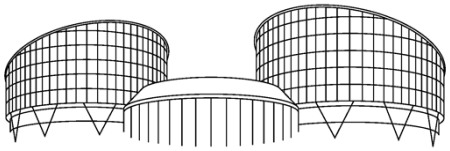

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF AVANESYAN v. ARMENIA

(Application no. 12999/15)

JUDGMENT

Art 9 • Manifest religion or belief • Disproportionate conviction of conscientious objector for draft evasion without due consideration to his religious beliefs

STRASBOURG

20 July 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 Avanesyan v. Armenia,

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

Yonko Grozev, *President,*
Tim Eicke,
Faris Vehabović,
Iulia Antoanella Motoc,
Armen Harutyunyan,
Pere Pastor Vilanova,
Jolien Schukking, *judges,*
and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to:

the application (no. 12999/15) against the Republic of Armenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Armenian national, Mr Artur Avanesyan ("the applicant"), on 12 March 2015;

the decision to give notice to the Armenian Government ("the Government") of the complaint concerning an alleged violation of the applicant's right to freedom of religion and to declare the remainder of the application inadmissible;

the parties' observations;

Having deliberated in private on 15 June 2021,

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

INTRODUCTION

1. The case concerns the applicant's refusal to perform military service for reasons of conscience and his conviction for draft evasion, and raises issues under Article 9 of the Convention.

THE FACTS

2. The applicant was born in 1995 and lives in Masis, Armenia. He was represented by Mr S.H. Brady and Ms Y. Margaryan, lawyers practising in Strasbourg and Yerevan.

3. The Government were represented by their Agent, Mr Y. Kirakosyan, Representative of the Republic of Armenia to the European Court of Human Rights.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. The applicant is a Jehovah's Witness. He was born, and at the material time lived, in the town of Askeran, situated in the unrecognised

"Nagorno Karabakh Republic" (hereafter "the NKR"). He is an Armenian national and has held an Armenian passport since 2012.

6. On 29 January 2014 the applicant received a summons to report to the Askeran military commissariat with a view to performing his military service.

7. On 30 January 2014 the applicant addressed a letter to the Askeran military commissariat, stating that, as a Jehovah's Witness, his conscience did not allow him to serve in the army. Since alternative civilian service was available in Armenia, he was willing to perform that service instead of compulsory military service.

8. On the same date the applicant moved to the town of Masis in Armenia as, according to his submissions, he was convinced that his application would be rejected and he feared criminal prosecution.

9. On 5 February 2014 he applied to the relevant authority to have his residence registered in Masis.

10. On 12 February 2014 he registered with the Masis military commissariat, which on the same date asked the Askeran military commissariat to transfer his personal file.

11. On 13 February 2014 the applicant applied to the Masis military commissariat requesting permission to perform alternative civilian service instead of military service.

12. On 17 February 2014 the Askeran regional prosecutor's office of the "NKR" instituted criminal proceedings against the applicant under Article 347 § 1 of the "NKR" Criminal Code (evasion of regular conscription for military service – see paragraph 25 below).

13. On 3 March 2014 an investigator from the Criminal Investigations Unit of the "NKR" police ordered that the applicant be brought in for questioning. That decision stated that a summons had been sent to the applicant's address in Masis ordering him to appear for questioning on 1 March 2014 but that the applicant had failed to appear.

14. On 14 March 2014 the investigator brought formal charges against the applicant under Article 347 § 1 of the "NKR" Criminal Code and declared the applicant a wanted person, since his whereabouts were unknown and it was impossible to bring him in for questioning because he was outside the territory of the "NKR".

15. On the same date the First-Instance Court of General Jurisdiction of the "NKR" ordered the applicant's pre-trial detention on the same grounds.

16. The applicant alleged that his application to perform alternative civilian service, lodged in Armenia (see paragraph 11 above), had been due to be examined by the relevant Armenian authority on 25 July 2014.

17. On 14 July 2014 the applicant appeared at Kentron police station in Yerevan following a summons. He was immediately arrested and handed over to the officers of the "NKR" police, who transported him to the "NKR" on the same date and placed him in a remand prison.

18. On an unspecified date the trial in the applicant's criminal case commenced in the First-Instance Court of General Jurisdiction of the "NKR". The applicant submitted before the court that his criminal prosecution violated his rights guaranteed by Article 9 of the Convention. He also argued that, as an Armenian national, he was entitled to perform alternative civilian service under the Alternative Service Act.

19. On 30 September 2014 the First-Instance Court of General Jurisdiction of the "NKR" found the applicant guilty as charged and sentenced him to two years and six months' imprisonment.

20. On 22 October 2014 the applicant lodged an appeal, raising similar arguments to those he had raised before the trial court (see paragraph 18 above).

