IN THE EUROPEAN COURT OF HUMAN RIGHTS

Burlya and others

Applicants

v

UKRAINE

Respondent State

Application Number 3289/10

Applicants' Observations on the Government's Observations

1. The applicants submit the following observations on the observations submitted by the Ukrainian Government ("the Government"), dated 15 September 2016. For ease of reference, the applicants follow the order of the Government's observations. The Court should not take the applicants' failure to deal with any particular argument raised by the Government as acceptance of that argument; unless expressly provided otherwise, the applicants reject the entirety of the Government's submissions.

2. The Government, at § 8 of their Observations, note that two of the applicants did not participate in the damages claim at domestic level. The applicants submit that this is not relevant for the Court's consideration of the case; the applicants have not relied on those proceedings to found their claim that they have exhausted domestic remedies. Instead, as the applicants made clear at § 5.4 of their application, they lodged their application after it became clear that the criminal investigation was ineffective. It is likewise irrelevant to the Court's examination of the case that some of the applicants were not recognised as "victims" for the purposes of the domestic criminal proceedings. The determination of whether they were victims by the domestic authorities does not prevent the Court from finding that they were victims for the purposes of Article 34 of the Convention. *Gorraiz Lizarraga and others v Spain* (2004), § 35. Indeed, the failure to recognise all of the applicants as victims for the purposes of the domestic criminal proceedings is an indication of the failure of those criminal proceedings to meet the minimum standards the Convention requires. See the application, § 4.84. The applicants note that all of them lived in the same neighbourhood of the village of Petrovka which was attacked by the mob. Some of the applicants who were not officially recognised as victims by the investigating authorities even lived at the same addresses as applicants whose victim status has not been contested. For the sake of completeness, the applicants submit at Annex 1 documents showing that the applicants complained about the failure to recognise some of them as victims in the criminal proceedings.

3. The double negative in the Government's sentence at § 11 makes it difficult to understand their argument, but they seem to be suggesting that because the police did not inspect the homes of applicants nos.5, 13, 14, and 19, those applicants must not have been victims of the pogrom. The applicants recall their complaint under Article 13 that the police investigation into what happened to them was ineffective. In criminal proceedings, the burden of proof is on the prosecution, not on the injured party, to prove that a criminal offence was committed and to bring the perpetrators to justice. The applicants therefore reject the Government's suggestion that the failure of police to inspect their homes can be attributed to them; the police conducted an ineffective investigation, and the responsibility for that falls on the Respondent State. See, mutatis mutandis, *Milanović v Serbia* (2010), § 88.

4. In response to the Government's comments at §§ 12-15, the applicants maintain that Ms Chiubey's version, as set out in the application and in her 2007 statement, is correct. The applicants also maintain that Ms Chiubey's 2004 statement was written in her own hand. The Court should not be surprised at some inconsistency in the accounts a person gives of a traumatic event, and Ms Chiubey should be given the benefit of the doubt, as the Court has done in cases concerning the often inconsistent memories of asylum seekers recounting traumatic events. See, e.g., *N v Sweden* (2010), § 53. In any event, the Government are focusing on details which do not place in doubt the overall credibility of the applicants' claims as to what happened to them. See, mutatis mutandis, *F.N. and others v Sweden* (2012), § 73; *J.K. and others v Sweden* (2016), § 93. The Government's suggestion that Ms Chiubey's granddaughters, who were children at the time the traumatic events that took place, should have been in a position to corroborate the story some ten years later shows an inexplicable disregard for the psychological effects of trauma on children and for children's ability to recall traumatic events, particularly many years later once they have become adults.

5. The applicants are not convinced by the Government's suggestion (§ 16 of their observations) that warning the applicants in advance of the pogrom diminished the State's responsibility resulting from the events of the night of 9-10 September 2002. The applicants have never claimed that their lives were at risk (i.e. they have not claimed a breach of Article 2). They claim that they were forced from their homes in the context of mob violence. As the applicants set out in detail in the application, that is sufficient to amount to a breach of Article 3.

