

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

FIFTH SECTION

CASE OF NADTOCHIY v. UKRAINE

(Application no. 32899/13)

JUDGMENT

STRASBOURG

20 September 2022

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



In the case of Nadtochiy v. Ukraine,

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

Lado Chanturia, *President,*
Ganna Yudkivska,
Mattias Guyomar, *judges,*
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 32899/13) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 1 April 2013 by a Ukrainian national, Ms Zinayida Sergiyivna Nadtochiy, who was born in 1928 and lived in Sumy ("the applicant") and who was represented before the Court by Mr M. Tarakhkalo, a lawyer practising in Kyiv;

the decision to give notice of the application to the Ukrainian Government ("the Government"), represented by their Agent, most recently Mr I. Lishchyna of the Ministry of Justice;

the parties' observations;

Having deliberated in private on 24 March 2022,

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

SUBJECT MATTER OF THE CASE

1. The case concerns allegedly unlawful and disproportionate deprivation of the applicant's property, contrary to Article 1 of Protocol No. 1.

2. On 4 June 2008 the Sumy Town Council ("the Council") granted the applicant, free of charge, a plot of land to be used for the construction of a house as part of the privatisation process. She had planned to start construction works within two years but did not do so and instead used the land primarily for gardening. For that reason, in August 2011 the Deputy Prosecutor of the Sumy Region instituted civil proceedings against the applicant, seeking to have her title to the land declared void ("the first set of proceedings"). He also argued that the designated use of the land contradicted the town's general zoning plan and violated the town's right to construct apartment buildings on the land. In a final decision given by the Sumy Regional Court of Appeal on 9 February 2012, the prosecutor's action was rejected on the grounds that he had not challenged the Council's decision of 4 June 2008 and that the fact that the applicant had been using the land for gardening was not a reason to deprive her of it. Later in February 2012 the prosecutor brought a second action, this time against the Council and the applicant, relying on similar grounds and also arguing that the Council's decision of 4 June 2008 had not been based on a detailed zoning plan and specific construction limits ("the second set of proceedings"). In a judgment

given by the Kovpakivskyy District Court of Sumy on 25 July 2012, which was ultimately upheld by the Higher Specialised Court of Civil and Criminal Matters on 18 January 2013, the prosecutor's second action was allowed: the Council's decision of 4 June 2008 and the applicant's title to the land were declared void and the land was returned to the municipality. The courts held, in particular, that when deciding to transfer the land to the applicant, the Council had failed to develop a detailed zoning plan and specific construction limits, thereby failing to serve the interests of the community.

3. The applicant complained under Article 1 of Protocol No. 1 that she had been deprived of the land for no legitimate purpose, since no apartment building had been erected on it; that, contrary to the principle of legal certainty, the second set of proceedings, leading to her being deprived of the land, had involved the re-examination of matters determined with final effect in the first set of proceedings; and that no compensation had been paid to her even though it had been the fault of the authorities that she had been deprived of the land.

THE COURT'S ASSESSMENT

I. *LOCUS STANDI* OF MRS N. BRATUSHKA

4. On 11 December 2016 the applicant died. Mrs N. Bratushka, the wife of the applicant's nephew, informed the Court that she wished to pursue the application. Regard being had to the pecuniary nature of the issues raised in the case and to the fact that in a will dated 14 April 2016 the applicant designated Mrs N. Bratushka as one of her heirs, the latter has a legitimate interest in pursuing the application in the late applicant's stead (see, among other authorities, *López Ribalda and Others v. Spain* [GC], nos. 1874/13 and 8567/13, §§ 72-73, 17 October 2019, and *Maksymenko and Gerasymenko v. Ukraine*, no. 49317/07, § 39, 16 May 2013). The Court will therefore continue dealing with the case at her request.

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

5. The Government raised an objection of abuse of the right of application on account of the applicant's failure to inform the Court that in 2011 criminal proceedings had been brought against her nephew, who had been a member of the Council in 2008, on suspicion of, *inter alia*, the fraudulent allocation of land to the applicant.

6. The Court notes that the material which the applicant initially submitted to it contained information regarding the criminal proceedings in question. In so far as the Government can be understood to be pointing to the fact that the applicant had not informed the Court of any developments in those proceedings, according to the parties' most recent submissions in

February 2017, they were still ongoing and the charges had not yet been determined. Furthermore, the applicant's grievances concerned the outcome of civil proceedings and judicial decisions which were based on reasons unrelated to the criminal proceedings. Thus, it cannot be concluded that she intended to conceal any essential information from the Court or to "mislead" it (see *G.I.E.M. S.R.L. and Others v. Italy* [GC], nos. 1828/06 and 2 others, §§ 173-75, 28 June 2018, and *Zličić v. Serbia*, nos. 73313/17 and 20143/19, §§ 56-57, 26 January 2021). It follows that the Government's objection must be dismissed.

7. The Court further notes that the application 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.

8. The relevant general principles under Article 1 of Protocol No. 1 applicable to instances of deprivation of property, as in the present case, have been summarised in, among other authorities, *Kryvenkyy v. Ukraine* (no. 43768/07, §§ 41, 42 and 45, 16 February 2017).