21. On 26 November 2014 the Appeal Court of the "NKR" dismissed the applicant's appeal and upheld the judgment of the first-instance court. The Appeal Court dismissed the applicant's arguments under Article 9 of the Convention. It found that the Alternative Service Act, relied on by the applicant, was not applicable in the "NKR"; hence, the fact that he was a Jehovah's Witness did not constitute grounds for him to be exempted from serving in the "NKR" army.

22. On 12 December 2014 the applicant lodged an appeal on points of law.

23. On 25 December 2014 the Supreme Court of the "NKR" declared the applicant's appeal on points of law inadmissible for lack of merit.

RELEVANT LEGAL FRAMEWORK

I. RELEVANT ARMENIAN LAW

24. On 1 July 2004 alternative service was introduced in Armenia with the entry into force of the Alternative Service Act. Under section 3 of the Act, Armenian citizens whose creed or religious beliefs do not allow them to carry out military service may perform alternative service, which includes alternative civilian service.

II. RELEVANT "NKR" LAW

25. Article 347 § 1 of the "NKR" Criminal Code (2013) prescribes a penalty of imprisonment for the evasion of regular conscription for fixed-term military service.

THE LAW

I. PRELIMINARY REMARKS

26. The Government submitted a unilateral declaration requesting the Court to strike the application out of its list of cases pursuant to Article 37 § 1 of the Convention.

27. The applicant objected to the Government's unilateral declaration.

28. In the light of the criteria established in its case-law, the Court considers that the unilateral declaration submitted by the Government does not offer a sufficient basis for finding that respect for human rights as defined in the Convention does not require the Court to continue its examination of the case (Article 37 § 1 *in fine*). Hence, the Court rejects the Government's request to strike the application out and will accordingly continue its examination of the merits of the case (see *Tahsin Acar v. Turkey* (preliminary objections) [GC], no. 26307/95, § 75, ECHR 2003-VI).

II. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

29. The applicant complained that his arrest and subsequent detention, prosecution and conviction for conscientious objection had violated the guarantees of Article 9 of the Convention, which reads as follows:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. Jurisdiction

30. The Court must first determine whether, for the purposes of the matters complained of, the applicant falls within the jurisdiction of the respondent State, within the meaning of Article 1 of the Convention.

(a) The parties' submissions

31. The Government submitted that Armenia had no jurisdiction in respect of the events which had taken place in the territory of the "NKR", including the applicant's detention and conviction. They argued that the conclusions reached by the Court with regard to extraterritorial jurisdiction in its earlier cases concerning Armenia (they referred to *Chiragov*

and Others v. Armenia [GC], no. 13216/05, §§ 169-86, ECHR 2015, and *Muradyan v. Armenia*, no. 11275/07, §§ 123-27, 24 November 2016) could not and should not be automatically applicable to all future scenarios. Relying on a number of cases decided by the International Court of Justice, the Government argued that the only responsibility which could be attributable to Armenia, in view of the military, political, financial and other support provided by it to the "NKR", was the obligation to exert influence over the local administration to prevent violations of international law. Armenia could not, however, be held responsible for the actions of the local unrecognised administration, since the "NKR" authorities were not agents of Armenia and this would contradict the principles of international law on State responsibility. Thus, Armenia's responsibility could be engaged only in so far as the inaction of its own agents was concerned, and could not arise in respect of the actions of the agents of the local administration. Moreover, the obligation described above could be engaged only in respect of violations that were of an ongoing and continuous nature, giving the Armenian authorities sufficient time to intervene and to exert influence over the local administration, as opposed to one-off actions. This was not the situation in the applicant's case and therefore his detention and conviction in the "NKR" did not fall under Armenia's jurisdiction.

32. The applicant submitted that the Government's submissions regarding Armenia's lack of responsibility under the Convention for the actions of the "NKR" authorities were in contradiction with the Court's case-law in the matter (he referred to *Chiragov and Others*, cited above, §§ 169-86; *Zalyan and Others v. Armenia*, nos. 36894/04 and 3521/07, §§ 214-15, 17 March 2016; and *Muradyan*, cited above, § 126). With reference to the case of *Mozer v. the Republic of Moldova and Russia* ([GC], no. 11138/10, §§ 156-58 and §§ 217-18, 23 February 2016) and *Chiragov and Others* (cited above), the applicant argued that, since Armenia exercised effective control over the "NKR", it was responsible under the Convention for the violation of his Article 9 rights by the local administration, including by the "NKR" courts and the "NKR" authorities. If it were otherwise, it would mean that the Convention was not applicable in the "NKR" and that the Court accepted the "NKR" as an independent State. The applicant contested the Government's assertion that he had been extradited to the "NKR", and submitted that he had simply been handed over by the Armenian police to the "NKR" police as if he were being transferred from one region of Armenia to another; this in itself demonstrated that the "NKR" was under the effective control of Armenia. In sum, Armenia had jurisdiction over the matters complained of and was responsible for the violation of the applicant's Convention rights.