6. The Government's claim at §§ 17-18 that the applicants' homes were not set ablaze appears to be an attempt to minimise the violence which the applicants suffered. It also begs the question: the Government rely on the evidence of an investigation whose effectiveness is in question in order to support their argument that the investigation was in fact effective. In any event, the Government admit that the applicants' homes were "ransacked" following the passage of the local council's racially-charged resolution, and that the applicants were warned to leave by police and the mayor ahead of time (§ 16 of the Government's Observations). These facts alone amount to a racially-motivated pogrom. While the failure to conduct an effective investigation means it will be impossible to know for certain what happened on the night of 9-10 September 2002, the applicants acknowledge that only one house was completely burned to the ground. See Annex 2, third paragraph.

7. The applicants do not object to the Government's summary of the Court's case law at §§ 22-26 of their Observations, but note that the Government's conclusions, at § 27, are inconsistent with the facts and the case law they summarise.

    a. The day before the pogrom, the village council, after holding several meetings for this purpose, passed a resolution to "support the decision of the meeting of the village residents to expel persons of Gypsy ethnicity from the village". In the light of this resolution, the Government's assertion that "there is no evidence that the authorities instigated, the less so carried out the destruction of the applicant's [sic] property" (§ 27(a)), is absurd. Public authorities called for the pogrom, and the police and mayor, clearly aware of what was going to happen, did nothing more than warn the applicants to leave. See, mutatis mutandis, *Ouranio Toxo and others v Greece* (2005), § 42 ("*deux jours avant les incidents, les autorités locales ont clairement incité la population de la ville de Florina à des protestations contre les requérants auxquelles certains de leurs membres ont participé. Elles ont ainsi contribué par leur comportement à attiser les sentiments hostiles d'une partie de la population à l'égard des requérants*"). Even though the authorities had knowledge about the impending pogrom and informed the applicants about the threat, they did not do anything to prevent the violent attack. The authorities thus failed to take all reasonable steps designed to ensure that individuals within their jurisdiction would not be subjected to torture or inhuman or degrading treatment or punishment. See e.g. *A v United Kingdom* (1998), § 22; *Osman v the United Kingdom* (1998), § 116. The applicants also maintain their assertion that the police facilitated and participated in the pogrom (see Application, § 2.13).
    b. The applicants note that they fled their homes after the passage of a racist resolution by the village council calling for their expulsion. This gives the pogrom a pre-

meditated racist character. Given that "*discrimination based on race can of itself amount to degrading treatment within the meaning of Article 3 of the Convention*" (*Moldovan and others (no.2) v Romania* (2005), § 111), the applicants submit that the undisputed facts in themselves are sufficient to lead to a finding of a breach of Article 3, taken with Article 14. The applicants therefore reject the suggestion (at § 27(b) of the Government's observations) that the treatment did not amount to a breach of Article 3 because some of them were not present to see their property destroyed. The Court's case law since the application was lodged has confirmed that Article 3 can be engaged when people who are members of a particularly vulnerable group are made homeless in aggravated circumstances. See *M.S.S. v Belgium and Greece* (2011), §§ 249-264. That is what happened to the applicants, who are members of a vulnerable group under the Court's case law (see, e.g., *D.H. v Czech Republic* (2007), § 182), in this case: were forced from their homes by a threat of racially-motivated violence which in fact was realised.

c. The applicants again reject the Government's attempt (at § 27(c) of their observations) to minimise the damage done to the applicants' homes. The applicants point the Court towards the evidence included in the application, including photographs contained at Annex 80 and references to press reports, in addition to the applicants' witness statements. In any event, in line with what has been said above, the applicants claim that being forced to flee their homes because of a threat of racially motivated violence, condoned and encouraged by a village council resolution, in itself engages Article 3, read on its own and with Article 14.

d. The Government's suggestion at § 27(d) that there was no evidence of hostility towards the applicants, making their "decision" to leave Petrovka voluntary, is illogical and cruel. The "public policy" of the village, as of 8 September 2002, was to "expel persons of Gypsy ethnicity from the village". The applicants may not have feared for their lives upon returning to inspect their property; but it would be unreasonable to expect them to continue living in a place where the only protection they received from a pogrom was advance warning to flee.

