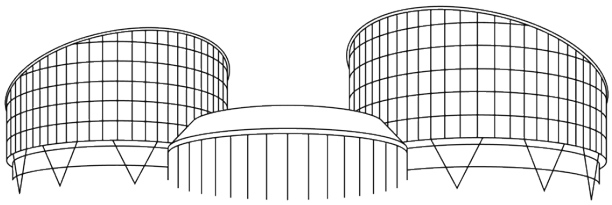

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF KERIMOVA v. AZERBAIJAN

(Application no. 20799/06)

JUDGMENT

STRASBOURG

30 September 2010

FINAL

30/12/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kerimova v. Azerbaijan,

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

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

Having deliberated in private on 9 September 2010,

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

PROCEDURE

1. The case originated in an application (no. 20799/06) 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, Ms Flora Alakbar qizi Kerimova (*Flora Ələkbər qızı Kərimova* – "the applicant"), on 23 May 2006.

2. The applicant was represented by Mr F. Ağayev, a lawyer practising in Baku. The Azerbaijani Government ("the Government") were represented by their Agent, Mr Ç. Asgarov.

3. The applicant alleged, in particular, that the invalidation of the parliamentary elections in her constituency had infringed her electoral rights under Article 3 of Protocol No. 1 to the Convention.

4. On 3 September 2008 the President of the First Section decided to give notice of the application to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1941 and lives in Baku.

6. She stood for the elections to the Milli Majlis (Parliament) of 6 November 2005 as a candidate of the opposition bloc Azadliq. She was registered as a candidate by the Constituency Electoral Commission ("the

ConEC") for the single-mandate Sumgayit Second Electoral Constituency no. 42.

7. The constituency was divided into thirty-seven electoral precincts, with one polling station in each precinct. There were a total of fifteen candidates running for election in this constituency.

A. Election results in the applicant's constituency

8. At the end of election day, the applicant obtained copies of the election protocols drawn up by each of the thirty-seven Precinct Electoral Commissions ("the PEC"). According to the copies of the PEC protocols in the applicant's possession, she received the largest number of votes in the constituency. Specifically, she received a total of 5,566 votes. The second highest number of votes, 3,922 votes in total, was received by a candidate from the ruling Yeni Azerbaijan Party (H.). The applicant received the highest number of votes in thirty polling stations, while H. received the highest number of votes in seven polling stations.

9. According to the ConEC protocol drawn up on 7 November 2005 following an official tabulation of results received from the precincts, the applicant obtained the highest number of votes cast in the constituency. Specifically, according to the ConEC protocol, the applicant received 5,350 votes, H. received 4,091 votes, and a third candidate received 1,532 votes. The total number of votes cast for each of the remaining candidates was substantially lower. The ConEC protocol indicated the applicant as "the elected candidate".

B. Invalidation of the election results and the applicant's appeals

10. On 8 November 2005 the Central Election Commission ("the CEC") issued a decision invalidating the election results in Sumgayit Second Electoral Constituency no. 42. The decision, in its entirety, stated as follows:

> "Pursuant to Articles 19.4, 19.14, 25.2.22, 28.4, 100.12 and 170.2.2 of the Electoral Code and sections 3.5 and 3.6 of the Law of 27 May 2003 on Approval and Entry into Force of the Electoral Code, the Central Electoral Commission decides:
>
> 1. To invalidate the election results in Polling Stations nos. 1, 3, 4, 5, 8, 11, 16, 17, 18, 19, 20, 21, 23, 24, 32, and 36 of Sumgayit Second Electoral Constituency no. 42 due to impermissible alterations ["*yolverilməz düzəlişlər*"] made in the PEC protocols of these polling stations as well as infringements of law ["*qanun pozuntuları*"] which made it impossible to determine the will of the voters.
>
> 2. To invalidate the election results in Sumgayit Second Electoral Constituency no. 42 due to the fact that the number of polling stations in which the election results have been invalidated constitutes more than two-fifths of the total number of polling stations in the constituency and that the number of voters registered in those polling

stations constitutes more than one-quarter of the total number of voters in the constituency.

3. To forward the relevant materials concerning this electoral constituency to the Prosecutor General's Office for investigation."

