

FIORI v. ZEPHYRIA

Facts

1. The applicants Ms Iris Fiori, Mr Peter Fiori, and Ms Chloe Fiori are nationals of Aetheria, a Council of Europe member state. They are survivors of a military attack that took place on 2 September 2015. As a result of the attack the applicants suffered serious injuries and four of their family members died.
2. Mr Philip Doré, born in 1934, and Ms Eva Doré, born in 1940, were the parents of the first applicant, Ms Iris Fiori. The first applicant Ms Iris Fiori, born in 1970, and the second applicant Mr Peter Fiori, born in 1975, are the parents of Arys born in 1998, Leto born in 2008, and the third applicant Chloe, born in 2000.
3. At the time of events relevant for the present application, all of the above family members lived together in a residential building in Neyra, a small town in Aetheria with approximately 10,000 inhabitants. Neyra is located 45 km from Aetheria's internationally recognised borders with Zephyria.
4. Aetheria and its neighbouring State Zephyria have been engaged in an international armed conflict since early 2015. Both States have resorted to involving their respective armed forces and have been conducting military operations in the area of approximately 40km into the territories of each State, on either side of the two States' internationally recognised border. The States have not signed any bilateral agreement concerning this area. The conflict is ongoing. As of June 2015, Zephyria ground forces have been deployed in and around Neyra. They included heavy artillery and two battalions consisting of approximately 1,000 soldiers.
5. On 2 September 2015 at 5 a.m., the armed forces of Zephyria launched a military attack in Neyra, using guided missiles. The operation targeted the formal local school campus. According to the intelligence at disposal of the Zephyria's military, the school campus had been evacuated during the first weeks of the conflict and it was being used by the Aetherian army as their main local warehouse and ammunition store. The entire former campus area was surrounded by a fence with a barbed wire. According to the intelligence, the main building of the former school campus was being used as the temporary headquarters of a local troop of approximately 30 soldiers and their commander.
6. The commanders in charge of the Zephyria's military operation of 2 September 2015, Colonel M and Colonel Z, planned the attack with the understanding that there were four civilian residential buildings in the vicinity of the former campus. The commanders considered that over a hundred civilians living there, as well as their property, would be affected by the attack. However, it was critical that the operation took place at the given date and time. According to the intelligence, it was established that additional troops would arrive on the following day with the aim of starting relocation of the warehouse to a more secure and secluded area. The plan of the military operation was considered and approved by the relevant military channels in line with the existing guidelines. Considering the weapons to be used, the timing of the attack, and the likely effect on civilians, it was established that the predicted collateral damage,

including the potential death of some civilians living in the four residential buildings, would be proportionate to the military objective and definite military advantage obtained.

7. The operation of 2 September 2015 lasted 50 minutes and successfully destroyed the main building of the former campus together with the warehouse and the ammunition storage. During the military operation, the warehouse was completely demolished, including the ammunition and artillery, as well as two tanks located in the area. The commander of the local Aetherian troop was killed. The event received wide coverage in national and international media and was generally considered as the first operation which brought a significant military advantage to Zephyria.
8. The four residential buildings near the former school campus were located outside the fence surrounding the campus. They were positioned ten to fifty meters from the western wall of the main warehouse building. As projected by the Zephyria's army, the military operation also affected these four buildings. In total, 30 people were caught in the attack while asleep in different parts of the buildings. Out of 30 persons, 20 persons died immediately in the attack and 10 were taken to hospital with serious wounds, mainly head and limb injuries. Ultimately eight out of 30 people survived the attack, all of them with life-long effects.
9. The applicants and their relatives lived in the building furthest from the warehouse. During the attack, Mr Philip Doré, Ms Eva Doré, and Ms Leto Fiori died immediately. Due to the subsequent fire in the vicinity of the residential buildings, the Red Cross and the first aid personnel was not able to reach the area for several hours. The Zephyria army did not pose any obstacles to humanitarian personnel reaching the area. Ultimately, after the fire was extinguished by the Aetherian emergency units, the wounded were transported to the nearest hospital six hours after the attack. Mr Arys Fiori died on the way to the hospital due to loss of blood.
10. The first applicant Ms Iris Fiori suffered severe injuries to her head and upper body. She lost a significant amount of blood. Upon arrival to the hospital, her left arm was amputated from the elbow bellow. Ms Fiori was also diagnosed with intracranial haemorrhage and had to undergo a neurosurgical procedure on the same day. Ms Fiori was kept in an induced coma for two months. Despite additional procedures, she remained paralysed on the left side of her body with significant long-term decline in cognitive function.
11. The second applicant, Mr Peter Fiori, underwent emergency surgery as a result of shrapnel penetrating the abdominal area of his body. The surgery focused on the shrapnel removal and reconstruction of some of his internal organs. A fragment of the shrapnel perforated the intestines and their contents leaked into the abdominal cavity, leading to an infection (peritonitis) complicated by sepsis. Mr Fiori also had numerous shrapnel wounds all over his body. Several fragments permanently destroyed his vision. Following the surgical procedures in the abdominal area, Mr Fiori has a permanent stoma, a surgically created opening between the intestines and the abdominal wall.

