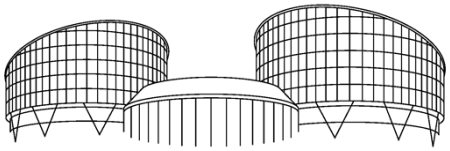

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF AVAZ ZEYNALOV v. AZERBAIJAN

(Applications nos. 37816/12 and 25260/14)

JUDGMENT

Art 5 § 3 • Reasonableness of pre-trial detention • Authorities' failure to give "relevant" and "sufficient" reasons to justify the need for the journalist's pre-trial detention
Art 6 § 2 • Presumption of innocence • Statement made in the Court of Appeal's decision amounting to a declaration of the applicant's guilt in the absence of a final conviction
Art 8 • Private life and home • Art 10 • Freedom of expression • Searches and seizures carried out in the applicant's home, workplace and vehicle not proportionate to the legitimate aim pursued
Art 6 § 1 and 6 § 3 (d) • Absence of an opportunity for the applicant to examine or have examined witnesses at any stage of the proceedings rendering the trial as a whole unfair

STRASBOURG

22 April 2021

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 Avaz Zeynalov v. Azerbaijan,

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

Síofra O'Leary, *President,*
Ganna Yudkivska,
Stéphanie Mourou-Vikström,
Lətif Hüseynov,
Lado Chanturia,
Arnfinn Bårdsen,
Mattias Guyomar, *judges,*
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the applications (nos. 37816/12 and 25260/14) 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 Avaz Tapdig oglu Zeynalov (*Əvəz Tapdıq oğlu Zeynalov* - "the applicant"), on 3 May 2012 and 11 March 2014, respectively;

the decision to give notice to the Azerbaijani Government ("the Government") of the complaints concerning the alleged lack of justification for the applicant's pre-trial detention (Article 5 § 3), the alleged violation of his right to the presumption of innocence as a result of the Baku Court of Appeal's decision of 8 December 2011 (Article 6 § 2), the alleged violation of the applicant's rights as a result of the searches and seizures carried out in his home, workplace and vehicle and the interference with his telephone calls and messages (Articles 8 and 10), the alleged unfairness of the criminal proceedings against him (Article 6 §§ 1 and 3 (d)) and the alleged violation of the applicant's right to freedom of expression as a result of his criminal conviction (Article 10) and to declare inadmissible the remainder of the applications;

the parties' observations;

Having deliberated in private on 30 March 2021,

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

INTRODUCTION

1. The present two applications concern the pre-trial detention and subsequent criminal conviction of the applicant who alleges that his rights protected under Articles 5 § 3, 6 §§ 1 and 3 (d), 6 § 2, 8 and 10 of the Convention were breached by the domestic authorities.

THE FACTS

2. The applicant was born in 1970 and lives in Baku. He was represented by Mr E. Sadigov and Mr R. Hajili, lawyers based in Azerbaijan and France, respectively.

3. The Government were represented by their Agent, Mr Ç. Əsgərov.

I. INSTITUTION OF CRIMINAL PROCEEDINGS AGAINST THE APPLICANT AND HIS REMAND IN CUSTODY

4. The applicant was a journalist, and the founder and editor-in-chief of the *Xural* newspaper.

5. On 20 October 2011 criminal proceedings were instituted against the applicant under Articles 311.3.3 (receiving a large amount as a bribe) and 311.3.4 (receiving a bribe, committed with the use of a threat) following a complaint submitted to the prosecuting authorities by G.A., a member of the Parliament at that time, who claimed that the applicant had requested from her 10,000 Azerbaijani manats (AZN) (approximatively 9,300 euros (EUR) at the material time) in return for not publishing in his newspaper compromising information that he had about her. A CD-ROM containing an audio recording of conversations between two persons was enclosed to G.A.'s complaint.

6. On 28 October 2011 the applicant was arrested and charged under the above provisions.

7. On the same day the investigator questioned the applicant who denied the accusations. He stated that he had normal relations with G.A. who had been involved in a dispute since June 2011 with the former editor-in-chief (N.A.) of the *Mərkəz* newspaper, founded by G.A. As he also had a good working relation with N.A., both of them, G.A. and N.A. had asked for his help for the normalisation of their relations, but their dispute had continued. In July 2011 N.A. had left Azerbaijan for Turkey and had sent to the applicant an article about her conflict with G.A. who had learnt about it. The article in question had been about the relations between G.A. and N.A. and the origin of their conflict and had not contained any information which might cause damage to the reputation of G.A. However, the latter, having learned about the article, had repeatedly asked the applicant not to publish it or any other article about her. Moreover, when G.A. had come to his office, she had tried to speak to him about financial aid she could offer, but he had not allowed her to do so. He had never demanded a bribe from G.A. and the article in question had not been published in the newspaper.

8. On 28 October 2011 the Nasimi District Court ordered the applicant's pre-trial detention for a period of three months, by citing the gravity of the charges and the likelihood that if released he would abscond and obstruct

the investigation by influencing participants in the criminal proceedings, or hiding or falsifying the material that was decisive for the investigation.

9. On 31 October 2011 the applicant appealed, arguing that there was no justification for his detention.

10. On 3 November 2011 the Baku Court of Appeal dismissed the appeal, reiterating the reasons given by the lower court.

II. INTERFERENCE WITH THE APPLICANT'S TELEPHONE CALLS AND MESSAGES

11. Following a request submitted by the prosecutor in charge of the case, on 26 October 2011 the Nasimi District Court authorised, relying on Article 177 of the Code of Criminal Procedure ("the CCrP"), the prosecuting authorities to obtain from two mobile telephone operators the list of incoming and outgoing telephone calls relating to three mobile telephone numbers used by the applicant covering the period between 1 January and 20 October 2011, as well as the content of SMS sent and received during the period in question by those mobile telephone numbers. The court relied in particular on the prosecutor's request referring to G.A.'s complaint (see paragraph 5 above) and stating that there was a likelihood that the applicant had obtained or demanded similar bribes from others.

12. On 31 October 2011 the applicant appealed against that decision, claiming a breach of his rights protected by Articles 8 and 10 of the Convention.

13. On 10 November 2011 the Baku Court of Appeal dismissed the applicant's appeal.

III. SEARCHES AND SEIZURES CARRIED OUT IN THE APPLICANT'S HOME, WORKPLACE AND VEHICLE

14. Following a request submitted by the prosecutor in charge of the case, on 28 October 2011 the Nasimi District Court authorised, relying on Articles 177, 242 and 243 of the CCrP, a search and seizure operation at the applicant's places of residence and work, without specifying the list of items or documents to be searched for or seized. The court decision referred to the prosecutor's request according to which there was information that the applicant had hidden material evidence concerning bribes and there was a likelihood that large amounts of money and relevant false documents were kept there.

15. On the same day a search was carried out at the applicant's home. According to the record, it was conducted in the presence of a family member and two attesting witnesses, but in the absence of the applicant and his lawyer. The investigator seized various documents and items, including

video cassettes, audio and video discs, diaries and different books and documents, as well as professional cards and a diary of the applicant's wife.

16. On 28 October 2011 the investigator also conducted a search at the office of the *Xural* newspaper in the presence of the director and deputy editor-in-chief and two attesting witnesses, but in the absence of the applicant and his lawyer. The investigator seized numerous documents and items contained in nine different boxes and a computer processor which were in the applicant's personal office and in other offices of the newspaper.

17. On 29 and 30 October 2011 the investigator drew up two records on inspection of boxes seized during the search (*axtarış zamanı götürülmüş qutulara baxış keçirilməsi haqqında*), conducted in the presence of the director of the *Xural* newspaper. The seized boxes contained a number of documents such as interviews, articles, letters, manuscripts, administrative documents, diaries, discs, photographs and so on.

18. On 29 October 2011 the investigator also carried out an inspection of a vehicle in the applicant's use, which was parked at the courtyard of the office of the *Xural* newspaper, and seized various documents and items belonging to the applicant. The investigator drew up an inspection record (*baxış keçirilməsi haqqında protokol*) and referred to the Nasimi District Court's decision of 28 October 2011 as a legal basis for the inspection.

