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**Khadija Ismayilova v. Azerbaijan
(Application No. 30778/15)**

Written Comments

By

**Freedom Now, Helsinki Foundation for Human Rights, Human Rights House Foundation, and
International Partnership for Human Rights**

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I. Introduction

This third party intervention is submitted jointly by Freedom Now, Helsinki Foundation for Human Rights, Human Rights House Foundation, and International Partnership for Human Rights, pursuant to leave granted by the President of the Chamber of the European Court of Human Rights (the Court) under Rule 44§2 of the Rules of the Court. This communication addresses the misuse of the judicial system as a tool of persecution and the lack of due process protections in trials of journalists and other civil society leaders in the Republic of Azerbaijan (Azerbaijan), in violation of the European Convention on Human Rights (the Convention).

Freedom Now is an organization (NGO) established in 2001 to advocate for the release of prisoners of conscience worldwide. A key piece of Freedom Now's work is to highlight arbitrary detention on a global scale and contribute to the evolution of human rights jurisprudence. The organization aims not only to help human rights victims but also to enhance respect for the rule of law and accountability of those governments responsible for such violations. Freedom Now works toward these goals by providing legal assistance and advice on cases to international bodies and courts, including the Court. Freedom Now is registered in the US and the UK, and holds special consultative status with the United Nations (UN).

Helsinki Foundation for Human Rights (HFHR) is an NGO established in 1989 by members of the Helsinki Committee in Poland in order to promote human rights and the rule of law in Poland as well as to contribute to the development of an open society in Poland. Activities of HFHR include legal actions undertaken in the public interest, such as the representation of parties and preparation of legal submissions to national and international tribunals. The aim of such submissions is to influence the process of changing laws and practices that are contrary to human rights. Since its establishment, HFHR has promoted the standards of the Convention. HFHR has engaged in training activities in the post-Soviet area, including the Caucasus and Azerbaijan.

The Human Rights House Foundation (HRHF) is a Secretariat of the Human Rights House Network (HRHN), which unites more than 100 human rights NGOs in 13 countries. HRHN's aim is to protect, empower, and support human rights organizations locally and unite them in an international network. HRHN has been active in Azerbaijan since 2004 focusing on institution building and networking among NGOs and legal training among lawyers. The Human Rights House Azerbaijan was registered in 2007 and served as an independent meeting place from 2009-2011. The Azerbaijani Ministry of Justice issued an order to cease all activities of the HRH on 10 March 2011. HRHF is based in Oslo with offices in Geneva, Brussels, and Tbilisi. HRHF has consultative status with the UN and HRHN has participatory status with the Council of Europe (CoE).

International Partnership for Human Rights (IPHR) is an NGO with its seat in Brussels. It was founded in 2008 with a mandate to empower local civil society groups and assist them in making their concerns heard at the international level. IPHR works with human rights groups from different countries on project development and implementation, research, documentation and advocacy. Its team members have substantial experience in the

field of international human rights and cooperates with human rights groups from across Europe, Central Asia, and North America, helping to prepare publications, conduct advocacy activities, and engage in strategic litigation nationally and internationally. Since establishment, IPHR has carried out activities aimed at assisting and empowering local human rights groups from the Russian Federation, Central Asia, and South Caucasus to engage effectively with the international community.

At issue in this case is the Azerbaijani government's pattern of politically motivated arrests of journalists, human rights defenders (HRDs), and dissidents and its wrongful imposition of long periods of pretrial detention. The observations contained in this intervention provide background on the judicial climate in which a continued crackdown targeting independent journalists, HRDs, and activists has taken place in Azerbaijan. Despite Azerbaijan's ostensible efforts to present itself as a country with democratic institutions, respect for rule of law is limited. Domestic and international observers report that the judiciary is not independent or impartial, and that criminal defendants are not guaranteed a presumption of innocence. Moreover, pre-trial detention is imposed without regard to international standards or domestic law, particularly in cases where political motivations are suspected. This intervention serves to provide a comparative law analysis of issues relevant to the case of the applicant and provide broader context on Azerbaijan's consistent violation of its obligations under Articles 5, 6, 10, and 18 of the Convention.

