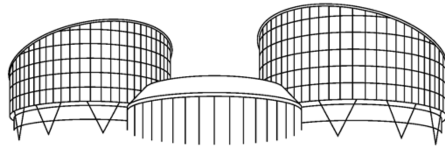

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

DECISION

Application no. 74628/16
Svetlana KHUDUNTS
against Azerbaijan

The European Court of Human Rights (Third Section), sitting on 26 February 2019 as a Chamber composed of:

Vincent A. De Gaetano, *President,*
Branko Lubarda,
Helen Keller,
Dmitry Dedov,
Pere Pastor Vilanova,
Georgios A. Serghides,
Lətif Hüseynov, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having regard to the above application lodged on 1 October 2016,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Ms Svetlana Khudunts, is an Armenian national, who was born in 1962 and lives in Martakert (Aghdara). She was represented before the Court by Mr A. Ghazaryan and Mr A. Zeynalyan, lawyers based in Yerevan.

A. General background

2. At the time of the demise of the Soviet Union, the conflict over the status of the region of Nagorno-Karabakh arose. In September 1991 the establishment of the "Republic of Nagorno-Karabakh" (the "NKR"; in 2017 renamed the "Republic of Artsakh") was announced, the independence of which has not been recognised by any State or international organisation. In

early 1992 the conflict gradually escalated into a full-scale war which ended with the signing, on 5 May 1994, of a ceasefire agreement (the Bishkek Protocol) by Armenia, Azerbaijan and the "NKR". Following the war, no political settlement of the conflict has been reached; the situation remains hostile and tense and there have been recurring breaches of the ceasefire agreement (see further *Chiragov v. Armenia* [GC], no. 13216/05, §§ 12-31, 16 June 2015). The most serious such breach started during the night between 1 and 2 April 2016 and lasted until 5 April and involved heavy military clashes close to the border between the "NKR" and Azerbaijan (sometimes referred to as the "Four-Day War"). Further clashes took place later that month. Estimates of casualties vary considerably; official sources indicate at least 100 dead on either side of the conflict. The great majority of the casualties were soldiers but also several civilians died. Many residents in the targeted towns and villages had to leave their homes for certain periods of time. Furthermore, the clashes led to substantial property and infrastructure damage.

B. The circumstances of the case

3. The facts of the case, as submitted by the applicant, may be summarised as follows.

1. The situation in Martakert

4. On 2 April 2016, at around 3 a.m., the residents of the "NKR" town of Martakert, situated only a few kilometres away from the line of contact, could hear the sound of explosions from the direction of Talish village, located next to the border. The head of the Martakert region ordered the residents to hide in the basement of their houses. At approximately 9 a.m. the Azerbaijani army began shelling Martakert, using artillery and rocket launchers. The head of the region then initiated the evacuation of the residents of the town.

5. On the same day the Prosecutor-General of the "NKR" opened a criminal investigation of the shelling. Within that framework, site examinations were conducted in Martakert and other affected areas of the "NKR".

6. The shelling of Martakert continued sporadically until 4 April 2016. The next day a ceasefire agreement was reached between the warring parties, and the head of the region allowed people to return to their homes.

7. A second evacuation of residents was ordered following further shelling of the town at the end of April 2016. A decision of the head of the region allowed them to return again on 11 May. However, as of September 2016, many of the residents had not returned, as they feared another attack.

2. The circumstances of the applicant

8. The applicant left Martakert for the town of Stepanakert (Khankendi) on 2 April 2016, as part of the above-mentioned evacuation. She returned on 5 April. She claims that her house was damaged as a result of the shelling.

COMPLAINTS

9. The applicant complained, under Article 2 of the Convention, that, as a result of an indiscriminate military attack by the Azerbaijani military forces, there had been a real and imminent threat to her life and her survival had been fortuitous.

10. She also claimed under Article 8 of the Convention that, on account of her forced displacement from Martakert, her right to respect for her family life and home had been infringed.

11. Under Article 1 of Protocol No. 1 to the Convention the applicant asserted that her house had been damaged during the shelling. Also, due to the continuous threat of further bombardment, she had lacked access to her property.

12. Invoking Article 13 of the Convention in conjunction with Articles 2 and 8 of the Convention and Article 1 of Protocol No. 1, she maintained that there was no effective remedy in Azerbaijan for her complaints.

13. Finally, under Article 14 of the Convention in conjunction with Articles 2, 8 and 13 of the Convention and Article 1 of Protocol No. 1, the applicant alleged that the military attacks had been directed against Armenians due to their ethnic and national origin.

THE LAW

A. The applicant’s submissions

14. In support of her complaints, the applicant submitted to the Court evidence of both a general and an individual nature. The general evidence consisted of a historical background to the conflict, news reports, articles on the characteristics of the weaponry used, statements by “NKR” officials, and various documents concerning the shelling and destruction of public and private buildings of Martakert and other residential areas of the “NKR” (i.e. site examination protocols, expert examination reports, and photographs). The individual evidence comprised ownership certificates of her house and arable land, aerial photographs of her property from Google Earth, a document issued by the mayor of Martakert confirming her

residence in the town and a document issued by the "NKR" police certifying her citizenship and birthplace.

