THE AIRE CENTRE
Advice on Individual Rights in Europe

CONFISCATION OF THE PROCEEDS OF CORRUPTION AND SERIOUS AND ORGANISED CRIME

AN OVERVIEW OF INTERNATIONAL AND EUROPEAN STANDARDS, GUIDANCE AND THE RELEVANT JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

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This original English version has also been translated into Bosnian/
Croatian/Montenegrin/Serbian, Albanian and Macedonian

Design by
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PREFACE

Asset recovery is a simple idea; the legal retrieval of illegal gains. In practice, however, asset recovery is a complex and multidimensional area of law, often requiring intricate practical procedures and involving multiple parties and jurisdictions. This practical complexity requires the judges and prosecutors to have knowledge of their own domestic legislation in relation to freezing, seizure and confiscation, as well as a broader understanding of the international standards and instruments that seek to harmonise international practice and ensure that valuable asset recovery is used consistently as a valuable tool to combat crime globally.

One of the fundamental principles of criminal law is that no one can retain illegal gains acquired through criminal activities. In European countries, in particular in the Western Balkans various legislative solutions exist which aim to achieve this principle. Legislative reforms in South Eastern Europe run parallel in occurring serious organised crimes and corruption committed by actors aspiring to obtain political and economic power across the region.

The AIRE Centre (Advice on Individual Rights in Europe) and RAI (Regional Anti-corruption Initiative), implement the regional project "Combating corruption and organised crime in the Western Balkans through strengthening regional cooperation in asset recovery", funded by the UK Government. In 2019 and 2020 two publications were published, Handbook on Effective Asset Recovery in Compliance with European and International Standards and the Tools and Best Practices for International Asset Recovery Cooperation Handbook. It is worth mentioning that these two publications give an overview of national and international standards and offer best practices in achieving international cooperation in asset recovery.

This publication delves into this subject matter by offering a comprehensive analysis of international standards and case law on the topic of confiscation in order to assist legal professionals in navigating challenges regarding effective confiscation. It is providing insights and guidance rooted in international standards and legal precedents. These international instruments serve as invaluable compasses for gaining a deeper comprehension of international cooperation regarding the confiscation of illegal assets.

One of the main challenges in dealing with confiscation lies in the practical application of extended confiscation, which involves the seizure of assets not only linked to the investigated criminal offense but also presumed to be associated with other criminal activities. Additionally, with extended confiscation, questions surrounding the confiscation of assets from third parties arise. Effectively understanding and applying extended confiscation as a unique legal concept necessitate a deep familiarity with relevant international conventions, directives, and core principles derived from these international instruments. In situations where domestic legislation lacks clear definitions, judges and prosecutors can rely on fundamental principles rooted in international conventions, and this Guide equips them with the essential tools for this purpose.

Furthermore, asset forfeiture in all its forms significantly impacts the respect for fundamental rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms (ECHR). This includes rights such as the peaceful enjoyment of possessions (Article 1 of Protocol No.1), the right to a fair trial (Article 6 ECHR), the principle of no crime or punishment without legal basis (Article 7 ECHR), and the right to respect for private and family life (Article 8 ECHR). These considerations also raise important questions regarding the retroactive application of the law in asset forfeiture cases.

A significant challenge revolves around civil forfeiture and confiscation, as the majority of confiscation procedures are currently conducted within the framework of criminal proceedings. Civil forfeiture is a concept that has been attempted in most countries within the region through specialised tax and customs laws. However, thus far, there has been a lack of effective implementation of these laws.

This Guide offers valuable insights by analysing fundamental principles derived from international instruments and examining the practice of the ECHR, thereby providing guidelines and solutions to address issues in practice. With an in-depth overview of key international conventions, directives and case law, it aims to aid judges and prosecutors, but also practitioners and decision makers throughout the region. Facing challenges in practice and strengthening a decision-making process regarding confiscation of illegal assets and international cooperation would inevitably result in achieving justice and enhancing the rule of law.

Radmila Dragicevic Dicic
Supreme Court, Republic of Serbia
Retired judge

List of Acronyms

The following table describes the significance of various abbreviations and acronyms used throughout the handbook.

Abbreviation	Definition
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FATF	Financial Action Task Force on Money Laundering
GRECO	Group of States against corruption
MONEYVAL	Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism
UN	United Nations
UNAC	UN Convention against Corruption
UNTOC	United Nations Convention against Transnational Organized Crime

Please note that the masculine pronoun is used in the following sections of the publication to refer to an antecedent that designates a person of either gender unless the publication specifically refers to a female. Both the authors of the publication and AIRE Centre advocate gender equality and in principle support gender neutral language.

Part I - Introduction

INTRODUCTION

This publication provides an overview of the international standards and relevant case law on the confiscation of the proceeds of crime and corruption. The first part of this publication covers key international instruments relevant to confiscation (including the European legal framework). The second part provides an overview of key international organisations such as Council of Europe monitoring bodies and also details the role of the new European Public Prosecutor's Office. The third part takes an introductory thematic approach to the international instruments relating to various aspects of confiscation, from the freezing of assets and what property can be confiscated, through to the procedural aspects of confiscation. The fourth part of this publication explains the application of the European Convention on Human Rights ("**ECHR**") to confiscation proceedings. This includes when relevant rights under the ECHR are deemed by the European Court of Human Rights ("**ECtHR**") to have been contravened. The final part of the publication contains case summaries of important judgments and decisions from the ECtHR and the Court of Justice of the European Union (CJEU) selected to illustrate how these courts have applied principles related to confiscation.

Confiscation proceedings are particularly vulnerable to challenge under the ECHR because they involve the balancing of an individual's right to peaceful enjoyment of property and a State's right to control that property in certain circumstances, under Article 1 of Protocol No.1 to the ECHR. This and other Articles of the ECHR require thoughtful consideration when the form of confiscation is not conviction-based or involves the rights of third parties. In recent years, international instruments and domestic laws have been increasingly permissive of broader forms of confiscation, in an attempt to tackle historically low recovery rates for the proceeds of crime. As a result, the line between a defendant's rights and the State's has become ever finer.

The frequently cross-border nature of corruption and organised crime also means that international law and its customary norms are relevant to confiscation proceedings, complicating the landscape for domestic courts handling cases under domestic implementing legislation.

This publication focuses primarily on confiscation court proceedings, although it also touches upon issues such as the freezing of assets with a view to confiscation and on international cooperation in confiscation matters.

What is confiscation?

Confiscation is the final or permanent deprivation of property by order of a court.[1] It may also include such a deprivation of property by order of a competent authority other than a court.[2] Confiscation is typically, although not necessarily, punitive in nature[3] and it is not necessarily limited to deprivations of property that follow from criminal proceedings.[4]

The wide definition of confiscation indicates that it is a flexible concept. There are a number of variables for a legislature to consider in designing confiscation measures. These variables include: the scope of property that is potentially liable to confiscation (including emerging asset classes such as crypto assets); the types of criminal (or other illicit) behaviour that should potentially lead to confiscation; and the standards and burdens of proof that should be applied in determining whether or not particular assets should be liable to confiscation. These and other issues are considered below in light of international standards and instruments.

Why is confiscation important?

Although there are differing views on exactly what a confiscation regime should look like, confiscation is nonetheless widely recognised and promoted as a powerful

[1] Articles 1 of the 1990 Strasbourg Convention, the Warsaw Convention and the 2014 Directive: "'Confiscation' means a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property." Articles 2 of UNTOC and UNCAC: "'Confiscation', which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority."

[2] It is so widened in the definition of "confiscation" used in UNTOC or UNCAC, but not that used in the 1990 Strasbourg Convention, the Warsaw Convention or the 2014 Directive.

[3] The definitions of "confiscation" in the 1990 Strasbourg and Warsaw Conventions state that confiscation can refer to a "penalty" or a "measure".

[4] It is so limited in its definition in the 1990 Strasbourg Convention, the Warsaw Convention and the 2005 Framework Decision, but not in UNTOC, UNCAC or the Vienna Convention.

weapon in the fight against serious crime and corruption.[5] It serves a number of purposes in this regard. When successfully implemented, it has the potential:

- To deprive persons of the proceeds of criminal conduct and act as a deterrent to criminal activity.
- To mitigate erosion of the prosecuting State's tax base.
- To redirect assets for the public good.
- To assist in upholding the rule of law.

[5] See, e.g., the inclusion of confiscation in Financial Action Task Force Recommendation 4 of 2012.

1.1 INTERNATIONAL INSTRUMENTS

Several international treaties and conventions criminalise various acts connected to corruption and regulate the enforcement of those offences, including confiscation of proceeds and property connected to them.

1.1.1 United Nations conventions

1. The United National Convention against Transnational Organised Crime (2000) ("UNTOC")

The UNTOC, which entered into force in September 2003, is the main UN instrument in the fight against transnational organised crime. It sets out a number of offences relating to participation in organised criminal groups, money laundering, corruption and obstructing justice as well as other "serious crimes". [6]

- Article 12 of UNTOC requires States to adopt, "to the greatest extent possible within their legal systems", measures to allow the confiscation of the proceeds of crime and property involved with criminal offences.
- Article 13 sets out procedures and obligations for international cooperation in confiscation proceedings.
- Article 14 outlines how confiscated property should be disposed of.

2. The United Nations Convention Against Corruption (2005) ("UNCAC")

The UNCAC entered into force in December 2005 and addresses the prevention, investigation and prosecution of public and private sector corruption. [7] It places signatory States under an obligation to enact measures to criminalise certain acts and to maximise the effectiveness of enforcement measures taken against those

[6] Further explanatory material can be found in the UNTOC Legislative Guide: https://t.ly/SSnkA

[7] Further explanatory material can be found in the UNCAC Legislative Guide and Technical Guide: https://t.ly/oaml and https://t.ly/X4sw

offences. In particular:

- Articles 15 to 25 set out the criminalised acts, including bribery (both of domestic and foreign public officials and within the private sector), embezzlement, trading in influence, abuse of functions, illicit enrichment, laundering the proceeds of crime, concealment and the obstruction of justice.

- Article 31 requires a State to adopt "to the greatest extent possible within its domestic legal systems" measures necessary to enable the confiscation of the proceeds of offences established in the convention, as well as the property used in or destined to be used in those offences. It also sets out the necessary procedures for the seizure and freezing of property related to those offences.

- Articles 53, 54 and 55 set out requirements for the recognition of confiscation orders between States and the mechanisms by which they are implemented.

- Article 57 provides for the return and disposal of confiscated assets.

3. Other relevant conventions

The following UN conventions also have a bearing on the international legal framework surrounding confiscation:

- Vienna Convention on the Law of Treaties (1998), concerning the operation of treaties. This treaty is relevant when questions of interpretation arise regarding the international instruments entered into between States described in this publication, including the interaction between international and national law.

- Terrorist Financing Convention (1999), concerning the criminalisation and punishment of terrorist financing. Article 8 of this convention requires State parties to freeze or seize funds used or allocated for the purpose of committing the terrorist financing offences set out in the convention, and to take appropriate measures for the forfeiture of such funds. Article 8 also suggests that State parties should consider establishing mechanisms for forfeited funds to be used to compensate victims of these offences. The confiscation mechanisms described in this publication apply to terrorist financing offences as well as the corruption offences that this publication focuses on.

1.1.2 Council of Europe conventions

1. 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS 141) (the "1990 Strasbourg Convention")

The 1990 Strasbourg Convention has a wider scope than UNTOC and UNCAC as it does not limit confiscation to any particular categories of offence. However, State parties may limit the application of the 1990 Strasbourg Convention's confiscation provisions to specified offences or categories of offences.[8]

- Article 2 lays out the steps State parties must take to allow for the confiscation of property involved with, and the proceeds of, criminal offences, as well as stating that every party to the convention may limit the categories of offence to which the convention's obligations apply.

- Article 13 places an obligation on State parties to enforce confiscation orders made by other parties to the convention. Article 14 lists the procedures by which such confiscation orders are to be executed.

- Article 18 establishes the grounds for State parties to refuse to cooperate with other parties.

- Article 23 establishes that parties should recognise foreign judicial decisions.

- Article 27 sets out the requirements for requests of cooperation between State parties in carrying out investigations or prosecutions.

2. 1999 Criminal Law Convention on Corruption (ETS 173) (the "1999 Strasbourg Convention")

The 1999 Strasbourg Convention was adopted in pursuance of the 1996 Committee of Ministers' Programme of Action against Corruption. It entered into force in July 2002 and addresses corruption in both the public and private sectors. It covers both the person bribing ("active bribery") and the person being bribed ("passive bribery").[9]

[8] Further explanatory material can be found in the Convention Explanatory Report: https://t.ly/EycG

[9] Further explanatory material can be found in the Convention Explanatory Report: https://t.ly/XFqLi

- Article 2 defines active bribery and obligates parties to the convention to criminalise such an act. Article 3 does the same for passive bribery. Articles 4 to 15 go on to set out the other acts that parties are obligated to criminalise under the convention.

- Article 23 establishes measures to be taken by parties to the convention for the purpose of gathering evidence of wrongdoing and confiscating the proceeds of any of the offences set out in the convention.

- Article 25 sets out the principles of international cooperation under the convention as well as the measures to be taken to ensure that cooperation. This is supplemented by Article 26 which sets out the obligations on parties to provide mutual assistance to one another in investigations and prosecutions.

3. 2005 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (ETS 198) (the "Warsaw Convention")

The Warsaw Convention is particularly concerned with the confiscation of terrorism finance, even where funds serving to fund terrorism have legitimate origins. It also applies to confiscation measures more generally, although contracting States are able to limit its application.[10]

- Article 3 sets out the general obligations on contracting parties to implement confiscation measures, while Article 5 states the need to ensure that laundered property can be subject to freezing, seizure and confiscation.

- Article 9 establishes the acts that amount to laundering offences under the Warsaw Convention and the need for parties to criminalise such acts.

- Article 15 lists the general principles of international cooperation for the effective implementation of confiscation orders as well as the measures necessary to achieve such cooperation.

- Article 16 sets out the obligation on parties to assist with international investigations.

[10] Further explanatory material can be found in the Convention's Explanatory Report: https://t.ly/vsEL

- Article 28 sets out the grounds for parties to refuse to cooperate with a confiscation order.

