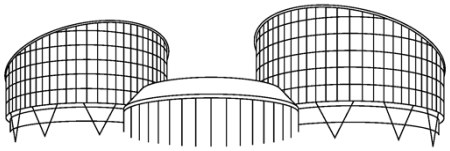

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF TAGIYEV AND HUSEYNOV v. AZERBAIJAN

(Application no. 13274/08)

JUDGMENT

Art 10 • Freedom of expression • Criminal conviction for publication of an article criticizing Islam • Right of religious people not to be insulted on grounds of their beliefs • Domestic courts' failure to justify qualification of impugned remarks as incitement to religious hatred • Domestic courts' failure to balance competing interests at stake • Severity of sanctions • Proportionality

STRASBOURG

5 December 2019

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Tagiyev and Huseynov v. Azerbaijan,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Angelika Nußberger, *President,*
Gabriele Kucsko-Stadlmayer,
Ganna Yudkivska,
Síofra O'Leary,
Mārtiņš Mits,
Lətif Hüseynov,
Lado Chanturia, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 5 November 2019,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 13274/08) against the Republic of Azerbaijan lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Azerbaijani nationals, Mr Rafig Nazir oglu Tagiyev (*Rafiq Nəzir oğlu Tağıyev* – "the first applicant") and Mr Samir Sadagat oglu Huseynov (*Samir Sədaqət oğlu Hüseynov* – "the second applicant") ("the applicants"), on 7 March 2008.

2. The applicants were represented by Mr I. Ashurov, a lawyer based in Azerbaijan. The Azerbaijani Government ("the Government") were represented by their Agent, Mr Ç. Əsgərov.

3. The applicants alleged, in particular, that their criminal conviction for publication of an article had amounted to a breach of their right to freedom of expression.

4. By a letter of 14 December 2011 the Court was informed of the first applicant's death on 23 November 2011 and the wish of his wife, Ms Maila Bulud gizi Tagiyeva (*Mailə Bulud qızı Tağıyeva*), to continue the proceedings before the Court in the first applicant's stead.

5. On 17 May 2017 notice of the complaints concerning Articles 7 and 10 of the Convention was given to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

By a letter of 9 August 2017, Ms Maila Tagiyeva and the second applicant informed the Court that they would be represented by Mr R. Hajili, a lawyer based in Strasbourg, following the death of Mr I. Ashurov and that the second applicant would also be represented by Mr K. Agaliyev, a lawyer based in Azerbaijan.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The first applicant was born in 1950 and at the time of the publication of the article lived in Baku. The second applicant was born in 1975 and resides in Lankaran.

A. Background information

7. The first applicant was a well-known writer and columnist, who collaborated with various newspapers and reviews writing under the pen name of Rafig Tagi. The second applicant worked as editor-in-chief of the *Sanat Gazeti (Art Newspaper)*, a bi-weekly newspaper which mostly covered issues related to art, literature and theatre, and had a circulation of around 800 copies.

8. On 1 November 2006 an article entitled "Europe and us" (*"Avropa və biz"*) and signed by the first applicant was published on page 24 of the *Sanat Gazeti* newspaper, issue no. 16 (060). It was one of the articles written by the first applicant in a series of "East-West studies". The full text of the article reads as follows:

> "Europe has always made mankind think of it not just as a geographical space, but in terms of a moral-ethical habitat. Since European values are in fact an achievement of all mankind, it should not lead to haughtiness on the part of the Europeans. Although unfortunately this haughtiness manifests itself from time to time, even materialising itself as fascism or in the form of a militarised aggressive nation.
>
> Of course, fascism was Europe's unforgivable mistake.
>
> It turns out that the ideas of freedom and humanism emerged in Europe and they are effective and real only there. It is because of the coincidence of its moral postulates with these ideas that Christianity became well set in Europe. No other religion may be spread, disseminated in Europe. Europe has always refused and refuses the deceitful humanist ideas of other religions, including Islam. Morality in Islam is a juggling act; its humanism is not convincing. The Islamic humanism criteria cannot even resist the dialectic materialist criticism that we learnt by heart, became accustomed to. Islam is a type of Eastern despotism and may be considered only as one of the modifications of despotism. Islam would never transform into a moral imperative in Europe; it is incapable of that. Although it was carried as a coffin on the shoulders of the Ottoman Empire throughout Europe, no place was found to put it down. It was again brought and placed in the East, in the direction of Mecca. A man worshipping Jesus Christ would never give any consideration to the Prophet Muhammad. In comparison with Jesus Christ, the father of war fatwas (*müharibə fətvalarının atası*) the Prophet Muhammad is simply a frightful creature (*qorxunc bir məxluqdur*). At best, Islam would advance in Europe with tiny demographic steps. And maybe there would be a country in which Islam would be represented by a few individuals or terrorists living incognito (*tək-tək fiziki şəxslər, ya inkoqnito yaşayan terroristlər*).

