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

FIRST SECTION

DECISION

This version was rectified on 29 January 2019
under Rule 81 of the Rules of Court.

Applications nos. 2256/09 and 2260/09
Klara Fedorovna NANIYEVA against Georgia
and Umar Yestateyevich BAGAYEV against Georgia

The European Court of Human Rights (First Section), sitting on 20 November 2018 as a Chamber composed of:

Linos-Alexandre Sicilianos, *President,*
Ksenija Turković,
Krzysztof Wojtyczek,
Pauliine Koskelo,
Tim Eicke,
Lado Chanturia,
Gilberto Felici, *judges,*

and Abel Campos, *Section Registrar,*

Having regard to the above applications lodged on 15 September 2008,

Having deliberated, decides as follows:

THE FACTS

1. The applicant in the first case, Klara Fedorovna Naniyeva, born in 1952 in Nakrepa, is a wife of the applicant in the second case, Umar Yestateyevich Bagayev, born in 1946 in Rustavi.

2. Both applicants are Russian nationals and live together in Tskhinvali, the capital of Tskhinvali Region (South Ossetia[1])[2]. They are represented

[1] The term 'South-Ossetia' refers to the region of Georgia which is beyond *de facto* control of the Georgian Government.
[2] Rectified on 29 January 2019: footnote added (see above).

before the Court by Dmitry Matveev and Partners, a law firm based in Moscow.

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

4. On 4 August 2008 the first applicant, together with the second applicant and their son, noticed that hostilities had started on the territory of Tskhinvali Region (South Ossetia).

5. On 7 August 2008 around midnight, when the applicants were resting in their apartment, they suddenly heard a heavy noise, caused by almost uninterrupted explosions.

6. They took shelter in the basement of the house they lived in. They had no water, food or electricity. Small children were crying and there were a number of injured people without access to any medication, whom the applicants could not help.

7. Later in the night, when the shootings were less heavy, the applicants moved to their house, where they were hiding in the basement until 10 August 2008. Georgian soldiers approached the basement several times threatening to kill those who want to "live with the Russians". The first applicant lost consciousness due to the fear and stress.

8. On 10 August 2008 they were taken to the bus station, from which they travelled by bus to Vladikavkaz (Russian Federation) and further to a camp in Alagir. Later they were transferred to Rostov on Don (Russian Federation).

9. When the applicants returned to Tskhinvali, they learned that both their apartment and the house were completely destroyed together with all furniture, household appliances, documents and personal belongings.

RELEVANT INTERNATIONAL MATERIAL

10. The *Report of the Independent International Fact-Finding Mission on the Conflict in Georgia (Volume I)* established in December 2008 by the Council of the European Union, states, *inter alia*, that (p. 10):

> "On the night of 7 to 8 August 2008, a sustained Georgian artillery attack struck the town of Tskhinvali. Other movements of the Georgian armed forces targeting Tskhinvali and the surrounding areas were under way, and soon the fighting involved Russian, South Ossetian and Abkhaz military units and armed elements. It did not take long, however, before the Georgian advance into South Ossetia was stopped. In a counter-movement, Russian armed forces, covered by air strikes and by elements of its Black Sea fleet, penetrated deep into Georgia, cutting across the country's main east-west road, reaching the port of Poti and stopping short of Georgia's capital city, Tbilisi. The confrontation developed into a combined inter-state and intra-state conflict, opposing Georgian and Russian forces at one level of confrontation as well as South Ossetians together with Abkhaz fighters and the Georgians at another. Such a combination of conflicts going on at different levels is particularly prone to violations

of International Humanitarian Law and Human Rights Law. This is indeed what happened, and many of these instances were due to the action of irregular armed groups on the South Ossetian side that would not or could not be adequately controlled by regular Russian armed forces."

COMPLAINTS

11. The applicants primarily argue that the activities of the Georgian army, namely the indiscriminate shelling of civilian areas in Tskhinvali, put their lives at immediate danger, and therefore violated Article 2 of the Convention. These activities also caused them serious moral and physical suffering in breach of Article 3 of the Convention.

12. The applicants further complain that in breach of Article 1 of Protocol No. 1, they were deprived of the possibility to peacefully enjoy the property in which they lived and which they were forced to leave, because their apartment and house were destroyed as a result of the bombing of Tskhinvali.

