



FIFTH SECTION

CASE OF GAZANFAR MAMMADOV v. AZERBAIJAN

(Application no. 4867/10)

JUDGMENT

STRASBOURG

23 September 2021

This judgment is final but it may be subject to editorial revision.

In the case of Gazanfar Mammadov v. Azerbaijan,

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

Mārtiņš Mits, *President*,

Lətif Hüseynov,

Mattias Guyomar, *judges*,

and Martina Keller, *Deputy Section Registrar*,

Having regard to:

the application 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 Gazanfar Huseyn oglu Mammadov (*Qəzənfər Hüseyn oğlu Məmmədov* - “the applicant”), on 12 January 2010;

the decision to give notice of the complaint concerning Article 1 of Protocol No. 1 to the Convention to the Azerbaijani Government (“the Government”) and to declare inadmissible the remainder of the application;

the Government’s observations;

Having deliberated in private on 2 September 2021,

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

INTRODUCTION

The present case concerns the alleged unlawful annulment without compensation of the applicant’s title to a cafe and raises issues under Article 1 of Protocol No. 1 to the Convention.

THE FACTS

1. The applicant was born in 1964 and lives in Baku. He was represented by Mr H. Mammadov.
2. The Government were represented by their Agent, Mr Ç. Əsgərov.
3. The facts of the case, as submitted by the parties, may be summarised as follows.

A. Background

4. On 9 November 1999 the Binagadi District Executive Authority (“the BDEA”) issued order no. 809 allocating a plot of land of 520 sq. m to an individual, V.A., allowing her to build a non-residential building for catering services and to use light construction materials on that land.

5. On 3 May 2001 a non-residential building, constructed from stone, was registered in the State registry and the corresponding technical passport was issued to V.A.

6. On 8 March 2003 V.A. sold 161.3 sq. m of the non-residential building to another individual, N.J.

7. On 6 March 2004 N.J. sold this property to the applicant for 49,000 Azerbaijani manats (AZN).

8. On 20 April 2004 the General State Technical Inventory, Registration of Property Rights and Urban Planning Cadastre Department of the State Committee on Construction and Architecture (“the SCCA”) issued a certificate of title (*qeydiyyat vəsiqəsi*) to the applicant certifying that he owned the non-residential building of 161.3 sq. m. The applicant used this property for business purposes as a cafe.

B. The first set of proceedings

9. On 22 May 2006 the Baku Metro lodged a claim against the applicant seeking demolition of the cafe, arguing that it had been unlawfully built on a plot of land owned by the former. The plot had been allocated to Baku Metro during Soviet times by a decision dated 1 January 1986 of the Baku City Council of Working Deputies.

10. On 6 September 2006 the Binagadi District Court upheld the claim and declared the BDEA’s order of 9 November 1999 null and void. A copy of this judgment has not been provided to the Court. It appears from the case file that the first-instance court ordered the demolition of the applicant’s cafe and the return of the plot of land to the Baku Metro and explained to him his right to lodge a claim for damages.

11. It appears that the applicant did not appeal, and this judgment became final.

12. According to the applicant, the cafe was demolished on the date the Baku Metro lodged its claim, that is 22 May 2006. The case file does not contain any document to show whether the cafe was indeed demolished on that date as claimed by the applicant or at a later date following the first-instance court’s judgment.

C. The second set of proceedings

13. On an unspecified date the applicant brought proceedings against the BDEA and the Ministry of Finance claiming compensation for the sum of AZN 452,000 in respect of the damage incurred as a result of the demolition of his cafe. He argued, in particular, that he had lawfully acquired ownership of the cafe.

14. On 27 June 2007 the Binagadi District Court, relying on Article 29 of the Constitution, Articles 152.1 and 1100 of the Civil Code (see paragraphs 26, 28 and 31 below), and Article 1 of Protocol No. 1 to the Convention, partly granted the applicant’s claim and awarded him AZN 351,714 in damages based on an expert report. It found that the

applicant had sustained damage as a result of the demolition of his cafe, which had been built on the basis of the BDEA's unlawful order of 9 November 1999.

15. The BDEA and the Ministry of Finance appealed.

16. The BDEA submitted that the cafe in question had been demolished by the Baku Metro on the basis of the Binagadi District Court's judgment of 6 September 2006 for construction of a new metro station. It also argued that the property in question had been built from stone, not using light construction materials, as specified in its order of 9 November 1999, and that the relevant authority had unlawfully issued a certificate of title to the applicant.

17. The Ministry of Finance argued that the amount of the damages was excessive compared to the purchase price of the cafe and it was not clear how it had been calculated.

