



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

FIFTH SECTION

CASE OF NADTOCHYIY v. UKRAINE

(Application no. 7460/03)

JUDGMENT

STRASBOURG

15 May 2008

FINAL

15/08/2008

This judgment may be subject to editorial revision.

In the case of Nadtochiy v. Ukraine,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Peer Lorenzen, *President*,
Snejana Botoucharova,
Volodymyr Butkevych,
Rait Maruste,
Renate Jaeger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska, *judges*,
and Claudia Westerdiek, *Section Registrar*.

Having deliberated in private on 22 April 2008,
Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 7460/03) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Mr Anatoliy Mykolayovych Nadtochiy (“the applicant”), on 5 February 2003.

2. The applicant was represented by Mr I. Uvarov, a lawyer practising in Chernigiv. The Ukrainian Government (“the Government”) were represented by their acting Agent, Mrs V. Lutkovska, of the Ministry of Justice.

3. On 2 April 2007 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

4. The applicant, Mr Anatoliy Mykolayovych Nadtochiy, is a Ukrainian national who was born in 1977 and resides in the city of Chernigiv, Ukraine.

5. On 21 February 2000 the applicant brought a car (Audi-100) registered in Lithuania into the customs territory of Ukraine. When crossing

the border he undertook an obligation to re-export the car before 21 February 2001.

6. On 25 September 2000 the applicant was arrested on suspicion of murder.

7. On 15 December 2000 the applicant was sentenced to eight years' imprisonment for murder.

8. On 5 June 2002, in the applicant's absence, the Chernigiv Customs Office drew up a report on an infringement of customs regulations due to the applicant's failure to bring the above car outside the customs territory of Ukraine (section 113 of the Customs Code). In the report, the Customs Office indicated the applicant's place of detention.

9. On 17 July 2002 the Customs Office sent the applicant's case to the Novozavodsky District Court of Chernigiv. In the covering letter they requested the court to consider the issue of the applicant's liability for a violation of section 112 of the Customs Code (loss of goods placed under customs control).

10. On 12 August 2002 the court considered the case in the applicant's absence. The court found the applicant guilty of having failed to re-export the car and of having lost it in violation of section 112 of the Customs Code. The court ordered the confiscation of the vehicle, but given that the car's location was unknown, it replaced the confiscation with payment of UAH 9,833.57 (about EUR 1,525.15) which corresponded to the value of the car, in accordance with section 149 § 3 of the Customs Code. In its decision, the court also indicated the applicant's actual place of detention and noted that the applicant had not expressed a wish to be present at the court's hearing, even though a notification about the time and place of the hearing had been sent to him. However, according to an information letter by the Deputy Head of the State Department for Enforcement of Sentences (*Державний департамент України з питань виконання покарань*) in reply to the Government Agent's request, the applicant's prison file contained no evidence that the applicant had received any summons to or notification about the above proceedings, while they were pending.

11. The applicant was informed about the above court decision by the prison administration, which received a copy of the decision on 23 August 2002.

12. On 29 December 2006 the applicant was released on probation.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Code on Administrative Offences of 7 December 1984 (in force at the material time)

13. The relevant provisions of the Code read as follows:

Section 2. Legislation of the USSR and Ukrainian SSR on administrative offences (in the wording prior to 17 May 2001)

“The legislation of the USSR and of the Ukrainian SSR on administrative offences consists of ..., this Code and other legislative acts of the Ukrainian SSR and decrees of the Council of Ministers of the Ukrainian SSR on administrative offences...”

Section 2. Legislation of Ukraine on administrative offences (in the wording of 17 May 2001)

“(...) administrative liability for infringement of customs regulations shall be governed by the Customs Code ...”

Section 9. Definition of an administrative offence

“An administrative offence is an unlawful, culpable (intentional or negligent) act or omission, which is prejudicial to the State or public order, property, citizens’ rights and freedoms, [and] established administrative procedures, and for which the law foresees administrative liability...”

Administrative liability for the offences provided for by this Code arises in circumstances where no grounds to subject a person to criminal liability can be found.”

Section 17. Circumstances that exclude administrative liability

“A person who has acted in the case of urgent necessity ... shall not be subject to administrative liability.”

Section 29. Confiscation of an item used to commit an administrative offence or one which is the direct subject-matter of such an offence

“...Only an item forming part of the private property of the offender can be confiscated, unless the legislative acts of the USSR provide otherwise...”¹

Section 38. Terms for imposing administrative penalties

“Administrative penalties (*адміністративні стягнення*) can be imposed not later than 2 months after the offence has been committed, and in the case of a continuous offence – not later than two months after the offence has been discovered...”