(b) The Court's assessment

33. At the outset, the Court recalls, in response to the Government's argument based on the principles on State responsibility under public international law, that it has consistently made clear that the test for establishing the existence of "jurisdiction" under Article 1 of the Convention has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under international law (see *Jaloud v. the Netherlands* [GC], no. 47708/08, § 154, ECHR 2014, and *Ukraine v. Russia (Re Crimea)* (dec.) [GC], nos. 20958/14 and one other, § 311, 16 December 2020).

34. In relation to the concept of "jurisdiction" under Article 1 of the Convention, the Court reiterates that under its established case-law such "jurisdiction" is a condition *sine qua non* in order for that State to be held responsible for acts or omissions attributable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention (see *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 130, ECHR 2011, and *M.N. v Belgium* (dec.) [GC], no. 3599/18, § 97, 5 May 2020). As to the meaning to be given to the concept of "jurisdiction" for the purposes of Article 1 of the Convention, the Court has emphasised that a State's jurisdictional competence is primarily territorial (ibid., § 98; see also *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, §§ 59-61, ECHR 2001-XII).

35. However, the Court has also recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extraterritorially must be determined with reference to the particular facts. One such exception to the principle that jurisdiction under Article 1 is limited to a State Party's own territory arises where that State exerts effective control over an area outside its national territory. The obligation to secure the rights and freedoms set out in the Convention in such an area derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration (for a summary of the case-law on these situations, see *Al-Skeini and Others*, cited above, §§ 138-40 and 142; for more recent applications of this case-law, see *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, §§ 121 22, ECHR 2012 (extracts); *Chiragov and Others*, cited above, § 186; *Mozer*, cited above, §§ 110-11; *Sandu and Others v. the Republic of Moldova and Russia*, nos. 21034/05 and 7 others, §§ 36-38, 17 July 2018; and *M.N. v Belgium*, cited above, § 103).

36. The Court notes that it has already examined this issue and reached similar conclusions in respect of Armenia and the "NKR". It found that, at

the relevant time, Armenia exercised effective control over the "NKR" and the surrounding territories and that, by doing so, Armenia was under an obligation to secure in that area the rights and freedoms set out in the Convention. Its responsibility under the Convention could not be confined to the acts of its own soldiers or officials operating in the "NKR" but was also engaged by virtue of the acts of the local administration which survived by virtue of Armenian military and other support (see *Chiragov and Others*, cited above, §§ 169-86; *Muradyan*, cited above, § 126; and *Zalyan and Others*, cited above, §§ 214-15).

37. The Court finds no particular circumstances in the instant case, all of which took place prior to the recent hostilities between Armenia and Azerbaijan which ended on 10 November 2020, that would require it to depart from its findings in the above-mentioned judgments and therefore concludes that, at that time, Armenia had jurisdiction over the matters complained of within the meaning of Article 1 of the Convention, including the applicant's prosecution and conviction in the "NKR".

38. It follows that the Armenian Government's objection of incompatibility *ratione loci* must be dismissed.

2. Compliance with the six-month time-limit

39. The Government also raised an objection as regards compliance with the six-month time-limit. They argued that, since Armenia's responsibility under the Convention was engaged only in respect of the acts of its own agents, the applicant had failed to comply with the six-month time-limit as far as those acts were concerned. In particular, the events involving the Armenian authorities, namely the Armenian police, had ended on 14 July 2014 when the applicant had been extradited to the "NKR" (see paragraph 17 above). Since the applicant had had no effective remedies to exhaust in respect of those actions, the six-month time-limit within the meaning of Article 35 § 1 of the Convention was to be calculated from that date. However, the application had been lodged only on 12 March 2015.

40. The applicant submitted that it was irrelevant whether or not he had had any remedies to exhaust in respect of his arrest in Armenia, since Armenia exercised effective control over the "NKR" and his arrest, prosecution and conviction constituted one continuous violation for which Armenia was responsible. He had challenged his arrest and conviction before all levels of jurisdiction in the "NKR" courts and had lodged his application with the Court approximately two months after the decision of the "NKR" Supreme Court of 25 December 2014 dismissing his final appeal (see paragraph 23 above). The Government's objection was therefore groundless.

41. The Court reiterates that, as a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Where it is clear from the outset however that no effective

remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on or prejudice to the applicant (see *Varnava and Others v. Turkey* [GC], nos. 16064/90 and 8 others, § 157, ECHR 2009).

42. Turning to the circumstances of the present case, the Court notes that the Government's objection regarding compliance with the six-month rule is based on their argument that Armenia's jurisdiction was limited to the actions of the Armenian police, including the applicant's arrest in Armenia and his transfer to the "NKR" police. The Court has already rejected this argument and found that Armenia was responsible not only for the acts of its own agents but also for those of the agents of the "NKR", including the applicant's prosecution and conviction in that entity. Thus, Armenia's jurisdiction extends to the entire criminal proceedings against the applicant, starting with his arrest in Armenia (see paragraph 17 above) and ending with his conviction by the "NKR" courts. The final decision within the meaning of Article 35 § 1 of the Convention was therefore the decision of 25 December 2014 of the Supreme Court of the "NKR" (see paragraph 23 above). In view of the fact that the applicant lodged his application within six months from the date of that decision, the Court rejects the Government's objection.

