



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

FIRST SECTION

CASE OF SUN v. RUSSIA

(Application no. 31004/02)

JUDGMENT

STRASBOURG

5 February 2009

FINAL

14/09/2009

This judgment may be subject to editorial revision.

In the case of Sun v. Russia,

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

Christos Rozakis, *President*,

Nina Vajić,

Anatoly Kovler,

Elisabeth Steiner,

Khanlar Hajiyeu,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 15 January 2009,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 31004/02) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a national of the People’s Republic of China, Mr Sun Huan Xin (“the applicant”), on 29 July 2002.

2. The Russian Government (“the Government”) were initially represented by Mr P. Laptev and then by Mrs V. Milinchuk, former Representatives of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, a violation of his right to peaceful enjoyment of possession on account of confiscation of his money.

4. On 20 January 2006 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1949 and lives in Khabarovsk.

6. In 2001 the applicant, a salesman by occupation, decided to go to China to purchase merchandise.

7. On 30 July 2001 the applicant arrived at the Khabarovsk International Seaport. The customs found on him 72,300 United States dollars (USD) and 760 Chinese yuan (CNY) in cash which he had not reported in his customs declaration. The applicant was charged with attempted smuggling of foreign currency, a criminal offence under Articles 30 § 3 and 188 § 1 of the Criminal Code. The money was appended to the criminal case as physical evidence (*вещественные доказательства*).

8. On 6 November 2001 the Tsentralniy District Court of Khabarovsk found the applicant guilty as charged and imposed a suspended sentence of two years' imprisonment conditional on one year's probation. As regards the money, the court held that:

“Physical evidence – USD 72,300 and CNY 760 taken from Mr Sun Huan Xin – shall be confiscated by the State ...”

9. In his statement of appeal, counsel for the applicant argued that the confiscation measure had no basis in domestic law because the offence of smuggling did not carry such a penalty. She asked that the money be returned to the applicant as the lawful owner.

10. On 29 January 2002 the Khabarovsk Regional Court upheld the conviction on appeal. As regards the money, the Regional Court held as follows:

“Pursuant to Article 86 (4) of the RSFSR Code of Criminal Procedure, criminally acquired money and other valuables shall be confiscated by the State after conviction.

It appears from the case materials that Mr Sun Huan Xin did not report USD 72,300 and CNY 760 in his customs declaration when crossing the customs border of the Russian Federation. Since that moment, the above-mentioned valuables have become criminally acquired by Mr Sun Huan Xin and, pursuant to Article 86 (4) of the RSFSR Code of Criminal Procedure, should be confiscated by the State after conviction.”

11. On 2 March 2006 the first deputy prosecutor of the Khabarovsk Region lodged an application for supervisory review of the applicant's conviction. He submitted as follows:

“It was established during the trial that the money which Mr Sun Huan Xin omitted to declare... USD 6,100 were his personal property, whereas the remainder was the money destined to pay for the merchandise he had intended to buy in China. Thus, the court did not adduce any evidence showing that the seized foreign currency had been criminally acquired. In these circumstances, the physical evidence – USD 72,300 and CNY 760 – must be returned to the lawful owner, Mr Sun Huan Xin. Moreover, the first-instance and appeal judgments contradict the requirements of Article 1 of Protocol No. 1 ...”

12. On 5 June 2006 the Presidium of the Khabarovsk Regional Court rejected the prosecutor's application. In a succinct decision it held, without further details, that “the convict's acts had been correctly characterised” and that “the penalty had been determined in accordance with the requirements of the law”. It did not address in substance the issue raised in the

prosecutor's application. Finally, noting that Article 188 of the Criminal Code did not provide for confiscation, the Regional Court considered it necessary to amend the first-instance and appeal judgments to read "reverted to the profit [of the State]" instead of "confiscated [by the State]".

II. RELEVANT DOMESTIC LAW AND PRACTICE

13. The Criminal Code of the Russian Federation provides that smuggling, that is movement of large amounts of goods or other objects across the customs border of the Russian Federation, committed by concealing such goods from the customs or combined with non-declaration or inaccurate declaration of such goods, carries a penal sanction of up to five years' imprisonment (Article 188 § 1).

14. The RSFSR Code of Criminal Procedure of the Russian Federation ("CCrP", in force at the material time) provided as follows:

Article 86. Measures taken in respect of physical evidence upon completion of a criminal case

"The judgment, interim decision or decision on discontinuation of proceedings must deal with the destiny of physical evidence in the following manner:

- (1) instruments of the crime belonging to the accused are liable to confiscation, transfer to competent authorities or destruction;
- (2) objects banned from circulation must be transferred to competent authorities or destroyed;
- (3) unusable objects of no value must be destroyed...;
- (4) criminally acquired money and other valuables must revert to the State by a judicial decision; any other objects must be returned to their lawful owners or, if the identity of the owner cannot be established, transferred to the State...
- (5) documents must be kept with the case file..."

