

Briefing Note: Sargsyan v Azerbaijan & Chiragov v Armenia

24 May 2016

Two Grand Chamber judgments delivered on 16 June 2015 ([Sargsyan v Azerbaijan](#) and [Chiragov v Armenia](#)) upheld the European Convention rights of families displaced by the Nagorno-Karabakh conflict in the early 1990s, a conflict that created hundreds of thousands of refugees and internally-displaced persons (IDPs) on both sides, and which has remained unresolved in the ensuing decades. Peace negotiations have been held under the auspices of the [OSCE 'Minsk Group'](#) (co-chaired by France, Russia and the United States), but as the judgments make clear, settlement negotiations have repeatedly failed.

The circumstances – and the Court's findings

Minas Sargsyan and his family, ethnic Armenians, lived in the village of Gulistan just north of the Nagorno-Karabakh region, but within the internationally-recognised territory of Azerbaijan. In June 1992 the village was heavily bombed by Azerbaijani forces, and the villagers fled for their lives. The Sargsyans resettled as refugees in Armenia. The applicants in the *Chiragov* case were Azerbaijani Kurds living in the Lachin region which came under repeated attack and they too fled, in May 1992, shortly before the town of Lachin was captured by forces of Armenian ethnicity. They were subsequently not able to return to the region and therefore lived as IDPs elsewhere in Azerbaijan.

In both cases the applicants' complaints about the loss of their homes, land and property were upheld, with the Court finding continuing violations of their rights under Article 1 of Protocol No. 1 (the peaceful enjoyment of property), Article 8 (the right to respect for private and family life and home) and Article 13 (the right to an effective remedy).¹

Jurisdiction

The *Chiragov* case concerned the extra-territorial reach of the Convention (did Armenia have jurisdiction over events occurring within the territory of Nagorno-Karabakh?), whereas in *Sargsyan* the key question was whether Azerbaijan was still considered to exercise jurisdiction over a part of its own territory over which it claimed to have lost control.

At issue in *Chiragov* was whether Armenia exercised 'effective control' over Nagorno-Karabakh and the surrounding territories. On the available evidence, the Court found it established that Armenia had been significantly involved in the Nagorno-Karabakh conflict from an early date, as a result of its military presence and the provision of military equipment and expertise. Such support 'has been – and continues to be – decisive for the conquest of and continued control over the territories in issue'. Furthermore, taking account of the close

¹ When the Court issued its judgments in 2015 there were more than one thousand individual applications lodged by people who were displaced during the conflict pending before the Court, slightly more than half of them being directed against Armenia and the remainder against Azerbaijan.

political links, and other provision of support, the Court found that Armenia and the ‘Nagorno-Karabakh Republic’ were ‘highly integrated in virtually all important matters’.

In the *Sargsyan* case, the location and status of the village of Gulistan, where the Sargsyan family had lived, was highly contested – notably as to its proximity to the two states’ military positions. On the available evidence, the Court found that it was not established that Azerbaijani forces were (or had been) present in Gulistan; however, there was also no evidence that the ‘Nagorno-Karabakh Republic’ had positions or troops in the village. The Grand Chamber therefore concluded that as the village was situated in the internationally recognised territory of Azerbaijan, a presumption of jurisdiction applied. A limitation of a state’s responsibility had only previously been accepted in respect of areas where another state or separatist regime exercised effective control, and the Court rejected the Azerbaijani Government’s argument that this should be extended to disputed zones, or ‘areas which are rendered inaccessible by the circumstances’.

Inadequacy of the peace negotiations

It was a central feature of both judgments that the Court made clear its view of the inadequacy of both states’ stances towards the settlement negotiations. For example, in *Sargsyan*, it underlined that:

‘... it is the responsibility of the two States involved in the conflict to find a political settlement of the conflict.... Comprehensive solutions to such questions as the return of refugees to their former places of residence, re-possession of their property and/or payment of compensation can only be achieved through a peace agreement. Indeed, prior to their accession to the Council of Europe, Armenia and Azerbaijan gave undertakings to resolve the Nagorno-Karabakh conflict through peaceful means...Although negotiations have been conducted in the framework of the OSCE Minsk Group, more than twenty years have gone by since the ceasefire agreement in May 1994...without a political solution being yet in sight. As recently as June 2013 the Presidents of the Co-Chair countries of the Minsk Group...have expressed their “deep regret that, rather than trying to find a solution based upon mutual interests, the parties have continued to seek one-sided advantage in the negotiation process” ... (*Sargsyan*, para. 216)