11. On 11 November 2005 the applicant lodged an appeal against this decision with the Court of Appeal, arguing that the findings in the CEC decision were wrong. While the CEC decision noted that "impermissible alterations" had been made to the protocols of sixteen PECs, in reality such alterations had been made to the protocols of only five PECs (in Polling Stations nos. 8, 10, 11, 21 and 24). The applicant noted that this conclusion could be arrived at by simply comparing the ConEC protocol with the copies of the PEC protocols in her possession. She further noted that, on each occasion, the alterations had been made to reduce the number of votes cast in her favour and to increase the number of H.'s votes. Even though these falsifications were directed against the applicant, she was still the winner according to the falsified results announced by the ConEC.

12. As to the alterations made in the remaining eleven PEC protocols, the applicant argued that they were of a technical nature and did not affect the number of votes cast for each candidate. Therefore, those alterations could not impede the determination of the will of the voters.

13. The applicant further complained that the CEC had failed to consider the possibility of ordering a recount of the votes as required by Article 108.4 of the Electoral Code and to summon her as the candidate and hear her explanation as required by Article 112.8 of the Electoral Code.

14. Lastly, the applicant noted that the ConEC protocol had been submitted to the CEC on the night of 7 to 8 November 2005 and the issue of invalidation of the election results had been put immediately on the CEC agenda on 8 November. As a result, due to lack of time, some CEC members had received incomplete or misleading information about the matter and had thus made an uninformed decision.

15. During the hearing held on 14 November 2005, the judges of the Court of Appeal refused to independently examine the originals of the PEC and ConEC protocols. The Court of Appeal upheld the CEC decision by reiterating the findings made in that decision and concluding that the invalidation of the election results based on those findings had been lawful.

16. The applicant lodged a cassation appeal. Apart from the arguments advanced in her appeal before the Court of Appeal, she also complained, *inter alia*, that the Court of Appeal had refused to independently examine the primary evidence (the originals of the relevant election protocols) and had simply taken the CEC's findings as fact.

17. On 25 November 2005 the Supreme Court rejected the applicant's appeal and upheld the Court of Appeal's judgment as lawful.

18. Subsequently, it was decreed to hold repeat elections in all constituencies in which the election results had been invalidated. There were a total of ten such constituencies. It appears that, owing to certain opposition forces' decision to boycott the repeat elections, the applicant did not stand for election in the repeat elections held on 13 May 2006.

C. Other judicial proceedings relevant to the case

19. In the meantime, criminal proceedings were instituted against the ConEC chairman and the chairman of the PEC of Polling Station no. 17, for tampering with the official PEC protocols of a total of nine different polling stations (Polling Stations nos. 1, 5, 8, 11, 17, 19, 20, 21 and 24).

20. On 19 January 2006 the Sumgayit City Court convicted both the defendants under Articles 161.1 (falsification of election documents) and 308.1 (abuse of official power) of the Criminal Code. The first defendant was fined in the amount of 110 new Azerbaijani manats (approximately 100 euros) and was banned from holding office in the electoral administration. The second defendant was sentenced to one year and twenty-eight days' corrective labour, with 15% of his earnings to be withheld in favour of the State.

21. The factual findings in the Sumgayit City Court's judgment, based on the defendant's own confessions and several witness statements, revealed that the majority of falsifications in the PEC protocols had been made at the ConEC level by its chairman, after the submission of the protocols to the ConEC. These falsifications were made in favour of either H. or other candidates, but not the applicant.

22. In particular, during the hearings, the first defendant, the ConEC chairman, confessed that he had tampered with the PEC protocols for eight polling stations. In particular, he altered the figures representing the total vote count of various candidates in each polling station by inserting additional numbers or changing the existing numbers. In this manner, he increased the number of votes for at least five candidates other than the applicant (including H., to whose vote count he added 100 more “votes”), and reduced the number of votes received by the applicant (by 100 “votes”).

23. The second defendant, the PEC chairman, confessed to having tampered with the PEC protocol for his polling station in a similar manner, with the aim of increasing the total vote counts of three candidates who were the applicant's opponents.

