

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

FIFTH SECTION

DECISION

Application no. 41678/20
Roman Anatoliyovych FUTORNYAK
against Ukraine

The European Court of Human Rights (Fifth Section), sitting on 4 June 2024 as a Chamber composed of:

Mattias Guyomar*, President*,
Carlo Ranzoni,
Mārtiņš Mits,
Stéphanie Mourou-Vikström,
María Elósegui,
Mykola Gnatovskyy,
Stéphane Pisani*, judges*,

and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the above application lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 5 September 2020;

the decision to give notice to the Ukrainian Government ("the Government") of the complaints under Article 13 of the Convention and Article 1 of its Protocol No. 1 and to declare the remainder inadmissible;

the observations submitted by the respondent Government and the observations in reply submitted by the applicant;

Having deliberated, decides as follows:

INTRODUCTION

1. The present case concerns the applicant's complaints under Article 13 of the Convention and Article 1 of its Protocol No. 1 about his inability to obtain compensation, allegedly due by the State under the Law on the Fight against Terrorism 2003 ("the Anti-Terrorism Act"), for his car destroyed as a result of the 2015 shelling by pro-Russian forces of Mariupol, which was controlled by Ukraine at the material time.

THE FACTS

2. The applicant, Mr Roman Anatoliyovych Futornyak, is a Ukrainian national who was born in 1981 and lives in Kharkiv. He is represented before the Court by Mr O. Romanchenko, a lawyer practising in Kharkiv.

3. The Ukrainian Government ("the Government") are represented by their Agent, most recently Ms M. Sokorenko, from the Ministry of Justice.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

A. Background information

5. After the outbreak of armed hostilities in certain parts of the Donetsk and Luhansk regions of Ukraine in spring 2014, the Government alleged that there had been widespread bombing and shelling of areas outside separatist control, which had resulted in civilian casualties and the destruction of property (see *Ukraine and the Netherlands v. Russia* (dec.) [GC], nos. 8019/16 and 2 others, 30 November 2022).

6. More specifically, the Government submitted that on 24 January 2015 "Russia's proxies" had used BM-21 Grad multiple rocket launchers supplied by the Russian Federation against Mariupol, attacking a densely populated residential area. As a result of the attack, thirty civilians, including one child, were killed. A further 118 were seriously injured and more than fifty residential buildings, four schools and numerous shops and businesses were damaged. According to the Government, the attack came from an area under the control of the so-called "Donetsk People's Republic" ("DPR") and there was no plausible military target in the vicinity of the attack. The UN Secretary General condemned the launching of rockets indiscriminately into civilian areas and demanded an investigation to bring the perpetrators to justice (ibid., § 243).

B. The circumstances of the case

7. On 24 January 2015 the applicant's car was destroyed by fire in a car park in Mariupol. The next day a report was drawn up by the local fire service stating that the fire had been caused by an explosion during the shelling.

1. Criminal proceedings

8. On 24 January 2015 the Donetsk Regional Office of the Security Service of Ukraine ("the SSU") instituted criminal proceedings under Article 258 of the Criminal Code in respect of a terrorist act – the shelling of Mariupol. The next day the applicant was granted victim status in those criminal proceedings.

9. During the pre-trial investigation, the SSU identified twelve "DPR" members, eight Russians and four Ukrainians as suspects in the above-mentioned crime.

10. As of January 2022, the investigation was suspended while a search for the suspects was carried out.

2. Civil proceedings

11. After the event, the applicant filed numerous requests with different State authorities with a view to obtaining compensation for his destroyed car. He was informed in reply that, while section 19 of the Anti-Terrorism Act provided for compensation by the State for damage caused by a terrorist act (see paragraph 18 below), no mechanism had been introduced to implement those provisions.

12. In October 2016 the applicant lodged a civil claim against the State, which was represented by the Cabinet of Ministers and the State Treasury, seeking compensation for his destroyed car in the amount of 198,362 Ukrainian hryvnas (UAH – around 10,812 euros (EUR)). This amount was based on a valuation certificate estimating the value of the car before it was destroyed. In support of his claim, the applicant relied, *inter alia*, on the Anti-Terrorism Act and the Convention.

