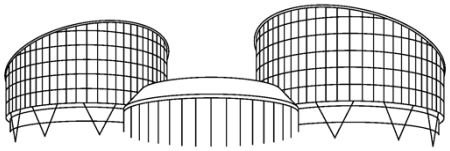

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF ANDONOSKI v. THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

(*Application no. 16225/08*)

JUDGMENT

STRASBOURG

17 September 2015

FINAL

17/12/2015

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Andonoski v. the former Yugoslav Republic of Macedonia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

András Sajó, *President,*
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Paulo Pinto de Albuquerque,
Dmitry Dedov, *judges,*

and André Wampach, *Deputy Section Registrar,*

Having deliberated in private on 25 August 2015,

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

PROCEDURE

1. The case originated in an application (no. 16225/08) against the former Yugoslav Republic of Macedonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Macedonian national, Mr Denis Andonoski ("the applicant"), on 24 March 2008.

2. The applicant was represented by Mr B. Šokoski, a lawyer practising in Prilep. The Macedonian Government ("the Government") were represented by their Agent, Mr K. Bogdanov.

3. The applicant alleged that his car, with which he made a living, had been confiscated in criminal proceedings, despite the fact that he had not been convicted of any offence.

4. On 26 November 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1968 and lives in Prilep.

6. The applicant was a taxi driver. On 25 July 2007 his car was parked on a taxi post at the Prilep bus station. As established in the course of the subsequent criminal proceedings (see paragraph 9 below), P.K., accompanied by S.O. and G.F., all Albanian nationals ("the migrants"),

asked the applicant to drive them to the village of Vitolište, Mariovo. Only P.K., who was fluent in Macedonian, told the applicant that they were going to Vitolište to work. S.O. and G.F. did not speak during the journey. At around 4 p.m. they were stopped by the police at a place called Sliva. The migrants had no travel documents. The applicant and the migrants were arrested. The applicant's car was also seized. A receipt for temporarily seized objects was issued to him.

7. On 26 July 2007 an investigating judge of the Prilep Court of First Instance ("the trial court") opened an investigation against the applicant and P.K. on grounds of a reasonable suspicion of migrant smuggling, punishable under Article 418-b of the Criminal Code (see paragraph 15 below).

8. On 8 August 2007 the public prosecutor withdrew the charges against the applicant for lack of evidence. In a written statement of that date the public prosecutor indicated that there was no evidence that the applicant had known or had reasonable grounds to believe that he had transported illegal migrants. He had met them for the first time at the Prilep bus station. He had never had any contact with them before. Since P.K. was fluent in Macedonian, the applicant could not have suspected that he (P.K.) was a migrant. The other two migrants had not spoken during the journey. Furthermore, P.K. had confirmed that he had misled the applicant, since otherwise nobody would have driven them. For that reason, he had advised S.O. and G.F. not to speak. When the police had stopped them, he had apologised to the applicant. That had been confirmed by S.O. and G.F. and two police officers who had stopped them on the day in question. On the same day, the investigating judge discontinued the investigation concerning the applicant. The latter decision indicated that the applicant had no previous criminal record.

9. On 3 September 2007 the trial court convicted P.K. of migrant smuggling and sentenced him to one year's imprisonment. The court established that P.K. had told S.O. and G.F., illegal migrants from Albania, that he could transfer them illegally into Greece. They had paid him 270 euros (EUR). They had crossed the Macedonian-Albanian border illegally; they had used a taxi to travel to several cities in the respondent State and to arrive ultimately at the Prilep bus station. There, P.K. had agreed with the applicant, who participated in the proceedings as a witness, to transport them to the village of Vitolište, from where all the migrants had intended to cross the border on foot.