Section 268. Rights of a person against whom administrative proceedings have been brought

“A person against whom administrative proceedings have been brought shall be entitled to: ... give explanations, present pieces of evidence, make motions... In the absence of the suspected person, the case can be considered only where there is

¹ By the Amendment Act of 5 April 2001 the words “legislative acts of the USSR” were replaced by the words “laws of Ukraine”.

information that he or she has received timely notification about the place and time of the hearing and if he or she has not requested an adjournment of the case...”

B. Customs Code 1991 (replaced by a new Customs Code on 1 January 2004)

14. Part VII of the Code defined smuggling and further referred to the criminal law on liability. The provisions pertinent to the present case are contained in Part VIII of the Code and read, in so far as relevant, as follows:

Part VIII

Infringement of customs regulations. Proceedings in cases concerning infringement of customs regulations

Chapter 1

Infringement of customs regulations and liability for such infringements

Section 112

“The giving out of the items under the customs control without the permission of the customs body of Ukraine or the loss thereof shall incur the fine from the citizens in the amount up to a salary minimum, officially established at the date of that infringement, with confiscation of goods in question or without the latter; and from the officials - in the amount from two and a half till ten minimums officially established at the date of that infringement, with confiscation of goods in question or without the latter.”

Section 113. Infringement of the obligation on taking the items in or out

“Failure to re-export items brought into the customs territory of Ukraine on condition of an obligation to re-export them within the established time-limits ... shall result in imposition of a fine ... with confiscation of the items concerned...”

Chapter 2. Proceedings in cases concerning infringement of customs regulations

Section 121. Proceedings with regard to infringement of customs regulations

“Proceedings concerning infringement of customs regulations shall be conducted in accordance with the provisions of this Code or, where not regulated by it, under the relevant legislation ... on administrative offences (...)”

Section 138. Presence of a person against whom administrative proceedings have been brought during consideration of the case concerning infringement of customs regulations.

“A case concerning infringement of customs regulations shall be considered in the presence of the person against whom administrative proceedings have been brought.

In the of the absence of the person against whom administrative proceedings have been brought, the case may be considered only when there is information about the timely notification of this person about the place and time of consideration of the case, but he or she has not submitted any petition for adjournment of the case or if there is information that at the time of consideration of the case the person is outside the territory of Ukraine, or when the person who committed the infringement of customs regulations has not been established, or in the case of a infringement of customs regulations via the sending of items by international postal correspondence.”

Section 139. Terms for imposing administrative penalties

“Administrative penalties (*адміністративні стягнення*) in the form of a warning or fine for infringement of customs regulations may be imposed not later than 2 months after the infringement of customs regulations, and in the case of a continuous infringement not later than two months after the infringement has been discovered...

Confiscation of items that have been the direct subject-matter of an infringement of customs regulations ... shall be effected regardless of the time of the commission or discovery of the infringement of customs regulations.”

Chapter 3. Execution of decisions of the customs authorities and courts concerning the imposition of an administrative penalty

Section 149. Execution of the decision of the court (judge) concerning confiscation.

“...If the items ... cannot be confiscated, the pecuniary equivalent of the value of the said items shall be collected from the persons who have infringed the customs regulations ...”

THE LAW

I. THE RIGHT TO A FAIR TRIAL

15. The applicant complained of an infringement of his right to a fair trial and, in particular, to the equality of arms. He further complained that the authorities unlawfully reclassified his actions as different offence. He referred to Article 6 § 1 of the Convention, which reads, in so far as relevant, as follows:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal...”

16. The Government contested that argument.

A. Admissibility

1. *The parties' submissions*

17. The Government maintained that in the instant case the applicant had failed to fulfil his obligation provided for by the Customs Code, which was not punitive in nature and was not a part of criminal law. They argued that the Criminal Code and the Code on Administrative Offences defined crimes and offences and the liability for their commission, which confirmed their punitive, criminal law nature. As to the Customs Code, under which the applicant became liable, the Government contended that the Code's purpose was to regulate the implementation of customs policies and activities. The Customs Code contained the regulatory norms, which determined the rights and obligations of individuals. Therefore, in the Government's opinion, the Customs Code was not punitive either in its content or in its functions, in contrast to the Criminal Code and the Code on Administrative Offences.