18. On 11 April 2008 the Baku Court of Appeal upheld the appeals and quashed the first-instance court's judgment. It firstly noted that, since the applicant's cafe had been demolished on the basis of the Binagadi District Court's judgment of 6 September 2006 and no order had been issued by the BDEA in this respect, the BDEA and the Ministry of Finance could not be ordered to pay damages. It further referred to the judgment of the Binagadi District Court of 17 January 2008 annulling the applicant's title to the cafe, which was delivered in the meantime in the parallel third set of proceedings (see paragraphs 20-25 below).

19. On 28 January 2009 the Baku Court of Appeal rejected the applicant's cassation appeal as lodged outside the statutory time-limit. On 3 March 2009 it dismissed the applicant's request for restoration of the missed time-limit, finding no good reason for granting it. On 19 May 2009 the Supreme Court upheld this decision.

D. The third set of proceedings

20. In December 2007 the BDEA brought an action against the applicant, the SCCA and its relevant department (see paragraph 8 above), seeking annulment of the applicant's title to the cafe. It submitted that V.A. had unlawfully built a non-residential property from unauthorised materials (stone) and was unlawfully issued a technical passport. It argued that the relevant department of the SCCA did not have authority to issue the applicant with a certificate of title in the given circumstances.

21. On 17 January 2008 the Binagadi District Court upheld the BDEA's claim. It found that, although the BDEA's order of 9 November 1999 authorised construction using light materials, V.A. had used stone and therefore had constructed an unauthorised building. However, a technical passport had been issued and the property had been registered in the State register without any legal grounds. Therefore, relying on Article 149.2 of

the Civil Code (see paragraph 27 below), the court declared the applicant's certificate of title invalid.

22. The applicant appealed, arguing that he had lawfully acquired the property in question.

23. On 20 November 2008 the Baku Court of Appeal upheld the first-instance court's judgment reiterating the same reasoning.

24. The applicant filed a cassation appeal arguing that he had been a *bona fide* buyer and, therefore, was not responsible for the alleged breaches of law by the previous owners of the property.

25. On 14 July 2009 the Supreme Court dismissed the applicant's appeal, without addressing his above argument.

RELEVANT LEGAL FRAMEWORK

A. The 1995 Constitution

26. Article 29 § IV of the Constitution provides as follows:

“No one shall be deprived of his or her property without a court decision. Total confiscation of property is not permitted. Alienation of the property for State needs may be permitted only subject to prior and fair compensation corresponding to its value.”

B. The 2000 Civil Code

27. Article 149.2 of the Code provides that if the registration of a right to property is unfounded, any person whose rights are affected by such registration can bring proceedings for its invalidation or modification. Claims for damages sustained as a result can be lodged. In such a case, rights of *bona fide* third parties stemming from the registration are reserved.

28. Article 152.1 of the Code defines the right to property as a person's right to own, use or dispose of his or her property in a desired manner, which is recognised and protected by the State.

29. Article 180 of the Code provides that a residential building, a construction, facility or other immovable property erected on a plot of land not allocated for such purposes or without obtaining the necessary permits or by seriously breaching town-planning and building regulations is considered an unauthorised construction. The party carrying out the unauthorised construction does not acquire ownership rights to such construction and is not entitled to dispose of it by sale, deed of gift, lease or by any other means. An unauthorised construction can be demolished by a court order on the basis of requests by relevant executive bodies or other interested parties.

30. Article 337.5 of the Code provides that if a transaction has been declared invalid, each party shall return to the other party all it has received

as part of that transaction. If the return is impossible in kind, its cost shall be reimbursed in money.

31. According to Article 1100 of the Code, any damage sustained by a physical or legal person as a result of the State authority's or local authority's act, which is contrary to the law or other legal acts, shall be reimbursed by the State or the relevant municipality.

THE LAW

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

32. The applicant complained that he had been unlawfully deprived of his possessions without any compensation, contrary to the requirements of Article 1 of Protocol No. 1 to the Convention, which reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

A. Admissibility

33. The Government argued that under Article 337.5 of the Civil Code, the applicant could bring an action against N.J. and ask for compensation. Moreover, he had failed to exhaust domestic remedies available to him in order to receive compensation for the property: in particular, the matter was not examined before the Supreme Court in the second set of proceedings.

34. The applicant did not make any submissions.

35. Article 35 § 1 requires that the complaints intended to be made subsequently in Strasbourg should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law. Where an applicant has failed to comply with these requirements, his or her application should in principle be declared inadmissible for failure to exhaust domestic remedies (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 72, 25 March 2014). However, the applicants are only obliged to avail themselves of domestic remedies that are effective and capable of redressing the alleged violation. More specifically, the only remedies which Article 35 § 1 of the Convention requires to be used are those that relate to the breaches alleged and which

are, at the same time, available and sufficient (see *Andonoski v. the former Yugoslav Republic of Macedonia*, no. 16225/08, § 22, 17 September 2015, with further references). The Court has also frequently emphasised the need to apply the exhaustion rule with some degree of flexibility and without excessive formalism (see *Vučković and Others*, cited above, § 76).