4. The European Convention on Human Rights

Measures and actions to recover the proceeds of crime must be compliant with international human rights law. This prevents the arbitrary seizure of assets and safeguards individuals' fundamental rights. The European Convention on Human Rights (the "**ECHR**" or the "**Convention**") sets out the minimum binding human rights standards applicable to Council of Europe members.

The European Court of Human Rights ("**ECtHR**") accepts that the powers of confiscation possessed by States are justified and necessary as enforcement mechanisms against the offences criminalised by the various instruments set out in this part. By applying the ECHR, it ensures, however, that basic levels of protection are afforded to the owners of such confiscated property.

The process of confiscating the proceeds of crime can engage a number of Convention rights. Primarily, these are:

- The right to peaceful enjoyment of property (Article 1 of Protocol No.1).
- The right to a fair trial (Article 6).
- *Nullum crimen sine lege and nulla poena sine lege*, or no crime and no punishment without law (Article 7), where questions of legality come into the prosecution of offences or enforcement proceedings.
- Right to respect for private and family life (Article 8), in certain circumstances, such as when properties considered to be "homes" are forfeited or searched.

1.1.3 European Union instruments

Corruption is listed as an area of crime in Article 83(1) of the Treaty on the Functioning of the European Union (the "**TFEU**"), giving the EU legislative powers to regulate this area. Other areas of crime listed in this Article include money laundering, illicit drug trafficking, counterfeiting means of payment, computer crime and organised crime. The European Commission has proposed that sanctions violations be added to the list.[11] The EU does not have legislative powers over criminal categories not listed in the TFEU.

EU legislation consists of: (i) Framework Decisions, which became obsolete following the signing of the Lisbon Treaty in 2007 (but which remain in force to the extent unrepealed) and which required Member States to implement national laws to give them effect; (ii) Directives, which also require implementation through national Member State law; and (iii) Regulations, which have direct effect in Member States and their courts.

There are various EU instruments covering the areas of confiscation, crime and corruption. Due to the jurisdiction of the EU over these areas of crime and the formal enforcement mechanisms available to the European Commission against Member States for failures to implement EU law, these instruments can achieve somewhat greater harmonisation than the international treaties and conventions described above. The main instruments are:

- Article 3 of Framework Decision 2005/212/JHA on Confiscation of Crime-Related Proceeds, Instrumentalities and Proceeds (the "**2005 Framework Decision**") provides for "extended confiscation" (also known as "special confiscation"). This allows for the confiscation of assets not directly related to the offence being heard before a national court. It applies where an individual's income is disproportionate to the value of their assets and the court is convinced that the assets in question have been derived from the individual's criminal activity.

- Directive 2014/42/EU on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union (the "**2014 Directive**") partially

[11] Proposal for a Directive of the European Parliament and of the Council on Asset Recovery and Confiscation COM/2022/245 final.

replaced the 2005 Framework Decision[12] and was introduced in order to encourage greater uniformity in Member States' freezing and confiscation regimes in light of continuing differences between Member States' laws. It sets minimum standards and includes fuller provisions for the harmonisation of confiscation laws within the EU in relation to certain specified serious offences.

- Regulation 2018/1805/EU on the Mutual Recognition of Freezing Orders and Confiscation Orders (the "**2018 Regulation**") was subsequently introduced to establish a system of mutual recognition for freezing and confiscation orders issued within the framework of criminal proceedings, setting out when a confiscation order should be recognised and executed and the situations in which Member States could refuse recognition of orders made in other countries. The regulation also covers the management and disposal of frozen and confiscated property; the obligations by Member States to affected persons; and those persons' available legal remedies.

- On 12 December 2023, a political agreement was reached between the European Parliament and the Council on updated rules on asset recovery and confiscation, and a new directive will be adopted. This directive will expand the possibilities to confiscate assets from a wider set of crimes such as arms trafficking, fraud and trafficking of cultural goods. It will allow for the confiscation of unexplained wealth linked to criminal activities, and establish Asset Management Offices in all EU Member States to ensure that frozen property does not lose its value and enable the sale of frozen assets that are at risk of this or are costly to maintain. Finally, it will facilitate victims' right to compensation, by allowing compensation through the confiscated property if necessary.[13]

[12] Recital 9, Directive 2014/42/EU on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union.

[13] Press release from the European Commission, 12 December 2023 – Commission welcomes the political agreement on rules strengthening asset recovery and confiscation in the European Union.

1.1.4 Other international instruments

1. Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) (the "OECD Anti-Bribery Convention")

Adopted in 1997, the OECD Anti-Bribery Convention binds OECD members and other signatory States to criminalise the bribery of foreign public officials and provides for signatory States to "*take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable*".[14]

The 2009 Recommendations of the OECD Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, which supplement the OECD Anti-Bribery Convention, contain a recommendation that OECD member countries consult and cooperate with the competent authorities in other States, including through information-sharing and the conduct of proceedings to confiscate and recover the proceeds of bribery of foreign public officials.[15]

Many South East European countries are not OECD members and have not ratified the OECD Anti-Bribery Convention.

2. Recommendations of the Financial Action Task Force on Money Laundering ("FATF Recommendations")

Adopted in 2012 and updated regularly since, the FATF Recommendations are a recognised international standard for combatting money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction. This includes the laundering of the proceeds of corruption. Whilst the Western Balkans countries are not themselves Member States of FATF, MONEYVAL, a permanent Council of Europe monitoring body for Anti-Money Laundering and Terrorist Financing, is an associate member and carries out its country evaluation on the basis of FATF standards.[16] The FATF Recommendations include:

[14] Article 3 of OECD Anti-Bribery Convention.

[15] Recommendation XIII of 2009 Recommendations of the OECD Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions.

[16] Further explanatory material can be found in the FATF Best Practice Paper 'The Use of the FATF

- Recommendation B (commonly referred to as "Recommendation 4"), which is concerned with money laundering and confiscation. Article 4 sets out the FATF Recommendations' approach to confiscation measures. It notes the importance of enabling national competent authorities to take enforcement measures such as confiscation without prejudicing bona fide third party rights, and states that countries should consider adopting measures allowing civil forfeiture and confiscation without requiring proof of lawful origin (to the extent consistent with domestic law principles).

- Recommendation G (commonly referred to as "Recommendation 38") establishes the FATF Recommendations' standards on international cooperation.

Recommendations to Combat Corruption': https://t.ly/ADB5R

1.2 INTERNATIONAL BODIES AND COURTS

1.2.1 The Financial Action Task Force

The Financial Action Task Force ("**FATF**") is an inter-governmental policy-making body that aims to set standards and promote the effective implementation of legal, regulatory and operational measures for combatting money laundering, terrorist financing and related financial crimes. In addition to policy making and standard setting, FATF operates a mutual evaluation procedure in conjunction with Associate Members and other partners, and grey/blacklists high risk jurisdictions. The Council of Europe is an Observer member of FATF.

1.2.2 Council of Europe Monitoring Bodies

1.2.2.1 GRECO

The Group of States against Corruption ("**GRECO**") was established in 1999 by the Council of Europe to monitor its Member States' compliance with agreed anti-corruption measures. As well as monitoring the implementation of the 1999 Strasbourg Convention, it monitors the observance of the Guiding Principles for the Fight against Corruption adopted in 1997 by the Committee of Ministers of the Council of Europe (the "**Guiding Principles**").

One of GRECO's functions is to evaluate compliance and produce recommendations to specific Member States, in procedures divided into evaluation rounds. Implementation of those recommendations is then monitored. In doing so, GRECO helps to identify deficiencies in national anti-corruption policies, prompting the necessary legislative, institutional and practical reforms.

Evaluation rounds are themed around parts of the Guiding Principles. The 2003-2006 evaluation round is the only round to date which has focused on confiscation and anti-corruption. Its themes were the identification, seizure and confiscation of corruption proceeds, the prevention and detection of corruption in public administration, and the prevention of legal persons from being used as shields for corruption.

GRECO also has powers to initiate ad hoc procedures on the receipt of reliable information that an institutional, legislative or procedural change in a Member State may result in a serious violation of a Council of Europe anti-corruption standard which has been the subject of a GRECO evaluation round.

GRECO also provides a platform for the sharing of best practices in the prevention and detection of corruption.

1.2.2.2 MONEYVAL

The Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism ("**MONEYVAL**") is another permanent monitoring body of the Council of Europe. It is an Associate Member of FATF, entrusted with the task of assessing compliance with the principal international standards to counter money laundering and the financing of terrorism and the effectiveness of their implementation, as well as with the task of making recommendations to national authorities in respect of necessary improvements to their systems. It does this through a dynamic process of mutual evaluations, peer review and regular follow-up of its reports.

MONEYVAL assesses its 34 members on the basis of the above FATF standards. Thus, Member States of the Council of Europe which have not committed to implementation of the FATF standards are nevertheless indirectly subject to those standards.

1.2.3 The European Court of Human Rights

The ECtHR is a judicial institution of the Council of Europe, with jurisdiction over individual or State applications alleging violations of the ECHR, so long as the violation has allegedly directly and significantly affected the applicant. The ECtHR cannot take up cases of its own initiative. The highest State courts may also seek an advisory opinion on matters of interpretation from the ECtHR in relation to cases proceeding before their domestic courts.

The ECtHR has strict admissibility criteria, including exhaustion of domestic remedies, being directly affected by the measure complained of, and having suffered a significant disadvantage.[17]

[17] For guidance on admissibility, see ECtHR, Practical Guide on Admissibility Criteria, last updated 31 August 2022.

Section 1.4 of this publication considers the case law of the ECtHR in respect of alleged violations of the ECHR in confiscation proceedings, and is followed in Part 2 of a selection of case summaries to further illustrate how the ECtHR applies the ECHR in cases concerning confiscation.

1.2.4 The European Public Prosecutor's Office

The European Public Prosecutor's Office ("**EPPO**") is an independent prosecutorial body of the EU operating from 1 June 2021 in 22 EU countries.[18] The EPPO was created under Council Regulation (EU) 2017/1939 (the "**2017 Regulation**") with the intention of working towards a common criminal justice system for EU cross-border financial crimes. Under the 2017 Regulation, the EPPO has powers to investigate and prosecute crimes involving EU funds or against the EU's financial interests, such as fraud, corruption, misappropriation of EU assets or serious cross-border VAT fraud. The EPPO is designed to act quickly and effectively on cross-border matters. A European Chief Prosecutor operates centrally as the head of the EPPO and European Delegated Prosecutors in each participating Member State undertake decentralised operations. The EPPO also draws on partnerships with national law enforcement authorities and the European Anti-Fraud Office ("**OLAF**").

Article 30(1)(d) of the 2017 Regulation specifically provides that European Delegated Prosecutors are empowered to "*freeze instrumentalities or proceeds of crime, including assets, that are expected to be subject to confiscation by the trial court, where there is reason to believe that the owner, possessor or controller of those instrumentalities or proceeds will seek to frustrate the judgement ordering confiscation.*"

As each of the European Delegated Prosecutors operates according to the law of the Member State in which they are based, asset confiscation varies according to national criminal law, including laws implementing EU laws without direct effect (such as the 2014 Directive).

In its first seven months of operation, EPPO reported that it initiated 81 recovery actions in 8 different EU Member States.[19] The EPPO requested the seizure of assets totalling €154 million and of this, it successfully seized €147 million, including

[18] Participating countries include: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, Spain and Slovenia.

[19] EPPO Annual Report 2021, available at: https://t.ly/C1cc

through non-conviction based, extended and value confiscation (see section 1.3 of this publication). However, the damages from the associated criminal activity were valued at an estimated €5.4 billion in the same period, highlighting the difficulty of recovering the proceeds of crime. Assets seized included bank accounts, real estate, vehicles, shares, cash and luxury items.

Article 28(1) of the Draft EU Asset Recovery Directive seeks to strengthen the EPPO's functions by requiring asset recovery offices to be established in each Member State, and for these asset recovery offices to "closely cooperate" with the EPPO to identify property that becomes or is the object of a freezing or confiscation order in EPPO criminal proceedings.

1.3 CORE PRINCIPLES FROM INTERNATIONAL INSTRUMENTS

1.3.1 Scope of assets which may be subject to freezing and confiscation, including emerging asset classes

While traditional asset classes such as cash, bank accounts, land and other tangible assets have long been within the scope of freezing and confiscation actions, there can be some ambiguity around the applicability of certain definitions to emerging asset classes such as cryptoassets.

The volume of unlawful activity involving cryptocurrency has risen rapidly over recent years, aided by the increased anonymity afforded by its borderless and decentralised digital ledgers – many of which harness blockchain technology. In response to this trend, different jurisdictions are adopting different approaches to the legal treatment and regulation of cryptoassets, which creates distinct difficulties when integrating these asset classes into existing enforcement and asset recovery regimes.

Further, the anonymous nature of crypto markets means that it is not always possible to identify market participants or locate their cryptoassets. Clearly, some cryptoassets are easier to identify than others. For example, non-fungible tokens ("**NFTs**") are unique and therefore easily identifiable, whereas cryptocurrencies are fungible, making them more difficult to identify and trace, an issue compounded by methods adopted by persons to obfuscate the origins and owners of funds (such as through crypto mixers). This poses issues of intermingling, explored further below, which also arise in relation to traditional asset classes. However, blockchain provides immutable proof of transactions and so, with expert assistance, it is typically possible to trace cryptocurrencies to end wallets (a value storage space for cryptoassets).

Notwithstanding the challenges posed by non-traditional asset classes, from an international policy perspective, it is becoming increasingly important to tackle the proliferation of crypto-based criminality through the effective use of new and existing enforcement powers. To that end, the legal and regulatory treatment of cryptoassets

has tended to embrace a broader definition of "property" favouring the victims of crime and those seeking to recover value. In the United Kingdom, for example, the English courts have overwhelmingly held that cryptoassets are to be treated as property, a necessary component of the test for the granting of proprietary relief in seeking their recovery under English domestic law. Broadly speaking, the English courts have determined that cryptoassets have all of the hallmarks of property: for example, they are capable of ownership, capable of definition and appear to be as permanent as other conventional financial assets. It has even been suggested that English law should explicitly recognise "data objects" (including cryptoassets) as a third category of personal property. Other jurisdictions such as Australia are reaching similar conclusions.

