



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

## THIRD SECTION

### **CASE OF KOTLYAR v. RUSSIA**

*(Applications nos. 38825/16 and 2 others – see list appended)*

## JUDGMENT

Art 7 • Retroactive application of criminal law

Art 10 • Freedom of expression • Criminal liability for deliberate false registration of immigrants at applicant's property, in protest against residence registration system for migrants • Application of generally applicable law not designed to suppress, nor having the effect of interfering with, any "communicative activity" and therefore not falling within the ambit of Art 10

STRASBOURG

12 July 2022

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the case of Kotlyar v. Russia,**

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

Georges Ravarani, *President*,

María Elósegui,

Darian Pavli,

Peeter Roosma,

Andreas Zünd,

Frédéric Krenc,

Mikhail Lobov, *judges*,

and Milan Blaško, *Section Registrar*,

Having regard to:

the applications (nos. 38825/16, 29722/18 and 12920/20) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Ms Tatyana Mikhaylovna Kotlyar (“the applicant”), on 23 June 2016, 6 June 2018 and 21 February 2020;

the decision to give notice of application no. 38825/16 to the Russian Government (“the Government”);

the parties’ observations;

Having deliberated in private on 14 June 2022,

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

## INTRODUCTION

1. The case concerns the commission of migration law offences by the applicant in protest against what was perceived as Russia’s restrictive system of residence registration.

## THE FACTS

2. The applicant was born in 1951 and lives in Obninsk in the Kaluga Region. She was represented before the Court by Mr Illarion Vasilyev, a lawyer practising in Moscow.

3. The Government were initially represented by Mr M. Galperin, the then Representative of the Russian Federation to the European Court of Human Rights, and later by Mr M. Vinogradov, his successor in this office.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

## THE CIRCUMSTANCES OF THE CASE

### A. Background to the case

5. The applicant is a human-rights defender and a member of the Obninsk Town Council. Since 2006 she has worked to provide legal advice and social assistance to migrants from other republics of the former Soviet Union, including persons participating in the State Programme for the Voluntary Resettlement of Compatriots Living Abroad, aimed at the return of Russian-speaking people to Russia.

6. On 23 January 2012 then Prime Minister Vladimir Putin – who was standing as a candidate in the presidential election – published his views on ethnic relations and the assimilation of migrants in Russia. He stated, in particular, that penalties for non-compliance with migration and residence-registration regulations should be increased and that offenders should face criminal prosecution.

7. On 6 February 2012 the applicant published an open letter to Mr Putin, in which she declared:

“As the owner of my flat, I will offer residence registration to anyone who needs it. I deliberately turned my flat into an ‘elastic flat’ and have had it registered as a place of residence of more than a hundred people.”

8. On 29 December 2012, after he had won the presidential election, President Putin introduced a draft law (no. 200753-6) providing for administrative and criminal responsibility for “fictitious residence registration” (*фиктивная регистрация*). An explanatory note to the draft law stated that hundreds of thousands of individuals had their residence officially registered in so-called “elastic flats”, while they actually lived elsewhere. In 2011, some 300,000 people had been registered at just 6,400 addresses. Owners of “elastic flats” facilitated such abuses, frequently for pecuniary gain. That situation prevented the correct delivery of court summons and tax assessments and meant that the migration service was often unable to locate migrants or make accurate migration forecasts.

9. The draft law introduced the concept of “fictitious residence registration” into the legislation dealing with residence registration and migration, created new criminal offences under Articles 322.2 and 322.3 of the Criminal Code (see paragraphs 20 and 22 below), and established new grounds for administrative liability.

10. On 21 December 2013 the draft law was enacted as Federal Law no. 376-FZ and became effective on 3 January 2014.

### B. First trial (application no. 38825/16)

11. On 11 March 2014 the Investigative Committee in the Kaluga Region instituted criminal proceedings against the applicant. She was charged under

Articles 322.2 and 322.3 of the Criminal Code with falsely registering, in the period between 6 and 10 January 2014, her flat as the place of residence of three foreign nationals who were not actually living there. On 11 September and 24 October 2014 further charges were brought against the applicant in respect of the same actions committed in the period between 21 January and 25 December 2013. On 29 October 2014 the three cases were joined in one set of proceedings.

