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

FIRST SECTION

DECISION

Application no. 27473/07
Shamsaddin Mansur Oglu ALIYEV
against Azerbaijan

The European Court of Human Rights (First Section), sitting on 6 May 2014 as a Chamber composed of:

Isabelle Berro-Lefèvre, *President,*
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Paulo Pinto de Albuquerque,
Linos-Alexandre Sicilianos, *judges,*

and Søren Nielsen, *Section Registrar,*

Having regard to the above application lodged on 7 June 2007,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Shamsaddin Mansur oglu Aliyev (*Şəmsəddin Mənsur oğlu Əliyev*), is an Azerbaijani national, who was born in 1948 and lives in Baku.

2. He was represented before the Court by Mr F. Agayev, a lawyer practising in Azerbaijan. The Azerbaijani Government ("the Government") were represented by their Agent, Mr Ç. Asgarov.

A. The circumstances of the case

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

1. The death of the applicant's son

4. The applicant's son, A.S., had been serving as a lieutenant in the State Border Service ("the SBS") in Samukh region since May 2002. The frontier station where A.S. had been serving was situated at the Azerbaijani-Georgian border, not far from the village of Burungovag. He was a deputy commander of his unit.

5. On 18 November 2002, at the request of his commander, A.S. and seven soldiers under his supervision went to a belt of woodland near their barracks to cut some wood. The objective of the mission was to provide the frontier station with wood for its domestic needs. A.S. and the other soldiers were sent on the mission without any weapons, other than axes for cutting wood and ropes.

6. After their arrival at the forest they divided into two groups: A.S. stayed with two of the soldiers, F.R. and A.A., and the other five soldiers worked in another part of the forest not far from them. At approximately 3 p.m. as A.S., F.R. and A.A. were approaching the road crossing the forest, where they met a hunter (B.N.) with a shotgun. A.S. asked B.N. to produce his gun licence. As B.N refused to do so, A.S. ordered the soldiers to take B.N. to the frontier station. At that moment, B.N. fired at A.S. He then attempted to shoot F.R., who prevented him from doing so by seizing his shotgun. However, B.N. managed to escape.

7. The soldiers took A.S. to the frontier station on a tractor trailer. A.S. was then taken to hospital by car, but he died before reaching the hospital.

2. Criminal proceedings in connection with the death of the applicant's son

8. A criminal investigation was immediately instituted in connection with A.S.'s death.

9. On 19 November 2002 B.N. was arrested by the police and on 21 November 2002 he was charged under Article 120 (murder) of the Criminal Code.

10. B.N. confessed to his crime during the investigation. He stated that he lived in the Burungovag village and on 18 November 2002 he had gone to the forest next to the village to hunt because it had been his daughter's birthday. At approximately 3 p.m. he met A.S. and two soldiers in the forest. A.S. asked him for his gun licence, and as he failed to produce it, A.S. ordered the soldiers to take him to the frontier station. Following A.S.'s order the two soldiers began to punch him and at that moment he shot A.S., who was standing between the two soldiers. He justified his action as retaliation for A.S.'s order to take him to the frontier station. However, B.N. denied that he had also attempted to shoot another soldier.

11. The two soldiers involved in the incident were also questioned by the investigator. They stated that on 18 November 2002 they had gone on a

mission to the forest to cut wood and that during the mission they had been under A.S.'s orders. When they arrived at the road crossing the forest, they met B.N., who was armed. A.S. asked B.N. for his gun licence. As B.N. failed to produce that document, A.S. ordered them to take B.N. to the frontier station. At that moment, B.N. shot A.S. and then tried to shoot F.R., but did not manage to do so because F.R. seized B.N.'s shotgun. The soldiers also stated that they had immediately taken A.S. to the frontier station, but that he died later.

12. A face-to-face confrontation was carried out between B.N. and the two soldiers during which the parties reiterated their initial submissions.

13. The commander of A.S.'s unit and the other soldiers of the unit participating in the mission were also questioned by the investigator. They confirmed the above-mentioned version of the events.

14. Following a forensic examination carried out during the investigation, it was established that A.S. had died as a result of the shooting of 18 November 2002. The investigation further established that B.N. was not in possession of a gun licence. On 28 February 2008 a psychiatric expert concluded that B.N. was not of unsound mind when he had shot A.S.