II. Patterns of Abuse and Crackdown on Civil Society

A pattern of systematic restriction of fundamental rights in Azerbaijan is well documented, especially the punishment for the exercise of freedom of expression through arbitrary arrests and detentions. Since 2013, the Azerbaijani government has targeted journalists, HRDs and civil society leaders who have been outspoken critics of government corruption and human rights abuses. The targeting and imprisonment of dissidents has long been a problem in Azerbaijan and of serious concern to CoE institutions. The current crackdown, however, is notable for a number of reasons. First, the government is targeting an ever wider set of independent actors that includes journalists, civil society leaders, and internationally respected HRDs. Second, the nature of the criminal charges used and the length of prison sentences imposed, including pretrial detention, indicates zero tolerance to dissent.¹ The environment for journalists and others has grown increasingly more restrictive due to a series of laws adopted by the government that limit the operations and funding options of independent organizations. Independent civil society in the country has been paralyzed and is virtually nonexistent.

In spite of Azerbaijan's obligations under the Convention and the International Covenant on Civil and Political Rights (ICCPR), the current crackdown shows no sign of abatement.² Local activists reported 98 political prisoners in August 2014.³ Shortly after this list was compiled, the government embarked on a spree to round up and imprison the country's most internationally respected and locally engaged civic leaders, including the creators of the list. Since this 2014 round-up, reliable numbers of how many political prisoners now languish in

¹ As a matter of practice, pre-trial detention periods in politically motivated cases in Azerbaijan are lengthy. For example, newspaper editor Avaz Zeynalli was held in pretrial for 17 months without legally sufficient justification. *Reporters without Borders Condemn Sentencing of Avaz Zeynalli*, Contact, (13 March 2013), available at <http://www.contact.az/docs/2013/Politics/031300031535en.htm#.VpIEVrYrLMo>.

² As party to the Convention and the ICCPR, Azerbaijan is obliged to, *inter alia*, respect individuals' freedom of expression and refrain from use of arbitrary detention. See International Covenant on Civil and Political Rights, G.A. Res 2200A (XXI), 21 UN GAOR Supp. (No. 16), at 52, UN Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976 at arts. 9, 19; European Convention on Human Rights, (ETS No. 5), 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively, at arts. 5, 10. Azerbaijan is also bound by the Universal Declaration of Human Rights, which requires States to respect freedom of opinion and expression and protect from arbitrary detention. Universal Declaration of Human Rights, G.A. Res. 217A (III), UN Doc. A/810, (1948) at arts. 9, 19.

³ Leyla Yunus and Rasul Jafarov, *The List of Political Prisoners in Azerbaijan*, (10 Aug. 2014), available at http://eap-csf.eu/assets/files/List_of_Political_Prisoners_AZ-%282%29-%281%29.pdf.

prison have been difficult to come by, as few activists are working. Most local NGOs have been shut down and political protests are very rare.⁴ Media voices have been particularly hardhit.⁵

In response, various international mechanisms established under the CoE and the UN have found that the imprisonment of peaceful advocates in Azerbaijan violates international law. The Court, for its part, has adjudged individual cases involving pre-trial detention – including recent decisions finding the pre-trial detentions of opposition leader Ilgar Mammadov⁶ and journalist Tofiq Rashid oğlu Yagublu⁷ to be arbitrary. Azerbaijan's very failure to execute the Court's judgments concerning violations of these rights highlights the systemic nature of the human rights violations in Azerbaijan.⁸

III. Reprisals against Human Rights Defenders and Journalists Cooperating with the CoE

Of particular concern is the imprisonment of HRDs, journalists, and activists who engage with international monitoring mechanisms. For example, Intigam Aliyev, Anar Mammadli, Rasul Jafarov, and Khadija Ismayilova were all incarcerated after cooperating with CoE institutions. This imprisonment of those who cooperate with international monitoring mechanisms is particularly damaging for the chilling effect which such reprisals have on independent voices in Azerbaijan and on the willingness of such independent voices to engage internationally. The CoE Commissioner for Human Rights has condemned such reprisals, stating that “virtually all the civil society partners of my Office [are detained], which makes it increasingly difficult to work on human rights issues in Azerbaijan”⁹ Likewise, the Parliamentary Assembly of the CoE (PACE) has voiced its concern “about the increasing number of reprisals against independent media and advocates of freedom of expression in Azerbaijan. In this regard, it deplores the arbitrary application of criminal legislation to limit freedom of expression, in particular the recent use of different criminal laws against journalists and bloggers, and recommends taking the measures necessary to ensure a genuinely independent and impartial review by the judiciary of cases involving journalists and others expressing critical opinions.”¹⁰

In this regard, Article 34 of the Convention provides for specific protection against intimidation or reprisal for applicants to the Court.¹¹ The Court has confirmed that “the expression ‘any form of pressure’ must be taken to cover not only direct coercion and flagrant acts of intimidation of applicants or their legal representatives but also other improper indirect acts or contacts designed to dissuade or discourage them from pursuing a