12. During the trial the applicant protested her innocence. She submitted that she could not be prosecuted retroactively for offences committed in 2013, before the new law had entered into force. As to the offences committed in 2014, she stated that she had provided residence certification without payment, on compassionate grounds, to persons who had relocated to Russia from other republics of the former Soviet Union and had needed to secure such registration in order to be able to apply for Russian nationality. Their applications for Russian nationality had been granted and no harm had been caused by her actions. She emphasised her conviction that the criminal-law provisions on “fictitious registration” violated the Constitution and human rights.

13. On 9 November 2015 a magistrate in the town of Obninsk in the Kaluga Region found the applicant guilty of having falsely certified to the migration authorities, in the period between 1 January 2013 and 1 April 2014, that ninety-one nationals of Tajikistan, Uzbekistan, Moldova, Georgia, Kyrgyzstan, Ukraine and Armenia were residing at her address on a permanent or temporary basis, even though she had known for a fact that they were living elsewhere. The magistrate accepted the prosecutor’s submission that the applicant’s conduct should be characterised as a “single continuous offence” under the new Articles 322.2 and 322.3. The magistrate held that the law was not being applied retroactively because the organisation of the illegal stay of migrants under Article 322.1 of the Criminal Code was to be interpreted as including the filing of a fictitious residence registration in respect of a non-national. The new Articles 322.2 and 322.3 constituted *leges speciales* that regulated specific aspects of what had previously been one general offence and provided lower penalties in respect of each. The magistrate sentenced the applicant to a fine but exempted her from paying it on the basis of a general amnesty act.

14. The applicant appealed, submitting that her actions had constituted a form of civil disobedience. She also complained of the retroactive application of criminal law.

15. On 23 December 2015 the Obninsk Town Court rejected the appeal, endorsing the reasoning of the first-instance judge.

**C. Second trial (application no. 29722/18)**

16. On 12 September 2017 the same magistrate convicted the applicant of 167 counts of fictitious residence registration committed in the period between 29 January and 20 July 2017 and acquitted her of a further nine counts on the basis of the “repentance and cooperation clause” (see paragraphs 22 and 23 below). The applicant was sentenced to a fine but exempted from paying it on account of the expiry of the statutory limitation period.

17. On 2 August 2018 the Obninsk Town Court quashed the decision to acquit the applicant, and discontinued the proceedings in that respect, while upholding the remainder of the judgment.

**D. Third trial (application no. 12920/20)**

18. On 25 February 2019 the police charged the applicant with a further 292 counts of fictitious residence registration. On 26 April 2019 a magistrate in Obninsk discontinued the proceedings on the basis of the “repentance and cooperation clause”.

19. Both the applicant and the prosecutor lodged appeals: the applicant sought an acquittal rather than a discontinuation of the proceedings; the prosecutor subsequently withdrew the appeal. On 23 August 2019 the Obninsk Town Court upheld the decision to discontinue the proceedings.

**RELEVANT LEGAL FRAMEWORK**

20. “Fictitious residence registration” is defined as the filing of an application to register the residence of a non-Russian national on the basis of false information or documents, and includes situations in which the non-national in question has no intention of living at that address or in which the homeowner has no intention of accommodating the non-national at that address (section 2(1)(10) and (11) of Federal Law no. 109-FZ of 18 July 2006). When filing an application for residence registration, foreign nationals must enclose a copy of their residence permit or immigration card (sections 17(1) and 22(2)(1)(a)).

21. Article 322.1 of the Criminal Code (Organisation of illegal migration) provides that organising the illegal entry of a non-Russian national into Russia, or such a person’s illegal stay in Russia or illegal transit through Russia, may be punished by up to five years’ imprisonment.

22. Article 322.2 (Fictitious registration of a permanent place of residence in respect of a Russian or non-Russian national in residential premises in Russia) provides that such fictitious registration may be punished by a fine of up to 500,000 Russian roubles or deprivation of liberty for up to three years. A “repentance and cooperation clause” stipulates that individuals who have

committed such an offence may be exempted from criminal responsibility if they have actively aided the investigation into the crime in question.

23. Article 322.3 (Fictitious registration of a temporary place of residence in respect of a non-Russian national) notes that such a fictitious registration might be carried out by means of, for example, lodging an application for the registration of the residence of a non-national who has no intention of staying at that address or where the homeowner has no intention of accommodating him or her. The offence carries the same penalties and contains the same repentance and cooperation clause.

