

App Nos. 1158/17, 8405/17, 11040/17, 44031/17

IN THE EUROPEAN COURT OF HUMAN RIGHTS

BETWEEN:

AYNUR GANBAROVA AND OTHERS

Applicants

-v-

AZERBAIJAN

Respondent

ARTICLE 19

Third Party Intervener

WRITTEN COMMENTS OF THE THIRD PARTY INTERVENER

INTRODUCTION

1. ARTICLE 19 submits these written comments pursuant to leave granted by the President of the Fifth Section under Rule 44 §3 of the Rules of the Court, by letter dated 5 January 2018.
2. These Applications concern the imposition, on various dates in 2015 and 2016, of travel restrictions upon the Applicants, each of whom works professionally in the media in Azerbaijan. The effect of those travel restrictions is that the Applicants are not permitted to travel outside Azerbaijan. All the Applicants argue that the restrictions violate their rights under Article 2 of the Fourth Protocol, and Articles 10 and 13 of the Convention, as well as Article 18, read in conjunction with Article 2 of the Fourth Protocol. The Applicants also make individual complaints with respect to alleged violations of Articles 6 and 8 of the Convention.
3. ARTICLE 19 has a long history of defending the right to freedom of expression and working to support journalists, media outlets, bloggers, and others whose work both relies upon, and fosters, these rights. By this intervention, ARTICLE 19 draws on that expertise to assist the Court by making the following two broad submissions:
 - 3.1. Restricting the movement of journalists and other voices of dissent poses a particular threat to freedom of expression, contrary to Article 10 and comparable international legal standards. ARTICLE 19 invites this Court to acknowledge that Article 10 is engaged

whenever journalists or persons involved in public advocacy, such as human rights defenders, have their freedom of movement restricted by a State; and

- 3.2. In considering the application of Article 18 of the Convention, this Court ought to have regard to the present situation in the state concerned, in this case Azerbaijan where the authorities have engaged, and continue to engage, in systematic repression of freedom of expression, including through the intimidation, targeting, and persecution of journalists and other voices critical of the government.

SUBMISSION I: Travel restrictions engage the protections of Article 10

4. ARTICLE 19 notes that the Applicants rely principally upon violations of their rights to freedom of movement under Article 2 of the Fourth Protocol. It is submitted that whether read together with Article 2 of the Fourth Protocol or on a standalone basis, Article 10 of the Convention is engaged where travel bans are imposed upon journalists, human rights defenders, or political activists or others who express dissent.
5. It is well established in this Court's jurisprudence that Article 10 '*applies not only to the content of information but also to the means of transmission or reception since any restriction on the means necessarily interferes with the right to receive and impart information.*'¹ Accordingly, Article 10 will be engaged in any situation where state action serves to create a practical barrier between a journalist's transmission and the would-be receiving audience. At the abstract end of the scale, licensing regimes may impose a practical obstacle to the use of, for instance, radio broadcasting. The present case lies, however, at the more concrete end. One of the effects of a travel ban – either imposed in legal proceedings or as a matter of practice – is to stop a journalist from being able to travel to meet with, and communicate directly to, their audience or, indeed, potential sources.
6. ARTICLE 19 recalls:
 - 6.1. The analogous facts of *Piermont v France*, in which a French politician (and MEP) was made subject to an order expelling her from French Polynesia and refusing her leave to re-enter that territory, with the result that she was confined to the airport.² As the Court noted, finding that such an order amounted to a *prima facie* interference with Article 10, the fact that the applicant was confined to the airport meant she '*had not been able to come into contact with the politicians who had invited her or to express her ideas on the spot.*'³ The practical restrictions on journalists confined to remain in a state is no different; if a journalist is unable physically to travel outside that state they will necessarily be

constrained in the range of opportunities they have to receive and impart information pursuant to Article 10.

