

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

FIFTH SECTION

CASE OF GANUSHCHAK v. UKRAINE

(Application no. 40776/16)

JUDGMENT

STRASBOURG

29 August 2024

This judgment is final but it may be subject to editorial revision.



In the case of Ganushchak v. Ukraine,

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

Mārtiņš Mits*, President*,
María Elósegui,
Kateřina Šimáčková*, judges*,
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 40776/16) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 6 July 2016 by a Ukrainian national, Mr Mykola Dmytrovych Ganushchak ("the applicant"), who was born in 1959, lives in Tysovets and was represented by Mr B.V. Fokiy, a lawyer practising in Chernivtsi;

the decision to give notice of the complaint under Article 1 of Protocol No. 1 to the Ukrainian Government ("the Government"), represented by their Agent, most recently Ms M. Sokorenko, and to declare the remainder of the application inadmissible;

the parties' observations;

Having deliberated in private on 4 July 2024,

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

SUBJECT MATTER OF THE CASE

1. The application concerns a complaint under Article 1 of Protocol No. 1 to the Convention about an allegedly unlawful punishment imposed on the applicant for a violation of customs regulations, namely bringing a car into Ukraine through the closed border checkpoint in Crimea.

2. Following the occupation of Crimea by the Russian Federation in 2014 and the blocking of the operation of the state border crossing checkpoints located on the peninsula, the border between Russia and Crimea was closed by the Ukrainian authorities (Government Decree No. 424-r of 30 April 2014 "On Temporary Closure of State Border Crossing Points and Checkpoints"). Anyone travelling to or from the Crimean peninsula should pass through Ukrainian checkpoints on the mainland. The list of checkpoints was defined in Government Decree No. 367 of 4 June 2015 "On Approval of the Procedure for Entry into and Exit from the Temporarily Occupied Territory of Ukraine" (entered into force on 10 June 2015).

3. In May 2015 the applicant left Ukraine for Russia by car. On his way back, on 21 July 2015, he entered Ukraine via the "Caucasus-Crimea" ferry crossing in the city of Kerch. When he arrived at a checkpoint on the mainland, in the Kherson region, the border authorities issued two administrative offence reports against the applicant, finding him liable for illegally crossing the border (Article 204-2 of the Code of Administrative

Offences) and for transporting goods - the car driven by the applicant - by evading customs control (Article 482 of the Customs Code). The applicant appealed. In his written explanations given at the border, the applicant submitted that his way home via Crimea was shorter and that he had not known that the Ukrainian checkpoint in Crimea was not operational and that the peninsula was illegally occupied by Russia, otherwise he would have chosen another way. In the proceedings before the domestic courts, the applicant further argued that the car, which belonged to his son, was for private use and therefore did not fall within the category of "goods" and accordingly did not constitute the object of the offence under Article 482 of the Customs Code. In support of this latter contention, he relied on a finding made by the Kherson Regional Court of Appeal ("the Court of Appeal") in its final judgment in a case involving similar facts.

4. On July 2015 the Kalanchak Town Court found the applicant liable for illegally crossing the border and imposed a fine of 1,700 Ukrainian hryvnias (UAH) (about 70 euros (EUR)) in this connection. The applicant's appeal against this decision was dismissed as time-barred.

5. On 9 December 2015 the Suvorivskyi District Court of Kherson ("the District Court") discontinued the administrative offence proceedings in respect of the car on account of the lack of constituent elements of an administrative offence. It found, first, that the administrative offence report was not clear as regards the circumstances of the alleged offence and failed to indicate which of the acts defined in Article 482 of the Customs Code the applicant was accused of committing, or to specify the objective and subjective elements of the offence. Relying further on Article 4 §1 (57), (58) and (60) of the Customs Code, which provided definitions of goods and transport, the District Court held that the Customs Code clearly distinguished between the concepts of goods, commercial and private vehicles and that the car driven by the applicant was a private transport within the meaning of the customs law and not "goods" or a "commercial vehicle" as suggested by the customs office. Accordingly, the District Court found that the object of the offence required by Article 482 was lacking.

6. By a final judgment of 14 January 2016, the Kherson Regional Court of Appeal ("the Court of Appeal") quashed the decision of the first-instance court and upheld that of the customs office. Noting that, under Article 4 §1 (57) of the Customs Code, the "goods" were defined as any movable items (except for commercial transport), currency, cultural valuables, as well as electricity transmitted through transmission lines and that, under the same Code, "transport" comprised commercial transport, private transport, pipelines and power lines, the Court of Appeal concluded that any transport, except commercial vehicles, fell under the notion of "goods". Accordingly, it held that by moving a private car across the State border through a temporarily closed checkpoint in occupied Crimea, namely outside the location of the customs authority and without fulfilment of

customs formalities, the applicant had committed an offence under Article 482 of the Customs Code.