13. The applicants also invoke Article 13 of the Convention in conjunction with Article 3 of the Convention, alleging that there was no effective remedy for the violations of their rights. They allege that the court system stopped functioning in Tskhinvali Region (South Ossetia) as a result of the hostilities, and Georgian authorities could not have been deemed to be capable of providing effective investigation into the activities of their own army.

14. Under Article 14 of the Convention in conjunction with Articles 3 and 13 of the Convention the applicants claim that the activities of the Georgian army were directed against South Ossetian civilians and that as South Ossetians, they do not enjoy effective access to protection of their rights through Georgian authorities.

15. Finally, they allege a violation of Article 8 of the Convention complaining, in substance, of having to leave their home behind.

THE LAW

A. Joinder of the applications

16. Given their similar factual and legal background, the Court decides that the applications should be joined under Rule 42 § 1 of the Rules of the Court.

B. The applicants' complaints

17. The applicants raised various complaints under Articles 2, 3, 8, 13 and 14 of the Convention and Article 1 of Protocol No. 1.

18. To support their claims, the applicants provided the Court with the following documents: the first and second applicant's passports; a list of property items damaged or destroyed in the conflict, supported by witness signatures; witness statements confirming their refuge in the basement and the course of the conflict events; photos of the basement the applicants were hiding in; a confirmation from the authorities of the Russian Federation that the applicants crossed the border to the Russian Federation; medical documents of both applicants; the House book and the technical passport to the apartment registered in the second applicant's name; a purchase contract to the house in the second applicant's name from 2006; and various documents relating to house appliances and paid bills for restoration of the apartment.

C. The Court's assessment

1. General considerations

19. The Court notes that pursuant to Article 35 § 1 of the Convention, it may only deal with applications after all effective domestic remedies have been exhausted, and within a period of six months from the date on which the final decision was taken.

20. Furthermore, under the third paragraph, letter a) of the same provision, the Court shall declare inadmissible any individual application if it considers that the application is incompatible with the provisions of the Convention or the Protocols thereto, or manifestly ill-founded.

21. The Court observes that the present applications were filed only a few weeks after the events complained of had taken place. The applicants did not attempt to exhaust domestic remedies as, according to them, such attempt would be obviously futile. They claim that the court system stopped functioning in South Ossetia as a result of the hostilities, and the Georgian authorities could not have been deemed to be capable of providing effective investigation into the activities of their own army.

22. However, the Court does not consider it necessary to decide whether the applicants satisfied the condition of exhaustion of domestic remedies, because their complaints are in any event inadmissible for the following reasons.

23. 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 *Aslakhanova and Others v. Russia*, nos. 2944/06 and 4 others, § 96, 18 December 2012). Consequently, the fact that no domestic investigation and fact-finding has

been initiated places the Court in a rather difficult situation as regards the establishment of facts.

24. The Court reiterates that it is for the parties to substantiate their factual arguments by providing the Court with the necessary 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. In this context, the conduct of the parties when evidence is being obtained has to be taken into account (see *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25; *Lisnyy and Others v. Ukraine and Russia* (dec.), nos. 5355/15, 44913/15 and 50853/15, § 25, 5 July 2016).

25. At the same time, the Court acknowledges that cases concerning armed conflicts may raise particular difficulties and require evidence which may only be at the disposal of the Government. 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, § 283, ECHR 2001-VII). Without prejudice to possible issues of jurisdiction raised by the present case, the Court recalls that it has held that in areas under the exclusive control of the authorities and with *prima facie* evidence that the State agents could have been involved in the alleged treatment contrary to Article 2 and Article 3, the State bears the burden of providing a plausible explanation (see *Akkum and Others v. Turkey*, no. 21894/93, § 211, ECHR 2005-II (extracts); *Toğcu v. Turkey*, no. 27601/95, § 95, 31 May 2005; *Makhauri v. Russia*, no. 58701/00, § 123, 4 October 2007).

26. Indeed, in specific circumstances, the distribution of the burden of proof must be adjusted to the specificity of the facts of the case (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 147, ECHR 2005-VII). Even though it is for the applicants to provide evidence in support of their claims, in exceptional cases, the requirement will also be satisfied if the applicants give the Court a convincing explanation as to why it was not possible to submit the evidence (see *Lisnyy*, cited above, §§ 27-30; *Creangă v. Romania* [GC], no. 29226/03, § 88, 23 February 2012).