II. RELEVANT DOMESTIC LAW AND INTERNATIONAL REPORTS

A. Electoral Code

24. After the count of votes in a polling station at the end of the election day, the PEC draws up an election protocol (in three original copies) documenting the results of the vote in the polling station (Articles 106.1-106.6). One copy of the PEC protocol, together with other relevant documents, is then submitted to the relevant ConEC within 24 hours (Article 106.7). The ConEC verifies whether the PEC protocol complies with the law and whether it contains any inconsistencies (Article 107.1). After submission of all PEC protocols, the ConEC tabulates, within two days of election day, the results from the different polling stations and draws up a protocol reflecting the aggregate results of the vote in the constituency (Article 107.2). One copy of the ConEC protocol, together with other relevant documents, is then submitted to the CEC within two days of election day (Article 107.4). The CEC checks whether the ConEC protocols comply with the law and whether they contain any inconsistencies (Article 108.1) and draws up its own final protocol reflecting the results of the elections in all constituencies (Article 108.2).

25. If within four days of election day the CEC discovers mistakes, impermissible alterations or inconsistencies in protocols (including the accompanying documents) submitted by ConECs, the CEC may order a recount of the votes in the relevant electoral constituency (Article 108.4).

26. Upon review of a request to invalidate the election win by a registered candidate, an electoral commission has a right to hear submissions from citizens and officials and to obtain necessary documents and materials (Article 112.8).

27. In case of discovery of irregularities aimed at assisting candidates who have not ultimately been elected, such irregularities cannot be a basis for invalidation of election results (Article 114.5).

28. The ConEC or CEC may invalidate the election results in an entire single-mandate constituency if election results in two-fifths of polling stations, representing more than one-quarter of the constituency electorate, have been invalidated (Article 170.2.2).

29. According to former Article 106.3.6 of the Electoral Code in force at the material time, during the initial vote-counting at a polling station at the end of election day, upon discovery in the ballot-box of a voting ballot which had not been properly placed in the corresponding envelope, the vote on that ballot was considered to be invalid. Article 106.3.6 was subsequently repealed on 2 June 2008.

B. The Organisation for Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights (OSCE/ODIHR) Election Observation Mission Final Report on the Parliamentary Elections of 6 November 2005 (Warsaw, 1 February 2006)

30. The relevant excerpts from the report read as follows:

"Although constituency aggregate results were made available within the legal deadline, detailed results by polling station were only released on 10 November, four days after the election, despite the computer networking of all ConECs with the CEC. This made it difficult for candidates and observers to check that results had been reported accurately. Protocols from two constituencies, 9 and 42, were never posted publicly. ...

The CEC invalidated the results of four constituencies [including Sumgayit Second Electoral Constituency No. 42] under Article 170.2 of the Election Code, which states that if a ConEC or the CEC cancels more than 2/5 of PECs representing more than 1/4 of the total electorate in a constituency, then the entire constituency result is considered invalid. ...

At least ... two ConEC chairpersons [ConECs 9 and 42] were dismissed after election day for involvement in electoral malfeasance. The two ConEC chairpersons were arrested and charged with forging election documents. ... The CEC forwarded materials on possible criminal violations to the Prosecutor General's Office regarding 29 PECs. ...

The process of invalidation of aggregated results in four constituencies by the CEC did not have sufficient legal grounds or an evidentiary basis, nor was the process transparent. The CEC decisions on the invalidation of the election results in the four constituencies concluded that there were "unacceptable modifications performed on the protocols and law infringements which made it impossible to determine the will of the voters" but did not provide any factual basis to support this conclusion. ...

Furthermore, when it invalidated results, the CEC did not make the required initial factual inquiry [as required by Article 170.2 of the Election Code], and ignored Article 108.4 of the Election Code, which authorizes the CEC to order a recount of votes in a constituency if the protocols and documents submitted by the ConEC reveal "mistakes, inadmissible corrections and inconsistencies." Protocols of ConECs and PECs were not examined or reviewed at CEC sessions. Invalidation of results in a polling station was premised solely on the conclusion of an individual CEC member as to whether a protocol should be invalidated. The judgment of a single CEC member that there were deficiencies in the protocol was accepted as established fact without any explanation of the alleged defect or identification of the number of votes involved. Accordingly, there was no factual basis presented publicly for invalidating results in any of the four constituencies, which is particularly troubling since the CEC registered few complaints that alleged violations in these constituencies. ...