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

24. In application no. 38825/16, the applicant complained that she had been tried for acts that had not constituted a criminal offence at the time at which they had been committed. She relied on Article 7 of the Convention, which reads as follows:

“1. 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 ... law at the time when it was committed ...

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

#### **A. Admissibility**

25. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

#### **B. Merits**

26. The applicant submitted that there had existed no legal possibility to prosecute the owners of “elastic flats” for “fictitious residence registration” prior to the creation of two new offences under Articles 322.2 and 322.3. The Government were unable to give an example of anyone being prosecuted for those acts under Article 322.1. The explanatory note to the draft law also suggested that no legal mechanism had previously existed by which it would have been possible to hold anyone liable for fictitious registration. The applicant had not arranged for anyone’s illegal entry into, or stay in, Russia and she was not liable for prosecution under Article 322.1. She had been aware that the new Articles 322.2 and 322.3 had been adopted but she could not have foreseen that they would be applied retroactively in her case.

27. The Government submitted that Article 322.1 of the Criminal Code sanctioned essentially the same conduct as the more recent Articles 322.2 and 322.3. As failure on the part of a non-Russian national to comply with the procedure for entering Russia and with the procedure for registering a place of residence was punishable under the same provision of the Code of Administrative Offences, the illegal stay of non-nationals – to which Article 322.1 refers – had to be understood as including a stay in Russia effected in breach of the procedure for residence registration. Accordingly, the lodging of an application for residence registration in a situation where non-nationals did not actually intend to stay at the registered address constituted an offence under Article 322.1. The new Articles 322.2 and 322.3 developed that general offence and provided lower penalties. By applying those provisions in the applicant's case, the domestic courts had granted her the benefit of the more lenient criminal law. This had been compatible with the Convention. Given her history of disagreement with migration policies in Russia and her open letters to the President of Russia and other officials, the applicant had to have been aware of the changes in the law and able to foresee the consequences that her conduct would entail.

28. Article 7 unconditionally prohibits the retrospective application of criminal law. That prohibition, known as the principle of non-retroactivity, is infringed in cases where the provisions defining the offence in question are applied to acts committed before those provisions came into force (see, for a restatement of the applicable principles, *Del Río Prada v. Spain* [GC], no. 42750/09, §§ 77-80 and 91-93, ECHR 2013). Two situations have to be distinguished within the context of applying the principle of non-retroactivity to the provisions defining an offence. The first concerns instances where an accused, under the criminal law in force at the time of the conviction, could be found guilty of an act that did not constitute an offence at the time of its commission. The second concerns instances where the act was proscribed – even if under different names – both at the moment of the commission of the offence and at the moment of the conviction. The latter situation concerns the reclassification of charges in the event of a succession of criminal laws over the course of time (see *Advisory opinion concerning the use of the “blanket reference” or “legislation by reference” technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law* [GC], request no. P16-2019-001, Armenian Constitutional Court, § 83, 29 May 2020).

29. Accordingly, the Court must examine whether, at the time at which they were committed, the applicant's actions, which were carried out before the entry into force of Articles 322.2 and 322.3 of the Criminal Code on 3 January 2014, constituted an offence, albeit under a different name, that was defined with sufficient foreseeability by domestic law (see *Rohlena v. the Czech Republic* [GC], no. 59552/08, § 56, ECHR 2015).



30. The applicant was prosecuted and tried under Articles 322.2 and 322.3 of the Criminal Code for falsely claiming in an application for residence registration in respect of non-Russian nationals that they lived in her flat on a temporary or permanent basis whereas they were actually living elsewhere. The Government argued that, even before the new law had come into force, she could have been prosecuted for those acts under Article 322.1 of the Criminal Code, which sanctioned the organisation of the illegal entry, stay or transit of non-Russian nationals.

31. The Court notes that it was not alleged that the non-nationals in question – whom the applicant had registered as residents in her flat – had entered Russia illegally or had lacked the proper documentation such as an immigration card or residence permit to stay legally in Russia. In fact, an application for residence registration had to be accompanied by proof of legal residence in Russia, failing which it was liable to be rejected (see paragraph 20 above). There is no indication that any applications were rejected on such grounds. Therefore, it does not appear that the applicant could have foreseen that she would be held responsible for organising the illegal entry or illegal stay of non-nationals in so far as the required element of illegality had not been made out.