Europe is a lost opportunity of the East. The East did not perceive human freedom, or did not want to do so. Human freedom in the East crawls along as a problem of lowest priority. A man deprived of social and public freedoms is promised illusory happiness at the level of dark Islamic sects. The way to paradise decorated with calamities is portrayed as a way out of social mires. Islam has caused hypocritical working principles in structures of Eastern countries. Its taboo system has caused a full fiasco of the East, rendering worthless the few bright public ideas and thoughts available in it. Look, religious science in the Islamic world consists of only multiplication of these taboos and its further improvement.

The West is always in dialectical and the East in metaphysical conditions. Only false progressive visions are possible in the Eastern metaphysical public status. Against the background of forward leaps of the West, the East looks like it has jumped back.

All attempts of Azerbaijan at building a secular State result from European influence. In these sincere attempts the Azerbaijani people has completely proved that it is a real member of the European family. Our State relations with Islamic countries are tedious and reluctant and diplomatically insincere. Our thinking people consider Islam in Azerbaijan as a mandatory, necessary Eastern sign, the residue of violence. Historically, at least in our most recent history, the 'sincere' relations of Azerbaijani heads of State towards Islam mostly proceed from insincere 'reigning' interests. For them the Muslims had always been among significant obstacles to be cleared off and had significance merely as electoral strata.

As much as I am the Pope, Azerbaijani heads of State were Muslims.

The Azerbaijani Turk even remains European within the strict Shiite-Islamic regime of Iran. Oppressions and any kind of persecution, or nationalist assimilation attempts, bring no success to Persian chauvinism. You should pay attention, the immigration from the South [Iranian Azerbaijan] is mainly towards Europe. This psychological self-knowledge says everything with no need for proof or explanations; one should take advantage of it. Frankly speaking, the Eastern elements in the character of the Azerbaijani who is in substance European seem like a foreign substance, I would say, a defect in the Azerbaijani man.

The Eastern belonging adds nothing to the system of values of the Azerbaijani man.

Russia too did not want to isolate itself from the West; even if it was subjected to regular military aggressions from the West. Peter the Great, having not been pleased with both sides said his word confidently and resolutely. His attempts to graft Europe on Russia succeeded entirely. Russian culture and Russian literature are entirely European sourced.

All States of the world, if looked at thoroughly, are engaged in the interpretation of freedom to a certain extent. The problem of human rights is discussed there in terms of Europe, taking it as a specimen. Since only European values are inevitable factors of progress. Human rights are a social European invention and are acceptable only in the European model.

European culture succeeded in removing the barbarism from human nature. With crimes reduced to a minimum; there is no need already for this living factor. First of all, man was able to overcome himself in the European area, could move away from the Evil and get closer to the Good. Europe also passed through bloody revolutions, but having gained experience earlier than others, it says no to them again first of all.

The refusal of revolution is a superiority of the West over the East.

Only societies which do not need social and political revolutions are good.

> By the way, the scientific and technical leaps in America and South-East Asia are also creations of European science. If there was no Europe, the world would probably have thought that the Sun rotates around the Earth. The East would have considered that the Earth is supported by bulls.
>
> Europe already finalised its painful moral, ethical, historical and philosophical searches, and managed to bring them to a necessary, decent, useful condition. Today the European man reaps the fruits of centuries-old searches and thoughts. Since these searches and thoughts were always practical, realistic and logical. The real life of a man exists only with logical deeds. The lack of logic is a shortage of intellect and is uselessness. Logic is the most important attribute of wit. The thoughts of the Eastern man are as if not for living; it is unknown for what they are. The European philosopher does not act as a clown like the Eastern philosopher, is not inclined to Sufism, or madness, stupidity. Yes, the Eastern philosopher is a pure actor; all his activities are decorated with imaginations of miniature ornament for the sake of ideology. The Eastern philosopher says something for the sake of saying something. The aim, the way is unknown, or quite abstract. In any case, the intention is to direct a man towards the life hereafter. The school of Eastern philosophers is a system of limited thinking inside Islam. The Eastern philosopher is at best in the role of an Islamic missionary. It is necessary to say that the link with Islam is not at all a merit for a philosopher.
>
> F. Nietzsche's works were beautiful exactly in that they were far from religion. In the case of Fyodor Dostoyevsky, although the link with religion looks so attractive, it was not so important. Outside Christianity, Dostoyevsky would still have been more interesting, more fundamental.
>
> ... The East-West comparative analysis is mainly met with envy and intolerance, and sometimes with severe pressure and reactions. And this article, which I have suddenly completed, has been written taking into account all the pressure and reactions. Moreover, I would say it is to be continued."

9. Following the publication of the article, the applicants were publicly criticised by various Azerbaijani and Iranian religious figures and groups. In particular, in November 2006 one of the prominent religious leaders of Iran, Ayatollah Muhammad Fazel Lankarani, issued a religious fatwa calling for the applicants' death. The publication of the article also triggered protests in Iran in front of the Azerbaijani embassy and consulate.

B. The applicants' criminal conviction and further developments

10. On 11 November 2006 criminal proceedings were instituted against the applicants under Article 283 of the Criminal Code (incitement to ethnic, racial, social or religious hatred and hostility).

