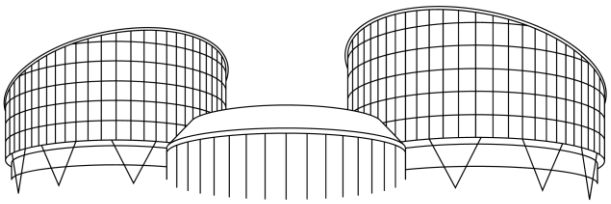

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

FIRST SECTION

CASE OF SEYIDZADE v. AZERBAIJAN

(Application no. 37700/05)

JUDGMENT

STRASBOURG

3 December 2009

FINAL

03/03/2010

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 Seyidzade v. Azerbaijan,

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

Nina Vajić, *President,*
Anatoly Kovler,
Khanlar Hajiyev,
Dean Spielmann,
Sverre Erik Jebens,
Giorgio Malinverni,
George Nicolaou, *judges,*
and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 12 November 2009,

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

PROCEDURE

1. The case originated in an application (no. 37700/05) 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 an Azerbaijani national, Mr Miraziz Mirasgar oglu Seyidzade (*Mirəziz Mirəsgər oğlu Seyidzadə* – "the applicant"), on 7 October 2005.

2. The applicant, who had been granted legal aid, was represented by Mr A. Rzayev, a lawyer practising in Baku. The Azerbaijani Government ("the Government") were represented by their Agent, Mr Ç. Asgarov.

3. The applicant alleged, in particular, that his right to stand for election, as guaranteed by Article 3 of Protocol No. 1 to the Convention, had been infringed.

4. On 11 January 2007 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1949 and lives in Baku.

6. The applicant held positions as head of the education department of the Caucasus Muslims Board (*Qafqaz Müsəlmanlar İdarəsi*, the official governing body of Muslim religious organisations in Azerbaijan), member of the Qazi (Islamic Judges') Council (*Qazılar Şurası*) of the Caucasus

Muslims Board, and director of the Sumgayit branch of Baku Islamic University. He was also a founder and editor-in-chief of a journal called *Kelam*, published since 2002 and printing various articles with an Islamic religious content.

7. On an unspecified date, the applicant lodged an application with the Constituency Electoral Commission ("the ConEC") for the single-seat Massalli Village Electoral Constituency No. 71 for registration as a candidate in the upcoming elections to the Milli Majlis (Parliament) on 6 November 2005. Together with the application, he submitted a written undertaking to terminate any professional activities incompatible with the office of member of parliament.

8. According to the minutes of the joint meeting of the Qazi Council and Religious Science Council of the Caucasus Muslims Board held on 14 July 2005, the applicant's membership of the Qazi Council was terminated on the basis of his own resignation letter. It was noted that the resignation was accepted in view of the applicant's having nominated himself as a candidate for the parliamentary elections.

9. According to an order issued by the chairman of the Caucasus Muslims Board on 15 August 2005, the applicant was relieved of his positions as head of the Board's education department and director of the Sumgayit branch of Baku Islamic University.

10. On 25 August 2005 the ConEC refused to register the applicant as a candidate because he "was continuing his activities as a professional clergyman (*peşəkar din xadimi*)", which were incompatible with the requirements of Article 14.2.4 of the Electoral Code.

11. The applicant complained about this decision to the Central Electoral Commission ("the CEC"). On 27 August 2005 the CEC rejected the applicant's complaint. The entire CEC decision consisted of the following:

> "[The CEC], having examined the complaint of Miraziz Mirasgar oglu Seyidzade, who has nominated himself for election to the Milli Majlis ..., in accordance with Articles 19.4, 19.14, 28.4 and 112.9 of the Electoral Code and Articles 3.5 and 3.6 of the Law of 27 May 2003 on the approval and entry into force of the Electoral Code, decides:
>
> To reject the complaint of Miraziz Mirasgar oglu Seyidzade as unsubstantiated."

12. The applicant lodged an appeal against this decision with the Court of Appeal, complaining that his candidacy had been terminated unlawfully as he had resigned from all positions involving "professional religious activity" and was no longer engaged in any religious activities. On 1 September 2005 the Court of Appeal rejected his appeal, finding that the CEC's decision was lawful. Specifically, the Court of Appeal noted:

> "According to the materials in the case file, Miraziz Mirasgar oglu Seyidzade, who has nominated himself for election to the Milli Majlis, is a clergyman.
>
> According to Article 56 of the Constitution of the Republic of Azerbaijan, the right of clergymen ... to participate in elections may be restricted.

> According to the requirements of Article 14.2.4 of the Electoral Code of the Republic of Azerbaijan, clergymen may not serve as members of the Milli Majlis while they are engaged in professional religious activity.
>
> The applicant's arguments that he had been relieved of his positions with the Caucasus Muslims Board and Baku Islamic University cannot be considered as a ground for upholding his claim.
>
> Specifically, the fact that [the applicant] has been relieved of the above-mentioned positions does not rule out his engaging in professional religious activity.
>
> On the other hand, according to Article 85 of the Constitution of the Republic of Azerbaijan, a clergyman may not be elected as a member of the Milli Majlis.
>
> Accordingly, given that the decision of the Central Electoral Commission was in compliance with the requirements of the Constitution and the Electoral Code of the Republic of Azerbaijan, the arguments advanced in the applicant's appeal cannot be considered as a basis for quashing this decision."

