actively avoided recording his statements.

Furthermore, there was no material in the case file to show that the threatening letter with still pictures, apparently sent from Moscow, had been investigated. A formal request

could have been made to the Russian authorities, for example.

Another immediate investigative step could also have been to identify the owners and/or operators of the two websites used to post the videos online and to determine the source of the videos and the identity of their uploaders.

Most importantly, no line of inquiry was developed to see if there had been a link between the fact that Ms Ismayilova was a well-known investigative journalist highly critical of the Government and the series of criminal acts committed against her.

Notwithstanding Ms Ismayilova's complaints, no progress had been made in the investigation after August 2013.

In sum, the Court found that the Azerbaijani authorities had failed to comply with their positive obligation under Article 8 to protect the applicant's private life on account of the significant shortcomings in the investigation and the overall length of the proceedings in her case.

Article 8 (concerning the publication of personal information in the report on the status of the investigation)

Ms Ismayilova complained about the excessive and superfluous disclosure of sensitive private details in the status report. The Court found that the public disclosure of such information had clearly constituted an interference with her privacy

rights and had not been justified.

Other than arguing that the purpose of the status report had been “to inform the public about the progress of the investigation”, the Government had not explained what legitimate purpose had been served by publishing the address and identity of the partner of someone who had been secretly and unlawfully filmed in the privacy of their own home while having sexual intercourse.

Indeed, given that the investigation itself had concerned an unjustified and flagrant invasion into her private life, the authorities should have exercised more care so as not to compound the breach of her rights.

Article 10 (concerning the failure to protect freedom of expression)

The Court took note of the fact that the threatening letter received by Ms Ismayilova had been related to her professional journalistic activity. It also had regard to reports on the general situation in Azerbaijan concerning journalists, notably their alleged persecution, including actual physical attacks, and the perceived climate of impunity for those responsible. Ms Ismayilova herself had expressed the fear that she had been the victim of a campaign orchestrated against her in retaliation for her journalistic work.

In such a situation, the State had not just been required to take measures to protect her from intrusion into her private

life, but also had a duty under Article 10 of the Convention to protect her freedom of expression. However, as the Court had found, the criminal investigation had been flawed and delayed, and the situation had been compounded by the articles published in allegedly progovernment newspapers and the authorities publicly disclosing information relating to her private life for no apparent reason. That had been contrary to the spirit of an environment protective of journalism.

Thus, the authorities had also failed to comply with their positive obligation to protect the applicant's freedom of expression under Article 10.

Just satisfaction (Article 41)

The Court held that Azerbaijan was to pay Ms Ismayilova 15,000 euros (EUR) in respect of nonpecuniary damage and EUR 1,750 in respect of costs and expenses.

The judgment is available only in English.

[1] Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to

the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

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