11. It appears from the documents in the case file that on 14 November 2006 the investigator in charge of the case ordered a forensic linguistic and Islamic assessment (*məhkəmə-linqvistik islamşünaslıq ekspertizası*) of the impugned article. In particular, he asked the expert to establish whether there were any elements capable of leading to incitement to religious hatred and hostility in the article "Europe and us", and if so in which part of the article those elements appeared.

12. Report no. 11908, signed by J.M., the head of the religious expertise department at the State Committee for Work with Religious Organisations, was issued on 15 November 2006. The relevant part of the report reads as follows:

> "The examined writings, submitted for assessment, consisted of Rafig Tagi's article 'Europe and us' published on page 24 of the *Sanat Gazeti* newspaper no. 16 (060).
>
> The author writes, in paragraph 3, that 'Europe has always refused and refuses the deceitful humanist ideas of other religions, including Islam. Morality in Islam is a juggling act; its humanism is not convincing'. In fact, Islam is a humanist religion calling for high moral standards and good behaviour. The author tries to propagandise among the individuals hatred and hostility against Islam by using these sentences.
>
> The author further argues that 'in comparison with Jesus Christ, the father of war fatwas the Prophet Muhammad is simply a frightful creature'. The fact that the Prophet Muhammad had high moral standards and that he treated the people well was established in the Koran and in the works of various Western scholars. In the third verse of the Al-Qalam Surah of the Koran, Allah indicated that the Prophet Muhammad had high moral standards. The comparison between Jesus Christ and the Prophet Muhammad and the consideration that the one is preferable to the other seek to incite religious hatred and hostility.
>
> The author also notes that 'at best, Islam would advance in Europe with tiny demographic steps. And maybe there would be a country in which Islam would be represented by a few individuals or terrorists living incognito'. The author tries to prove by this sentence that Muslims living in the West are terrorists and Islam supports terrorism. However, terrorism is vigorously condemned in the verses of the Koran and the hadiths.
>
> In the last paragraph the author argues that 'the European philosopher does not act as a clown like the Eastern philosopher, is not inclined to Sufism, or madness, stupidity. Yes, the Eastern philosopher is a pure actor; all his activities are decorated with imaginations of miniature ornament for the sake of ideology. The Eastern philosopher says something for the sake of saying something. The aim, the way is unknown, or quite abstract'. By these words, he insulted the Eastern philosophers ridiculing them, claiming that they are mad and stupid. However, philosophers of worldwide renown such as Al-Farabi, Al-Ghazali and Ibn Rusd appeared in the East. This position of the author accusing all the Eastern philosophers of being clowns seeks to spread propaganda of hatred and hostility against Islam.
>
> The above-mentioned considerations give sufficient grounds to conclude the existence of elements of actions leading to incitement to religious hatred and hostility in Rafig Tagi's article 'Europe and us' published on page 24 of the *Sanat Gazeti* newspaper 16 (060).
>
> Conclusion
>
> There are elements of actions leading to incitement to religious hatred and hostility in Rafig Tagi's article 'Europe and us', published on page 24 of the *Sanat Gazeti* newspaper 16 (060), in paragraph 3 in the sentences 'Europe has always refused and refuses the deceitful humanist ideas of other religions, including Islam. Morality in Islam is a juggling act; its humanism is not convincing'; 'in comparison with Jesus Christ, the father of war fatwas the Prophet Muhammad is simply a frightful creature'; 'at best, Islam would advance in Europe with tiny demographic steps. And maybe there would be a country in which Islam would be represented by a few individuals or

terrorists living incognito'; and in the last paragraph in the sentences 'the European philosopher does not act as a clown like the Eastern philosopher, is not inclined to Sufism, or madness, stupidity. Yes, the Eastern philosopher is a pure actor; all his activities are decorated with imaginations of miniature ornament for the sake of ideology. The Eastern philosopher says something for the sake of saying something. The aim, the way is unknown, or quite abstract."

13. On 15 November 2006 the Nasimi District Court ordered the applicants' detention pending trial.

14. On 4 May 2007 the Sabayil District Court found the first applicant guilty under Article 283.1 of the Criminal Code (incitement to ethnic, racial, social or religious hatred and hostility, committed publicly or by use of the mass media) and sentenced him to three years' imprisonment. The court also found the second applicant guilty under Article 283.2.2 of the Criminal Code (incitement to ethnic, racial, social or religious hatred and hostility, committed by a person using his official position) and sentenced him to four years' imprisonment. It appears from the judgment that the applicants pleaded not guilty in the course of the court proceedings, arguing that they had not committed any criminal offence. The employees of the *Sanat Gazeti* newspaper and of the company which published it were questioned as witnesses before the court and stated that the impugned article had been sent by the first applicant to the newspaper and had been published following the authorisation of the second applicant. The court held that the passages of the impugned article referred to in report no. 11908 dated 15 November 2006 contained elements capable of leading to incitement to religious hatred and hostility. In that connection, the judgment relied on the conclusions of the forensic report, without making any legal assessment or giving further explanation. The relevant part of the judgment reads as follows:

