



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

1959 · 50 · 2009

FIRST SECTION

CASE OF ADZHIGOVICH v. RUSSIA

(Application no. 23202/05)

JUDGMENT

STRASBOURG

8 October 2009

FINAL

08/01/2010

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Adzhigovich v. Russia,

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

Nina Vajić, *President*,

Anatoly Kovler,

Elisabeth Steiner,

Khanlar Hajiyeu,

Sverre Erik Jebens,

Giorgio Malinverni,

George Nicolaou, *judges*,

and André Wampach, *Deputy Section Registrar*,

Having deliberated in private on 17 September 2009,

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

PROCEDURE

1. The case originated in an application (no. 23202/05) 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 Ukrainian national, Ms Yuliya Grigoryevna Adzhigovich (“the applicant”), on 21 June 2005.

2. The applicant was represented by Mr V. Fomin, a lawyer practising in the Moscow Region. The Russian Government (“the Government”) were initially represented by Mr P. Laptev and Ms V. Milinchuk, former Representatives of the Russian Federation at the European Court of Human Rights, and subsequently by their Representative, Mr G. Matyushkin.

3. The applicant alleged in particular a violation of her property rights on account of confiscation of her 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).

5. The Ukrainian Government did not exercise their right to intervene in the proceedings (Rule 36 § 1 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1975 and lives in Moscow.

7. On 8 October 2004 the applicant travelled from Moscow to Simferopol in Ukraine through Sheremetyevo airport. She had on her 13,020 US dollars (USD), 31 Ukrainian hryvnyas (UAH) and 1,100 Russian roubles (RUB). However, she only reported USD 10,000 and UAH 31 in her customs declaration. The customs inspection uncovered the remaining USD 3,020, which the applicant claimed she had forgotten about. She was charged with smuggling, a criminal offence under Article 188 § 1 of the Criminal Code. The money was appended to the criminal case as physical evidence (*вещественные доказательства*).

8. On 9 December 2004 the Golovinskiy District Court of Moscow found the applicant guilty as charged and imposed a suspended sentence of one year's imprisonment, conditional on one year's probation. As regards the money, it referred to Article 81 of the Code of Criminal Procedure and held that:

“Physical evidence – USD 13,020 and UAH 31 held in the evidence storage room of the Sheremetyevo Customs Office – shall revert to the State.”

9. In his statement of appeal, counsel for the applicant contested the lawfulness of the confiscation measure. He submitted that the gravity of the offence should have been determined by reference to the amount the applicant had concealed from the customs, that is USD 3,020, rather than the entire amount she had carried. The money had been the object rather than the instrument of the offence and as such it should have been returned to the lawful owner because it had not been claimed that it had been criminally acquired.

10. On 25 January 2005 the Moscow City Court upheld the judgment by a succinct decision, without examining the counsel's arguments in detail.

11. Counsel for the applicant submitted several applications for supervisory review of the judgments. The applications were rejected by a judge of the Moscow City Court on 22 August 2005, the President of the Moscow City Court on 18 January 2006, and a judge of the Supreme Court of the Russian Federation on 12 April 2006. As regards the confiscation measure, the judicial authorities maintained that the measure had been lawful and compliant with Article 81 of the Code of Criminal Procedure.

12. On 26 April 2007 the Presidium of the Moscow City Court examined yet another application for supervisory review. It held that the applicant had been correctly found guilty of smuggling but amended the judgment in part concerning the confiscation measure, having found as follows:

“However, the decision that the authentically declared amount of USD 10,000 and UAH 31 should revert to the State was not founded on sufficient reasons.

In deciding that the foreign currency should revert to the State, the court posited that the currency transported by Ms Adzhigovich was the object of the offence. However, since her criminal intent was directed at the breach of the procedure for transferring

cash money (currency) across the customs border rather than at their unlawful misappropriation, the cash money (currency) was not the object of the offence and therefore not liable to confiscation under Article 81 [§ 3] (1) of the Code of Criminal Procedure.

Moreover, according to Article 81 [§ 3] (4) of the Code of Criminal Procedure, criminally acquired property, money or other valuables must revert to the State. The case file does not contain any evidence to the effect that Ms Adzhigovich obtained the above-mentioned money through criminal means or as the proceeds of criminal activity.

In such circumstances, the judgments in the part concerning the decision that the foreign currency should revert to the State may not be considered lawful or justified.”

The Presidium held that the judgments would be amended and that USD 10,000 and UAH 31 would be returned to the applicant.

13. On 5 July 2007 a writ of execution was issued and sent to the bailiffs' service for enforcement.

14. On 23 January 2008 the bailiffs determined that the enforcement was impossible because the cash money in the amount of USD 10,000 and UAH 31 was absent from the evidence storage room of the Sheremetyevo Customs Office. That money had been taken away on 4 October 2005 by the bailiffs of the Northern Administrative District of Moscow, which appeared to have made enforcement impossible.

II. RELEVANT DOMESTIC LAW AND PRACTICE

15. 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).

