

IN THE NAME OF THE RUSSIAN FEDERATION

CONSTITUTIONAL COURT
OF THE RUSSIAN FEDERATION

Judgment
of 27 May 2008 No. 8-II

in the case concerning the review of constitutionality of the provisions of Section 1, Article 188 of the Criminal Code of the Russian Federation, in connection with a complaint of M. A. Aslamazyan.

Saint Petersburg, 27 May 2008

The Constitutional Court of the Russian Federation composed of Presiding Judge L. M. Zharkova and Judges Yu. M. Danilov, G. A. Zhilin, V. D. Zorkin, S. M. Kazantsev, M. I. Kleandrov, N. V. Melnikov, N. V. Seleznev, O. S. Khokhryakova,

in the attendance of the attorney V. V. Parshutkin as M. A. Aslamazyan's representative, Representative of the Council of the Federation Ye. V. Vinogradova, PhD in Law,

pursuant to Section 4, Article 125 of the Constitution of the Russian Federation, Subsection 3, Section 1, Sections 3 and 4, Article 3, Subsection 3, Section 2, Article 22, Articles 36, 74, 86, 96, 97 and 99 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation",

in an open hearing, examined the constitutionality of the provisions of Section 1, Article 188 of the Criminal Code of the Russian Federation.

The reason for the consideration of the case is a complaint of M. A. Aslamazyan. The ground for the consideration of the case is the discovered uncertainty of whether the provisions challenged by the applicant are in conformity with the Constitution of the Russian Federation.

Having heard the report of Judge-Rapporteur N. V. Melnikov, statements by the parties, interventions by the Judge of the Supreme Court of the Russian Federation N. L. Khlebnikov for the Supreme Court of the Russian Federation, A. V. Timofeyev for the Investigative Committee at the Prosecutor General's Office of the Russian Federation, A. A. Naumov and L. G. Podgornaya for the Federal Customs Service; and having considered written submissions and other materials, the Constitutional Court of the Russian Federation

e s t a b l i s h e d :

1. Pursuant to Section 1, Article 188 "Smuggling" of the Criminal Code of the Russian Federation, smuggling is large scale transportation of goods or any other objects across the

customs border of the Russian Federation, committed outside or concealed from customs control or with fraudulent use of documents or means of customs identification or by failure to declare or false declaration.

Pursuant to this norm, on 31 January 2007 the inquiry officer of the Sheremetyevo Customs Inquiry Department instituted criminal proceedings against the applicant in the present case M. A. Aslamazyan due to the transportation of undeclared currency in the amount of 9,550 euro and 5,130 Russian rubles (equivalent of 328,685 Russian rubles at the official exchange rate of the Central Bank of the Russian Federation on the date of entry into the Russian Federation) across the customs border on 21 January 2007. The complaints about the unreasonableness of instituting criminal proceedings and the request for annulment of the decision instituting them lodged by the attorney to the Office of the Prosecutor General of the Russian Federation and the Golovinsky District Court of Moscow on behalf of M. A. Aslamazyan were dismissed.

As follows from the enforcement decisions in the present case, in determining such element of the crime prescribed by Section 1, Article 188 of the Criminal Code of the Russian Federation, as “large scale” the amount of currency M. A. Aslamazyan transported was not decreased by the amount which under the currency regulation and currency control legislation of the Russian Federation does not need to be declared in writing. Pursuant to the explanatory note to Article 169 of the Code a large scale is defined as an amount above 250,000 Russian rubles.

In the applicant’s opinion, Section 1, Article 188 of the Criminal Code of the Russian Federation violates guarantees of the constitutional rights of citizens established by Articles 17 (Section 1) and 19 (Section 1) of the Constitution of the Russian Federation including equality before the law and the court, and contradicts the principle of legal certainty proclaimed by the Convention for the Protection of Human Rights and Fundamental Freedoms. It deprives the citizen of the opportunity to reasonably predict negative consequences of his actions which violates the procedure of transportation of such specific objects as foreign currency or the currency of the Russian Federation across the customs border of the Russian Federation.