"It was established by forensic linguistic and Islamic report no. 11908 dated 15 November 2006 completed in connection with that case that there are elements of actions leading to incitement to religious hatred and hostility in Rafig Tagi's article 'Europe and us', published on page 24 of the *Sanat Gazeti* newspaper 16 (060), in paragraph 3 in the sentences 'Europe has always refused and refuses the deceitful humanist ideas of other religions, including Islam. Morality in Islam is a juggling act; its humanism is not convincing'; 'in comparison with Jesus Christ, the father of war fatwas the Prophet Muhammad is simply a frightful creature'; 'at best, Islam would advance in Europe with tiny demographic steps. And maybe there would be a country in which Islam would be represented by a few individuals or terrorists living incognito'; and in the last paragraph in the sentences 'the European philosopher does not act as clown like the Eastern philosopher, is not inclined to Sufism, or madness, stupidity. Yes, the Eastern philosopher is a pure actor; all his activities are decorated with imaginations of miniature ornament for the sake of ideology. The Eastern philosopher says something for the sake of saying something. The aim, the way is unknown, or quite abstract.'

Therefore, assessing the totality of the collected evidence, the court considers that it was fully proven by the statements from the accused persons and the witnesses, and the forensic report that Tagiyev Rafig Nazir oglu was guilty of committing the criminal offence provided for by Article 283.1 of the Criminal Code of the Republic

of Azerbaijan and that Huseynov Samir Sadagat oglu was guilty of committing the criminal offence provided for by Article 283.2.2 of the Criminal Code of the Republic of Azerbaijan."

15. On 18 May 2007 the applicants appealed against that judgment, claiming a breach of their right to freedom of expression as protected under Article 10 of the Convention. In particular, they argued that the first-instance court's judgment had simply copied the conclusions of report no. 11908 dated 15 November 2006, without giving any consideration to the Court's case-law relating to Article 10 of the Convention.

16. On 6 July 2007 the Court of Appeal upheld the judgment of 4 May 2007. The wording of the appellate court's judgment was almost identical to the first instance court's judgment and made no mention of the applicants' particular complaint under Article 10 of the Convention.

17. On 31 August 2007 the applicants lodged a cassation appeal against the appellate court's judgment, reiterating their previous complaints.

18. On 22 January 2008 the Supreme Court upheld the Court of Appeal's judgment of 6 July 2007. The Supreme Court held in particular that it agreed with the lower courts' findings, based on the forensic linguistic and Islamic report and the witness statements, that the applicants had committed the criminal offence provided for by Article 283 of the Criminal Code.

19. In the meantime, on 28 December 2007 the applicants were dispensed from serving the remainder of their sentence by a presidential pardon decree and were released from prison, having spent more than one year and one month in detention.

20. On 19 November 2011 when the first applicant returned home from work he was stabbed by an unknown person who fled from the scene of the crime. On 23 November 2011 the first applicant died in hospital. A separate application (see application no. 72611/14) concerning the circumstances of the death of the first applicant, in which various complaints under Articles 2, 10 and 13 of the Convention were raised, is pending before the Court.

II. RELEVANT DOMESTIC LAW

A. The Constitution of the Republic of Azerbaijan

21. At the material time, the relevant provisions of the Constitution provided as follows:

Article 7 Azerbaijani State

"I. The Azerbaijani State is a democratic, secular, unitary republic governed by the rule of law. ..."

Article 18 Religion and State

"I. Religion is separated from the State in the Republic of Azerbaijan. All religious faiths shall be equal before the law. ..."

Article 47 Freedom of thought and speech

"I. Everyone enjoys the freedom of thought and speech.

II. No one shall be forced to proclaim or to repudiate his or her thoughts and beliefs.

III. Agitation and propaganda inciting racial, ethnic, religious, social discord and hostility are not allowed."

Article 48 Freedom of conscience

"I. Everyone enjoys the freedom of conscience.

II. Everyone has the right to freely determine his or her attitude to religion, to profess, individually or together with others, any religion or to profess no religion, to express and disseminate his or her beliefs concerning his or her attitude to religion. ..."

B. Criminal Code

22. Article 283 of the Criminal Code, in force at the relevant time, provided as follows:

Article 283 Incitement to ethnic, racial, social or religious hatred and hostility

"283.1. Acts aimed at inciting ethnic, racial, social or religious hatred and hostility, humiliation of national dignity, as well as acts aimed at restricting citizens' rights or establishing citizens' superiority on the basis of their ethnic, racial, social or religious origin, if committed openly or by means of the mass media, are punishable by a fine in the amount of one thousand to two thousand manats, or restriction of liberty for a period of up to three years, or deprivation of liberty for a period of two to four years.

283.2. The same acts, if committed:

283.2.1. with the use of violence or the threat of use of violence;

283.2.2. by a person using his official position;

283.2.3. by an organised group;

are punishable by deprivation of liberty for a period of three to five years.

..."

THE LAW

I. PRELIMINARY ISSUE

23. The Court notes at the outset that the first applicant, Mr Rafig Tagiyev, died on 23 November 2011 after lodging the present application and his wife, Ms Maila Tagiyeva, has expressed her wish to continue the proceedings before the Court in his stead (see paragraph 4 above). The Government did not dispute the standing of the first applicant's wife to pursue the application in the first applicant's stead.

