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## Case of Islam-Ittihad Association v. Azerbaijan Republic

### **Abstract**

*The article has been dedicated to one of the challenges of our times. In general, it discusses the phenomena of freedom of religion and belief (FORB, in Azerbaijani DVEA), and reviews the legal aspects of the fight against the radical religious groups. One of the recent cases seen by the European Court of Human Rights, "Islam-Ittihad and others v. Azerbaijan", has been placed in the centre of attention in this research.*

### **Annotasiya**

*Məqalə zəmanəmizin çağırışlarından birinə həsr olunmuşdur. Ümumilikdə o, din və etiqad azadlığı (DVEA – ingiliscə, FORB) fenomenini, habelə radikal dini qruplara qarşı mübarizənin hüquqi aspektlərini araşdırır. Avropa İnsan Hüquqları Məhkəməsinin son işlərindən biri – "İslami-İttihad və digərləri Azərbaycana qarşı" işi bu araşdırmada diqqət mərkəzini təşkil edir.*

### **Introduction**

**I**slam-Ittihad and others v. Azerbaijan (the Case)<sup>1</sup> is one of the most recent cases seen by the European Court of Human Rights ("the Court"). It was lodged with the Court on 17 January 2005. Two Azerbaijani nationals appeal-ed against the Azerbaijani Government. The Court in its 13 November 2014 judgement unanimously held that there had been a violation of Article 11.

The above paragraph constitutes a very brief survey of the case. It does not seem to be a pure freedom of religion and belief (FORB) issue. Nevertheless, the details of the case prove that the freedom of association in this particular context has been closely linked to the religious activities.

Now I would like to provide a brief overview of the structure of the article. The next section has been dedicated to the details of the case. Secondly, the doctrinal issues and case law of the Court will be analysed in order to reach the middle ground between universal values and local necessities. Thirdly, Azerbaijan-specific FORB environments will be discussed. Lastly, the major outcomes of the analysis and discussions carried out in the essay will be put in the conclusory findings.

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<sup>1</sup> For the online version of the case please

[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-147866#{"itemid":\["001-147866"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-147866#{)

## I. Details of the Case: Agenda and Activities of the Association, Domestic Legislation and the Court Findings

Azerbaijan was a highly secular society before the collapse of the USSR. This dissolution gave birth to the spread of Islam in the territory of CIS republics<sup>2</sup>, including Azerbaijan. The 1995 Constitution clearly establishes country as a “democratic, legal, secular and unitary republic”.<sup>3</sup> However, since 1991 several denominations of Islam has entered into competition with secularism.

The Islam-Ittihad<sup>4</sup> Association was also established in 1991. The Ministry of Justice (the Ministry) of AR registered it in 1995. Its main aims included “the repair and maintenance of abandoned mosques and other places of worship, organising pilgrimages to Islamic shrines, providing material and moral aid to orphanages as well as elderly, ill and disabled people, and publishing books with a religious content” (§ 9 of the Judgement). And its actual activities encompassed the repair of some religious buildings, the provision of financial assistance to the people in need, the propagation of the historical and religious values, and publishing appropriate articles in the media.

Nevertheless, inspections of the Association’s activities by the Ministry in 2002 discovered several nonconformities between the allowed and actual actions. *The Association did not have a bank account, the sources of financing were not clear, there were no accounting records, its actual headquarters were located in a mosque. Also, the chairman and members of the Association belonged to the same religious community.*<sup>5</sup> More importantly, the Ministry claimed that the Association’s actual primary activities involved religious propaganda and agitation which was acknowledged as being totally unlawful (§§ 11-16).

After exchange of correspondence between the parties, on 2 July 2003 the Ministry lodged an action with a District Court which found that “*the Association had unlawfully engaged in religious activities, and despite three warnings by the Ministry, had failed to take any measure to cease such activities*” (§ 22). The Association was dissolved on 28 August 2003.

The Association claimed that “*the Ministry had failed to specify which of the Association’s activities was qualified as “religious activity”, “Azerbaijani legislation did not provide any precise definition of what constituted a “religious activity”*” (§ 17) and “*the first instance court had put the burden of proof on it*” (§ 23). But on 20 November 2003 the Court of Appeal and on 21 July 2004 the Supreme Court upheld decisions of the previous instances.