13. The applicant lodged a cassation appeal against this judgment with the Supreme Court. On 8 September 2005 the Supreme Court dismissed the appeal using the same reasoning.

14. The applicant attempted to have the proceedings reopened and the case reviewed by the Plenum of the Supreme Court, by lodging an additional cassation appeal with the Supreme Court's President. On 20 September 2005 the Supreme Court's President rejected his request, finding no grounds for reopening the proceedings.

15. Lastly, the applicant lodged a constitutional complaint. By an inadmissibility decision of 26 October 2005, the Constitutional Court refused to admit the complaint for examination on the merits, finding that the applicant had essentially disputed the factual findings of the courts of general jurisdiction (specifically, on the question whether the applicant was actually engaged in any "professional religious activity"). The Constitutional Court noted that it had no competence to review the correctness of the established factual circumstances of the case. It also stated the following with regard to the restriction of clergymen's right to stand for election in general:

> "According to Article 7 (I) of the Constitution, the Republic of Azerbaijan is a democratic, secular, unitary republic governed by the rule of law. Article 18 (I) of the Constitution provides that religion shall be separate from the State. In this context, the above provisions must inevitably be taken into account in the constitutional rules on formation of the supreme elected government body.
>
> The restriction on the election of clergymen to government bodies, which is based on the demands of the public interest, has the primary aim of separating religion from the State. The restriction serves the purposes of removing matters inherent in the State's functioning from the sphere of influence of religious communities, clerics and religious figures, and keeping such influence to a minimum.
>
> Another aim of the restriction is to separate religious voters from the clergy in the context of the election process, as a means to ensure that voters form their opinions and make their choice free from any undue interference.

It must be noted that the legal systems of a number of other States also provide for restrictions on the right of clergymen to stand for election. ...

Article 14.2.4 of the Electoral Code provides that clergymen cannot be members of the Milli Majlis, President of the Republic, or members of municipalities while they are engaged in professional religious activity. As such, the legislator applied the "religious-based eligibility requirement" restricting clergymen's right to serve as members of parliament only to periods when the latter are engaged in professional religious activity."

II. RELEVANT DOMESTIC LAW

A. Constitution of the Republic of Azerbaijan of 1995

16. 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.

II. The spreading and proselytising of religions which undermine human dignity and contradict the principles of humanism shall be prohibited.

III. The State education system shall be secular."

Article 56 Electoral rights

"I. Citizens of the Republic of Azerbaijan shall have the right to elect and be elected to the institutions of government, and to participate in referendums.

II. Persons whose legal incapacity has been determined by a court decision shall not have the right to participate in elections and referendums.

III. Members of the armed forces, judges, State officials, clergymen (*din xadimləri*), persons imprisoned pursuant to a final court judgment, and other persons specified in this Constitution and in legislation may be subject by law to restrictions on their right to participate in elections."

Article 85 Requirements for candidates for election to the Milli Majlis of the Republic of Azerbaijan

"I. Every citizen of the Republic of Azerbaijan not younger than 25 years of age may be elected as a member of the Milli Majlis ... in a manner stipulated by law.

II. Persons who have dual citizenship, those who have obligations *vis-à-vis* other States, those who work within the system of the executive or judicial power and those who carry out any other types of remunerated activity except scientific, pedagogical or creative activities, clergymen (*din xadimləri*), persons whose legal incapacity has been determined by a court decision, those who have been convicted of serious crimes and those who are serving prison sentences pursuant to a conviction under a final judgment, cannot be elected as members of the Milli Majlis ..."

B. Electoral Code of the Republic of Azerbaijan of 2003

17. At the material time, the relevant provisions of the Electoral Code provided as follows:

Article 13 Passive electoral rights

"13.1. Except for the cases stipulated in Article 56 of the Constitution of the Republic of Azerbaijan and in this Code, every citizen who has active electoral rights shall also have passive electoral rights, that is, he or she shall have the right to form a referendum campaign group and to be elected as a member of the Milli Majlis, as President or as a member of a municipality, provided he or she meets the candidacy requirements laid down by the Constitution of the Republic of Azerbaijan for these offices.

13.2. Restrictions on passive electoral rights shall be established by Articles 56, 85, and 100 of the Constitution of the Republic of Azerbaijan and by this Code.

13.3. Pursuant to Articles 56 (III), 85 and 100 of the Constitution of the Republic of Azerbaijan, the following persons shall not have passive electoral rights, that is, they shall not have the right to be elected as a member of the Milli Majlis, as President or as a member of a municipality:

13.3.1. persons serving prison sentences pursuant to a conviction under a final judgment;

13.3.2. persons convicted of the crimes under Articles 15.4-15.5 of the Criminal Code of the Republic of Azerbaijan;

13.3.3. citizens of the Republic of Azerbaijan with dual citizenship (until their second citizenship expires); and

13.3.4. citizens of the Republic of Azerbaijan who have obligations *vis-à-vis* foreign States (until such obligations are terminated) ..."