10. The trial court also ordered, under Articles 100-a and 418-b of the Criminal Code 2004 (see paragraphs 14 and 15 below) confiscation of the applicant's car, as the means by which the criminal offence had been committed ("the confiscation order"). The relevant part of the judgment reads as follows:

> "According to Article 100-a(2) and (3) taken in conjunction with Article 418-b(5) of the [Criminal Code], the court confiscated ... from [the applicant] the vehicle which

had been used for transportation of [S.O. and G.F.], because [the applicant] could have known that [they] were migrants, since both of them – the witnesses [,] had not talked, had not had any equipment with which they would work as construction workers or lumberjacks, and also the time in the afternoon when he had transported them to Mariovo indicated that they were not going to work, but [had intended] to cross the Macedonian-Greek border illegally at night, which should have been known to the [applicant] as an experienced taxi-driver. [The applicant] also stated that he had been suspicious about one of the witnesses, because he had been thin, which meant that he could have known that they had been migrants and not (ordinary) persons who were going to Vitolište to work, as he himself had known that the border was illegally crossed near the villages Vitolište, Canište and Bešište."

11. The applicant appealed, arguing that the confiscation order had not been based on any fact. He had not been convicted of any crime and the trial court was not entitled to order confiscation of his car. P.K., who was convicted, had been travelling in the car as a passenger. The fact that the public prosecutor had withdrawn the charges against him confirmed that he had not known that he was transporting illegal migrants. No evidence had been adduced to prove otherwise. Lastly, he had never been involved in migrant smuggling.

12. On 7 November 2007 the Bitola Court of Appeal dismissed the applicant's appeal and upheld the confiscation order. The relevant part of the decision reads as follows:

"It is true that the first-instance court, in the operative part and in the reasoning of the impugned judgment concerning the confiscation of the [car], provided reasons, [i.e.] referred to Articles 100-a (2) and (3) in conjunction with Article 418-b (5) of [the Criminal Code], which constitute an incorrect application of the substantive law, and an incorrect application of [the Code]. Article 100-a of [the Code] concerns the confiscation of objects, and paragraph (3) refers to objects used for the commission of a criminal offence. When those objects are owned by a third person, they may be confiscated only if third persons knew or could and ought to have known that the objects are being used or are intended to be used to commit an offence. In the present case there is no need for the application of this rule, because the rule contained in Article 418-b (5) necessarily requires the confiscation of the objects and the means of transport used to commit the offence, irrespective of whom they belong to, whom they are for, or whom they come from.

In such circumstances, coupled with the fact which was established beyond any doubt, (namely) that this offence was committed by the accused with the [applicant's] vehicle, the court was correct to confiscate the vehicle by its decision contained in the operative provision of the judgment."

13. On 23 January 2008 the public prosecutor notified the applicant that there were no grounds to institute legality review proceedings (*барање за заштита на законитоста*).

II. RELEVANT DOMESTIC LAW

Criminal Code 2004 (Official Gazette no.19/2004, 30 March 2004)

14. The relevant provisions of the Criminal Code state as follows:

"2. Confiscation of objects (*Одземање предмети*)
Conditions for confiscation
Article 100-a

(1) Nobody can keep or withhold the proceeds of crime.

(2) The objects which were intended to be used or were used to commit the crime will be confiscated from the offender, regardless of whether he or she or a third person is their owner, if the interests of general security, the health of the people or the ethics so require.

(3) The objects which were used or were intended to be used to commit the crime can be confiscated if there is a danger that they will be used again to commit a crime. Objects owned by a third person will not be confiscated, unless he or she knew or could and ought to have known that they have been used or were intended to be used to commit the offence.

(4) The court will issue a confiscation order in proceedings regulated by a law also when, for factual or legal obstacles, it is not possible that criminal proceedings are conducted against the offender.

(5) The application of this measure does not affect the right of third parties to compensation of damage against the offender."

15. Article 418-b, which specifically concerns the offence of smuggling of migrants, states as follows:

"Smuggling of migrants
Article 418-b

...

(5) The objects and means of transport used to commit the offence shall be confiscated."

THE LAW

I. ARTICLE 1 OF PROTOCOL NO. 1 OF THE CONVENTION

16. The applicant complained that his car had been confiscated despite the fact that he had not been convicted. He relied on Article 6 of the Convention.