3. Conclusion

43. 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

(a) The applicant

44. The applicant submitted that his arrest in Armenia and his subsequent detention, prosecution and conviction in the "NKR" amounted to an interference with his Article 9 rights.

45. According to the applicant, the interference had not been prescribed by law. Firstly, with regard to the applicant's transfer by the Armenian police to the "NKR" police, the Government had failed to cite any law that required the Armenian police to take the actions in question. His transfer could not be characterised as an "extradition", as claimed by the Government, but even if it were viewed as a *de facto* extradition, it would have been effected in violation of Armenia's Constitution and Code of Criminal Procedure since Armenia did not allow extradition of its citizens. Secondly, his conviction by the "NKR" courts had also been unlawful, since

he had not committed any offence under Armenian law. Armenia recognised the right to conscientious objection under the Alternative Service Act. Contrary to the Government's claim, he was an Armenian citizen, as evidenced by his passport (see paragraph 5 above), and, as an Armenian citizen, he had exercised that right by applying to the relevant Armenian authority with a request to perform alternative civilian service, and could not be prosecuted while his application was still pending. Moreover, the "NKR" courts could not be considered a lawful authority with the capacity to prosecute and convict the applicant (he referred to *Mozer*, cited above, §§ 143-48).

46. Furthermore, the interference had not pursued a legitimate aim since his arrest, prosecution and conviction had been in total disregard of Armenian law and the Convention, including the Court's judgment in the case of *Bayatyan v. Armenia* ([GC], no. 23459/03, ECHR 2011).

47. Lastly, the interference had not been necessary in a democratic society. In particular, alternative civilian service had been available in Armenia and the applicant had applied to perform that service. Rather than permitting him to do so, the Armenian police had acted to prevent him from performing alternative service and to punish him for his conscientious objection. They had arrested and handed him over to the "NKR" authorities, just eleven days before his application for alternative service was due to be determined (see paragraphs 16 and 17 above), being well aware that there he would be detained, prosecuted and convicted for his conscientious objection.

48. In sum, in the applicant's submission, his arrest in Yerevan and his subsequent detention, prosecution and conviction in the "NKR" had violated his Article 9 rights.

(b) The Government

49. The Government submitted at the outset that since the introduction of the Alternative Service Act in 2004 conscientious objectors in Armenia had enjoyed the right to conscientious objection and to perform alternative civilian service. The "NKR", on the other hand, not being a member of the Council of Europe and not being bound by the Court's case-law, was a separate entity and could not be influenced by the legislative changes in Armenia. It had developed its own independent strategy in the matter, choosing not to introduce alternative service in view of its unique political and military situation.

50. The Government further submitted that the only interference by the Armenian authorities with the applicant's Article 9 rights had been his extradition to the "NKR", where he had risked a potential violation of that provision through his prosecution and conviction for conscientious objection. The Government wished therefore to refrain from making any submissions regarding the events which had taken place in the "NKR". As

to the applicant's extradition by the Armenian authorities, the Government argued that, while the applicant had submitted a request to perform alternative civilian service in Armenia (see paragraph 11 above), there had been no guarantee that his application would be successful since he was a citizen of the "NKR" and had not been registered with any military commissariat. Thus, his extradition had pursued a legitimate aim since criminal proceedings had been officially instituted against him in the "NKR". However, the Government were prepared to acknowledge that the applicant's extradition might have been unlawful or unnecessary in a democratic society. In particular, the Armenian authorities, being aware of the legislation in the "NKR" and the fact that the applicant's extradition would most likely result in his conviction, had not followed the formal extradition procedures or duly considered the legitimacy of the extradition by taking into account the fact that it might raise issues with respect to the applicant's right to freedom of religion.

2. The Court's assessment

(a) Whether there was an interference

51. The applicant asserted that his refusal to perform military service had been a manifestation of his religious beliefs, which the Government did not dispute and which the Court has no reasons to doubt. His conviction for draft evasion (see paragraph 19 above) therefore amounted to an interference with his freedom to manifest his religion as guaranteed by Article 9 § 1 (see *Bayatyan*, cited above, § 112). Such interference will be contrary to Article 9 unless it is "prescribed by law", pursues one or more of the legitimate aims set out in paragraph 2 and is "necessary in a democratic society" (see, among other authorities, *Buscarini and Others v. San Marino* [GC], no. 24645/94, § 34, ECHR 1999-I, and *Bayatyan*, cited above, § 112).