No consistent EU-wide approach has been established to date, but the draft Markets in Crypto-Assets Regulation explicitly provides for the freezing and sequestration of assets in furtherance of that regulation's primary objective to regulate cryptoassets and their markets.[20] In relation to Russian sanctions, the EU has also published guidance that cryptoassets should be considered to be within the definitions of "funds", "economic resources" and "transferable securities".[21] While not directly relevant to confiscation, this demonstrates the proactive approach of the EU to bringing cryptoassets within scope of existing legislation where they are used for purposes adjacent to traditional assets.

As the majority of international instruments discussed in this publication do not have direct effect but require national implementation, depending on the definitions adopted in domestic implementing legislation, there may be particular national barriers to cryptoassets being considered property or assets subject to freezing and confiscation proceedings in a given jurisdiction. However, in this fast-developing area of law, it increasingly appears that States and courts are taking the view that these emerging intangible asset classes should be capable of definition and recovery, whether through legislation or judicial precedent.[22]

[20] Article 82(2)(f) Proposal for a Regulation on Markets in Crypto-assets and amending Directive (EU) 2019/1937, COM/2020/593.

[21] European Commission, "Are crypto-assets and in particular cryptocurrencies covered by these sanctions?", *Frequently asked questions on crypto-assets concerning sanctions adopted following Russia's military aggression against Ukraine and Belarus' involvement in it*, 21 March 2023.

[22] See the inclusive approach of English courts for example; *Lavinia Deborah Osbourne v (1) Persons Unknown and (2) Ozone Networks Inc trading as Opensea* [2022] EWHC 1021 (Comm); *Ion Science Limited and Duncan Johns v Persons Unknown, Binance Holdings Limited and Payment Ventures*

1.3.2 Freezing orders and investigative powers

Confiscation is often preceded by the freezing of assets during an investigation, temporarily preventing dealings in those assets. The freezing of assets is a crucial step in preventing the concealment or dissipation of property that may eventually become liable to confiscation.

All major international conventions[23] addressed in this publication oblige signatories to adopt measures to facilitate the investigation and the freezing of assets. UNTOC and UNCAC set out wide-ranging investigative powers for the purpose of building an effective case by seizing assets and ordering that key documents and information be made available or seized. UNTOC and UNCAC signatories are required to adopt measures to "*enable the identification, tracing, freezing or seizure*" of proceeds of crime or property, equipment and other instrumentalities to offences covered by the conventions. These include provisions designed to empower courts and authorities to order that bank records, financial or commercial data are made available or be seized. Parties are prevented from declining to provide documents on the grounds of bank secrecy under these provisions. This enables key information to be collated to investigate and, where necessary, build a case for prosecution.[24]

The 1990 Strasbourg Convention includes the same types of investigative powers. Article 4 specifies the techniques which parties may use to facilitate the identification, tracing and gathering of evidence. Techniques include monitoring orders, observation, interception of telecommunications, access to computer systems and orders to produce specific documents.[25] The 1999 Strasbourg Convention requires cooperation with and between national authorities under Article 21.

The Warsaw Convention also provides the same investigative powers and includes enhanced provisions specifically to address the confiscation of terrorist finance. The below measures apply to banks and other, broader financial institutions. Article 7(2) requires signatories to adopt measures in domestic law to give the relevant authorities the power to:

(unreported, 21 December 2020); and *R v West* (unreported, 2019).

[23] UNTOC, UNCAC, the 1990 Strasbourg Convention, the 1999 Strasbourg Convention and the Warsaw Convention.

[24] Article 12 of UNTOC and Article 31 of UNCAC.

[25] Article 4 of 1990 Strasbourg Convention.

- Determine whether a natural or legal person is the holder or beneficial owner of one or more accounts in any bank located in its territory, and if so, obtain all of the details of the identified accounts.

- Obtain the particulars of specified bank accounts and banking operations carried out during a specified period.

- Monitor the banking operations being carried out through one or more identified accounts.

- Ensure banks do not disclose to the bank customer concerned or other third parties that information has been sought or obtained, or that an investigation is being carried out.[26]

These powers are developed further in the 2014 Directive, which includes safeguards to ensure that a freezing order must not remain in force longer than necessary and frozen property that is not confiscated must be returned to its legitimate owner.[27] This publication does not deal with the freezing or seizure of assets in detail.

1.3.3 Ordinary (conviction-based) confiscation

Conviction-based confiscation is the final deprivation from a person of economic advantages or benefits derived from a criminal offence for which that person has been convicted. It enables, by court order, a person to be deprived of the proceeds of a crime for which that person has been finally convicted.

All of the international instruments listed above oblige State parties to adopt any necessary measures to enable ordinary confiscation of the "proceeds" of crimes within their respective scope.[28] The definition of the "proceeds" of crime is therefore important:

[26] Article 7 of Warsaw Convention.

[27] Freezing orders are subject to the same proportionality tests as confiscation orders, but their temporary and preventive nature is likely to help the case that they are proportionate (e.g. *Raimondo v. Italy*, judgment of 22 February 1994, no. 12954/87 (included as a summary in this publication) and *Arcuri v. Italy*, judgment of 5 July 2001, no. 52024/99 (included as a summary in this publication)).

[28] When signing or ratifying the 1990 Strasbourg Convention parties may limit the application of this provision in Article 2(1) on the adoption of confiscation measures to specified offences or

- UNTOC and UNCAC define the "proceeds" of crime as any property (including legal documents or instruments evidencing title to, or interest in, such property) derived from or obtained, directly or indirectly, through the commission of an offence.[29]

- The 1990 Strasbourg Convention and the 1999 Strasbourg Convention define the "proceeds" of crime as any economic advantage from criminal offences, which may consist of property of any description and may also include any legal documents or instruments evidencing title to, or interest in, such property.[30]

- The Warsaw Convention defines "proceeds" of crime more widely as "*any economic advantage, derived or obtained, directly or indirectly, from criminal offences, which may consist of property of any description and also any legal documents or instruments evidencing title to, or interest in, such property*".[31] [Emphasis added]

- The Warsaw Convention also provides for the confiscation of laundered property.[32]

- The 2014 Directive also adopts a wide definition: "*any economic advantage derived from a criminal offence; it may consist of any form of property [including legal documents or instruments evidencing title to, or interest in, such property] and includes any subsequent reinvestment or transformation of direct proceeds by a suspected or accused person and any valuable benefits*".[33] [Emphasis added]

categories of offences. The application of the equivalent provision in the Warsaw Convention may also be limited either to offences punishable by a maximum of more than one year's imprisonment or by reference to a list of specified offences, provided that ordinary confiscation must apply to money laundering and to the categories of offences listed in the appendix of the Convention.

[29] Article 2 of UNTOC; Article 2 of UNCAC.

[30] See Explanatory Report to the Criminal Convention on Corruption, para. 94.

[31] Article 1 of the Warsaw Convention.

[32] Article 1 of the Warsaw Convention.

[33] Article 2 of Directive 2014/42/EU on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union.

1.3.4 Value confiscation and intermingling

In some situations, it may not be possible to seize the direct proceeds of crime, which may make ordinary confiscation difficult or impossible. This may arise where the proceeds of crime have been transformed or converted into another form of property. In such a case, a measure which enables the confiscation of an amount of money that corresponds to the value of the proceeds of a crime may be an effective tool. This form of confiscation is known as value confiscation.

Another situation in which it may not be possible to seize the direct proceeds of crime is when such proceeds have been mixed with property acquired from legitimate sources. This is known as intermingling. The issue of intermingling may be addressed by the introduction of specific measures allowing for the confiscation of an amount of the mixed property capped at the assessed value of the original proceeds of crime.

The type of property which can be the subject of value confiscation can vary from country to country. The international instruments set out in section 1.1 do not establish a standard definition. Some States draw a distinction between monies of equivalent value to the proceeds of crime, and non-monetary property of equivalent value to the same (such as real estate and vehicles). For example, in the Criminal Codes of Montenegro and Croatia,[34] an offender is obliged to pay the equivalent monetary value of criminal proceeds but cannot be compelled to deliver property of equivalent non-monetary value in satisfaction of a confiscation order.[35]

UNTOC, UNCAC, and the Warsaw Convention all oblige parties to (i) adopt value confiscation measures; (ii) enable the confiscation of property into which the proceeds of crime have been transformed or converted; and (iii) enable the confiscation of intermingled assets up to the assessed value of the proceeds of crime that have been mixed. In the EU, all but two countries (Cyprus and Malta) have implemented value confiscation.[36]

[34] Article 113 of the Criminal Code of Montenegro and Article 77 of the Criminal Code of Croatia.

[35] OECD Anti-Corruption Network for Eastern Europe and Central Asia, "Confiscation of Instrumentalities and Proceeds of Corruption Crimes in Eastern Europe and Central Asia", 2018.

[36] B Vettori, T Kolarov and A Rusev, "Disposal of Confiscated Assets in the EU Member States: Laws and Practices", Centre for the Study of Democracy, 2014; OECD Anti-Corruption Network for Eastern Europe and Central Asia, "Confiscation of Instrumentalities and Proceeds of Corruption Crimes in Eastern Europe and Central Asia", 2018.

The 1990 and 1999 Strasbourg Conventions contain an express obligation to adopt value confiscation measures but do not directly address issues relating to transformation, conversion or the intermingling of assets. These issues are perhaps intended to be addressed through the wide definition of "proceeds", which covers any economic advantage from a criminal offence. It may be considered that a transformed, converted or intermingled asset that was ultimately derived from an offence could be confiscated, without any explicit additional provisions, on the basis that it remains an economic advantage whether or not its form has changed.

1.3.5 Confiscation of instrumentalities

Instrumentalities are any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences. They may include, for example, vehicles that are used to conceal goods in trafficking situations or equipment intended for use in carrying out a crime. The confiscation of instrumentalities is not restricted to any such property in the possession or ownership of the criminal. These may also be confiscated from third parties.[37]

UNTOC and UNCAC both oblige parties to adopt measures to enable the confiscation of property, equipment or other instrumentalities[38] used in or destined for use in offences covered by those conventions. Similarly, the 1990 and 1999 Strasbourg Conventions, the Warsaw Convention and the 2014 Directive all provide that each State party shall introduce measures to enable that State to confiscate any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences.

1.3.6 Confiscation of income and other benefits derived from the proceeds of crime and corruption

The proceeds of crime and corruption, or property into which such proceeds have been transformed or converted, may give rise to income or other valuable benefits. Each of the main international instruments provides for the confiscation of such benefits, although they do it in different ways. The policy behind enabling confiscation of income and other benefits derived from the proceeds of crime aims to ensure that offenders are not rewarded for illegal behaviour.

[37] OECD Anti-Corruption Network for Eastern Europe and Central Asia, "Confiscation of Instrumentalities and Proceeds of Corruption Crimes in Eastern Europe and Central Asia", 2018.

[38] "Instrumentalities" is not a defined in UNTOC or UNCAC.

UNTOC, UNCAC and the Warsaw Convention all provide expressly for the confiscation of income and benefits in the same manner and to the same extent as the direct proceeds of crime. The 1990 Strasbourg Convention addresses the issue differently through a definition of the "proceeds" of crime that encompasses any economic advantage from a criminal offence. Arguably, at least, this covers advantages in the form of income derived from the proceeds of crime.

The 2014 Directive extends the definition of "proceeds" to explicitly cover "any valuable benefits". However, the 2014 Directive does not allow for the confiscation of monies on this ground if the economic benefit is not derived from the crime itself. For example, in Joined Cases C-845/19 and C-863/19 - *Criminal proceedings against DR and TS*,[39] the CJEU held that since the criminal possession of narcotics does not in itself generate an economic benefit, the money which was the subject of confiscation proceedings following a conviction for such possession, without a conviction for sale, could not have arisen from a criminal offence within the scope of the 2014 Directive and therefore could not be confiscated under that Directive.

Extended confiscation, which is provided for in Article 5 of the 2014 Directive, goes further than the confiscation of income and benefits derived from the proceeds of a crime of which a person has been convicted. It is the confiscation of property belonging to a person convicted of an offence, where the court is satisfied that the property is derived "from criminal conduct" (i.e. not necessarily from the offence convicted of). The 2014 Directive describes the value of the property being disproportionate to the offender's legitimate income as an example of a circumstance which might satisfy the court that the property is derived from criminal conduct. The Draft EU Asset Recovery Directive retains these provisions.

1.3.7 Reversing the burden of proof

One important element of a confiscation regime is how it determines which assets should be properly liable to be confiscated. It may be difficult to prove that assets have an illicit origin without the owner's assistance, so it may be considered appropriate for confiscation measures to put the burden on the defendant to prove that assets have a lawful origin. UNTOC, UNCAC and the FATF Recommendations tentatively suggest this approach by providing that each State party may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged

[39] Joined Cases C-845/19 and C-863/19 - *Criminal proceedings against DR and TS*, judgment of 21 October 2021 (included as a summary in this publication).

proceeds of crime/corruption or other property liable to confiscation, to the extent that such a requirement is consistent with the principles[40] of its domestic law, and with the nature of the judicial and other proceedings. The 2014 Directive, for example, provides that an extended confiscation should be possible where a court is satisfied that the property in question is derived from criminal conduct. EU Member States may, for example, adopt a presumption that it is substantially more probable that the property in question has been obtained from criminal conduct than from other activities, thus putting the onus on the defendant to rebut this presumption.

The Warsaw Convention is a little less tentative. It obliges State parties to adopt measures in respect of serious offences (as defined by national law) requiring an offender to demonstrate the origin of property allegedly liable for confiscation, although a State party can disapply this provision of the Warsaw Convention by declaration at the time of signature, ratification or accession.[41]

The ECtHR has found specific systems involving reversed burdens of proof within limits to be compatible with the ECHR.[42] For non-conviction based confiscation (civil forfeiture) proceedings, reversal of the burden of proof may be allowed so long as it does not result in an "*unacceptable imbalance between the parties*".[43] For conviction-based confiscation proceedings, presumptions against the defendant are permissible as long as States confine these presumptions to "*within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence*".[44] In determining these reasonable limits, the following factors may be taken into account:

› Whether the confiscation is putative rather than restitutive.[45]

[40] In UNCAC the reference here is to "fundamental principles"; in UNTOC the reference is merely to "principles".

