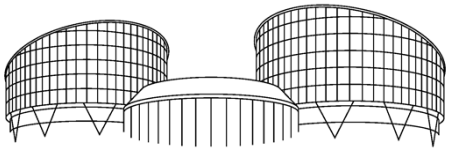

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF EL OZAIR v. ROMANIA

(Application no. 41845/12)

JUDGMENT

STRASBOURG

22 October 2019

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

In the case of El Ozair v. Romania,

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

Faris Vehabović, *President,*
Iulia Antoanella Motoc,
Carlo Ranzoni, *judges,*

and Andrea Tamietti, *Deputy Section Registrar,*

Having deliberated in private on 1 October 2019,

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

PROCEDURE

1. The case originated in an application (no. 41845/12) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Lebanese and Guatemalan national, Mr Lorence El Ozair ("the applicant"), on 18 May 2012.

2. The applicant was represented by Mr S.D. Lungu, a lawyer practising in Bucharest. The Romanian Government ("the Government") were represented by their Agent, most recently Mr V. Mocanu of the Ministry of Foreign Affairs.

3. On 29 May 2018 the Government were given notice of the complaint concerning an alleged breach of the applicant's right to respect for his possessions on account of the sanctions imposed on him by the Customs Office for failure to declare a sum of cash upon exiting the country. The remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

4. The Government objected to the examination of the application by a Committee. Having considered the Government's objection, the Court dismisses it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1964 and lives in Bucharest.

6. In the night of 16-17 October 2010, prior to embarking a flight to Lebanon, the applicant was stopped by a customs officer before exiting the customs control area. When asked, the applicant declared that he was carrying 13,500 US dollars (USD), that is to say a little less than the maximum amount allowed of 10,000 euros (EUR) (see paragraph 13 below). His luggage was searched by the customs officer in the applicant's presence. An additional sum of USD 80,000 was found hidden in a shoe.

7. The money found in the luggage was confiscated on the spot and the applicant was fined 8,000 Romanian lei (RON), approximately EUR 1,800 at that time.

8. On 2 November 2010 the applicant lodged an application with the Buftea District Court, seeking annulment of the administrative-offence report. He argued that he had that money from selling a car and his share in a flat in Bucharest. He presented copies of the respective sales contracts.

9. The District Court dismissed the action in a decision of 15 March 2011. The court established that the applicant had intended to hide the amount of USD 80,000 in order to avoid declaring it. The court further considered that the fine inflicted on the applicant had been proportionate to the seriousness of the deed and reiterated that the confiscation of the amount over the legal limit of EUR 10,000 was expressly provided by law and was thus mandatory.

10. The applicant appealed, and in a final decision of 19 January 2012 the Bucharest County Court upheld the previous decision on the same grounds as those given by the District Court. As for the sanctions applied, the court found as follows:

> "Even assuming that this sum of cash is not related to any illegal activity, as [the applicant] avers, this fact is irrelevant, in so far as the legislature criminalised the very act of failing to declare in writing, to the Customs Office, sums of cash of a value equal or more than that set by [the relevant EU] Regulation, independent of the source of that sum of cash.
>
> As for the penalty applied, the court considers that it was correctly individualised, bearing in mind the seriousness of the deeds committed."

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

11. The relevant provisions of Government Decision no. 707/2006 on the Rules of enforcement of the Customs Code read as follows:

Article 653

> "The following is considered an administrative offence and shall be sanctioned with a fine between [RON] 3,000 and 8,000 ...:
>
> ...
>
> (i) failure by natural persons who cross the border to abide by the obligation prescribed under Article (3) of Regulation (EC) No 1889/2005 of the European Parliament and of the Council, to declare in writing to the customs authorities of cash in national and/or foreign currency equal or higher than the limit prescribed by that Regulation, carried upon themselves, in their means of transportation or in their attended or unattended luggage, as well as in parcels. Cash undeclared in writing and exceeding the limit prescribed by [Regulation (EC) No 1889/2005 of the European Parliament and of the Council] shall be confiscated."