2. Complaints under Article 1 of Protocol No. 1

27. In the light of the above, the Court considers that it was for the present applicants to submit documents showing that the property allegedly destroyed or damaged was part of their possessions and that the property suffered damage as a result of the relevant conflict events.

28. The applicants provided the Court with a number of documents proving the second applicant's ownership of the house and their registration at the apartment they lived in, witness testimonies that the applicants had

been present and hiding in the basement during the shelling of Tskhinvali, a document confirming that they fled Tskhinvali shortly after the bombing, various documents relating to the purchase of home appliances as well as bills for restoration of the apartment.

29. In general, the Court requires a standard of proof "beyond reasonable doubt" in its assessment of evidence (see *Avşar v. Turkey*, no. 25657/94, § 282, ECHR 2001-VII). At the same time, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Taniş and Others v. Turkey*, no. 65899/01, § 160, ECHR 2005-VIII). No such presumptions, however, arise in the present case regarding the alleged destruction of the applicants' property.

30. The Court did not obtain any *prima facie* evidence relating to the alleged destruction of or damage to the relevant property. As regards the copies of bills submitted by the applicants concerning home appliances bought in the period after the conflict, the Court cannot accept such documents as even *prima facie* evidence of the existence and extent of the alleged destruction or damage, or the causes thereof.

31. The Court admits that situations arising from an armed conflict imply specific circumstances which may create obstacles for adducing evidence. The Court is, however, aware that many applicants before the Court, whose complaints stem from the particular context of the hostilities in the Tskhinvali Region during the same period of time and who raise similar issues, have been able to submit documentary evidence from the local authorities attesting to the damage suffered and its extent. Regarding the present case, the Court cannot but note that the applicants did not provide any specific explanation as to why no documentation confirming the damage or destruction of their property could have been adduced (see, *mutatis mutandis*, *Lisnyy*, cited above, §§ 27-30; *Dzhioyeva and Others v. Georgia*, nos. 24964/09, 20548/09 and 22469/09 (dec.), § 44, 20 November 2018).

32. As noted above, neither the circumstances of the case nor the applicants' claims suggest that it was impossible for them to obtain any official statement from the local Ossetian authorities confirming the extent of the damage actually suffered. The Court therefore finds that the applicants failed to produce appropriate *prima facie* evidence in support of their complaints under Article 1 of Protocol No. 1, and that this part of the application is therefore manifestly ill-founded.

3. Complaints under Articles 2, 3 and 8 of the Convention

33. In relation to the applicants' complaints under Articles 2, 3, and 8 of the Convention, the Court notes that both applicants claim that they were forced to seek shelter in the basement of their house and spend several days without water or food, together with a number of other persons, some of

whom were injured. Subsequently, the applicants had to flee their homes and seek refuge in the Russian Federation. They were, after a few weeks, able to return to their home.

34. The Court recognizes that the applicants' allegations are of a serious nature and that such grievances may, under certain circumstances, raise issues under the afore-listed provisions.

35. According to the Court's jurisprudence, an immediate danger to life caused by the conduct of the State agents, can engage Article 2 of the Convention even in situations, when no death occurred (see *Makaratzis v. Greece* [GC], no. 50385/99, § 55, ECHR 2004-XI; *Soare v. Romania*, no. 72439/01, § 109, 16 June 2009; *Trévalec v. Belgium*, no. 30812/07, § 55-61, 14 June 2011). The same applies to situations of indiscriminate use of lethal force against 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, 2 December 2010, §§ 200 and 203).

36. Assuming that Article 2 of the Convention were applicable under the circumstances of the case, a *prima facie* claim on part of the applicant is sufficient to shift the burden of proof to the respondent Government to provide a convincing explanation as to how the events in question occurred (see *Varnava and Others v. Turkey*, [GC], nos. 16064/90 and 8 others, § 184, ECHR 2009).

37. An examination of the merits of the case might therefore be warranted had the applicants provided the Court with *prima facie* evidence that while taking shelter in the basement of their house, they had been exposed to an immediate danger which was sufficiently sever to engage Article 2 of the Convention (see *Dzhioyeva and Others v. Georgia*, nos. 24964/09, 20548/09 and 22469/09 (dec.), § 44, 20 November 2018).