⁴*Id.*

⁵ Over spring and summer 2015 the Baku RFE/RL bureau closed down and foreign journalists were banned from entering the country. See *RFE/RL Takes Action in Azerbaijan*, Broadcasting Board of Governors, (22 May 2015), available at <http://www.bbg.gov/blog/2015/05/22/rferl-takes-action-in-azerbaijan/>; Shaun Walker, *Azerbaijan Bans Guardian from Reporting on Baku European Games*, The Guardian, (11 June 2015), available at <http://www.theguardian.com/sport/2015/jun/11/azerbaijan-bans-guardian-european-games-baku-2015>. Moreover, at least 13 journalists and bloggers currently sit in prison. *No Holds Barred: Azerbaijan's Human Rights Crackdown in Aliyev's Third Term*, Sport for Rights, 42, (Oct. 2015), available at <http://www.mediasupport.org/wp-content/uploads/2015/10/sfr-no-holds-barred-hires-FINAL.pdf>.

⁶*Ilgar Mammadov v. Azerbaijan*, European Court of Human Rights, Application No. 15172/13, (22 May 2014).

⁷*Yagublu v. Azerbaijan*, European Court of Human Rights, Application No. 31709/13, (5 Nov. 2015).

⁸ The Court has defined systemic human rights violations as being the ones deriving from structural causes not addressed by authorities. See *Broniowski v. Poland*, European Court of Human Rights, Application No. 31443/96, (28 Sept. 2005),

⁹*Azerbaijan: Stop Reprisals Against Human Rights Defenders* (24 Oct. 2014), available at http://www.coe.int/en/web/commissioner/-/azerbaijan-stop-reprisals-against-human-rights-defenders?inheritRedirect=true&redirect=http://www.coe.int/en/web/commissioner/news?p_p_id=101_INSTANCE_easZQ4kHrFrE&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_count=1.

¹⁰ *Resolution 2062 (2015)*, PACE, (23 June 2015). The Parliamentary Assembly has further reported on various types of intimidation and reprisals and acts of intimidation and reprisal against lawyers of applicants to the Court, especially in Azerbaijan. See PACE Doc. 11183 (9 Feb. 2007); PACE Doc. 12957 (11 June 2012). PACE has noted that “acts of intimidation [in the North Caucasus region of the Russian Federation, Azerbaijan and Moldova] have prevented alleged victims of violations from bringing their applications to the Court, or led them to withdraw their applications.” *PACE Resolution 1571(2007)*, (2 Oct. 2007).

¹¹ Article 34 of the Convention, *supra* note. 2.

Convention remedy.”¹² Although Article 34 applies *per se* only to the Court, an interpretation which denies protection to those cooperating with other CoE mechanisms, would be contrary to the spirit of the text.

IV. Misuse of Judicial System as Tool of Oppression

The government has turned its judicial system into a weapon of persecution of independent voices through its use of politically motivated criminal charges. Such criminal charges can be described as fitting into one or more of three categories: patently politically-motivated, common fabricated, and organization-directed.

Patently politically-motivated charges involve allegations wherein the authorities essentially admit that the detainee’s speech, association, assembly or political activities – all protected under international law – is the reason for the arrest, and typically include charges such as inciting hatred, mass disorder, and treason.¹³ However, in the absence of any evidence that such defendants have advocated violence to achieve their goals, the government’s use of such charges in response to peaceful dissent or assembly violates the State’s obligations under international law.¹⁴

Fabricated charges are criminal allegations that are not, at least on their face, directly related to the exercise of a fundamental right and commonly include drug and weapon charges, hooliganism, embezzlement, and service forgery. Given such lack of facial relation to the exercise of a fundamental right, the government’s use of fabricated charges can make the designation of political cases more difficult, however the procedural violations and political context present in such cases highlights the true motivation of the authorities.

Of special concern is the recent trend of organization-directed charges wherein officials arrest journalists, civil society leaders, and HRDs for violating dubious administrative rules combined with criminal laws, notably tax evasion, illegal business activities, and abuse of authority – an approach that attempts to conceal the political motivation behind a clearly flawed legal theory. Fabricated financial charges, such as embezzlement and forgery, are often combined with these organization-directed charges. Such charges are at issue in the current case under consideration by the court.