36. The Court notes that, in the present case, the applicant's grievances concerning the deprivation of property were examined in three separate sets of proceedings, including the proceedings instituted by the Baku Metro requesting the demolition order, the proceedings instituted by the applicant requesting compensation, and the proceedings instituted by the BCEA for the annulment of the applicant's title to the cafe. The latter two sets of proceedings essentially ran in parallel.

37. The Court observes that in the proceedings concerning the demolition order the applicant did not appeal and thus failed to exhaust ordinary remedies. It follows that the part of the complaint raising issues relating to the proceedings concerning the demolition of the cafe must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

38. The Court further notes that the issue of the annulment of the applicant's title was decided in the third set of proceedings. During these proceedings the applicant duly lodged all available appeals arguing that he had been a *bona fide* buyer. It is true that the applicant failed to lodge a cassation appeal in the second set of proceedings. However, even assuming that a successful compensation claim for the demolition of the cafe might have been relevant for the examination of the issue of the annulment of the applicant's title, such an appeal would not have had any prospect of success in the circumstances of the present case, considering that, when quashing the lower court's judgment partly granting the applicant's claim, the appellate court referred to the Binagadi District Court's judgment of 17 January 2008 annulling his title, delivered in the third set of proceedings (see paragraph 18 above). The Court considers that, in such circumstances, the rule of exhaustion of domestic remedies cannot be applied with excessive degree of formalism. Moreover, in any event, it has not been demonstrated or argued by the Government that the applicant's action during the third set of proceedings did not constitute an effective remedy for challenging the annulment of his title to the cafe.

39. Furthermore, Article 337.5 of the Civil Code provided that if a transaction was declared invalid, each party had to return to the other party everything that it had received as part of that transaction (see paragraph 30 above). It is true that the applicant has never initiated any court proceedings against N.J. However, the Court reiterates that the existence of a possibility to seek damages cannot be regarded as necessary for compliance with the rule of exhaustion of domestic remedies within the meaning of Article 35 § 1 of the Convention. Any damages received by the applicant may only be

taken into account for the purposes of assessing the proportionality of the interference, the calculation of pecuniary damage if a violation of Article 1 of Protocol No. 1 to the Convention is found by the Court, and if just satisfaction is awarded under Article 41 of the Convention (see *Gladysheva v. Russia*, no. 7097/10, §§ 60-62, 6 December 2011; *Dzirnis v. Latvia*, no. 25082/05, § 65, 26 January 2017; and *Batkivska Turbota Foundation v. Ukraine*, no. 5876/15, § 47, 9 October 2018).

40. Having regard to the particular circumstances of the present case, the Court dismisses the Government's objection regarding the non-exhaustion of domestic remedies in respect of the part of the complaint concerning the annulment of the applicant's title to the cafe without compensation.

41. The Court further notes that this part of the complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

42. The Government argued that, as established by the domestic courts, the cafe was an unauthorised construction and, consequently, the applicant's title to it was annulled in accordance with the law.

43. They further argued that since the applicant failed to dispute the validity of the sale and purchase contract signed between him and N.J., the *bona fide* notion was not addressed by the domestic courts. They agreed that the interference imposed an excessive individual burden on the applicant to a certain degree but argued that the effect of his dispossession could be mitigated if he sued N.J for damages.

44. Lastly, the Government argued that the public authorities' interference with the applicant's property rights was necessary in a democratic society in the interests of the public and was in line with domestic legislation.

45. The applicant did not submit any observations.

2. The Court's assessment

46. The applicable general principles under Article 1 of Protocol No. 1 to the Convention have been stated, *inter alia*, in cases of *Gladysheva* (cited above, §§ 64-68), *Stolyarova v. Russia*, (no. 15711/13, §§ 39-43, 29 January 2015), and *Dzirnis* (cited above, §§ 75-80).

47. The Court considers that the applicant had a "possession" for the purposes of Article 1 of Protocol No. 1 to the Convention as he had a valid title to the cafe until the domestic courts had it annulled, in order to uphold the BDEA's action. The annulment of his title constituted an interference with his right to property which must be considered as a deprivation of

possessions to which, accordingly, the second rule of Article 1 of Protocol No. 1 to the Convention, applies (compare *Arzamazova v. the Republic of Moldova*, no. 38639/14, § 46, 4 August 2020). It must therefore be ascertained whether this deprivation was lawful, effected in the public interest and whether it pursued a legitimate aim by means reasonably proportionate to the aim sought to be realised (see *Batkivska Turbota Foundation*, cited above, § 55).