17. The Government, in the context of their admissibility objections, argued that the applicant's allegations were essentially of a fourth-instance nature, as they related to the application of the domestic law and the manner

in which the domestic courts had established the facts. This complaint therefore fell outside the scope of the Court's review.

18. The Court considers that this objection concerns the characterisation of the applicant's complaint. In this connection it reiterates that it is master of the characterisation to be given in law to the facts of the case, and that it is therefore not bound by the characterisation given by the applicant or the Government. A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on (see *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 54, 17 September 2009; *Şerife Yiğit v. Turkey* [GC], no. 3976/05, § 52, 2 November 2010; *Arsovski v. the former Yugoslav Republic of Macedonia*, no. 30206/06, § 33, 15 January 2013; and *Budchenko v. Ukraine,* no. 38677/06, § 25, 24 April 2014).

19. The Court observes that the applicant's complaint in the present case concerns essentially the confiscation of his car. It considers therefore that it should be analysed under 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

20. The Government submitted that the applicant had failed to exhaust all available domestic remedies. In particular, he had failed to initiate civil proceedings for compensation against P.K. under Article 100-a (5) of the Criminal Code. In this connection, the Government cited the case of *Jusufoski* (*Jusufoski v. the former Yugoslav Republic of Macedonia* (dec.), no. 32715/04, 23 August 2009).

21. The applicant did not comment on this argument.

22. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 of the Convention obliges those seeking to bring their case against the State before an international judicial organ to first use the remedies provided by the national legal system (see *Aksoy v. Turkey,* 18 December 1996, § 51, Reports 1996-VI). Applicants are only obliged to avail themselves of domestic remedies that are effective and capable of redressing the alleged violation. More specifically, the only remedies which Article 35 § 1 of the Convention requires to be used are those that relate to the breaches alleged and which are, at the same time, available and sufficient (see *Paksas v. Lithuania* [GC], no. 34932/04, § 75, ECHR 2011

(extracts), and *Papadakis v. the former Yugoslav Republic of Macedonia*, no. 50254/07, § 101, 26 February 2013).

23. In the instant case, the Court notes that the gist of the applicant's grievances concern the confiscation of his car by the State authorities and not the fact that he suffered damage as a result of the actions of P.K., who was convicted for smuggling of migrants. In this respect, the Court observes that the applicant appealed against the confiscation order; in his appeal he raised in substance the arguments which he reiterated in the application before the Court. The Court of Appeal was competent to quash or overturn the confiscation order. The Court therefore considers that the applicant used a reasonable avenue to challenge the confiscation order. It will refer to the Government's argument that the applicant could have claimed compensation from P.K. in context of the proportionality of the measure (see paragraph 39 below).

24. In view of these considerations, the Court considers that the Government's non-exhaustion objection should be dismissed.

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

B. Merits

1. The parties' submissions

26. The applicant submitted that he was a taxi driver and that he had been making a living for himself and his family by using the car which had now been confiscated. He had no criminal record. Furthermore, it had not been established that he had known that the individuals he had transported were illegal migrants. He had just been doing his job and he had not been required to ask the passengers for their identity. The way in which Article 418-b had been applied in his case implied that every means of public transport used for transportation of illegal migrants should be confiscated. The confiscation of the car pursued no public interest, nor could it have had the aim of preventing the commission of further offences, given that the applicant had not been convicted.

27. The Government argued that the confiscation of the applicant's car had been based on Article 418-b of the Code and had therefore been lawful. It had served the aim of preventing the use of the car for the commission of further criminal offences. The measure amounted to control of use of property, in which States enjoyed a wide margin of appreciation. The applicant had had the opportunity to present his case before the competent domestic bodies, namely to lodge an appeal against the confiscation order. In addition, the domestic courts' decisions had provided sufficiently

developed reasoning for their decisions. Accordingly, the confiscation had not been disproportionate.

2. The Court's assessment

(a) The applicable rule

28. It is not in dispute between the parties that the confiscation order amounted to an interference with the applicant's right to peaceful enjoyment of his possessions. It remains to be determined whether the measure was covered by the first or second paragraph of that Convention provision.