Call for a property claims mechanism

The mere fact that peace negotiations were on-going did not absolve the two Governments from taking other measures, especially when negotiations had been pending for such a long time, without leading to tangible results. In both cases, the Court directed the Governments’ attention towards international standards on property rights (notably the [UN Pinheiro Principles](#)), concluding:

...it would appear particularly important to establish a property claims mechanism, which should be easily accessible and provide procedures operating with flexible evidentiary standards, allowing the applicant and others in his

situation to have their property rights restored and to obtain compensation for the loss of their enjoyment. (*Sargsyan*, para. 238, *Chiragov*, para. 199)

Precedents for Court-ordered claims mechanisms

There is a precedent in the context of another long-standing and intense political dispute - property claims in northern Cyprus. In its 2005 judgment in [Xenides-Arestis v Turkey](#), the Court directed the Turkish Government to introduce a mechanism of redress for property claims within three months, which led to the establishment of the Immoveable Property Commission (IPC) (whose composition included a former Secretary General and Deputy Secretary General of the Council of Europe). Subsequently, in its decision in 2010 in [Demopoulos v Turkey](#), the Grand Chamber found that the IPC provided an accessible and effective framework of redress.

Similarly Turkey was ordered to provide remedies to victims of 1990s internal conflict and displacement in the Court's 2004 judgment in *Dogan v. Turkey*, and a resulting compensation scheme was deemed to provide adequate redress in the 2006 *Icyer v. Turkey* decision. Both *Demopoulos* and *Icyer* are open to not unreasonable criticism because of the Court's acceptance of remedies that barely just meet (and in some senses may fall short of) criteria previously enunciated. Although they do not represent a 'blueprint', it may, however, be that that key elements of *Demopoulos* and *Icyer* can be incorporated into a contextually appropriate mechanism for the Nagorno-Karabakh conflict.

Elsewhere, the Court made a creative, and ultimately [successful](#), contribution to resolving large-scale property claims in Poland, stretching back to the aftermath of the Second World War ([Broniowski v Poland](#)). It has also directed a number of states (albeit with mixed results) to introduce mechanisms to redress mass property claims: examples include [Romania](#), [Albania](#) and [Italy](#).

Furthermore, the Court can be increasingly prescriptive in such contexts, for example, directing states to take measures in order to prevent the unlawful occupation of immovable property ([Sarica and Dilaver v Turkey](#)) and stipulating factors to be taken into account in calculating compensation for expropriated property ([Yetiş v Turkey](#)). In the current cases, the Court has referred explicitly not only to international guidance such as the [Pinheiro Principles](#) adopted by the UN Human Rights Sub-Commission in 2005, but also regional standards such as the [Poulsen Principles](#) adopted by the PACE in 2010.

Property claims and the right to return

In both *Sargsyan* and *Chiragov*, the Court takes note of the [2007 Madrid Basic Principles](#) developed by the OSCE Minsk Group for resolution of the Nagorno Karabakh conflict, which stipulate "the right of all internally displaced persons and refugees to return to their former places of residence" (*Sargsyan*, para. 236), as well as standards such as the Pinheiro Principles that assert this right, and the determination by the International Committee of the Red Cross of its existence as a matter of customary international humanitarian law.

However, the Court does not order measures to directly facilitate the return of the applicants. In *Sargsyan*, the Court found that it was justifiable on grounds of safety to refuse former

residents access to the village of Gulistan, which remains situated in an area of military activity (para. 233). In finding an interference with the applicants' property rights in *Chiragov*, the Court makes the general observation that "it is not realistic, let alone possible, in practice for Azerbaijanis to return to these territories in the circumstances which have prevailed throughout this period ..." (para. 195).

Nevertheless, in such a situation, both states still had a duty to take 'alternative measures' in order to secure property rights, satisfying an essential precondition for the eventual return of the displaced (*Sargsyan*, para. 234, cf. "other measures", *Chiragov*, para. 198). Such property measures can be taken in advance of the actual return of displaced persons, whereas return cannot take place in the absence of mechanisms to secure property rights. As a result, the Court's decision allows the more politically-loaded question of return to remain a part of the on-going negotiation process, while requiring the state parties to focus on technical measures related to property, which not only lay the ground for eventual return but may also have the potential to build confidence between them. However, it is important to note that the question of how a property claims mechanism is formulated is not entirely divorced from the question of return.

