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

# FIFTH SECTION

# DECISION

Application no. 45230/15
Tetyana Vasylivna TYMCHYSHENA
against Ukraine

The European Court of Human Rights (Fifth Section), sitting on 23 March 2023 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. 45230/15) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 2 September 2015 by a Ukrainian national, Ms Tetyana Vasylivna Tymchyshena ("the applicant"), who was born in 1964 and lives in Shpykiv, and was represented by Ms I. Shevchuk, a lawyer practising in Kyiv;

the decision to give notice of the complaint under Article 1 of Protocol No. 1 to the Ukrainian Government ("the Government"), represented by their then Agent, Mr I. Lishchyna, and to declare the remainder of the application inadmissible;

the parties' observations;

Having deliberated, decides as follows:

## SUBJECT MATTER OF THE CASE

1. The case concerns the applicant's failure to declare cash when she was crossing the Ukrainian border and the sanction imposed on her in that connection. It primarily raises an issue under Article 1 of Protocol No. 1 to the Convention.

2. On 19 December 2014 the applicant was crossing the Ukrainian border in a lorry using the "red channel" (which was reserved for those with goods to declare) to pass through the customs control area. In a written declaration,

which she filled in at the request of the customs officers, the applicant stated that she was transporting 600 United States dollars (USD) and 35,000 Russian roubles (RUB – equivalent to 435 euros at the time). During the search procedure which followed, the applicant informed the customs officers that she also had USD 20,000 in her suitcase. The search revealed that she had USD 65,910 hidden in the lining of her suitcase and USD 202,000 placed in a recess under a mattress behind the driver's seat of the lorry; the cash had been wrapped in a black polyethylene bag. The customs officers drew up an administrative offence report concerning the discovery of an undeclared sum of money and a violation of customs rules by the applicant. The report was signed by the applicant, with no objections recorded on the document.

3. In a written statement which she gave to the customs authorities at the time, the applicant explained, among other things, that only USD 20,000 out of the total amount of USD 65,910 in her suitcase belonged to her; the remaining sums in the suitcase and in the lorry belonged to Ms A. and Ms L., who had entrusted the applicant, while she was in Russia, to transport their money to Ukraine; Ms A. had told the applicant that her package contained USD 45,000 and Ms L. had said that hers contained USD 100,000. The applicant stated that she had not declared the money because she had been afraid that she would not be allowed to pass through the border. She further stated that she had eventually informed the officers of only her part of the money because she had not counted the money given to her by Ms A. and Ms L. and had therefore been unaware of the exact amount of cash she was transporting. Nothing in the material available to the Court suggests that the applicant provided the customs officers with any documents relating to the undeclared sums.

4. In proceedings before the first-instance court, the applicant confirmed that only USD 20,000 of the undeclared amount of USD 267,910 had been her own property. She submitted that the USD 202,000 found in the lorry was a loan given to her by Mr U., who, when giving her the money, had told her that the total amount was USD 150,000. She further submitted that the remainder of the cash belonged to Ms A., and that the latter had asked the applicant to hand it over to her daughter in Ukraine. The applicant provided copies of a handwritten statement, dated 10 December 2014, acknowledging that she had received RUB 8,755,000 (equivalent to approximately USD 161,000 at the relevant time) from Mr U., and submitted a handwritten letter from Ms A., dated 14 December 2012, indicating the sum of USD 45,000. Stating that she frequently travelled abroad, the applicant submitted that she had forgotten to declare the money because she was feeling unwell when crossing the border and that she had hidden the money for security purposes only, so that it would not be stolen from her during her journey. In her submissions before the appellate court, the applicant explained that her failure to declare the full amount of the cash had stemmed from her understanding that she would need to fill in separate declarations for the

money she had been carrying in her luggage and in the lorry. She argued that she had voluntarily shown the officers the money (USD 65,910) which had been hidden in the suitcase. Reiterating that her state of health had prevented her from thinking clearly, the applicant submitted that the explanations she had written at the customs office had been "practically dictated" to her by the officers, who had used her weakness against her. The applicant concluded by stating that she had committed no offence since she had had no intent to conceal the money from customs control.