Thus the subject matter for consideration by the Constitutional Court of the Russian Federation in the present case is the provisions of Section 1, Article 188 of the Criminal Code of the Russian Federation to the extent that they, taken together with the explanatory note to Article 169 of the Code, permit criminal prosecution for smuggling by transportation of undeclared foreign currency or the currency of the Russian Federation across the customs border of the Russian Federation on a large scale, with the large scale being defined as an amount above 250,000 Russian rubles, where, for establishing the large scale of the moved amount, it is

counted in full without excluding the amount which does not need to be declared to the customs bodies under law.

2. Pursuant to Article 71 of the Constitution of the Russian Federation, the competence of the Russian Federation includes the regulation and protection of the rights and freedoms of man and citizen (Subsection “c”) and criminal legislation (Subsection “n”). Exercising the powers in this area, the federal legislator independently determines the contents of criminal law, in particular, it decides on the criminality of socially dangerous acts, their punishability and other criminal law consequences of committing a crime. At the same time the legislator is bound by Article 55 (Section 3) of the Constitution of the Russian Federation, which provides that the rights and freedoms of man and citizen may be restricted by federal law only to the extent necessary for the protection of the fundamentals of the constitutional order, morals, health, the rights and lawful interests of others, and for ensuring defence of the country and security of the state. The principle of the rule of law implies that it is not permitted to use criminal law for disproportionate and excessive restrictions on rights and freedoms in applying criminal sanctions.

The constitutional requirements of fairness and proportionality imply differentiation of the public law responsibility on the basis of the gravity of the offence, the extent and character of the damage, the degree of the offender’s guilt and other circumstances significant for individualization of certain measures of state compulsion (Judgment of the Constitutional Court of the Russian Federation No. 11-II of 15 July 1999). Accordingly, the criminal law measures aimed at protecting the constitutional values shall be established regarding the requirement of such measures (particularly for the person concerned) to be adequately related to the damage caused by the crime, in order to ensure proportionality of the criminal sanction and the offence and to safeguard the balance of the individual’s fundamental rights and common interest in protecting the individual, society and state against criminal acts.

That is why the Criminal Code of the Russian Federation establishes that punishment and other criminal law measures applicable to the person who committed an offence shall be fair, i.e. they shall correspond to the character and degree of social danger of the offence, the circumstances of its commission and the personality of the guilty person (Article 6); at the same time an action or inaction formally having elements of any act prohibited by the Code may not be considered a crime if by the reason of its insignificance it has no social danger (Section 2, Article 14).

3. The federal legislator exercises finance, currency and credit regulation and establishes a special procedure and conditions for the import of foreign currency and (or) currency of the Russian Federation into the Russian Federation in order to protect the economic basis of state

sovereignty and national interests in financial transactions, ensure stability of the ruble, implementation of a single financial, credit and monetary policy (Article 4, Subsection “g”, Article 71, Section 2, Article 75 and Subsection “b”, Section 1, Article 114 of the Constitution of the Russian Federation).

Pursuant to Article 12 of the Customs Code of the Russian Federation, everyone has the right to transport goods (including currency and currency values) and vehicles across the customs border of the Russian Federation under the Code and equally with others, except as otherwise provided by the Code, other federal laws and international agreements of the Russian Federation. The procedure for the transportation of the currency of the Russian Federation, internal securities and currency values across the customs border of the Russian Federation is regulated by the currency legislation of the Russian Federation.

Pursuant to Article 15 of Federal Law No. 173-Φ3 of 10 December 2003, “On Currency Regulation and Currency Control” (as amended by Federal Law No. 90-Φ3 of 18 July 2005), the import of foreign currency and (or) the currency of the Russian Federation into the Russian Federation by residents and non-residents is exercised without limitations provided that the requirements of customs legislation of the Russian Federation are met. If the resident individual imports foreign currency and (or) the currency of the Russian Federation into the Russian Federation in the amount above the equivalent of 10 000 US dollars, such foreign currency and (or) currency of the Russian Federation must be declared to the customs body by filing a written customs declaration for the full amount of foreign currency and (or) the currency of the Russian Federation imported (Section 1). The US dollar equivalent of such foreign currency and (or) the currency of the Russian Federation amount is calculated at the official exchange rate of the Central Bank of the Russian Federation on the date of declaration to the customs body (Section 5).