8. The Government's claim that what happened to the applicants was no more than "unlawful and deplorable" (§ 28) is an attempt to claim that a severe episodic outburst of anti-Gypsyism was no more than an isolated event. This is inconsistent with the long history of anti-Gypsyism[1] in Ukraine, which continues today. The applicants' representatives do not have the time to recount that long history here, but have annexed to this application (Annex 3) the third-party intervention of the European Roma Rights Centre ("the ERRC") in *Pastrama v Ukraine* (pending, application no.54476/14) concerning policing and anti-Gypsyism in Ukraine in recent years. What happened to the applicants is consistent with a long history of anti-Gypsyism in the country.

9. The applicants reject the Government's submission, at § 29 of their observations, that the criminal-law proceedings were ineffective because of the large number of perpetrators involved. The Government misstate the requirements for the effectiveness of a police investigation. As the Court noted in *Mikheyev v Russia* (2006): "*Not every investigation should necessarily be successful or come to a conclusion which coincides with the claimant's account of events; however, it should in principle be capable of leading to the*

[1] The applicants urge the Court to use the word "anti-Gypsyism" to describe climate in which the events of the night of 9-10 September 2002 took place. The term has been defined by the European Commission against Racism and Intolerance in its general policy recommendation no.13 as "*a specific form of racism, an ideology founded on racial superiority, a form of dehumanization and institutional racism nurtured by historical discrimination, which is expressed, among others, by violence, hate speech, exploitation, stigmatization and the most blatant kind of discrimination*". Recently, a coalition of NGOs supporting the rights of Roma introduced its own definition of antigypsyism (spelled without a hyphen) in "Antigypsyism – a reference paper" (June 2016, available at www.antigypsyism.eu):

Antigypsyism is a historically constructed, persistent complex of customary racism against social groups identified under the stigma 'gypsy' or other related terms, and incorporates:
1. a homogenizing and essentializing perception and description of these groups;
2. the attribution of specific characteristics to them;
3. discriminating social structures and violent practices that emerge against that background, which have a degrading and ostracizing effect and which reproduce structural disadvantages.

establishment of the facts of the case and, if the facts prove to be true, to the identification and punishment of those responsible" (§ 107). It is important to note that, even though fourteen years have passed since the pogrom, not a single person responsible has been brought to justice. The applicants believe that the Ukrainian authorities in charge of the investigation completely failed in their obligations under the Convention; this amounts to a violation of the Convention in and of itself, not an excuse for the Government to shirk its Convention obligations. The suggestion that a criminal investigation will necessarily be ineffective in cases involving hundreds of potential perpetrators flies in the face of the requirements of the Convention. Indeed, the Court has not hesitated to find violations of the Convention resulting from the failure of police effectively to investigate mob violence, often involving large numbers of perpetrators attacking members of minority groups. See, e.g., *Ouranio Toxo v Greece* (2005), § 43; *The case of 97 members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v Georgia* (2007), § 124; *Identoba and others v Georgia* (2015), §§ 75-78; *Gergely v Romania* (2007), § 16 (where the Government admitted, and the Court accepted, that the failure to investigate mob violence amounted to a breach of the Convention). This is a clear indication that minorities subjected to mob violence can expect a criminal investigation into that violence to be effective. It was only after it became clear to the applicants that the investigation was ineffective that they applied to the Court. In any event, this question is so closely connected to the merits of the applicants' complaints that it would be inappropriate to deal with it separate under the heading of admissibility, as the Government propose.

10. As far as the Government's arguments at §§ 31-35 are concerned, the applicants reiterate the argument they made at § 5.2 of their application: the applicants were only required to make use of one set of remedies before applying to the Court. The Court has consistently found that applicants complaining about the failure of the authorities to investigate crimes against them have complied with the exhaustion requirement once the criminal proceedings begun by the authorities have proved ineffective. See, mutatis mutandis, *R.B. v Hungary* (2016), §§ 61-62 ("*[T]he applicant lodged a criminal complaint…. [B]y virtue of that remedy, the State was afforded an opportunity to put matters right*".)