38. Such evidence was not, however, submitted by the applicants in the present case. Although they provided the Court with witness statements confirming that they had taken shelter in the basement, the applicants produced no evidence to show that the conflict events affected the area where they were present in such a manner as to directly and immediately endanger their lives. Although the Court is aware from various sources of the activities of the Georgian army in Tskhinvali Region (see paragraph 10 above), it is unable to establish whether and to what extent the activities took place in the area where the applicants were seeking shelter.

39. The Court reiterates that it is not a tribunal of facts, and cannot, without appropriate assistance on part of the applicants, establish the factual account of complex events, such as the situation of armed conflict. Because the applicants failed to provide the Court with a convincing *prima facie* evidence that the hostilities took place in their proximity in such intensity and manner that would have directly endangered their lives, the Court must

consider their complaint under Article 2 of the Convention as manifestly ill-founded.

40. Regarding the applicants' complaints under Article 3 of the Convention, the Court acknowledges that having to take shelter in the basement with no access to water, food or medication, could have caused the applicants a considerable level of distress. The provision has previously been found applicable in the cases of destruction of homes by heavy artillery, which was premeditated and targeted deliberately against civilians' homes (see, for example, *Selçuk and Asker v. Turkey, no.* 23184/94, 24 April 1998, *Reports of Judgments and Decisions* 1998-II; *Ayder and Others v. Turkey*, no. 23656/94, 8 January 2004; *Bilgin v. Turkey*, no. 23819/94, 16 November 2000).

41. The Court has also held that when such an attack is not carried out with the purpose of humiliating and causing mental suffering to the civilians, the threshold of severity required for engaging Article 3 of the Convention will generally not be reached (see *Esmukhambetov and Others v. Russia*, no. 23445/03, 29 March 2011, § 188). It has, however, also held that the absence of a purpose of subjecting the applicants to inhuman treatment or of causing moral suffering cannot conclusively rule out a violation of Article 3 of the Convention (see *Benzer and Others v. Turkey*, no. 23502/06, § 212, 12 November 2013). Furthermore, the Court has found violations of Article 3 on account of mental suffering endured by applicants as a result of the acts of armed forces who had burnt down their homes and possessions before their eyes (see *Selçuk and Asker*, cited above; *Yöyler v. Turkey*, no. 26973/95, §§ 74-76, 24 July 2003; and *Ayder and Others v. Turkey*, cited above).

42. In the present cases, the applicants did not provide the Court with a prima *facie claim* and evidence that the activities of the Georgian army were of such nature and with the aim to humiliate them and cause them mental suffering. The Court acknowledges that the situation of an armed conflict in itself puts human dignity and lives under threat. It cannot, however, be concluded that such a situation always amounts to treatment contrary to Article 3 of the Convention.

43. At the same time, the applicants did not provide the Court with a *prima facie* evidence to show that they had to face destruction of their home (see *Benzer and Others v. Turkey*, cited above, § 212), which could cause them severe psychological suffering. Accordingly, their complaint under Article 3 of the Convention is manifestly ill-founded.

44. The applicants also raised a complaint under Article 8 of the Convention, complaining, in substance, of having to flee their home and seek refuge in another country. Forced flight from the hostilities or destruction of the applicants' home in the conflict can, under certain circumstances, engage this provision. In respect of the present case the Court notes, however, that although the applicants left their home in

reaction to the hostilities, they were able to return after a few weeks and continue living in their home (see, in contrast, *Chiragov and Others v. Armenia* [GC], no. 13216/05, §§ 206-207, ECHR 2015; *Sargsyan v. Azerbaijan* [GC], no. 40167/06, §§ 256-257, ECHR 2015).

45. Albeit it is reasonable to assume that taking refuge in another country for a relatively short period of time due to the hostilities caused the applicants some level of stress and discomfort, the Court concludes that such discomfort does not amount to an interference with private and family life of the applicants protected by Article 8 of the Convention. The complaint under this provision is therefore manifestly ill-founded.

4. Complaints under Articles 13 and 14 of the Convention

46. Taking into account that the Court has considered the complaints under Articles 2, 3 and 8 of the Convention and Article 1 Protocol No. 1 to be manifestly ill-founded, it follows that the complaints under Articles 13 and 14 of the Convention are also manifestly ill-founded.

D. Conclusion

47. In the light of these circumstances, the Court declares the applications inadmissible pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Decides to join the applications;

Declares the applications inadmissible.

Done in English and notified in writing on 13 December 2018.

Abel Campos Registrar	Linos-Alexandre Sicilianos President