With organization-directed charges the government first alleges that the NGO has failed to comply with some provision of Azerbaijani administrative law, often failure to register international grants or register itself with authorities. In some cases, the alleged failure is due to government intransigence – as in cases where organizations try to comply with the clearly intentionally burdensome requirements, but the responsible agencies refuse to take any action. This is generally the case for NGOs that are independent of the government.¹⁵ In other cases, the authorities simply fabricate the violation –falsely claiming that it was not registered.¹⁶ The critical point here is that as a result of purposeful and discriminatory government malfeasance, the leaders of civil society organizations stand accused of failing to meet administrative rules that authorities made impossible in the first place. Second, prosecutors charge the civil society actor with unrelated violations of the Criminal Code. For example, authorities may begin with the claim that a particular grant or organization was not properly registered. However, they do not charge the organization or its officers with failing to register under the administrative laws (which involve sanctions that were controversially strengthened but do not

¹² See *e.g.* *Ryabov v. Russia*, European Court of Human Rights Application No. 33774/08 (1 Aug. 2013).

¹³ Patently politically-motivated charges have been used against, for example, Leyla and Arif Yunus, two prominent civil society actors who, in addition to convictions for swindling, tax evasion, forgery, and illegal business activity (for Leyla Yunus) and large-scale fraud (for Arif Yunus), currently stand accused of treason for their work brokering understanding between citizens of Armenia and Azerbaijan. See, *e.g.*, *Azerbaijan: Ailing Rights Defendants Convicted in Political Trial*, Human Rights Watch, (13 Aug. 2015), available at <https://www.hrw.org/news/2015/08/13/azerbaijan-ailing-rights-defenders-convicted-political-trial>; *Baku Court Sentences Activist Couple to Tough Prison Terms*, Radio Free Europe Radio Liberty, (13 Aug. 2015), available at <http://www.rferl.org/content/azerbaijan-leyla-arif-yunus-verdict/27187221.html>.

¹⁴ See, *e.g.*, *Sidiropoulos and Others v. Greece*, European Court of Human Rights, Application No. 26695/95, ¶ 43, (10 July 1998).

¹⁵ An example of this tactic can be seen in the case of Rasul Jafarov, pending before the Court as Application No. 69981/14.

¹⁶ An example of this tactic can be seen in the case of Intigam Aliyev, pending before the Court as Application No. 71200/14.

include the prospect of imprisonment). Instead, they charge the organization's leaders with unrelated provisions of the Criminal Code, such as laws against tax evasion, illegal business activity, and abuse of office. Such an approach empowers Azerbaijani authorities – seemingly through the law – to punish and silence dissidents.

This approach essentially relies upon the legal theory that administrative rule violations, of whatever type, do not implicate the directly relevant administrative sanctions but instead render the activity of the organization “entrepreneurial,” thereby subjecting it to an entirely different regulatory and tax treatment to which the government then alleges the organization failed to comply. This theory, as discriminatorily applied to leaders of independent NGOs and other organizations, appears to have no basis in Azerbaijani law, which clearly distinguishes between commercial and non-commercial activity based upon the nature of the activity.¹⁷ The use of such charges are both unfounded under domestic law and a blatant attempt to punish the exercise of internationally protected activities.

The case under current consideration is thus strikingly similar to that of others where individuals have been imprisoned recently, all charged with large-scale misappropriation, illegal entrepreneurship, tax evasion, and abuse of power on the basis of alleged failure to comply with administrative regulations. For example, organization-directed charges have been used to convict Leyla and Arif Yunus, two prominent civil society actors on 13 August 2015; Intigam Aliyev, a well-respected human rights lawyer on 22 April 2015; and Rasul Jafarov, a prominent HRD, on 16 April 2015.

V. Specific Issues of International and European Law

The case of the applicant, as the related Azerbaijani applications currently pending before the Court, implicates a number of important legal questions relating to heightened protection for HRDs, judicial independence, the presumption of innocence during the pre-trial phase, and the improper imposition of pretrial detention.

A. International Framework for the Protection of HRDs

The concept and importance of HRDs is enshrined in the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration)¹⁸ and has been repeatedly reaffirmed by the UN General Assembly¹⁹ and Human Rights Council.²⁰ The CoE²¹ and PACE²² have both called for and taken steps to ensure enhanced protection for HRDs. Journalists working on reporting of human rights abuses are explicitly recognized as falling under the definition of HRDs.²³

¹⁷ Article 13 of the Civil Code of Azerbaijan defines “entrepreneurial activity” as “a person’s activity conducted independently and for the main purpose of receiving obtaining [sic.] profit from the use of property, sale of goods, and performance of works or provision of services.” See also Article 13.2.27 of the Tax Code of Azerbaijan which defines non-commercial activity, by contrast, as “a conduct of legal activity the purpose of which is not generation of profit and that stipulate the use of income received in non-commercial purposes only, including the purposes of its charter. Otherwise such activity shall be considered as commercial.”