- 6.2. The decision of this Court in *Cox v Turkey*.⁴ That application concerned an American citizen who had lectured at a university in Turkey in the 1980s. She was alleged to have made statements to her students to the effect that the Turkish State had attempted to assimilate its Armenian and Kurdish minorities. Her employment at the university was terminated and the Ministry for the Interior ordered her expulsion and imposed a ban on her return to the country. When she was found to have re-entered the country, she was expelled again and an entry made on her passport banning her from returning. This Court held that the ban was materially related to the applicant's exercise of her right to free expression and, importantly, that the statement in Article 10(1) that the right applies '*regardless of frontiers*' means that Contracting States may only restrict expression from abroad '*within the confines of Article 10(2)*'.⁵ This Court found that the applicant's right to freedom of expression had been restricted because the ban resulted from her past expressions and her being unable to make future communications in Turkey.⁶
7. There is no qualitative difference between the situation of the applicants in *Piermont* and *Cox* - where administrative orders excluded the applicants from the countries in question - and the situation of journalists who have been restricted by means of a travel ban or measure of equivalent effect from entering other countries. Further, the '*chilling effect*' of such measures is plain. Accordingly, this Court is invited to acknowledge that as a matter of Convention law, the imposition of a travel ban or measures of equivalent effect, on journalists and other dissenting voices is capable of amounting not only to a restriction on movement under Article 2 of the Fourth Protocol, but also a restriction on the exercise of the right of freedom of expression, thereby engaging the protections of Article 10.
8. In this regard ARTICLE 19 notes that the growing prevalence of travel bans and their concomitant impact on the right of freedom of expression has come to the attention of the UN Special Rapporteur on Freedom of Expression as well as the UN Special Rapporteur on the Situation of Human Rights Defenders. In particular:
 - 8.1. In an article published in November 2017,⁷ the UN Special Rapporteur on Freedom of Expression, while noting that travel bans receive relatively little attention, compared them to the other well-known "*weapons to censor information*" such as detention and physical violence, and commented that States use them not just as a means of punishment but also to deny the spread of information⁸ about the state of repression and corruption in their jurisdictions. The Special rapporteur went on to conclude:

“Travel bans signal weakness, limited confidence in the power of a government’s arguments, perhaps even a public but quiet concession that, “yes indeed, we repress truth in our country”. While not nearly as painful as the physical weapons of censorship, they undermine global knowledge and debate. They exclude activists and journalists from the kind of training that makes their work more rigorous, accurate, and effective. They also interfere in a direct way with every person’s human right to “leave any country, including one’s own,” unless necessary for reasons such as national security or public order.”

- 8.2. In his February 2017 report,⁹ the UN Special Rapporteur on the Situation of Human Rights Defenders noted various instances from around the world of the imposition of travel bans for political reasons and in order to suppress dissent, debate and criticism of the government. The report noted a trend involving the targeting of human rights advocates in India with measures including travel bans,¹⁰ identified the use of travel bans in similar contexts in Turkey,¹¹ Egypt,¹² and Saudi Arabia,¹³ noted the widespread use of travel bans in the Middle East and North Africa region to suppress citizens’ opportunity to engage in human rights advocacy abroad,¹⁴ expressed serious concern regarding the recurrent practice of the Bahraini government in imposing travel bans on human rights defenders, especially when the measures involved reprisals for cooperation with UN mechanisms,¹⁵ and commented as follows regarding the Europe and Central Asia region generally:

“The Special Rapporteur underlines the heightened risks faced by whistle-blowers, anti-corruption activists, human rights lawyers and defenders who protect environmental rights, and the rights of minorities and migrants. Those groups are exposed to threats of stigma, criminal defamation, attacks by extremist groups and judicial harassment. In addition, **there is a noticeable increase in the restriction of movement of human rights defenders, including through the imposition of travel bans.**” (Emphasis added)

9. In the light of the deleterious trend towards the greater imposition of travel bans as a means of controlling and constraining journalists, activists, and others, ARTICLE 19 urges this Court to use the opportunity afforded by these Applications to acknowledge that such State action is capable of amounting to a *prima facie* violation of Article 10, whether read in conjunction with Article 2 of the Fourth Protocol, or alone.
10. Of course, ARTICLE 19 recognizes that the existence of an infringement is not the end of the analysis, and that there may be circumstances (for instance in the context of pre-trial bail conditions or in similar circumstances) in which a State may successfully demonstrate that a travel restriction is justified as

a proportionate restriction taken in pursuit of a legitimate aim. But ARTICLE 19 submits that the starting point is clear: a travel restriction imposed upon a journalist will constitute an infringement of Article 10 of the Convention, and the State will be required to demonstrate that the measure is provided by law, justified, and proportionate, as Article 10(2) demands.