18. The Government further maintained that the applicant had voluntarily taken an obligation to re-export the impugned vehicle within a year, by signing a customs declaration. In the Government's opinion the declaration signed by the applicant had a contractual nature as it determined the relevant obligation and the liability in case of non-execution of the obligation. They considered that this case concerned neither the violation of a universal principle of law, nor the punishment for its violation. This case raised the issue of the violation of a contractual obligation, and thus the application of a penalty stipulated in the contract. The aim of this penalty was not the punishment of the person who had breached the terms for the import of the goods and other items, but compensation for the amount of the non-paid customs duties for the goods imported into the territory of Ukraine. Thus, the Government maintained that the non-performance of the obligation voluntarily undertaken by the applicant could not be qualified as a criminal offence within the meaning of the Convention. Thus, Article 6 § 1 of the Convention in its criminal part was not applicable in this case.

19. The applicant agreed with the Government that the proceedings in question were not criminal, but they touched upon the applicant's pecuniary interests, and Article 6 § 1 of the Convention was therefore applicable to the proceedings in its civil limb.

2. *The Court's assessment*

20. In order to determine whether Article 6 is applicable under its "criminal" head, the Court will have regard to the three alternative criteria laid down in its case-law (see *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22, p. 35, § 82; *Ravnsborg v. Sweden*, judgment of 23 March 1994, Series A no. 283-B, p. 28, § 30; and

Putz v. Austria, judgment of 22 February 1996, *Reports of Judgments and Decisions* 1996-I, p. 324 § 31).

21. The Court notes that the Government admitted the punitive, criminal law nature of the Code on Administrative Offences, but denied that the Customs Code had a similar nature. In the Court's view, the primary purpose of the Customs Code is to regulate economic issues, but, as it appears from its provisions referred to in the Relevant domestic law (see paragraph 14 above), it also covers customs-related offences. The Court notes that part VII deals with smuggling and refers to the criminal law, and that part VIII, whose provisions are pertinent to the present case, deals with infringements of customs regulations. In this connection, it should be noted that section 2 of the Code on Administrative Offences clearly mentions administrative liability for infringement of customs regulations and section 139 of the Customs Code talks about administrative penalties in form of a warning, a fine or confiscation. The latter two are sanctions for infringements of customs regulations under sections 112 and 113 of the Customs Code. In the light of these considerations, the Court does not see any substantial difference between the Code on Administrative Offences, whose punitive, criminal law nature the Government admitted, and part VIII of the Customs Code, which refers to particular types of customs-related offences, which can also be described as administrative offences. The Court therefore does not share the Government's view that the pertinent provisions of the Customs Code deal with contractual obligations. The Court notes that the relevant provisions of the Customs Code are directed towards all citizens who cross the border and regulate their conduct by means of sanctions (a fine and confiscation), which are punitive as well as deterring. Thus the customs offences in question had elements pertaining to a "criminal charge" within the meaning of Article 6 of the Convention (see, *mutatis mutandis*, *Öztürk v. Germany*, judgment of 21 February 1984, Series A no. 73, §§ 53). As regards the actual measure imposed on the applicant (a confiscation order), the Court notes that it was provided by both the Code on Administrative Offences and the Customs Code as one of the penalties (main or supplementary) imposed on the offenders. In any case, whatever the characterisation of the measure in issue, the facts remain that the applicant faced a serious detriment due to its application (see *Welch v. the United Kingdom*, judgment of 9 February 1995, Series A no. 307-A, § 34).

22. Therefore the Court concludes that the present case was criminal in nature and the purported customs-related administrative offences were in fact of a criminal character attracting the full guarantees of Article 6 of the Convention.

23. Moreover, the Court notes that these matters are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

24. The applicant maintained that the customs authorities and then the court had considered the case in his absence and without any confirmation that he had been notified about the hearing. He further complained that the unfairness of the proceedings had led to an arbitrary decision in his case.

25. Having objected to the applicability of Article 6, the Government made no comments as to the merits of the complaint.

26. The Court reiterates that the principle of equality of arms – one of the elements of the broader concept of a fair trial – requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see, among many other authorities and *mutatis mutandis*, *Kress v. France* [GC], no. 39594/98, § 72, ECHR 2001-VI; *F.C.B. v. Italy*, judgment of 28 August 1991, Series A no. 208-B, § 33; *T. v. Italy*, judgment of 12 October 1992, Series A no. 245-C, § 26; and *Kaya v. Austria*, no. 54698/00, § 28, 8 June 2006).