¹⁸ *Resolution on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, UN Doc. A/RES/53/144 (8 March 1999).

¹⁹ *Resolution 22/6*, UN Doc. A/HRC/RES/22/6 (21 March 2013).

²⁰ *Resolution 68/181*, UN Doc. A/RES/68/181, (18 Dec. 2013).

²¹ The Committee of Ministers of the CoE has called on CoE Member States to “create an environment conducive to the work of human rights defenders, enabling individuals, groups and associations to freely carry out activities [...] to promote and strive for the protection of human rights and fundamental freedoms without any restrictions other than those authorised by the [Convention ... and] “to take effective measures to protect, promote and respect human rights defenders and ensure respect for their activities. *Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities*, (6 Feb. 2008), at ¶¶ 2.i, 2.ii.

²² For example, both the UN and PACE have established rapporteurs on the situation of HRDs.

²³ See, e.g., “Who is a Defender”, Website of the UN Special Rapporteur on the situation of human rights defenders, available at <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx>.

In the context of judicial review of detention, the imprisonment of a HRD must be subjected to heightened scrutiny. The UN Working Group on Arbitrary Detention (WGAD) has confirmed the necessity to “subject interventions against individuals who may qualify as human rights defenders to particularly intense review,”²⁴ specifically in the cases when the WGAD must consider “the relationship between the detention and prosecution of [an investigative journalist and a HRD] and his exercise of the fundamental rights to freedom of expression and association.”²⁵ Moreover, “the possible restriction on [the right to freedom of expression] and the work as human rights defender [...] put a heavy burden on the Government to show that the harsh punishment was not discriminatory due to [the individual's] human rights activities.”²⁶ Therefore, when considering the detention of HRDs, including journalists, the Court should examine the circumstances in which HRDs work and apply a heightened standard of review to such detention.

A. Judicial Independence and Impartiality

This Court has held that a detainee’s right to be brought before a judge under Article 5(3) of the Convention and a detainee’s right to have the lawfulness of detention examined under Article 5(4) of the Convention require an independent adjudicating court or judicial officer.²⁷ The Court has further confirmed that “independence” means independence from the legislative or executive power,²⁸ which can be determined in part by reference to the manner of the appointment of members of the court and the length of their term, the existence of guarantees against outside pressure, and whether the court presents the appearance of independence.²⁹

The UN Human Rights Committee, the body tasked with implementation of ICCPR and adjudication of individual complaints regarding treaty’s provisions³⁰ has opined that the right to equality before the courts “is a key element of human rights protection and serves as a procedural means to safeguard the rule of law.”³¹ At its core, this right to equality requires that the adjudicatory process be conducted by a competent, independent, and impartial tribunal that is established by law.³² This standard must be measured by an objective “reasonableness standard” – that is, the court must appear to a reasonable observer to be impartial.³³ If, for example, a court fails to prevent or remedy serious procedural mistakes – such as failing to consider evidence or address witness testimony favourable to the defendant – this would indicate to a reasonable observer that the proceedings are not “fair.”

Azerbaijani courts are heavily dependent on the executive. Judges are selected via an examination process that lacks external monitoring to ensure fairness and then appointed by the president or the parliament, depending on the court.³⁴ Considering also the domination of parliament by the president’s ruling party, there are no

²⁴*Nega v. Ethiopia*, WGAD, Opinion No. 62/2012, (21 Nov. 2012) at ¶ 39.

²⁵*Dilmurod Saidov v. Uzbekistan*, WGAD, Opinion No.67/2012, (12 Apr. 2012) at ¶ 56.

²⁶*Id.*, at ¶ 57.

²⁷*Schiesser v. Switzerland*, European Court of Human Rights, Application No. 7710/76, ¶ 31, (4 Dec. 1979); *Stephens v. Malta (no. 1)*, European Court of Human Rights, Application No. 11956/07, ¶ 95, (21 Apr. 2009).

²⁸*Ninn-Hansen v. Denmark*, European Court of Human Rights, Application No. 28972/95 (Decision on Admissibility), (18 May 1999).

²⁹*Findlay v. United Kingdom*, European Court of Human Rights, Application No. 22107/93, ¶ 73, (25 Feb. 1997).