This procedure for the transportation of currency across the customs border of the Russian Federation complies with the international standards developed with participation of the Russian Federation. Thus, pursuant to the Financial Action Task Force’s (FATF) IX Special Recommendation, countries should have measures in place to detect physical cross-border transportation of currency and bearer negotiable instruments, including a declaration system. In its Resolution 1617 (2005) of 29 July 2005, the United Nations Security Council strongly urges all Member States to implement this and other FATF Recommendations.

4. Pursuant to Articles 71 (Subsection “n”), 72 (Subsection “j”, Section 1) and 75 of the Constitution of the Russian Federation, the federal legislator established both criminal and administrative responsibility for violation of cross-border transportation of currency, determined respective elements of the offences and sanctions.

Pursuant to Article 16.4 of the Administrative Offences Code of the Russian Federation (as amended by Federal Law No. 116-Φ3 of 22 June 2007), individuals' non-declaration or false declaration of foreign currency and (or) the currency of the Russian Federation transported across the customs border of the Russian Federation and subject to mandatory declaration in writing shall be punishable by an administrative fine in the amount of 1,000 to 2,500 Russian rubles. Furthermore, as the law does not impose limitations on the import of foreign currency and (or) the currency of the Russian Federation by individuals and does not provide for any customs duties, the obligation to declare it arises only in case of transportation of currency in the amount above the equivalent of 10,000 US dollars.

Therefore currency import itself is not considered by the legislation in force as an infringement on the legally protected economic interests of the Russian Federation, i.e. as a socially dangerous act. Undeclared import in the Russian Federation of currency in the amount below the equivalent of 10,000 US dollars by resident individuals is not a socially dangerous and illegal act either. And only undeclared import of amounts above the legally prescribed limit is illegal, i.e. encroaching upon the established procedure for transportation of currency across the customs border of the Russian Federation and causing application of coercive measures by the state. Unlike administrative responsibility, criminal responsibility is established for non-declaration or false declaration of currency transported into the Russian Federation on a large scale (Article 188 of the Criminal Code of the Russian Federation). Thus only uncontrollable transportation of currency in the amount which by far exceeds the legally permitted equivalent for import, that does not need to be declared, constitutes a higher social danger which necessitates the imposition of criminal responsibility.

The legal regulation of responsibility for violating the procedure of currency import in the Russian Federation affects the constitutional right of property which includes the rights to have property, possess, use and dispose of it (Article 35 of the Constitution of the Russian Federation). So the federal legislator prescribing this responsibility shall rely on such general legal principles as equality and fairness and shall follow the requirements of correspondence of the restrictions to the constitutional values and proportionality of the measures of state coercion to the character of the offence and its social danger (Article 19 and Section 3, Article 55 of the Constitution of the Russian Federation).

This conclusion is coherent with the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms which establish that every natural or legal person is entitled to peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to conditions provided for by law and by the general principles of international law. The state has the right to enforce such laws as it deems necessary

to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties (Article 1 §§ 1 and 2 of Protocol No. 1).

5. Pursuant to the provision of Section 1, Article 188 of the Criminal Code of the Russian Federation both in its literal sense and within the meaning attributed to it in the law-enforcement practice, in determining the large scale of the amount of transported currency (pursuant to the explanatory note to Article 169 of the Code an amount above the equivalent of 250,000 Russian rubles), the transported sum is taken in full and is not decreased by the amount which pursuant to the law does not need to be declared when imported in the Russian Federation.

As a result, even if the amount of currency undeclared to the customs body only insignificantly exceeds the amount allowed for import in the Russian Federation without declaration (as it was in the case of M. A. Aslamazyan) it may entail criminal responsibility. To a significant extent this is caused by the deficiency of the provision itself and lack of due formal certainty which allows to interpret and enforce this criminal law prohibition as a prohibition disproportionately restricting the constitutional right to have property and violating the principles of equality and justice.