11. In response to the Government's arguments at §§ 37-40, the applicants note that they are members of a particularly vulnerable group, and even before the pogrom they were excluded from mainstream Ukrainian society. The Government's reliance in *Lisnyy and others v Ukraine and Russia* (decision, 2016) rests on a false comparison. In *Lisnyy*, there was no evidence that the applicants had any connection with the property they claimed was destroyed. In the present case, while there is a dispute as to the extent of the damage incurred, there is no dispute about the fact that the applicants' homes were targeted during the pogrom; the Government admit the applicants' homes were "ransacked", and that one was burned to the ground. The applicants in *Lisnyy* did not belong to a particularly vulnerable group. The applicants recall that under the Court's case law, both Roma and internally displaced persons are considered members of particularly vulnerable groups. See *Chiragov and others v Armenia* (decision, 2011), § 146. While the applicants were physically able to return to the place where their homes were located, their homes were severely damaged and the applicants naturally felt compelled to relocate because of a real risk to their lives and property based on their ethnicity; the applicants urge the Court to consider their situation in this light and find them to be members of a particularly vulnerable group, not only by virtue of their Roma ethnicity but also by virtue of finding themselves in a situation tantamount to that of internally displaced persons. The applicants firmly reject the Government's implicit accusation, in their use of the word "feeble", that the applicants are acting in bad faith.
    a. The Government's argument at § 40(a) that the applicants, when fleeing a pogrom, should have thought to collect documents to substantiate a future legal claim, is insensitive and unrealistic. The applicants at the time they fled their homes – on the advice of officials – could not be expected to think beyond their immediate safety.
    b. The applicants reiterate, in response to § 40(b) of the Government's observations, that their homes were indeed badly damaged, and that the authorities' failure to show otherwise places the burden on the Government in this respect.
    c. In response to § 40(c), the applicants note that only some of them sold their homes (see § 2.15 of the application) for a small amount of money.

d. In response to § 40(d), the applicants are surprised that the Government, who have access to the "State registers" of land documents, have not clarified the situation concerning the applicants' property, given that they have more ready access to that information than the applicants themselves. This is particularly noteworthy given the fact that the Government sought several extensions to submit their observations, claiming to have engaged in extensive documentary research concerning other matters (see below, §§ 20 *et seq.*). Given the applicants' particularly vulnerable status as Roma and in a situation tantamount to internal displacement, and their credible claim that their documents were destroyed, the burden should shift onto the Government to fill in the documentary record with documents they claim "can easily be issued".
e. In response to § 40(e), the applicants again reiterate their claim that any documents they had attesting the value of their possessions were lost. The amounts claimed in their civil claims were based on their knowledge at the time that those claims were made.

12. In response to the Government's conclusion, at § 41 of their observations, that the applicants' claims under Article 1 of Protocol no.1 should be rejected as manifestly ill-founded, the applicants assert that the Government appear to be relying on vicious racist stereotypes of Roma as rootless people without possessions. The applicants urge the Court not to confirm that stereotype by dismissing their claim under Article 1 of Protocol no.1. The applicants were forced to flee a racial pogrom and returned to find their homes destroyed and evidence of what they lost obliterated. The Government cannot rely on their own failures properly to investigate what happened to argue for the dismissal of the applicants' claims. The question of documentary evidence gets merely to the issue of pecuniary damage, but not to the existence of a violation of the right to property. According to the Court's case law, these are separate questions; the difficulty of calculating the amount of pecuniary damage caused does not affect the finding of a violation of the protection of property. See, e.g., *Sporrong and Lönnroth v Sweden* (1982), § 73; and *Sporrong and Lönnroth v Sweden* (Article 50) (1984), §§ 31-32.

13. The applicants reject the Government's claim at § 42 that Article 8 is inapplicable due to the lack of a State policy. The Government admit that the resolution of the local council, giving the mob the confidence that they were acting under the colour of law, "was adopted obviously under the pressure of the villages' [sic] public opinion". The Court has not hesitated in the past to find States liable under the Convention under Article 14 (taken with another provision of the Convention) when public officials acted in a discriminatory manner as a result of pressure from the local community. See, e.g., *Sampanis and others v Greece* (2008), §§ 82-83 ("*[L]es incidents [racistes] susmentionnés ont pesé sur la décision subséquente des autorités concernées de placer les élèves d'origine rom dans des salles préfabriquées constituant une annexe de la 10e école primaire d'Aspropyrgos. Dans ces conditions, les éléments de preuve présentés par les requérants et ceux figurant au dossier de l'affaire peuvent être considérés comme suffisamment fiables et révélateurs pour faire naître une forte présomption de discrimination. Il y a donc lieu de renverser la charge de la preuve*"). The fact that the applicants may, for a brief period, have lived in their homes in intolerable conditions before moving away does not undermine the finding of a violation of Article 8. See, mutatis mutandis, *Fadeyeva v Russia* (2008), § 121 (noting that the applicant stayed in her home in an environmentally unsafe area because "*relocation to another home would imply considerable financial outlay which, in her situation, would be almost unfeasible*"). The fact that some of the applicants had nowhere to go and so were reduced to living in their destroyed homes while they worked out what to do in no way diminishes the fact that they should not have been expected to remain in their homes.