15. Having requested recognition as a legal heir of the victim (*zərərçəkmişin hüquqi varisi*), on 11 March 2003 the investigator granted the request and the applicant was then heard as such. The applicant stated that at approximately 6 p.m. on 18 November 2002 he had been informed that his son had been killed in the Burungovag village, but he had not known the circumstances of his death.

16. On 10 April 2003 the investigator lodged an indictment with the Assize Court.

17. On 23 May 2003 the Assize Court held a preliminary hearing. It transpires from the minutes of the hearings before the Assize Court that B.N. and the soldiers maintained their initial statements submitted during the investigation. The unit commander was also heard before the court. He stated that on 18 November 2002 A.S. and seven other soldiers went at his request to the forest to cut some wood for the domestic needs of the frontier station. At approximately 3.10 p.m. a tractor approached the frontier station and he learned that A.S. had been shot by a hunter. He immediately took A.S. to the Burungovag village doctor and informed the SBS's administration about the incident, but it was not possible to save A.S.'s life.

18. On 30 May 2003 the Assize Court found B.N. guilty, under Articles 29 (attempt to commit a crime) and 120 (murder) of the Criminal Code, and sentenced him to thirteen years' imprisonment. The court found that B.N. had had no gun licence and that the SBS officers had been entitled to stop and check the documents of people who lived in the border area. The court also noted that the rules on hunting in the border area should be coordinated with the border troops.

19. On an unspecified date the applicant and B.N. appealed against the Assize Court's judgment. The applicant asked the appellate court to sentence B.N. to life imprisonment, while B.N. asked the court to reduce his prison term.

20. On 11 August 2003 the Court of Appeal dismissed the applicant's and B.N.'s appeals and upheld the Assize Court's judgment. It held that the applicant's appeal was unsubstantiated, because the Assize Court had taken into consideration the mitigating and aggravating circumstances when it had sentenced B.N. to thirteen years' imprisonment.

21. On an unspecified date the applicant lodged a cassation appeal. He asked the court to sentence B.N. to a heavier penalty.

22. On 16 March 2004 the Supreme Court dismissed the applicant's appeal and upheld the Court of Appeal's judgment.

3. Civil proceedings instituted by the applicant

23. On 26 August 2005 the applicant brought a civil action against the Ministry of Finance seeking compensation for the death of his son. The applicant argued that his son had been killed because he had not been provided with adequate weapons when he was sent on a mission, and that therefore the State had failed to protect his son's life. He also noted that B.N. had been given a lenient sentence and that the responsibility of the SBS's officers for his son's death had not been established.

24. It appears from the case file that, in the proceedings before the Nasimi District Court, a representative of the Ministry of Finance objected to the judge sitting in the case, claiming that the judge in question had taken no action despite the fact that the applicant had insulted her at the hearings.

25. On 11 November 2005 the President of the Nasimi District Court granted the request of the representative of the Ministry of Finance and allocated the case to another judge.

26. On 14 December 2005 the applicant appealed against that decision, objecting to the participation in the case of all the judges of the court, including the president of the court.

27. On 11 January 2006 the Court of Appeal dismissed the applicant's appeal and remitted the case to the Nasimi District Court. The court held that the applicant had failed to substantiate his objection.

28. On 25 May 2006 the Nasimi District Court delivered a judgment on the merits, dismissing the applicant's claim. The court held that it had been established in the criminal proceedings that A.S. had been killed by B.N. and that a civil judge was obliged to take the findings of the criminal proceedings into account in order to establish the facts. Therefore the applicant should lodge a compensation claim against B.N., but not against the State, which was not responsible for the death of his son.

29. The applicant appealed against that judgment. He claimed that his son had been killed because A.S. and other soldiers had been sent on a

mission without weapons. He further complained that the civil proceedings had been unfair, claiming in particular that the judge had not examined his claim within the statutory time-limits and that the hearing had not been held in accordance with the formal requirements of the law.

30. On 13 September 2006 the Court of Appeal upheld the first-instance court's judgment. It held that the State had no civil responsibility for A.S.'s death, because his death had not resulted from any wrongful acts of the State authorities or their officials. The court further held that B.N. was responsible for A.S.'s death and that the applicant could bring an action against him.