Article 14 Incompatibility of positions (*Vəzifələrin uzlaşmaması*)

"14.1. Cases of incompatibility of positions shall be established by Articles 56, 85 and 100 of the Constitution and by this Code.

14.2. Pursuant to Article 56 (III) of the Constitution of the Republic of Azerbaijan, the following persons shall not have the right to serve as members of the Milli Majlis, as President or as members of municipalities, by virtue of the positions they occupy:

14.2.1. Members of the armed forces (while in military service);

14.2.2. Judges (while in office);

14.2.3. Civil servants (while in State service); and

14.2.4. Clergymen (*din xadimləri*) (while engaged in professional religious activity (*peşəkar dini fəaliyyət ilə məsğul olduqları müddətdə*)).”

Article 53 Nomination of candidates on their own initiative or directly by voters

“...

53.3. An application containing a written undertaking by the candidate to terminate any activities incompatible with a post in an elected State or municipal body shall be submitted together with the notification mentioned in Article 53.2 of the Code. This application shall contain information on the candidate ([including] his or her official workplace (or type of activity, if not working) ...”

Article 69 Equality of registered candidates and referendum campaign groups

“69.1. All the registered candidates and referendum campaign groups shall have equal rights and responsibilities, taking into account their status.

69.2. Registered candidates and authorised representatives of referendum campaign groups who are in State or municipal service or who work in the mass media under an employment or civil contract shall be released from performing their official duties during the period of their participation in the election (referendum) campaign (this rule shall not apply to the [current] President of the Republic of Azerbaijan, [current] members of the Milli Majlis or [current] members of municipalities). The approved copy of the relevant order [on release from performing official duties] shall be submitted to the electoral commission registering the above-mentioned candidates or authorised representatives within 3 days, at the latest, from the day of registration. Such candidates or authorised representatives shall not abuse their official authority or positions in order to gain privileges or advantages.”

Article 143 Principles governing elections to the Milli Majlis

“125 members shall be elected to the Milli Majlis from single-seat constituencies (one member per constituency).”

Article 144 Right of the citizens of the Republic of Azerbaijan to be elected to the Milli Majlis

“The citizens of the Republic of Azerbaijan indicated in Article 85 of the Constitution of the Republic of Azerbaijan may be elected as members of the Milli Majlis ...”

C. Law on Freedom of Religion of 1992

18. At the material time, the Law on Freedom of Religion provided as follows:

Article 5 State and religious institutions

"In the Republic of Azerbaijan, religion and religious institutions (*dini qurumlar*) shall be separate from the State.

The State shall not delegate any of its functions to religious institutions and shall not interfere with their activities.

All religions and religious institutions shall be equal before the law. ...

Religious institutions shall not participate in the activities of political parties and shall not provide them with financial assistance.

In the event of the election or appointment of clergymen (*din xadimləri*) to positions in the institutions of government, their activities as clergymen (*onların din xadimi kimi fəaliyyəti*) shall be suspended for the period during which they occupy the relevant position."

D. Relevant domestic practice concerning the eligibility of civil servants to stand for election

19. The case of *Agayev v. Azerbaijan* (no. 7607/06, declared inadmissible by the Court in a Committee decision of 9 September 2009) contained the following facts relevant to the present case regarding the eligibility requirements laid down by Article 14 of the Electoral Code. The applicant in that case was a candidate in the elections of 6 November 2005 for the single-seat Saatli-Sabirabad-Kurdamir Electoral Constituency No. 65. One of his opponents, G.A., was the Head of the Saatli Regional Executive Authority ("the SREA"). Heads of regional executive authorities were appointed and removed from their posts by the President of the Republic. Following his formal registration as a candidate, G.A. was temporarily relieved of his official duties, without pay, until 16 November 2005, pursuant to an SREA decision of 5 September 2005 signed by G.A. himself. This decision was duly notified to the electoral authorities and the President's Office. G.A. also submitted an undertaking to terminate any activities incompatible with the office of member of parliament, if elected as such. The applicant challenged the lawfulness of the election process in the constituency before the domestic authorities, arguing that G.A. should have been definitively removed from his post by a presidential order prior to his formal registration as a candidate. The electoral authorities and courts dismissed the applicant's claims, noting that G.A. had been temporarily relieved of his duties in full compliance with Article 69.2 of the Electoral Code and that, therefore, he was not in a position to unduly influence the electoral process in his capacity as a high-ranking civil servant. For these reasons, G.A. was allowed to stand as a candidate. Subsequently, G.A. won the election in the constituency. On 2 December 2005 G.A. was definitively removed from his post by a presidential order.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1 TO THE CONVENTION

20. The applicant complained that, although he had resigned from all positions which could be construed as involving "professional religious activity", his nomination as a candidate for the parliamentary elections had been rejected arbitrarily, in breach of Article 3 of Protocol No. 1 to the Convention, which reads as follows:

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

A. Admissibility

21. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 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

22. The Government argued that the disqualification of clergymen, while they were engaged in professional religious activity, from serving as members of parliament was within the State's margin of appreciation in imposing conditions on the rights to vote and stand for election. This restriction was provided for by law and was not disproportionate and thus liable to thwart the free expression of the opinion of the people in the choice of legislature.