In its 2010 decision in [Demopoulos v. Turkey](#), the Court implied that some restrictions may be placed on return, albeit in the context of a comprehensive, negotiated peace settlement that included mechanisms to safeguard the human rights of all affected parties. In a lengthy description of the return and property provisions of the UN's 2004 "Annan Plan" for the unification of Cyprus, the court noted that it "had provided for the property rights of Greek Cypriots to be balanced against the rights of those now living in the homes or using the land", in effect by limiting both physical restitution of properties (as opposed to compensation) and return of former residents. (para. 10)

By contrast, in *Demopoulos* the Court rejected the applicants' calls for default restitution of all Greek Cypriot properties, based on the failure of the parties to come to an agreement and the resultant risk that unilateral action to redress old harms would fail to strike an appropriate balance: "there is no precedent in the Court's case-law to support the proposition that a Contracting State must pursue a blanket policy of restoring property to owners without taking into account the current use or occupation of the property in question" (para. 117).

These considerations have several implications for a property mechanism. First, while it may be possible for the parties to set out limitations on return to pre-war homes, such restrictions would need to be agreed in a peace settlement and formulated in a manner that created a fair balance between the human rights of all categories of affected individuals. Second, while the Court will not accept a property claims mechanism that rules out any possibility of physical restitution (see *Xenides-Arestis*), a balance between restitution, compensation and other remedies may be possible, particularly in cases where the right to return is subjected to agreed and justified restrictions.

Steps toward a property claims mechanism

Given that the balance between physical restitution of claimed properties and other remedies is likely to be to some degree contingent on the nature of an overall peace settlement, the crucial task of those formulating property claims mechanisms will be to demonstrate that they have created the conditions for displaced persons to receive an adequate and effective remedy for their dispossession, whatever form that remedy may take. Several criteria should be considered in this regard:

- Remedies include both substantive and procedural elements
- In terms of substance, the generally accepted rule is that physical restitution should be provided whenever possible. Where this is not possible, other remedies such as compensation through cash or other property can be considered. However as noted above, “impossibility” may reasonably be construed in light of *Demopoulos* to include cases in which limiting restitution is necessary to protect the rights of others.
- In either case, compensation should also be provided, if possible, for non-pecuniary damages as well as damage to and lost revenue from usurped properties. While compensation need not be at full value and may be standardized to assist in more expeditious assessment, it must bear a reasonable relationship to actual value.
- Official recognition of usurped property rights is an important part of a remedy, as are steps to provide prospective legal protection to the restored property rights of displaced persons.
- In terms of procedure, property claims mechanisms should be expedited, simple, inexpensive and accessible, with an emphasis on efficiency and rapid, predictable outcomes for claimants.
- In particular, claimants should benefit from systems of presumptions in their favour, as well as lowered evidentiary burdens. Such a departure from ordinary judicial proceedings may be justified as an acknowledgment of the extraordinary nature of the circumstances of the claimants’ collective dispossession.

Property claims mechanisms are frequently expensive in terms of both direct and indirect costs and political capital in the context of difficult negotiated peace processes. Nevertheless, the initial steps of developing such mechanisms involve low initial expenditures and could serve as an important confidence-building measure, particularly if they are mutually adopted, with both state parties to the Nagorno-Karabakh conflict making simultaneous and substantially similar undertakings to displaced persons on the other side. In light of *Sargsyan* and *Chiragov*, such undertakings should include, at a minimum:

- An undertaking to recognize all property rights affected by the conflict, and to provide adequate remedies, including restitution and compensation. If the state parties explicitly included interferences with property rights that took the form of instantaneous acts prior to entry into force of the ECHR, the symbolic impact of such a voluntary statement would be significant.
- A definition of property rights that included all significant, legally protected tenure forms to land, business property and homes that existed under the former Soviet

system without regard to whether such rights technically constituted private property rights at the time (e.g. based on the definition of “possessions” in *Sargsyan and Chiragov*).

- A commitment to accept ‘prima facie’ evidence of property rights and local residence on the terms and based on the definitions set out by the Court in *Sargsyan and Chiragov*.
- A joint timeline for finalizing procedures for the property claims mechanisms, disseminating information to all interested parties, and collecting claims.

It should be noted that the steps required in the proposed joint timeline would increasingly require broader agreement on the outlines of a peace deal. Even deciding the procedures for claims mechanisms involves making choices that presuppose a certain degree of clarity on issues handled in the negotiations, notably return. Hence, there is both a risk and an opportunity. The risk is that proceeding too far toward a property mechanism without progress in the overall talks may undermine the credibility of both efforts. However, the hope is that sustained attention to the technical details of a property mechanism may give a new impetus to negotiations, helping to resolve the political impasse.

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24 May 2016

² Note: EHRAC and the NGO *Legal Guide* represented the applicants in *Sargsyan v Azerbaijan*.