[41] See Article 53(4).

[42] For example, *Grayson and Barnham v. the United Kingdom*, judgment of 23 September 2008, nos. 19955/05 and 15085/06 (included as a summary in this publication).

[43] *G v. France*, decision of 5 October 1988, no. 11941/86; Reversal of the burden of proof in confiscation of the proceeds of crime: a Council of Europe Best Practice Survey (Best Practice Survey No. 2) PC-S-CO (2000) 8 Rev.

[44] *Salabiaku v. France*, judgment of 7 October 1988, no. 10519/83 at §28 (included as a summary in this publication).

[45] Reversal of the burden of proof in confiscation of the proceeds of crime: a Council of Europe Best Practice Survey (Best Practice Survey No. 2) PC-S-CO (2000) 8 Rev, 9.

- The effects of the confiscation order upon the defendant.[46]
- Whether the presumption is in a manner compatible with the presumption of innocence such that there is some possibility of rebuttal even if the rebuttal requires the accused to defend himself or herself.[47]
- Whether reversing the burden of proof would require self-incrimination.[48]

1.3.8 Third party confiscation

An offender may attempt to avoid confiscation measures by transferring assets representing the proceeds of crime to third parties, such as relatives or persons over whom the offender has control. Third party confiscation refers to the confiscation of assets in the hands of such third parties. The UN and Council of Europe conventions do not contain special rules on third party confiscation but their respective general confiscation provisions, including the definitions of "proceeds of crime" and express protections for the rights of innocent third parties, allow for third party confiscation.[49]

The 2014 Directive, however, contains developed provisions on third party confiscation. It explicitly requires the introduction of measures enabling third party confiscation where the third party acquired the proceeds, or other property the value of which corresponds to proceeds, from a suspected or accused person if the third party knew or ought to have known, from the facts and circumstances, that the purposes of the transfer or acquisition were to avoid confiscation. The fact that the property was transferred free of charge or in exchange for an amount significantly lower than the market value is mentioned as a possible indications of such imputed knowledge.

[46] Reversal of the burden of proof in confiscation of the proceeds of crime: a Council of Europe Best Practice Survey (Best Practice Survey No. 2) PC-S-CO (2000) 8 Rev, 9.

[47] *Pham Hoang v. France*, judgment of 25 September 1992, no. 13191/87; *Salabiaku v France*, judgment of 7 October 1988, no. 10519/83 (included as a summary in this publication).

[48] Reversal of the burden of proof in confiscation of the proceeds of crime: a Council of Europe Best Practice Survey (Best Practice Survey No. 2) PC-S-CO (2000) 8 Rev, 9.

[49] It is believed that the definition of "proceeds" in these conventions are broad enough to encompass proceeds in the hands of third parties. Therefore, a confiscation of these proceeds will mean a confiscation from third parties.

Rights of fair trial and effective remedy apply to third parties from whom property is proposed to be confiscated. This will include appearing as a party in the confiscation proceedings where such persons claim to have proprietary rights in the property sought to be confiscated. This was held to be the case by the CJEU in Joined Cases C-845/19 and C-863/19 – *Criminal proceedings against DR and TS*, where it was claimed that sums recovered during investigations belonged to family members and had never been in the possession of the defendants, let alone mixed up in criminality.[50] In this case, the CJEU held that national laws in Bulgaria precluding third parties from appearing in the proceedings was contrary to the 2014 Directive.

The rights of bona fide third parties (i.e. those to whom the requisite knowledge cannot be proven or imputed) must not be prejudiced. This is expressly provided for in UNTOC, UNCAC, the FATF Recommendations and the 2014 Directive. The Warsaw Convention in particular specifically mandates that each State party must adopt legislative provisions to ensure that those who are affected by the freezing, seizure, confiscation, or other measures of property shall have effective legal remedies in order to preserve their rights. Such protective measures apply to both third parties who are nominal owners of the impugned property and those who possess such property. The 1999 Strasbourg Convention is silent on the rights of bona fide third parties.

While ECHR jurisprudence has historically provided limited protections for bona fide third parties,[51] in *Varvara v. Italy*, the ECtHR suggested that the protection of bona fide third parties is a customary norm of international law which must not be prejudiced in the confiscation of instruments and proceeds of crime.[52] If the protection of bona fide third parties is indeed a customary norm of international law in relation to the confiscation of criminal instruments and proceeds generally, this right applies regardless of the international convention underpinning the particular form of confiscation proceedings at issue (for example, the 1999 Strasbourg Convention in respect of bribery offences, or UNTOC in respect of organised crime). Where international law is engaged, national courts should therefore take care to weigh any prejudice to bona fide third parties against the confiscation sought and, where relevant, facilitate the right for such third parties to be heard during proceedings.

[50] Joined Cases C-845/19 and C-863/19 - *Criminal proceedings against DR and TS*, judgment of 21 October 2021 (included as a summary in this publication).

[51] In *AGOSI v. the United Kingdom*, judgment of 24 October 1986, no. 9118/80 a seizure order against an "innocent owner" was upheld.

[52] *Varvara v. Italy*, judgment of 29 October 2013, no. 17475/09.

1.3.9 Non-conviction based confiscation

There are certain situations in which conviction-based confiscation may not be possible. For example, a defendant may be unknown, deceased, a fugitive or immune from prosecution, or a limitation period may prevent criminal proceedings from being brought against them. In such situations, there is no criminal conviction, but it may still be considered desirable to enable confiscation proceedings, subject to appropriate safeguards. Some States do provide for confiscation proceedings, under certain conditions, in the absence of a criminal conviction. This is referred to as non-conviction-based confiscation, or civil forfeiture.

The international instruments referenced in this publication do not contain detailed provisions on civil forfeiture. UNTOC, UNCAC, the 1990 Strasbourg Convention, the 1999 Strasbourg Convention and the Warsaw Convention do not make criminal conviction a precondition to confiscation, but their definitions of "proceeds" and instrumentalities suggest that the focus is very much on conviction-based confiscation. This may be due to the severity of confiscation (as a final deprivation of property) and the risk of misuse of such powers, including arbitrary deprivation of property in contravention of a person's fundamental rights, in the absence of a conviction at the criminal standard of proof.

However, there have been some developments in the international standards in this area. UNCAC provides that, for mutual assistance purposes, parties shall "consider" taking measures to allow confiscation of property of foreign origin under a court order without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight, absence or in other appropriate cases.[53] The FATF Recommendations also note that countries should "consider adopting" such measures.[54] Moreover, the Warsaw Convention states, in the context of cooperation with requesting States, that the execution of measures may be required "to the widest extent possible under their domestic law" where this is requested "*in relation* to a criminal offence" [emphasis added], and not necessarily as a criminal sanction following conviction.[55]

Within the EU, standards recognising civil confiscation are developing. The 2005 Framework Decision provides, in relation to tax offences, that Member States may use procedures other than criminal procedures to deprive a perpetrator of the

[53] See Article 54(1)(C) of UNCAC.

[54] Recommendation 4 of the FATF Recommendations.

[55] Article 23(5) of Warsaw Convention.

proceeds of the offence. In 2008, the European Commission suggested that Member States consider introducing civil confiscation measures.[56]

The 2014 Directive introduced specific provisions for non-conviction-based confiscation, albeit only in limited circumstances where criminal proceedings have been commenced but the illness or flight of the suspected or accused person has made the pursuit of a criminal conviction impossible and on the proviso that the person whose property is affected must be represented by a lawyer. The threshold test set out in Article 4(2) of the 2014 Directive is that the criminal proceedings "could" have led to a criminal conviction if the accused had been able to stand trial. According to the European Commission's explanatory memorandum, it allows Member States to choose whether confiscation should be imposed by criminal and/or civil/administrative courts.[57]

The Draft EU Asset Recovery Directive adds death, immunity from prosecution, the provision of amnesty and the expiry of a limitation period under national law to the circumstances in which, provided criminal proceedings have been commenced, non-conviction based confiscation may be pursued.[58] The draft text tightens the applicability test, requiring the national court to be "*satisfied that all the elements of the offence are present*".

The ECtHR has also considered non-conviction-based confiscation. Recent case law confirms that, as a matter of principle, such a system for non-conviction-based confiscation may be introduced, albeit in a way that is compatible with Convention rights.[59] This means that:

- Proceedings for non-conviction-based confiscation must be conducted in the presence of both parties and with respect for the rights of the defence,[60] although the rights under the criminal limb of Article 6 ECHR are not likely to apply.[61]

[56] Communication from the Commission to the European Parliament and the Council, "Proceeds of organised crime: Ensuring that 'crime does not pay'", COM (2008) 766 final, para 3.3.1.

[57] Proposal for a Directive of the European Parliament and of the Council on the Freezing and Confiscation of Proceeds of Crime in the European Union COM (2012) 85 final, p.11.

[58] Article 15 of Proposal for a Directive of the European Parliament and of the Council on Asset Recovery and Confiscation COM/2022/245 final.

[59] *Arcuri v. Italy*, judgment of 5 July 2001, no. 52024/99 (included as a summary in this publication).

[60] *Arcuri v. Italy*, judgment of 5 July 2001, no. 52024/99 (included as a summary in this publication).

[61] *Butler v. the United Kingdom*, admissibility decision of 27 June 2022, no. 41661/98 (included as a summary in this publication).

- The court in such proceedings must give full reasons for their judgment.[62]
- There must be a right of appeal.[63]
- It may still be permissible to reverse the burden of proof for a non-conviction-based confiscation.[64]

1.3.10 International cooperation

UNTOC, UNCAC, the 1990 Strasbourg Convention, the 1999 Strasbourg Convention and the Warsaw Convention recognise the importance of international cooperation in relation to confiscation and include detailed provisions to that effect.[65] For example, the 1990 Strasbourg Convention explicitly recognises the existence of other international conventions and allows the other international conventions to supersede the provisions in that convention if it facilitates international cooperation.[66]

The establishment of the EPPO and proposals for national asset recovery offices within the EU also points to the importance of harmonisation and international cooperation where the offences concerned are likely to have a cross-border element.

1.3.11 Safeguards

In light of the severity of confiscation as an enforcement and punishment mechanism, safeguards are required for defendants, victims and third parties. Both UNCAC and UNTOC oblige State parties to take appropriate measures for the protection of witnesses, experts and victims who give testimony concerning offences established in accordance with those Conventions, without prejudice to the rights of the defendant, including the right to due process. They further state that the rights of bona fide third parties must not be prejudiced.

[62] *Butler v. the United Kingdom*, admissibility decision of 27 June 2022, no. 41661/98 (included as a summary in this publication).

[63] *Butler v. the United Kingdom*, admissibility decision of 27 June 2022, no. 41661/98 (included as a summary in this publication).

[64] *Gogitidze v. Georgia*, judgment of 12 May 2015, no. 36862/05 (included as a summary in this publication).

[65] See UNODC Manual on International cooperation for the purposes of confiscation of the proceeds of crime: https://t.ly/XNbI4

[66] Article 39 of 1990 Strasbourg Convention.

Whilst the 1990 and 1999 Strasbourg Conventions do not detail specific safeguards, the Explanatory Report to the 1999 Strasbourg Convention acknowledges the potential intrusiveness of special investigative techniques. The Explanatory Report confirms that State parties are free to decide that some of these techniques will not be admitted in their domestic legal system or surround the use of these "*with as many safeguards and guarantees as may be required by the imperative of protecting human rights and fundamental freedoms*".[67]

Other international conventions such as the European Convention on the Compensation of Victims of Violent Crimes[68] and the Council of Europe Convention on the Prevention of Terrorism[69] may apply when dealing with the proceeds of crime in relation to specific offences matters such as terrorism and human trafficking. These categories of offence are outside the scope of this publication.

1.3.12 Administration of confiscated property

The major international conventions[70] address the administration of confiscated property. UNCAC provides that confiscated property shall be disposed of, including being returned to its prior legitimate owners, in a manner consistent with both UNCAC and domestic law. States are also required to adopt legislative measures to enable its authorities to return confiscated property at the request of another signatory State. Article 57 includes the requirement that a party requesting the return of confiscated property would be required to establish prior ownership of property and obtain a final court judgment; the latter requirement can be waived by the requesting State.[71]

UNTOC states that confiscated property is to be disposed of in accordance with domestic laws. It directs that priority consideration should be given to returning confiscated property or proceeds of crime to a requesting State party so it can distribute compensation to victims of crime or return it to its legitimate owners. Article 14(3) outlines a mechanism by which States can effectively donate the value of any property derived from the sale of criminal property to

[67] Explanatory Report to the Criminal Convention on Corruption, para 114.

[68] 1983, ETS No.116.

[69] 2005, CETS No.196.

[70] UNCAC, UNTOC, Directive 2014/42/EU on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union, 1990 Strasbourg Convention and Warsaw Convention.

[71] Article 57 of UNCAC.

a fund administered by the UN to assist developing countries in implementing UNTOC.[72]

Article 10 of the 2014 Directive offers examples of the types of measures which parties can take to manage frozen and confiscated property. These include establishing centralised offices, specialised offices to manage frozen property with a view to possible confiscation. The 2014 Directives notes that there should be provision to sell or transfer property where necessary and States may wish to consider measures to allow the confiscated property to be used for public interest or social purposes.[73]

The 1990 Strasbourg Convention and Warsaw Convention also empower parties to adopt their own legislative measures to manage confiscated property.[74]

[72] Article 14 of UNTOC.

[73] Article 10 of Directive 2014/42/EU on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union.

[74] Article 15 of 1990 Strasbourg Convention and Article 6 of Warsaw Convention.

1.4 APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The purpose of this section is to explain, with reference to relevant case law, how relevant Articles of the ECHR function in relation to the confiscation, seizure, and forfeiture of the proceeds of crime. The content of the Articles, and key principles developed by the ECtHR, will be examined, followed by summaries of key case law relevant to the confiscation of assets. The overarching purpose is to help the reader gain a deeper understanding of the different contexts in which these ECHR rights may be engaged, and when they may be violated.[75]

As stated in the introduction to this publication, certain ECHR rights must always be balanced in the context of confiscation proceedings. One of the main rights concerned can be found in Article 1 of Protocol No.1 to the ECHR, which sets out the right of individuals to peaceful enjoyment of their possessions. The right to fair trial (Article 6 ECHR), the principle of there being no crime or punishment without legal basis (Article 7 ECHR) and the right to respect for private and family life (Article 8 ECHR) are also relevant and have been the subject of ECtHR cases concerning confiscation.