23. The Government noted that the Masally Region, where the applicant had intended to run as a candidate, was under the constant influence of the Islamic religious community and clergy. In this area, members of the clergy had an exceptional degree of authority among local inhabitants, which could be used as a source of undue influence on voters. As an active religious figure, the applicant would have had an unfair advantage over other candidates from the same electoral constituency.

24. The Government maintained that, despite the applicant's claim that he had resigned from all positions involving religious activity, he had continued to fulfil his professional duties as a clergyman, according to the information obtained by the electoral commissions. The Government also

noted that the applicant had continued to hold the position of editor-in-chief of *Kelam* during and after the election period.

25. The applicant noted that there was no precise legal definition of the term "clergyman" or "professional religious activity" in domestic law. Therefore, describing him as a "clergyman" and, on this basis, restricting his right to stand for election had not been prescribed by law. In any event, Article 14.2.4 of the Electoral Code specified only that clergymen could not serve as members of parliament. Therefore, the law did not preclude them from standing for election and from being elected, and simply required that clergymen cease their religious activity if and when elected to the Milli Majlis, and not at the time of their nomination for election. Therefore, the electoral authorities should have registered his candidacy based on a written undertaking that he would cease any "professional religious activity" if elected. Nevertheless, to be on the safe side, the applicant had taken precautionary measures and resigned from all positions which could be construed as involving "professional religious activity".

26. The applicant further argued that the domestic authorities' finding and the Government's submission that, in practice, he had continued to engage in professional religious activity had been incorrect. No evidence had been presented in support of this finding. As to his continued performance of duties as editor-in-chief of *Kelam*, the applicant argued, firstly, that this job qualified merely as journalistic (and not religious) activity and, secondly, that in any event he had stopped performing his functions as the journal's editor-in-chief at the time of his nomination for election.

2. The Court's assessment

(a) General principles

27. Article 3 of Protocol No. 1 enshrines a fundamental principle for effective political democracy, and is accordingly of prime importance in the Convention system (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 47, Series A no. 113). The Court has established that this provision guarantees individual rights, including the rights to vote and to stand for election. As important as those rights are, they are not, however, absolute. Since Article 3 recognises them without setting them out in express terms, let alone defining them, there is room for "implied limitations", and contracting States have a wide margin of appreciation in this sphere. In their internal legal orders they may make the rights to vote and to stand for election subject to conditions which are not in principle precluded under Article 3 (ibid., §§ 51-52; *Matthews v. the United Kingdom* [GC], no. 24833/94, § 63, ECHR 1999-I; and *Labita v. Italy* [GC], no. 26772/95, § 201, ECHR 2000-IV). The concept of "implied limitations" is of major importance for the determination of the relevance of the aims pursued by the restrictions on the rights guaranteed by this provision. Given that Article 3 of Protocol No. 1 is not limited by a specific list of "legitimate aims" such

as those enumerated in Articles 8-11, the States are therefore free to rely on an aim not contained in that list to justify a restriction, provided that this aim is compatible with the principle of the rule of law and the general objectives of the Convention. Moreover, in examining compliance with Article 3 of Protocol No. 1, the Court does not apply the tests of "necessity" or "pressing social need"; instead, it has focused mainly on two criteria: whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people (see *Yumak and Sadak v. Turkey* [GC], no. 10226/03, § 109 (iii), 8 July 2008).

28. While the Contracting States enjoy a wide margin of appreciation in imposing conditions on the right to vote and to stand for election, it is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see *Mathieu-Mohin and Clerfayt*, cited above § 52, and *Gitonas and Others v. Greece*, 1 July 1997, § 39, *Reports of Judgments and Decisions* 1997-IV). In particular, any conditions imposed must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage (see *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 62, ECHR 2005-IX). The Court also reiterates its approach in recent cases where, in the context of its examination of the compliance of statutory restrictions on electoral rights with the requirements of Article 3 of Protocol No. 1, it also had regard to the importance of the notion of "lawfulness" inherent in the Convention (see *Ādamsons v. Latvia*, no. 3669/03, §§ 116-19, 24 June 2008, where the Court, at the outset of its analysis, assessed the lawfulness of a legislative restriction on passive electoral rights; see also, *mutatis mutandis*, *Yumak and Sadak*, cited above, § 118, where the Court, at the outset of its analysis, noted that the issue of the foreseeability of the legislative measure complained of was not in dispute in that particular case).