19. On 31 October 2011 the applicant appealed against the Nasimi District Court's decision of 28 October 2011 (see paragraph 14 above), claiming that the searches and seizures carried out at his places of residence and work, as well as in the vehicle in his use, had been unlawful and unjustified. He claimed that his rights protected under Articles 8 and 10 of the Convention had been breached since the court decision authorising the searches and seizures had been very broad, without specifying the items to be searched for and seized, and had not protected his journalistic sources. The applicant also asked the court to provide him with a copy of the court order which authorised the search and seizure in the vehicle in his use.

20. By a decision of 3 November 2011, the Baku Court of Appeal dismissed the appeal, holding that the first-instance court's decision had been lawful and justified. The appellate court did not address the applicant's particular complaints.

IV. EXTENSION OF THE APPLICANT'S PRE-TRIAL DETENTION

21. On 30 November 2011 the applicant lodged an application with the Nasimi District Court, asking to be released on bail or put under house arrest.

22. It appears from the documents in the case file that on 1 December 2011 the Nasimi District Court dismissed the applicant's application. Despite the Court's explicit request to the parties to submit copies of all

documents relating to the domestic proceedings, they failed to provide a copy of that decision.

23. On 2 December 2011 the applicant appealed against that decision.

24. On 8 December 2011 the Baku Court of Appeal, whose decision was not amenable to appeal, upheld the first-instance court's decision. The relevant parts of the text of the decision read as follows:

> "It appears from the case file that the accused Zeynalov Avaz Tapdig oglu was charged with the criminal offences under Articles 311.3.3 and 311.3.4 of the Criminal Code of the Republic of Azerbaijan.
>
> In accordance with Article 155.3.1 of the Code of Criminal Procedure of the Republic of Azerbaijan, the preventive measure of remand in custody or an alternative preventive measure may be imposed on a person who is charged with a criminal offence which carries a punishment of more than two years' imprisonment.
>
> As it appears, the accused Zeynalov Avaz Tapdig oglu is a person who is charged with criminal offences which carry a punishment of more than three years' imprisonment.
>
> The panel of the court considers that the first-instance court, for the purpose of ensuring the normal course of the investigation, did not grant on a justified basis the application [of the accused] asking to be released on bail or put under house arrest rather than being held in pre-trial detention, having regard to the degree of public dangerousness of the criminal offence committed by Zeynalov Avaz Tapdig oglu, its nature, the likelihood that he would abscond, hide from the investigation and the court, influence the normal course of the investigation, as well as the fact that the investigation was pending.
>
> As the arguments put forward in the appeal do not constitute grounds for quashing the decision, the Nasimi District Court's decision of 1 December 2011 no. 4(006)-661/11 refusing to replace the preventive measure of remand in custody applied in respect of Zeynalov Avaz Tapdig oglu by the preventive measures of release on bail or house arrest, should remain unchanged and the appeal should not be allowed.
>
> In view of the above considerations and having regard to Articles 452 and 453 of the Code of Criminal Procedure of the Republic of Azerbaijan, the panel of the court
>
> Decided:
>
> The Nasimi District Court's decision of 1 December 2011 no. 4(006)-661/11 should remain unchanged.
>
> The appeal lodged by Sadigov Elchin Ali oglu, the counsel for the accused Zeynalov Avaz Tapdig oglu, should not be allowed.
>
> The decision is final, not amenable to appeal and protest."

25. Between 17 January and 20 April 2012 the relevant district and appellate courts, in decisions extending the term of the applicant's pre-trial detention or rulings on his appeals, examined three times the justification for the applicant's continued detention and maintained it essentially referring to the gravity of the charges, the fact that the investigation was still pending and that the initial grounds for the detention were still valid.

Despite the Court's request, the parties have not submitted copies of all documents in relation to the above proceedings.

V. CRIMINAL INVESTIGATION AND THE APPLICANT'S TRIAL

26. Following the applicant's arrest, on various dates three people (S.T., A.M. and A.H.) informed the prosecuting authorities that the applicant had previously asked and obtained amounts of money from them in exchange of not publishing articles.

27. On 4 November 2011 the investigator questioned the applicant who denied the accusations against him, reiterating that he had never requested money for not publishing an article.

28. Referring to the above additional complaints, on 4 November 2011 the investigator charged the applicant with the criminal offence under Article 311.3.2 of the Criminal Code (receiving a bribe, repeatedly committed).

29. On 8 December 2011 the investigator ordered a phonoscopic and linguistic expert examination (*məhkəmə-fonoskopik və linqivistik ekspertiza*) of the audio recording of the conversations between a man and a woman contained in a CD-ROM submitted by G.A. (see paragraph 5 above). In particular, the investigator asked the expert to establish the content of the conversations and to identify whether the voices of the persons in question corresponded to the applicant and G.A.

30. On 9 January 2012 the expert issued a report, finding that the audio recording corresponded to various conversations between the applicant and G.A. and that there was no trace of editing of the audio recording. The expert report also established the content of the conversations between the applicant and G.A. According to the transcript of the conversations, G.A., who insistently asked the applicant not to publish an interview with N.A. already announced in the newspaper, proposed to provide the applicant with financial assistance for publication costs of his newspaper for a period of one year and asked him to indicate an amount of money in that connection. In reply, the applicant said that he would not indicate any amount since G.A. herself was from the media sector. In the subsequent part of the conversation, G.A. asked him whether she could give him AZN 10,000 and, in reply, the applicant stated: "I do not know, do as you want".

31. On 14 March 2012 the investigator drew up a record examining SMS messages exchanged between the applicant and G.A. It appears from the record that while on 6, 11, 12 and 13 August 2011 G.A. sent to the applicant numerous messages in which she insistently asked him to answer her telephone calls, not to publish an article about her and described her difficult financial situation, the applicant answered only twice to her messages indicating the time of their incoming meetings.

32. On 13 April 2012 the investigator made a decision on assessment of evidence (*sübutların qiymətləndirilməsi*). By that decision, relying on the results of a tax inspection concerning the activities of the *Xural* newspaper covering the period between 1 January 2008 and 20 October 2011 and the submissions from the enforcement officers from the Ministry of Justice, the investigator additionally charged the applicant with new criminal offences under Articles 306.2 (non-enforcement of a court judgment, committed by an official) and 213.1 (tax evasion of significant amounts) of the Criminal Code. The investigator also decided not to institute criminal proceedings against G.A. and the other persons who accused the applicant of bribery on the grounds that they had voluntarily informed the relevant State authorities and that the bribes had been requested from them by the applicant through the use of threats. Furthermore, the investigator ordered the return of the documents and items seized during the searches carried out at the applicant's places of residence and work, and in his vehicle.

33. On 26 April 2012 the investigator issued a bill of indictment and filed it with the Baku Court of Serious Crimes ("the BCSC").

34. During the trial stage of the proceedings, the BCSC examined the justification for the applicant's continued detention on 18 and 31 May and on 26 September 2012 and considered that he should remain in detention since no grounds were established for changing the preventive measure of remand in custody.

35. It appears from the transcripts of the court hearing on the merits of the criminal charges held on 2 July 2012 that when the applicant learned that G.A. would appear before the BCSC, he objected, arguing that he could not prepare his defence in respect of G.A.'s questioning and asked for the postponement of the hearing. The court decided to proceed with G.A.'s testimony. G.A. made the same statements as those she had made during the investigation. The prosecutor questioned G.A. and the applicant then asked her one question, stating that he will question G.A. further at the next court hearings. However, in his observations submitted to the Court, the applicant denied that he had asked G.A. any question as indicated in the transcripts. According to the applicant, following his objections to G.A.'s appearance on that date, his lawyer had left the courtroom in protest and he had not asked G.A. any question.

36. According to the transcripts of the court hearing of 2 October 2012, S.T. appeared before the BCSC and stated that he had given money to the applicant like financial aid, and not as a bribe. He was subsequently questioned by the prosecutor, the applicant's lawyer and the applicant himself and answered various questions, but during the questioning he stated that his state of health deteriorated and left the courtroom.

37. On 9 October 2012 A.H. also appeared before the BCSC. According to the transcripts of that court hearing, when A.H. was making his statement, a scandal broke out between A.H. and those present at the court

hearing, and A.H. left the courtroom without permission of the court, arguing that his state of health deteriorated. There is no indication in the transcripts of the court hearing that A.H. was questioned by the applicant or any other participant in the proceedings.