16. The Code of Criminal Procedure of the Russian Federation (“CCrP”) provides as follows:

Article 81. Physical evidence

“1. Any object may be recognised as physical evidence -

(1) that served as the instrument of the offence or retained traces of the offence;

(2) that was the target of the criminal acts;

(3) any other object or document which may be instrumental for detecting a crime or establishing the circumstances of the criminal case.

...

3. On delivery of a conviction... the destiny of physical evidence must be decided upon. In such a case –

(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) non-reclaimed objects of no value must be destroyed...;

(4) criminally acquired money and other valuables must revert to the State by a judicial decision;

(5) documents must be kept with the case file...;

(6) any other objects must be returned to their lawful owners or, if the identity of the owner cannot be established, transferred to the State...”

THE LAW

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

17. The applicant complained under Article 6 of the Convention and Article 1 of Protocol No. 1 that the confiscation measure did not have a sufficient and clear basis in domestic law. The Court considers that this complaint will be more appropriately examined 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

18. The Government firstly claimed that the Russian authorities had taken measures at the domestic level to remedy the alleged violations of the applicant's rights. They did not specify the nature of those measures.

19. The applicant replied that the Presidium's judgment of 26 April 2007 had only concerned the return of the amount of USD 10,000 and UAH 31. It had not specified the legal basis for the decision that the remaining USD 3,020 should revert to the State. Moreover, the amount to be returned had not been paid back to her.

20. In so far as the Government's submission may be understood as a challenge to the applicant's status as a "victim" of the alleged violation, the Court will deal with it in the admissibility part. It is recalled that a decision or measure favourable to an applicant is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see *Amuur v. France*, 25 June 1996, § 36, *Reports of Judgments and Decisions* 1996-III, and *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI). In the instant case the applicant complained that the legal basis for the confiscation measure was unclear. Even though the Presidium of the Moscow City Court acknowledged certain deficiencies in the confiscation order, its decision only extended to a part of the money that had been seized from the applicant. Furthermore, the amount to be returned was not repaid to the applicant because it was missing from the Sheremetyevo Customs Office. In these circumstances, the Court finds that the applicant was not afforded acknowledgement of, and redress for, the alleged violation of her property rights, and may still claim to be a "victim".

21. The Government also claimed that the applicant had not applied to the Supreme Court of the Russian Federation for supervisory review of the judgments. The Court notes that counsel for the applicant made a number of applications for supervisory review to the Moscow City Court and the Supreme Court, all of which had been rejected before the case was communicated to the Government (see paragraph 11 above). In any event, it reiterates that applications for supervisory review are not a remedy to be made use of for the purposes of Article 35 § 1 of the Convention (see *Tumilovich v. Russia* (dec.), no. 47033/99, 22 June 1999, and *Berdzenishvili v. Russia* (dec.), no. 31697/03, 29 January 2004). Accordingly, the Government's objection as to the non-exhaustion of domestic remedies must be dismissed.

22. The Court notes that the 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*

23. The Government submitted that the applicant's property rights had been restricted as a result of her having committed a criminally reprehensible act. The money which she had illegally transported across the customs border had been confiscated in accordance with Article 81 § 3 of the Code of Criminal Procedure. According to existing judicial practice, the money was considered an “instrument” of the offence of smuggling and was covered by a broader notion of the “object” of the offence.

24. The applicant contended that the Government failed to specify the paragraph of Article 81 § 3 which had been applied in her case. The domestic courts had never indicated that the money was an “instrument” of the offence of smuggling. Their decisions justifying the application of the confiscation measure had been inconsistent and could not have amounted to established judicial practice.

2. *The Court's assessment*

(a) **The applicable rule**

25. 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).

26. The “possession” at issue in the present case was an amount of money in United States dollars and Ukrainian hryvnyas 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 her 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.

27. 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, in respect of a similar measure, *Sun v. Russia*, no. 31004/02, § 25, 5 February 2009, and *Ismayilov v. Russia*, no. 30352/03, § 30, 6 November 2008, with further references). Accordingly, it considers that the same approach must be followed in the present case.

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

28. 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).

29. 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).

30. 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. In ordering confiscation of the entire amount, the first-instance court mentioned Article 81 of the Code of Criminal Procedure, without, however, indicating the part of that provision which was applicable in the applicant's particular case. The appeal court and three supervisory-review decisions did nothing to fill the lacuna, as they referred generally to Article 81 rather to a specific ground or grounds for the confiscation measure of the many such foreseen in part 3 of that Article.

31. In accordance with paragraph 3 of Article 81, only instruments of the criminal offence mentioned in sub-paragraph 1 and criminally acquired

valuables referred to in sub-paragraph 4 were liable to confiscation or reversion to the State. All other objects which were not banned from circulation had to be returned to their lawful owners pursuant to sub-paragraph 6 of Article 81 § 3. Examining the applicant's request for supervisory review, on 26 April 2007 the Presidium of the Moscow City Court determined that the money which the applicant had carried across the customs border had been neither the object of the offence of smuggling nor proceeds from any criminal activities. It was therefore not liable to confiscation under either sub-paragraph 1 or sub-paragraph 4 of Article 81 § 3. It is remarkable in this connection that, in making such a finding in a general manner, the Presidium's decision could only be read as being applicable to the entire amount of money carried by the applicant. However, for unexplained reasons it only ordered the return of USD 10,000 and UAH 31 to the applicant, whereas it upheld the confiscation order in respect of the remaining USD 3,020.