27. The Court notes that the applicant was serving a prison sentence at the time of the impugned administrative proceedings and was not present at those proceedings, even though the domestic authorities were aware of his particular situation and the place of his detention. The domestic court mentioned in its decision that the applicant had been notified about the court proceedings, but there are no documents to support that such notification occurred. To the contrary, as can be seen from the case-file, and in particular from the information letter of the penitentiary authorities to the Government Agent's Office (see paragraph 10 above), there was no evidence that the applicant had received any notification or information about the proceedings at the relevant time. Moreover, the Government, despite the Court's explicit request, failed to inform it whether the applicant's attendance at the court hearings was possible in practice, in particular of his own motion, given that he was serving a sentence for a serious crime.

28. The Court further notes the applicant's arguments that he could not be held liable for an infringement of customs regulations on the ground that, being imprisoned, he could not possibly honour his obligation of re-exporting the car. The domestic authorities failed to consider these circumstances of their own motion and did not give the applicant an opportunity to raise the issue. Instead the authorities opted for reclassification of the applicant's actions as a different offence – the loss of

property which was under customs supervision. Here again, it does not appear from the case-file materials that in reaching that conclusion the domestic court tried to ascertain what had happened to the vehicle or, as would have been appropriate in the circumstances, to ask the applicant about what had become of the car and its present location. Instead the court simply noted that the location of the vehicle was unknown.

29. The Court considers that the impugned proceedings lacked important procedural guarantees and that these procedural deficiencies, in the circumstances of the case, were serious enough to compromise the fairness of the proceedings.

There has accordingly been a violation of Article 6 § 1 of the Convention.

II. THE ALLEGED RETROACTIVE APPLICATION OF PROCEDURAL LAW

30. The applicant complained that the domestic authorities had unlawfully proceeded in his case under the provisions of the Customs Code and not under the Code on Administrative Offences. He based this complaint on the fact that at the time when he had allegedly infringed customs regulations the Code on Administrative Offences contained no reference to the Customs Code as a procedural basis for consideration of cases concerning the customs offences and for imposition of penalties for such offences. Such reference had appeared only later.

31. The Court, which is master of the characterisation to be given in law to the facts of the case, decided to examine the problem raised by the applicant under Article 7 of the Convention which is the relevant provision and which provides insofar as relevant as follows:

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”

32. The Court recalls its findings about the applicability of Article 6 under its criminal head to the impugned proceedings (see paragraph 22 above) and concludes that these findings are equally pertinent to the issue of applicability of Article 7.

33. The Court notes that the Code on Administrative Offences and the Customs Code contained similar procedural provisions, including those on imposition of penalties. Furthermore, section 2 of the Code on Administrative Offences contained a general reference to other legal acts under which administrative liability could be established and by the Amendment Act of 17 May 2001 the above section was reworded and a direct reference to the Customs Code was included. Introduction of this direct reference further clarified the relations between the Code on

Administrative Offences and the Customs Code, but, in the Court's opinion, does not warrant the conclusion that prior to such clarification the procedural provisions of the Customs Code could not apply to cases concerning customs-related offences. Moreover, the Customs Code constituted *lex specialis* and *lex posterior* in relation to the Code on Administrative Offences, since it was adopted later and its section 121 clearly provided that proceedings concerning infringements of customs regulations should be conducted in accordance with the provisions of the Customs Code, and in accordance with other relevant legislation on administrative offences only where not regulated by the Code itself. In fact, section 139 of the Customs Code clearly provided for confiscation regardless of the time of the offence and of the ownership of the item to be confiscated. Section 149 of the Customs Code provided for replacement of the confiscation by the reimbursement of the item's value, if the item could not be confiscated (see paragraph 14 above).

34. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

35. Referring to Article 1 of Protocol No. 1, the applicant complained of a violation of his property right on account of the outcome of the proceedings. Article 1 provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

A. Admissibility

36. The Court notes that this complaint is closely linked to the Article 6 complaint and must therefore likewise be declared admissible.

B. Merits

1. *Submissions of the parties*

37. The Government maintained that there had been no violation of Article 1 of Protocol No. 1, given the inapplicability of Article 6 § 1 of the Convention to the impugned proceedings.