38. It appears from the transcripts of the court hearing of 7 November 2012 that the court clerk contacted G.A. by phone requesting her to appear again before the court, but her assistant answered that she would not be able to attend the court hearing for health reasons. On the same date the BCSC decided to take measures to bring G.A. to the court hearing. A.H. also failed to appear before the BCSC on that date but provided the court with a medical document concerning his state of health.

39. The transcripts of the court hearing of 7 November 2012 do not contain any further information about the medical document provided by A.H. or about A.H.'s state of health. No medical document concerning A.H.'s state of health was available in the case file submitted by the Government to the Court.

40. It appears from the transcripts of the court hearing of 14 November 2012 that the court clerk again contacted G.A. by phone requesting her to appear before the court, but her assistant answered that she would not be able to attend the court hearing for health reasons and she would provide the court with a medical document in that connection.

41. No further information is available as regards any medical document concerning G.A.'s state of health in the case file submitted by the Government to the Court.

42. On 12 March 2013 the BCSC found the applicant guilty under Articles 213.1, 306.2, 311.3.2, 311.3.3 and 311.3.4 of the Criminal Code. The BCSC sentenced him to eight years' imprisonment for bribery related criminal offences (Articles 311.3.2, 311.3.3 and 311.3.4), to three years' imprisonment for non-enforcement of a court judgment, committed by an official (Article 306.2) and to one year and six months' imprisonment for tax evasion of significant amounts (Article 213.1) and sentenced him to a total of nine years' imprisonment with deprivation of the right to hold head and financial position in commercial legal entities for a period of one year, by merging the sentences. As regards the bribery accusations, the BCSC found the applicant guilty in respect of all four episodes: bribe requests from G.A., S.T., A.M. and A.H. In that connection, the court's judgment based on the witness statements made by G.A., S.T., A.M. and A.H. during the investigation and at the court hearings, the audio recording of the conversations contained in CD-ROM submitted by G.A., the content of the messages exchanged between the applicant and G.A., as well as the hearsay evidence made at the trial by several witnesses.

43. On appeal, the applicant argued that the criminal case against him had been fabricated and politically motivated and asked the appellate court to summon G.A., S.T. and A.H. to appear before it since he had been

deprived of the possibility to question them at the hearings before the BCSC.

44. On 13 May 2013 the Baku Court of Appeal dismissed the applicant's appeal. The appellate court did not summon G.A., S.T. and A.H. and its judgment made no mention of the applicant's complaint concerning the alleged impossibility for him to question them at the hearings before the BCSC.

45. On 2 July 2013 the applicant lodged a cassation appeal, reiterating his previous complaints.

46. On 11 September 2013 the Supreme Court upheld the Baku Court of Appeal's judgment of 13 May 2013, without addressing the applicant's particular complaints.

47. On 29 December 2014 the applicant was released from serving the remainder of his sentence after being pardoned by a presidential decree.

RELEVANT LEGAL FRAMEWORK

48. The relevant provisions of the Criminal Code provided as follows at the time of the events:

Article 213. Tax evasion

"213.1. Evasion of payment of significant amounts (*xeyli miqdarda*) of taxes or mandatory State social security contributions,

is punishable by a fine in the amount of one thousand to two thousand manats, or correctional work for a period of up to two years, or imprisonment for a period of up to three years, with or without deprivation of the right to hold a certain position or to engage in a certain activity for a period of up to three years. ..."

Article 306. Failure to execute judgment, decision or another act of the court

"306.1. Malicious non-execution of a judgment, decision, ruling or order of the court that has entered into force, or impeding with the execution of those acts of the court,

...

306.2. If the same acts were committed by an official,

is punishable by a fine in the amount of four thousand to six thousand manats, or correctional work for a period of up to two years, or imprisonment for a period of three to five years, with or without deprivation of the right to hold a certain position or to engage in a certain activity for a period of up to three years."

Article 311. Receiving a bribe (passive bribery)

"311.1. Receiving a bribe, that is the request or receipt by an official directly or indirectly, in person or through an intermediary, of a material or another asset, advantage or concession, as well as the acceptance of a proposal or promise in that connection, for himself or for third persons, for any action (inaction) in connection

with the performance of his job duties (functions) or in return for general patronage or indifference,

...

311.2. Receiving a bribe by an official for illegal actions (inaction),

...

311.3. If the acts specified in Articles 311.1 and 311.2 of this Code were committed,

...

311.3.2. repeatedly committed;

311.3.3. in a large amount;

311.3.4. with use of threat,

is punishable by imprisonment for a period of eight to twelve years."

49. Article 15 of the Criminal Code classifies criminal offences by degree of gravity into (i) offences which do not pose a major public threat, (ii) less serious criminal offences, (iii) serious criminal offences, and (iv) especially serious criminal offences. According to Article 15.4, a serious criminal offence is an offence committed deliberately or negligently, for which the maximum punishment does not exceed twelve years' imprisonment. Under those criteria, the criminal offences under Articles 311.3.2, 311.3.3 and 311.3.4 of the Criminal Code fall into the category of serious criminal offences.

50. The relevant provisions of the Code of Criminal Procedure ("the CCrP") concerning pre-trial detention are described in detail in the Court's judgments in *Farhad Aliyev v. Azerbaijan* (no. 37138/06, §§ 83-102, 9 November 2010) and *Muradverdiyev v. Azerbaijan* (no. 16966/06, §§ 35-49, 9 December 2010).

51. The relevant provisions of the CCrP concerning witness and forcible appearance, and search and seizure provided as follows at the time of the events:

Article 95: Witness

"95.1. A person who is aware of any important circumstances of the case may be summoned and questioned as a witness by the prosecution during the investigation or the court hearing and by the defence during the court hearing.

...

95.4. The witness shall fulfil the following duties in accordance with this Code in the circumstances provided for by it:

95.4.1. attend and participate in the investigation and other procedures as required by the prosecuting authority and answer questions fully and correctly on all facts known to him;

...

95.4.6. comply with the instructions of the preliminary investigator, investigator, prosecutor and court president;

95.4.7. be at the disposal of the court, and not go elsewhere without the permission of the court or without notifying the prosecuting authority of his whereabouts; ..."

Article 177. Right to carry out coercive investigative measures

"177.1. The authority conducting criminal proceedings may carry out coercive investigative measures in order to ensure the normal course of the investigation ...

177.2. If the conduct of an investigative measure is not authorised by the person concerned and the coercive conduct of such a measure requires a court decision, the prosecutor supervising the preliminary investigation, after acceding to a reasoned request by the investigator, applies to the court with a petition.

177.3. The coercive conduct of the below investigative measures requires, as a general rule, a court decision:

177.3.1. conduct of inspection, search, seizure and other investigative measures in a residential place, office or industrial buildings;

...

177.3.5. interception of conversations held by telephone and other means as well as of information sent via telecommunications and other technical means;

...

177.4. inspection and other investigative measures in a residential place, service or industrial buildings as well as the investigative measures provided by Articles 177.3.6 and 177.3.7 of this Code may be conducted only on the basis of a court decision. The investigator may forcibly conduct on the basis of his own decision and without a court decision the following measures:

177.4.1. inspection, search and seizure in a residential place, office or industrial buildings – on the grounds and under the circumstances provided by Article 243.3 of this Code;

...

177.5. ... The decision of the investigator shall justify the necessity and the urgency of the conduct of an investigative measure without a court decision ..."

Article 178: Forcible appearance

"178.1. Forcible appearance shall entail bringing a person by force to the authority conducting criminal proceedings and forcibly ensuring his participation in investigative or other procedures.

178.2. This measure may be applied to a person participating in criminal proceedings and summoned by the authority conducting criminal proceedings only in the following circumstances:

178.2.1. if he fails to attend in response to a compulsory summons of the authority conducting criminal proceedings without good reason;

178.2.2. if he evades receipt of the summons from the authority conducting criminal proceedings;

178.2.3. if he hides from the authority conducting criminal proceedings;

178.2.4. if he has no permanent place of residence.