Meanwhile, every offence as well as measures of criminal responsibility should be clearly defined by law in such a way that everybody may predict negative criminal law consequences of his actions or inactions on the basis of the text of the respective provision or, if necessary, on the basis of a judicial interpretation. Lack of precision, clarity and certainty of the law opens a possibility for ambiguous interpretations and, as a result, arbitrary application of its norms. Thus, the constitutional principles mentioned above are violated. As the Constitutional Court of the Russian Federation previously stated these principles form the basis for the requirement of certainty, clarity and lucidity of legal norms, their coherence within the system of legal regulation in force, imposed on the legislator. Failure to comply with this requirement may cause divergent law-enforcement practice, which weakens the guarantees of state protection of the rights, freedoms and lawful interests of citizens (Judgments No. 11-II of 15 July 1999 and No. 9-II of 27 May 2003).

The European Court of Human Rights also highlights the importance of the principle of legal certainty in applying the general principles expressed or implied in the Convention for the Protection of Human Rights and Fundamental Freedoms, including those which are used to determine consistency between the Convention and national law. Pursuant to the European Court of Human Rights' position, the law shall in any case meet the standard set by the Convention which requires that legal norms be formulated sufficiently precise to allow the person – if need be, with appropriate advice – to foresee the consequences which a given action may entail (*The Sunday Times v. the United Kingdom (No. 1)*, Judgment of 26 April 1979, Series A, no. 30, § 49;

Ječius v. Lithuania, Judgment of 31 July 2000, § 56; *Baranowski v. Poland*, Judgment of 28 March 2000, §§ 50–52; *Rakevich v. Russia*, Judgment of 28 October 2003, § 31; *Ignatov v. Russia*, Judgment of 24 May 2007, § 74; *Vladimir Solovyev v. Russia*, Judgment of 24 May 2007, § 86).

5.1. The requirements of certainty, clarity and lucidity of legal norms, their consistency in the system of general legal regulation are of particular importance in criminal legislation, which inherently is an ultimate deterrent that the state uses to respond to offensive behaviour in order to protect social relations if it is impossible to do so by means of other legislation (Decision of the Constitutional Court of the Russian Federation of 10 July 2003 No. 270-O).

The principle of formal certainty of law implying lucidity and clarity of legislative imperatives is an essential element of the rule of law and serves as a necessary guarantee of effective protection against arbitrary prosecution, conviction and punishment both in legislation and its enforcement. Criminal responsibility may be considered lawfully established and respecting the requirements of Article 55 (Section 3) of the Constitution of the Russian Federation provided that it is proportionate to the social danger of the offence and that the criminal law defines the elements of offence clearly in order to differentiate it from other unlawful and lawful acts.

The violation of the principle of formal certainty in construing and formulating the provision of Section 1, Article 188 of the Criminal Code of the Russian Federation resulted in an unlawfully broad interpretation and breach of the general principles of law, such as equality, fairness and proportionality, which must be followed when any restrictions on the rights and freedoms of man and citizen are imposed.

5.2. Pursuant to Section 2, Article 54 of the Constitution of the Russian Federation, no one may be held responsible for an action which was not regarded as a crime at the time when it was committed. The corresponding Article 7 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.

These provisions develop the general principle of punishment only under law recognized by civilized states (*nullum crimen, nulla poena sine lege* – no crime, no punishment without a law). It also follows from this maxim that the law may not be interpreted broadly in its enforcement, i.e. as applicable to actions it does not directly prohibit; it may not be applied by analogy; and the law which establishes a penalty or a heavier penalty (i.e. disadvantageous for the person) has no retroactive effect.

Article 54 of the Constitution of the Russian Federation taken together with its Articles 1, 2, 15 (Section 4) and 17 (Section 1) predetermine that the provisions on criminality of an action, its punishability and other criminal law consequences are defined solely by the Criminal Code of the Russian Federation and are the most important provisions of the criminal legislation of the Russian Federation as a rule of law state. The application of criminal law by analogy is not permissible and the ground for criminal responsibility is commission of a socially dangerous act having all the elements of the crime provided for by the Code (Articles 3 and 8 of the Criminal Code of the Russian Federation). If certain actions are permitted by regulation of a certain area of social relations, i.e. are lawful at the time of their commission, no criminal responsibility for such actions may be imposed.