B. The Court's assessment

1. General considerations

15. The Court recalls that its role is subsidiary and that it must be cautious in taking on the role of a first-instance tribunal of fact, unless it is unavoidable by the circumstances of the case (see, for example, *Aslakhanova and Others v. Russia*, nos. 2944/06 and 4 others, § 96, 18 December 2012).

16. Moreover, the proceedings before the Court are adversarial in nature. It is therefore for the parties to substantiate their arguments by providing the Court with the necessary factual evidence. Whereas the Court is responsible for establishing the facts, it is up to the parties to provide active assistance by supplying it with all the relevant information (see, for instance, *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25; and *Lisnyy and Others v. Ukraine and Russia* (dec.), nos. 5355/15, 44913/15 and 50853/15, § 25, 5 July 2016).

17. In general, the Court applies a "beyond reasonable doubt" standard of proof in its assessment of evidence. However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see, among many authorities, *Taniş and Others v. Turkey*, no. 65899/01, § 160, ECHR 2005-VIII). Especially when it comes to allegations made under Articles 2 and 3 of the Convention, the Court must apply a particularly thorough scrutiny (see, *mutatis mutandis*, *Ribitsch v. Austria*, 4 December 1995, § 32, Series A no. 336; and *Avşar v. Turkey*, no. 25657/94, § 284, ECHR 2001-VII).

18. At the same time, the Court acknowledges that cases concerning armed conflicts may raise particular difficulties. It has had regard to the circumstances in which applicants have been compelled to leave their homes, abandoning them when they came under military attack (see, for example, *Saveriades v. Turkey* (no. 16160/90, § 18, 22 September 2009; and *Chiragov and Others*, cited above, § 143). Furthermore, in exceptional cases, a lack of documentary evidence may be accepted if the applicant convincingly explains that it has not been possible to obtain and submit it (see, *mutatis mutandis*, *Lisnyy and Others*, cited above, § 30; and *Kudukhova v. Georgia*, nos. 8274/09 and 8275/09, § 28, 20 November 2018).

19. The question whether an applicant has substantiated ownership of property within the meaning of Article 1 of Protocol No. 1 or the existence of a home under Article 8 of the Convention has arisen in a number of cases before the Court. Such claims have been accepted on the basis of both primary and prima facie documentation issued by the relevant authorities,

including copies of title deeds, certificates of registration, purchase contracts, "technical passports", affirmations of ownership, extracts from housing inventories or from land or tax registers and, in special circumstances, certificates of residence. Additionally, the applicant's residence in a house or flat constituting his or her home has been established through prima facie evidence such as maintenance receipts, proof of mail deliveries and statements of witnesses (see *Chiragov and Others*, cited above, §§ 130, 133-134, 141 and 143, with further references).

20. However, if an applicant does not produce any evidence of title to property or of residence, the complaints are generally bound to fail (see, for instance, *Lordos and Others v. Turkey*, no. 15973/90, § 50, 2 November 2010; see also the conclusion as to some applicants in the case of *Kerimova and Others v. Russia*, nos. 17170/04, 20792/04, 22448/04, 23360/04, 5681/05 and 5684/05, 3 May 2011).

21. When an applicant claims that his or her property has been damaged or destroyed, at least prima facie evidence of such impairment should be submitted. In *Damayev v. Russia* (no. 36150/04, § 108-111, 29 May 2012) the Court considered that the applicant, complaining about the destruction of his home, should have provided at least a brief description of the property in question. Since no documents or detailed claims were submitted, his complaint was found to be unsubstantiated.

22. In sum, while the difficulties arising in times of armed conflict are taken into account and may lead to a lowering of the normal probative requirements, an applicant must still provide adequate substantiation of his or her claims.

2. *Complaint under Article 1 of Protocol No. 1 to the Convention*

23. The applicant complained about damage and lack of access to her property under Article 1 of Protocol No. 1, the first paragraph of which provides as follows:

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

24. In line with the above general principles, it was for the applicant to produce concrete evidence of at least prima facie nature showing both that the property was part of her possessions and that it had been damaged as a result of the shelling in April 2016. However, while she furnished the Court with ownership certificates attesting her title to a house and arable land in Martakert, she did not provide any evidence relating to the alleged damage to the house.

25. In this connection, it should be noted that, as a result of the April 2016 events, the "NKR" Prosecutor-General initiated a criminal investigation into the destruction of public and private property, during

which site examinations were conducted. Many other applicants from Martakert who have complained to the Court have submitted at least some kind of evidence indicating the damage inflicted on their property, such as site examination protocols, decisions according victim status, expert examination reports, statements by neighbours, and photographs.