178.3. Children under the age of fourteen, pregnant women, persons who are seriously ill and victims bringing a private criminal prosecution may not be forcibly brought before the authority conducting criminal proceedings. ...”

Article 236. Inspection

“236.1. An investigator inspects the crime scene, buildings, documents, items and human and animal corpses in order to find traces of the crime and other material objects of potential evidentiary value and to determine the circumstances of the crime and other circumstances relevant for the case.

...

236.4. An investigator inspects visible objects on condition of not breaching citizens’ rights...

...

236.9. The inspection of a residential place, service or industrial buildings and objects visible therein is carried out if there are grounds and facts provided by Article 243.3. of this Code and in compliance with the requirements of Articles 177.2.-177.6. of this Code.”

Article 242. Conduct of a search or seizure

“242.1. Where the available evidence or material obtained following an investigation gives rise to a reasonable suspicion that a residential place, service or industrial buildings or other place contains, or that certain persons are in possession of, items or documents of potential significance to a case as evidence, the investigator may conduct a search. ...”

Article 243. Grounds for conducting a search or seizure

“243.1. As a rule, the search or seizure shall be carried out by a court decision. The court shall deliver a decision on conducting a search or seizure following a reasoned request from the investigator and the submissions from the prosecutor in charge of the investigation. The search or seizure is carried out in compliance with the requirements provided by Articles 177.2.-177.6. of this Code.

243.2. The decision on the search or seizure should provide the following:

243.2.1. The delivering date, time and place of the decision;

243.2.2. The name, surname, patronymic and position of the person delivering the decision;

243.2.3. The justification of the objective facts and motives constituting grounds for conduct of the search or seizure;

243.2.4. The name, surname and patronymic of the person in respect of whom the search or seizure is to be conducted;

243.2.5. The exact place (residential, service or industrial buildings, its address or situation) where the search or seizure will be conducted;

243.2.6. If a decision on the seizure is adopted, also the items and documents to be seized.

243.3. The investigator may conduct in urgent circumstances a search or seizure without a court decision only if there is exact information giving rise to a likelihood of the following:

243.3.1. Hiding in a residential place of an item or document confirming the commission of a criminal offence against a person or State authority or its preparation;

...

243.4. In the circumstances provided for by Article 243.3 the investigator delivers a reasoned decision on the search or seizure. The investigator's decision should be in compliance with the requirement of Article 243.2 of this Code taking into account the grounds for necessity and urgency of the conduct of a search or seizure in the absence of a court decision."

Article 244. Participants in the search or seizure

" 244.2. Counsel for the suspect or accused is entitled to participate in the conduct of a search or seizure concerning him or her. If counsel for the defence, having been informed by the investigator that this investigative measure will be carried out, expresses the wish to participate in the search and seizure, the investigator shall take steps to guarantee his right.

...

244.4. During a search or seizure steps shall be taken to guarantee the presence of the person concerned by the search and seizure, adult members of his family or those who represent his legal interests. If it is impossible to secure the participation of the above-mentioned people, a representative of the relevant housing organisation or local executive authority shall be invited."

THE LAW

I. SCOPE OF THE APPLICATIONS

52. In his submissions of 10 December 2018 in reply to the Government's observations, the applicant complained for the first time about the alleged violation of Article 18 of the Convention.

53. In the Court's view, this new complaint does not constitute an elaboration or elucidation of the applicant's original complaints, on which the parties have commented. The Court does not therefore find it appropriate to examine that matter in the present context (see *Sadkov v. Ukraine*, no. 21987/05, § 77, 6 July 2017; *Aliyev v. Azerbaijan*, nos. 68762/14 and 71200/14, § 97, 20 September 2018; and *Petukhov v. Ukraine (no. 2)*, no. 41216/13, § 116, 12 March 2019).

II. JOINDER OF THE APPLICATIONS

54. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment, pursuant to Rule 42 § 1 of the Rules of Court.

III. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

55. The applicant complained under Article 5 § 3 of the Convention that the domestic courts had failed to justify the need for his pre-trial detention and to provide reasons for his continued detention. Article 5 § 3 of the Convention reads as follows:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

A. Admissibility

56. The Court notes that this 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

57. The applicant maintained his complaint.

58. The Government submitted that there had been a reasonable suspicion that the applicant had committed serious corruption-related criminal offences and that he had been "on many occasions" held responsible for administrative offences related to his "socially dangerous behaviour". Also, the complexity of the criminal case necessitated a number of investigative actions.

2. The Court's assessment

59. The Court refers to the general principles established in its case-law and set out in the judgment *Buzadji v. the Republic of Moldova* [GC] (no. 23755/07, §§ 84-91, 5 July 2016), which are equally pertinent to the present case.

60. As regards the period to be taken into consideration for the purposes of Article 5 § 3, the Court notes that this period commenced on 28 October 2011, when the applicant was arrested, and ended on 12 March 2013, when

the BCSC convicted him. Thus, the applicant was held in pre-trial detention for one year, four months and twelve days in total.

61. The Court observes that the domestic courts, in their decisions on the applicant's detention, used a standard template and limited themselves to repeating a number of grounds for detention in an abstract and stereotyped way, without giving any reasons why they considered those grounds relevant to the applicant's case. They also failed to mention any case-specific facts relevant to those grounds and to substantiate them with relevant and sufficient reasons. The Court has repeatedly found violations of Article 5 § 3 in previous Azerbaijani cases where similar shortcomings were noted and analysed in detail (see *Farhad Aliyev v. Azerbaijan*, no. 37138/06, §§ 191-94, 9 November 2010; *Muradverdiyev v. Azerbaijan*, no. 16966/06, §§ 87-91, 9 December 2010; and *Zayidov v. Azerbaijan*, no. 11948/08, §§ 64-68, 20 February 2014).

62. In view of the foregoing considerations, the Court finds that the legal issue raised in the present case under Article 5 § 3 of the Convention is of repetitive nature and it does not see any fact or argument capable of persuading it to reach a different conclusion. Therefore, the Court considers that the authorities failed to give "relevant" and "sufficient" reasons to justify the need for the applicant's pre-trial detention.

63. Accordingly, there has been a violation of Article 5 § 3 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

64. The applicant complained that the statement made in the Baku Court of Appeal's decision of 8 December 2011 (see paragraph 24 above) had infringed his right to the presumption of innocence. Article 6 § 2 of the Convention provides as follows:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

A. Admissibility

65. The Court notes that this 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

66. The applicant argued that the statement "the degree of public dangerousness of the criminal offence committed by [the applicant]"

unequivocally purported to indicate that he had committed a criminal offence and that this statement was made in the absence of any final decision declaring him guilty.

67. The Government submitted that the statement in question, which was made only in the expository part of the decision, cannot be taken out of the context of the whole decision which referred to the applicant as an accused person. They also noted that the Baku Court of Appeal's decision of 8 December 2011, which contained the impugned statement, had not caused any prejudice to the applicant since none of the subsequent decisions of the domestic courts had referred to it.

2. The Court's assessment

68. The Court reiterates that the presumption of innocence will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before his guilt has been proved according to law. It suffices, even in the absence of a formal finding, that there is some reasoning suggesting that the court or the official regards the accused as guilty, and a premature expression of such an opinion by the tribunal itself will inevitably run foul of the principle. However, a distinction should be made between statements which reflect the opinion that the person concerned is guilty and statements which merely describe "a state of suspicion". The former infringe the presumption of innocence, whereas the latter have been regarded as unobjectionable in various situations examined by the Court (see *Ramkovski v. the former Yugoslav Republic of Macedonia*, no. 33566/11, §§ 81-82, 8 February 2018, and *Grubnyk v. Ukraine*, no. 58444/15, § 136, 17 September 2020).

69. Turning to the circumstances of the present case, the Court notes that the impugned statement was used in the legal reasoning part of a decision in which the appellate court justified the applicant's continued pre-trial detention and that the decision in question referred to the applicant as an accused person in all its other parts. The appellate court thus appears to have used the impugned statement not to proclaim the applicant guilty but to substantiate its decision to justify his pre-trial detention. However, the lack of intention to breach the right to the presumption of innocence cannot rule out a violation of Article 6 § 2 of the Convention and the Court has found on numerous occasions a violation of Article 6 § 2 on account of unqualified declaration of guilt in a pre-trial detention order (see, among many other authorities, *Gutsanovi v. Bulgaria*, no. 34529/10, §§ 201-04, ECHR 2013 (extracts), and *Grubnyk*, cited above, §§ 138 and 142).