SUBMISSION II: The Court's consideration of Article 18 must take account of the wider background to any application

11. The function of Article 18 of the Convention is to act '*as a defence against abusive limitations of Convention rights and freedoms and thus to prevent the resurgence of undemocratic regimes in Europe*'¹⁶ recognizing that '*States could always and would always find excuses or reasons to limit, restrict, and ultimately hollow out individual rights and freedoms.*'
12. Article 18 requires that the restrictions imposed upon rights protected under the Convention must only be applied for the reasons formally provided by the state imposing those restrictions. Accordingly, Article 18 requires that states act in good faith at all times. As this Court stated in the case of *Khodorkovsky and Lebedev v Russia*, there is a '*rebuttable assumption*' that states act in good faith, but it is open to an applicant to show that '*the real aim of the authorities was not the same as that proclaimed (or as can be reasonably inferred from the context).* Thus the Court has to apply a very exacting standard of proof to such allegations.'¹⁷
13. The presumption that a state will act in good faith will be rebutted where the circumstances demonstrate that state authorities have in fact exercised their powers for ulterior purposes. This Court has found violations of Article 18 in circumstances where pre-trial detention enacted by a State has *in fact* been used for a purpose other than the legitimate purpose for pre-trial detention,¹⁸ namely '*of bringing [a person] before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.*'¹⁹
14. The Court's jurisprudence on Article 18 has been comprehensively surveyed and distilled by the Grand Chamber in its recent judgment in *Merabishvili v Georgia*.²⁰ In that case, the Grand Chamber clarified that, notwithstanding the historic presumption of good faith on the part of states parties to the Convention, it is open to an applicant to establish that a state has, in the circumstances of any given case, acted for an unlawful predominant purpose.²¹ As explained in *Mammadov v Azerbaijan*, that proof can be made out by way of inference from factual information.²² Further, the Grand Chamber in *Merabishvili* clarified that it must be sensitive to the evidentiary difficulties often faced by parties before it and, as a result, '*[r]eports or statements by international observers, non-governmental organisations or the media, or the decisions of other national or international courts*

*are often taken into account to, in particular, shed light on the facts, or to corroborate findings made by the Court.'*²³

15. ARTICLE 19 notes that, in the recent judgment of *Jafarov v Azerbaijan*, this Court employed a structured approach to the analysis of a potential Article 18 violation, applying a three-part test in considering whether or not the State has acted in good faith.²⁴ First, the Court will examine '*the general context of the increasingly harsh and restrictive legislative regulation*' concerning the relevant field. Secondly, the Court will examine the statements of high-ranking State officials together with articles published in pro-government media relevant to the matter in issue. Thirdly, the Court will examine whether a pattern has emerged where individuals in the same positions as the applicants have been targeted in the same or similar terms.
16. ARTICLE 19 invites this Court, in carrying out its analysis in respect of the three-part test outlined in *Jafarov*, to take into account the up-to-date information regarding the scale and ubiquity of **increasingly harsh restrictions on the media and human rights defenders in Azerbaijan** (supported by state officials) which is set out in detail in the 9 October 2017 joint submission annexed to these Written Comments. The Court is invited to read that submission in full, but particular attention is drawn to the following matters:
 - 16.1. On 5 December 2017, the Council of Europe's Committee of Ministers took the unprecedented step of initiating infringement proceedings against Azerbaijan under Article 46(4) of the Convention in respect of Azerbaijan's persistent failure to recognize and give effect to this Court's judgment requiring the release of the opposition activist Ilgar Mammadov;
 - 16.2. In recognition of the ongoing human rights crisis in the country, the Parliamentary Assembly of the Council of Europe on 11 October 2017 adopted a resolution expressing its continuing 'concern... about the reported prosecution and detention of leaders of non-governmental organisations (NGOs), human rights defenders, political activists, journalists, bloggers and lawyers, allegedly in retaliation for their work.'²⁵
 - 16.3. As documented by the work of human rights organisations,²⁶ the Azerbaijani authorities dominate the country's media landscape, through regulations, direct ownership or indirect economic control. In the period under review, the majority of independent media outlets have been forced to close or go into exile, with those still operating inside the country subject to police raids, financial pressures, and prosecution of journalists and editors on politically-motivated charges. Where media outlets have been forced to stop

print publication and publish only online, their sites are subject to periodic blocking and throttling by the Azerbaijani authorities.