(b) Whether the interference was justified

(i) Prescribed by law and legitimate aim

52. The Court notes at the outset that the parties disagreed as to whether the interference with the applicant's rights had been prescribed by law and pursued a legitimate aim. However, it does not consider it necessary to determine these issues, having regard to its conclusions set out below regarding the necessity of the interference (see, *mutatis mutandis*, *Christian Democratic People's Party v. Moldova*, no. 28793/02, §§ 49-54, ECHR 2006-II, and *Bayatyan*, cited above, §§ 116-17).

(ii) Necessary in a democratic society

53. The Court reiterates that, as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic

society" within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion (see *Buscarini and Others*, cited above, § 34; *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 104, ECHR 2005-XI; and *Bayatyan*, cited above, § 118).

54. While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares. Article 9 lists a number of forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance (see *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 60, ECHR 2000-XI, and *Bayatyan*, cited above, § 119).

55. According to its settled case-law, the Court affords States Parties to the Convention a certain margin of appreciation in deciding whether and to what extent an interference is necessary. This margin of appreciation goes hand in hand with European supervision embracing both the law and the decisions applying it. The Court's task is to determine whether the measures taken at national level were justified in principle and proportionate (see *Leyla Şahin*, cited above, § 110). Furthermore, in so far as the Court has had an opportunity to consider the issue at hand, it has made clear that a State which has not introduced alternatives to compulsory military service in order to reconcile the possible conflict between individual conscience and military obligations enjoys only a limited margin of appreciation and must advance convincing and compelling reasons to justify any interference. In particular, it must demonstrate that the interference corresponds to a "pressing social need" (see *Bayatyan*, cited above, § 123).

56. The Court has also held that any system of compulsory military service imposes a heavy burden on citizens. It will be acceptable if it is shared in an equitable manner and if exemptions from this duty are based on solid and convincing grounds. However, a system which imposes on citizens an obligation which has potentially serious implications for conscientious objectors, such as the obligation to serve in the army, without making allowances for the exigencies of an individual's conscience and beliefs and with imposition of penalties in case of refusal, will fail to strike a fair balance between the interests of society as a whole and those of the individual (ibid., §§ 124 and 125).

57. Turning to the circumstances of the present case, it is undisputed that the applicant is a member of the Jehovah's Witnesses who sought to be exempted from military service, not for reasons of personal benefit or

convenience but on the ground of his genuinely held religious convictions (ibid., § 124; see also *Bukharatyan v. Armenia*, no. 37819/03, § 48, 10 January 2012, and *Tsaturyan v. Armenia*, no. 37821/03, § 44, 10 January 2012). While alternative civilian service was available in Armenia at the material time to conscientious objectors like the applicant (see paragraph 24 above), he was not able to take advantage of that option because he was apparently considered liable for military service in the "NKR" which, unlike Armenia, did not recognise the right to conscientious objection. The Government argued that the applicant, despite having applied to perform alternative civilian service, had had no guarantee that he would be allowed to perform it owing to the fact that he was an "NKR" citizen (see paragraph 50 above). They failed, however, to produce any evidence in support of their allegation that the applicant was an "NKR citizen" and, in fact, it transpires from the case file that the applicant has been an Armenian passport-holder since 2012 (see paragraph 5 above). The Government disregarded this fact and, consequently, failed to explain why the applicant, an Armenian national, had been prevented from exercising the right to conscientious objection bestowed on him under section 3 of the Alternative Service Act (see paragraph 24 above) and instead had had to face harsh criminal sanctions (see paragraph 19 above). Moreover, the authorities appear to have acted to prevent this from happening while the applicant's application for alternative service was already pending before the relevant Armenian authority (see paragraphs 11, 16 and 17 above).

58. In any event, even assuming that the applicant was a "citizen" of the "NKR" as argued by the Government, the Court is mindful of its finding above that Armenia was responsible for the acts and omissions of the "NKR" authorities and was under an obligation to secure in that area the rights and freedoms set out in the Convention. Therefore, the Government's argument that the "NKR" was a separate entity where the Alternative Service Act did not apply is artificial for the purposes of the present case (see, *mutatis mutandis*, *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99 and 7 others, § 89, ECHR 2010). Thus, regardless of the reasons, the applicant, in the particular circumstances of his case, had no possibility – or was deprived of the possibility – to perform alternative civilian service instead of military service, a circumstance which led eventually to his conviction and imprisonment. This fact is sufficient for the Court to conclude that the authorities failed to make appropriate allowances for the exigencies of the applicant's conscience and beliefs and to secure to him a system of alternative service that struck a fair balance between the interests of society as a whole and those of the applicant, as required by Article 9 of the Convention. It follows that the applicant's conviction constituted an interference which was not necessary in a democratic society within the meaning of that provision (see *Bayatyan*, cited above, §§ 124-128; *Bukharatyan*, cited above, § 48-49; *Tsaturyan*, cited above,

§ 44-45; and *Adyan and Others v. Armenia*, no. 75604/11, § 72, 12 October 2017).