70. The Court deems that in the present case the impugned statement was not limited to describing a "state of suspicion" against the applicant, but represented the applicant as a person who had committed a criminal offence without any qualification or reservation (compare *Maksim Savov*

v. Bulgaria, no. 28143/10, § 73, 13 October 2020). Therefore, the overall manner in which the statement was issued by the appellate court risked leaving the reader in no doubt that the applicant had committed the criminal offence in question.

71. The Court also does not consider that the absence of any reference to the Baku Court of Appeal's decision of 8 December 2011 in the subsequent decisions of the domestic courts may be interpreted as remedying that situation. On the contrary, the Court observes that none of the subsequent decisions of the domestic courts made any attempt to correct the relevant wording of the Baku Court of Appeal's decision of 8 December 2011 (see *Fedorenko v. Russia*, no. 39602/05, § 91, 20 September 2011).

72. In the light of the foregoing, the Court finds that the impugned statement amounted to a declaration of the applicant's guilt, in the absence of a final conviction, and breached his right to be presumed innocent.

73. There has accordingly been a violation of Article 6 § 2 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION ON ACCOUNT OF THE SEARCHES AND SEIZURES CARRIED OUT IN THE APPLICANT'S HOME, WORKPLACE AND VEHICLE

74. The applicant complained under Article 8 of the Convention that his Convention rights had been breached as a result of the searches and the seizures carried out in his home, workplace and vehicle. Article 8 of the Convention reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

75. The Court notes that this 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*

76. The applicant submitted that the search and seizure order had been very broad and had not specified the list of items to be searched for and seized. He pointed out that, although the order implied that there were large amounts of money and false documents, the investigator seized items such as discs, letters, photographs, video recordings, flash cards and so on. The applicant also noted that the searches and seizures had been carried out in his and his lawyer's absence. Lastly, he submitted that there had been no court order concerning the search and seizure conducted in the vehicle in his use.

77. The Government submitted that the searches and seizures had been based on a court order, pursued the legitimate aim of the prevention of crime and were strictly necessary in a democratic society.

2. *The Court's assessment*

(a) Whether there was interference

78. The Court finds, and this is not in dispute between the parties, that the searches of the applicant's home and the premises of the *Xural* newspaper, which was the applicant's workplace, and the seizure of various materials constituted an interference with the exercise of the applicant's right to respect for his private life and home within the meaning of Article 8 § 1 of the Convention (see *Saint-Paul Luxembourg S.A. v. Luxembourg*, no. 26419/10, §§ 37-39, 18 April 2013; *Amarandei and Others v. Romania*, no. 1443/10, § 215, 26 April 2016; *Aliyev v. Azerbaijan*, nos. 68762/14 and 71200/14, § 178, 20 September 2018; and *Yunusova and Yunusov v. Azerbaijan (no. 2)*, no. 68817/14, § 148, 16 July 2020). It is also undisputed by the parties that the vehicle in which the search and seizure was conducted had been in the applicant's use and the Court considers that the search and seizure carried out in that vehicle also constituted an interference with the exercise of the applicant's right to respect for his private life within the meaning of Article 8 § 1 of the Convention (see *Ernst and Others v. Belgium*, no. 33400/96, § 110, 15 July 2003).

(b) Whether the interference was justified

79. Such an interference will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of Article 8 as being in accordance with the law, pursuing one or more of the legitimate aims listed therein, and being necessary in a democratic society in order to achieve the aim or aims concerned.

(i) Whether the interference was in accordance with the law

80. The Court notes that while the Government submitted that the searches and seizures were carried out in accordance with a court decision based on the relevant provisions of the CCrP, the applicant argued in a general way that the interference had been unlawful. The applicant also noted that there was no court decision for the search and seizure conducted in his vehicle. The Court observes that Articles 242 and 243 of the CCrP regulating the conduct of the search and seizure provided for the conditions in which an investigator could carry out a search and seizure on the basis of a court order (see paragraph 51 above) and it accepts that the domestic law was clear, accessible and sufficiently precise.

81. However, the Court notes that the Nasimi District Court's order of 28 October 2011, which constituted the legal basis of the impugned searches and seizures, concerned only the applicant's home and the premises of the *Xural* newspaper and did not mention the vehicle in the applicant's use among the places where a search and seizure was to be conducted (see paragraph 14 above). In that connection, the Court cannot overlook the provisions of Article 243.2.5. of the CCrP which clearly required that a court order must indicate the exact place where the search and seizure will be conducted (see paragraph 51 above). The Government also failed to refer to any other court decision authorising the search and seizure in the vehicle and did not argue that there were circumstances justifying urgent action in the absence of a court decision. Consequently, the Court cannot but conclude that the interference with the applicant's right to respect for his private life on account of the search and seizure carried out in the vehicle in his use was not in accordance with the law within the meaning of paragraph 2 of Article 8.

82. The Court will therefore continue to examine whether the interference was necessary in a democratic society for one of the aims enumerated in Article 8 § 2, but only as regards the searches and seizures carried out in the applicant's home and the premises of the *Xural* newspaper (compare *Mirgadirov v. Azerbaijan and Turkey*, no. 62775/14, § 119, 17 September 2020).

(ii) Whether the interference pursued a legitimate aim

83. The Court accepts that the interference pursued the legitimate aim of preventing crime since the searches and seizures were ordered in the context of a criminal investigation opened against the applicant following allegations of bribe.

(iii) Whether the interference was "necessary in a democratic society"

84. Under the Court's settled case-law, the notion of "necessity" implies that the interference corresponds to a pressing social need and, in particular,

that it is proportionate to the legitimate aim pursued. In determining whether an interference is "necessary in a democratic society" the Court will take into account the fact that a certain margin of appreciation is left to the Contracting States. However, the exceptions provided for in § 2 of Article 8 are to be interpreted narrowly, and the need for them in a given case must be convincingly established (see *Smirnov v. Russia*, no. 71362/01, § 43, 7 June 2007).

85. With regard to, in particular, searches of premises and seizures, the Court has consistently held that the Contracting States may consider it necessary to resort to such measures in order to obtain physical evidence of certain offences. The Court will assess whether the reasons adduced to justify such measures were "relevant" and "sufficient" and whether the aforementioned proportionality principle was adhered to (see *Buck v. Germany*, no. 41604/98, § 45, ECHR 2005-IV, and *Vinks and Ribicka v. Latvia*, no. 28926/10, § 102, 30 January 2020).

86. As regards the latter point, the Court must first ensure that the relevant legislation and practice afford individuals adequate and effective safeguards against abuse. Secondly, the Court must consider the particular circumstances of each case in order to determine whether, in the concrete case, the interference in question was proportionate to the aim pursued. The criteria the Court has taken into consideration in determining this latter issue have been, *inter alia*, the severity of the offence in connection with which the search and seizure were effected, the circumstances in which the order was issued, in particular further evidence available at that time; the content and scope of the order, having particular regard to the nature of the premises searched and the safeguards implemented in order to confine the impact of the measure to reasonable bounds; the manner in which the search was carried out, including the presence of independent observers during the search, and the extent of possible repercussions on the work and reputation of the person affected by the search (see *Buck*, cited above, § 45; *Smirnov*, cited above, § 44; and *Vinks and Ribicka*, cited above, § 103).

87. Turning to the circumstances of the present case, the Court observes that the offence in respect of which the searches and seizures were ordered concerned the criminal offence of receiving a bribe which belongs to the category of serious criminal offences under Azerbaijani law (see paragraph 49 above). The Court also notes that the searches and seizures were ordered following a criminal complaint lodged by G.A. against the applicant, supported by some evidence (see paragraph 5 above), and that the prosecuting authorities had a duty to investigate this complaint, given its serious nature.