The adjudication of post-election disputes in the courts largely disregarded the legal framework, and fell short of internationally accepted norms. ... In most cases, complaints and appeals were either dismissed without consideration of the merits or rejected as groundless by both the Court of Appeal and the Supreme Court.

Opposition candidates appealed the CEC's invalidation of results in constituencies 9, 42 and 110. The Court of Appeal upheld the three CEC decisions without any investigation or review of the primary documents and evidence, such as the PEC protocols. In constituency 9, the appellant petitioned the Court of Appeal to examine the protocols, which had been forwarded to the Prosecutor General's office by the CEC. This petition was denied. In constituency 42, the appellant made an identical request and the court again denied the petition, ruling that it was impossible to obtain the protocols from the Prosecutor General within the legal deadline. The CEC was not able to explain or give any information as to any specific defect in an invalidated protocol or offer any explanation as to what change to a protocol was sufficient for invalidation. ...

Proceedings in the Supreme Court did not correct the shortcomings noted above. The Supreme Court upheld each CEC decision."

THE LAW

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

31. Relying on Article 3 of Protocol No. 1 to the Convention and Article 13 of the Convention, the applicant complained that the invalidation of election results in her constituency had been arbitrary and unlawful and had infringed her electoral rights as the rightful winner of the election. She argued that the process of invalidation had lacked transparency and sufficient safeguards against arbitrariness, and that the decisions of the electoral commissions and domestic courts lacked any factual basis and were contrary to a number of requirements of the domestic electoral law.

32. The Court considers that this complaint falls to be examined only under Article 3 of Protocol No. 1 to the Convention and that no separate examination is necessary under Article 13. Article 3 of Protocol No. 1 reads as follows:

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

A. Admissibility

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

B. Merits

1. The parties' submissions

34. The Government submitted that the CEC's decision to invalidate the election results in the applicant's electoral constituency had been based on sound factual findings. These findings were subsequently proved to have been correct by the outcome of the criminal proceedings against the two officials of the ConEC for Sumgayit Second Electoral Constituency no. 42 and the PEC for Polling Station no. 17 of that constituency. Both of these officials confessed to having tampered with the election protocols.

35. As to the applicant's argument that the CEC had failed to order a recount, the Government argued that Article 108.4 of the Electoral Code did not require the CEC to recount the votes in all cases, but simply vested it with discretion to decide whether a recount of votes should be ordered in each particular case. The Government further argued that the recount of votes had not been possible in the present case, because in accordance with Article 106.3.6 of the Electoral Code in force at the material time (this provision was subsequently repealed in 2008), ballots which were not in envelopes were considered invalid. As all the ballots submitted to the CEC had already been pulled out of their envelopes during the original count in the relevant polling stations and had not been put back into them, the recount of these ballots was impossible.

36. The Government argued that the established incidents of tampering with election protocols had made it impossible for the CEC to determine the true will of the voters on the basis of those protocols. Such interference with the procedure of the vote-count documentation interfered with the free expression of the opinion of the people and, therefore, the CEC had correctly invalidated the election results in the constituency, as it was guided by the legitimate aim of ensuring that only the candidates elected in accordance with the will expressed by voters represented those voters in the Parliament.

37. The applicant submitted that she had won the election convincingly by a high margin of votes. The relevant results protocols, both before and after the tampering, indicated her as a winner. Although the tampering with the election protocols resulted in a considerable reduction in the total number of votes counted as cast for her, and a corresponding increase in the number of those cast for her main opponent, she was still the clear winner of the election even according to the results reflected in the protocols which had been tampered with. Thus, even after the tampering, the relevant protocols showed that the applicant had won by a margin of 1,259 votes.

38. The applicant noted that all the impermissible changes introduced to the election protocols had been made in favour of her opponents, and not in her favour. Despite this, the CEC failed to comply with Article 114.5 of the

Electoral Code, which did not allow invalidation of election results if it was established that any irregularities discovered during the election process had been made to assist the candidates who had not been ultimately elected, and not the winning candidate.

39. The applicant noted that out of sixteen protocols which had been allegedly tampered with only five contained impermissible alterations of the total vote counts of candidates. The remaining protocols contained alterations of a "technical nature" which did not affect the figures on the total number of votes cast, and therefore could not impede the determination of the true will of the voters.