³⁰Under the First Optional Protocol to the ICCPR the UN Human Rights Committee is empowered to hear individual complaints with regard to alleged violations of the ICCPR by state parties. *See* First Optional Protocol to the ICCPR, G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16), UN Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force March 23, 1976, at art. 1. The ICCPR sets forth certain articles, such as Articles 9 (guaranteeing right to liberty and security of person) and 14 (guaranteeing, *inter alia*, the right to fair and public hearing by a competent, independent and impartial tribunal established by law and a presumption of innocence), which are directly analogous to the Convention articles at issue in the applicant’s case.

³¹*General Comment 32*, UN Human Rights Committee, UN Doc. CCPR/C/GC/32, ¶ 2 (23 Aug. 2007).

³²*Id.*, at ¶ 15.

³³*Id.*, at ¶ 21.

³⁴*Nations in Transit 2014 – Azerbaijan*, Freedom House, 104-106, available at https://freedomhouse.org/sites/default/files/NIT14_Azerbaijan_final.pdf.

safeguards against political favoritism in the selection process for judges.³⁵ Moreover, far from the independent, unbiased proceedings that are required under international law, the criminal prosecutions of activists in Azerbaijan cases are orchestrated from the beginning to reach a guilty verdict. To illustrate, in the recent trials of two HRDs, Intigam Aliyev and Rasul Jafarov, every substantive motion made by the respective defense attorneys was denied. Additionally, seven of the supposed “victims” of Mr. Jafarov’s embezzlement claimed to have no complaint against him. Similarly, in the case of Anar Mammadli, an activist charged with tax evasion, illegal business activities, and abuse of office, 19 of the alleged victims contested their status as such and the court ignored a letter from Mr. Mammadli’s primary funder stating that the grants cited by the prosecution as evidence of his financial crimes had been properly allocated.

The failure of the Azerbaijani courts to deal with the parties fairly, refusal to address contradictory evidence, and the reported bias of judges in these proceedings indicates that they are not fair from the perspective of a “reasonable observer.” As such, they fail to meet the requirements established by international law.

B. Right to Presumption of Innocence

Under European and international human rights law, as codified in the Convention and the ICCPR, criminal defendants are presumed innocent until proved guilty according to law.³⁶ This requirement creates obligations for the government inside and outside the courtroom. Throughout the adjudicatory process, the defendant must enjoy the benefit of the doubt;³⁷ the Court has found that the presumption of innocence will be violated if a judicial decision concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law.³⁸

Outside the courtroom, the authorities are under an obligation to “refrain from pre-judging the outcome of a trial”; specifically this means that officials must “[abstain] from making public statements affirming the guilt of the accused.”³⁹ This requirement is violated where, for example, “public statements made by high ranking law enforcement officials portraying the [defendant] as guilty [are] given wide media coverage.”⁴⁰

It is especially striking that in Azerbaijan, senior government officials consistently use their pulpit to portray the work of journalists, NGOs, and HRDs as threats to national security. Indeed, government officials and pro-government media have publicly smeared government critics – repeatedly and often before any criminal proceedings are even initiated and well before they are concluded. For example, prior to the arrest of Avaz Zeynalli, the editor-in-chief of the independent newspaper Khural, the pro-government Press Council declared Khural to be involved in racketeering.⁴¹ Shortly thereafter the head of the Presidential Administration filed a series of lawsuits against Khural, leading to the seizure of all of the newspaper’s equipment.⁴²

³⁵*Id.*

³⁶Article 6(2) of the Convention provides that “Everyone charged with a criminal offense shall be presumed innocent until proved guilty according to law.” Similarly, Article 14(2) of the ICCPR provides that “Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.”

³⁷General Comment 32, *supra* note 31, at ¶ 30.

³⁸*Minelli v. Switzerland*, European Court of Human Rights, Application No. 8660/79, ¶ 37, (25 March 1983).

³⁹General Comment 32, *supra* note 31, at ¶ 30. *See also, Dakaras v. Lithuania*, European Court of Human Rights, Application No 42095/98, ¶ 41, (10 Oct. 2000).

⁴⁰*Gridin v. Russian Federation*, UN Human Rights Committee, Communication No. 770/1997, UN Doc. CCPR/C/69/D/770/1997 (2000), ¶ 8.3, (20 July 2000).

⁴¹Avaz Tapdig oglu Zeynalli, Human Rights Freedoms, available at <http://hrf.report/avaz-zeynalli/>; *Nine-Year Jail Term – Warning to Media Ahead of Election*, Reporters Without Borders, 13 March 2013, available at <http://en.rsf.org/azerbaijan-nine-year-jail-term-warning-to-13-03-2013.44202.html>.