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<sup>2</sup> Galina Yemelianova, *Radical Islam in the Former Soviet Union*, Chapter 6 (2010)

<sup>3</sup> The 1995 Constitution of Azerbaijan Republic, Article 7, item 1

<sup>4</sup> The Arabic word “ittihad” means “union”, or “unification”

<sup>5</sup> Galina Yemelianova, pp. 185-186

The applicants took the case to the Court claiming that the forced dissolution of the Association had violated their rights to freedom of expression and freedom of association. The major findings of the Court solely on Article 11 include:

The sanction imposed on the Association had a basis in domestic law and the law was accessible (§ 45);

Domestic courts based the dissolution of the Association on the fact that it had engaged in religious activities, despite the fact that it had the status of a non-governmental organisations (§ 48);

The Azerbaijani law, as in force at the material time, did not provide any definition of what constituted “*professional religious activity*” (§§ 47-48)<sup>6</sup> and this made it impossible to foresee what constituted “*religious activity*”; Moreover, the Ministry and domestic courts, instead of giving an interpretation of “*religious activity*”, and legally proving which activities of the Association were exactly “*religious*”, strikingly, imposed the burden of proof on the Association (§ 49);

Clause 2 of the 1995 Charter of the Association contained provisions related to the organisation of pilgrimages to holy shrines, and if this kind of activity was to be considered “*religious*”, then the Ministry had omitted to request the Association to amend those provision (§ 50). Additionally, the Court rejected the alleged violation of Article 6 of the Convention (reasonable time requirement), as it could not find any proof of this claim among the materials in its possession (§§ 53-54). Apparently, on the basis of stronger legal arguments, the Court found violation of Article 11 and held unanimously that the respondent State had to pay the applicants, within three months from the date on which the judgement becomes final, 4,000 Euro in respect of non-pecuniary damage and 2,000 Euro in respect of costs and expenses.

## **II. Striking Balance between the National Interests and Universal Values: a Legal Necessity or a Legal Circumvention**

The decision of the Court is to become final in the circumstances set out in Article 44, § 2 of the Convention and the attitude of all judges reserves due respect. However, a “legal conflict between two parties + a fundamental human right to be protected + unsuccessful domestic courts + a helpful cross-border Court = solution” formula seems to be only a visible side of the iceberg in this case. There are also religious, social, economic, political, even geopolitical aspects of the problem. Certainly, those aspects gave birth to this legal conflict, and undoubtedly, had serious impact on its resolution at the domestic level.

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<sup>6</sup> See also: *Seyidzade v. Azerbaijan*, no. 37700/05, §§ 31-40 (3 December 2009)

Many distinguished Western scholars are well-familiar with the mentioned aspects<sup>7</sup>. They are not vague claims used to circumvent international legal obligations of a state. There are real threats which require striking an adequate and necessary balance between secularism and religiosity. The notion “*striking balance*” in this context is not something new at all and it does not denote to the legal circumvention. The Court has a “*margin of appreciation*” doctrine which is understood as “*the latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies*”.<sup>8</sup> The major aim of this doctrine is “*to strike a balance between national views of human rights and the uniform application of Convention values*”<sup>9</sup>. This doctrine<sup>10</sup> is a comprehensive legal tool with the well-established principles consisting of effective protection,<sup>11</sup> subsidiarity<sup>12</sup> and review, permissible interference with Convention rights (prescribed by law and in accordance with law; legitimate aims; necessary in a democratic society), proportionality,<sup>13</sup> and the “*European Consensus*” standard.<sup>14</sup> Moreover, there is a growing tendency of its application in international law in general<sup>15</sup> and in international case law.<sup>16</sup>

Briefly speaking, “*The needs and resources of the community and individuals has to be given due regard while ensuring compliance with the Convention. In that, the Contracting States enjoy a wide margin of appreciation*”.<sup>17</sup> And what are those needs and necessities of the Azerbaijani society with secular majority today? The next section may be helpful to find appropriate answers to this question.