12. A comprehensive presentation of the relevant provisions of EU law and practice and of the international standards on money laundering can be found in *Grifhorst v. France* (no. 28336/02, §§ 27-56, 26 February 2009).

13. In particular, the relevant provisions of Regulation (EC) no I1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community read as follows:

Article 3
Obligation to declare

"1. Any natural person entering or leaving the Community and carrying cash of a value of EUR 10 000 or more shall declare that sum to the competent authorities of the Member State through which he is entering or leaving the Community in accordance with this Regulation. The obligation to declare shall not have been fulfilled if the information provided is incorrect or incomplete."

Article 4
Powers of the competent authorities

"1. In order to check compliance with the obligation to declare laid down in Article 3, officials of the competent authorities shall be empowered, in accordance with the conditions laid down under national legislation, to carry out controls on natural persons, their baggage and their means of transport.

2. In the event of failure to comply with the obligation to declare laid down in Article 3, cash may be detained by administrative decision in accordance with the conditions laid down under national legislation."

Article 9
Penalties

"1. Each Member State shall introduce penalties to apply in the event of failure to comply with the obligation to declare laid down in Article 3. Such penalties shall be effective, proportionate and dissuasive.

2. By 15 June 2007, Member States shall notify the Commission of the penalties applicable in the event of failure to comply with the obligation to declare laid down in Article 3."

14. In addition on 30 January 2019 the Court of Justice of the European Union ("the CJEU") examined an application for a preliminary ruling on whether national legislation allowing, in addition to the imposition of a penalty of a term of imprisonment or a fine, the undeclared sum to be confiscated by the State was proportionate (Joined Cases C-335/18 and C-336/18). It considered that an overall penalty consisting of fine and confiscation of the entire sum of undeclared cash was not proportionate to the aims sought.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

15. The applicant complained that the confiscation of USD 80,000 that he had failed to declare to a customs officer and the additional RON 8,000 fine imposed had breached his right to respect for his possessions, as provided in Article 1 of Protocol No. 1 to the Convention, 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

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

B. Merits

(a) The parties' observations

17. The applicant made reference to his statements from the application form. He contended that his right to respect for his possessions had been breached.

18. The Government admitted that the sanctions represented interference with the applicant's right to peaceful enjoyment of possessions. However, that interference was provided for by law and served the legitimate aim of preventing money laundering. They further contended that the two sanctions inflicted on the applicant had been proportionate to the specific danger represented by the applicant's conduct. Moreover, the domestic courts had reviewed the proportionality of the measures. They also noted that the fine itself had represented barely 2.25% of the amount that the applicant had failed to declare.

(b) The Court's assessment

19. The applicable general principles are set out in *Grifhorst v. France* (no. 28336/02, §§ 81-83, 26 February 2009).

20. Turning to the facts of the present case, the Court observes that it is not in dispute between the parties that the sanction imposed on the applicant represented interference with his right to peaceful enjoyment of possessions (see paragraph 18 above; see also *Ismayilov v. Russia*, no. 30352/03, § 29, 6 November 2008).

21. The Court reiterates its consistent approach that a confiscation measure, even though it involves a deprivation of possessions, falls within the scope of the second paragraph of Article 1 of Protocol No. 1 to the Convention, which allows the Contracting States to control the use of property (see *Grifhorst*, §§ 85-86, and *Ismayilov* § 30, both cited above).

22. The obligation to declare the amount transported across the border is expressly provided in domestic law and in European Union law (see paragraphs 11 and 13 above). The domestic law provides the sanctions in the event of a failure to declare: a fine and confiscation of the sum of cash. The Court is therefore satisfied that the interference with the applicant's property rights was provided for by law, as required by Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Grifhorst*, cited above, §§ 90-91).

23. The Court further considers that the interference pursued a legitimate aim in the general interest, namely the fight against money laundering (ibid., § 92; see also *Boljević v. Croatia*, no. 43492/11, § 40, 31 January 2017, with further references).