Lack of certainty, clarity and lucidity of the provision of Section 1, Article 188 of the Criminal Code of the Russian Federation, violates these fundamental legal principles.

5.3. The principle of proportionality of legal responsibility measures to the committed offence follows from Articles 19, 54 and 55 (Section 3) of the Constitution of the Russian Federation. In criminal law it is expressed in the requirement of proportionality of punishment to criminal offence. It obliges the federal legislator to determine measures of criminal responsibility proportionate to the social danger of the criminal offence and to differentiate criminal actions prohibited by law and criminal punishments from administrative offences and administrative responsibility measures in order to preclude confusion of the grounds and types of responsibility.

Accordingly, the norms establishing legal responsibility shall exclude broad interpretation in order to prevent the possibility to impose criminal responsibility for offences which are in fact administrative. Moreover no regulation shall exist establishing criminal responsibility for certain actions permitted by regulation of a certain area of social relations, i.e. lawful in their essence.

The provision of Section 1, Article 188 of the Criminal Code of the Russian Federation taken together with the explanatory note to Article 169 of the Code do not respect these criteria.

Considering that the amount of currency imported in the Russian Federation which needs to be declared in writing is provided by law, the administrative responsibility for non-declaration or false declaration of currency transported across the customs border of the Russian Federation is permissible only if the full amount of currency exceeds the equivalent of 10,000 US dollars at the official exchange rate of the Central Bank of the Russian Federation on the date of declaration to the customs body (Article 16.4 of the Administrative Offences Code of the Russian Federation, Article 15 of the Federal Law “On Currency Regulation and Currency Control”). However, pursuant to Section 1, Article 188 of the Criminal Code of the Russian Federation taken together with the explanatory note to Article 169 of the Code if the exchange

rate of the US dollar on the date of currency import in the Russian Federation is 25 or more rubles, then any undeclared import of currency in the amount above the equivalent of 10,000 US dollars results in large scale transportation of currency across the customs border of the Russian Federation, i.e. smuggling. Thus even insignificant excess of the undeclared amount permitted for transportation turns an administrative offence into smuggling, which is qualified as large scale currency transportation across the customs border of the Russian Federation. *De facto* administrative responsibility for non-declaration or false declaration of currency is arbitrarily substituted by criminal responsibility.

This criminal law regulation does not consider the specificity of currency as an object of customs relations, is not coherent with the legislation on currency regulation and currency control, and considering the “floating” exchange rate does not allow the person to foresee with sufficient certainty the consequences which his actions on non-declaration or false declaration of imported currency may entail. Moreover, under this regulation, in determining the large scale amount of non-declared or falsely declared currency the imported amount is taken in full and is not decreased by the amount which does not need to be declared pursuant to the Federal Law “On Currency Regulation and Currency Control”. This leads to overly broad interpretation of criminal law and results in aggravation of responsibility and criminal responsibility measures disproportionately to the social danger of the offence, which is administrative in essence.

5.4. Hence the provision of Section 1, Article 188 of the Criminal Code of the Russian Federation taken together with the explanatory note to Article 169 of the Code does not conform to the constitutional principles of the rule of law and the rule of law state, and to the general legal principles of proportionality, fairness and equality. It does not meet the requirements of Articles 1, 19 and 55 (Section 3) of the Constitution of the Russian Federation in holding a person legally responsible and thus leads to disproportionate restrictions on the constitutional right to property guaranteed by Article 35 of the Constitution of the Russian Federation and Article 1 of Protocol No. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Further, this provision does not ensure proper quality of law (both in form and in content) which is a necessary condition for criminal prosecution in a rule of law state. Thus the principle *nullum crimen, nulla poena sine lege* guaranteed by Article 54 of the Constitution of the Russian Federation taken together with Articles 15 (Section 4) and 17 (Section 1) of the Constitution of the Russian Federation and Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms is violated. The provision in question precludes full and efficient judicial protection contrary to Article 46 of the Constitution of the Russian Federation and its Article 21, which guarantees respect of human dignity.