12. The third applicant Ms Chloe Fiori had had her pelvis broken and suffered multiple injuries to her internal organs. Her injuries required a complicated reconstructive surgery of the genito-urinary organs, which significantly decreased her ability to conceive naturally in the future. Chloe also suffered serious burns on 70 % of total body surface area. Since 2 September 2015 she has undergone ten reconstructive surgeries of her face and body. Ms Chloe Fiori will need at least ten further surgeries in the upcoming years.
13. All three surviving applicants were later diagnosed with a post-traumatic stress disorder and have been undergoing psychiatric treatment. After recovering from the most serious injuries, the first and second applicants returned to Neyra in 2018 and lived with their relatives. The third applicant has never returned to Neyra. She currently lives with her relatives in the capital city where she gets medical treatment. In September 2019 the first and the second applicant joined the third applicant in the capital city with a view of having easier access to more specialised health-care.

Military investigation

14. Following the media publicity of the events of 2 September 2015, on 15 September 2015 the Zephyria Military Investigation Board started an investigation into any potential crimes committed by the Zephyria military personnel. The investigators gathered the available written evidence and interviewed several persons regarding the events. They also conducted interviews with Chief of Command of the Army, Ministry of Defence and Counterintelligence Services. The board concluded that there was reasonable doubt as to whether the military took adequate measures to protect civilians. On 3 October 2015, it recommended that the Prosecutor General open an official criminal investigation.
15. The Prosecutor General opened the investigation on 15 November 2015. The investigation was focused on the actions of Colonel M and Colonel Z, who were in charge of the military operation. The Prosecutor General interrogated the colonels, heard several witnesses present at the command centre at the relevant time, and collected documents concerning material damages, video material as well medical certificates and reports listing deaths and injuries of the survivors. The Prosecutor General also reviewed information gathered and documents compiled by Military Investigation Board. Due to the applicants' state of health and the ongoing armed conflict the applicants were not heard directly. At a later stage, through their lawyer, they submitted written statements which were considered by the Prosecutor General.
16. On 16 November 2016, the applicants requested access to the case files from the investigation. Their request was only partially granted by the Prosecutor General, as some of the files pertained to national security.
17. The investigation reached a stalemate due to the ongoing conflict and the high number of other cases pending with the Prosecutor General's office, and the applicants were not informed of any developments. On 6 November 2017, they requested the Prosecutor General to inform them of the progress of the investigation, but received no response. They submitted similar requests in early 2018. On 15 May 2018, the Prosecutor General finally sent a letter to the applicants informing them that the investigation was complex, involved cross-border

investigations, and access to classified documents. He noted that the applicants would be duly informed about the outcome.

18. On 11 April 2019, the Prosecutor General discontinued the investigation due to a lack of sufficient grounds for suspicion that Colonels M and Z had committed any war crimes, crimes against humanity, or any other crimes against the civilian population of Aetheria. He concluded that the operation was conducted in line with international humanitarian law and that civilians were spared to the maximum extent possible respecting the principle of proportionality. He also noted that while torture is prohibited under international humanitarian law (and there was no torture in the case at hand), killing of civilians is not *per se* prohibited, provided all rules governing the conduct of international armed conflict were complied with. A redacted version of the discontinuation decision was published and served on the applicants on 20 April 2019.
19. On 21 April 2019, the applicants lodged an appeal against the discontinuation decision with the Gedru Regional Court. The Prosecutor General's decision and reasoning was fully upheld by the Regional Court on 21 May 2019 and, on further appeal, by the Supreme Court. The courts had access to all information gathered during the investigation stage, including the classified information pertaining to national security. The classified information was adduced as evidence *in camera* in the presence of the applicants' lawyer. The final redacted version of the decision was served on the applicants on 30 July 2019.

Compensation proceedings

20. On 16 November 2016, the applicants, represented by a lawyer, lodged an action under the Zephyria Act on State Responsibility for Violations of Human Rights with the respective court of Zephyria. The applicants claimed compensation for material and non-material damage suffered as a result of the attack of 2 September 2015. They specifically claimed compensation for the death of their relatives, for the injuries each of them had sustained at the time of the event and their life-long effects, as well as for the destruction of their home. The applicants also complained about the fact that they were forced to witness the death of their relatives, which amounted to treatment prohibited by Article 3 of the European Convention on Human Rights. They submitted detailed medical reports of their physical injuries as well as psychological reports listing the psychological effects of their injuries and the loss of lives of their close family members.
21. The court heard witnesses, including civilians and military personnel, medical experts, reviewed video, documentary and other evidence. The court also considered non-classified evidence from the criminal investigation. On 15 January 2019, the first-instance court partially granted the applicants' claim and awarded them jointly 5,000 EUR for the destruction of their property, amounting to a 50% market value of their flat in the residential building. The court noted that even though the military action was lawful, it nevertheless caused damage to the applicants' property - it was undisputed that the residential building had been destroyed during the military attack led by Zephyria. The court held that there was no evidence that Zephyria's actions had been unlawful, or that Zephyria had failed to take measures to protect civilians. The responsibility, if any, lay with individual members of the military, against whom a criminal

investigation was ongoing. The request for non-pecuniary damage was, therefore, rejected and no further reasons were provided.