31. On 12 December 2006 the applicant lodged a cassation appeal, reiterating his previous complaints.

32. On 31 January 2007 the Supreme Court dismissed the applicant's cassation appeal. It noted that in accordance with Article 1100 of the Civil Code, the State was responsible for the damage caused to individuals by wrongful acts or omissions of the State authorities or their officials. However, the State was not responsible for A.S.'s death because his death had not resulted from any wrongful acts of the State authorities or their officials.

B. Relevant domestic law

33. Article 32 of the Law on the Border Troops of 6 January 1994 provides that military personnel of the border troops, while directly protecting the State border of the Republic of Azerbaijan, will use firearms and weaponry. The same provision refers to the Law on State Border which deals with the circumstances of the use of firearms and weaponry.

34. Article 37 of the Law on State Border of 9 January 1991 provides for the rules on the use of firearms and weaponry by border patrols. The relevant part of the provision reads as follows:

> "1. During the exercise of their duties in the field of protection of the State border, the border troops shall use firearms and weaponry for the neutralisation of real and potential threats on the State border, the protection of the population and property in the frontier zone from such actions, and their prevention.
>
> Border patrols are also entitled to use firearms and weaponry in the following cases:
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> a) In order to neutralise attacks and to break down the resistance of armed individuals where there is a threat to the lives of border guards or the population and there is no possibility to prevent this threat;
>
> ...
>
> 7. The use of firearms by the border troops is forbidden in the following cases:
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> a) Against persons violating the State border of the Republic of Azerbaijan within the sight of a border guard, provided that this violation is related to the implementation of agricultural and other work (hunting, cattle grazing, gathering of

berries or fuel, and so on) in the vicinity of the State border of the Republic of Azerbaijan ..."

35. Article 24 of the Law on State Border provides that hunting rules within the frontier zone must be coordinated with the border troops.

36. Article 106 of the Code of Criminal Procedure ("the CCrP") provides that a close relative of a victim who has died as a result of an incident can be considered as a legal heir of the victim if he or she wishes to deal with the rights and duties of the victim within the criminal proceedings. Article 106 read in conjunction with Article 87 (victim) of the CCrP entitles a person recognised as a legal heir of the victim, *inter alia*, to submit material to the criminal case file; to object to actions of the criminal prosecution authority; to lodge petitions; to have access to transcripts and documents in the case file; to be informed about and to obtain copies of the procedural decisions of the criminal prosecution authority; and to lodge appeals against procedural steps or decisions, as well as against court judgments and decisions.

COMPLAINTS

37. The applicant complained, under Article 2 of the Convention, that the domestic authorities had been responsible for the death of his son. In particular, he alleged that his son had been killed because he had not been armed when he had been sent on the mission. The applicant also complained that there had been no investigation of the alleged responsibility of A.S.'s superiors for the death of his son.

38. The applicant also complained, under Article 6 of the Convention, that in the civil proceedings instituted by him his request for the withdrawal of the judges of the first-instance court had been rejected without any reason, that the outcome of the proceedings had been unfair and that the "reasonable time" requirement had not been respected by the domestic courts.

39. Relying on Article 13 of the Convention in conjunction with Article 1 of Protocol No. 1 to the Convention, the applicant complained that the domestic remedies related to civil proceedings had been ineffective and that his property rights had been violated, because the domestic courts had not granted his compensation claim.

THE LAW

A. Complaint concerning the death of the applicant's son

40. The applicant complained, under Article 2 of the Convention, that the State had failed to protect the life of his son. In particular, he alleged that his son had been killed by B.N. because he had been sent to work in the woods unarmed. He further complained that the domestic authorities had not carried out an investigation of the alleged responsibility of A.S.'s military superiors for his death. The relevant part of Article 2 of the Convention reads as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

41. The Government submitted that the applicant had failed to exhaust domestic remedies in that he had not complained about the alleged ineffectiveness of the criminal investigation in connection with his son's death. In this connection, the Government submitted that the applicant had been recognised as a legal heir of the victim within the context of the criminal proceedings, but he had never disputed the findings and outcome of the criminal investigation. The Government further submitted that the applicant had failed to comply with the six-month rule, as he had not lodged his complaint within six months of 16 March 2004, the date of the Supreme Court's decision concerning the criminal proceedings.