9. At the outset, the Court notes that, although the matters decided in the proceedings initiated on the basis of the prosecutor's two actions had many similarities, they were not identical. Notably, unlike the first set of proceedings, the second set of proceedings encompassed additional questions relating to the process which had led to the Council's decision of 4 June 2008. Nor did the matters decided in those proceedings overlap to the extent that the second set of proceedings could be regarded as a re-examination of the dispute determined in the first set of proceedings and thus as raising an issue under Article 1 of Protocol No. 1 (see, for instance, *Decheva and Others v. Bulgaria*, no. 43071/06, §§ 53-58, 26 June 2012).

10. On the whole, notwithstanding the applicant's arguments to the contrary and having regard to the reasoning set out in the relevant judicial decisions, the Court is prepared to proceed on the assumption that the interference in issue had a basis in domestic law and pursued a legitimate aim in the public interest, namely ensuring the most effective use of the land belonging to the municipality.

11. At the same time, the Court considers that the interference in issue was disproportionate to that aim.

12. In particular, the applicant acquired the land in good faith, without knowing that when transferring it to her, the Council had failed to do what had been necessary with regard to the interests of the community. Thus, she should not have had to bear all the negative consequences for the mistake committed by that body, without any compensation or other type of appropriate reparation (see *Tomina and Others v. Russia*, nos. 20578/08 and 19 others, § 39, 1 December 2016).

13. In so far as the Government argued that no compensation was necessary in the applicant's case since she had acquired the land free of charge, the Court reiterates that this does not rule out a finding of a violation

of Article 1 of Protocol No. 1 (see, for example, *Kryvenkyy*, cited above, § 46, and *Zelenchuk and Tsytsyura v. Ukraine*, nos. 846/16 and 1075/16, § 143, 22 May 2018 with further references). As to the Government's argument that after having been deprived of the land in question, the applicant could have used her right to privatise another plot of land, no information has been provided to the Court demonstrating that a comparable plot of land was actually available to her.

14. Lastly, in so far as the Government pointed to the fact that the applicant had failed to start constructing a house on the land pursuant to the terms on which she had been granted title and instead had used it for gardening, the Court refers to the domestic courts' finding that the applicant could not be deprived of her title to the land on that ground.

15. Accordingly, the Court finds that the fact that the applicant was deprived, without any compensation or other type of appropriate reparation, of the plot of land which she had acquired in good faith and had used for about four years imposed a disproportionate burden on her, and that there has been a violation of Article 1 of Protocol No. 1 in that regard.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

16. Mrs N. Bratushka, the applicant's heir, claimed 50,000 euros (EUR) in respect of non-pecuniary damage. Under the head of pecuniary damage, she requested that the Court order the respondent State to transfer to her the title to the land of which the applicant had been deprived, or, if this was not possible, to award her 301,037.16 Ukrainian hryvnias (the equivalent of around EUR 10,000) representing the value of the land as stated in an official document issued by the Sumy Regional Land Register Office on 2 February 2017. Mrs N. Bratushka also claimed EUR 3,750 for legal fees incurred before the Court, which she was liable to pay to her representative, Mr M. Tarakhkalo, for twenty-five hours of legal work pursuant to a contract dated 24 January 2017. She requested that the latter sum be paid directly into Mr M. Tarakhkalo's bank account.

17. The Government contended that those claims were excessive and unsubstantiated.

18. Having regard to the documents in its possession and ruling on an equitable basis, the Court considers it reasonable that the following amounts be awarded to the late applicant's estate (see, *mutatis mutandis*, *Kirpichenko v. Ukraine*, no. 38833/03, § 98, 2 April 2015; *Bajzík and Others v. Slovakia* [Committee], nos. 46609/13 and 9892/14, § 46, 27 June 2017; *Debelyy and Others v. Ukraine* [Committee], no. 7174/11 and 2 others, § 30, 27 May 2021; and *Polishchuk and Others v. Ukraine* [Committee], no. 6648/14 and 3 others, § 17, 16 September 2021): EUR 10,000 in respect of pecuniary damage and EUR 800 in respect of non-pecuniary damage, plus any tax that may be chargeable on those amounts, and also EUR 3,750 for legal costs in

the proceedings before the Court, plus any tax that may be chargeable to the applicant's estate. The latter sum is to be paid directly into the bank account indicated by Mr M. Tarakhkalo.

19. The Court further considers it appropriate that the default interest rate 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. *Holds* that Mrs N. Bratushka has standing to pursue the present application in the late applicant's stead;
2. *Declares* the application admissible;
3. *Holds* that there has been a violation of Article 1 of Protocol No. 1;
4. *Holds*
   (a) that the respondent State is to pay to the applicant's estate, 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 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of pecuniary damage;
      (ii) EUR 800 (eight hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (iii) EUR 3,750 (three thousand seven hundred and fifty euros), plus any tax that may be chargeable to the applicant's estate, in respect of costs and expenses, to be paid directly into the bank account indicated by Mr M. Tarakhkalo;
   (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 20 September 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller	Lado Chanturia
Deputy Registrar	President