29. The Court reiterates that Article 1 of Protocol No. 1 comprises three rules: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers the deprivation of property and subjects it to conditions; the third rule, stated in the second paragraph, recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, must be read in the light of the general principle laid down in the first rule (see, among many other authorities, *Hábenczius v. Hungary*, no. 44473/06, § 27, 21 October 2014; *Rummi v. Estonia*, no. 63362/09, § 101, 15 January 2015; and *Veits v. Estonia*, no. 12951/11, § 69, 15 January 2015).

30. In the instant case, the Court notes that the confiscation of the applicant's car was a permanent measure which entailed a conclusive transfer of ownership (see, conversely, *JGK Statyba Ltd and Guselnikovas v. Lithuania*, no. 3330/12, § 115, 5 November 2013; and *Hábenczius*, cited above, § 28). The Government did not argue that there was any possibility for the applicant to seek restoration of his car (see, conversely, *C.M. v. France* (dec.), no. 28078/95, § 1, ECHR 2001-VII). The Court therefore considers that the measure amounts to a deprivation of property.

(b) Compliance with Article 1 of Protocol No. 1

31. As the Court has held on many occasions, interference with property rights must be prescribed by law and pursue one or more legitimate aims. In addition, there must be a reasonable relationship of proportionality between the means employed and the aims sought to be realised. In other words, the Court must determine whether a fair balance was struck between the demands of the general interest and the interest of the individuals concerned. The requisite balance will not be found if the person or persons concerned have had to bear an individual and excessive burden (see *James and Others v. the United Kingdom*, 21 February 1986, § 50, Series A no. 98;

Schirmer v. Poland, no. 68880/01, § 35, 21 September 2004; and *Waldemar Nowakowski v. Poland*, no. 55167/11, § 47, 24 July 2012).

32. The Court notes at the outset that the confiscation of the applicant's car was based, as explained by the Court of Appeal (see paragraph 12 above), on Article 418-b of the Criminal Code. The confiscation order was therefore prescribed by law.

33. Moreover, it pursued the legitimate aim of preventing clandestine immigration and trafficking in human beings (see *Yildirim v. Italy* (dec.), no. 38602/02, ECHR 2003-IV).

34. As regards the balance between that aim and the applicant's rights, the Court reiterates that, where possessions that have been used unlawfully are confiscated, such a balance depends on many factors, which include the owner's behavior (see *Waldemar Nowakowski*, cited above, § 50).

35. The Court, in this respect, firstly notes that the car was confiscated in the context of criminal proceedings against a third person, namely P.K., after the criminal charges against the applicant had been withdrawn by the public prosecutor. The prosecutor noted that the applicant had not been aware that his car had been used to transport illegal migrants. On the basis of the prosecutor's statement, the investigating judge discontinued the investigation concerning the applicant (see paragraph 8 above).

36. In addition, the applicant had been making his living as a taxi driver. He had no criminal record. There was no indication that his car had been previously used to commit an offence (see, conversely, *Air Canada v. the United Kingdom*, cited above, § 41). Nor is there anything to suggest that there were any reasons to fear that the car would be used to commit further offences.

37. The Court particularly notes that under Article 418-b of the Criminal Code the confiscation of vehicles used for smuggling of migrants is mandatory (see, conversely, *Waldemar Nowakowski*, cited above, § 51). In other words, that provision provides for an automatic confiscation of means of transport used for smuggling of migrants (see*, mutatis mutandis, Grifhorst v. France*, no. 28336/02, § 100, 26 February 2009), and it does not allow for any exceptions. It is applied irrespectively of whether those means were owned by the offender or a third party and, in the latter case, irrespectively of the third party's behavior or relation to the offence.

38. In the present case, such an automatic confiscation deprived the applicant of any possibility to argue his case and have any prospect of success in the confiscation proceedings. Similarly, the domestic courts, in such circumstances, had no discretion and were unable to examine the case on the basis of any of the factors described above (see paragraphs 36 and 37).