32. Turning next to the application in practice of Article 322.1 of the Criminal Code, the Court observes that the Government did not submit evidence to indicate that any homeowners who had made fraudulent registration applications had been prosecuted under this provision. The explanatory note to the new law observes that the problem of “elastic flats”, whereby hundreds of people were registered as residents while living elsewhere, was not limited to a few isolated cases but had reached considerable proportions (see paragraph 8 above). An issue of that magnitude should have given rise to extensive case-law on the prosecution of owners of “elastic flats” under Article 322.1 of the Criminal Code, and yet not one conviction has been submitted to the Court (contrast with *Rohlina*, cited above, §§ 59 and 62, in which the Court found in particular that the applicant’s conduct had amounted to a criminal offence even prior to the amendment of the legislation). Rather, the explanatory note makes it apparent that the Russian authorities were concerned that there were no sufficient legal means of tackling the problem of “elastic flats”. The impunity of dishonest owners of such properties under the existing legal regime seems to have been the main reason for the adoption of the new law ascribing to such owners, as it did, criminal responsibility for such activities. Conversely, the absence of evidence of any prior convictions tends to indicate that such activities could not be prosecuted under the previous legislation.

33. The timing of the criminal proceedings against the applicant is also significant. The authorities had been aware of her activities for years before the adoption of the new law; she had openly declared that she was prepared to certify that any person in need was resident in her “elastic flat” and she had

followed through on her declaration (see paragraphs 7 and 27 *in fine* above). The Government's claim that her activities had amounted to a prosecutable offence even before the adoption of the new law would have been more plausible had the proceedings against her been instituted under the formerly existing provisions. However, that was not the case. The criminal proceedings were only initiated after the new law had entered into force, and initially only in respect of the three instances of "fictitious registration" that had taken place after the date of its entry into force (see paragraph 11 above). At a later stage, further charges relating to a period prior to the new law's entry into force were added, despite the applicant's objection regarding the retroactive application of criminal law.

34. Having regard to the above elements, the Court finds that it has not been shown that the applicant's acts constituted a prosecutable offence under domestic law prior to the entry into force of Articles 322.2 and 322.3 of the Criminal Code on 3 January 2014. It follows that, in so far as her conviction concerned the acts carried out before that date, it amounted to the retroactive application of criminal law, in breach of Article 7 of the Convention. There has therefore been a violation of that provision.

## II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

35. The applicant complained that the criminal proceedings against her had sought to stifle her freedom to express an opinion on a systemic social problem. She alleged a violation of Article 10 of the Convention, which reads as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others ..."

36. The Government submitted that there had been no interference with the applicant's right to freedom of expression. She had publicised her views in the media and had also made written submissions to the State authorities. The right to exercise her freedom of expression had not given her licence to flout the provisions of criminal law. The commission of offences had not been a necessary or appropriate means of expressing her views in a democratic society. Even assuming that there had been interference with her rights, it had been prescribed by law, had pursued the legitimate aim of the protection of public order and had also been necessary in order to deal with the pressing issue of "elastic flats". In the two years following the changes in the law, the number of "elastic flats" had decreased from 10,090 to 59. The interference

was also proportionate because the applicant was given the most lenient penalty possible and exempted from paying the fine.

37. The applicant submitted that her prosecution had been intended to have a “chilling effect” on her work as a human-rights defender standing up for migrants’ rights. Since 2006 she had provided residence registration at her flat to hundreds of people who had needed it in order to apply for Russian citizenship. She had done so without payment, on compassionate grounds. Her activities had amounted to an information campaign to raise awareness of the urgent social problem of housing people resettled in Russia. The application of an amnesty act had not erased or negated the guilty verdict against her.

38. The Court must first ascertain whether the disputed measure – the applicant’s conviction for providing “fictitious residence registration” to non-Russian nationals – amounted to interference in the form of a “formality, condition, restriction or penalty” imposed in connection with the exercise of her right to freedom of expression (see *Wille v. Liechtenstein* [GC], no. 28396/95, § 43, ECHR 1999-VII). In establishing whether or not there has been interference with the right to freedom of expression, the characterisation given to the expressive acts by the domestic courts is not decisive because the protection of Article 10 of the Convention extends not only to the substance of the opinions, ideas and information expressed but also to the form in which they are conveyed (see *Pentikäinen v. Finland* [GC], no. 11882/10, §§ 83 and 87, ECHR 2015).