13. On 23 May 2017 the Pecherskyi District Court of Kyiv allowed the applicant's claim in full. It reasoned that section 19 of the Anti-Terrorism Act clearly provided that the State had to compensate the victims of terrorist acts, irrespective of whether the perpetrator had been convicted with final effect. The first-instance court also took into consideration the following facts: (i) an anti-terrorist operation ("ATO") had been underway in the Donetsk region; (ii) the applicant's car had been destroyed in the shelling; and (iii) the criminal case investigating the terrorist act was ongoing.

14. On 16 November 2017 the Kyiv City Court of Appeal quashed the above decision and found against the applicant. It reasoned that while it was the State's responsibility to compensate the victims of terrorist acts, that responsibility was conditional upon the compensation subsequently being recovered from the perpetrator. The appellate court further held that the applicant's claim was premature since the criminal investigation into the circumstances of the shelling was still ongoing and no guilty verdict had been reached.

15. In December 2017 the applicant appealed in cassation, stating that, under the relevant provisions of the Anti-Terrorism Act (see paragraph 18 below), compensation could not be considered conditional on the perpetrator being convicted with final effect. According to the applicant, the State's responsibility was of an absolute and objective nature, so if the State was unable to ensure peace and security, it would have to bear the consequences in terms of compensation.

16. On 25 March 2020 the Supreme Court set aside the lower courts' decisions and adopted a new decision.

The Supreme Court found that domestic legislation, in particular the Anti-Terrorism Act, provided for the right to obtain compensation from the State for damage caused by a terrorist act. The court further reasoned that the exercise of the right to receive such compensation was conditional and depended on there being a mechanism for calculation and payment, which had to be established in a separate law. However, the court observed that the law regulating the procedure and conditions for compensation from the State budget for damage caused by a terrorist act to citizens' non-residential property was absent both at the time of the dispute and at the time of the court proceedings. On the basis of the above and referring to *Budchenko v. Ukraine* (no. 38677/06, § 42, 24 April 2014) and *Petlyovanyy v. Ukraine* ((dec.), no. 54904/08, 30 September 2014), the court concluded that no proprietary interest could be inferred from the domestic legislation in force at the material time and that the Anti-Terrorism Act did not give rise to a legitimate expectation that the State would have to provide compensation for the car destroyed during the ATO.

Nevertheless, the Supreme Court awarded the applicant UAH 10,000 (around EUR 332) in compensation for the State's failure to comply with its positive obligation under Article 1 of Protocol No. 1 to the Convention. In particular, the court found that the applicant's property rights had been violated and that the State should have introduced a legislative mechanism for compensation, which it had failed to do. In the ruling, the court referred to its settled case-law in similar legal matters (see paragraphs 21 and 22 below).

17. No information is available as to whether the above final decision was enforced.

C. Relevant domestic law and practice

1. Relevant domestic law

18. Section 19 of the Anti-Terrorism Act, as worded at the material time, reads as follows:

Section 19 - Compensation for damage caused by a terrorist act

> "Compensation for damage caused to citizens by a terrorist act shall be paid from the State Budget of Ukraine in accordance with the law and with the subsequent recovery of the amount of that compensation from the persons who caused the damage, in accordance with the procedure established by law."

19. As a result of legislative amendments introduced on 21 March 2023 (in force since 28 April 2023), section 19 of the Anti-Terrorism Act now provides that compensation for damage caused by a terrorist act is paid in accordance with the procedure established by the Cabinet of Ministers.