14. Again, the applicants find the Government's attempt to minimise the effects of the pogrom, this time at §§ 43-45 of their observations, to be insensitive and absurd. The Government's attempt to compare the harm the applicants suffered to a mere decline in house prices shows that the Government continue to fail to grasp the sequence of events that took place. The applicants fled their homes due to a pogrom. They were targeted because of their ethnicity. Even the comparison to environmentally dangerous conditions is inadequate; the closest

equivalent in the Court's case law remains the case of *Moldovan and others (no.2) v Romania* (2005), where the Court found a violation of Articles 3 and 8.

15. In response to § 47 of the Government's observations, the applicants reiterate their claims above and in the application as to the lack of evidence.

16. In response to the Government's claims at §§ 50-53 that some of the applicants cannot claim to have victim status because they were not recognised as victims of the pogrom at domestic level, the applicants recall that the characterisation of an individual as a victim by the domestic authorities is not determinative of whether a person is a "victim" as that term is used in Article 34 of the Convention. *Gorraiz Lizarraga and others v Spain* (2004), § 35. The applicants named by the Government at § 50 of the application rely on their complaints as set out in the application, which the Government have produced no evidence to contradict, other than the question-begging evidence of the flawed investigation itself. The applicants again point the Court to Annex 1 to these observations.

17. The applicants do not contest the Government's summary of the Court's case law on the application of the six-month rule in cases of continuing violations, at §§ 54-56. Indeed, that case law has expanded since the application was lodged to cover complaints, like the applicants', where the continuing violation concerns loss of property, as opposed to a violent loss of life. In cases of continuing violations concerning loss of property, the Court has ruled that the requirement for applicants to act diligently is less pressing than in cases concerning violent loss of life, given that the evidence is less likely to deteriorate over time. *Chiragov and others v Armenia* (decision, 2011), § 137.

18. The applicants reject the Government's attempt, at § 58, to cast aspersions on their honesty by pointing out inconsistencies in the applicants' evidence. The applicants recall that as victims of a traumatic event it is not unusual for them to have difficulty recalling precise details; intimidation by the police will also have played a role. See Annex 3 (the ERRC's third-party intervention in *Pastrama and others v Ukraine*, outlining the problems of police harassment of Roma in Ukraine).

19. The applicants reject the Government's claim that the proceedings were ultimately suspended on 5 April 2006 (§ 60 of the Government's observations).

20. The Government's very serious accusation, at § 61, that the applicants fabricated evidence before the Court is entirely false.

21. The Government allege that a letter dated 13 July 2009 (no.54/3429) from Ivanovka district police, which confirms the case was reopened in 2009 and which the applicants annexed to their application, looks "highly suspicious" or "forged" because it was written in Russian, whereas official communication is routinely carried out in Ukrainian. The Government claim that the letter does not have the correct type of stamp and letterhead. The Government also claim that no mention of the document appears in the police station's outgoing communication records. The Government support their accusation with an assertion that another letter with the same registration number was issued by the Ivanovka police station instead.

22. The letter of 13 July 2009 that the applicants submitted is an authentic document. As a matter of practice, Russian is used in official communication in the Odessa region, where Russian is widely spoken, and its use is permitted under Ukrainian language laws. The document contains a stamped letterhead which includes the same information as an electronic letterhead. The stamp used in the document is routinely used in outgoing communication from Ivanovka police station. The Government have failed to substantiate their allegation that another document bearing the same registration number was issued by Ivanovka police station and, despite claiming to provide a copy of the document (Government observations, § 62(d) *in fine*), did not provide a copy of it, as far as the applicants' representatives can see.

