No Going Nuclear in Strasbourg

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Mammadov v. Azerbaijan, the much anticipated judgment handed down by the Grand Chamber of the European Court of Human Rights yesterday, is no ordinary judgment. It is the first time the Court has ruled on a referral by the Council of Ministers to determine that a member state has not complied with a judgment delivered against it before – in this case, ' the 2014 judgment of *Mammadov v. Azerbaijan*. This referral mechanism (also known as 'infringement proceedings') is nearly ten years old on paper – it was added to Article 46 of the Convention in 2010 by Protocol 14. While the mechanism does not lay down any specific sanctions, it is the most serious form of political pressure that members of the Council of Europe can exert on one of their own – short, of course, of expulsion from the club. This case therefore offers us all a first look at how the mechanism actually works in practice. It's a first look at its limits, but also at the innovation it could bring to the effective implementation of the Convention by the member states of the Council of Europe.

Why did the Committee of Ministers refer Mammadov v. Azerbaijan to the Court?

Ilgar Mammadov is a well known Azerbajiani opposition politician and activist. In 2013 he was charged with organising or actively participating in actions against the public order by the Azerbaijani authorities and was placed in pre-trial detention. In the same year, he took his case to the European Court of Human Rights, arguing that his detention and the charges against him were unlawful under the Convention. While his case was still pending in Strasbourg, in March 2014 the Azerbaijani authorities concluded domestic judicial proceedings and sentenced him to seven years of imprisonment. The Strasbourg judgment on the lawfulness of his pretrial detention arrived two months later, finding that there was no reasonable suspicion to detain him under Article 5(1)c of the Convention and that his detention pursued the political purpose of silencing and/or punishing him for having criticised the government. Yet, by the time the Court found the reasons of his pretrial detention unlawful and in bad faith, Mammadov was no longer a detained person, but a convicted one. In addition, the judgment was only declaratory: it was silent about the specific individual remedies required to put an end to the violation against Mammadov or, importantly, to prevent similar violations in the future.

The Committee of Ministers first examined the execution of this judgment in December 2014, and called for Mr Mammadov's "release without delay" emphasising that there was no reasonable suspicion in his case and that the Court found a violation of Article 18. This call was not met by Azerbaijan which argued that the judgment did not call for the applicant's release. The Committee of Ministers stood its ground. It was in October 2017, almost three years after this first call for

Mammadov's release, that the Committee of Ministers decided to go 'nuclear'. It put Azerbaijan on formal notice that it had failed to fulfil its Convention obligation to comply with the Court's 2014 judgment.

In the meantime, in November 2017, the European Court of Human Rights delivered its response to the second case brought by Mammadov in 2015 concerning the fairness of his trial – *Mammadov 2*. The Court found that criminal proceedings against the applicant were not fair, as required by Article 6 of the Convention. The Court, however, did not find it necessary to examine the claims of the applicant under Article 18 concerning the political motivations behind his trial and it did not indicate any specific remedies other than, again, monetary compensation.

In December 2017, the Committee of Ministers referred the case to the Court asking it to determine whether Azerbaijan has failed to fulfil its obligation to abide by the *Mammadov 1* judgment under Article 46 § 1 of the Convention.

What were the core issues before the Grand Chamber?

As the Court underlined, the nature of adjudication in the case of this proceeding is different to that of the standard adjudicative functions of the Court (para 168). On this occasion, the Court was specifically asked to do a job which it has consistently seen as falling under the mandate of the Committee of Ministers — compliance monitoring. Infringement proceedings, in this case, reverses the institutional balance between the Court and the Committee of Ministers.

The Court had three issues that it had to clarify in this case.

First was the scope of the infringement proceedings. Were the infringement proceedings only concerned with the release of the applicant or were they broader, also extending to a lack of other individual and general measures in the first case and, perhaps, in the second?

Second was the interpretation of what the substantive findings of violations of Articles 5 and 18 of the Convention in *Mammadov 1* required in terms of remedies. Was the interpretation of the remedial aspects of *Mammadov 1* as requiring the release of the applicant the correct interpretation of the remedial dimension of a judgment? Could other remedies that would have been equally acceptable for the state to pursue to give full effect to *Mammadov Number 1* been employed?