40. As for the Government's argument concerning the alleged impossibility of a recount of votes, the applicant noted that the Government's reference to former Article 106.3.6 of the Electoral Code was wrong, because that provision concerned only the original count of the votes in polling stations at the end of election day, when the envelopes containing the ballots were first taken out of the ballot boxes, and did not concern any subsequent recount of votes in the presence of the CEC members. In any event, the applicant considered that on the facts of the case there was no need for a recount, for the simple reason that her victory in the election could be established beyond any doubt even from the protocols tampered with in favour of her opponents.

41. The applicant submitted that there were no legitimate grounds for invalidation of the election results. Such a decision in the present case meant in essence that the domestic electoral system allowed one random person to frustrate the opinion of tens of thousands of voters simply by introducing minor alterations to election protocols. This in turn gave the current Government the opportunity to prevent opposition candidates from becoming members of parliament by simply having an electoral official tamper with an election protocol in order to render the results of the election null and void, and subsequently escape with a very lenient penalty for doing this. In this connection, the applicant noted that the ConEC chairman who had been found guilty of ruining the election results had received a very mild punishment in the form of a small fine and, despite his conviction, was reinstated to work in the public service in 2008.

2. The Court's assessment

42. Article 3 of Protocol No. 1 appears at first sight to differ from the other rights guaranteed in the Convention and Protocols, as it is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom. However, the Court has established that it guarantees individual rights, including the right to vote and to stand for election (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, §§ 46-51, Series A no. 113). The Court has consistently highlighted the

importance of the democratic principles underlying the interpretation and application of the Convention and has emphasised that the rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law (ibid., § 47; see also *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 58, ECHR 2005-IX).

43. The rights bestowed by Article 3 of Protocol No. 1 are not absolute. There is room for "implied limitations" and Contracting States have a wide margin of appreciation in the sphere of elections (see *Mathieu-Mohin and Clerfayt*, cited above, § 52; *Matthews v. the United Kingdom* [GC], no. 24833/94, § 63, ECHR 1999-I; and *Labita v. Italy* [GC], no. 26772/95, § 201, ECHR 2000-IV). It is, however, for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with. In particular, it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see *Mathieu-Mohin and Clerfayt*, cited above, § 52, and *Gitonas and Others v. Greece*, 1 July 1997, § 39, *Reports of Judgments and Decisions* 1997-IV). Such conditions must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage (see *Hirst (no. 2)*, cited above, § 62).

44. Furthermore, the object and purpose of the Convention, which is an instrument for the protection of human rights, requires its provisions to be interpreted and applied in such a way as to make their stipulations not theoretical or illusory but practical and effective (see, among many other authorities, *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 33, *Reports* 1998-I; *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 100, ECHR 1999-III; and *Lykourezos v. Greece*, no. 33554/03, § 56, ECHR 2006-VIII). The right to stand as a candidate in an election, which is guaranteed by Article 3 of Protocol No. 1 and is inherent in the concept of a truly democratic regime, would only be illusory if one could be arbitrarily deprived of it at any moment. Consequently, while it is true that States have a wide margin of appreciation when establishing eligibility conditions in the abstract, the principle that rights must be effective requires that the eligibility procedure contain sufficient safeguards to prevent arbitrary decisions (see *Podkolzina v. Latvia*, no. 46726/99, § 35, ECHR 2002-II). Although originally stated in connection with the conditions on eligibility to stand for election, the principle requiring prevention of arbitrariness is equally relevant in other situations where the effectiveness of individual electoral rights is at stake (see *Namat Aliyev v. Azerbaijan*, no. 18705/06, § 72, 8 April 2010),

including the manner of review of the outcome of elections and invalidation of election results (see *Kovach v. Ukraine*, no. 39424/02, § 55 et seq., ECHR 2008-...).

45. The Court has emphasised that it is important for the authorities in charge of electoral administration to function in a transparent manner and to maintain impartiality and independence from political manipulation (see *The Georgian Labour Party v. Georgia*, no. 9103/04, § 101, 8 July 2008), that the proceedings conducted by them be accompanied by minimum safeguards against arbitrariness and that their decisions are sufficiently reasoned (see, *mutatis mutandis*, *Namat Aliyev*, cited above, §§ 81-90, and *Kovach*, cited above, §§ 59-60).