15. The Resolution of the Plenary Supreme Court of the USSR "On judicial practice regarding the offence of smuggling" (no. 2 of 3 February 1978) provided as follows:

"7. In accordance with the current legislation, the objects of smuggling are liable to confiscation to the State as physical evidence. Vehicles and other means of transport are also liable to confiscation as instruments of the crime provided that they were equipped with special hiding places for concealing goods or other valuables..."

16. The Resolution of the Plenary Supreme Court of the USSR "On confiscation of the instruments of the offence that were recognised as physical evidence in the case" (no. 19 of 16 August 1984) provided as follows:

“Having regard to the questions relating to the possibility of applying Article 86 § 1 of the RSFSR Code of Criminal Procedure... in cases of negligent criminal offences, the Plenary USSR Supreme Court resolves -

- to clarify that the objects belonging to the convict and declared to be physical evidence may be confiscated on the basis of Article 86 (1) of the RSFSR Code of Criminal Procedure... only if the convict or his accomplices deliberately used them as the instruments of the crime with a view to achieving a criminal result.”

17. The Presidium of the Supreme Court of the Russian Federation in the case of *Prosecutor General v. Petrenko* (decision no. 446p98pr of 10 June 1998) granted the prosecution’s appeal against the judgment, by which Mr Petrenko had been found guilty of smuggling foreign currency but the money had been returned to him on the ground that Article 188 of the Criminal Code did not provide for confiscation as a penal sanction. The Presidium held as follows:

“Confiscation of property as a penal sanction must be distinguished from confiscation of smuggled objects which were recognised as physical evidence. These issues must be addressed separately in the judgment...”

In the meaning of [Article 86 (1) of the RSFSR Code of Criminal Procedure] and also Article 83 of the CCrP, an instrument of the offence is any object which has been used for accomplishing publicly dangerous actions, irrespective of the main purpose of the object. Accordingly, the notion of an instrument of the offence comprises the object of the offence.

A mandatory element of a criminal offence under Article 188 of the Criminal Code is an object of smuggling that is being illegally transported across the customs border... The court found Mr Petrenko guilty of [attempted smuggling], noting that the US dollars were the object of the offence. Accordingly, it was required to decide on the destiny of physical evidence in accordance with Article 86 § 1 of the CCrP – that is, according to the rules on the instruments of the offence – but failed to do so.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

18. The applicant complained under Articles 6 and 7 § 1 of the Convention and Article 1 of Protocol No. 1 that the confiscation measure had had no basis in domestic law. The Court considers that this complaint should be examined solely under Article 1 of Protocol No. 1, which reads as follows:

“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

19. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

20. The applicant maintained firstly that the decision to confiscate his money had been unlawful. Pursuant to the general provisions of the Criminal Code, confiscation is a form of an auxiliary penal sanction which may only be imposed for serious or particularly serious criminal offences. The offence of smuggling was neither and moreover Article 188 of the Criminal Code did not provide for confiscation as a sanction. Furthermore, confiscation could be ordered if the defendant was given a suspended sentence, as it was in the applicant’s case. The Supreme Court’s judgment in the *Petrenko* case could not be a lawful basis because it had not been officially published and had also been issued in breach of the binding instructions of the Plenary Supreme Court (no. 19 of 16 August 1984).

21. Secondly, the applicant pointed out that the appeal court’s finding that the currency had been criminally acquired did not have a factual basis. He had earned the money through the lawful exercise of his trade on Russian territory and was the lawful owner of the confiscated currency.

22. The Government denied that the applicant had been the lawful owner of the confiscated currency since he had not presented any documents showing that he had legally imported currency into Russia. In the Government’s view, irrespective of whether or not the applicant had legally earned the currency in Russian territory, he was no longer the “legal holder” of that money after he had entered the customs control zone located in the Khabarovsk seaport. The Government maintained that the taking of the currency had been carried out in accordance with the domestic law.

2. *The Court's assessment*

(a) **The applicable rule**

23. Article 1 of Protocol No. 1 comprises three distinct rules: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, *inter alia*, to control the use of property in accordance with the general interest. The three rules are not, however, distinct in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, as a recent authority, *Broniowski v. Poland* [GC], no. 31443/96, § 134, ECHR 2004-V).

24. The “possession” at issue in the present case was an amount of money in United States dollars and Chinese yuan which was confiscated from the applicant by a judicial decision. It is not in dispute between the parties that the confiscation order 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. It remains to be determined whether the measure was covered by the first or second paragraph of that Convention provision.

25. The Court reiterates its constant approach that a confiscation measure, even though it does involve a deprivation of possessions, constitutes nevertheless control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1 (see *Riela and Others v. Italy* (dec.), no. 52439/99, 4 September 2001; *Arcuri and Others v. Italy* (dec.), no. 52024/99, 5 July 2001; *C.M. v. France* (dec.), no. 28078/95, 26 June 2001; *Air Canada v. the United Kingdom*, judgment of 5 May 1995, Series A no. 316-A, § 34; and *AGOSI v. the United Kingdom*, judgment of 24 October 1986, Series A no. 108, § 34). Accordingly, it considers that the same approach must be followed in the present case.