88. However, the Court notes that the impugned order was couched in general and broad terms, and allowed searches and seizures at the applicant's home and the premises of the *Xural* newspaper, without specifying what items or documents were expected to be found and seized

(see the terms of the order in paragraph 14 above and compare, among many other cases, *Roemen and Schmit v. Luxembourg*, no. 51772/99, § 70, ECHR 2003-IV; *Ernst and Others*, cited above, § 116; and *Bagiyeva v. Ukraine*, no. 41085/05, § 52, 28 April 2016). The Court reiterates that, according to its case-law, search orders have to be drafted, as far as practicable, in a manner calculated to keep their impact within reasonable bounds (see *Iliya Stefanov v. Bulgaria*, no. 65755/01, § 41, 22 May 2008, and *Kolesnichenko v. Russia*, no. 19856/04, § 33, 9 April 2009). This requirement was manifestly disregarded in the present case. In that connection, the Court does not lose sight of the fact that the limitation of the scope of a search and seizure order also constituted a requirement of the domestic law since Article 243.3.6 of the CCrP explicitly provided that a decision on the seizure must indicate the items and documents to be seized (see paragraph 51 above). The Court furthermore does not consider that the reference in the impugned court's decision to the prosecutor's request, which was also drafted in broad terms, quoting large amounts of money and false documents, could remedy the above-mentioned shortcoming.

89. The Court observes that the order's breadth and vagueness was also reflected in the way in which it was executed. The investigator seized numerous items and documents (see paragraphs 15-17 above) which were not clearly related to the investigation in respect of which the searches and seizures were conducted (compare *Amarandei and Others*, cited above, § 226). It is significant that in the course of judicial review of the searches and seizures, the appellate court did not give any indication as to the relevance of those items seized from the applicant to the ongoing criminal investigation and did not address the applicant's complaint relating to the vagueness of the search and seizure order, limiting itself to the examination of the lawfulness of the legal framework of those investigative actions (see paragraph 20 above) (compare *Misan v. Russia*, no. 4261/04, § 62, 2 October 2014, and *Vinci Construction and GTM Génie Civil et Services v. France*, nos. 63629/10 and 60567/10, § 79, 2 April 2015).

90. In addition, the Court considers that the above-mentioned shortcomings were aggravated by the domestic authorities' failure to take any steps to guarantee the presence of the applicant and his lawyer during the searches and seizures as provided under Azerbaijani law (see paragraph 51 above) (compare *Modestou v. Greece*, no. 51693/13, § 51, 16 March 2017).

91. The foregoing considerations are sufficient to enable the Court to conclude that the interference was not proportionate to the legitimate aim pursued.

92. There has accordingly been a violation of Article 8 of the Convention on account of the searches and seizures carried out in the applicant's home, workplace and vehicle.

VI. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION ON ACCOUNT OF THE SEARCHES AND SEIZURES CONDUCTED IN THE APPLICANT'S HOME, WORKPLACE AND VEHICLE

93. The applicant complained under Article 10 of the Convention that the searches and seizures conducted in his home, workplace and vehicle had amounted to a breach of his right to the protection of his journalistic sources under Article 10 of the Convention, which 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

94. The Court notes that this 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

95. The applicant submitted that the impugned searches and seizures had revealed his journalistic sources and had created a fear of persecution in his sources. He also noted that the interference had been unlawful, had pursued no legitimate aim and had not been necessary in a democratic society.

96. The Government submitted that there was no evidence that the searches and seizures were connected to the limitation of the applicant's rights protected under Article 10 of the Convention and referred to their submissions made under Article 8 of the Convention.

2. The Court's assessment

(a) Whether there was interference

97. The Court observes that in the present case, while the Government denied that the searches and seizures had been related to the applicant's

rights protected under Article 10 of the Convention, the applicant submitted that the searches and seizures had amounted to a breach of his right to the protection of his journalistic sources.

98. The Court has already held in a number of the cases that there was an interference with the exercise of the applicants' right to freedom of expression as a result of the searches and seizures conducted at the journalists' homes and workplaces since those investigative actions could lead to the identification of journalistic sources (see *Tillack v. Belgium*, no. 20477/05, § 56, 27 November 2007; *Saint-Paul Luxembourg S.A.*, cited above, §§ 53-56; *Görmüş and Others v. Turkey*, no. 49085/07, § 32, 19 January 2016; and *Man and others v. Romania* (dec.), no. 39273/07, § 125, 19 November 2019). The Court does not see any reason to depart from that finding in the present case and thus considers that the impugned searches and seizures amounted to an interference with the applicant's right to receive and impart information within the meaning of Article 10 § 1 of the Convention.

(b) Whether the interference was justified

99. 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 those aims.

100. The Court notes that it has already concluded that the interference with the applicant's right to respect for his private life as a result of the search and seizure conducted in the vehicle in his use was not in accordance with the law within the meaning of paragraph 2 of Article 8 (see paragraph 81 above). Having regard to this conclusion, the Court considers that, similarly, the interference with the applicant's right to freedom of expression as a result of the search and seizure conducted in the vehicle in his use was not prescribed by law within the meaning of Article 10 § 2 of the Convention.

101. As regards the searches and seizures conducted at the applicant's home and workplace, having regard to its conclusion under Article 8 concerning this issue (see paragraphs 80 and 83 above), the Court considers that the interference was prescribed by law and pursued a legitimate aim.

102. As to the necessity of the interference in a democratic society, the Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and the safeguards to be afforded to the press are of particular importance. Whilst the press must not overstep the bounds set, not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog". The right of journalists to protect their sources is part of the freedom to "receive and impart information and ideas without interference

by public authorities" protected by Article 10 of the Convention and serves as one of its important safeguards. It is a cornerstone of freedom of the press, without which sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information to the public may be adversely affected (see *Sanoma Uitgevers B.V. v. the Netherlands* [GC], no. 38224/03, § 50, 14 September 2010, and *Görmüş and Others*, cited above, §§ 40 and 44). Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society, an interference cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest. Limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court (see *Roemen and Schmit*, cited above, § 46).

103. The Court also notes that its understanding of the concept of journalistic "source" is "any person who provides information to a journalist"; it understands "information identifying a source" to include, as far as they are likely to lead to the identification of a source, both "the factual circumstances of acquiring information from a source by a journalist" and "the unpublished content of the information provided by a source to a journalist" (see *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands*, no. 39315/06, § 86, 22 November 2012). It also held that the search and seizure warrant on the premises used by the journalists was a more drastic measure than an order to divulge the source's identity, because investigators who raid a journalist's workplace unannounced and armed with search warrants have very wide investigative powers, as, by definition, they have access to all the documentation held by the journalist (see *Roemen and Schmit*, cited above, § 57).

104. Turning to the circumstances of the present case, the Court notes that it has already found that the Nasimi District Court's search and seizure order dated 28 October 2011 was drafted in broad terms without specifying the list of items or documents to be searched for or seized (see paragraph 88 above). In that connection, the Court considers that, even assuming that the purpose of the searches and seizures was not to disclose the applicant's journalistic sources, as submitted by the Government, the wording of the order was clearly too broad to rule out that possibility and the impugned searches and seizures were disproportionate inasmuch as they enabled the investigating authorities to search for the applicant's journalistic sources (see *Saint-Paul Luxembourg S.A.*, cited above, § 61).

105. In the present case, those shortcomings of the Nasimi District Court's order of 28 October 2011 were also aggravated by the fact that during the impugned searches the investigating authorities seized numerous documents and items clearly unrelated to the ongoing criminal investigation, but capable of leading to the identification of the applicant's

journalistic sources. The Court also cannot lose sight of the fact that the investigating authorities decided the return of those documents and items only on 13 April 2012 (see paragraph 32 above).

106. The Court deems it necessary to reiterate that the seizure of numerous documents and items clearly unrelated to the ongoing criminal proceedings against the applicant during the searches of the applicant's home and workplace was liable not only to have a very negative impact on the applicant's relations with his sources of information, but also to have a deterrent effect, in general, on other journalists and their sources in the exercise of their activities (see *Görmüş and Others*, cited above, §§ 73-74).

107. The foregoing considerations are sufficient to enable the Court to conclude that the interference was not proportionate to the legitimate aim pursued.

108. There has accordingly been a violation of Article 10 of the Convention on account of the searches and seizures carried out in the applicant's home, workplace and vehicle.