59. There has accordingly been a violation of Article 9 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

60. 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

61. The applicant claimed 36,000 euros (EUR) in respect of non-pecuniary damage.

62. The Government did not comment on the applicant's claim.

63. The Court considers that the applicant has undoubtedly suffered non-pecuniary damage as a result of his conviction and imprisonment. It awards him EUR 9,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

64. The applicant also claimed EUR 2,000 for the costs and expenses incurred before the domestic courts and EUR 3,000 for those incurred before the Court.

65. The Government did not comment on the applicant's claim.

66. 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 above criteria, the Court considers it reasonable to award the sum of EUR 1,500 covering costs under all heads, plus any tax that may be chargeable to the applicant.

C. Default interest

67. 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. *Rejects* the Government's request to strike the application out of the list;

2. *Declares* the complaint concerning an alleged violation of the applicant's right to freedom of thought, conscience and religion admissible;

3. *Holds* that there has been a violation of Article 9 of the Convention;

4. *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 9,000 (nine thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,500 (one thousand five 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 20 July 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth	Yonko Grozev
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Harutyunyan is annexed to this judgment.

Y.G.R.
I.F.

CONCURRING OPINION OF JUDGE HARUTYUNYAN

I. INTRODUCTION

Although the Court has already had the opportunity to express its position on the question of effective control in Nagorno-Karabakh and surrounding territories, it is worth noting that the positions expressed in *Chiragov and Others v. Armenia* ([GC], no. 13216/05, ECHR 2015) are currently rather outdated in the light of recent developments and the results of the second Nagorno-Karabakh war of 2020.

In *Chiragov and Others*, the Court held that a number of factors such as economic, financial and military ties made it possible to establish that Armenia had effective control over Nagorno-Karabakh and thus should bear the responsibilities arising from its positive obligations. It is worth mentioning that the Court has underlined in its recent case-law that effective control is not equivalent to occupation within the meaning of international humanitarian law, if it is established on the basis of the Court's own criteria that are different from those of public international law.

In the light of the events of the forty-four-day war in and around Nagorno-Karabakh, the situation of effective control fundamentally changed and the conclusions of the previous case-law of the Court are no longer valid. After the tripartite ceasefire statement[1] of 9 November 2020 imposed on Armenia (which gave rise to major international and constitutional law concerns), the effective control of Nagorno-Karabakh and seven surrounding regions was divided between two member States of the Council of Europe – Russia and Azerbaijan.

II. FACTS

A. Effective control over Nagorno-Karabakh and surrounding territories

Following the 2020 Nagorno-Karabakh war, Azerbaijan gained control over the integral parts of Nagorno-Karabakh that it had seized during the fighting, including the districts of Hadrut and Shushi. It also maintained its control over four of the adjacent territories surrounding Nagorno-Karabakh that it had seized during the war, namely Qubadli, Zangilan, Jabrayil and Fuzuli, and was granted effective control of the remaining three territories of Aghdam, Lachin and Kalbajar through the tripartite ceasefire statement. The only territory whose effective control is currently not within the jurisdiction of Azerbaijan is the Lachin corridor (5 km wide) connecting

1 Kremlin, Statement by the President of the Republic of Azerbaijan, the Prime Minister of the Republic of Armenia and the President of the Russian Federation, published 10 November 2020. http://en.kremlin.ru/events/president/news/64384

Armenia to Nagorno-Karabakh. Control over the corridor is exercised by the armed forces of the Russian Federation.

The current area of Nagorno-Karabakh which was not transferred to Azerbaijan is placed under Russian "boots on the ground". It should be recalled that the 9 November tripartite statement does not ensure an international peacekeeping mission in Nagorno-Karabakh but rather a Russian one, which was not duly agreed with the OSCE Minsk Group Co-Chairs.

The Commander-in-Chief of the Russian military legion in Nagorno-Karabakh is the *de facto* decision-maker. The Russian border guards stationed on the Armenia-Nagorno-Karabakh road through the Lachin corridor decide who can or cannot visit Nagorno-Karabakh. Many international journalists were recently refused entry to visit Nagorno-Karabakh to document post-war effects on people's lives.[2]

The change of effective control in Nagorno-Karabakh has largely contributed to the continuing violations of the newly formed Azeri-Armenian border in the Gegharkunik and Syunik regions of Armenia by Azerbaijani troops. The enforced drawing of the border taking into account GPS connections and Google Maps (an application developed by a private company) gave rise to serious condemnation by the international community. Such a practice is not based on public international law and international public order.

