European Court of Human Rights: Fatullayev v. Azerbaijan

IRIS 2010-8:1/2

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Having been convicted of defamation and threat of terrorism and while serving a prison sentence, the founder and chief editor of the newspapers Gündəlik Azərbaycan and Realny Azerbaijan, Mr. Fatullayev, applied successfully before the European Court of Human Rights against a violation of his freedom of expression and right to a fair trial. The European Court ordered the Azerbaijani authorities to release Fatullayev immediately.

In 2007 two sets of criminal proceedings were brought against Fatullayev in connection with two articles published by him in Realny Azerbaijan. The first set of criminal proceedings related to an article and to separate Internet postings. The statements made in the article and the postings differed from the commonly accepted version of the events that took place at the town of Khojaly during the war in Nagorno-Karabakh, according to which hundreds of Azerbaijani civilians had been killed by the Armenian armed forces with the reported assistance of the Russian army. Four Khojaly survivors and two former soldiers involved in the Khojaly battle brought a criminal complaint against Fatullayev for defamation and for falsely accusing Azerbaijani soldiers of having committed an especially grave crime. The courts upheld the claims, convicted Fatullayev of defamation and sentenced him to imprisonment for a term of two years and six months. Fatullayev was arrested in the courtroom and taken to a detention centre. In addition, in civil proceedings brought against Fatullayev before the above-mentioned first set of criminal proceedings, he was ordered to publish a retraction of his statements, an apology to the refugees from Khojaly and the newspaper's readers and to pay approximately EUR 8,500 personally, as well as another EUR 8,500 on behalf of his newspaper, in respect of non-pecuniary damages.

The second set of criminal proceedings related to an article entitled "The Aliyevs Go to War". In it Fatullayev expressed the view that, in order for President Ilham Aliyev to remain in power in Azerbaijan, the Azerbaijani government had sought the support of the United States in exchange for Azerbaijan's support for US "aggression" against Iran. He speculated about a possible US-Iranian war in which Azerbaijan could also become involved and provided a long and detailed list of strategic facilities in Azerbaijan that would be attacked by Iran if such a scenario developed. He concluded that the Azerbaijani government should have maintained neutrality in its relations with both the US and Iran and that it had not

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realised all the dangerous consequences of the geopolitical game it was playing, like for example the possible deaths of Azeris in both Azerbaijan and Iran. Before Fatullayev was formally charged with the offence of threat of terrorism, the Prosecutor General made a statement to the press, noting that Fatullayev's article constituted a threat of terrorism. A short time later, Fatullayev was indeed found guilty as charged and convicted of threat of terrorism. The total sentence imposed on him was imprisonment for eight years and six months. In his defence speech at the trial and in his appeals to the higher courts, Fatullayev complained that his presumption of innocence was breached as a result of the Prosecutor General's statement to the press and that his right to freedom of expression as a journalist was violated. His complaints were summarily rejected.

Apart from finding breaches of Art. 6 § 1 (right to a fair trial, no impartial tribunal) and Art. 6 § 2 (breach of presumption of innocence) of the European Convention of Human Rights, the Court found that the conviction of Fatullayev in both criminal cases amounted to a manifest violation of Article 10 of the Convention.

With regard to the first criminal conviction, the Court acknowledged the very sensitive nature of the issues discussed in Fatullayev's article and that the consequences of the events in Khojaly were a source of deep national grief. Thus, it was understandable that the statements made by Fatullayev may have been considered shocking or disturbing by the public. However, the Court recalled that freedom of information applies not only to information or ideas that were favourably received, but also to those that offend, shock or disturb. In addition, it is an integral part of freedom of expression to seek historical truth. Various matters related to the Khojaly events still appear to be open to ongoing debate among historians and as such should have been a matter of general interest in modern Azerbaijani society. It is essential in a democratic society that a debate on the causes of acts of particular gravity which might amount to war crimes or crimes against humanity should be able to take place freely. Further, the press plays the vital role of a "public watchdog" in a democratic society. Although it ought not to overstep certain bounds, in particular in respect of the reputation and rights of others, the duty of the press is to impart information and ideas on political issues and on other matters of general interest. The Court considered that the article had been written in a generally descriptive style with the aim of informing Azerbaijani readers of the realities of day-to-day life in the area in question. The public was entitled to receive information about what was happening in the territories over which their country had lost control in the aftermath of the war. Fatullayev had attempted to convey, in a seemingly unbiased manner, various ideas and views of both sides in the conflict and the article had not contained any statements directly accusing the Azerbaijani military or specific individuals of committing the massacre and deliberately killing their own civilians.

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As regards the Internet postings, the Court accepted that, by making those statements without relying on any relevant factual basis, the applicant might have failed to comply with the journalistic duty to provide accurate and reliable information. Nevertheless, taking note of the fact that he had been convicted of defamation, the Court found that those postings had not undermined the dignity of the Khojaly victims and survivors in general and, more specifically, the four private prosecutors who were Khojaly refugees. It therefore held that the domestic courts had not given "relevant and sufficient" reasons for Fatullayev's conviction of defamation. In addition, the Court held that the imposition of a prison sentence for a press offence would be compatible with journalists' freedom of expression only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in cases of hate speech or incitement to violence. As this had not been the case, there had been no justification for the imposition of a prison sentence on Fatullayev. There had accordingly been a violation of Article 10 of the Convention in respect of his first criminal conviction.

With regard to the second criminal conviction, the Court reached a similar conclusion. The article "The Aliyevs Go to War" had focused on Azerbaijan's specific role in the dynamics of international politics relating to US-Iranian relations. As such, the publication had been part of a political debate on a matter of general and public concern. The applicant had criticised the Azerbaijani Government's foreign and domestic political moves. At the same time, a number of other media sources had also suggested during that period that, in the event of a war, Azerbaijan was likely to be involved and speculated about possible specific Azerbaijani targets for Iranian attacks. The fact that the applicant had published a list of specific possible targets in itself had neither increased nor decreased the chances of a hypothetical Iranian attack. The applicant, as a journalist and a private individual, had not been in a position to influence or exercise any degree of control over any of the hypothetical events discussed in the article. Neither had Fatullayev voiced any approval of any such possible attacks or argued in favour of them. It had been his task, as a journalist, to impart information and ideas on the relevant political issues and express opinions about possible future consequences of specific decisions taken by the Government. Thus, the domestic courts' finding that Fatullayev had threatened the State with terrorist acts had been arbitrary. The Court considered that Fatullayev's second criminal conviction and the severity of the penalty imposed on him had constituted a grossly disproportionate restriction of his freedom of expression. Further, the circumstances of the case had not justified the imposition of a prison sentence on him. There had accordingly been a violation of Article 10 in respect of Fatullayev's second criminal conviction as well.

In application of Article 46 of the Convention (execution of the judgment), the Court noted that Fatullayev was currently serving the sentence for the press offences in respect of which it had found Azerbaijan in violation of the Convention.

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Having considered it unacceptable that the applicant still remained imprisoned and the urgent need to put an end to the violations of Article 10, the Court held, by six votes to one, that Azerbaijan had to release the applicant immediately. Under Article 41 (just satisfaction) of the Convention, the Court held that Azerbaijan is to pay Fatullayev EUR 25,000 in respect of non-pecuniary damages and EUR 2,822 in respect of costs and expenses.

Judgment by the European Court of Human Rights (First Section), case of Fatullayev v. Azerbaijan, No. 40984/07 of 22 April 2010

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