

SECRETARIAT GENERAL

SECRETARIAT OF THE COMMITTEE OF MINISTERS
SECRETARIAT DU COMITE DES MINISTRES



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Meeting: 1294th meeting (September 2017) (DH)

Communication from the applicant (06/06/2017) in the case of KAPETANIOS AND OTHERS v. Greece (Application No. 3453/12)

Information made available under Rule 9.1 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1294^e réunion (septembre 2017) (DH)

Communication du requérant (06/06/2017) dans l'affaire KAPETANIOS ET AUTRES c. Grèce (Requête n° 3453/12) **[anglais uniquement]**

Informations mises à disposition en vertu de la Règle 9.1 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

To the Committee of Ministers of the Council of Europe



According to Rule 9.1 of the Rules of the Committee of Ministers for the supervision of the execution of judgments

Submitted by:

Athanasios Nikolopoulos, 28 Theokritou Street, Patras, Greece

Representative: Konstantinos Farmakidis-Markou, lawyer, 86 Solonos Street, Athens, Greece

Dear Madams/Sirs,

I am submitting the present communication concerning the execution of judgment of the Court "Kapetanios, Nikolopoulos and Aggloupas vs. Greece" (30.4.2015), specifically the execution of the part of the judgment that declared a violation of articles 6 para.2 and 4th of the 7th additional protocol of the Convention in the case of Athanasios Nikolopoulos (application no.42941/12).

The applicant had been prosecuted in year 1998 for smuggling (selling 110.000 liters of gasoline and 221.000 of diesel without proper documents proving he had previously bought such quantities). He was found innocent by the competent criminal court of Patras (judgement no. 2828/2000, which has become irrevocable according to the provisions of the Greek Code of Penal Procedure).

On the 29th of September 1996 the competent customs authority imposed on the applicant an administrative fine consisting of an amount of 37.089.905 drachmas for evaded taxes and duties and a second amount of 74.180.000 drachmas as "multiple fine" (twice the amount of taxes and duties evaded). The fine has been imposed for the exact same breach of the law, that led to the prosecution and later to the acquittal in substance of the applicant, as mentioned above.

The applicant filed an application for annulment of the administrative fine. The competent administrative court of first instance of Patras rejected the application (judgment 424/1998). On the 23rd of October 2003, the administrative court of appeal of Patras rejected the appeal filed by the applicant against the judgment of the court of first instance (judgement no.447/2003); the court decided that it was not within its powers to take into account the acquittal by the criminal court and that the applicant had to invoke and bring the criminal court's judgement before the administrative court according to the provisions of the Greek Code of Administrative Procedure, i.e. before the hearing of the case, whereas the applicant had done so only after the hearing of the case. On November the 16th of 2011 the supreme administrative court of Greece (Council of State), rejected the appeal on points of law that the applicant had filed against the judgment of the administrative court of appeal (judgement no.3616/2011). The CoS found no violation of the presumption of innocence or the principle of non bis in idem, by the fact that the administrative courts did not annul the

imposed fine, despite the former acquittal of the applicant for the exact same criminal prosecution.

The applicant resorted to the European Court of Human Rights, which found a violation of articles 6 para.2 and 4 of the 7th additional protocol of the Convention (case of Kapetanios, Nikolopoulos, Agloupas vs. Greece, 30.4.2015, application no.42491/12). The applicant then applied to the Council of State demanding compliance of the greek courts to the judgment of the ECHR, according to articles 46 of the Convention and 105A of the Greek Code of Administrative Procedure), reversal of judgement no.3616/2011 and annulment of the previous judgments of the administrative courts and of the fine for smuggling. In judgment no.1993/2016 the CoS held that the ECHR had exceeded its jurisdiction and erred, because it disregarded the non-compliance of the applicant with the rules of the administrative procedure (timely invocation of the criminal judgment before the administrative court of appeal), which should exclude any breach of rights by the greek courts.

In the meantime the Council of State issued judgment no.1741/2015 stating in the cases of breaches of the Law of Customs (smuggling) that lead to both, a criminal prosecution for the illegal act and an imposition of fine (taxes and duties evaded and "multiple fine"), the judgement of the courts of the administrative jurisdiction is not bound by the acquitting judgement of the courts of criminal jurisdiction, because criminal acquittal is "easier" due to the implementation of the rule "in dubio pro reo", which has no place in the rules and principles governing the administrative jurisdiction (para.14 of the judgement).

Apart from the matter of annulment of the fine by the competent courts of the administrative jurisdiction in compliance with the res judicata of the courts of the criminal jurisdiction, the applicant further sought the revocation of the fine by the competent administrative authority in compliance with the acquittal by the criminal courts.

On August the 16th of 2016, the applicant filed an application to the Council of Compliance (article 2 of statutory law no.3068/2002) of the Supreme Court of Greece (Areios Pagos), which is competent of overseeing the compliance of the Administration to the court judgments. He demanded that the Council orders the compliance of the Customs Authority to the acquittal, by revocation of the fine and that damages be paid for non-compliance. The duty of compliance is relevant to the judgments, decisions and orders of all jurisdictions, civil, criminal, administrative and auditory; the Council of Areios Pagos is competent for cases of non-compliance of the Administration to civil and criminal judgments. On December the 8th of 2016 the Council rejected the application (judgment 19/2016). The Council held that judgments of the courts of the criminal jurisdiction that find the accused innocent do not entail a duty of compliance in the sense of article 95 para.5 of the Constitution and the provisions of statutory law 3068/2002.

The applicant further applied to the Ministry of Finance (11.12.2016), demanding the revocation of the charging act of the 29th of September 1996 in compliance to the 2828/2000 criminal judgment. On March the 10th 2017 the General Director of Customs and Special Consumer Taxes rejected the application declaring that the law does not provide for the revocation or annulment of acts of the directors of customs services by themselves or other superior organs of the administration. She further added that, according to the Greek

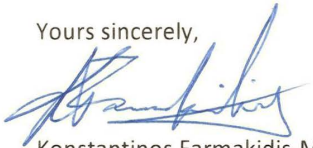
Customs Code, smuggling is an administrative offence for which a fine is imposed even if the competent authorities held that there is no criminal offence of smuggling.

Although the Greek Government has paid for just satisfaction (5.000 euro for damages and 2.500 euro for expenses), all competent authorities (Council of State, Council of Compliance, General Director of Customs) have refused to the applicant the restitutio in integrum, i.e. the cancelation of the fine. Restitutio in integrum is an integral part of the compliance of the State to the ECHR judgments. Due to non-compliance the applicant still has the obligation to pay a vast amount of money for a crime he did not perpetrate, despite having spent years of effort to pursue his case successfully, even before the ECHR. He actually suffers a triple injustice because of the imposition of the fine, the sanction of the fine by the administrative courts and the refusal of the Council of State to comply with the ECHR judgment.

The applicant requests that all necessary measures be taken to ensure that the Greek Government respects the duty of compliance and its most important aspect, that of restitution in integrum.

Please find attached, judgments no. 1993/2016, 19/2016 and the answer of the General Director of Customs to the applicant (10.3.2017).

Yours sincerely,



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