7. The Court of Appeal went on to note, in a general way, that in deciding on the sanction it had to remain within the limits provided for by the said article and take into account the nature of the offence, the degree of the applicant's guilt, information about his character and property status, and other aggravating and mitigating factors. The Court of Appeal ordered the confiscation of the applicant's car and the payment of a fine equal to the value of the car (UAH 77,422.50; approximately EUR 3,020 at the time) as prescribed by the mandatory sanction of the relevant article of the Customs Code.

8. Before the Court the applicant complained, under Article 1 of Protocol No. 1 to the Convention, that the confiscation measure and the fine had been unlawful and disproportionate.

THE COURT'S ASSESSMENT

ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

9. The applicant denied that he had committed the offence with which he was charged. He argued that the Court of Appeal's interpretation of the substantive law to the effect that the car he was driving should be regarded as "goods" was arbitrary and contrary to its own approach in similar cases. In that regard, the applicant submitted copies of judgments of the Court of Appeal delivered between June 2015 and January 2016. In eight judgments (cases nos. 33/791/329/15, 33/791/120/15, 33/791/353/15, 33/791/362/15, 33/79/428/15, 33/791/460/15, 33/791/461/15 and 33/791/7/16) the Court of Appeal held, in similar factual circumstances, that a private car did not fall within the category of goods for the purpose of Article 482 of the Customs Code, but was a means of transport for the alleged offenders; the proceedings were closed for lack of the constituent elements of an administrative offence. Case no. 33/791/427/2015 concerned a commercial vehicle; the Court of Appeal closed the proceedings, finding no intention on the part of the driver to breach the law. Finally, in cases nos. 33/791/388/15 and 33/791/437/15, the Court of Appeal found that the private car fell under the notion of goods but that in the absence of direct intention to breach the law by the drivers, the subjective element of the offence had been missing; the proceedings were terminated accordingly. According to the applicant, such inconsistent practice in respect of the same issue was in itself evidence that the interference with his property rights was unforeseeable and therefore unlawful.

10. The applicant further submitted that he had not hidden anything from the customs authorities and had not brought any prohibited items across the

border. The imposition of such a high fine, combined with the confiscation of the car, apart from being unlawful, was clearly disproportionate.

11. The Government submitted that the interference was lawful since it had been established by the final judgment of the national court that the applicant had committed the offence provided for in Article 482 of the Customs Code. The sanction imposed on him was mandatory under that Article, sufficiently precise, and did not impose an excessive burden on the applicant.

12. They further stated that the aim of the interference was to protect State interests in the field of border and customs control and to ensure the observance of law by individuals entering and leaving the occupied territory and transporting goods.

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

14. The relevant general principles for the Court's assessment have been summarised in *Krayeva v. Ukraine* (no. 72858/13, §§ 23-24, 13 January 2022).

15. Given that the available evidence, including the applicant's submission before the domestic authorities, suggests that he was not the owner of the confiscated car, the Court finds that the "possession" in issue in the present case is the money which the applicant was ordered to pay by way of a fine, namely EUR 3,020 (see, for a similar approach, *Karapetyan v. Georgia*, no. 61233/12, § 31, 15 October 2020, and *Krayeva*, cited above, § 19).

16. The parties agreed that the imposition of the fine equal to the value of the confiscated car had amounted to an interference with his rights under Article 1 of Protocol No. 1 to the Convention. The Court sees no reason to hold otherwise.

17. The Court reiterates that the principle of lawfulness presupposes that the applicable provisions of domestic law are sufficiently accessible, precise and foreseeable in their application (see *Beyeler v. Italy* [GC], no. 33202/96, § 109, ECHR 2000-I).

18. In the present case, the Court of Appeal's order for the applicant to pay the fine was made pursuant to Article 482 § 1 of the Customs Code which set responsibility for the movement of goods and commercial vehicles across the customs border of Ukraine outside customs control, that is outside the location of the customs authority or outside the working hours established for it, and without fulfilment of customs formalities, or with illegal exemption from customs control as a result of abuse of office by officials of the customs authority. The sanction of this Article provided for mandatory imposition of a fine in the amount of 100% of the value of goods, vehicles - direct objects of violation of customs rules, with confiscation of these goods and vehicles used for transportation of goods.

19. It is not in dispute between the parties that the applicant crossed the border between Russia and Ukraine via an inoperative checkpoint in occupied Crimea, that is outside the customs control of Ukraine. The main disagreement between the parties is whether the car in which he crossed the State border should be considered as "goods" within the meaning of Article 482 of the Customs Code, a constituent element for the offence for which the applicant was found liable.