5. The domestic judicial process ended with a final decision, given on 10 March 2015 by the Chernihiv Regional Court of Appeal, finding the applicant guilty of transporting goods across the border by concealing them from customs control (Article 483 § 1 of the Customs Code). It ordered that the undeclared goods (cash) be forfeited and that the applicant pay a fine equal to 100% of the customs value of the goods which she had transported while avoiding customs inspection, a sanction prescribed by the relevant Article of the Customs Code. The Court of Appeal found that the intent to conceal the money was apparent from the available evidence, which was coherent and consistent.

The Court of Appeal noted, *inter alia*, that the applicant had declared only part of the money but had not mentioned the other money she had been transporting until the customs search had commenced. It further found that the content and structure of the written explanations given by the applicant at the customs office did not suggest that the statements she had made had been dictated to her; her answers had been consistent and coherent with the other evidence in the case. With regard to the sanction, the Court of Appeal noted that it was provided for in the relevant Article of the Code and that it had been decided taking into account the nature of the offence, the degree of the applicant's guilt and relevant information about her.

6. On 12 February 2015 enforcement proceedings concerning the confiscation of the cash were completed.

## THE COURT'S ASSESSMENT

7. Relying on Articles 6 and 13 of the Convention and Article 1 of Protocol No. 1 to the Convention, the applicant complained that the sanction – the confiscation of the money which she had been transporting across the Ukrainian border in violation of her duty to declare it to the customs authorities – had constituted a disproportionate interference with her property rights. The Court, being the master of the characterisation to be given in law to the facts of the case, considers that the complaint falls to be examined under Article 1 of Protocol No.1 only.

8. Given the applicant's submission before the domestic authorities, which has not been disputed by the Government, that she only owned part of the confiscated money (see paragraphs 3 and 4 above), the Court finds that

the "possession" in issue in the present case is the money which the applicant claimed was her own, namely USD 20,000 (see, for a similar approach, *Karapetyan v. Georgia,* no. 61233/12, § 31, 15 October 2020).

9. The Court further finds that the applicable rule is that concerning the control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1 to the Convention (see *Togrul v. Bulgaria*, no. 20611/10, § 38, 15 November 2018).

10. The parties agreed that the confiscation of the money which the applicant claimed as her own had amounted to an interference with the applicant's right to the peaceful enjoyment of her possessions. They also agreed that the interference had been "provided for by law" and conformed to the general interest of the community. The Court finds no reason to hold otherwise. It notes that Article 483 § 1 of the Customs Code, on which the interference was based, was foreseeable in its application and accessible and that the measure at issue had the legitimate aim of preventing money laundering and other financial crimes and was therefore in the public interest (see *Sadocha v. Ukraine*, no. 77508/11, § 26, 11 July 2019).

11. The applicant and the Government disagreed as to whether the interference with the applicant's property rights was compatible with the proportionality requirement set out in Article 1 of Protocol No. 1. The applicant relied on the unintentional nature of her conduct, her unawareness of the customs rules, her voluntary disclosure of the cash to the customs authorities and the lawful origin of the money. According to the Government, the present case was similar to that of *Karapetyan* (cited above), in which the Court found no breach of Article 1 of Protocol No. 1 on account of the seizure of undeclared money from the applicant.

12. The Court reiterates that in order to be proportionate, the interference should correspond to the severity of the infringement, and the sanction to the gravity of the offence it is designed to punish (see, among other authorities, *Boljević v. Croatia*, no. 43492/11, § 44, 31 January 2017).