[75] In addition to the case law discussed in this section, readers are referred to the ECHR Knowledge Sharing Platform (ECHR-KS). This excellent resource is maintained by the Registry of the European Court of Human Rights, is updated regularly, and can be accessed via https://ks.echr.coe.int/en/web/echr-ks/. In particular, Key Theme Article 1 of Protocol No. 1 Confiscation/Seizure of Assets will be of interest to readers, and can be accessed via https://ks.echr.coe.int/documents/d/echr-ks/confiscation-seizure-of-assets.

1.4.1 The right to peaceful enjoyment of possessions: Article 1 of Protocol No.1 ECHR

1.4.1.1 Overview

The principle of the right to peaceful enjoyment of possessions is set out in Article 1 of Protocol No.1 of the ECHR.

Article 1 of Protocol No.1 states:

1) 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.

2) 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.

Article 1 of Protocol No.1 guarantees the right to property and protects individuals or legal persons from arbitrary State interference with their possessions.[76] Article 1 of Protocol No.1 imposes both a negative and positive obligation on States to protect the enjoyment of possessions.[77] However, the ECtHR recognises the right of a State to confiscate the property of individuals or legal persons within the conditions set out in Article 1 of Protocol No.1. Specifically, any interference must be pursuant to the public interest, conducted in a manner which is in accordance with the rule of law, and proportionate to its aim.

The ECtHR has established a three-stage process to determine whether a violation of this provision has occurred.

[76] *Marckx v. Belgium*, judgment of 13 June 1979, no. 6833/74.

[77] *Öneryildiz v. Turkey*, judgment of 30 November 2004, no. 48939/99.

1. Engagement of Article 1 of Protocol No.1: "Possession" of "property"

To fall under the scope of Article 1 of Protocol No.1, the individual must "possess" their property. The term "possession" has an autonomous meaning in the ECHR,[78] including under Article 1 of Protocol No.1. It relates to an individual's claim and/or right to property. Crucially, this claim and/or right must have a basis in domestic law and it is incumbent on an applicant alleging a violation of the right in the ECtHR to establish the exact nature of their entitlement in the relevant domestic law. For instance, in *Novikov v. Russia*,[79] the ECtHR noted that the applicant had a claim to fuel that had been seized by the Russian police as an object of crime because he was the beneficiary of an assignment agreement concerning the fuel that was enforceable under Russian law.

Claims and/or rights to property can also be recognised as a "possession" if they fall within the scope of a lawful claim or legitimate expectation to that property. A legitimate expectation must be enforceable under domestic law and regarded as an asset for the purposes of Article 1 of Protocol No.1. *Denisova and Moiseyeva v. Russia*[80] involved a man who had been convicted of treason and had his property confiscated by the authorities. The man's wife and daughter subsequently claimed that they partly owned the property that had been confiscated. In assessing the wife's claim, the ECtHR found that domestic law provided for joint ownership of property acquired by spouses in marriage and that the wife therefore had a legitimate expectation to a portion of the family property equal to that of her husband. *Pine Valley Developments Ltd and Others v. Ireland* considered legitimate expectation in a commercial context, albeit not in a confiscation context. In this case, legitimate expectation arose when outline planning permission had been granted, in reliance on which the applicant companies purchased land to develop it. The planning permission was deemed a part of the property and the companies had a legitimate expectation of full planning permission being granted.[81]

Interests can be considered "possessions" within Article 1 of Protocol No.1 even if the domestic laws of a State do not recognise a particular interest as a "property right". This was demonstrated in *Depalle v. France* where, although the applicant's right to occupy a public property was revocable and precarious (and not the subject of a

[78] *Gasus Dosier und Föedertechnik GmbH v. the Netherlands*, judgment of 23 February 1995, no. 15375/89.

[79] *Novikov v. Russia*, judgment of 11 July 2013, no. 7087/04.

[80] *Denisova and Moiseyeva v. Russia*, judgment of 1 April 2010, no. 16903/03.

[81] *Pine Valley Developments Ltd and Others v. Ireland*, judgment of 29 November 1991, no. 12742/87.

proprietary right under domestic law), this amounted to possession for the purposes of Article 1 of Protocol No.1 because it was "sufficiently established and weighty to amount to possession"[82], even where the domestic law did not recognise that time in occupancy attributed a proprietary interest. The term "property" is broadly construed and not limited to physical goods.[83] It includes the following:

- Tangible, moveable and immoveable property, such as goods, buildings, land.
- Intangible property, including monetary funds, shares, intellectual property, pensions, social security entitlements, professional clientele, and business licences.
- Legal claims such as binding judgments of courts and tribunals, debt obligations.

In the context of seizure, confiscation, or forfeiture of assets, possessions have included confiscated aircraft,[84] property seized in criminal proceedings,[85] as well as assets seized in a foreign country.[86]

2. Interference with Article 1 of Protocol No.1 – The Three Rules

After the applicant's possession of property has been established and Article 1 of Protocol No.1 therefore applies, the ECtHR will then determine whether there is (or has been or will be) an interference with the enjoyment of a possession. This involves examining the relevant acts or omissions to see whether they affect the enjoyment of the possessions in question. The ECtHR takes a "three rules" approach to this question, with the first being the general right, and the second and third being the two forms of qualification to that right contained in Article 1 of Protocol No.1. The ECtHR's decision will be determined by an examination of which of the three rules apply to the situation at hand. [87]

[82] *Depalle v. France*, Grand Chamber judgment of 29 March 2010, no. 34044/02.

[83] See the ECtHR Guide on Article 1 of Protocol No.1 to the European Convention on Human Rights, available at https://t.ly/Pdxy, last updated 31 August 2022.

[84] *Bosphorus Airways v. Ireland*, Grand Chamber judgment of 30 June 2005, no. 45036/98 (included as a summary in this publication).

[85] *Tendam v. Spain*, judgment of 13 July 2010 (included as a summary in this publication).

[86] *Saccoccia v. Austria*, judgment of 18 December 2008, no. 69917/01 (included as a summary in this publication).

[87] *Gogitidze v. Georgia*, judgment of 12 May 2015, no. 36862/05 (included as a summary in this publication).

First rule

The first rule establishes the overall principle that individuals are entitled to the peaceful enjoyment of their possessions (a catch-all formula). The second and third rules are to be construed in light of this general principle.

Second rule

The second rule concerns the deprivation of possessions, meaning the extinguishment of an individual's rights of ownership. To determine whether there has been or will be a "deprivation" the judge considers whether the individual is (or will be) able to use, sell, donate, or otherwise exercise their rights over the possession in question.

A deprivation can be *de facto or de jure*. Generally speaking, *de facto* deprivation occurs when the relevant authorities (i.e. a State body) interfere with the enjoyment of property without officially removing the owner's title. It should be noted that the ECtHR is wary about recognising *de facto* deprivations of property for the purposes of Article 1(2) of Protocol No.1 unless the owner's rights have been formally extinguished. In *Hentrich v. France*[88] the ECtHR held that the tax authority's pre-emption of the applicant's property, after it was sold at too low a price to the applicant, amounted to a *de facto* expropriation of the property as the pre-emption amounted to a deprivation of the applicant's possessions as defined under Article 1 of Protocol No.1.

Deprivations of possessions can arise even where there has not been a formal decision extinguishing individual rights but the impact on possessions is so profound, it amounts to expropriation. The ECtHR will look behind appearances and investigate the realities of the situation.[89] In *Sarica and Dilaver v. Turkey*, land had been incorporated into a military zone which allowed Turkish authorities to occupy it and change its intended use irreversibly, so it came to be considered State property, even though no formal declaration was made.[90] If the ECtHR deems a measure to be expropriation there is an obligation for the State to award compensation to the affected owner.[91]

[88] *Hentrich v. France*, judgment of 22 September 1994, no. 13616/88.

[89] *Apap Bologna v. Malta*, judgment of 9 December 2021, no. 47505/19.

[90] *Sarica and Dilaver v. Turkey*, judgment of 27 May 2010, no. 11765/05.

[91] ECtHR Guide on Article 1 of Protocol No.1 to the European Convention on Human Rights, available at https://t.ly/XEIX, last updated 31 August 2022, p.23.

Not all acts restricting an owner's property rights are considered deprivations under the second rule, instead, they may fall under the third rule. However, as confiscation is a final deprivation of property, a confiscation order once carried out will generally fall within this second rule.

Third rule

The third rule concerns the control of the use of property in accordance with the general interest. A control of the use of property will occur when a relevant body has established rules in the general interest which will restrict an owner's enjoyment of their property but will not amount to a deprivation of possession. States have a wide, but not unlimited, margin of appreciation in their power to control property. The control of property must be implemented in line with a general rule and cannot be arbitrary.[92] The ECtHR often cites forfeiture and confiscation orders as examples of control of property under the third rule.

A State's control of use of property can have a much wider scope than a deprivation of property. The State may affect "control" by implementing rules requiring a positive action by an individual, or by rules imposing restrictions on their activities, such as freezing assets, confiscation or forfeiture orders, planning controls, environmental orders, changes to licensing conditions and the demolition of unlawfully constructed buildings.

The ECtHR emphasises that the three rules are not distinct and unconnected. The latter two are both instances of an interference with peaceful enjoyment of property and as such they should be construed in light of the general principle set out in the first rule.[93] If the interference with property rights cannot be classified under the second or the third rule, the first rule applies.

3. Justification for an interference

The final step the ECtHR must take to assess whether there has been a violation of Article 1 of Protocol No.1 is determining whether the interference with the applicant's property rights was justified. To be justified, the State's actions must pass three distinct tests: they must be lawful, serve a legitimate aim, and have struck a fair, proportionate balance between the rights of the individual and the legitimate aim pursued.

[92] *Pine Valley Developments Ltd v. Ireland (Article 50)*, judgment of 9 February 1993, no. 12742/87.

[93] *James v. the United Kingdom*, judgment of 21 February 1986, no. 8793/79.

Lawfulness

Firstly, the State's interference with the applicant's property must have been lawful, meaning the interference must have both a clear basis in domestic law and adherence to the principles of the rule of law (including clarity, foreseeability and precision). In particular, the law must enable those subject to it to foresee, to a degree that is reasonable in the circumstances, the consequences of their actions.[94] Further, lawfulness does not just require that the State complies with its domestic law, but also that it follows a fair and proper procedure – the measure in question should issue from and be executed by an appropriate authority and should not be arbitrary.[95] Any interference must be accompanied by procedural guarantees that afford the affected individual or entity a reasonable opportunity to present their case to the responsible authorities to challenge the measures.[96]

In summary, for interference to be lawful it must have a basis in national law,[97] be clear, foreseeable to those concerned, and be precise.[98] In addition, the ECtHR has noted that any punishment determined at a pre-trial stage would seriously impede a person's ability to present his case effectively before the court.[99]

Legitimate aim

Secondly, State interference with the right to peaceful enjoyment of property must serve a legitimate aim in the public or general interest.[100] Due to the wide variety of policies developed by States which may impact property in some way shape or form, the ECtHR recognises that States possess a wide margin of appreciation in

[94] *Baklanov v. Russia*, judgment of 9 June 2005, no. 68443/01 (included as a summary in this publication).

[95] *Winterwerp v. the Netherlands*, judgment of 24 October 1979, no. 6301/73.

[96] *Shorazova v. Malt*, judgement of 3 March 2022, no. 51853/19 (included as a summary in this publication).

[97] *Bosphorus Airways v. Ireland*, Grand Chamber judgment of 30 June 2005, no. 45036/98 (included as a summary in this publication).

[98] *Carbonara and Ventura v. Italy*, judgment of 30 May 2000, no. 24638/94; *Beyeler v. Italy*, judgment of 5 January 2000, no.33202/96.

[99] *Markus v. Latvia*, judgement of 11 June 2020, no. 17483/10 (included as a summary in this publication).

[100] *James v. the United Kingdom*, judgment of 21 February 1986, no. 8793/79.

determining what may or may not be in the public or general interest.[101] Where State interference includes social and economic policy implemented via legislation, the ECtHR will respect the legislature's judgment as to what is *"in the public interest unless that judgment is manifestly without reasonable foundation"*.[102]

The ECtHR has found the following purposes to fall within the public interest:

- Prevention of tax evasion.
- Measures to combat drug trafficking and smuggling.
- Confiscation of monies acquired unlawfully.
- Prevention of collusive practices and protection of the public purse.
- Smooth operation of the justice system.

In *Riela and Others v. Italy* the applicants' property was confiscated by the Italian authorities on the grounds that the property was, or had been acquired, through the proceeds of crime. There was significant evidence that the first two applicants were members of a Mafia-type criminal organisation, and that the confiscated property had been acquired through their activities in this organisation. The applicants complained under Article 1 of Protocol No.1 that the confiscation measure infringed their right to respect for property. The ECtHR in *Riela* stated that while the confiscation measure had unquestionably infringed the applicants' rights under Article 1 of Protocol No.1, the legitimate aim of combating Mafia-type criminal organisations in Italy was so significant that the interference with the ECHR was not disproportionate to that aim. Therefore, there was no violation of the ECHR and the application was manifestly ill-founded.[103]

[101] *James v. the United Kingdom*, judgment of 21 February 1986, no. 8793/79.

[102] *James v. the United Kingdom*, judgment of 21 February 1986, no. 8793/79.

[103] *Riela and Others v. Italy*, admissibility decision of 4 September 2001, no. 52439/99.