46. The Government contended that the impugned decision on the invalidation of election results was aimed at protecting the free expression of the voters' opinion from illegal interference and ensuring that only the rightfully elected candidates represented the voters in the Parliament. However, the Court has doubts as to whether a practice of discounting all votes cast in an entire electoral constituency owing merely to the fact that irregularities have taken place in some polling stations, regardless of the extent of the irregularities and their impact on the outcome of the overall election results in the constituency, can necessarily be seen as pursuing a legitimate aim for the purposes of Article 3 of Protocol No. 1 (compare, *mutatis mutandis*, *Kovach*, cited above, § 52). However, the Court is not required to take a final view on this issue in the light of its findings below.

47. It is sufficiently clear from the material available in the case file that, according to the copies of PEC protocols obtained by the applicant from each of the polling stations at the end of election day (before the incidents of tampering with protocols took place), the applicant received a total of 5,566 votes against H.'s 3,992 votes. According to the ConEC protocol issued on the basis of those PEC protocols, after some of those protocols had been tampered with, the applicant received 5,350 votes against H.'s 4,091 votes. Thus, it is obvious that the election results, as they stood both before and after the irregularities involving illegal alterations to protocols, showed that the applicant was the clear winner of the elections. Moreover, neither the CEC nor the domestic courts hearing appeals against its decision, nor the Sumgayit City Court, dealing with the criminal case concerning the irregularities in question, ever found that any of the illegal alterations had been made to assist the applicant's cause. On the contrary, it was found by the Sumgayit City Court that they had been made exclusively in favour of her opponents. Neither did the Government, in their observations, argue that the irregularities had been intended to benefit the applicant. Accordingly, even despite the fact that these irregularities had been made in an attempt to inflate her opponents' vote counts and decrease her vote count, the election results still showed the applicant as a clear winner. In such circumstances, the Court finds it hard to understand the electoral authorities' and the

Government's position that these irregularities had somehow made it "impossible to determine the will of the voters" in the entire constituency. On the contrary, the Court considers that the facts of the case clearly disclose a situation where the irregularities, however grave they might have been, did not impact the ultimate result of the election and failed to cast any doubt on the choice made by the majority of voters in the constituency.

48. Moreover, as to the CEC decision of 8 November 2005 invalidating the election results in the applicant's constituency, the Court notes that it contained no specific description of the alleged "impermissible alterations" made to the PEC protocols or other "infringements of law", no elaboration as to the nature of these "alterations" and "infringements", and no reasons explaining as to why the alleged breaches obscured the outcome of the vote in the relevant polling stations and made it impossible to determine the true opinion of the voters. In such circumstances the Court cannot but note that the CEC decision was totally unsubstantiated.

49. As to the parties' submissions concerning the recount of votes, the Court agrees with the applicant that such a recount was in any event redundant because it was possible to establish who was the winning candidate even despite the irregularities. Nevertheless, the Court finds alarming the CEC's failure to even consider the possibility of a recount before invalidating the election results. The Court considers that, in cases where illegal tampering with vote counting or election documents may affect the determination of the outcome of the elections, a fair procedure for recounting votes where such a recount is possible is an important safeguard of the fairness and success of the entire election process. Even accepting the Government's argument that under Azerbaijani law an election recount was optional (at the CEC's discretion) and not mandatory, the Court considers that in the present case the CEC could have considered the possibility of a recount and at least explained the reasons for passing up this opportunity before deciding on an outright invalidation of the election results. In the Court's view, the CEC's failure to do so contributed to the appearance of arbitrariness of its decision.

50. As to the Government's argument that the recount was not possible owing to the conflicting requirements of former Article 106.3.6 of the Electoral Code, the Court finds this argument misplaced. Firstly, as noted above, it was up to the CEC to explain the reasons for not ordering a recount and it failed to offer such reasons. Secondly, it appears that former Article 106.3.6 of the Electoral Code (see paragraph 29 above) concerned the determination of the validity of the ballots at the moment when they were taken out of the ballot boxes for the original count. Once a ballot was pulled out of its envelope, determined to be valid and counted during the original count, nothing could prevent the use of this ballot at any subsequent election recount. Thirdly, the Court generally finds that it is unacceptable to rely solely on such irrelevant and petty formalities in order to justify a

failure to abide by statutorily-prescribed safeguards of the integrity of the electoral process.