39. In deciding whether a certain act or conduct falls within the ambit of Article 10 of the Convention, an assessment must be made of the nature of the act or conduct in question, in particular of its expressive character seen from an objective point of view, as well as of the purpose or the intention of the person performing the act or carrying out the conduct in question (see *Murat Vural v. Turkey*, no. 9540/07, § 54, 21 October 2014).

40. The applicant has worked for many years to provide legal advice and social assistance to people who decided to move to Russia from other republics of the former Soviet Union. She has been a vocal critic of deficiencies in the legal framework and its practical implementation which have prevented immigrants from accessing State benefits or applying for Russian citizenship. She has used a variety of means to raise awareness of the issues faced by immigrants, including seeking to draw the authorities’ attention to those issues, making statements to the media, giving interviews and publishing open letters.

41. There is no indication that any repressive measures have been taken in reaction to the forms of expression that she has chosen to voice her opinions on that matter. In so far as the applicant was not prevented from bringing her views to the public’s attention, the present case does not concern a restriction on a communicative activity aimed at broader public but rather the taking of measures against the applicant for actions that, under the

domestic legal system, infringed criminal law in a manner unrelated to the exercise of freedom of expression (compare *Brambilla and Others v. Italy*, no. 22567/09, § 57, 23 June 2016, in which the applicants were held liable for illegally intercepting police communications, and, by contrast, *Gough v. the United Kingdom*, no. 49327/11, § 150, 28 October 2014, in which the applicant's prosecution for appearing naked in public constituted a repressive measure undertaken in reaction to that form of expression). Even assuming that the applicant intended to convey a message of protest through her disruptive conduct in the administrative proceedings, the Court does not consider that such conduct, seen from an objective point of view, amounted to an expressive act in the circumstances of the case.

42. The present case must further be distinguished from cases in which the applicants were sanctioned for criminally reprehensible acts that they had committed in the preparation of a publication or broadcast (see *Erdtmann v. Germany* (dec.), no. 56328/10, § 16, 5 January 2016, in which the applicant carried a knife onto an airplane in order to prepare a television documentary about airport security flaws, and *Salihu and Others v. Sweden* (dec.), no. 33628/15, § 49, 10 May 2016, in which the applicants illegally purchased a firearm to investigate how easy it was to obtain one). In those cases the Court accepted that the sanction had interfered with the applicants' right to freedom of expression in so far as they had been held responsible for acts that had formed part of an investigation undertaken while gathering material for a planned article. The applicant in the instant case did not claim that she had committed residence-regulation offences as part of an investigation into any official abuse or for the purposes of preparing material that was to be published (compare *Pentikäinen*, cited above, § 93).

43. The residence registration law that the applicant was found to have infringed did not target the exercise of freedom of expression as such or any specific form of expression. It went no further than requiring that the information about a person's place of residence be truthful and accurate, so that the authorities could, among other purposes, reliably calculate how many public services are needed in each area and ensure that official correspondence is properly addressed and delivered (see paragraph 8 above). Providing untrue information about the place of residence impedes the achievement of those legitimate aims, and the authorities can take measures to counteract such conduct by introducing administrative or criminal sanctions.

44. The Court cannot accept that either the applicant's altruistic motivation or the sincerity of her conviction of the wrongness of the residence regulations released her from the duty to obey the law (compare *Pentikäinen*, cited above, § 91). Admittedly, a protest taking the form of impeding the activities of which applicants disapprove may constitute an expression of opinion within the meaning of Article 10 (see, for example, *Steel and Others v. the United Kingdom*, 23 September 1998, § 92, *Reports of Judgments and*

*Decisions* 1998-VII, and *Hashman and Harrup v. the United Kingdom* [GC], no. 25594/94, § 28, ECHR 1999-VIII, in which the applicants had protested, respectively, against hunting by disrupting organised hunts and against the enlargement of a motorway by breaking into a construction site). However, there is a significant difference between being sanctioned for offering some form of resistance to lawful activities of others and actively engaging in criminally reprehensible conduct by making false representations to the authorities. The law made it an offence to provide deliberately false information in official applications. There is nothing unusual or unreasonable in that approach; nor is there any basis in the Court's case-law to find that Article 10 protects the provision of deliberately false information in applications filed with the authorities for neutral regulatory purposes.