This behaviour by Azerbaijan has allowed Russia to increase its military influence over Armenia, by placing its military personnel in the south of Armenia. In fact, Russia is boosting its feet on the ground in Armenia as an overriding criterion for enjoying effective control over Armenia. As of 17 June 2021, Russia is planning an additional deployment of its armed forces to the Syunik and Gegharkunik regions of Armenia.[3]

B. The impact of effective control on demographic change

The territorial changes had a direct influence on the demographic picture of the region. The second Nagorno-Karabakh war of 2020 was accompanied by the departure of tens of thousands of ethnic Armenian residents from the long-time settlements of Hadrut and Shushi in the southern part of Nagorno-Karabakh, as well as from territories outside the region.[4] As the military and political control over these districts changed, the entire

2 Reporters Without Borders, "Russian peacekeepers deny foreign reporters access to Nagorno-Karabakh", 9 April 2021. https://rsf.org/en/news/russian-peacekeepers-deny-foreign-reporters-access-nagorno-karabakh

3 https://mil.am/hy/news/9547

4 Congressional Research Service, "Azerbaijan and Armenia: The Nagorno-Karabakh Conflict", 7 January 2021, p. 15. https://fas.org/sgp/crs/row/R46651.pdf

population of Hadrut and Shushi had to flee under constant threat to their lives and property.

The expulsion of the Armenian population from Nagorno-Karabakh and surrounding regions was accompanied by execution videos of Armenian soldiers and civilians shared via multiple social media outlets, as well as videos of the demolition of homes and destruction of the cultural and religious heritage of Armenians in Hadrut and Shushi especially.[5] [6] [7] No case has been brought in Azerbaijan against the perpetrators of those crimes against the Armenians.

Furthermore, a State-sponsored Armenophobia element has emerged in Azerbaijani society after the end of the war. The so-called "Trophy Park" inaugurated in Baku by the Azerbaijani President displays Armenian military equipment taken as a trophy during the war and shows dehumanising scenes, including wax mannequins depicting dead and dying Armenian soldiers. In her strong letter of condemnation to the President of Azerbaijan, the Council of Europe Commissioner for Human Rights Dunja Mijatović stated: "This kind of display can only further intensify and strengthen long-standing hostile sentiments and hate speech, and multiply and promote manifestations of intolerance."[8] The official reply by the Office of the President of Azerbaijan, demonstrating a refusal to prevent the continued damage and human suffering caused to the Armenian population by the conflict,[9] is yet further proof that the Armenian refugees cannot count on a safe return to their homes and on having a decent life free from discrimination, inhuman and degrading treatment and threats to their lives. Therefore, as previously argued by Armenia and local Armenians, the jurisdiction of Azerbaijan is dangerous to the safety of ethnic Armenians indigenous to those lands and the Armenian cultural heritage. The element of ethnic hatred towards Armenians in Azerbaijan has also been recognised by the Court in various cases (see, for example, *Makuchyan and Minasyan*

---

5 Human Rights Watch, "Azerbaijan: Armenian Prisoners of War Badly Mistreated: Investigate, Prosecute Violations; Ensure Protection of All Military Detainees", 2 December 2020. https://www.hrw.org/news/2020/12/02/azerbaijan-armenian-prisoners-war-badly-mistreated

6 Human Rights Watch, "Azerbaijan: Armenian POWs Abused in Custody: Investigate Abuse; Protect All Detainees", 19 March 2021. https://www.hrw.org/news/2021/03/19/azerbaijan-armenian-pows-abused-custody

7 Zartonk Media, "Azeris Publish Videos of their Soldiers Humiliating & Killing Two Armenian Captives, One an Elderly Civilian", 15 October 2020. https://zartonkmedia.com/2020/10/15/azeris-publish-videos-of-their-soldiers-humiliating-killing-two-armenian-captives-one-an-elderly-civilian/

8 Letter from the Council of Europe Commissioner for Human Rights, 27 April 2021. https://www.coe.int/en/web/commissioner/-/azerbaijan-efforts-to-deal-with-the-past-should-become-the-priority-to-ensure-reconciliation-andlasting-peace

9 Reply of the Permanent Representative of the Republic of Azerbaijan to the Council of Europe, 20 April 2021. https://rm.coe.int/reply-of-the-azerbaijani-authorities-to-the-letter-of-the-council-of-e/1680a24413

v. Azerbaijan and Hungary, no. 17247/13, 26 May 2020, and *Saribekyan and Balyan v. Azerbaijan*, no. 35746/11, 30 January 2020).