⁴²*Id.* In yet another example, the head of the Azerbaijani Presidential Administration Ramiz Mehdiyev, concluded that Radio Azadlig organized “anti-Azerbaijani programs distributing delusional statements.” *Mehdiyev Accuses US of “Color Revolution”* Contact, (4 Dec. 2014), available at <http://www.contact.az/docs/2014/Politics/120400098728en.htm#.VpjSpzbKnFI>. Mr. Mehdiyev also discussed the “anti-state” activities of Khadija Ismayilova and the channel Meydan TV, who he claimed were involved in “blackening” the government of Azerbaijan. *Id.*

In addition to the broader campaign to discredit the work of journalists and HRDs, Azerbaijani authorities undermine the right to presumption of innocence by publicly pre-judging the outcome of ongoing criminal trials in politically-motivated cases. In one striking instance, the coerced confessions of three youth activists were broadcast on television across Azerbaijan just days after the activists were arrested and beaten and long before the trial began. In the case of *Mammadov v. Azerbaijan*, the Court found that the state violated the presumption of innocence when the Prosecutor General's office and the Ministry of Internal Affairs issued a public statement indicating that "it had been established" that Mr. Mammadov had urged local residents to resist police and block roads during unrest in the Ismayilli region – essentially pre-judging the outcome of the criminal proceedings.⁴³

C. Right to Release Pending Trial

Because pretrial detention has been imposed in nearly every recent criminal case involving journalists, HRDs, and activists in Azerbaijan – essentially in all cases where political motivations are suspected,⁴⁴ the issue is central to a number of cases now pending before the Court. This question of pretrial detention implicates a number of important violations, including those under Articles 5, 6, 10, and 18 of the Convention.

The Court has repeatedly criticized the Azerbaijani authorities' imposition of pretrial detention.⁴⁵ The Convention broadly establishes the requirement under Article 5(1)(c) that a court must demonstrate a "reasonable suspicion" of guilt when ordering remand; such "reasonable suspicion" presupposes the "existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence."⁴⁶ Azerbaijani law also requires that local authorities consider additional facts, such as the likelihood that the suspect will flee or obstruct the investigation, his or her personal characteristics, and whether house arrest or bail would be suitable.⁴⁷ Similarly, the UN Human Rights Committee has confirmed that the measure of "arbitrariness" in detention "is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. As the Committee has observed on a previous occasion, this means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances."⁴⁸

Most recently, in the cases of *Mammadov v. Azerbaijan* and *Yagublu v. Azerbaijan*⁴⁹, this Court found that the government had failed to establish a reasonable suspicion of guilt. Instead, the Court found that local courts had relied on vague and conclusory statements regarding the evidence against the defendant without reviewing any specific facts or information to support the prosecution's claims of guilt.⁵⁰ Importantly, in *Mammadov v. Azerbaijan*, the Court additionally looked to "all the relevant circumstances" in assessing whether the government had met its burden – including the detainee's history as an opposition candidate who publicly criticized the government before upcoming elections and the fact that he was threatened by members of

⁴³*Mammadov v. Azerbaijan*, *supra* note 6. In that case, the Court rejected the government's arguments that it was merely "providing information to the public about the status of the investigation and countering the dissemination of inaccurate and distorted information." *Id.*, at ¶¶ 123-127. It also held that the inclusion a sentence indicating that the case would be "fully and thoroughly investigated and [would] receive legal assessment" was not enough negate the unqualified statement of guilt. *Id.*

⁴⁴ The political nature of the arrests and pre-trial detention of HRDs in Azerbaijan has been recognized by international organizations and political leaders across Europe. See e.g., Statement by Mailis Reps, CoE Parliamentary Assembly rapporteur on 'Strengthening the role and protection of human rights defenders in Council of Europe member States' (20 July 2014), available at <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5080&lang=2&cat=5>; Statement of Nils Muižnieks, CoE Commissioner for Human Rights (23 Apr. 2014), available at <http://www.coe.int/en/web/commissioner/-/freedom-of-expression-assembly-and-association-deteriorating-in-azerbaijan>.

⁴⁵*Mammadov v. Azerbaijan*, *supra* note 6; *Aliyev v. Azerbaijan*, European Court of Human Rights, Application No. 37138/06, (9 Nov. 2010); and *Muradverdiyev v. Azerbaijan*, European Court of Human Rights, Application No. 16966/06, (9 Dec. 2010).

⁴⁶*Mammadov v. Azerbaijan*, *supra* note 6, at ¶ 88.