29. Stricter requirements may be imposed on the eligibility to stand for election to parliament, as distinguished from voting eligibility (see *Melnychenko v. Ukraine*, no. 17707/02, § 57, ECHR 2004-X). States have broad latitude to establish constitutional rules on the status of members of parliament, including criteria for declaring them ineligible. These criteria vary according to the historical and political factors specific to each State. For the purposes of applying Article 3, any electoral legislation must be assessed in the light of the political evolution of the country concerned, so that features that would be unacceptable in the context of one system may be justified in the context of another (see *Mathieu-Mohin and Clerfayt*, cited

above, § 54; *Podkolzina v. Latvia*, no. 46726/99, § 33, ECHR 2002-II; and *Melnychenko*, cited above, § 55). While it is true that States have a wide margin of appreciation when establishing eligibility conditions in abstract, the principle that rights must be effective requires that the eligibility procedure contain sufficient safeguards to prevent arbitrary decisions (see *Podkolzina*, cited above, § 35, and *Russian Conservative Party of Entrepreneurs and Others v. Russia*, nos. 55066/00 and 55638/00, § 50, ECHR 2007-I).

30. The Court has held that Article 3 of Protocol No. 1 does not prevent, in principle, Contracting States from introducing general policy schemes by way of legislative measures whereby a certain category of individuals is treated differently from others, provided that the interference with the rights of the statutory category as a whole can be justified under the Convention. Where the domestic legislation in issue is sufficiently clear and precise as to the definition of the categories of persons affected and as to the scope of application of the impugned statutory restriction, it is necessary only to determine that the statute's underlying purpose is compatible with the proportionality requirements of the Convention. As long as the statutory distinction itself is proportionate, the task of the domestic authorities may be limited to establishing whether a particular individual belongs to the impugned statutory category (see *Ždanoka v. Latvia* [GC], no. 58278/00, §§ 112-14 and 125, ECHR 2006-IV, with further reference to *Rekvényi v. Hungary* [GC], no. 25390/94, §§ 34-50 and 58-62, ECHR 1999-III). In such cases, the Court's remaining role is simply to assess whether the procedures applied in the applicant's individual case, or the conclusions reached by the domestic authorities in applying the relevant domestic legislation, could be considered arbitrary (see *Ždanoka*, cited above, § 127). Where the definition of the impugned statutory category is wide or imprecise, it may be necessary to take an "individualised" approach in restricting the electoral rights of a person belonging to that category and to assess whether, in the specific individual case, his or her personal political involvement represented a possible danger to the democratic order (see, *mutatis mutandis*, *Ādamsons v. Latvia*, no. 3669/03, §§ 125, 24 June 2008).

(b) Application to the present case

31. In the present case, the applicant's request for registration as a candidate was refused on the basis of Article 85 (II) of the Constitution, which banned "clergymen" from being elected to parliament, and Article 14.2.4 of the Electoral Code, which made "clergymen" ineligible to serve as members of parliament while they were engaged in "professional religious activity".

32. The Court notes that the primary issue in dispute in the present case is the alleged unforeseeability and arbitrariness of the measure taken. In this context the applicant argued, firstly, that the relevant law was ambiguous in respect of the scope of the restriction imposed and, secondly, that it did not provide a precise definition of the categories of persons whose rights were

restricted. Accordingly, the main thrust of the applicant's complaint concerns the quality of the law on which this restriction was based. In particular, the foreseeability of the restriction is in dispute in the present case (contrast *Yumak and Sadak*, cited above, § 118).

33. In previous cases where the lawful basis and foreseeability of various measures complained of under Article 3 of Protocol No. 1 was not in dispute, the Court, as a general rule, limited its assessment of those measures solely to the questions of their compatibility with the requirements of legitimacy of aim and proportionality. The Court reiterates, however, that conditions imposed on the individual rights guaranteed by Article 3 of Protocol No. 1 may not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness (see paragraph 28 above). In the light of this principle, as well as the general Convention requirement that rights must be effective and not illusory, the Court considers that where, as in the present case, restrictions on eligibility to stand for election are provided for by law, such law should satisfy certain minimum requirements as to its quality, such as the requirement of foreseeability. In this connection, the Court reiterates that a rule is "foreseeable" if it is formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his conduct (see, *mutatis mutandis*, *Rotaru v. Romania* [GC], no. 28341/95, § 55, ECHR 2000-V).

34. At the outset, the Court takes note of the applicant's first argument concerning the scope of the restriction, namely that the Electoral Code did not preclude clergymen from standing for election and from being elected, but simply required that they cease their religious activity if and when elected to the Milli Majlis and not at the time of nomination for election. The Court notes that, indeed, regard being had to the literal wording of the various relevant provisions of domestic law, the latter may appear to be mutually inconsistent on the point whether clergymen were deprived of their passive electoral rights (that is, the right to stand as a candidate for elections), or whether they were only subject to disqualification due to simultaneously holding incompatible positions (that is, combining "professional religious activity" with the office of member of parliament, if elected). In particular, Article 85 (II) of the Constitution and Articles 13 and 144 of the Electoral Code stated that clergymen could not "be elected" as members of parliament ("*deputat seçilə bilməzlər*"). On the other hand, Article 14.2.4 of the Electoral Code and Article 5 of the Law on Freedom of Religion provided that, during the period when they were engaged in "professional religious activity", clergymen could not "be [serve as] a member" of the Milli Majlis ("*Milli Məclisin deputatı ... ola bilməzlər*") and that clergymen's religious activities were to be "suspended" for the period during which they occupied elected government office. In this connection, the Court also notes that the same legal provisions, and in particular Article 14.2 of the Electoral Code, provided for restrictions of electoral rights not only of the "clergymen", but also other categories of persons such

as civil servants, under essentially the same wording. However, having regard to the relevant domestic practice (see paragraph 19 above), the Court notes that there have been cases where civil servants were actually registered as candidates for the same parliamentary elections in 2005 where they had submitted an undertaking to resign from the State service if elected (in accordance with Article 53.3 of the Electoral Code) and had been temporarily released from their official functions during the election period (in accordance with Article 69.2 of the Electoral Code). Therefore, in so far as the scope of the restriction is concerned, there appears to be a possible lack of consistency in applying the relevant legal provisions to different categories of persons listed therein.