Proportionate interference

Finally, the State's interference with property must be proportionate. A fair balance must be struck between the rights of the applicant to the peaceful enjoyment of their property and the requirement of the public interest. Any uncertainty, whether legislative, administrative, or arising from practices applied by the authorities, is a factor considered by the ECtHR when assessing the State's conduct. [104]

The ECtHR has accepted that confiscation measures are proportionate even where there is no conviction establishing the guilt of the applicants, provided the relevant assets are found to be proceeds of crime.[105]

In *AGOSI v. the United Kingdom* the applicant had sold 1,500 Kruegerrand gold coins to a pair of men who were then arrested attempting to smuggle the coins into the UK. The coins were confiscated as objects of smuggling. The sale contract for the coins stipulated that the title to the coins would not transfer until payment was received by the company. As the cheque presented to AGOSI for payment was not honoured, the company argued in proceedings in the UK that as they still had title to the coins, they should be restituted to them. The applicant complained to the ECtHR that the confiscation of the coins violated Article 1 of Protocol No.1 as they were innocent of any wrongdoing. In its assessment of proportionality, the ECtHR in *AGOSI* stated:

"The State enjoys a wide margin of appreciation with regard to both choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question"

[104] *Broniowski v. Poland*, judgment of 24 June 2004, no. 31443/96.

[105] *Balsamo v. San Marino*, judgment of 8 October 2019, nos. 20319/17 and 21414/17 (included as a summary in this publication).

The ECtHR has recognised that striking a fair balance is contingent on many different factors, including:

- The owner's behaviour (relating to the act causing the State to take action, such as a criminal act).[106]
- The degree of fault or care the owner had displayed in their behaviour and whether applicable procedures allowed the State to take account of the applicant's degree of fault or care.[107]
- Whether the person affected was afforded a reasonable opportunity to put their case to the responsible authorities effectively.[108]
- The aims and objectives of the policy/legislation in question. In particular, it must be open to the legislature to take measures to give effect to the aim of the adopted policy.[109]
- Whether the State has exceeded its margin of appreciation.[110]
- Whether less intrusive measures existed that could reasonably have been resorted to.[111]
- Further considerations include: timeliness,[112] certainty in the exercise of State power,[113] the impact of the interference on the individual,[114] procedural safeguards,[115] and the payment of compensation.[116]

[106] *AGOSI v. the United Kingdom*, judgment of 24 October 1986, no. 9118/80.

[107] *AGOSI v. the United Kingdom*, judgment of 24 October 1986, no. 9118/80.

[108] *G.I.E.M. S.R.L and Others v. Italy*, Grand Chamber judgment of 28 June 2018, nos. 1828/06, 34163/07 and 19029/11 (included as a summary in this judgment).

[109] *Mellacher v. Austria*, judgment of 19 December 1989, nos. 10522/83, 11011/84, 11070/84.

[110] *Pressos Compania Naviera SA v. Belgium*, judgment of 20 November 1995, no. 17849/91.

[111] *OAO Neftyanaya Kompaniya Yukos v. Russia*, judgment of 31 July 2014, no. 14902/04.

[112] *Erkner and Hofauer v. Austria*, judgment of 23 April 1987, no. 9616/81.

[113] *Hentrich v. France*, judgment of 22 September 1994, no. 13616/88.

[114] *Erkner and Hofauer v. Austria*, judgment of 23 April 1987, no. 9616/81.

[115] *Hentrich v. France*, judgment of 22 September 1994, no. 13616/88.

[116] *Lithgow and Others v. the United Kingdom*, judgment of 8 July 1986, nos. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81 and 9405/81.

The State's wide margin of appreciation in the fight against corruption is exemplified in the case of *Gogitidze v Georgia*. The ECtHR considered it justified for the burden of proof to be placed on the applicant, and legitimate that the applicant's assets were confiscated prior to a determination of criminal guilt (and ultimately without a conviction of any crime) as there was overwhelming circumstantial evidence suggesting that the applicant's lawful income could not have sufficed to acquire the assets in question.[117]

While it must be open to domestic authorities to take measures to give effect to the aim of their adopted policies, these measures must also be proportionate.

The applicant in *Gabrić v. Croatia* was stopped by police as she crossed the border between Bosnia and Herzegovina and Croatia. 20,000 Deutschemarks and 61 cartons of cigarettes were seized from her car. The applicant was convicted of avoiding customs controls and given a six-month suspended sentence and had her cigarettes confiscated. She was also convicted of an administrative offence related to the 20,000 Deutschmarks for which she was fined and had the money confiscated. The applicant argued that such measures were excessive and violated her rights under Article 1 of Protocol No.1. The ECtHR recognised that the authorities' confiscations were lawful and amounted to a control of the use of property. However, as the applicant had already been fined in relation to the non-declaration of the money, had not been subject to a criminal conviction in relation to the money, and had lawfully obtained said money, the ECtHR decided that the Government had not convincingly shown that the initial fine had not been a sufficient deterrence and punishment. Therefore, the confiscation was disproportionate and amounted to a violation of the ECHR.[118]

The approach to proportionality in *Gabrić* is mirrored in the CJEU case of *Chmielewski v. Nemzeti Adó- és Vámhivatal Dél-alföldi Regionális Vám-és Pénzügyőri Főigazgatósága*. The CJEU found that while Member States have a margin of discretion in deciding how to ensure compliance with their obligations to implement EU law, the sanctions under the measures chosen must be proportionate and necessary to achieve the objectives pursued by the relevant legislation. [119]

[117] *Gogitidze v. Georgia*, judgment of 12 May 2015, no. 36862/05 (included as a summary in this publication).

[118] *Gabric v. Croatia*, judgment of 5 February 2009, no. 9702/04.

[119] *Chmielewski v. Nemzeti Adó- és Vámhivatal Dél-alföldi Regionális Vám- és Pénzügyőri Főigazgatósága*,

Examples of where the ECtHR has held State action to be disproportionate can be seen in the following cases:

- ***Grifhorst v. France:***[120] The confiscation of the applicant's cash violated Article 1 of Protocol No.1 as no evidence could be produced that the cash was related to any illegal activity and the confiscation order was vastly more severe than the usual penalty in such circumstances.

- ***Tendam v. Spain:***[121] The ECtHR held that, in case the owner of the property is acquitted of the relevant charges against them, reasonable measures must be taken for the preservation of seized property.

- ***Gladysheva v. Russia:***[122] Dispossessing a bona fide purchaser of her flat, without compensation, in circumstances in which there were no conflicting private interests at stake, and without sufficient justification that it was in the public interest, constituted a disproportionate interference.

Recent ECtHR case law demonstrates that signatory States have significant discretion in asset recovery proceedings. For example, in *Ulemek v. Serbia*, the applicant was convicted of numerous serious crimes and was required to forfeit his house, bought using illicit funds in 1998. The ECtHR found that it was not arbitrary to extend confiscation of assets retrospectively to property that the applicant had acquired before the domestic 2008 law.[123] In *Phillips v. the United Kingdom*, the ECtHR opined that confiscation order procedures operated to deter and deprive a person of profits received from drug trafficking as in this case. It was deemed that this important aim justified interference suffered by the applicant with the peaceful enjoyment of his possessions.[124]

CJEU judgment of 16 July 2015 (included as a summary in this publication)

[120] *Grifhorst v. France*, judgment of 26 February 2009, no. 28336/02 (included as a summary in this publication).

[121] *Tendam v. Spain*, judgment of 13 July 2010 (included as a summary in this publication).

[122] *Gladysheva v. Russia*, judgment of 6 December 2011, no. 7097/10 (included as a summary in this publication).

[123] *Ulemek v. Serbia*, admissibility decision of 2 February 2021, no. 41680/13 (included as a summary in this publication).

[124] *Phillips v. the United Kingdom*, judgment of 5 July 2001, no. 41087/98 (included as a summary in this publication).

1.4.1.2 Bona Fide Third Parties

A notable issue arises where a third party, acting in good faith, suffers the consequences of asset seizure or confiscation. The ECtHR has sympathised with such applicants in the past, accepting that third parties had suffered severe ramifications due to seizure and confiscation orders. As noted above, the protection of bona fide third parties is also explicitly provided for in a number of the international instruments providing the basis for national implementing legislation on confiscation; and the CJEU has found domestic laws preventing third party participation in proceedings to be contrary to the 2014 Directive.[125]

When ruling on the claims of third parties in relation to Article 1 of Protocol No.1 the ECtHR will consider two main factors. Firstly, the ECtHR will consider whether the affected third party was able to effectively raise their claims to the property, and whether those claims have been considered, in enforcement proceedings. Secondly, the ECtHR will have regard to the applicant's conduct and degree of fault, and whether these factors had been sufficiently considered by the domestic courts.[126]

Significant third party cases have been *AGOSI v. the United Kingdom (above) and Air Canada v. the United Kingdom*[127] where it was accepted that a third party had suffered severe detriment due to seizure and confiscation orders but there was no violation of the right to property under Article 1 of Protocol No.1.

In *Air Canada v. the United Kingdom*, UK Customs and Excise seized an aircraft belonging to Air Canada after a large quantity of drugs were found on board. The seizure occurred after a long history of drug trafficking related incidents involving Air Canada and British airports, as well as multiple requests by the British authorities for Air Canada to tighten their security procedures at Heathrow Airport, where the seizure occurred. The aircraft was held for several hours and only released after a payment was made by the applicant company of €60,000 for its return. The applicant company complained before the ECtHR that the seizure of the aircraft, and the conditions placed on its return, had violated its rights under Article 1 of Protocol No.1 and Article 6.

[125] Joined Cases C-845/19 and C-863/19 - *Criminal proceedings against DR and TS*, judgment of 21 October 2021 (included as a summary in this publication).

[126] *AGOSI v. the United Kingdom*, judgment of 24 October 1986, no. 9118/80.

[127] *Air Canada v. the United Kingdom*, judgment of 5 May 1995, no. 18465/91.

In *Air Canada*, as in *AGOSI*, no violation of Article 1 of Protocol No.1 was ultimately found. In this case the applicant's history of drug trafficking incidents and failure to tighten security had been factored into the Customs and Excise Commissioner's decision to seize their asset. Furthermore, the ECtHR noted that the decision to confiscate property had been subject to judicial challenge and the applicant had been able to effectively argue their case and provide evidence to support their arguments. The applicant also had the opportunity to bring a judicial review of the decision but did not do so. As such, there was no violation.

The applicant in *Air Canada* can be distinguished from that in *Gladysheva v. Russia*.[128] In the latter, the applicant had taken all the required steps and lodged all the relevant paperwork (with the relevant bodies) to become the lawful owner of the property; in contrast, the fraud had occurred in the course of procedures conducted by State authorities. Similarly, in *Denisova and Moiseyeva v. Russia*,[129] the confiscation orders could only include the guilty spouse's share of the marital property in a situation where the property was acquired criminally and subsequently registered in the innocent spouse's name in order to prevent its confiscation.

The ECtHR's approach in considering whether the affected third party was able to effectively raise their claims to the property can be seen in *Andonoski v. the Former Yugoslav Republic of Macedonia*.[130] A violation of Article 1 of Protocol No.1 was found because, amongst other reasons, the domestic law imposed an automatic confiscation of any vehicle used for people smuggling without exception, thereby depriving the applicant of any possibility to argue his case or to claim compensation.

In some cases, the ECtHR will consider other factors unique to third party cases to determine whether there has been a breach. In *B.K.M. Lojistik Tasimacilik Ticaret Limited Sirketi v. Slovenia*,[131] the ECtHR found that a deprivation of property in

[128] *Gladysheva v. Russia*, judgment of 6 December 2011, no. 7097/10 (included as a summary in this publication).

[129] *Denisova and Moiseyeva v. Russia*, judgment of 1 April 2010, no. 16903/03.

[130] *Andonoski v. the Former Yugoslav Republic of Macedonia*, judgment of 17 September 2015, no. 16225/08 (included as a summary in this publication).

[131] *B.K.M. Lojistik Tasimacilik Ticaret Limited Sirketi v. Slovenia*, judgment of 17 January 2017, no. 42079/12 (included as a summary in this publication).

respect of a third party could only be justified if the third party's interest in having the property returned to them was outweighed by the risk that the property's return would undermine the legitimate aim of the authorities. In this case, as the lorry was not adapted for smuggling, had not been used for smuggling in the past and its driver had been convicted and sentenced to jail, there was no reason to conclude that the lorry would be used for smuggling in the future.

Whilst third party considerations are important for the ECtHR, they are not decisive in finding a violation of Article 1 of Protocol No.1. The ruling will ultimately be a fact-sensitive question of balance.

However, where confiscation is involved, the ECtHR has accepted that the authorities may apply confiscation measures not only to persons directly accused but also to their family members or other close relatives involved.[132] In *Balsamo v. San Marino*, a confiscation order was imposed on the applicants due to their father's previous criminal record. [133]

1.4.1.3 Cooperation with a foreign State

All of the international instruments mentioned in the first part of this publication include obligations on States to collaborate with each other. *Saccoccia v Austria*[134] demonstrates how State collaboration with the aim of seizing assets can be consistent with Article 1 of Protocol No.1, provided that the domestic law of the executing State ensures respect for Article 1 of Protocol No.1. In this case, the ECtHR found a fair balance had been struck between the rights of the applicant and the legitimate aim of enhancing international cooperation to ensure money derived from drug dealing was forfeited and seized, such that there was no violation of Article 1 of Protocol No.1 and Article 6 when Austrian authorities executed a forfeiture order made in the United States.

[132] *Raimondo v. Italy*, judgment of 22 February 1994, no. 12954/87 (included as a summary in this publication).

[133] *Balsamo v. San Marino*, judgment of 8 October 2019, nos. 20319/17 and 21414/17 (included as a summary in this publication).

[134] *Saccoccia v. Austria*, judgment of 18 December 2008, no. 69917/01 (included as a summary in this publication).

1.4.1.4 Judicial Review requirements

Despite the lack of explicit procedural requirements in the second paragraph of Article 1 of Protocol No.1, the ECtHR has held that the proceedings as a whole must afford the applicant a reasonable opportunity to put his case to the competent authorities with a view to enabling them to establish a fair balance between the conflicting interests at stake. Thus, domestic courts are under an obligation to exercise their powers of further review on request, specifically to determine whether the requisite balance had been maintained between the applicant's right to peaceful enjoyment of their property and the authorities' legitimate aim. In *Paulet v. the United Kingdom*, a case concerning the confiscation of earnings obtained through illegal work, it was found that the appellate court's scope of review was too narrow to satisfy the requirement of seeking a fair balance inherent in Article 1 of Protocol No.1.[135]

1.4.1.5 Key points

In summary, when determining whether there has been a violation of the right to property, the ECtHR will consider the following questions:

- Is there a right to property or possession within the scope of Article 1 of Protocol No.1?
- Has there been interference with that possession?
- Under which three rules does the interference fall?
- Does the interference comply with the principle of lawfulness?
- Does the interference serve a legitimate objective in the public or general interest?
- Is the interference proportionate – has a balance been struck between the demands of the general interest of the community and the need to protect the individual's fundamental rights?