⁴⁷ For a detailed description of the Criminal Procedure Code, see *Aliyev v. Azerbaijan*, *supra* note 45, at ¶¶ 89 – 95.

⁴⁸*Mukong v. Cameroon*, Communication No. 458/1991, UN Doc. CCPR/C/51/D/458/1991. ¶ 9.8, (10 Aug. 1994).

⁴⁹*Yagublu v. Azerbaijan*, *supra* note 7, at ¶ 62.

⁵⁰*Id.*, at 61; *Mammadov v. Azerbaijan*, *supra* note 18, at ¶¶ 87 – 101.

parliament with legal action.⁵¹

In many of the cases now pending before the Court, the question of whether the government established a “reasonable suspicion” of guilt and the government’s ultimate motivation for the prosecution – which implicates Articles 10 and 18 – are closely related. As in *Mammadov v. Azerbaijan* and *Yagublu v. Azerbaijan*, these cases arise in the context of an ongoing crackdown on civil society and a targeted campaign to discredit and undermine journalists and civil society leaders, including the applicant in this case. While the Court has noted that there is a general presumption of good faith under the Convention, that presumption is rebuttable where the applicant is able to “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.”⁵² In applying this “very exacting standard of proof,” the Court has not relied on broad statements regarding the general political situation in the country.⁵³ Instead, the Court has looked to the relevant case specific facts to determine whether, given all of the evidence before it, the ultimate motive of the government is an arbitrary limitation on the exercise of a fundamental right.⁵⁴

In addition, the Court has held that, under Article 5(3) of the Convention, even a reasonable suspicion of guilt will not justify the lawfulness of a continued detention without reference to “specific facts and the applicant’s personal circumstances justifying his detention.”⁵⁵ In recent cases, the Court has time and time again found that Azerbaijan has violated its obligations under Article 5(3) by relying on irrelevant grounds and failing to mention or substantiate case-specific facts relevant to the acceptable grounds for continued detention.⁵⁶

While the legality of a detention will not depend upon general observations about the country, the specific circumstances surrounding the continued detention of journalists, HRDs, and activists are relevant to investigations under Articles 5 and 18.⁵⁷ Indeed, a number of specific facts may be relevant to such an inquiry in this case, including the nature of the applicant’s work, a history of past harassment and persecution, the conduct of state agents towards the applicant, the specificity of the charges, the length of pretrial detention, and the conduct of the proceedings.

VI. Conclusion

On behalf of Freedom Now, Helsinki Foundation for Human Rights, Human Rights House Foundation, and International Partnership for Human Rights,

⁵¹*Id.*, at ¶ 92.

⁵² *Mammadov v. Azerbaijan*, *supra* note 18, at ¶ 137.

⁵³ *Id.*, at ¶ 138.

⁵⁴ *Id.*, at ¶ 138. Contrast *Khodorkovskiy v. Russia*, European Court of Human Rights, Application No. 5829/04, ¶ 254 – 260, (31 May 2011).

⁵⁵ *Aleksanyan v. Russia*, European Court of Human Rights, Application No. 46468/06, ¶ 179, (12 Dec. 2008). Specifically, the Court has developed four basic acceptable reasons for refusing bail: (a) the risk that the accused will fail to appear for trial; (b) the risk that the accused, if released, would take action to prejudice the administration of justice, or (c) commit further offences, or (d) cause public disorder. See *Smirnova v. Russia*, European Court of Human Rights, Application Nos. 46133/99 and 48183/99, ¶ 59, (24 July 2003).

⁵⁶ See e.g., *Isayeva v. Azerbaijan*, European Court of Human Rights, Application No. 36229/11, ¶¶ 90-91 (25 June 2015); *Allahverdiyev v. Azerbaijan*, European Court of Human Rights, Application No. 49193/08, ¶¶ 58-59, (6 March 2014); *Ismayilov v. Azerbaijan*, European Court of Human Rights, Application No. 16794/05, ¶¶ 60-63, (20 Feb. 2014); *Zayidov v. Azerbaijan*, European Court of Human Rights, Application No. 11948/08, ¶¶ 65-69, (20 Feb. 2014); *Aliyev v. Azerbaijan*, European Court of Human Rights, Application No. 45875/06, ¶ 92, (6 Dec. 2011).

⁵⁷ The Court has held that a determination based on Article 18 will first depend upon finding a violation elsewhere in the case. In the case of *Mammadov v. Azerbaijan*, the violation of Article 5(1)(c) supported the broader finding of political motivation under Article 18.



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