24. The Court notes that in various cases in which an applicant has died in the course of the Convention proceedings, it has taken into account the statements of the applicant's heirs or of close family members expressing the wish to pursue the proceedings before the Court (see, among other authorities, *Jėčius v. Lithuania*, no. 34578/97, § 41, ECHR 2000-IX; *Pisarkiewicz v. Poland*, no. 18967/02, §§ 30-33, 22 January 2008; and *Ergezen v. Turkey*, no. 73359/10, §§ 27-30, 8 April 2014). The Court has accepted that the next-of-kin or heir may in principle pursue the application, provided that he or she has sufficient interest in the case (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 97, ECHR 2014, and *Ksenz and Others v. Russia*, nos. 45044/06 and 5 others, § 86, 12 December 2017). In view of the above and having regard to the circumstances of the present case, the Court accepts that Ms Maila Tagiyeva has a legitimate interest in pursuing the application in her late husband's stead. However, for reasons of convenience, the text of this judgment will continue to refer to Mr Rafig Tagiyev as "the first applicant", even though only Ms Maila Tagiyeva is today to be regarded as having the status of first applicant before the Court (see *Gulub Atanasov v. Bulgaria*, no. 73281/01, § 42, 6 November 2008, and *Isayeva v. Azerbaijan*, no. 36229/11, § 62, 25 June 2015).

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

25. The applicants complained under Articles 7, 9 and 10 of the Convention that their criminal conviction for publication of the impugned article had amounted to a violation of their rights protected by the Convention. Having regard to the circumstances of the case, the Court considers that the applicants' complaints do not raise a separate issue under Articles 7 and 9 of the Convention and fall to be examined under Article 10 of the Convention, albeit questions relating to Article 9 arise in the balancing exercise thereunder. Article 10 reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not

prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Admissibility

26. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

27. The applicants maintained their complaint, submitting that their criminal conviction for the publication of the article "Europe and us" had amounted to an unjustified interference with their right to freedom of expression. They argued that their criminal conviction for inciting religious hatred and hostility had not been justified by the domestic courts which simply relied on a forensic report concluding that there were elements capable of leading to incitement to religious hatred and hostility. In that connection, the applicants noted that the article in question could not be characterised as incitement to religious hatred and hostility and it had only sought to make a comparison between Islam and Christianity in the context of European and Eastern humanist values and human rights concepts.

28. Relying on the Court's case-law, the applicants submitted that a number of elements should have been taken into account in the assessment of the impugned article. In particular, the article had not targeted any religious group or its believers and there was no intent to incite hatred and hostility between various religious groups. The applicants further pointed out that the context should also be taken into account in the assessment of the case by the Court, as there was neither before nor after the publication of the impugned article any hostility among the religious groups in Azerbaijan, a country with a high degree of religious tolerance and peace. Moreover, the author of the article was a writer without any political affiliation and did not have any authority or influence on any social or religious group in the country. The article had been published in a newspaper which had a circulation of around 800 copies, with a very limited impact on society.

Lastly, the applicants drew attention to the severity of the sanctions imposed by the domestic authorities, arguing that they had been totally disproportionate.

29. The Government agreed that the applicants' criminal conviction had constituted an interference with their right to freedom of expression. That interference had been prescribed by Article 283 of the Criminal Code, and had pursued the legitimate aims of "the protection of the rights of others" and "the prevention of disorder".

30. The Government submitted that the applicants' criminal conviction had met a pressing social need, as the impugned article had contained an abusive attack on religion, in particular Islam, and had offended and insulted religious feelings. There had been a strong public reaction to that article. Various religious entities, such as the Juma Mosque Religious Community, the Azerbaijan Islamic Party and the Caucasian Muslims Office, had made public statements condemning the article and several public rallies had been held in the suburbs of Baku.

31. Relying on the Court's case-law, the Government submitted that the national authorities enjoyed a certain margin of appreciation in assessing the existence and extent of the necessity for such an interference and that in the case of "morals" it was not possible to discern throughout Europe a uniform conception of the significance of religion in society. Taking into account the margin of appreciation left to the Contracting States in such circumstances, the Government considered that the domestic courts had been entitled to interfere with the exercise of the applicants' right in the present case. Moreover, the domestic courts had struck the right balance between the rights protected under Articles 9 and 10 of the Convention. Furthermore, the Government drew attention to the fact that the applicants had been dispensed from serving the remainder of their sentence in December 2007 by a presidential decree.

2. The Court's assessment

(a) Whether there was interference

32. The Court notes that it is undisputed by the parties that the applicants' criminal conviction amounted to an interference with the exercise of their right to freedom of expression, as guaranteed by Article 10 of the Convention. The Court shares this view.

(b) Whether the interference was justified

33. Such an interference will constitute a breach of Article 10 unless it was "prescribed by law", pursued one or more legitimate aims under paragraph 2, and was "necessary in a democratic society" for the achievement of such an aim (see *Perinçek v. Switzerland* [GC], no. 27510/08, § 124, ECHR 2015 (extracts)).