Third was the time frame. Should the Court take the date of the referral as the critical date to assess compliance or should it also have taken subsequent developments after the referral into account? This question was particularly pertinent as, on 13 August 2018, the Azerbaijani authorities released Mr. Mammadov from prison. He was, however, banned from running in presidential elections in Azerbaijan until 2024 and his criminal record has not been expunged.

What did the Grand Chamber say?

When it came to the first question, the Court noted that, in its interim resolution of 5 December 2017, the Committee of Ministers had asked the Court "whether the Republic of Azerbaijan [had] failed to fulfil its obligation under Article 46 § 1" in respect to paragraph 67 of that judgment. It then underlined the emphasis placed by the Committee of Ministers on the lack of progress in releasing Mr. Mammadov in its overall history of monitoring the case. So, whilst accepting that the full range of general and individual measures did in principle fall within the scope of the infringement proceedings, the Court decided that aspects beyond the release of the applicant did not warrant a detailed examination by the Court. It is particularly noteworthy that the Court found the supervision of general measures in similar cases that found Article 18 violations (*Farhad Aliyev v. Azerbaijan*, no. 37138/06, 9 November 2010, and *Rasul Jafarov*)as a reason not to examine compliance with general measures in Mammadov 1.

In response to the second question, the Court confirmed that its initial judgment was declaratory and, indeed, silent on the matter of appropriate individual measures. Yet, it went on to hold that 'the absence of an explicit statement relevant to execution in the first Mammadov judgment is not decisive for the question as to whether there has been a failure by Azerbaijan to fulfil its obligations under Article 46 § 1. What is decisive is whether the measures taken by the respondent state are compatible with the conclusions and spirit of the Court's judgment.' (para 186). For the Court, compatibility with the spirit of the Convention can only be recovered by analysing the reasons why violations of the Convention were found in this case.

This is where it gets interesting.

The Court held that, given that it found that the authorities were acting with the sole purpose of silencing the applicant from the start, 'it follows that the Court's finding of a violation of Article 18 in conjunction with Article 5 of the Convention in the first *Mammadov* judgment vitiated any action resulting from the imposition of the charges.' (para 189). The Court sided with the Committee of Ministers, arguing that the the only logical conclusion flowing from a bad faith charge and detention must be the expunging of all charges or the consequences of any further proceedings based on those charges. The Court continued to explain that states can argue for impossibility of performance of remedies under general international law, but found that nowhere in the submissions of Azerbaijan was such an impossibility presented or defended.

Thirdly, the Grand Chamber narrowed the temporal scope of review of the compliance with the judgment to the date when the Committee of Ministers referred the case to the Court. This meant that subsequent developments that led to the release of the applicant, his ongoing efforts to have his conviction expunged, the ban on him to run for presidential elections until 2024 were not taken into account in the judgment at all.

A robust judicial treatment of bad faith non-compliance?

This can read as a glass half-full or glass half-empty judgment.

If we see the glass as more full, the Court confirms that, even when it is silent on remedies, the Committee of Ministers is well placed to demand *restitution ad integrum.* What is more, the Court finds that release from prison as *restitution ad integrum* cannot be denied when convictions are based on charges which the Court finds disingenuous and in bad faith. This reasoning has important potential for preventing states from hiding behind judgments that are silent on individual remedies in the future. It also sends an important signal to states that they cannot use the final nature of prison sentences as a reasons for non compliance with release requests if those convictions are based on non-Convention compliant charges.

On the glass half-empty side, the material and temporal limitations that the Court introduced as to what it will review under infringement proceedings really narrows the contribution of the Court to questions of compliance with judgments finding bad faith violations.

In this case, the Court could have addressed other general and individual remedies required by the judgment, if it had wanted to do so. It brushed off this point by merely indicating that other Article 18 cases were under the ongoing supervision of the Committee of Ministers as to general measures. By limiting itself to the date of referral the Court also chose to focus on one individual remedy. Yet, as Mr. Mammadov reminded the Committee of Ministers just a few hours after the judgment was delivered, while he is indeed free, he is still unable to stand for election and unable to expunge his criminal record. One may argue that the political pressure for the release of Mr Mammadov, to which the initiation of the infringement procedures was one contribution, has worked. However, given how hard and rare it is to get the requisite two thirds of the membership of the Council of Europe to initiate infringement proceedings against one of their own, the narrow material and temporal angle adopted by the Court to address compliance with a bad faith judgment could be interpreted as a calming signal to states with pending Article 18 violation cases. Even when the Committee of Ministers goes nuclear, the Court really does not.

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