[135] *Paulet v. the United Kingdom*, judgment of 13 May 2014, no. 6219/08 (included as a summary in this publication).

In the context of confiscation proceedings, the first three questions above are likely to be reasonably straightforward. The difficulty lies in the application of the tests for lawfulness, legitimate aims and proportionality. However, the case law is clear that the various forms of confiscation, including civil forfeiture and confiscation from third parties, can be undertaken without a violation of Article 1 of Protocol No.1, so long as procedural safeguards are in place and followed. While the scope of this Article is wide, it affords a reasonable margin of appreciation to enable States to recover the proceeds of criminality.

The case summaries in Part 2 of this publication provide an overview of important cases where applicants have argued a violation of Article 1 of Protocol No.1 in the context of the seizure and confiscation of assets and the proceeds of crime.

1.4.2 The right to fair trial: Article 6 ECHR

1.4.2.1 Overview

The right to a fair trial is provided by Article 6 of the ECHR. Article 6 states:

1. *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

2. *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*

3. *Everyone charged with a criminal offence has the following minimum rights:*

    a) *to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*

    b) *to have adequate time and facilities for the preparation of his defence;*

c) *to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*

d) *to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*

e) *to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

Article 6 is applicable to proceedings concerning "civil rights and obligations" and "criminal charges". These terms have been interpreted autonomously and may have a different meaning in the ECHR to domestic law.

Briefly, "the determination of civil rights and obligations" includes disputes of a genuine and serious nature as to the rights and obligations of private persons under, for example, contract law, commercial law, family law, property law and employment law. The applicant must be able to claim, on arguable grounds, a right that is already recognised in domestic law as Article 6 does not facilitate the creation of new rights. Article 6 only applies to civil rights that are central to the proceedings at issue. "Civil rights and obligations" can, for instance, be affected by disputes relating to property in the context of expropriation and civil confiscation.

In a criminal context, Article 6 may apply even if the charge is not classified as "criminal" but, for example, as "administrative" in domestic law. The nature of the offence and the purpose, nature and severity of the penalty will be considered when determining whether Article 6 applies. The term "charged" also has an autonomous meaning, including an official indication given to an individual that he is suspected of having committed a criminal offence, and a situation in which the suspect has been substantially affected because of suspicion to that effect.

Importantly, Article 6(2) requires a presumption of innocence; meaning that members of a tribunal should not possess a preconceived notion that the accused has committed the offence with which they are charged. Importantly, however, the forfeiture of property ordered as a result of civil proceedings does not in itself give rise to an issue under Article 6(2).[136]

[136] *Gogitidze v. Georgia*, judgment of 12 May 2015, no. 36862/05 (included as a summary in this publication).

1.4.2.2 Article 6 – Confiscation of assets

Article 6 is most often invoked in the context of anti-corruption and confiscation proceedings on the basis that confiscation of an applicant's assets has been undertaken in the absence of any procedure compatible with Article 6(1),[137] confiscation orders are based on charges of which the applicant has been acquitted,[138] or the applicant believes that the court that ruled on the criminal charge and confiscation order against them was not competent.[139]

The ECtHR established basic principles applicable to confiscation proceedings and Article 6 in *Phillips v. the United Kingdom*.[140] It held that Article 6(2) would not be engaged unless any statutory assumptions in confiscation procedures amounted to bringing a new charge within the autonomous meaning of the ECHR. On the other hand, Article 6(1) applies to the entirety of proceedings in respect of a criminal charge, including sentencing proceedings. The ECtHR found that confiscation proceedings are akin or analogous to sentencing proceedings. The applicant's rights were sufficiently safeguarded where the applicant had the opportunity to rebut the presumption that his property had been acquired through illegitimate means.

This finding in *Phillips* on Article 6(2) can be contrasted with *Geerings v. the Netherlands*,[141] in which the prosecution submitted an application for a confiscation order in respect of numerous offences, despite the applicant having been acquitted of most. The ECtHR found a violation of Article 6(2) as for all intents and purposes, the applicant had been treated as guilty without being found guilty according to law.

The findings in *Phillips* relating to Article 6(1) are further elaborated in the judgment of *Grayson and Barnham v. the United Kingdom*.[142] The ECtHR held that in

[137] *Al-Dulimi and Montana Management Inc v. Switzerland*, Grand Chamber judgment of 21 June 2016, no. 5809/08 (included as a summary in this publication).

[138] *Geerings v. the Netherlands*, judgment of 1 March 2007, no. 30810/03 (included as a summary in this publication).

[139] *Iliya Stefanov v. Bulgaria*, judgment of 22 May 2008, no. 65755/01 (included as a summary in this publication).

[140] *Phillips v. the United Kingdom*, judgment of 5 July 2001, no. 41087/98 (included as a summary in this publication).

[141] *Geerings v. the Netherlands*, judgment of 1 March 2007, no. 30810/03 (included as a summary in this publication).

[142] *Grayson and Barnham v. the United Kingdom*, judgment of 23 September 2008, nos. 19955/05 and

the context of the applicant's proven drug dealing, it was not unreasonable to expect him to explain the legitimacy of his money. There was therefore no violation of Article 6(1) in shifting the burden of proof to the applicant in confiscation proceedings.

This finding can be contrasted with the case of *Al-Dulimi and Montana Management Inc v. Switzerland*.[143] The freezing of assets pursuant to United Nations Security Council resolutions was not compliant with Article 6 because the applicants had not been able to obtain judicial review before an independent tribunal of both the orders and their implementation.

Building on this principle, *Ravon v. France* demonstrates that it is not sufficient for domestic law to merely provide the opportunity to contest the legal basis of a confiscation order. Irregularities in the implementation of the orders must also be open to contest, and any protections afforded in this context must be real and effective, not merely theoretical.[144]

1.4.2.3 Key Points

- Article 6(2) will not apply to confiscation orders related to criminal proceedings unless the order amounts to the bringing of a new "charge", but Articles 6(1) and (3) may continue to have applicability.
- Confiscation orders cannot be implemented in relation to crimes an individual has been acquitted of when such an order would imply that person's criminal responsibility and therefore violate the presumption of innocence. Non-conviction based confiscation is allowable where it does not create such an implication of guilt.
- Safeguards must be in place to ensure that applicants can rebut any presumptions that their assets were obtained with illegal money.
- Applicants are entitled to have their claims examined by national courts i.e. where they wish to challenge a confiscation order.

15085/06 (included as a summary in this publication).

[143] *Al-Dulimi and Montana Management Inc v. Switzerland*, Grand Chamber judgment of 21 June 2016, no. 5809/08 (included as a summary in this publication).

[144] *Ravon v. France*, judgment of 21 February 2008, no. 18497/03 (included as a summary in this publication).

1.4.3 No punishment without law: Article 7 ECHR

1.4.3.1 Overview

Article 7 mandates that there shall be no punishment without law, in the context of criminal law: *nullem crimen, nulla poena sine lege*.[145] It embodies an essential element of the rule of law and is an absolute right. Article 7 states:

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 or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence 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.*

The fundamental purpose of Article 7 is to ensure effective safeguards against arbitrary prosecution, conviction and punishment.[146] The Article embodies the general principle that offences must be based in law, and that an individual should be able to know from the wording of the relevant provision, if necessary, with the assistance of courts' interpretation, what acts and omissions will render them criminally liable. The law must therefore be adequately accessible and foreseeable. Absolute certainty is not required: the standard of "reasonable foreseeability" is sufficient.

It is also worth noting that the second sentence of Article 7, prohibiting the imposition of a heavier penalty than that which applied at the time of the offence, has been extended to include the right of a defendant to benefit from a more lenient penalty in cases where it was entered into force subsequent to the offence.

1.4.3.2 The interplay between Article 7 and confiscation

Allegations of Article 7 violations have mostly arisen in cases where the applicant has sought to challenge the penalty imposed on them by domestic courts.

[145] *Kafkaris v. Cyprus*, Grand Chamber judgment of 12 February 2008, no. 21906/04.

[146] *Streletz, Kessler and Krenz v. Germany*, Grand Chamber judgment of 22 March 2001, nos. 35532/97, 34044/96 and 44801/98.

The applicability of Article 7 to confiscation measures consequently depends on whether the ECtHR determines that the measure in question is a penalty, within the autonomous Convention meaning of the word, or some other measure.[147]

In *Welch v. the United Kingdom*, the applicant was found guilty of importing large quantities of cannabis and was sentenced to 22 years' imprisonment. The judge also imposed a confiscation order to the amount of €75,000, pursuant to the Drug Trafficking Offences Act 1986 (the "**1986 Act**"). The confiscation order had been imposed before the 1986 Act had come into force, and the applicant complained that the confiscation order therefore amounted to the imposition of a retrospective criminal penalty, contrary to Article 7. Noting the autonomous nature of the definition of penalty under Article 7, the ECtHR held that in order to ensure that Article 7 remained effective, it had to determine whether the confiscation amounted to a penalty in substance. To this end the ECtHR considered whether the measure was imposed following a criminal offence; and looked to the nature and purpose of the measure, its characterisation under national law, the procedures involved in the making and implementation of the measure, and the severity of the confiscation order. The imposition of the 1986 Act depended on there having been a criminal conviction and the ECtHR did not consider the preventative and reparative aspects of confiscation to exclude its punitive aspects. In fact, the ECtHR noted that prevention and reparation may be seen as constituent elements of punishment. While the severity of the measure was not deemed to be relevant, the procedures involved with the imposition of the measure, including the possibility of prison time in the event of non-compliance, strongly indicated that the measure amounted to a penalty. Therefore, considering the substance of the measure, Article 7 of the ECHR applied to the confiscation order and had been violated.

A court judgment that the confiscation order amounts to a penalty is important, but not always decisive. In *G.I.E.M. and Others v. Italy*,[148] the ECtHR found that the confiscation measure amounted to a penalty. However, Article 7 was violated only

[147] Council of Europe, *Guide on Article 7 of the European Convention on Human Rights*. 31 August 2022. Available at: https://t.ly/c_5_.

[148] *G.I.E.M. S.R.L and Others v. Italy*, Grand Chamber judgment of 28 June 2018, nos. 1828/06, 34163/07 and 19029/11 (included as a summary in this judgment).

in respect of the applicants not party to the criminal proceedings that led to the confiscation orders; there was no violation in respect of an applicant whose liability had been established in criminal proceedings.

The judgments in *Welch* and *G.I.E.M.* are in contrast with that of *M. v. Italy*.[149]

In *M. v. Italy* the applicant was convicted of, amongst other charges, "membership of a criminal organisation" and sentenced to multiple periods of imprisonment. Preventative measures, including the seizure of the applicant's property, were sought. A confiscation order was subsequently instituted against him on the basis that the only way he could have accumulated his extensive property was through unlawful activities. The applicant argued that the Italian domestic courts had deprived him of his property through retroactively applied provisions, the property having been acquired by him before the relevant domestic law came into force. In this instance, the ECtHR ruled that the preventative measures of confiscation pursued the legitimate aim of "striking a blow against mafia-type organisations" and their resources. In Italian law, such preventative measures were not criminal in character and did not amount to punishment for an offence. As such, the ECtHR concluded the measure did not involve a finding of guilt subsequent to a criminal charge and so did not constitute a penalty.

This principle is further explored in *Yildirim v. Italy*.[150]

In *Yildrim v. Italy* the applicant owned a bus which he hired out. While under hire, the bus was found carrying illegal immigrants. The drivers were then arrested and given custodial sentences and the bus was seized. The applicant brought proceedings to recover the bus. Relying on Article 1 of Protocol No.1 and Article 7, the applicant disputed the rejection of his application to reclaim the bus and the refusal to return his vehicle. In respect of Article 7, the ECtHR noted that there had been no criminal charge levelled against the applicant, the confiscation proceedings did not concern a criminal charge against the

[149] *M. v. Italy*, admissibility decision of 15 April 1991, no. 12386/86.

[150] *Yildirim v. Italy*, admissibility decision of 10 April 2003, 38602/02.

applicant, and so the confiscation could not have involved a finding of guilt subsequent to a criminal charge. Therefore, the confiscation could not be a penalty under Article 7.

1.4.3.3 Key points

The interplay between Article 7 and Article 1 of Protocol No.1 is often subtle, with the ECtHR's judgment on whether confiscation amounts to a penalty or not (and therefore whether Article 7 applies) dependent on marginal differences in fact. Crucial to the ECtHR's reasoning is whether the confiscation measures are a consequence of criminal charges, and whether such measures are themselves characterised as criminal penalties under national law. Other motives such as reparation and prevention do not preclude a confiscation measure from being a "penalty" and therefore within the remit of Article 7.

Where Article 7 applies to a confiscation measure, domestic courts must ensure that the timing of the commission of any underlying offence(s) and the penalties applicable both at that time and any subsequent introduction of more lenient penalties are considered carefully.

1.4.4 Right to respect for private and family life: Article 8 ECHR

1.4.4.1 Overview

Article 8 provides for the respect for private and family life, which comprises also the right to respect for the home and correspondence. It is a qualified right.

Article 8 states:

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*

2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health*

or morals, or for the protection of the rights and freedoms of others.

The concept of a private life applies to natural and legal persons and encompasses personal identity, autonomy, personal information, sexuality, self-development, relationships with other individuals, reputation and physical and moral integrity (i.e. physical and psychological well-being). Family life encompasses biological, legal and social family units, for example, the relationships within a traditional family between married couples, parents and children, grandparents and grandchildren, and siblings. It also covers engaged couples, cohabiting couples, separated parents of children, homosexual couples, adoptive parents and children, and foster parents and children. Finally, the concept of home has been given a wide definition by Convention organs, it applies to *de jure* and *de facto* homes, and to natural and legal persons, with the definition linked more to occupation than any legal basis. Since "home" and "private life" may overlap with business and professional activities, the protection of Article 8 has been found to extend to personal offices and, in the case of companies, to company premises.