51. Furthermore, having regard to the CEC decision of 8 November 2005, the Court notes that the CEC first invalidated the election results in sixteen polling stations owing to the alleged irregularities, and then proceeded to rely on Article 170.2.2 of the Electoral Code in order to invalidate the election results in the entire constituency based on the fact that the elections in two-fifths of the total number of polling stations representing more than one-quarter of the constituency electorate had been annulled. However, the Court finds it troubling that, upon invalidating the elections both in the relevant polling stations and in the entire constituency, the CEC ignored the requirements of Article 114.5 of the Electoral Code, which prohibited invalidation of election results at any level on the basis of a finding of irregularities committed for the benefit of candidates who lost the election (see paragraph 27 above). This rule protected the opinion of the electorate, as well as the interests of a candidate who received the highest number of votes and who was not responsible for any irregularities, from any unlawful actions attempted against such winning candidate. As such, this rule was aimed at preventing a situation where a winning candidate is wrongfully punished by being deprived of his or her victory in the election for malfeasance attributable to his or her losing opponents. In this connection, the Court notes that the situation envisaged in Article 114.5 of the Electoral Code is the direct opposite of a situation where irregularities are found to have been allegedly made to the benefit of the "winning" candidate (contrast *Namat Aliyev*, cited above, §§ 9-18, 64, 67 and 74). However, the Court observes that, despite the expressly stated requirement of Article 114.5 of the Electoral Code, neither the CEC, at the time of making its decision to annul the election, nor the domestic courts dealing with the appeals against its decision, made an attempt to determine in whose favour the alleged irregularities had been made. In any event, the subsequent criminal proceedings at the Sumgayit City Court established that all the illegal alterations to the PEC protocols had been made exclusively for the benefit of the applicant's opponents. Finally, as noted above, even despite these illegal alterations, the applicant still emerged as the candidate with the largest number of votes and it has never even been suggested by any of the domestic authorities that she could be responsible for any of the irregularities in question. In such circumstances, it is all but apparent that the decision to invalidate the election results in the applicant's constituency, and thus deprive her of the parliamentary seat, not only lacked any relevant substantiation but was also made in breach of the requirement of Article 114.5 of the Electoral Code. At the very least, the failure to take this requirement into account, and the lack of any explanation for such failure, contributed to the appearance of arbitrariness of the annulment of the election.

52. Lastly, the Court notes that, despite the fact that the applicant repeatedly raised all of the above points in her appeals to the domestic courts, the courts failed to adequately address these issues and simply reiterated the CEC's findings. They refused to examine any primary evidence, which primarily consisted of the illegally altered originals of the PEC protocols, and failed to review the compliance of the CEC's decision with the requirements of the electoral law. As such, the manner of examination of the applicant's election-related appeals was ineffective.

53. The authorities' inadequate approach to this matter brought about a situation where the whole election process in the entire electoral constituency was essentially single-handedly sabotaged by two low-ranking electoral officials, who had abused their position to make some changes to a number of election protocols that were in their possession. By arbitrarily invalidating the election results because of these officials' actions, the domestic authorities essentially aided and abetted them in thwarting the election. Such lack of concern for integrity of the electoral process from within the electoral administration cannot be considered compatible with the spirit of Article 3 of Protocol No. 1 to the Convention.

54. In view of the above, the Court concludes that, while the perpetrators of the irregularities, which ostensibly "necessitated" the authorities' decision to invalidate the election results, did not appear to succeed in their aim of affecting the ultimate outcome of the elections, the invalidation decision itself "succeeded" in doing so. The annulment of the elections in the applicant's constituency lacked any relevant reasons and was in apparent breach of the procedure established by the domestic electoral law (see paragraph 51 above). This decision arbitrarily infringed the applicant's electoral rights by depriving her of the benefit of being elected to Parliament, and as such ran counter to the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage.