(i) Prescribed by law

34. The Court observes that the applicants' criminal conviction had been based on Article 283 of the Criminal Code, which was accessible and foreseeable and, therefore, that the interference with their right to freedom of expression had been "prescribed by law" within the meaning of Article 10 § 2 of the Convention.

(ii) Legitimate aim

35. The Court observes that the Government submitted that the interference had pursued the legitimate aims of "the protection of the rights of others" and "the prevention of disorder". The Court endorses this assessment (see *İ.A. v. Turkey*, no. 42571/98, § 22, ECHR 2005-VIII, and *Aydın Tatlav v. Turkey*, no. 50692/99, § 21, 2 May 2006).

(iii) Necessary in a democratic society

(α) General principles

36. The general principles for assessing whether an interference with the exercise of the right to freedom of expression has been "necessary in a democratic society" are well-established in the Court's case-law and have been reiterated in numerous cases. The Court has stated, in particular, that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to Article 10 § 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society" (see, among many other authorities, *Pentikäinen v. Finland* [GC], no. 11882/10, § 87, ECHR 2015; *Perinçek*, cited above, § 196; and *Bédat v. Switzerland* [GC], no. 56925/08, § 48, ECHR 2016).

37. Moreover, there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debates on questions of public interest. The margin of appreciation of States is thus reduced where a debate on a matter of public interest is concerned (see *Baka v. Hungary* [GC], no. 20261/12, § 159, 23 June 2016, and *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 167, 27 June 2017). As paragraph 2 of Article 10 recognises, however, the exercise of freedom of expression carries with it duties and responsibilities. Amongst them, in the context of religious beliefs, is the general requirement to ensure the peaceful enjoyment of the rights guaranteed under Article 9 to the holders of such beliefs including a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane (see *Giniewski v. France*, no. 64016/00, § 43, ECHR 2006-I, and

Sekmadienis Ltd. v. Lithuania, no. 69317/14, § 74, 30 January 2018). Where such expressions go beyond the limits of a critical denial of other people's religious beliefs and are likely to incite religious intolerance, for example in the event of an improper or even abusive attack on an object of religious veneration, a State may legitimately consider them to be incompatible with respect for the freedom of thought, conscience and religion and take proportionate restrictive measures (see for example, *mutatis mutandis*, *Otto-Preminger-Institut v. Austria*, 20 September 1994, § 47, Series A no. 295-A; *İ.A.*, cited above, §§ 29-31; and *E.S. v. Austria*, no. 38450/12, § 43, 25 October 2018).

38. In addition, with regard, more specifically, to the interference with freedom of expression in cases concerning expressions alleged to stir up or justify violence, hatred or intolerance, the Court reiterates that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify violence or hatred based on intolerance, provided that any "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued (see, *mutatis mutandis*, *Gündüz v. Turkey*, no. 35071/97, § 40, ECHR 2003-XI). It certainly remains open to the relevant State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks (see *Erdoğdu v. Turkey*, no. 25723/94, § 62, ECHR 2000-VI).

39. In examining whether restrictions on the rights and freedoms guaranteed by the Convention can be considered "necessary in a democratic society", the Court has frequently held that the absence of a uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions broadens the Contracting States' margin of appreciation when regulating freedom of expression in relation to matters liable to offend personal convictions within the sphere of morals or religion (see *Wingrove v. the United Kingdom*, 25 November 1996, § 58, *Reports of Judgments and Decisions* 1996-V; *Aydın Tatlav*, cited above, § 24; and *E.S.*, cited above, § 44).

40. The adjective "necessary" implies the existence of a "pressing social need", which must be convincingly established. Admittedly, it is first of all for the national authorities to assess whether there is such a need capable of justifying that interference and, to that end, they enjoy a certain margin of appreciation (see, for instance, *Erdoğdu*, cited above, § 53). However, in the context of the freedom of press the authorities enjoy only a limited margin of appreciation in assessing whether "a pressing social need" exists (see *Görmüş and Others v. Turkey*, no. 49085/07, § 42, 19 January 2016). Moreover, the margin of appreciation is coupled with supervision by the

Court both of the law and the decisions applying the law, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see, among many other authorities, *Karataş v. Turkey* [GC], no. 23168/94, § 48, ECHR 1999-IV, and *Perinçek*, cited above, § 196).

41. The Court's supervisory function is not limited to ascertaining whether the national authorities exercised their discretion reasonably, carefully and in good faith. It has rather to examine the interference in the light of the case as a whole and to determine whether the reasons adduced by the national authorities to justify it were "relevant and sufficient" and whether the measure taken was "proportionate" to the legitimate aim pursued. In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10 of the Convention (see *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI). In order to determine its proportionality, the Court must consider the impugned interference not only in the light of the content of the statements at issue, but also the context in which they were made. Furthermore, the nature and severity of the penalty imposed are also factors to be taken into account (see, for example, *Gündüz*, § 42, and *Bédat*, § 79, both cited above).