42. As to the merits of the complaints, the Government submitted that the fact that A.S. had been sent on the mission without firearms had not put his life at risk, because the objective of the mission was not to defend the State border but to cut wood for the domestic needs of the frontier station.

43. The applicant disputed the Government's submissions. He submitted that the nature of the mission during which his son had been killed was not relevant. In this connection, he argued that the very fact that A.S. had been killed while on duty meant that the State had not fulfilled its obligations under Article 2 of the Convention and had failed to protect his son's life. He also argued that his son had been killed by B.N. because he had not been armed. Lastly, the applicant submitted that the domestic authorities had not

carried out an investigation of the alleged responsibility of A.S.'s military superiors for his death.

44. In the circumstances of the present case, the Court does not find it necessary to decide whether the applicant can be considered to have exhausted domestic remedies or whether he complied with the six-month rule. Even assuming that the applicant has fulfilled those requirements, the present complaint is in any event inadmissible for the following reasons.

45. The Court reiterates that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports of Judgments and Decisions* 1998-III). This positive obligation indisputably applies in the field of military service, where, in addition, there is above all a primary duty to put in place a legislative and administrative framework designed to provide effective deterrence. In this regard, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives (see *Kılınç and Others v. Turkey*, no. 40145/98, § 41, 7 June 2005, and *Salgın v. Turkey*, no. 46748/99, § 76, 20 February 2007).

46. Turning to the circumstances of the present case, the Court observes that it is not disputed that the death of A.S. was not caused by any lethal use of force by the State, but that he was killed by a hunter while he was on duty. In such circumstances two issues arise under Article 2 of the Convention. First, whether the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (see *Osman v. the United Kingdom*, 28 October 1998, § 116, *Reports of Judgments and Decisions* 1998-VIII, and *Branko Tomašić and Others v. Croatia*, no. 46598/06, § 51, 15 January 2009). Second, the State must have in place an effective mechanism which purpose is to secure the effective implementation of the domestic law which protects the right to life.

47. As regards the first aspect, the Court finds that the factual circumstances of the present case give no reason to conclude that the authorities knew or should have known that there was a real and immediate risk to the life of the applicant's son. As regards the second aspect, the Court observes that criminal proceedings were instituted immediately after A.S.'s death. In the course of the domestic investigation and subsequent court proceedings, the authorities identified all of the actors who could give evidence in respect of the circumstances of A.S.'s death. They conducted several interviews with them and face-to-face confrontations between them with a view to establishing the exact circumstances of the incident. The

investigation also conducted several expert examinations concerning the circumstances of A.S.'s death.

48. The Court further observes that the applicant was recognised by the investigator as a legal heir of the victim and effectively participated in all the stages of the investigation in that capacity (compare *Trubnikov v. Russia*, no. 49790/99, § 93, 5 July 2005; *Sergey Shevchenko v. Ukraine*, no. 32478/02, § 74, 4 April 2006; and *Mikayil Mammadov v. Azerbaijan*, no. 4762/05, § 132, 17 December 2009). In particular, the applicant was heard during the investigation and subsequently before the domestic courts. He was also able to participate in the court hearings and to challenge the domestic court's judgments. Furthermore, the Court notes that the applicant could, and did, under domestic law, institute separate civil proceedings in which any possible civil liability could be established.

49. For these reasons, the Court finds that the present case does not disclose any appearance of a failure on behalf of the respondent State to put in place such mechanisms which are required for the purposes of Article 2 of the Convention. Accordingly, the Court finds that the complaints under Article 2 of the Convention are inadmissible as being manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

B. The remainder of the application

50. Relying on Article 6 of the Convention, the applicant complained that in the civil proceedings his request for the withdrawal of the judges of the first-instance court had been rejected without any reason, that the outcome of the proceedings had been unfair and that the "reasonable time" requirement had not been respected by the domestic courts. He further complained, under Article 13 of the Convention in conjunction with Article 1 of Protocol No. 1 to the Convention, that the domestic remedies had been ineffective and that his property rights had been violated, because the domestic courts had not granted his compensation claim.

51. The Court has examined the complaints as submitted by the applicant. However, having regard to all the material in its possession and in so far as the complaints fall within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Søren Nielsen
Registrar

Isabelle Berro-Lefèvre
President