26. Moreover, the applicant, who has been represented by legal counsel, did not make any submissions as to the reasons for which she failed to submit relevant documents supporting her claim of damage to property. Nor did she inform the Court of any attempts she might have made in order to obtain at least fragmentary documentary evidence to substantiate that claim.

27. In these circumstances, the Court finds that the applicant's complaint under Article 1 of Protocol No. 1 is not sufficiently substantiated and that, consequently, this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

28. The applicant's complaint regarding her lack of access to her property will be more appropriately examined below under Article 8 of the Convention.

3. Complaint under Article 2 of the Convention

29. The applicant asserted, under Article 2 of the Convention, that, during the military attack on Martakert, through the indiscriminate use of force by the Azerbaijani forces, she had been in a real and serious life-threatening situation and had survived only by chance. In so far as relevant, this provision reads as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally ... ."

30. The Court recognises that the situation of an armed conflict, in particular the presence of an applicant in the area during heavy bombing and concurrent danger to his or her life, may raise issues under Article 2. Notably, an immediate danger to life caused by the conduct of State agents can engage that provision even in situations when no death occurs (see, for example, *Makaratzis v. Greece* [GC], no. 50385/99, § 55, ECHR 2004-XI; and *Trévalec v. Belgium*, no. 30812/07, §§ 55-61, 14 June 2011). The same applies to situations of indiscriminate use of lethal force against the civilian population, if the level of danger the applicant was exposed to was sufficiently immediate and severe (see *Abuyeva and Others v. Russia*, no. 27065/05, §§ 200 and 203, 2 December 2010). In such a situation, a prima facie claim by the applicant may be sufficient to shift the burden of proof to the respondent Government to provide documentary evidence or a satisfactory and convincing explanation as to how the events in question unfolded (see *Varnava and Others v. Turkey* [GC], nos. 16064/90 and 8 others, § 184, ECHR 2009).

31. In the present case, an examination of the merits of the claim might therefore have been warranted had the applicant provided the Court with prima facie evidence that the level of danger to which she was exposed was of such seriousness as to pose an immediate threat to her life. However, such evidence was not submitted by the applicant. Although she submitted general evidence providing descriptions of the events and the threat posed to the life of the residents of Martakert, she failed to provide any individual evidence or statements substantiating her claim that there was a direct and imminent threat to her life during the course of said events. Moreover, the witness statements of other residents of the town as well as property destruction certificates referred to by the applicant do not disclose any information on the applicant herself.

32. The Court reiterates that it is not a tribunal of facts, and cannot, without appropriate assistance from the applicants, establish the factual account of complex events, such as the situation of an armed conflict. It concludes that the applicant failed to provide the Court with convincing prima facie evidence that she was exposed to an immediate threat to her life. It follows that her complaint under Article 2 of the Convention is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4.

4. Complaint under Article 8 of the Convention

33. The applicant further claimed that, on account of her forced displacement from Martakert and the continuous threat of further bombardment, she had lacked access to her property, violating her right to respect for her family life and home. This falls to be examined under Article 8 of the Convention, the first paragraph of which provides the following:

> "Everyone has the right to respect for his private and family life, his home and his correspondence."

34. A forced flight from one's home as a consequence of an armed conflict can, in certain circumstances, involve a breach of the displaced person's rights under Article 8 (see, for instance, *Chiragov and Others*, cited above, §§ 206-207). In the present case the Court notes, however, that, although the applicant left Martakert for Stepanakert on 2 April 2016 as a consequence of the hostilities, she was able to return after a few days and continue living in her home (cf. *Kudukhova*, cited above, § 37). She has not claimed that she was forced to leave Martakert again at a later date.

35. While it is reasonable to assume that taking refuge in another town for a period of time due to the hostilities caused the applicant some level of stress and discomfort, the Court concludes that the discomfort did not amount to an interference with her right to respect for her family life and home under Article 8 of the Convention. Consequently, this part of the

application is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4.

5. *Complaints under Articles 13 and 14 of the Convention*

36. The applicant finally maintained that there was no effective remedy in Azerbaijan for her complaints and that the conduct of the Azerbaijani military forces had been directed against Armenians due to their ethnic and national origin. She relied on Articles 13 and 14 of the Convention, which read as follows:

Article 13

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Article 14

> "The enjoyment of the rights and freedoms set forth in this 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."

37. Having regard to its above findings that the complaints under Articles 2 and 8 of the Convention and Article 1 of Protocol No. 1 to the Convention are manifestly ill-founded, the Court concludes that the applicant had no arguable claim of a violation of those provisions. It follows that the complaint under Article 13 is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4. With reference to the same findings, the Court further considers that the case reveals no appearance of discrimination of the applicant. Consequently, her complaint under Article 14 is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4.

For these reasons, the Court, by a majority,

Declares the application inadmissible.

Done in English and notified in writing on 21 March 2019.

Fatoş Aracı	Vincent A. De Gaetano
Deputy Registrar	President