(β) Application of the above principles to the present case

42. In the present case, the first and second applicants were prosecuted in criminal proceedings and were sentenced to three and four years' imprisonment, respectively, for the publication of the article "Europe and us" in the *Sanat Gazeti* newspaper. In particular, relying on a forensic report, the domestic courts found the applicants guilty under Article 283 of the Criminal Code for inciting religious hatred and hostility in using the following four remarks in the above-mentioned article: (a) "Europe has always refused and refuses the deceitful humanist ideas of other religions, including Islam. Morality in Islam is a juggling act; its humanism is not convincing"; (b) "in comparison with Jesus Christ, the father of war fatwas the Prophet Muhammad is simply a frightful creature"; (c) "at best, Islam would advance in Europe with tiny demographic steps. And maybe there would be a country in which Islam would be represented by a few individuals or terrorists living incognito"; and (d) "the European philosopher does not act as a clown like the Eastern philosopher, is not inclined to Sufism, or madness, stupidity. Yes, the Eastern philosopher is a pure actor; all his activities are decorated with imaginations of miniature ornament for the sake of ideology. The Eastern philosopher says something for the sake of saying something. The aim, the way is unknown, or quite abstract".

43. The Court observes at the outset that the Government did not argue before it that the impugned remarks contained in the above-mentioned article constituted hate speech and that, therefore, the applicants should not benefit from the protection of Article 10 of the Convention by virtue of the application of Article 17 of the Convention (compare *Perinçek*, cited above, §§ 103-15, and *Stern Taulats and Roura Capellera v. Spain*, nos. 51168/15 and 51186/15, §§ 25-42, 13 March 2018). Moreover, the Court sees nothing in the case file to suggest that the impugned remarks were directed against the Convention's underlying values or that by making them the applicants attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down therein (compare *Belkacem v. Belgium* (dec.), no. 34367/14, §§ 29-37, 27 June 2017, and *ROJ TV A/S v. Denmark* (dec.), no. 24683/14, §§ 34-42, 17 April 2018).

44. The issue before the Court therefore involves weighing up the conflicting interests of the exercise of two fundamental freedoms, namely the right of the applicants to impart to the public their views on religion in the press on the one hand, and the right of others to respect for their freedom of thought, conscience and religion on the other (see *Otto-Preminger-Institut*, § 55; *İ.A.*, § 27; and *Aydın Tatlav,* § 26, all cited above). The Court reiterates that a religious group must tolerate the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith, as long as the statements at issue do not incite to hatred or religious intolerance (see *E.S.*, cited above, § 52).

45. In that connection, the Court notes that, although the article "Europe and us" contained several remarks about Islam and its social and philosophical implications, it is clear from the reading of the whole text that the article mainly dealt with the comparison between Western and Eastern values, expressing the author's ideas about the role of religion in the formation of those values, as well as the impact of those values in the context of human rights and development in the world and in Azerbaijan. Therefore, the article should not be examined only in the context of a matter relating to religious beliefs, but also in the context of a debate on a matter of public interest, namely the role of a religion in society and its role in the development of society.

46. As regards the content of the impugned remarks characterised by the domestic courts as incitement to religious hatred and hostility, the Court notes that some of these remarks, in particular those concerning the Prophet Muhammad and Muslims living in Europe (see paragraph 42 above), may be seen by certain religious people as an abusive attack on the Prophet of Islam and Muslims living in Europe, capable of causing religious hatred. However, it is first of all for the national authorities to carry out a comprehensive assessment of the impugned remarks, putting forward relevant and sufficient reasons for justifying the interference and carefully

balancing the applicants' right to freedom of expression with the protection of the right of religious people not to be insulted on the grounds of their beliefs.

47. In that connection, the Court notes that it cannot, in the instant case, accept the reasons provided by the domestic courts as relevant and sufficient for the purpose of justifying the interference in question. It observes that the domestic courts confined themselves in their decisions to reiterating the conclusions of a forensic report, without giving any explanation as to why the particular remarks contained in the article constituted incitement to religious hatred and hostility. The domestic courts failed to examine the report and merely endorsed its conclusions. The relevant assessment clearly went far beyond resolving mere language and religious issues, such as, for instance, defining the meaning of particular words and expressions or their religious importance, and provided, in essence, a legal characterisation of the impugned remarks. The Court finds that situation unacceptable and stresses that all legal matters must be resolved exclusively by the courts (see *Dmitriyevskiy v. Russia*, no. 42168/06, § 113, 3 October 2017, and *Maria Alekhina and Others v. Russia*, no. 38004/12, § 262, 17 July 2018).

48. The domestic courts also failed to carry out any assessment of the impugned remarks by examining them within the general context of the article. On the contrary, they examined the impugned remarks detached from the general context and content of the article, without assessing the author's intention, the public interest of the matter discussed and other relevant elements. However, domestic courts in such proceedings are required to consider whether the context of the case, the public interest and the intention of the author of the impugned article justified the possible use of a degree of provocation or exaggeration (compare *Paraskevopoulos v. Greece*, no. 64184/11, § 40, 28 June 2018). Moreover, the Court cannot accept the Government's assertion that the domestic courts struck the right balance between the rights protected under Articles 9 and 10 of the Convention, as the domestic courts in their decisions did not even try to balance the applicants' right to freedom of expression with the protection of the right of religious people not to be insulted on the grounds of their beliefs (see paragraphs 14, 16 and 18 above).