45. As the applicant was held liable for breaching a generally applicable law that was not designed to suppress, or had the effect of interfering with, any "communicative activity" on her part, the Court finds that the conduct for which she was sanctioned did not fall within the ambit of Article 10 of the Convention. Accordingly, this complaint in all three applications is incompatible *ratione materiae* and must be rejected, in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

### III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

46. Lastly, in application no. 29722/18, the applicant complained under Article 6 § 1 of the Convention that the trial judge in her case had not been impartial because he had previously found her guilty of a similar offence in another set of proceedings. The Court reiterates that a judge is not necessarily biased just because he or she has been involved in other proceedings concerning the same person. The mere fact that the same trial judge had in the past taken part in the criminal case against the applicant does not objectively justify her fears as to a lack of impartiality on his part (see *Anguelov v. Bulgaria* (dec.), no. 45963/99, 14 December 2004). In the absence of any indication of subjective bias on the part of the judge, this complaint is manifestly ill-founded and must be rejected, in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

### IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. 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."

48. The applicant asked the Court to determine the amount of compensation in respect of non-pecuniary damage. She claimed 3,200 euros

(EUR) for legal costs, relying on a timesheet showing the hours spent on the case and the hourly rate.

49. The Government submitted that the applicant had not quantified her claim in respect of non-pecuniary damage or provided receipts for payment for legal services.

50. The Court awards the applicant EUR 6,000 in respect of non-pecuniary damage, plus any tax that may be chargeable. As the applicant did not produce any document showing that she was liable to pay the fee according to the timesheet, her claim for legal costs must be rejected (see *Merabishvili v. Georgia* [GC], no. 72508/13, §§ 371-72, 28 November 2017).

51. 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

1. *Declares*, unanimously, the complaint concerning the alleged retroactive application of criminal law admissible, and the remainder of application no. 38825/16, and also applications nos. 29722/18 and 12920/20, inadmissible;
2. *Holds*, by six votes to one, that there has been a violation of Article 7 of the Convention on account of the applicant's conviction for the acts of "fictitious residence registration" carried out before 3 January 2014;
3. *Holds*, by six votes to one,
  - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
  - (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;
4. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

KOTLYAR v. RUSSIA JUDGMENT

Done in English, and notified in writing on 12 July 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško  
Registrar

Georges Ravarani  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Lobov is annexed to this judgment.

G.R.  
M.B.

## PARTLY DISSENTING OPINION OF JUDGE LOBOV

1. While agreeing, albeit for slightly different reasons, with the Chamber’s finding regarding the inadmissibility of the complaint of a violation of the applicant’s right to freedom of expression, I am unable to endorse the majority’s position on the violation of Article 7 on account of the allegedly retroactive application of the criminal law.

2. The Chamber unambiguously accepted that the applicant had engaged in “*criminally reprehensible conduct by making false representations to the authorities*” (see paragraph 44 of the judgment). As a result, she was convicted in November 2015 under Articles 322.2 and 322.3 of the Criminal Code, both of which had been enacted in January 2014, on account of a “continuous offence” resulting from a mass infringement of the immigration rules in 2013 and 2014 (section 2(1)(7) and (10), section 14 and section 15 of Law no. 109-FZ of 18 July 2006 on the migration registration of foreigners and stateless persons, and section 2(3) of Government Decree no. 9 of 15 January 2007 on migration registration procedures).

3. The concept of “continuous offence” has already been examined at length by the Court in *Rohlena v. the Czech Republic* (no. 59552/08, § 56, ECHR 2015). The Grand Chamber unanimously found that there was no violation of Article 7 in that case. The majority’s attempt to distinguish the present case from *Rohlena* does not sit well, in my view, with either the Grand Chamber’s approach to continuous offences or the consonant interpretation by the Russian courts of the applicability of the domestic criminal legislation to the applicant’s case.

4. The similarities between *Rohlena* and the present case are most striking indeed. In both cases, the domestic courts relied on the concept of a continuous criminal offence, which was well established in both respondent States in line with deep-rooted legal traditions. The Court’s comparative legal analysis demonstrated that “*the notion of a continuous criminal offence [was] not only a commonly used legislative and judicial approach to penalising a particular type of conduct, but [was] also specifically aimed at applying more lenient sentencing rules*” (ibid., §§ 30-37).