VII. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (D) OF THE CONVENTION

109. The applicant complained that the criminal proceedings against him had been unfair since he had not been given an opportunity to examine the main witnesses against him at any of the hearings. The relevant part of Article 6 reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him ..."

A. Admissibility

110. The Court notes that this 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

111. The applicant maintained that his criminal conviction had been based mainly on the statements of the prosecution witnesses whom he could not question. In particular, he had been deprived of the opportunity to

question three main witnesses (G.A., A.H. and S.T.) concerning the alleged bribe charges against him. While A.H. and S.T. had appeared and testified before the BCSC, they had refused to reply to any question of the defence. Despite the applicant's repetitive requests A.H. and S.T. had never been brought before the court for questioning and the Baku Court of Appeal and the Supreme Court had ignored his complaints in this regard. As to the questioning of G.A., the applicant contested the transcripts of the court hearing of 2 July 2012, submitting that he and his lawyers had been unable to question G.A. when she had appeared before the BCSC.

112. The Government submitted that the applicant had been able to obtain the attendance of witnesses and to examine them and that the criminal proceedings had been fair.

2. The Court's assessment

113. The Court reiterates that the guarantees in paragraph 3 (d) of Article 6 of the Convention are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision (see *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011); it will therefore consider the applicant's complaint under both provisions taken together (see *Schatschaschwili v. Germany* [GC], no. 9154/10, § 100, ECHR 2015).

114. According to the principles developed in *Al-Khawaja and Tahery* (cited above, § 152), it is necessary to examine in three steps the compatibility with Article 6 §§ 1 and 3 (d) of the Convention of proceedings in which statements made by a witness who had not been present and questioned at the trial were used as evidence. The Court must examine whether:

(i) there was a good reason for the non-attendance of the witness and, consequently, for the admission of the absent witness's untested statements in evidence (ibid., §§ 119-25);

(ii) the evidence of the absent witness was the sole or decisive basis for the defendant's conviction (ibid., §§ 119 and 126-47); and

(iii) there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps caused to the defence as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair (ibid., § 147).

115. In *Schatschaschwili*, the Grand Chamber clarified that all three steps of the test were interrelated and, taken together, served to establish whether the criminal proceedings at issue had, as a whole, been fair (cited above, § 118). At the same time, it noted in respect of the first step that while the absence of good reason for the non-attendance of the witness cannot of itself be conclusive of the unfairness of the applicant's trial, it is a very important factor to be weighed in the balance when assessing the overall fairness of a trial, and one which may tip the balance in favour of

finding a breach of Article 6 §§ 1 and 3 (d) of the Convention (ibid., § 113). Expounding on the interplay of the second and third steps, the Grand Chamber highlighted the importance of sufficient counterbalancing factors not only in cases in which the absent witness's testimony was the sole or the decisive basis for the conviction, but also in those cases where, in the domestic courts' assessment, that evidence, without clearly reaching the threshold of "sole or decisive", carried significant weight and its admission may have handicapped the defence (ibid., § 116; *Seton v. the United Kingdom*, no. 55287/10, § 59, 31 March 2016, and *Oddone and Pecci v. San Marino*, nos. 26581/17 and 31024/17, § 92, 17 October 2019).

116. Turning to the circumstances of the present case, the Court notes that the applicant alleged a violation of Article 6 §§ 1 and 3 (d) of the Convention essentially on the grounds that his trial had been unfair in that he had been unable to cross-examine three prosecution witnesses in respect of the bribe charges against him. The Court firstly notes that although the applicant was found guilty of the criminal offences under Articles 213.1 and 306.2 of the Criminal Code in addition to the bribery-related criminal offences, the latter were the only criminal offences falling into the category of serious criminal offences and leading to the imposition of a heavy imprisonment sentence on him. The Court observes that G.A., A.H. and S.T. were not "absent" witnesses in the sense that they were not presented for cross-examination. Indeed, it appears from the transcripts of the court hearings before the BCSC that each of them appeared once before the court for testifying but either they refused to answer the applicant's questions (see paragraph 37 above) or their questioning by the applicant was not completed and they did not again appear before the court (see paragraphs 35-36 above).

117. In that connection, the Court reiterates that Article 6 § 3 (d) of the Convention enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings (see *Al-Khawaja and Tahery*, cited above, § 118, and *Asadbeyli and Others v. Azerbaijan*, nos. 3653/05 and 5 others, § 134, 11 December 2012). In the circumstances of the present case, as the applicant was not able to sufficiently question the above-mentioned witnesses against him, the Court will therefore apply the principles set out above (compare *Cabral v. the Netherlands*, no. 37617/10, § 33, 28 August 2018).

(a) Whether there was good reason for not securing the attendance of the witnesses at the trial for the questioning by the applicant

118. The Court observes that G.A., A.H. and S.T. were summoned to the trial in their capacity as witnesses and each of them attended one hearing making their statements and leaving the courtroom either without being examined by the applicant or prior to the end of the examination. They also failed to attend any subsequent hearing in order to have them examined as witnesses by the applicant. In particular, despite the BCSC's summons concerning the appearance of G.A. and A.H. before it (see paragraphs 38 and 40 above), they failed to appear at the subsequent court hearings and it does not appear from the documents submitted to the Court that the domestic courts took any step in order to establish whether there were any good reasons preventing them from appearing before the court in order to allow the applicant to question them.

119. In that connection, the Court notes that under domestic law a witness shall be at the disposal of the court and only a witness who is seriously ill cannot be compelled to appear before the court (see paragraph 51 above). However, the BCSC failed to provide any element of proof that G.A. and A.H. had been seriously ill and confined itself to mentioning in the transcripts of the court hearings an unidentified medical document sent to the court by A.H. and G.A.'s intention to do so (see paragraphs 38 and 40 above). The higher courts also ignored the applicant's relevant requests asking for the attendance of the above-mentioned witnesses for questioning by him, without providing any argument. In any event, it does not appear from the documents submitted to the Court that the domestic courts took any step in order to establish whether those witnesses' health problems were such as to prevent them from appearing before the court (see *Efendiyev v. Azerbaijan*, no. 27304/07, § 45, 18 December 2014).

120. It follows, that in the circumstances of the present case there was no good reason for not securing the attendance of the witnesses at the trial for the questioning by the applicant. As noted above, while this cannot of itself be conclusive of the unfairness of a trial, it is a very important factor to be weighed in the balance when assessing the overall fairness of a trial and one which may tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (d) (see *Schatschaschwili*, cited above, § 113).

(b) Whether the evidence of the absent witnesses was the sole or decisive basis for the applicant's conviction

121. The Court reiterates that in determining the weight of the evidence given by the absent witnesses and, in particular, whether that evidence was the sole or decisive basis for the applicant's conviction, the Court has regard, in the first place, to the domestic courts' assessment (see *Schatschaschwili*, cited above, § 141). In the present case, the domestic courts, which did not consider the statements made by G.A., A.H. and S.T.

as the sole evidence against the applicant in respect of the bribery related criminal offences, did not indicate whether they considered those statements as decisive evidence as defined by the Court in its judgment in *Al-Khawaja and Tahery*, that is, as being of such significance as to be likely to be determinative of the outcome of the case.

122. In the Court's view, although the domestic courts relied, in addition to the statements made by G.A., A.H. and S.T., on further corroborating evidence, namely the audio recording of the conversations contained in CD-ROM and the messages exchanged between the applicant and G.A. (see paragraph 42 above), it is clear that the statements made by G.A., A.H. and S.T. were conclusive in the applicant's conviction of bribe related criminal offences (compare *Kuchta v. Poland*, no. 58683/08, § 58, 23 January 2018, and *Panagis v. Greece*, no. 72165/13, § 50, 5 November 2020). In particular, as regards the bribe offer by G.A. which triggered the criminal proceedings against the applicant, the Court observes that the audio recording of the conversations recorded on a CD-ROM and the messages exchanged between the applicant and G.A. did not refer to any element of use of threat by the applicant (see paragraphs 30-31 above), which was supported only by G.A.'s statement. As to the bribe offers from A.H. and S.T., in addition to the statements made by those witnesses, the other evidence available to the trial court was solely hearsay evidence made by several witnesses confirming various meetings between the applicant and A.H. and S.T. Those findings are sufficient for the Court to consider that the statements made by G.A., A.H. and S.T. were decisive, that is, determinative of the applicant's conviction of bribe related criminal offences.