13. Against this background, the Court notes that the wording of Article 483 § 1 of the Customs Code leaves no discretion to the domestic courts as to the sanction to be imposed, since confiscation and a fine are mandatory. The Court has found that rigid domestic laws which make confiscation an automatic sanction often lead to domestic court decisions that fail to strike a fair balance between the requirements of the general interest and the protection of an individual's right to property (see, among other authorities, *Gyrlyan v. Russia*, no. 35943/15, §§ 30 and 31, 9 October 2018). However, the Court's task is not to review domestic law *in abstracto*, but to determine whether the manner in which it was applied to, or affected, the applicant gave rise to a violation of the Convention (see *Garib v. the Netherlands* [GC], no. 43494/09, § 136, 6 November 2017, with further references). The Court notes in this connection that in the circumstances of the present case it is precluded from examining the imposed

sanction in its entirety since the applicant did not complain that the court's order to pay the fine interfered with her possession; her grievances concerned solely the confiscation of the cash, only a part of which constituted her "possession" for the purposes of Article 1 of Protocol No. 1 (see paragraph 8 above).

14. The Court reiterates that in some cases concerning Ukraine it has found confiscation measures similar to that at issue in the present case disproportionate (see, for instance, *Sadocha*, cited above, § 36, and *Yaremiychuk and Others v. Ukraine*, nos. 2720/13 and 6 others, § 35, 9 December 2021). However, unlike in those cases, in the present case, in view of the applicant's behaviour and submissions, the Court sees no reason to disagree with the findings of the domestic courts that the applicant made a deliberate decision to avoid making an appropriate declaration for the total amount of cash she was transporting and to attempt to cross the border with the money concealed from the customs authorities.

15. The Court further observes that, according to the applicant's own submissions before the domestic courts, she had gone abroad on a number of occasions prior to the events in issue (see paragraph 4 above). She must have been aware of the fact that such a considerable amount of cash had to be declared to the customs authorities. In fact, unlike the applicants in the cases referred to in paragraph 14 above, the applicant in the present case chose to cross the border using the red channel and filled in the declaration form given to her by the customs officers (see paragraph 2 above). However, in doing so, she chose to provide false information as regards the amount of cash she was transporting.

16. In addition, while the issue of the ownership of the confiscated sums might have been irrelevant with respect to the application of the related sanction, as the relevant domestic law applies to the transport of undeclared money regardless of its ownership, the Court cannot but also note the inconsistent nature of the applicant's statements concerning the origin of the money, in particular with regard to the sum of USD 202,000. In her written explanations to the customs authorities, the applicant submitted that that money belonged to Ms L., who had asked the applicant to take it to Ukraine and had told her that it amounted to USD 100,000 (see paragraph 3 above); the applicant allegedly took the money without counting it. At the same time, as is indicated by the documents available to the Court, the applicant submitted before the domestic courts that the money belonged to Mr U., who had lent it to her (see paragraph 4 above). In the Court's view, such discrepancies in the applicant's statements raise reasonable doubts as to the applicant's conduct and the reliability of her submissions concerning the ownership and lawful origin of the money.

17. While the Court has found above that the applicant can be presumed to have owned only a part of the sum confiscated from her, namely USD 20,000, it also cannot overlook, in the assessment of the proportionality

of the interference, the total amount of cash transported by the applicant as she attempted to circumvent the customs inspection.

18. Lastly, the applicant did not submit any documents to the domestic courts or to the Court detailing her financial situation at the material time.

19. In the light of the foregoing and the particular circumstances of the present case, the Court does not consider that the confiscation of USD 20,000 out of the total sum of USD 267,910 was on the face of it disproportionate or that, in the circumstances, the applicant suffered an excessive individual burden as a result of the confiscation measure under review.

20. In view of the above, the Court finds that the applicant's complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court, unanimously,

*Declares* the application inadmissible.

Done in English and notified in writing on 13 April 2023.

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| Martina Keller<br>Deputy Registrar | Mārtiņš Mits<br>President |