35. The Court notes that the Government have not submitted any examples of domestic practice or judicial rulings showing the existence of a comprehensive and consistent interpretation of the scope of the above-mentioned domestic legal provisions in respect of "clergymen". It is not the Court's task to substitute its own interpretation for that of the national authorities, and notably the courts, as it is primarily for the latter to interpret and apply domestic law (see, among many other authorities, *Kruslin v. France*, 24 April 1990, § 29, Series A no. 176-A). The Court observes that, in this particular case, by deciding to refuse the applicant's request for registration as a candidate on the basis of the relevant legal provisions, the domestic authorities implicitly held that those provisions restricted the very right of "clergymen" to stand as a candidate for election. Therefore, for the purposes of the present case, the Court will proceed with its further analysis on the basis of the above approach taken by the authorities.

36. However, turning to the applicant's argument as to the category of persons affected by the restriction, the Court finds that, indeed, the relevant domestic law was not sufficiently clear and precise to prevent arbitrary decisions by the electoral authorities in determining whether a particular individual belonged to the category whose rights were restricted. In particular, the domestic law did not provide for any definition of who qualified as "clergymen" and what constituted "professional religious activity". The existence of a large variety of religious denominations which organise themselves internally in different ways may potentially result in different views as to who can be considered as a "clergyman" in respect of a specific religion, faith or belief. Moreover, since the term "religious activity" is rather ambiguous and lends itself to quite a broad interpretation, it is not clear whether this term included only the primary activities of persons occupying ordained or otherwise formalised clerical positions (such as, *inter alia*, imams, priests or rabbi) or, as may have been implied in the Government's submissions (see paragraph 24 above), whether it also extended to a range of other activities connected with religion which could not be described as clerical or involving direct links with the mass of religious followers (such as, for example, activities of publicists writing on religious topics or pedagogical activity focusing on religious subjects). The

connotations of the term "professional" as used with the term "religious activity" are also unclear. In particular, it is not clear if this meant an official position or formal employment involving the provision of remunerated religious services, or some other form of full-time or part-time activity which did not necessarily constitute remunerated employment in its ordinary meaning. While it could be argued that the drafters of the Constitution and the Electoral Code might have deliberately left the issue open to some extent to further judicial interpretation and clarification, the Court notes that the Government have not argued that there existed any domestic judicial decisions defining and clarifying the above terms and have not submitted any examples of such decisions. The domestic courts in the present case have not provided any definition or clarification either (see paragraph 38 below).

37. In such circumstances, the Court finds that the domestic legislation providing for the impugned restriction was not foreseeable as to its effects and left considerable room for speculation as to the definition of the categories of persons affected by it. The relevant legal provisions were not sufficiently precise to enable the applicant to regulate his conduct and foresee which specific types of activities would entail a restriction of his passive electoral rights. The lack of any definition of the terms "clergyman" and "professional religious activity" allowed an excessively wide discretion to the electoral authorities and left much room for arbitrariness in applying the restriction based on Article 85 (II) of the Constitution and Article 14.2.4 of the Electoral Code. This is precisely what happened in the present case as, despite the applicant's resignation from all the positions that could be construed as "professional religious activity", the domestic authorities arbitrarily refused his request for registration without even specifying any factual grounds for their finding that he was still a "clergyman" engaging in "professional religious activity".

38. More specifically, the Court observes that the applicant held a number of positions with the Caucasus Muslims Board and Baku Islamic University which could be construed as involving "professional religious activity". He in fact resigned from all the above positions, believing that this would make him eligible to stand for election. However, his resignation from these positions was not deemed sufficient by the electoral commissions, who considered that he was still a professional clergyman. In finding that the applicant "was continuing his activities as a professional clergyman", the ConEC failed to explain what activities were meant specifically. Likewise, the CEC summarily rejected the applicant's arguments to the contrary without providing any substantiation or explanation. Upon reviewing the electoral commissions' decisions, the domestic courts merely noted that the fact that the applicant had resigned from the positions in question "[did] not rule out his engaging in professional religious activity". The courts, like the electoral commissions, failed to offer any explanation as to what other specific activity conducted by the applicant precluded him from standing for election and on the basis

of what definition and evidence he was still considered to be a "clergyman" within the meaning of Article 85 of the Constitution and Article 14.2.4 of the Electoral Code. As to the Government's argument that the applicant continued to fulfil the function of editor-in-chief of a religious journal, the Court notes that neither the electoral authorities nor the domestic courts ever explicitly referred to this specific function in finding that the applicant continued to engage in "religious activity". In sum, it appears that no legal reasoning was offered as to why the applicant was considered to fall into that category.