(c) Whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured

123. The Court must further determine whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured as a result of the admission of the evidence from the witnesses that the applicant was not able to question. The following elements are relevant in this regard: the trial court's approach to the untested evidence, the availability and strength of further incriminating evidence, and the procedural measures taken to compensate for the lack of opportunity to question the witnesses at the trial (see *Schatschaschwili*, cited above, § 145).

124. The Court firstly notes that there is nothing in the file to establish that the domestic courts dealt cautiously with the witnesses' statements or attached less importance to them because the applicant was unable to question them.

125. The Court has already observed that the domestic courts had before them some additional incriminating hearsay and circumstantial evidence

supporting the witness statements made by G.A., A.H. and S.T. and it found that such evidence could not be considered conclusive (see paragraph 122 above).

126. As regards the procedural measures taken to compensate for the lack of opportunity to question the witnesses at the trial, the Court notes that, although the applicant had the possibility to give his own version of the events at the trial, no procedural measure was taken by the domestic courts to compensate for the lack of opportunity to question the witnesses by the applicant.

(d) Assessment of the trial's overall fairness

127. In assessing the overall fairness of the proceedings and having regard to any counterbalancing factors, in the light of its finding to the effect that the evidence given by G.A. A.H. and S.T. were decisive for the applicant's conviction, the Court considers that the trial court had before it scarce additional incriminating evidence regarding the bribe related criminal offences of which the applicant was found guilty. However, no procedural measure was taken to compensate for the lack of opportunity to examine the witnesses at the trial.

128. In those circumstances, the Court is of the view that the absence of an opportunity for the applicant to examine or have examined witnesses G.A. A.H. and S.T. at any stage of the proceedings rendered the trial as a whole unfair. Accordingly, there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

VIII. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

129. Relying on Articles 8 and 10 of the Convention, the applicant complained in application no. 37816/12 that the interference with his telephone calls and messages had amounted to a breach of his Convention rights. He also complained in application no. 25260/14 that he had been criminally convicted on account of his critical articles about high-ranking officials of the country.

130. Having regard to the conclusions reached above under Articles 8, 10 and 6 §§ 1 and 3 (d) of the Convention (see paragraphs 92, 108 and 128 above) and the parties' submissions, the Court considers that there is no need to give a separate ruling on the admissibility and merits of these complaints in the present case (compare *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014; *Khadija Ismayilova v. Azerbaijan* (no. 3), no. 35283/14, § 87, 7 May 2020; and *Farzaliyev v. Azerbaijan*, no. 29620/07, § 73, 28 May 2020).

IX. APPLICATION OF ARTICLE 41 OF THE CONVENTION

131. 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

132. The applicant claimed 143,000 euros (EUR) in respect of non-pecuniary damage.

133. The Government contested the amount claimed as unsubstantiated and excessive.

134. The Court considers that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by the finding of violations, and that compensation should thus be awarded. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant the sum of EUR 10,000 under this head, plus any tax that may be chargeable on this amount.

B. Costs and expenses

135. The applicant claimed EUR 33,500 for the costs and expenses incurred before the Court. In support of his claim, he submitted two contracts with one of his representatives before the Court, Mr E. Sadigov.

136. The Government considered that the claim was excessive and unsubstantiated and did not correspond to the amount of work done by the applicant's representatives. The Government asked the Court to dismiss the applicant's claim under that head. Alternatively, in their view, the applicant may claim EUR 2,000 under this head.

137. 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 were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the amount of work carried out by the applicant's representatives, the Court considers it reasonable to award the sum of EUR 3,000 covering costs under all heads, plus any tax that may be chargeable to the applicant.

C. Default interest

138. 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. *Decides* to join the applications;

2. *Declares* the complaints under Articles 5 § 3 (the alleged lack of justification for the pre-trial detention), 6 § 2 (the alleged violation of the right to the presumption of innocence), 8 and 10 (the alleged violation of the applicant's rights as a result of the searches and seizures carried out in his home, workplace and vehicle), and 6 §§ 1 and 3 (d) (the alleged unfairness of the criminal proceedings against him) of the Convention admissible;

3. *Holds* that there has been a violation of Article 5 § 3 of the Convention;

4. *Holds* that there has been a violation of Article 6 § 2 of the Convention;

5. *Holds* that there has been a violation of Article 8 of the Convention on account of the searches and seizures carried out in the applicant's home, workplace and vehicle;

6. *Holds* that there has been a violation of Article 10 of the Convention on account of the searches and seizures carried out in the applicant's home, workplace and vehicle;

7. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention;

8. *Holds* that there is no need to examine separately the admissibility and merits of the remaining complaints;

9. *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 the currency of the respondent State, at the rate applicable at the date of settlement:
      (i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 3,000 (three thousand euros), 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;

10. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 April 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik	Síofra O'Leary
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges O'Leary, Hüseynov and Guyomar is annexed to this judgment.

S.O.L.
V.S.

JOINT CONCURRING OPINION OF JUDGES O'LEARY, HÜSEYNOV AND GUYOMAR

1. We voted in favour of finding a violation of Article 6 § 2 of the Convention in this case, albeit not without a degree of hesitation.

2. We agree with the well-established general principles relating to this article of the Convention according to which, in essence, a premature expression by a court that an accused is guilty will fall foul of the principle of the presumption of innocence (see the case-law cited in §§ 68 – 69 of the judgment).

3. However, we consider it important to emphasise that, while the strictness to which the Court's existing case-law lends itself is both understandable and legitimate, it gives rise to two risks. Firstly, there is a risk that the principles are applied too rigidly, with an impugned statement being read too literally, in isolation and out of context. The Court has emphasised the relevance of context where, in cases of "unfortunate language", it has considered it necessary to look at the context of the proceedings as a whole and their special features (see, for example, *Pasquini v. San Marino* (no. 2), no. 23349/17, § 51, judgment of 20 October 2020). Secondly, there is a risk that the general principles may be applied, over time, in an ever more demanding fashion, with the result that a violation of Article 6 § 2 of the Convention in one set of circumstances is read as *requiring* a violation in another, despite differences in the nature and context of the judicial statements made or the judicial proceedings to which they relate.

4. In the present case, the impugned statement, which appeared in an order of the Baku Court of Appeal rejecting the applicant's request to have his pre-trial detention discontinued, read as follows: "having regard to the degree of public dangerousness of the criminal offence committed by Zeynalov Avaz Tapdig oglu, [...]".

5. There was, as such, a judicial expression of guilt while the investigation was still pending. However, the order of the Court of Appeal, reproduced in its entirety in § 24 of the judgment, reveals that the impugned statement was accompanied by many others: "the accused [...] was charged with the criminal offences"; "an alternative preventive measure may be imposed on a person who is charged with a criminal offence [...]; the accused [...] is a person who is charged with criminal offences [...] and "the investigation was pending".

6. Viewed in the overall context of the order, and the domestic proceedings, did the one statement challenged represent the applicant as a person who had committed a criminal offence without any qualification or reservation (see § 73 of the *Savov* judgment, cited in § 70 of the judgment)?

7. In the particular circumstances of the present case, two factors led us to vote in favour of a violation. Firstly, the statement was made by a court

of appeal, not merely by an official, and one which should have known the Convention standards by which such a statement would be judged. Statements by judges are subject to stricter scrutiny than those by investigative authorities (see *Pandy v. Belgium*, no. 13583/02, § 43, judgment of 21 September 2006). Secondly, and most importantly, that court order reflected a sort of "template" reasoning, such that, were the Court not to point out the error it contained, there is a risk that such standard expressions would continue to be repeated without due regard to the requirements of the presumption of innocence. It is important that the domestic courts express themselves with requisite care.

8. However, we do consider it necessary to emphasise the need, in cases related to Article 6 § 2 of the Convention, to assess impugned statements case by case and with careful attention to their wording, context and the proceedings in which they are made in order to ensure that strict scrutiny does not become blinkered scrutiny.