48. The Court notes that a failure to observe the legal requirements in such cases concerning, for instance, the guarantees for *bona fide* acquirers, may lead to a finding that the interference with an applicant's rights was not "in accordance with the law". In the present case, the domestic courts annulled the applicant's title based on Article 149.2 of the Civil Code (see paragraph 27 above) without examining the fact that the applicant had been the third buyer of the property in question and had apparently acted in a *bona fide* manner. However, the Court considers that, even assuming that the impugned interference had been provided for by law and pursued an aim in the public interest, it in any event fell short of the requirement of proportionality, as will be set out below (compare *Arzamazova*, cited above, § 47, and *Fortetsya, MPP v. Ukraine* [Committee], no. 68946/10, § 42, 11 June 2020, with further references).

49. The applicant's title was annulled following the domestic courts' finding that V.A. had constructed the non-residential building from stone and did not use light construction materials, as specified under the BDEA's order of 9 November 1999. The courts, exclusively focusing on V.A.'s actions, concluded that the property in question was an unauthorised construction (see paragraphs 21, 23 and 25 above). It appears from the case file that, not only had the applicant's or N.J.'s lack of good faith at the time of the conclusion of the sale and purchase contracts not been established, but neither had this issue been examined at domestic level.

50. The Government argued that the *bona fide* notion had not been examined by the domestic courts due to the applicant's failure to bring proceedings against N.J.

51. In this connection, the Court observes that during the third set of proceedings the applicant submitted in his appeals that he had lawfully purchased the non-residential building from N.J. and had acted as a *bona fide* buyer. However, the courts failed to address his arguments (see paragraphs 22 and 24 above).

52. The Court considers that it was not for the applicant, who apparently acted in good faith when acquiring the contested property from N.J., to assume the risk of his title to the property being revoked on account of the first owner's actions. The Court notes in this connection that, despite V.A.'s failure to comply with the BDEA's order of 9 November 1999 when constructing the non-residential building from stone, without using light construction materials, she was issued with a technical passport (see

paragraphs 4-5 above). Part of this non-residential building was later sold to N.J., and only then to the applicant by the latter, both transactions being duly approved and title to the property being registered by the relevant State authorities.

53. The Court reiterates that the consequences of any mistake made by a State authority must be borne by the State and any such errors must not be remedied at the expense of the individual concerned (see *Gashi v. Croatia*, no. 32457/05, § 40, 13 December 2007, and *Tomina and Others v. Russia*, nos. 20578/08 and 19 others, § 39, 1 December 2016). Moreover, in the context of revoking ownership of a property transferred erroneously, the good governance principle may not only impose on the authorities an obligation to act promptly in correcting their mistake, but may also necessitate the payment of adequate compensation or another type of appropriate reparation to its former *bona fide* holder (see *Fortetsya, MPP*, cited above, § 43, with further references).

54. The Court further observes that the applicant has been deprived of ownership without any compensation. The domestic courts referred to Article 149.2 of the Civil Code when invalidating the applicant's certificate of title, which stated, *inter alia*, that rights of *bona fide* third parties stemming from the registration of a right to property were reserved (see paragraph 27 above). However, by failing to determine whether the applicant was a *bona fide* buyer, they precluded him from claiming compensation for the annulment of his title to the cafe.

55. The Government argued that the effects of the applicant's dispossession could be mitigated if he sued N.J. They essentially suggest that the applicant pass his excessive individual burden on to another individual, who himself was a *bona fide* buyer, and it is hard for the Court to see how that would improve the balance between the public interest and the need to protect individuals' rights in view of the fact that the State authority had issued V.A. with a technical passport despite her failure to comply with the BDEA's order (compare *Gladysheva*, cited above, § 81, and *Dzirnits*, cited above, § 92).

56. The Court thus concludes that the annulment of the applicant's title to the cafe without any compensation placed a disproportionate and excessive burden on him and that the authorities have failed to strike a fair balance between the demands of the public interest on the one hand and the applicant's right to peaceful enjoyment of his possessions on the other.

57. There has therefore been a violation of Article 1 of Protocol No. 1 to the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. 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.”

59. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the part of the complaint under Article 1 of the Protocol No. 1 to the Convention concerning the annulment of the applicant’s title to the cafe without compensation admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention.

Done in English, and notified in writing on 23 September 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller
Deputy Registrar

Mārtiņš Mits
President