39. In conclusion, the Court notes that the legal definition of the category of persons affected by the impugned restriction was too wide and imprecise. In addition, the application of the law in respect of the applicant resulted in a situation where the very essence of the rights guaranteed by Article 3 of Protocol No. 1 was impaired.

40. It follows that there has been a violation of Article 3 of Protocol No. 1 to the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

A. Article 14 of the Convention

41. In conjunction with the above complaint, the applicant complained that he had been discriminated against on the ground of his former occupation involving religious activity. He noted that the electoral authorities had actually registered as candidates a number of other persons who had previously held, but resigned from, positions incompatible with the office of parliamentarian. Unlike the applicant, those candidates had held positions within the executive and judicial branches of government. Article 14 of the Convention provides as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

42. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

43. However, having regard to its above finding in relation to Article 3 of Protocol No. 1, the Court considers that it is not necessary to examine whether in this case there has been a violation of Article 14.

B. Article 6 of the Convention

44. The applicant complained under Article 6 of the Convention that the domestic proceedings had been unfair, as the domestic courts had upheld the arbitrary decisions of the electoral commissions, without giving a reasoned

judgment. Article 6 of the Convention provides, in its relevant part, as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

45. The Court notes that the proceedings in question involved the determination of the applicant's right to stand as a candidate in the parliamentary elections. The dispute in issue therefore concerned the applicant's political rights and did not have any bearing on his "civil rights and obligations" within the meaning of Article 6 § 1 of the Convention (see *Pierre-Bloch v. France*, 21 October 1997, § 50, *Reports* 1997-VI; *Cherepkov v. Russia* (dec.), no. 51501/99, ECHR 2000-I; *Ždanoka v. Latvia* (dec.), no. 58278/00, 6 March 2003; and *Mutalibov v. Azerbaijan* (dec.), no. 31799/03, 19 February 2004). Accordingly, this Convention provision does not apply to the proceedings complained of.

46. It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. 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

48. The applicant claimed 83,209 euros (EUR) for loss of the earnings he would have received in the form of a parliamentary member's salary if elected to the Milli Majlis, had his right to stand for election not been breached.

49. The Government considered that there was no causal link between the applicant's claim and the alleged violation.

50. The Court notes that the present application was about the applicant's right to stand for election. It cannot be assumed that, had the applicant's registration as a candidate not been refused, he would have necessarily won the election in his constituency and become a member of parliament. It is therefore impossible for the Court to speculate as to whether the applicant would have received a salary as a parliamentarian (see, *mutatis mutandis*, *The Georgian Labour Party v. Georgia*, no. 9103/04, § 150, 8 July 2008). The Court therefore considers, like the Government, that no causal link has been established between the alleged

pecuniary loss and the violation found (ibid., § 151; see also *Melnychenko*, cited above, §§ 73-75). Accordingly, it dismisses the applicant's claim under this head.

2. Non-pecuniary damage

51. The applicant claimed EUR 100,000 in respect of non-pecuniary damage, arguing that the refusal to register him as a candidate had caused him distress and damaged his reputation.

52. The Government considered that the claim was exorbitant and aimed at unjustified enrichment, and requested the Court to award a reasonable amount on an equitable basis.

53. The Court acknowledges that the applicant suffered non-pecuniary damage as a result of being prevented from standing as a candidate in the parliamentary elections. Ruling on an equitable basis and having regard to all the circumstances of the case, it awards him the sum of EUR 7,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

54. The applicant claimed EUR 2,000 for the costs and expenses incurred before the domestic courts and EUR 1,000 for those incurred before the Court. In support of his claims, he submitted only a copy of the contract for legal services provided by Mr A. Rzayev in the proceedings before the Court.

55. The Government argued that the claim should be rejected because it was unsupported by the necessary documentary evidence and did not reflect the actual cost of the legal services rendered.

56. 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 were reasonable as to quantum. In the present case, the Court notes that the applicant has not submitted any documents supporting his claim for costs and expenses in the domestic proceedings. Therefore, the Court rejects this part of the claim. Furthermore, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the applicant the sum of EUR 1,000 for the proceedings before the Court, less the sum of EUR 850 received in legal aid from the Council of Europe, plus any tax that may be chargeable to the applicant on that sum.

C. Default interest

57. The Court considers it appropriate that the default interest 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. *Declares* the complaints under Article 3 of Protocol No. 1 to the Convention and Article 14 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 3 of Protocol No. 1 to the Convention;

3. *Holds* that there is no need to examine separately the complaint under Article 14 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the 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 New Azerbaijani manats at the rate applicable at the date of settlement:
      (i) EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,000 (one thousand euros), less EUR 850 (eight hundred and fifty euros) granted by way of legal aid, plus any tax that may be chargeable to the applicant, 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 applicant's claim for just satisfaction.

Done in English, and notified in writing on 3 December 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Nina Vajić
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, a concurring opinion of Judge Malinverni, joined by Judges Vajić and Kovler, is annexed to this judgment:

N.A.V
S.N.