55. There has accordingly been a violation of Article 3 of Protocol No. 1 to the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

56. In conjunction with the above complaint, the applicant complained that despite clearly winning the election she was arbitrarily deprived of her seat in Parliament owing to her political affiliation with an opposition party. She relied on Article 14, which provides as follows:

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

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

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

59. Article 41 of the Convention provides:

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

A. Damage

1. Pecuniary damage

60. The applicant claimed 83,185.83 euros (EUR) for loss of the earnings she would have received in the form of a parliamentary member's salary if elected to the Milli Majlis had the results of elections in her constituency not been invalidated. She noted that her other income during the relevant period, as a retired singer and recipient of a State allowance, amounted only to 125 new Azerbaijani manats (AZN) (approximately EUR 120) per month.

61. The Government contested the applicant's claim and argued that her other income must have been much higher than AZN 125 per month.

62. The Court reiterates its analysis made in the *Kovach* case (cited above, § 66), which concerned a similar claim:

> "It is true that, if elected, the applicant would have received a salary as a member of Parliament. That is not, however, sufficient to award the sums claimed, because the sums claimed would have to be set off against other income which he may have been receiving and which he would have had to forego if elected, as in the case of *Lykourezos v. Greece* ([no. 33554/03, § 64, ECHR 2006-VIII], in which the applicant was prevented from continuing to exercise his mandate). The applicant has given details of the salary he would have received as a member of Parliament, but has not specified what his net loss would have been."

63. In the earlier *Lykourezos* judgment (cited above, § 64), the Court approached the issue as follows:

> "The Court notes that it was not disputed that, had the applicant not been forced to forfeit his parliamentary seat, he would have received, between the date of the impugned measure and the end of the legislature to which he had been elected, the amount claimed. However, the Court also notes that the applicant did not remain inactive during this period; on the contrary, he was able to resume his professional

> activities and to receive the resultant fees. In addition, the applicant has not shown that the total of the fees in question was less than that of the parliamentary allowances that he did indeed lose during the period in question ... Having regard to the inherent uncertainty in any attempt to estimate the real losses sustained by the applicant and making its assessment on an equitable basis, the Court decides to award him EUR 20,000 under this head, plus any tax that may be chargeable."

64. The Court notes that, unlike in the above cases, the applicant submitted detailed information about the difference between the salaries that she would have received as a member of parliament and her other income which she had been receiving during the relevant period, which information is in principle sufficient to calculate her "net loss". The Court considers that, had the applicant become a member of parliament, she could have been expected to serve at least part of her tenure and received certain income from her service. Accordingly, she suffered certain pecuniary damage, although this damage cannot be technically quantified in terms of monthly salaries for the entire term of service of a member of parliament. Therefore, having regard to the inherent uncertainty in any attempt to estimate the real losses sustained by the applicant and making its assessment on an equitable basis, the Court decides to award her EUR 50,000 under this head.

2. Non-pecuniary damage

65. The applicant claimed EUR 100,000 in compensation for the anguish and distress caused to her by the infringement of her electoral rights.

66. The Government argued that the amount claimed was unjustified and excessive.

67. The Court considers that the applicant suffered non-pecuniary damage which cannot be compensated solely by the finding of the violation of Article 3 of Protocol No. 1. Ruling on an equitable basis, the Court awards her the sum of EUR 7,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

68. The applicant also claimed EUR 4,800 for the costs and expenses incurred before the Court, including EUR 4,500 for legal fees and EUR 300 for postal expenses.

69. The Government claimed that the claim in respect of legal fees was excessive and that the claim in respect of postal expenses was unsupported by any documents.

70. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. Having regard to the legal services actually rendered in the present case and to the services stipulated in the relevant contract concluded

between the applicant and her lawyer, the Court considers that the amounts claimed do not correspond to the legal assistance that was actually provided in the present case. Therefore, only a partial award can be made in this respect. Furthermore, the Court notes that the applicant failed to support her claim for postal expenses with any documentary evidence and therefore no sum can be awarded in respect of those expenses.

71. Regard being had to the above, the Court considers it reasonable to award the sum of EUR 1,600 for the proceedings before the Court, plus any tax that may be chargeable to the applicant on that sum.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

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

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

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts to be converted into new Azerbaijani manats at the rate applicable on the date of settlement:

(i) EUR 50,000 (fifty thousand euros) in respect of pecuniary damage;

(ii) EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage; and

(ii) EUR 1,600 (one thousand six hundred 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;

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

Done in English, and notified in writing on 30 September 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Registrar	Christos Rozakis President