38. The applicant maintained that the Customs Code could not serve as a legal basis for confiscation of the car and under the Code on Administrative Offences such confiscation was time-barred. He further submitted that the unfairness of the proceedings had led to an arbitrary decision imposing an excessive financial burden on him.

2. *Court's assessment*

39. The Court observes that the “possession” at issue in the present case is the car, used by the applicant, in respect of which the domestic courts issued a forfeiture order, which was then replaced by a sum of money to be paid by the applicant himself. It is not in dispute between the parties that the court’s decision amounted to an interference with the applicant’s right to peaceful enjoyment of his possessions and that Article 1 of Protocol No. 1 is therefore applicable. Furthermore, the Court finds that it is the second paragraph of Article 1 of Protocol No. 1 which applies.

40. Such an interference must be in accordance with the domestic law of the respondent State and achieve a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights (see, among many other authorities, *Former King of Greece and Others v. Greece* [GC], no. 25701/94, § 89, ECHR 2000-XII, with further references).

41. The applicant challenged the applicability of the Customs Code provisions to the confiscation procedure and claimed, accordingly, that the confiscation could not be imposed on him outside a two-month statutory limitation provided for in section 38 of the Code on Administrative Offences. The Court, however, in view of its relevant findings under Article 7 of the Convention (see paragraph 33 above), does not share this view.

42. The Court notes that the remainder of the applicant’s arguments of an unjustified interference with his right to peaceful enjoyment of his possessions under Article 1 of Protocol No. 1 is essentially based on the same lack of procedural protection which has already been found to give

rise to a violation of Article 6 (see, *Credit and Industrial Bank v. the Czech Republic*, no. 29010/95, § 82, ECHR 2003-XI (extracts)).

43. In these circumstances, the Court considers that it is not necessary to examine these matters under Article 1 of Protocol No. 1 separately.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

44. Referring to Article 13 of the Convention, the applicant complained that the domestic judicial proceedings had been ineffective since they had been unfair.

45. The Government made no comments on the merits of the complaint.

46. The Court notes that this complaint is closely linked to the Article 6 complaint and must therefore likewise be declared admissible.

47. Having regard to the finding relating to Article 6 § 1 of the Convention (see paragraphs 27-29 above), the Court considers that it is not necessary to examine this issue separately (see, *mutatis mutandis*, *Tomašić v. Croatia*, no. 21753/02, § 43, 19 October 2006).

V. OTHER COMPLAINTS

48. Additionally, the applicant raised various complaints under Articles 8, 10, 11 and 17 of the Universal Declaration of Human Rights.

49. The Court recalls that it has examined the issues of fair trial under Article 6 § 1 of the Convention and found no separate issues under Article 13 of the Convention and Article 1 of Protocol No. 1 (see paragraphs 29, 42 and 47 above).

50. The remainder of the applicant's complaints are outside the competence of the Court and should therefore be rejected pursuant to Article 35 §§ 3 and 4 of the Convention (see *Kucherenko v. Ukraine*, no. 27347/02, § 28, 15 December 2005).

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

51. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

52. The applicant claimed 220,000 euros (EUR) in respect of pecuniary and non-pecuniary damage.

53. The Government considered the above claim unsubstantiated since the applicant had furnished no documents or explanations in support of his claim.

54. The Court does not discern any causal link between the violation found and the pecuniary damage alleged. It cannot speculate on what the outcome of the proceedings would have been had they complied with Article 6 §§ 1. Consequently, it dismisses the applicant's claims under this head (see *Lucà*, cited above, § 48, and *Cöeme and Others v. Belgium* [GC], nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 155, ECHR 2000-VII).

55. Moreover, with regard to the applicant's claim for non-pecuniary damage, the Court notes that where an individual, as in the instant case, has been convicted by a court in proceedings which did not meet the Convention requirement of fairness, a retrial, a reopening or a review of the case, if requested, represents in principle an appropriate way of redressing the violation (see, *mutatis mutandis*, *Öcalan v. Turkey* [GC], no. 46221/99, §§ 207-210, ECHR 2005-IV). Therefore, it considers that the finding of a violation constitutes in itself sufficient just satisfaction.

56. As to the costs and expenses, the applicant did not submit any claims and the Court therefore makes no award.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints under Articles 6 § 1 and 13 of the Convention and Article 1 of Protocol No. 1 concerning unfairness of the proceedings admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* that there is no need to examine the complaints under Article 1 of Protocol No. 1 and Article 13 of the Convention separately;
4. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 15 May 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President