20. To date, no such procedure has been introduced, either by law or by regulation.

2. Relevant domestic practice

21. On 4 September 2019 the Grand Chamber of the Supreme Court delivered a decision with a view to developing the law and unifying case-law in disputes concerning compensation for damage caused by a terrorist act (case no. 265/6582/16-ц). It reached the following conclusions as to the correct application of section 19 of the Anti-Terrorism Act:

(i) in the absence of the relevant law, the right to compensation for damage caused to citizens by a terrorist act does not create a legitimate expectation of obtaining such compensation from Ukraine for damage caused to non-residential property during an ATO, irrespective of the territory – controlled or not controlled by Ukraine – on which the act took place;

(ii) the absence of relevant provisions in Ukrainian legislation on compensation to an owner of non-residential property for damage caused by a terrorist act does not prevent that person from seeking compensation from the State for failure to comply with its positive obligation to develop compensatory mechanisms for interference with the right to peaceful enjoyment of possessions and to conduct an objective and effective investigation of the fact of interference with that right;

(iii) there are no grounds for concluding that such compensation must provide for reimbursement of the real value of the damaged or destroyed property.

22. The above conclusions were subsequently applied by the Supreme Court in its final decision of 20 January 2023, by which a claimant was awarded compensation for the State's failure to introduce a legislative mechanism for compensation for property damage caused by a terrorist act – the shelling of Mariupol on 24 January 2015. The Supreme Court also referred to those conclusions when dealing with other similar cases, including the applicant's case.

COMPLAINTS

23. The applicant complained that the State had failed to ensure his right to the peaceful enjoyment of his possessions by not having compensated him in full for damage caused by a terrorist act and by not having put in place a mechanism for such compensation. He relied on Article 13 of the Convention and Article 1 of its Protocol No. 1, which read as follows:

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Article 1 of Protocol No. 1

"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."

THE LAW

24. The Court observes at the outset that the present case does not concern the destruction of the applicant's car by military action carried out against Ukraine but solely his claim that he had a legitimate expectation under Ukrainian law to obtain compensation from the Ukrainian authorities since the destruction was considered a terrorist act and domestic law allegedly provided for such compensation.

25. The Government submitted that the exercise of the applicant's right to obtain compensation for his destroyed car depended on there being a compensatory mechanism, which had to be established in a separate law. However, at the time of the dispute and the court proceedings in the applicant's case, no such legislative mechanism had been introduced. For this reason, and referring to the Supreme Court's findings (see paragraph 16 above), the Government noted that the right to compensation provided for in section 19 of the Anti-Terrorism Act did not give rise to a legitimate expectation that the State would provide such compensation for the applicant's car destroyed during the shelling. Relying on *Petlyovanyy* (cited above), the Government submitted that, in the absence of a law establishing a mechanism for compensation for damage caused by a terrorist act, the applicant did not have a sufficiently established claim to compensation for the purposes of Article 1 of Protocol No. 1 to the Convention and that his complaints should therefore be rejected as incompatible *ratione materiae*.

In addition, the Government submitted that the applicant had failed to exhaust the available domestic remedies because he had not lodged a civil claim within the criminal proceedings (see paragraphs 8-10 above) for compensation for the damage caused by the criminal offence and/or had not filed a constitutional complaint challenging the Supreme Court's interpretation of the relevant provisions of the Anti-Terrorism Act as unconstitutional. The Government further observed that the Supreme Court, in its final decision, had acknowledged that the State had failed to comply with its positive obligation under Article 1 of Protocol No. 1 to the Convention by failing to introduce an appropriate legislative mechanism to compensate the applicant for the value of his car; it had also awarded

the applicant some compensation for the State's failure to do so (see paragraph 16 above). In view of this, the Government stressed that the applicant lacked victim status.

26. The applicant maintained the application without, however, commenting on the Government's admissibility objections.

27. The Court does not consider it necessary to examine the non-exhaustion objection raised by the Government because the application is inadmissible for the reasons set out below.

28. The Court reiterates that Article 1 of Protocol No. 1 to the Convention protects "possessions", which can be either existing possessions or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right (see *Kopecký v. Slovakia* [GC], no. 44912/98, § 35, ECHR 2004-IX). Where a proprietary interest is in the nature of a claim, the person in whom it is vested may be regarded as having a legitimate expectation if there is a sufficient basis for the interest in national law, for example where there is settled case-law of the domestic courts confirming its existence (see *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 65, ECHR 2007-I). A legitimate expectation must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision (see *Béláné Nagy v. Hungary* [GC], no. 53080/13, § 75, 13 December 2016). In order to create a legitimate expectation, the legal provision relied upon must determine the necessary rules for a claim. If the legal conditions to be met and the other parameters of a claim are not clearly defined, the legal provision in question cannot be said to serve as a basis for a legitimate expectation (see *Klaus and Iouri Kiladze v. Georgia*, no. 7975/06, §§ 58-60, 2 February 2010).