20. The Court reiterates that it is normally in the first place for the national authorities, notably the courts, to interpret and apply domestic law. The Court is, nonetheless, required to verify that the manner in which the domestic law was interpreted and applied produced consequences that were consistent with the principles of the Convention (see *Mullai and Others v. Albania*, no. 9074/07, § 114, 23 March 2010).

21. The Court observes in this respect that the courts of first and second instance reached opposite conclusions as to whether the concept of goods in Article 482 of the Customs Code included private transport and, consequently, as to the applicability of that Article to the applicant's actions (see paragraphs 5 and 6 above).

22. Moreover, the judgments cited by the applicant as examples further show that there was no agreement even within the Court of Appeal itself on this issue, and that the judgment of the Court of Appeal of 14 January 2016 departs from a number of its previous final judgments in which it confirmed, in almost identical circumstances, that private transport should not be regarded as 'goods' within the meaning of Article 482 of the Customs Code (see paragraph 9 above). Despite the applicant's direct reference to one such judgment (see paragraph 3 above), the Court of Appeal did not give any clarification of why it had reached a different conclusion in the present case.

23. While, in their observations, the Government subscribed to the findings of the Court of Appeal in the applicant's case, they likewise did not comment on the divergent case-law mentioned above, including the conflicting assessments of the same situation in the applicant's case and in cases brought by other individuals.

24. The Court has already held on many occasions that where such manifestly conflicting decisions interfere with the right to peaceful enjoyment of possessions and no reasonable explanation is given for the divergence, such interference cannot be considered lawful for the purposes of Article 1 of Protocol No. 1 to the Convention, because it leads to inconsistent case-law lacking the required precision to enable individuals to foresee the consequences of their actions (see, *mutatis mutandis*, *Jokela v. Finland*, no. 28856/95, § 65, ECHR 2002-IV; *Saghinadze and Others v. Georgia*, no. 18768/05, §§ 116-18, 27 May 2010; and *Brezovec v. Croatia*, no. 13488/07, §§ 67-68, 29 March 2011).

25. The Court observes that the applicant was not in a position to remove the ambiguity in the national court's practice by applying to the higher court

since, under national law, the judgment of the Court of Appeal was final and not subject to appeal.

26. On the facts, in the absence of the relevant comments from the Government, it is difficult for the Court to see why a vehicle which was registered in Ukraine when it left Ukraine and when it returned there, and which was a vehicle for private use and not the subject of any commercial activity or transaction and, accordingly, not the subject of payment of any customs duties and fees, should be regarded as "goods" for the purpose of Article 482 of the Customs Code. However, bearing in mind its limited power to review compliance with domestic law, the Court finds that the inconsistency of the case-law on the matter is sufficient to find, in the circumstances of this case, that the interference complained of, in the form of the judgment of the Court of Appeal of 14 January 2016 and its consequences, was not foreseeable by the applicant and was therefore incompatible with the principle of lawfulness enshrined in Article 1 of Protocol No. 1 to the Convention.

27. 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 applicant's fundamental rights.

28. There has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

29. The applicant claimed UAH 154,845 (approximately EUR 4,015 at the time of submission of the claim) in respect of pecuniary damage, which consisted of the value of the confiscated vehicle and the amount of the fine he had been ordered to pay. He also claimed EUR 2,500 in respect of non-pecuniary damage and EUR 2,675 for the costs and expenses incurred before the Court. The latter amount included EUR 2,550 in lawyer's fees and UAH 4,800 (about EUR 125) for translation costs.

30. The Government considered the claim unsubstantiated, arguing mainly that there had been no violation of the Convention in the applicant's case.

31. As regards non-pecuniary damage, the Court considers that the finding of a violation of Article 1 of Protocol No. 1 constitutes in itself sufficient just satisfaction. As regards pecuniary damage, in view of the Court's conclusions relating to the lawfulness of the interference with the applicant's property rights, and given the fact that neither the Government nor any available documents suggested that the applicant had not paid the fine imposed on him, the Court finds it appropriate to award the applicant the amount of the fine paid, that is EUR 2,007 in respect of pecuniary damage, plus any tax that may be chargeable.

32. Lastly, regard being had to the documents in its possession and to its case-law, the Court awards the applicant EUR 1,000 for the legal costs of the proceedings before the Court, plus any tax that may be chargeable to the applicant. The latter amount is to be paid directly into the bank account of Mr B. Fokiy (see, for example, *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 288, 15 December 2016). The remainder of the applicant's claim should be rejected.

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 to the Convention;

3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 2,007 (two thousand and seven euros), plus any tax that may be chargeable, in respect of pecuniary damage;
      (ii) EUR 1,000 (one thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be paid into the bank account of Mr B. Fokiy;
   (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;

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

Done in English, and notified in writing on 29 August 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller	Mārtiņš Mits
Deputy Registrar	President