Azerbaijan has continued to hold Armenian prisoners of war, in grave violation of international humanitarian and international human rights law, despite many calls from the international community to release them. On 20 May 2021 the European Parliament condemned Azerbaijan for holding and torturing Armenian prisoners of war and other captive persons in degrading conditions since the end of the active stage of hostilities. It also called on the Government of Azerbaijan to cooperate with the European Court of Human Rights and to comply with the interim measures in place. Finally, the European Parliament demanded "the immediate and unconditional release of all Armenian prisoners, both military and civilian, detained by Azerbaijan **during and after the conflict**, and that Azerbaijan refrain from detaining people arbitrarily in the future".[10]

C. Occupied positions and effective control by Azerbaijan over the sovereign territory of Armenia

Although there have been a number of clashes between Azerbaijani and Armenian armed forces on the new line of contact created as a result of the November ceasefire statement, reports of a targeted invasion of certain areas deep within the internationally recognised borders of Armenia emerged in early May 2021. In particular, on 12 May 2021 several hundred Azerbaijani soldiers advanced 3.5 kilometres into the international border area around Ishkhanasar in the Syunik province of Armenia around Lake Sev (Sev Lij). A similar intrusion was also halted south of the village of Verin Shorja in the Gegharkunik province, territories which were never part of Azerbaijan during the Soviet era.[11] Thus, certain territories inside Armenia are currently under the effective control of Azerbaijan. The Russian troops additionally deployed in Armenia "to protect it from external threats" did not implement their international obligations.

The international reaction to the occupation of certain strategic territories in Armenia was strong and supportive of Armenia's territorial integrity.

On 27 May 2021 the US State Department indicated that it was concerned "by recent developments along the international border between Armenia and Azerbaijan, including the detention of several Armenian soldiers by Azerbaijani forces".[12] Moreover, it stated: "Specifically, **we call**

10 European Parliament resolution of 20 May 2021 on prisoners of war in the aftermath of the most recent conflict between Armenia and Azerbaijan (2021/2693(RSP)). https://www.europarl.europa.eu/doceo/document/TA-9-2021-0251_EN.html (emphasis added).

11 https://mirrorspectator.com/2021/05/24/armenia-rules-out-border-demarcation-talks-until-azerbaijani-forces-pull-out-of-armenian-territory/

12 https://www.state.gov/detention-of-armenian-soldiers/

on Azerbaijan to relocate its forces to the positions they held on May 11. We also call on Armenia to relocate its forces to the positions they held on May 11, and welcome statements of intent to this effect. These actions will de-escalate tensions and create space for a peaceful negotiation process to demarcate the border on an urgent basis. The United States is prepared to assist these efforts."

On 14 May 2021 the President of France, Emmanuel Macron, gave a statement which read as follows: "Azerbaijani armed forces have crossed into Armenian territory. They must withdraw immediately. I say again to the Armenian people: France stands with you in solidarity and will continue to do so."[13] On 27 May 2021 the Ministry for Europe and Foreign Affairs of France expressed "its deep concern over the increasing number of incidents seen on the border between Armenia and Azerbaijan, the latest of which was the capture of six Armenian soldiers by Azerbaijani forces during the night of May 26" and reaffirmed President Macron's statement of 14 May.[14] On 1 June 2021 the French President again stated that "the Azerbaijani troops must leave Armenia's sovereign territory" and called on the parties "to return to the positions held".[15]

On 28 May 2021 the European Union External Action Service issued a statement calling for a return to the positions held before 12 May 2021. The statement read as follows: "All forces should pull back to positions held before 12 May and both sides should engage in negotiations on border delimitation and demarcation. We continue to call on Azerbaijan to release all prisoners of war and detainees without delay."[16]

Finally, the OSCE Minsk Group Co-Chairs in a statement of 28 May 2021 called on Azerbaijan to "release ... all prisoners of war and other detainees on an all for all basis" and noted that "the use or threat of force to resolve border disputes is not acceptable".[17]

III. CONCLUSION

In the light of the foregoing, the Court must develop a clearer formulation as its previous case-law on the subject of effective control in Nagorno-Karabakh and surrounding territories no longer corresponds to the present-day reality. More specifically, the Court must clarify that Armenia no longer has effective control over Nagorno-Karabakh and surrounding territories. In fact, the forty-four-day war revealed two "beneficiaries" of

13 https://twitter.com/EmmanuelMacron/status/1392965873187659778
14 https://www.diplomatie.gouv.fr/en/country-files/armenia/news/article/armenia-azerbaijan-incidents-on-the-border-between-armenia-and-azerbaijan-may
15 https://www.rferl.org/a/france-macron-nagorno-karabakh/31284862.html
16 https://eeas.europa.eu/headquarters/headquarters-homepage/99246/armeniaazerbaijan-statement-spokesperson-recent-developments-border_en
17 https://www.osce.org/minsk-group/487879

effective control over Nagorno-Karabakh and surrounding territories: the Russian Federation for the remaining parts of Nagorno-Karabakh, the Lachin corridor and the ongoing reinforcement of its "boots on the ground" in Armenia; and Azerbaijan for all territories surrounding Nagorno-Karabakh, the Shushi and Hadrut regions of Nagorno-Karabakh and several parts of Armenian territory in the Syunik and Gegharkunik regions. Statements given by Russia and Azerbaijan on implementing demarcation and delimitation without the participation of the other two members of the OSCE Minsk Group Co-Chairs – France and the United States – go against the internationally recognised format for settling the Nagorno-Karabakh conflict.