16.4. A number of media outlets in Azerbaijan have been forcibly closed, including:

- In June 2014, leading independent newspaper Zerkalo was forced to stop publishing in print, because government control of advertising and distribution networks made it economically untenable.²⁷ This was a consequence of government pressure on advertisers, and a ban on selling newspapers in the street or metro drastically reducing sales.
- In December 2014, the Baku Bureau of Radio Free Europe/Radio Liberty (RFE/RL) - Radio Azadliq - was forcibly closed after it was raided and placed under seal by police, supposedly in connection with financial mismanagement.²⁸ Journalists working for RFE/RL in Azerbaijan continue to be harassed by Azerbaijani officials.²⁹
- In July 2016, ANS TV was abruptly suspended by Azerbaijan's regulatory authority the National Television and Radio Council (NTRC), after the station planned an interview with the Turkish opposition figure Fethullah Gülen, under Article 11 of the Law on Television and Radio Broadcasting (to avoid propaganda of terrorism via TV or Radio).³⁰ The initial suspension was for one month, but in September 2016 the NTRC revoked ANS' licence³¹ and it remains off air.³²
- In September 2016, the last independent daily newspaper, Azadliq, stopped publishing following the arrest of its financial director Faiq Amirov, cutting off access to the newspaper's bank accounts and income. The outlet had been financially throttled for years, as the state-owned distribution network consistently failed to transfer sales proceeds that it owed to the newspaper.
- In August 2017, the authorities initiated a criminal case against Turan news agency for tax evasion, the last remaining independent media in the country. Its Editor-in-Chief, Mehman Aliyev, was also arrested on similar trumped-up tax evasion charges and its bank accounts have been frozen, forcing it to officially suspend all activities.³³

16.5. Moreover, Meydan TV, an independent online media outlet whose coverage includes human rights abuses and government corruption, closed its Baku office in December 2014 due to safety concerns. It continues to operate from its headquarters in Germany, in

cooperation with journalists in Azerbaijan, despite relentless harassment and state-level blocking of the site since May 2017.³⁴ In August 2015, the Azerbaijani Prosecutor General's Office launched a criminal case in relation to Meydan TV's activities under Articles 213.2.2 (evasion of taxes in a large amount), 192.2.2 (illegal business) and 308.2 (abuse of power) of the Criminal Code. In April 2016, 15 individuals were named in the criminal investigation, with Aynur Elgunash, Aytaj Ahmadova, Sevinj Vagifgizi, and Natig Javadli, subject to travel bans.³⁵ Journalists associated with Meydan TV have been repeatedly summoned for interrogations by the Prosecutor's Office.³⁶ The case remains open.

- 16.6. The access to foreign media outlets remains restricted, notwithstanding the government's acceptance of a specific UPR recommendation to expand media freedoms across broadcast platforms, including by ending its ban on foreign broadcasts on FM radio frequencies as well as restrictions on the broadcast of foreign language television programmes. A 2009 ban imposed by NTRC (based on Article 13 of Law of the Republic of Azerbaijan on Telecommunication), remains in place, preventing foreign entities from accessing national frequencies, which effectively took the BBC, Radio Free Europe/Radio Liberty, and Voice of America, off the air.³⁷ The NTRC, established on 5 October 2002 by Presidential Decree (#795), is fully funded from the state budget and the President directly appoints its members. Similarly, the Azerbaijani public service broadcaster, Ictimai, consistently demonstrates clear bias favourable to the government and ruling party, a problem exacerbated by the lack of media pluralism and alternative information sources in the country.
- 16.7. Civil society organisations focused on media freedom issues have also been targeted. In August 2014, the office of the Institute for Reporters' Freedom and Safety (IRFS) was raided by the authorities in the capital Baku as part of a broader crackdown on NGOs in Azerbaijan. They confiscated equipment, documents, and assets, and the staff were harassed and interrogated by Azerbaijan's Public Prosecutor office. As a result, IRFS has been forced to cease its operations in Azerbaijan; its Director, Emin Huseynov, remains in exile since fleeing Azerbaijan in 2014.³⁸
17. The combined effect of Azerbaijan's crackdown on free speech and the State's failure to investigate or punish attacks on critical voices has created and entrenched a climate and culture of impunity. Where punishment or sanction has ensued, it has largely targeted the attacked rather than the attacker.

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¹ *Autronic AG v Switzerland* [1990] ECHR 12; (1990) 12 EHRR 485, para 47.

² *Piermont v France* [1995] ECHR 14.

³ *Ibid.*, para 81.

⁴ *Cox v Turkey* [2010] ECHR 700; (2012) 55 EHRR 13.

⁵ *Autronic AG v Switzerland, op.cit.*, paras 50 and 52.

⁶ *Cox v Turkey, op.cit.*, para 31.

⁷ David Kaye, "The other travel ban" (22 November 2017), published on the website of the Index on Censorship, available at <http://bit.ly/2naMEa> (last accessed 24 January 2018).