5. The Czech courts in *Rohlena* applied a more recent criminal-law provision to a continuous criminal offence of domestic violence (Article 215a of the Czech Criminal Code), while clearly asserting that the offence had also been punishable under the previous criminal legislation (Article 197a or Article 221 § 1 of the Czech Criminal Code). Likewise, the Russian courts in the present case applied the new Articles 322.2 and 322.3 of the Russian Criminal Code to a continuous criminal offence consisting of a mass breach of the immigration rules, while clearly asserting that the applicant’s conduct had also been punishable under the previous law, namely Article 322.1 of the Criminal Code, as that Article included “fictitious residence registration” as a way of organising the “illegal stay” of migrants in the country. The Russian



court further specified that the new Articles 322.2 and 322.3 constituted *leges speciales* that regulated specific aspects of what had been previously one general offence and provided for lower penalties in respect of each (see paragraph 13 of the judgment).

6. Contrary to the Grand Chamber’s unanimous position in *Rohlena*, the majority surprisingly remained deaf to the above findings of the domestic court in the present case. Indeed, the majority failed to respond to the domestic court’s assessment of the three relevant Articles (322.1, 322.2 and 322.3) as an ensemble of interconnected criminal-law provisions. Instead, the judgment has blatantly overruled what appears on its face to be a reasonable and straightforward interpretation of Article 322.1 by the domestic court (“illegal stay” as comprising “fictitious residence registration”).

7. The central argument in the majority’s reasoning consists of adverse inferences drawn from the Government’s failure to provide domestic case-law on the prosecution of other persons in the applicant’s position under Article 322.1 prior to 3 January 2014 (see paragraph 32 of the judgment). Yet the existence of such case-law had never been considered by the Grand Chamber in *Rohlena* to be a decisive precondition for the Court to find that the applicant’s conduct had amounted to a criminal offence prior to the amendment of the legislation. On the contrary, paragraph 59 of the Grand Chamber’s judgment, which is quoted by the majority to distinguish *Rohlena* from the present case, strictly stuck to the interpretation by the Czech domestic courts of the interconnection between the old and new provisions. As a result, the Grand Chamber’s conclusion in paragraph 62 of *Rohlena* cannot be *contrasted* with the present case but should have been *followed* in the present circumstances too. The Chamber could accordingly have concluded in virtually identical terms as follows: “Since the applicant’s conduct before 3 January 2014 amounted to a punishable criminal offence under Article 322.1 of the Criminal Code and comprised the constituent elements of the Articles 322.2 and 322.3 offence, the Court accepts that the fact of holding the applicant liable under the said provisions also in respect of acts committed before that date did not constitute retroactive application of more detrimental criminal law as prohibited by the Convention” (see *Rohlena*, cited above, §§ 59 and 62).

8. Admittedly, the alleged absence of domestic case-law relating to Article 322.1 may have demonstrated a high degree of official tolerance in respect of fictitious registration practices before 3 January 2014. The majority are no doubt aware that the challenges in migration management are far too complex and there are seldom easy answers. Prosecutions in respect of unlawful migration accordingly involve tough policy choices at the domestic level. The Court is not best placed to engage in second-guessing the evolution of criminal policies in this sensitive area (see the majority’s reasoning in paragraph 33 of the judgment), let alone in reassessing the domestic courts’ interpretation of the criminal legislation unless it appears arbitrary or

manifestly unreasonable. At any rate, the alleged absence of examples of prosecution, which had been neither requested from the parties in the proceedings nor verified by the Court of its own motion, is not sufficient to challenge the applicability of a particular criminal-law provision to the applicant's conduct at a given point in time. Nor does the high degree of official tolerance towards a particular offence make it automatically unpunishable under the Criminal Code.

9. Lastly, the majority should not have lost sight of the conspicuous fact that the domestic court gave the applicant the most lenient sentence possible, ordering an exemption from payment of the fine and relieving her from acquiring a criminal record. The outcome of the proceedings genuinely demonstrates that the domestic courts' application of the concept of continuous offence under the new Articles 322.2 and 322.3 as *leges speciales* in relation to Article 322.1 was by no means arbitrary or unreasonable. On the contrary, the applicant benefited from the most favourable outcome. Both the purpose and the spirit of Article 7 of the Convention were therefore fully respected in line with the Court's case-law.

**Appendix**

**List of applications**

1. 38825/16 Kotlyar v. Russia
2. 29722/18 Kotlyar v. Russia
3. 12920/20 Kotlyar v. Russia