32. Since the Presidium held that the object of the offence was the procedure of customs declaration rather than the money as a physical object and also found on the facts that the applicant's money had not been criminally obtained, it remains unclear what legal provision could be applied to the maintenance of the confiscation order in respect of the remaining amount. In fact, as regards that amount, the Presidium's decision did nothing to remedy the lacunae in the legal reasoning of the first-instance, appeal and supervisory-review courts. In this connection the Court emphasises that the existence of public-interest considerations for the contested measure, however relevant or appropriate they might have appeared, did not dispense the domestic authorities from the obligation to cite a specific legal basis for such decision (see *Frizen*, cited above, § 34).

33. As regards the amount which the Presidium determined should be returned to the applicant, the Court notes that the authorities did not invoke any legal grounds for its continued retention beyond a reference to the fact that it was “missing from the evidence storage room at the Sheremetyevo airport”.

34. Having regard to the Russian authorities' consistent failure to indicate a legal provision that could be construed as the basis for the confiscation of the applicant's property and their refusal to return the money which the Presidium determined should be repaid to the applicant, the Court finds the impugned interference with the applicant's property rights cannot be considered “lawful” within the meaning of Article 1 of Protocol No. 1. This finding makes it unnecessary to examine 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.

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

36. 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

37. The applicant claimed USD 13,020 and UAH 31 in respect of pecuniary damage, representing the confiscated amount. She also claimed USD 10,000 in respect of non-pecuniary damage.

38. The Government considered that the claim should be rejected because it was not the Court's task to review to national authorities' decision to bring criminal charges against the applicant.

39. As regards the claim for the pecuniary damage, the Court has found that the amount claimed was confiscated from the applicant in breach of Article 1 of Protocol No. 1. Furthermore, despite the Presidium of the Moscow City Court's decision of 25 April 2007 to return part of the money to the applicant, the enforcement thereof appears to have been made impossible. The Court therefore accepts the claim in respect of the pecuniary damage in its entirety and awards the applicant EUR 10,240, plus any tax that may be chargeable. It considers, however, that the claim in respect of non-pecuniary damage is excessive. Making its assessment on an equitable basis, the Court awards the applicant EUR 1,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on it.

B. Costs and expenses

40. The applicant also claimed RUB 61,000 for legal fees and RUB 2,660.90 for postal expenses. She submitted a copy of a legal services agreement and postal receipts.

41. The Government did not make any comments.

42. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,500 for costs and expenses, plus any tax that may be chargeable to the applicant.

C. Default interest

43. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

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;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Russian roubles at the rate applicable at the date of settlement:
 - (i) EUR 10,240 (ten thousand two hundred forty euros), plus any tax that may be chargeable, in respect of pecuniary damage;
 - (i) EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 8 October 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach
Deputy Registrar

Nina Vajić
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Judge Kovler is annexed to this judgment.

N.A.V.
A.M.W.

CONCURRING OPINION OF JUDGE KOVLER

I agree with the conclusions reached by the Chamber. Nevertheless, I feel I should clarify the reasons for my decision.

Unlike in some similar cases (for example, *Baklanov v. Russia*, no. 68443/01, 9 June 2005, and *Ismaylov v. Russia*, no. 30352/03, 6 November 2008), where the national courts admitted all money carried across the customs border without a customs declaration as physical evidence in the criminal case, ordering the confiscation of the entire amount (as did the first-instance court in the present case), the Presidium of the Moscow City Court, after examining the applicant's request for supervisory review, again found her guilty of smuggling, but declared that the amount of 10,000 United States dollars (USD) and 31 Ukrainian hryvnias (UAH) should be returned to her (see paragraph 12 of the judgment) because this part of the sum had been declared to the customs authorities.

I disagree, in view of this evident fact, with the contradictory conclusions of the Chamber in paragraphs 31-32 of the judgment, especially with the statement that “*on 26 April 2007 the Presidium of the Moscow City Court determined that the money which the applicant had carried across the customs border had been neither the object of the offence of smuggling (sic! – A.K.) nor proceeds from any criminal activities*” (§ 31). The Moscow City Court's order to return “only” USD 10,000 and UAH 31 to the applicant was not based on “unexplained reasons”, but instead was logical because it separated the “smuggled” part of the total amount (USD 3,020), which was not declared to the customs authorities and consequently was confiscated, from the “legally carried” part of the amount, which was declared to the customs authorities and was thus confiscated illegally. This judgment was in line with the decision (*определение*) of the Constitutional Court of the Russian Federation of 8 July 2004, in which money smuggling was qualified as a criminal offence in the light of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (8 November 1990). I regret that the present judgment did not mention the provisions of that instrument.

But I accepted the final decision of the Chamber because of the truly outrageous fact of the “mysterious” disappearance of the money confiscated from the evidence storage room of the Sheremetyevo Customs Office by the bailiffs long before the final judgment of the national court! For this reason I also agree with the amount awarded for pecuniary damage.