24. Accordingly, the remaining question for the Court to determine is whether there was a reasonable relationship of proportionality between the means employed by the authorities to achieve that aim and the protection of the applicant's right to the peaceful enjoyment of his possessions. The requisite balance will not be achieved if the applicant has had to bear an individual and excessive burden (see *Ismayilov*, § 34; *Grifhorst*, § 94; and *Boljević*, § 41, judgments cited above).

25. The Court notes that the only administrative offence of which the applicant was found guilty consisted of his failure to declare to the customs authorities the USD 80,000 in cash which he was carrying. It has not been established that the confiscated cash had been unlawfully obtained (see paragraph 10 above). The applicant presented documentary evidence showing that the money had originated from the sale of his property (see paragraph 8 above). However, this element was of no relevance for the domestic courts, in so far as the domestic legislation imposed an automatic confiscation of any undeclared cash (see paragraph 11 above). Moreover, there is nothing to suggest that, by confiscating the amount of USD 80,000 from the applicant, the authorities sought to forestall any criminal activities, such as money laundering (see, *mutatis mutandis*, *Gyrlyan v. Russia*, no. 35943/15, § 27, 9 October 2018, and *Boljević*, cited above, § 43).

26. The confiscation measure in question was purely deterrent and punitive in its purpose. However, it has not been convincingly shown that the fine alone was not sufficient to achieve the desired deterrent and punitive effect and prevent future breaches of the declaration requirement. In these circumstances, the Court concludes that the confiscation of the entire amount of money that should have been declared, as an additional sanction to the fine, was disproportionate (ibid., § 45, with further references). The Court cannot but note that the CJEU has also recently decided that an overall penalty consisting of a fine and confiscation of the entire sum of undeclared cash was not proportionate (see paragraph 14 above).

27. The foregoing considerations are sufficient to enable the Court to conclude that by confiscating the undeclared sum of cash in addition to fining the applicant, the authorities imposed an excessive burden on the applicant which was disproportionate to the offence committed.

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

28. 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

29. The applicant claimed 80,000 United States dollars (USD) in respect of pecuniary damage, representing the sum of cash confiscated by the authorities. He also claimed USD 20,000 in respect of non-pecuniary damage.

30. The Government argued that the amounts sought were exaggerated. They pointed out that neither the Court nor the CJEU had decided what would be a proportionate sanction for a failure to declare. They further contended that no award should be made in respect of pecuniary damage, as the applicants can seek the reopening of the proceedings under Article 509 § 10 of the new Code of Civil Procedure. They also argued that the finding of a violation of the Convention should constitute in itself sufficient just satisfaction.

31. The Court has found that an amount of USD 80,000 was confiscated from the applicant in breach of Article 1 of Protocol No. 1 to the Convention. As to the Government's argument that the applicant could seek the reopening of the proceedings (see paragraph 30 above), the Court has

already noted that the domestic legislation imposed an automatic confiscation of any undeclared cash transported across the border (see paragraph 25 above). Under these circumstances, the Court considers that the Government have not shown how the applicant could benefit from the said reopening. It therefore accepts the applicant's claim in respect of pecuniary damage and awards him USD 80,000 under this head, plus any tax that may be chargeable on that amount.

32. As regards non-pecuniary damage, the Court considers that in the circumstances of the present case the finding of a violation of Article 1 of Protocol No. 1 to the Convention constitutes in itself sufficient just satisfaction (see in that sense *Boljević*, cited above, § 54).

B. Costs and expenses

33. The applicant did not make any claim under this head.

34. Consequently, the Court is not called upon to make an award for costs and expenses.

C. Default interest

35. The Court 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. *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 the non-pecuniary damage sustained by the applicant;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, USD 80,000 (eighty thousand US dollars), plus any tax that may be chargeable, to be converted into the currency of the respondent State at the rate applicable at the date of settlement, in respect of pecuniary damage;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount 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 22 October 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti	Faris Vehabović
Deputy Registrar	President