22. The applicants' appeal of 20 January 2019 was dismissed by a final judgment of the Supreme Court on 30 August 2019. The court held that the first-instance court was right to partially grant the compensation claim. This was corroborated by the fact that in the meantime the criminal investigation against Colonels M and Z had been discontinued. The Supreme Court noted that there was no indication that Zephyria would be responsible for any violation of human rights of the applicants or their relatives. It also stated that the Zephyrian army in the present case targeted a military objective and that a military objective did not stop being a military objective for the sole reason that civilians lived nearby. On the contrary, the military carefully planned the attack and made sure that the collateral damage would be limited to the absolute minimum. The court noted that the applicants should have also lodged a complaint against their own State, seeking compensation for the fact that Aetheria was not able to protect them, for example by evacuating them from the area nearby the conflict zone.
23. On 8 September 2019, the applicants lodged an application before the European Court of Human Rights alleging violations of Articles 2, 3, 6 and 8 of the European Convention on Human Rights. They also alleged that they did not have effective domestic remedies at their disposal, as required under Article 13. The applicants brought the application on their own behalf as well as on behalf of their relatives Mr Philip Doré, Ms Eva Doré, Mr Arys Fiori and Ms Leto Fiori, who died as a result of the military operation.

Law

24. Both Aetheria and Zephyria are the Council of Europe member states. They ratified all major Council of Europe and United Nations human rights treaties, all additional protocols to ECHR, as well as all four Geneva Conventions of 1949 relating to (i) the amelioration of the condition of the wounded and sick in armed forces in the field, (ii) the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea, (iii) the treatment of prisoners of war, and (iv) the protection of civilian persons in time of war; as well as two Protocols of 1977 relating to the protection of victims of international and non-international armed conflicts. Neither country has ever made derogations pursuant to Article 15 of the European Convention on Human Rights.
25. Both Aetheria and Zephyria include a provision in their respective Constitutions pursuant to which "the ratified international treaties as well as the internationally recognised principles and rules of international law are an integral part of the [country's] Constitution. Where there is a conflict or a discrepancy with the national legislation, the ratified international treaties, rules and principles of international law shall prevail."
26. The Zephyria's Act on State Responsibility for Violations of Human Rights stipulates a procedure whereby an individual who alleges a violation of human rights by an action or an omission of Zephyria, may lodge a civil action with the respective regional court. The local jurisdiction is established based on the residency of the claimant. If the claim is lodged by an individual, who is not a resident of Zephyria, the regional court located in the capital city

Gedru has jurisdiction to hear the case. Should the regional court reject the claim, the claimant may lodge an appeal with the Supreme Court within 30 days.

27. If the courts establish the State's responsibility for a violation of human rights under the above-mentioned Act, they shall award a reasonable just satisfaction for the harm suffered and offer other redress, as appropriate in the particular circumstances of the case. The courts of Zephyria have not yet dealt with any claims concerning the alleged violation of human rights and the State's responsibility for civilian deaths and ill-treatment in the context of the Aetheria-Zephyria armed conflict. There is therefore no relevant domestic case-law on this matter.
28. The Prosecutor General is a part of the public administration with the authority to represent the State while protecting public interests in civil, criminal and administrative matters. It, *inter alia*, lodges indictments to courts in criminal matters. Article 25 of the Zephyrian Law on Armed Forces provides that the Prosecutor General has the authority to oversee the adherence to the law by the Armed Forces of Zephyria. The Prosecutor General has the authority and obligation to investigate any crimes committed by the Armed Forces of Zephyria, upon a criminal complaint lodged by the alleged victims, upon a recommendation by the Zephyria Military Investigation Board, or *ex proprio motu*.
29. If the Prosecutor General decides to discontinue the investigation, the alleged victims may lodge an appeal with the Regional Court in Gedru, the capital city, within 5 days. The Regional Court's decision may be appealed against to the Supreme Court within 10 days. The alleged victims have the rights to be heard by the courts or present their arguments in writing.
30. Any indictment brought by the Prosecutor General under the Law on Armed Forces shall be heard by the Regional Court in Gedru. A judgment of the Regional Court may be appealed within 10 days. The Supreme Court of Zephyria shall have jurisdiction to hear the case on appeal. The judicial review by the Regional and the Supreme Courts will focus on both substantive and procedural elements of the case.