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<sup>7</sup> Willy Fautré, *Non-Muslim Minorities in Azerbaijan: From Their First Inception through Russian Empire and Soviet Repression to Present-Day Secular State of Azerbaijan*, Conclusions, § 3 (October 2013). Electronic version is available at:

[www.academia.edu/5201189/Non-Muslim\\_Minorities\\_in\\_Azerbaijan\\_a\\_Secular\\_State](http://www.academia.edu/5201189/Non-Muslim_Minorities_in_Azerbaijan_a_Secular_State)

<sup>8</sup> Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, p. 13 (1996)

<sup>9</sup> Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of ECHR*, p.3 (2001)

<sup>10</sup> Please see:

[www.coe.int/t/dghl/cooperation/lisbonnetwork/Themis/ECHR/Paper2\\_en.asp#P65\\_400](http://www.coe.int/t/dghl/cooperation/lisbonnetwork/Themis/ECHR/Paper2_en.asp#P65_400)

<sup>11</sup> Bernadette Rainey, *Concentrate Human Rights Law*, p. 142 (2nd ed. 2013)

<sup>12</sup> Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 *The American Journal of International Law* 38, pp. 38-79, (Jan., 2003)

<sup>13</sup> Jeremy McBride, *Proportionality and the European Convention on Human Rights*, in Evelin Ellis, *The Principle of Proportionality in the Laws of Europe*, pp. 23-37 (1999)

<sup>14</sup> *Rasmussen v. Denmark*, No.8777/79, § 40 (28 Nov., 1984) and *Sunday Times v. United Kingdom*, no.6538/74, § 59 (26 Apr. 1979).

<sup>15</sup> Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law*, 16 *The European Journal of International Law* 907, p. 908 (2006)

<sup>16</sup> Three ICJ cases including “*Oil Platforms*”, “*Avena*” (only this case embraced the possibility of the use of the doctrine), and “*Wall in the Occupied Palestinian Territory*”

<sup>17</sup> *Lautsi and others v. Italy*, no.30814/16, § 61 (18 March 2011)

### III. Factors Affecting FORB Environments in Azerbaijan Positively and Negatively

There are several major factors to be discussed in this section. *First of all*, for centuries Azerbaijan has been a land of clashes and dialogues between several faiths and religions.<sup>18</sup> Subsequently, this centuries-old and persistent, even though sometimes involuntary<sup>19</sup> examples of multi-religious and multi-ethnic co-existence have always been the major reason behind the remarkable level of multiculturalism and tolerance existing in Azerbaijan.

*Secondly*, all state formations and legal systems, established in Azerbaijan in the course of the centuries, have usually stuck to the policy of multiculturalism. Several historical exceptions<sup>20</sup> to this general rule, should not damage a general positive image, as in the majority of cases, they were directed towards the goal of protection of the established beliefs.

*Thirdly*, current multi-religiosity has a two-fold impact on the religious economy of modern Azerbaijani society: *first of all*, the society has developed an admirably tolerant model and best practices of multiculturalism; *moreover*, it is not always an easy task to maintain the achieved *status quo* due to the phenomena of “*exported religious extremism*”.

*Fourthly*, Azerbaijan is a comparatively young independent state and its national security has become a target of a number of direct threats and crime. The National Security Concept<sup>21</sup> (2007) of AR encompasses a non-exhaustive list of those threats.

*Fifthly*, although it may seem repetitious, one should mention that regional and global geopolitical dynamics do also play here their role<sup>22</sup>.