When the federal legislator established criminal responsibility for currency smuggling due to uncertainty of the norms, criminal responsibility could not be differentiated from objectively similar administrative offence. Thus the legislator created conditions for arbitrary application of this provision and substitution of administrative responsibility by criminal responsibility in violation of the Constitution of the Russian Federation and international obligations of the Russian Federation. This contradicts the general principles of criminal responsibility and does not conform to the mission of criminal legislation and principles of legality, equality of everyone before the law and the court, fairness, humanity prescribed by the Criminal Code of the Russian Federation relying on the Constitution of the Russian Federation. Moreover, it does not correspond to grounds of criminal responsibility and concept of a crime defined by the Criminal Code.

Relying on the above requirements the federal legislator was obliged to formulate the provision in a manner that permits to decrease the full imported amount by the amount which did not need to be declared pursuant to the law or was declared, to determine large scale transportation of non-declared or falsely declared currency across the customs border of the Russian Federation. Only the fraction of the currency which exceeds the amount transported without declaration may be considered unlawfully transported.

The application of the provision of Section 1, Article 188 of the Criminal Code of the Russian Federation without due regard to the abovementioned condition is the ground for reconsideration of judicial and other law-enforcement bodies' decisions under Article 54 (Section 2) of the Constitution of the Russian Federation, which has direct effect. Pursuant to this Article in case the meaning of the law imposing responsibility alters and the responsibility for an offence is mitigated such alteration has retroactive effect.

This imperative is fully applicable to all law-enforcement decisions delivered on the basis of Section 1, Article 188 of the Criminal Code of the Russian Federation, which does not conform to the Constitution of the Russian Federation. The same conclusion applies to the decisions in the case of M. A. Aslamazyan, which pursuant to Section 2, Article 100 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", shall be necessarily reconsidered.

Concluding from the above and pursuant to Section 6, Article 125 of the Constitution of the Russian Federation, Section 1, Article 71, Articles 72, 74, 79 and 100 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", the Constitutional Court of the Russian Federation

h e l d :

1. To recognize the provision of Section 1, Article 188 of the Criminal Code of the Russian Federation, as non-conforming to the Constitution of the Russian Federation and its Articles 17 (Section 1), 19 (Section 1), 54 (Section 2) and 55 (Section 3), to the extent that they, taken together with the explanatory note to Article 169 of the Code, permit criminal prosecution for smuggling as transportation of undeclared or falsely declared foreign currency or the currency of the Russian Federation across the customs border of the Russian Federation on a large scale, i.e. in the amount above 250,000 Russian rubles, while in determining the large scale the transported amount is taken in full and is not decreased by the amount which does not need to be declared to be imported in the Russian Federation under the law.

2. The provision of Section 1, Article 188 of the Criminal Code of the Russian Federation, to the extent that it is recognized unconstitutional by this Judgment, loses its legal force and may not be applied; the decisions of courts and other bodies relying on this provision shall be reconsidered pursuant to Article 54 (Section 2) of the Constitution of the Russian Federation.

3. Pursuant to Article 54 (Section 2) of the Constitution of the Russian Federation and Section 2, Article 100 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, the case of M. A. Aslamazyan decided on the basis of the provisions of Section 1, Article 188 of the Criminal Code of the Russian Federation, which are recognized as unconstitutional by this Judgment, is to be in any event reconsidered by the competent authority.

4. This Judgment shall be final and shall not be subject to any appeal, it shall come into force immediately upon pronouncement, shall be directly applicable, and shall not require confirmation by other authorities and state officials.

5. Pursuant to Article 78 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, this Judgment shall be published in the Collection of Laws of the Russian Federation and *Rossiyskaya Gazeta*. The Judgment shall also be published in the Bulletin of the Constitutional Court of the Russian Federation.

Constitutional Court
of the Russian Federation

No. 8-II