CONCURRING OPINION OF JUDGE MALINVERNI, JOINED BY JUDGES VAJIĆ AND KOVLER

(Translation)

1. Like my colleagues, I voted in favour of finding a violation of Article 3 of Protocol No. 1 to the Convention. However, my reasons differ from theirs.

2. In the present case the applicant's request for registration as a candidate was refused on the basis of Article 85 (II) of the Constitution, which banned "clergymen" from being elected to parliament, and Article 14.2.4 of the Electoral Code, which made "clergymen" ineligible to serve as members of parliament while they were engaged in "professional religious activity".

3. The judgment lays considerable emphasis on the fact that "the relevant law was ambiguous in respect of the scope of the restriction imposed and ... did not provide a precise definition of the categories of persons whose rights were restricted" and that, "[a]ccordingly, the main thrust of the applicant's complaint concern[ed] the quality of the law on which this restriction was based [and] in particular the foreseeability of the restriction" (see paragraphs 32 and 33).

4. I have difficulty agreeing with these assertions and with the arguments articulated in paragraphs 34 et seq. of the judgment, particularly when the Court states that "regard being had to the literal wording of the various relevant provisions of domestic law, the latter may appear to be mutually inconsistent on the point whether clergymen were deprived of their passive electoral rights (that is, the right to stand as a candidate for elections) or whether they were only subject to disqualification due to simultaneously holding incompatible positions" (paragraph 34), that "the term 'religious activity' is ... ambiguous" (paragraph 36) and that "the connotations of the term 'professional' as used with the term 'religious activity' are also unclear" (idem). A piece of legislation, whatever its nature and whatever sphere it governs and is intended to regulate, is of necessity an abstract and general instrument. It cannot enter into every detail and contemplate all possible scenarios, nor can it define all the terms which it employs. The Court has observed this fact on a number of occasions.

5. In Azerbaijan, the legislation in question was in my opinion perfectly satisfactory. While the 1995 Constitution stated in general terms that "... clergymen ... may be subject by law to restrictions on their right to participate in elections" (Article 56 (III)) and that "... clergymen ... cannot be elected as members of the Milli Majlis ..." (Article 85 (II)), the 2003 Electoral Code identified very clearly two different situations giving rise to ineligibility. Firstly, Article 13, entitled "Passive electoral rights", excluded certain categories of persons from eligibility for election in any circumstances, specifying that such persons "shall not have the right to be elected as a member of the Milli Majlis" (Article 13.3). The categories

included "persons serving prison sentences", "persons convicted of the crimes under Articles 15.4-15.5 of the Criminal Code" and "citizens with dual citizenship", but not "clergymen".

Article 14 of the same Code, entitled "Incompatibility of positions", on the other hand, stipulated that the position of member of parliament could not be occupied at the same time as, or parallel to, certain other positions. This provision thus took pains to make clear that the incompatibility existed only while the persons concerned continued to exercise another activity. It referred to "members of the armed forces, *while in military service*", judges, *while in office*", civil servants, *while in State service*" and, finally, "clergymen, *while engaged in professional religious activity*".

6. In order to be allowed to stand as a candidate, the applicant had given a written undertaking to cease his professional religious activities (see paragraph 7). Hence, according to the minutes of the joint meeting of the Qazi Council and Religious Science Council of the Caucasus Muslims Board held on 14 July 2005, the applicant's membership of the Qazi Council was terminated on the basis of his own resignation letter (paragraph 8); and, following an order issued by the chairman of the Caucasus Muslims Board on 15 August 2005, he was relieved of his positions as head of the Board's education department and director of the Sumgayit branch of Baku Islamic University (paragraph 9).

7. Despite that, the Constituency Electoral Commission (the ConEC) refused to register the applicant as a candidate on the ground that he "was continuing his activities as a professional clergyman"; however, it failed to furnish the slightest evidence in support of this claim (paragraph 10).

The Central Electoral Commission (the CEC) subsequently rejected a complaint by the applicant without giving any reasons beyond stating that it was "unsubstantiated" (paragraph 11).

In their turn, the Court of Appeal and then the Court of Cassation dismissed the appeals lodged by the applicant in decisions giving wholly inadequate reasons (paragraphs 12 and 13), stating in particular that "the fact that [the applicant] has been relieved of the above-mentioned positions does not rule out his engaging in professional religious activity".

Lastly, the Constitutional Court, while referring to Article 14.2.4 of the Electoral Code, merely reaffirmed that this provision restricted "clergymen's right to serve as members of parliament only to periods when the latter [were] engaged in professional religious activity" (paragraph 15 *in fine*), but said nothing about the applicant's case, in particular whether the decision to refuse his candidacy had been correct.

8. My conclusion is that the legislation in force in Azerbaijan at the material time was satisfactory, being sufficiently clear and foreseeable, but was applied in an *arbitrary* manner by all the authorities which ruled on the applicant's various applications. It is therefore not the legislation as such which should be criticised in the present case but the way in which it was applied by the courts. The fault lay not with the legislature, but with the courts and with them alone.