To summarise, I would like to draw a line between the positive and negative factors mentioned above. So, the long history of multiculturalism (factor 1), well-established state practices of protecting multiculturalism (factor 2), and high levels of interreligious/interethnic tolerance within the civil society (factor 3) can be considered as the positive factors, whereas the last two interconnected and interrelated factors Nos. 4 and 5, balancing

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<sup>18</sup> Please see the paragraphs 5 and 6 of the speech of the President of Azerbaijan Republic delivered at the opening ceremony of the Third Baku International Humanitarian Forum held on 31 October – 1 November, 2013. The full text is available at: <http://en.president.az/articles/9894>

<sup>19</sup> Barbara A. West, *Encyclopaedia of the Peoples of Asia and Oceania*, pp. 147-149 (2009)

<sup>20</sup> The movement of Al-Muganna, and Khurremiyya movement. Please see: M.S. Asimov, C.E. Bosworth, *History of Civilisations of Central Asia*, Volume IV, p. 46-51 (1999). Another example may be the establishment of Shi'ism in Safavids State. Please see: Elton L. Daniel, *The Greenwood Histories of the Modern Nations: The History of Iran*, p. 87 (2001)

<sup>21</sup> [http://www.un.int/azerbaijan/userfiles/file/National\\_security.pdf](http://www.un.int/azerbaijan/userfiles/file/National_security.pdf)

<sup>22</sup> Tracey German, *Regional Cooperation in the South Caucasus: Good Neighbours or Distant Relatives?* Chapters 4, 5, 6 and 7, (2012)

national security interests of the state and surviving 'geopolitical waves', are factors which have negative impacts on the FoRB in Azerbaijan.

#### **IV. Public and Private Aspects of FoRB**

The latest acts of international terrorism prove the fact that all above-mentioned factors are not the only challenges of modernity. Unfortunately, FoRB itself may also be regarded as a unique and specific factor of threat under current circumstances. On the one hand, international community continue viewing certain suppressive measures taken by subsequent governments as anti-democratic and illegal. On the other hand, the practice proves the fact that sometimes FoRB may culminate in the emergence of territories being disobedient to the secular jurisdictions. Leaving terrorists to benefit from FoRB may thus lead to tragedies, domestic and international chaos. In other words, the most important practical difficulty here is in finding the 'golden ratio' between private and public aspects of FoRB.

This case may also be viewed as one of those cases in which a state faces with practical difficulties in finding the 'golden ratio' between private and public aspects of FoRB. The problem is that various religious manifestations seriously challenge secularism in Azerbaijan.

Thus, the Azerbaijani courts, while deciding the Ijtimai-Ittihad case, did their best to maintain a necessary balance between public and private aspects of FoRB, or secularism and religiosity. Any formulas, ideas, principles taking the Azerbaijani society back to the past must be excluded by the law.

#### **Conclusion**

Apparently, the findings of the Court in items 3, 4 and 5 above, in particular the urgency and necessity of striking balance between public and private aspects of FoRB, played a decisive role in the final outcome of the trials. The Court applied the principle of proportionality more intensely than the doctrine of "*margin of appreciation*". Consequently, "*The more intense the standard of proportionality becomes, the narrower the margin allowed to national authorities*".<sup>23</sup>

Nevertheless, the Court, while rightly defending the freedom of association, might leave several questions open which are humbly stipulated below:

- i. Was the subject-matter of the Case a mere, legal "freedom of association conflict" between the Parties, or was it complicated with other significant elements?
- ii. Can a juridical person comprising of totally religious members be allowed to get engaged in the activities which are, at least, extremely unpredictable?

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<sup>23</sup> Yutaka Arai-Takahashi, p. 14

iii. What are the limits of the “*religiously motivated freedom of association*” within secular societies?

Moreover, the last sentence of § 36 in the Judgment states that, “*The Government submitted that the interference pursued the legitimate aims of “protection of public safety”, “protection of the rights and freedoms of others” and “prevention of crimes”*”.<sup>24</sup> These seem to be very serious arguments deserving due and thorough contemplations.

I’d like to share further observations which might, at least informally validate the dissolution of the Association. *First of all*, Azerbaijani administration at all levels has centuries-old practices in the adequate and equal treatment of various religious communities. The Government would hardly take any unfair and unnecessary actions against the Association without valid reasons. *Secondly*, Azerbaijani society, like any open and receptive community, is remarkably secular, but also very fragile to religious extremism. *And, last but not least*, Azerbaijan is a part of the global world. The country has no room for religions with political agendas.

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<sup>24</sup> [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-147866#{"itemid":\["001-147866"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-147866#{)