29. The Court notes at the outset that section 19 of the Anti-Terrorism Act, as worded at the material time, provided for compensation from the State to be paid for damage caused to individuals by a terrorist act. At the same time, that section clearly provided that entitlement to such compensation was conditional, in that the conditions and procedure for the award and payment of such compensation were to be established by a law (and, after the recent legislative changes, by a regulation), which, however, has never been enacted (see paragraphs 18-20 above). The Court further observes that in the present case the Supreme Court confirmed, referring to its well-established case-law (see paragraphs 21 and 22 above), that in the absence of a legislative mechanism laying down the conditions and procedure, no enforceable right to compensation could arise from section 19 of the Anti-Terrorism Act taken alone (see paragraph 16 above). The applicant has not argued that the Supreme Court's interpretation of domestic law on this point was arbitrary, contrary to the principles and rules of legislative technique in Ukraine, or otherwise untenable.

30. Given the above, the Court agrees with the Government that there was no sufficient legal basis either in law or in case-law for the applicant's alleged enforceable right to compensation from the State for the destruction of his car. It follows that the applicant cannot argue that, with regard to the state of Ukrainian law at the relevant time and at present, he had a legitimate expectation of obtaining such compensation from the State Budget (see, for a similar approach, *Zolotyuk v. Ukraine* (dec.), no. 3958/13, 16 December 2014, and contrast *Budchenko*, cited above, § 38, where the applicant's pecuniary interest was recognised by the national authorities). It follows that this part of the applicant's Article 1 of Protocol No. 1 complaint is incompatible *ratione materiae* within the meaning of Article 35 § 3 (a) of the Convention.

31. Insofar as the applicant complains, in addition, that the very failure of the Ukrainian Parliament to adopt additional legislation providing for an enforceable right to compensation in situations such as that at issue and setting out the conditions and modalities for the exercise of such a right was in itself in breach of the respondent State's duties flowing from Article 1 of Protocol No. 1 to the Convention, the Court emphasises at the outset that the State's obligation to protect the right to peaceful enjoyment of possessions guaranteed by Article 1 of Protocol No. 1 to the Convention is not absolute and cannot extend further than what is reasonable in the circumstances (see, *mutatis mutandis*, *Hadzhiyska v. Bulgaria* (dec.), no. 20701/09, 15 May 2012). Nonetheless, without there being a need to determine whether in the circumstances of the present case Article 1 of Protocol No. 1 to the Convention could be interpreted in the sense of giving rise to an obligation to adopt a compensation mechanism for damage resulting from terrorist acts, the Court considers that this part of the applicant's complaint is in any event inadmissible for loss of victim status within the meaning of Article 34 of the Convention and the Court's case-law. Indeed, the Court observes that in the domestic proceedings brought by the applicant the Supreme Court acknowledged the State's failure to introduce an appropriate mechanism for compensation for damage caused by a terrorist act and awarded the applicant approximately EUR 332 in compensation for that omission (see paragraph 16 above).

32. As regards Article 13, the Court, having found the complaints under Article 1 of Protocol No. 1 to the Convention inadmissible, also concludes that the applicant has no arguable claim for the purposes of Article 13 of the Convention (see, *mutatis mutandis*, *Rodić and Others v. Bosnia and Herzegovina*, no. 22893/05, § 82, 27 May 2008). It follows that the latter provision did not apply and that, therefore, the complaint under Article 13 is incompatible *ratione materiae* with the Convention and must be rejected pursuant to its Article 35 §§ 3 (a) and 4.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 27 June 2024.

Victor Soloveytchik Registrar	Mattias Guyomar President