49. The Court further considers it necessary to draw attention to the severity of the penalties imposed on the applicants, who were convicted in criminal proceedings and given sentences of three and four years' imprisonment, respectively, spending more than one year and one month in detention. The Court reiterates in this connection that a criminal conviction is a serious sanction, having regard to the existence of other means of intervention and rebuttal (see *Perinçek*, cited above, § 273). Moreover, although sentencing is in principle a matter for the national courts, the Court does not consider that the circumstances of the present case disclosed any justification for the imposition on the applicants of such severe sanctions,

which were capable of producing a chilling effect on the exercise of freedom of expression in Azerbaijan and dissuading the press from openly discussing matters relating to religion, its role in society or other matters of public interest (see *Aydın Tatlav,* cited above, § 30, and *Fatullayev v. Azerbaijan*, no. 40984/07, § 128, 22 April 2010).

50. The foregoing considerations are sufficient to enable the Court to conclude that the applicants' criminal conviction was disproportionate to the aims pursued and, accordingly, not "necessary in a democratic society". There has accordingly been a violation of Article 10 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

51. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

1. Pecuniary damage

52. The applicants, without indicating an exact amount, claimed compensation in respect of pecuniary damage, arguing that they had lost earnings over a period of 408 days as a result of their criminal conviction. In that connection, the first applicant submitted that his average monthly salary and earnings amounted to 800-900 Azerbaijani manats (AZN) and the second applicant submitted that his average monthly salary and earnings totalled AZN 650-800. The applicants further claimed that their family had spent approximately 400-500 euros (EUR) per month on sending food to them and regularly visiting them in prison.

53. The Government contested the claims, submitting that the applicants had failed to substantiate them.

54. As regards the applicants' claim for loss of earnings, the Court reiterates that, under Rule 60 of the Rules of Court, any claim for just satisfaction must be itemised and submitted in writing, together with the relevant supporting documents or vouchers, failing which the Court may reject the claim in whole or in part. In the present case, even assuming that there is a causal link between the damage claimed and the violation found, the Court observes that the applicants did not submit any documentary evidence in support of their claim (see *Hajibeyli and Aliyev v. Azerbaijan*, nos. 6477/08 and 10414/08, § 73, 19 April 2018, and *Haziyev v. Azerbaijan*, no. 19842/15, § 48, 6 December 2018).

55. As to the part of the claim concerning the food and visiting expenses, the Court does not find any causal link between the damage claimed and the violation found (see *Fatullayev,* cited above, § 186; *Efendiyev v. Azerbaijan*, no. 27304/07, § 60, 18 December 2014; and *Yagublu v. Azerbaijan*, no. 31709/13, § 68, 5 November 2015).

56. For the above reasons, the Court rejects the applicants' claims in respect of pecuniary damage.

2. Non-pecuniary damage

57. The applicants each claimed EUR 50,000 in respect of non-pecuniary damage.

58. The Government submitted that a finding of a violation would constitute sufficient just satisfaction.

59. The Court considers that the applicants have suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards each applicant the sum of EUR 12,000 under this head, plus any tax that may be chargeable on this amount.

B. Costs and expenses

60. The applicants each claimed EUR 1,450 for costs and expenses incurred before the Court. In support of this claim, they submitted a contract between Ms Maila Tagiyeva and Mr R. Hajili and a contract between the second applicant and his representatives, Mr R. Hajili and Mr K. Agaliyev. The applicants further claimed EUR 5,000 for costs and expenses incurred before the domestic courts and the preparation of the initial application to the Court on the basis of the legal services conducted by Mr I. Ashurov. No contract was submitted in support of that claim.

61. The Government argued that the claims were unsubstantiated. In particular, they pointed out that no relevant documentation was submitted in support of the amount claimed for legal expenses incurred before the domestic courts and the preparation of the initial application to the Court by Mr I. Ashurov. They further asked the Court to reject the part of the claim concerning the applicants' representation before the Court, disputing the authenticity of the contracts submitted by the applicants and pointing out that it could not be established on the basis of these contracts that the costs had actually been incurred.

62. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the Court observes that the applicants did not submit any document in support of their claim for legal expenses

incurred before the domestic courts and the preparation of the initial application to the Court by Mr I. Ashurov. As to the remaining part of the claim, the Court notes that the applicants made identical submissions before the Court and the amount of work done by their representatives before the Court was limited to the preparation of their observations. Having regard to these facts, as well as to the documents in its possession and the above criteria, the Court considers it reasonable to award to each applicant the sum of EUR 850 covering costs under all heads.

C. Default interest

63. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Holds* that the first applicant's wife, Ms Maila Tagiyeva, has standing to pursue the application in the first applicant's stead;

2. *Declares* the application admissible;

3. *Holds* that there has been a violation of Article 10 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay Ms Maila Tagiyeva and the second applicant within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 12,000 (twelve thousand euros) each, plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 850 (eight hundred and fifty euros) each, plus any tax that may be chargeable to them, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the claim for just satisfaction.

Done in English, and notified in writing on 5 December 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Angelika Nußberger
President