39. Lastly, the Court observes that Article 418-b of the Criminal Code, on which the confiscation order was based, did not provide for the possibility to claim compensation as specified under Article 100-a of the

Code. The Government did not provide any illustration of domestic practice that would demonstrate that a compensation claim under Article 100-a (5) was available, let alone effective, in similar circumstances to the applicant's case.

40. In such circumstances, the Court is of the view that the confiscation order was disproportionate, in that it imposed an excessive burden on the applicant.

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

42. 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

43. The applicant claimed, in respect of pecuniary damage, EUR 11,000, as the value of his car, arguing that he had paid that sum when he had bought the car. He did not provide any supporting document in this respect, arguing that he did not have any documents since his car had been seized. He argued that the catalogue value of the car in 2013 was EUR 3,924, again without providing any supporting document. He further claimed 1,242,000 Macedonian denars (MKD) on account of his lost earnings as a taxi driver. Concerning the latter sum, he argued that by being used as a taxi the car had provided him with a monthly income of MKD 18,000. In support, he submitted a copy of a document certifying the financial transactions of a company registered at the applicant's address for 2007. In addition, he claimed MKD 250,000 for non-pecuniary damage suffered as a result of the mental and physical suffering caused by the loss of means of making a living and the deterioration of family relations suffered as a result of the confiscation of the car.

44. The Government contested these claims as unsubstantiated.

45. The Court reiterates that the principle with regard to pecuniary damage is that the applicant should be placed as far as possible in the position in which he or she would have been had the violation found not taken place – in other words, *restitutio in integrum*. This can involve compensation for both loss actually suffered (*damnum emergens*) and loss, or diminished gain, to be expected in the future (*lucrum cessans*). It is for the applicant to show that pecuniary damage has resulted from the violation or violations alleged. The applicant should submit relevant documents to

prove, as far as possible, not only the existence but also the amount or value of the damage (see *Milosavljev v. Serbia*, no. 15112/07, § 67, 12 June 2012). The Court is also aware of the difficulties in calculating lost profits in circumstances where such profits could fluctuate owing to a variety of unpredictable factors (see *Dacia S.R.L. v. Moldova* (just satisfaction), no. 3052/04, § 47, 24 February 2009).

46. The Court notes that the applicant stated that he had bought the car in 2006 for EUR 11,000. The car was seized and confiscated in 2007. The Court considers that restoration of the car, in the state at the time of confiscation, would place the applicant in the position in which he would have found himself had the violation not occurred. In the alternative, if such restoration is impossible, the Court considers it appropriate to award the applicant EUR 10,000 for the actual loss sustained.

47. Concerning the applicant's claim for loss of income, the Court cannot decide, on the basis of documents submitted by the applicant, whether the income to which the applicant referred (see paragraph 43 above) was generated from his activities as a taxi driver. The Court therefore rejects the applicant's claim under this head.

48. On the other hand, the Court considers that the applicant must have sustained non-pecuniary damage which cannot be compensated for solely by the finding of a violation of the Convention. Making its assessment on an equitable basis, the Court awards the applicant EUR 3,000 under this head, plus any tax that may be chargeable.

B. Costs and expenses

49. The applicant also claimed MKD 7,150 for costs and expenses incurred before the Court, namely for his legal representative's fees.

50. The Government contested these as unsubstantiated and excessive.

51. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see *Stojkovic v. the former Yugoslav Republic of Macedonia*, no. 14818/02, § 55, 8 November 2007). In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award EUR 115 for the proceedings before the Court.

C. Default interest

52. 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;

3. *Holds*
   (a) that the respondent State is to return to the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the confiscated car in the state at the time of the confiscation;
   (b) that, failing such restitution, the respondent State is to pay the applicant, within the same three-month period, EUR 10,000 (ten thousand euros) in respect of pecuniary damage;
   (c) that in any event, the respondent State is to pay to the applicant, within the same three-month period, the following amounts:
      (i) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 115 (one hundred and fifteen euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (d) that the amounts in question are to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (e) 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;

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

Done in English, and notified in writing on 17 September 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach	András Sajó
Deputy Registrar	President