23. The applicants' representatives, mindful of the gravity of the Government's accusation, made an information request to Ivanovka police station, which confirmed that the document of 13 July 2009 was registered with them and that the stamp they used is appropriate for that

document. Moreover, they used the very same stamp in their most recent answer and provided the letter in Russian. See Annex 4. An ERRC employee and the applicant's lawyer in the domestic proceedings attended the police station in Ivanovka on 7 November 2016 and spoke with the registrar. The registrar claims she has been working there for twenty-seven years and that she personally registered the answer of 13 July 2009. This is plausible, given that Petrovka is a village of only 2,500 people, this kind of matter is not commonplace, and the registration number handwriting on both documents is identical. The registrar also confirmed that her office uses two types of letterhead: an electronic letterhead and the stamped letterhead they used in the letter of 13 July 2009.

24. The registrar's statements, along with details of the efforts made in the past two months to obtain the both documents from Ivanovka police station, are recorded in a witness statement provided by the applicant's lawyer in the domestic proceedings (Annex 5) and a witness statement provided by the ERRC's employee who accompanied him on 7 November (Annex 6).

25. The Government's allegation that the document the applicants submitted is forged because it does not meet formal requirements is also inconsistent with the documents the Government have provided to the Court, one of which (a document setting out the investigative actions of the police – Annex 2 to the Government's observations) has no date or registration number whatsoever.

26. The applicants' representatives firmly reject allegations of forgery and bad faith raised by the Government and express our hope that the Court will take note of our efforts despite an unequal position compared to that of the Government. The applicants also find it particularly suspicious that the Government would choose to make such a claim after months of delaying the submission of their observations, and so near the end of the text of their observations, when the accusation is so strong and strikes at the heart of the applicants' entire case. The Government treat this accusation of fraud – which puts the entire reputation of the European Roma Rights Centre in jeopardy – as an afterthought. Indeed, the Government seem unsure how to characterise their fabricated allegation. They simultaneously accuse the applicants of submitting a forged document (§ 63) and of misleading the Court "by omission" (§ 64).

27. The applicants urge the Court to reject the Government's claims, as the Court did in comparable circumstances in *Melnik v Ukraine* (2006), § 60, and in *Svyato-Mykhaylivska Parafiya v Ukraine* (2007), § 96. The applicants urge the Court to go further and find that by making this false allegation, the Government have so inhibited the Court's establishment of the facts of the case as to violate Article 38 of the Convention.

28. The applicants find the Government's arguments at §§ 64-67 of their observations incoherent. The Government claim, on the one hand, that the applicants could have appealed the decision of 5 April 2006 (§ 66) and, on the other hand, that "[t]he applicants had no effective remedy against the ruling of 5 April 2006" (§ 67). Whatever doubts the applicants may have harboured about the effectiveness of the investigation at any point, the fact remains that on 10 February 2009 the applicants were informed that the investigation had restarted, and on 2 March 2009 that it was again suspended.

29. In response to § 70 of the Government's observations, the applicants again recall that the events of the night of 9 September 2002 were preceded by a racially explicit local council decision. The Court cannot ignore such statements. See, mutatis mutandis, *Bączkowski and others v Poland* (2007) § 100.

30. In response to the Government's conclusions at §§ 71-79, the applicants reiterate what is stated above and maintain the complaints they made in the application.

The European Roma Rights Centre, on behalf of the applicants
28 November 2016

List of Annexes

1. Documents showing that the applicants complained about some of them not being characterised as victims in the criminal proceedings: 19 August 2008 (mentioned at § 2.63 of the application); 8 April 2009 (mentioned at § 2.65 of the application).
2. Letter from the Romano Congreso Odesako Chakreste concerning the events of 9-10 September 2002: 9 January 2003.
3. Intervention of the European Roma Rights Centre in *Pastrama v Ukraine* (application no. 54476/14): 10 November 2016.
4. Response from the Police Department of Ivanovka to the ERRC's request for information: 7 November 2016.
5. Witness statement of the applicants' lawyer in the domestic proceedings (Igor Stoyanov): 7 November 2016.
6. Witness statement of the ERRC's employee (Corina Ajder): 28 November 2016.