(b) **Compliance with Article 1 of Protocol No. 1**

26. The Court emphasises that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be “lawful”: the second paragraph recognises that the States have the right to control the use of property by enforcing “laws”. Moreover, the rule of law, one of the foundations of a democratic society, is inherent in all the Articles of the Convention. The issue of whether a fair balance has been struck between the

demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights only becomes relevant once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary (see, among other authorities, *Baklanov v. Russia*, no. 68443/01, § 39, 9 June 2005, and *Frizen v. Russia*, no. 58254/00, § 33, 24 March 2005).

27. Moreover, the Court reiterates that a norm cannot be regarded as a "law" within the meaning of the Convention unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; an individual must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, for example, *Chauvy and Others v. France*, no. 64915/01, §§ 43-45, ECHR 2004-VI).

28. Turning to the case before it, the Court observes that the money which had been discovered on the applicant was recognised as physical evidence in the criminal case. The first-instance court ordered confiscation of the entire amount without specifying the legal basis for the measure. The appeal court filled in the lacuna and indicated that the money should be confiscated as "criminally acquired" in accordance with Article 86 (4) of the then effective Code of Criminal Procedure. The supervisory-review instance upheld that finding but replaced the word "confiscated" with the expression "reverted to the State" with a view to bringing the text of the judgment in line with Article 86 of the Code of Criminal Procedure.

29. In examining the applicant's case, the domestic courts determined that the money had become "criminally acquired" from the moment he had crossed the customs border without reporting it on the customs declaration. They did not cite any case-law or legal authority or indicate any factual ground for that finding. The Court will accordingly examine whether such a development was foreseeable in the circumstances of the case.

30. On the facts, the Court observes that it has never been claimed that the applicant's money was the proceeds of any criminal activity (see, by contrast, *Phillips v. the United Kingdom*, no. 41087/98, §§ 9-18, ECHR 2001-VII) or had been unlawfully acquired (see, by contrast, *Riela and Arcuri*, both cited above, or else *Raimondo v. Italy*, judgment of 22 February 1994, Series A no. 281-A, § 29). As it transpires from the prosecutor's application for supervisory review, the trial court unambiguously established that of the total amount, some 6,100 United States dollars had been the applicant's own whereas the remainder had been the money that had been destined for purchasing merchandise in China (see paragraph 11 above). The applicant did not have a criminal record and he had not been suspected of, or charged with, any criminal offences prior to

the incident at issue. This lends support to his submission that the entire amount had been lawfully earned through his commercial activities on Russian territory.

31. It has thus been established that the applicant's money had had a lawful origin. That fact was brought by the prosecution to the attention of the supervisory-review instance which, however, omitted to address that issue. Through holding that the applicant's offence had received appropriate legal characterisation, the supervisory-review instance endorsed the appeal court's finding that the nature of the applicant's money had changed from "lawfully acquired" to "criminally acquired" when it crossed the customs border without being entered into a customs declaration.

32. In this connection the Court considers, firstly, that such an interpretation appears to be at variance with the ordinary meaning of the term "criminally acquired", which implies that the offender gained possession of the assets through criminal activities. In the instant case the applicant did not obtain the money as a result of committing the offence of smuggling, but rather – as has been noted above – he earned it through the exercise of his trade. Secondly, the Court observes that the interpretation in question does not appear to be the result of a gradual clarification of the rules of criminal liability through judicial interpretation from case to case (compare *K.-H. W. v. Germany* [GC], no. 37201/97, § 45, ECHR 2001-II). The finding that the smuggled object is "criminally acquired" represented a departure from the previous case-law of the Russian courts. In a series of binding resolutions the Supreme Court clarified that the money or other objects smuggled across the customs border were the "instruments" or "objects" of the offence of smuggling. That approach was endorsed by the Supreme Court's judgment in the *Petrenko* case, to which the Government referred, and also followed by ordinary Russian courts in the cases which have previously come before the Court (see *Baklanov*, cited above, § 14). In the applicant's case, however, the courts did not recognise that the money he had carried was either the "instrument" or "object" of the offence. On the other hand, the Government did not cite any other case-law or legal authority supporting the domestic courts' finding that the money the applicant had omitted to report on a customs declaration had been "criminally acquired" from the moment he had crossed the customs border.

33. In these circumstances, the Court finds that the confiscation measure issued by the Russian courts in the applicant's case fell short of the requirement of foreseeability of the law. This finding makes it unnecessary to examine whether the interference with the applicant's property right also pursued a general community interest and was also proportionate to it.

34. There has therefore been a violation of Article 1 of Protocol No. 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

35. 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.”

36. The applicant did not submit a claim for just satisfaction. The Court considers therefore that there is no call to award him any sum on that account. It observes, however, that Article 413 § 4 (2) of the Code of Criminal Procedure of the Russian Federation provides for the reopening of the criminal proceedings if a violation of the Convention has been established. In the present case the Court found a violation of Article 1 of Protocol No. 1. Accordingly, it is open to the applicant to request the reopening of the criminal proceedings in so far as the domestic courts’ findings were incompatible with the requirements of that Convention provision.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 1 of Protocol No. 1.

Done in English, and notified in writing on 5 February 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President