⁸ On 5 December 2017, both the Special Rapporteur on Freedom of Expression, and the Special Rapporteur on the Situation of Human Rights Defenders, issued a joint statement urging the removal of the travel ban on Khadija Ismayilova, one of the Applicants in the present proceedings. The statement comments: 'The ban stifles her right to freedom of expression as it is aimed at preventing her from travelling abroad to speak about human rights issues. We urge the authorities to lift it and to ensure that journalism is not being restricted under false pretenses;' available at: <http://bit.ly/2k7RDTf> (last accessed 24 January 2018).

⁹ Report of the Special Rapporteur on the Situation of Human Rights Defenders, Michel Forst, Addendum 'Observations on communications transmitted to Governments and replies received' (20 February 2017), UN doc: A/HRC/34/52/Add. 1 ('Forst Report').

¹⁰ *Ibid.*, para 365.

¹¹ *Ibid.*, para 583.

¹² *Ibid.*, para 658.

¹³ *Ibid.*, para 735.

¹⁴ *Ibid.*, para 603.

¹⁵ *Ibid.*, paras 633-655.

¹⁶ See *Navalnyy and Ofitserov v Russia* [2016] ECHR 202, Joint Partly Dissenting Opinion of Judges Nicolaou, Keller, and Dedov, para 2.

¹⁷ *Khodorkovskiy and Lebedev v Russia* [2013] ECHR 747; (2014) 59 EHRR 7, [899]. See also: *Lutsenko v Ukraine* (App No. 6492/11) (Judgment of 3 July 2012), para 106.

¹⁸ See, for instance: *Merabishvili v Georgia* [2016] ECHR 523, [106]; *Gusinskiy v Russia* [2004] ECHR 205; (2005) 41 EHRR 17, [76]; *Tymoshenko v Ukraine* [2013] ECHR 389; (2014) 58 EHRR 3, [299]-[301]; *Cebotari v Moldova* [2007] ECHR 920, [53]; and *Lutsenko v Ukraine*, [108].

¹⁹ ECHR, Article 5(1)(c).

²⁰ *Merabishvili v Georgia* [2017] ECHR 1070 ('*Merabishvili*').

²¹ *Merabishvili*, [311]-[314].

²² *Mammadov v Azerbaijan* [2014] ECHR 504, [142].

²³ *Merabishvili*, [315]-[317].

²⁴ *Jafarov v Azerbaijan* [2010] ECHR 149.

²⁵ Azerbaijan's Chairmanship of the Council of Europe: what follow-up on respect for human rights?, available at <http://bit.ly/2rIHJyf>.

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- ²⁶ See, e.g. Submission of ARTICLE 19 and other freedom of expression groups to the Universal Periodic Review of Azerbaijan, 9 October 2017; available at <http://bit.ly/2Ghsb85>.
- ²⁷ Reporters Without Borders (RSF), *De stop publishing*, 20 June 2014, available at <http://bit.ly/2FjxEDj>.
- ²⁸ RFE/RL - Radio Azadliq, *Azadliq Radio Baku Bureau Sealed Shut*, 26 December 2014, available at <http://bit.ly/2DRupMX>.
- ²⁹ RFE/RL, *RFE/RL's Azerbaijani Service: Radio Azadliq*, available at <http://bit.ly/2GIDV9y>.
- ³⁰ IRFS, *Private Broadcaster ANS TV's Broadcast Suspended for One Month*, 18 July 2016, available at <http://bit.ly/2nflzym>.
- ³¹ Council of Europe (CoE)'s PACE, *The functioning of democratic institutions in Azerbaijan (provisional report)*, p.12
- ³² Chai-khana, *Azerbaijan's ANS: Death of a TV Station*, (17 July 2017), available at: <http://bit.ly/2ngb2Tv>.
- ³³ Council of Europe, *Statement on the arrest of Mehman Aliyev in Azerbaijan*, (25 August 2017) available at <http://bit.ly/2wzfhAd>.
- ³⁴ Eurasianet, *Azerbaijan: Court Upholds the Blocking of Independent Media Outlets*, 15 May 2017, available at <http://www.eurasianet.org/node/83591>.
- ³⁵ Meydan TV, *Fifteen journalists named in criminal investigation of Meydan TV*, 21 April 2016, available at <https://www.meydan.tv/en/site/news/13829/>
- ³⁶ E.g. <https://www.meydan.tv/en/site/news/24362>.
- ³⁷ RFE/RL, *Azerbaijan Bans RFE/RL, Other Foreign Radio From Airwaves*, (30 December 2008), available at <http://bit.ly/2FmfiYZ>.
- ³⁸ The Guardian, *Swiss fly out opposition journalist hiding at its Azerbaijan embassy*, (14 June 2015), available at <http://bit.ly/2GmBxiL>.