Under Article 8, the State has a negative obligation not to interfere with an individual's private life, family life, home and correspondence. Where the State introduces measures affecting such rights, a violation will be found unless the interference was "in accordance with the law", pursued a legitimate aim and satisfied the requirement of proportionality. Article 8(2) lists a number of these legitimate aims including national security, the prevention of disorder or crime, and the protection of the rights and freedoms of others. In some circumstances, the State will have a positive obligation to take steps to ensure effective respect for Article 8. This concerns relationships not only between the State and the individual, but between the individual and private bodies, and also between private individuals.

1.4.4.2 The interplay between Article 8 and Article 1 of Protocol No.1

It is not uncommon for applicants who allege a violation of their right to respect for home under Article 8 to also rely on Article 1 of Protocol No.1 – particularly where the subject of confiscation proceedings is a home which is a place of residence for the applicant. The entry of police into a residence or a place of work, with the view to seizing items, has been used to argue breaches under both Article 8 and Article 1 of Protocol No.1 as illustrated in *Niemietz v. Germany*.[151]

[151] *Niemietz v. Germany*, judgment of 16 December 1992, no. 13710/88.

Niemitz v. Germany concerned a tax investigation that led to a criminal charge of defamation. A search warrant was issued for the search of the applicant's law office to discover the identity of the author of a letter. During the search, filing cabinets concerning confidential client information that had not been the object of the warrant were searched. The applicant complained under Article 8(1) and Article 1 of Protocol No.1 that the search violated his right to respect for the home and correspondence, that the search was disproportionate and ordered to circumvent confidentiality laws. The ECtHR noted that the warrant was broad in its terms in that it ordered a search for and seizure of "documents", without any limitation. It was therefore disproportionate and not necessary in a democratic society, violating Article 8. The applicant's complaint under Article 1 of Protocol No.1, that the search warrant ruined his reputation as a lawyer, had already been considered in the context of Article 8 and so no further examination under Article 1 of Protocol No.1 was deemed necessary.

In cases concerning confiscation orders, however, the ECtHR has been willing to find a violation of both Article 1 of Protocol No.1 and Article 8. In *Gladysheva v. Russia*,[152] the ECtHR found a violation of Article 8 as the State had ignored the applicant's rights under that Article; and a violation of Article 1 of Protocol No. 1 as the State had confiscated the applicant's flat, on the basis that it had been fraudulently obtained by the prior owner, without providing her with alternative accommodation.

1.4.4.3 Article 8 and searches of property

All the international conventions and standards mentioned in the first part of this publication impose or encourage, in general terms, the implementation of investigatory and search powers so that law enforcement can be implemented effectively. Article 8 may therefore apply prior to the seizure of assets, for instance, while investigating allegations of corruption. Where domestic authorities are required to search an applicant's home or business premises, Article 8 prescribes that such a search be "in accordance with law." This requires that the search not only be based on accessible and foreseeable legislation, but also that this legislation offers adequate guarantees against arbitrariness. Thus, in general, searches must be conducted with a judicial warrant.

[152] *Gladysheva v. Russia*, judgment of 6 December 2011, no. 7097/10 (included as a summary in this publication).

Where there is no judicial warrant, the search may be legitimised post-facto through judicial scrutiny of the lawfulness of the search, and the availability of judicial redress should the search have been unlawful. In *Gutsanovi v. Bulgaria*,[153] the ECtHR found that it was not sufficient for the domestic judge to simply sign and stamp a record of the search with the word "approved", without giving any reasons for his approval; this did not amount to a sufficient safeguard against abuse. Moreover, the scope of any judicial search warrant will be relevant to its "necessity". For instance, in *Iliya Stefanov v. Bulgaria*,[154] the ECtHR found that the excessive breadth of the terms of the search warrant, reflected in the way in which it was executed, could not be considered necessary and proportionate in line with the requirements of Article 8.

1.4.4.4 Key points

Article 8 and Article 1 of Protocol No.1 can be engaged and interact in a number of ways. It is important to note that the State must take reasonable steps to ensure that the seizure of assets does not extend beyond the necessary limits i.e. search and seizure warrants should not be unfettered. Such measures have, as explained above, been found to violate both Article 1 of Protocol No.1 and Article 8.

[153] *Gutsanovi v. Bulgaria*, judgment of 15 October 2013, no. 34529/10 (included as a summary in this publication).

[154] *Iliya Stefanov v. Bulgaria*, judgment of 22 May 2008, no. 65755/01 (included as a summary in this publication).

Part 2 – Case Summaries

Not allowing persons and entities listed under a UN Security Council sanctions regime, entailing the freezing and confiscation of assets, to request the examination of measures taken pursuant to that regime by national courts violated Article 6

GRAND CHAMBER JUDGMENT IN THE CASE OF
AL-DULIMI AND MONTANA MANAGEMENT INC. v. SWITZERLAND

(Application no. 5809/08)
21 June 2016

1. Principal Facts

The first applicant, Khalaf M. Al-Dulimi, was an Iraqi national who lived in Jordan. According to the Security Council of the United Nations (UN), he was head of finance for the Iraqi secret services under Saddam Hussein's regime. The second applicant was a company incorporated under the laws of Panama, Montana Management Inc, with its registered office in Panama. The first applicant was also the managing director of Montana Management Inc.

After Iraq invaded Kuwait in August 1990, the UN Security Council adopted two new Resolutions inviting UN and non-UN member States to impose a general embargo on Iraq. In response the Swiss Federal Council issued "the Iraq order" on 7 August 1990, implementing economic measures against Iraq and calling for the freezing of assets and economic resources belonging to the then Iraqi Government, senior officials, and to companies or bodies under control or management of that Government or its officials. This order led to the freezing of the applicants' assets. In May 2004 the applicants were included on a list drawn up by the UN of persons and groups that were to be targeted by the renewed sanctions regimes against Iraq. In response, the Swiss authorities issued an order to confiscate the previously frozen Iraqi assets that had been included on the list and to transfer them to the Development Fund for Iraq.

The first applicant wished to submit a request for the de-listing of his assets to the UN Sanctions Committee and asked the Swiss Federal Department for Economic

Affairs to suspend the confiscation proceedings against his property while he did so, a request that the authorities accepted. Negotiations between the applicant and the UN over his inclusion on the list broke down in 2005 after no action was taken in response to his request to provide oral evidence to the Sanctions Committee. The Swiss authorities again ordered that the assets be confiscated, noting that Switzerland was bound by its obligations under international law and that it could only remove a name from the list when the Sanctions Committee itself had done so.

The applicants submitted three appeals to the Swiss Federal Court which were all dismissed by January 2008, and the domestic courts restricted their judgments to reaffirming the Swiss authorities' obligations to enforce international law, and the presence of the applicants on the Sanctions Committee's list of targets. In July 2008, the applicants submitted a de-listing request to the Sanctions Committee in line with UN procedure which was rejected in January 2009.

2. Decisions of the Court

The applicants argued under Article 6 § 1 (right to a fair trial) that the confiscation of their assets had been ordered in the absence of any procedure compatible with the Convention.

Article 6 § 1

The right to a fair hearing had to be construed in the light of the rule of law, requiring that all litigants should have an effective judicial remedy enabling them to assert their civil rights. However, the right of access to a court is not absolute, but subject to limitations, as long as these limitations do not restrict the individual's access in such a way or to such an extent that the very essence of the right is impaired.

In its judgments of January 2008, the Swiss Federal Court set out detailed reasons why it considered itself to be bound only to verify that the applicants' names actually appeared on the Sanctions Committee's lists and that the assets concerned belonged to them. The Federal Court invoked the absolute primacy of obligations stemming from the UN Charter and UN Security Council decisions, saying that the obligations imposed by Resolution 1483 (2003) did not leave the States any discretion. In those circumstances, the Court was of the view that the applicant's right of access to a court had clearly been restricted and that it remained to be examined whether that restriction was justified.

The aim of the measures was to further the stabilisation and development of Iraq, and assets were to be transferred to the Development Fund for Iraq. Hence, the impugned decision was taken to implement an objective that was compatible with the Convention and had pursued a legitimate aim, namely to maintain international peace and security.

The Government had argued that Switzerland had been confronted with a conflict between its UN Charter obligations and its Convention obligations and that it could not be resolved because Switzerland had no room for manoeuvre in the implementation of the UN Resolution. The Court referred to the purposes for which the United Nations was created: as well as to maintain international peace and security, Article 1 of the Charter provided that the United Nations was created "[t]o achieve international co-operation ... in promoting and encouraging respect for human rights and for fundamental freedoms ...". Consequently, there had to be a presumption that the Security Council did not intend to impose any obligation on States that would breach fundamental principles of human rights.

The Court found that none of the provisions of Resolution 1483 (2003) expressly prohibited the Swiss courts from verifying, to ensure respect for human rights, the measures taken at national level to implement the Security Council decisions. The inclusion of individuals and entities on the lists of persons subject to the UN sanctions entailed practical interferences that could be extremely serious for the Convention rights of those concerned, and should be subject to review.

The Court found that where a Security Council resolution did not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, it would always have to be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness could be avoided. By limiting that scrutiny to arbitrariness, the Court struck a fair balance between the need to ensure respect for human rights and the imperatives of the protection of international peace and security.

Switzerland had hence not been faced in the present case with a real conflict of obligations such as to engage the primacy rule of the UN Charter. This finding made it unnecessary for the Court to determine the question of the hierarchy between the obligations of the States Parties to the Convention under that instrument, on the one hand, and those arising from the UN Charter, on the other.

As regards the substance of the sanctions – the freezing of the assets and property of senior officials of the former Iraqi regime – the Court took the view that the choice fell within the eminent role of the UN Security Council as the ultimate political decision-maker in this field. However, before taking the above-mentioned measures, the Swiss authorities had a duty to ensure that the listing was not arbitrary. The Federal Court had merely confined itself to verifying that the applicants' names actually appeared on the Sanctions Committee's list and that the assets concerned belonged to them, but that was insufficient to ensure that the applicants had not been listed arbitrarily. The applicants should have been afforded at least a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show that their inclusion on the impugned lists had been arbitrary. The very essence of their right of access to a court had thus been impaired.

The Court further noted that the applicants had been, and continued to be, subjected to major restrictions. The fact that it had remained totally impossible for them to challenge the confiscation measure for many years was hardly conceivable in a democratic society.

Lastly, the Court observed that the UN sanctions system, and in particular the procedure for the listing of individuals and legal entities and the manner in which delisting requests were handled, had received very serious, reiterated and consistent criticisms from many international and national bodies and courts. Access to that procedure could not therefore replace appropriate judicial scrutiny at the level of the respondent State or even partly compensate for its absence.

Hence, the Court found that there had been a violation of Article 6 § 1.

Article 41

The Court considered that there had been no causal link between the violation of Article 6 § 1 and the applicants' allegations of pecuniary damages. As the applicants had not requested compensation for non-pecuniary damages or the reimbursement of their costs and expenses, the Court did not make any award under those heads either.

Domestic legal requirement to automatically confiscate vehicle used in the smuggling of migrants constituted a violation of Article 1 of Protocol No. 1

JUDGMENT IN THE CASE OF

ANDONOSKI v. THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

(Application no. 16225/08)

17 September 2015

1. Principal facts

The applicant was born in 1968 and lived in Prilep. On 25 July 2007 the applicant, who was a taxi driver, was stopped by police while driving three Albanian nationals from Prilep to Vitolište, a village situated near the Macedonian-Greek border. The police arrested the applicant and his three passengers when the passengers were unable to produce travel documents. The police also seized the applicant's car and issued him a receipt for temporarily seized objects.

On 26 July 2007, an investigating judge opened an investigation against the applicant and one of the passengers on grounds of a reasonable suspicion of migrant smuggling. On 8 August 2007, the public prosecutor dropped all charges against the applicant, indicating that there was no evidence that the applicant had known or had reasonable grounds to believe that he had transported illegal migrants. It was established, and corroborated by the passengers, that the applicant had never met or been in previous contact with any of the passengers. Further, the only passenger with whom the applicant spoke, P.K., was fluent in Macedonian.

On 3 September 2007, the trial court determined that P.K. had been paid to smuggle the other two passengers, illegal Albanian migrants, across the Macedonian-Greek border and convicted him of migrant smuggling. The trial court also ordered the permanent confiscation of the applicant's car, as the means by which the criminal offence had been committed ("the confiscation order") as required by the Criminal Code.

The applicant appealed the confiscation order, arguing that it was not based in fact since all charges against him had been dropped. The appellate court dismissed his appeal on the grounds that the confiscation of vehicles used for smuggling of migrants was mandatory under the Criminal Code.

2. Decision of the Court

The applicant argued that the confiscation of his taxi, which he had been using to support himself and his family, did not serve a public interest, nor could it have had the aim of preventing the commission of further offences, given that he had not been convicted, and constituted a violation of Article 1 of Protocol No. 1.

Article 1 of Protocol No. 1

The protection of property, contained in 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 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 certain conditions; the third rule, 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. In the present case, the respondent State's actions amounted to a permanent deprivation of the applicant's property. The confiscation of the applicant's car was a permanent measure which entailed a conclusive transfer of ownership. The State did not argue that there was a possibility for the applicant to seek restoration of his property.

The Court referred to its established case law that State interference with property rights must be prescribed by law and must pursue one or more legitimate aims. A fair balance must be struck between the demands of the general interest and the interests 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. In the instant case, the confiscation of the applicant's vehicle was required by the Criminal Code and it pursued the legitimate aim of preventing clandestine immigration and trafficking in human beings.

With regard to the proportionality assessment, the Court reiterated that, where possessions that have been used unlawfully are confiscated, such a balance depends on many factors, which include the owner's behaviour. In this case, the applicant had no history of trafficking, did not have a criminal record and was cleared by the public prosecutor.

The Court observed that the relevant provision of the Criminal Code required an automatic confiscation of means of transport used for smuggling of migrants and did not allow for any exceptions. It was 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 behaviour or relation to the offence. In the applicant's 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. Finally, the Court observed that the Criminal Code did not provide for the possibility to claim compensation for property seized in this manner. The Government did not provide any illustration of domestic practice that would demonstrate that a compensation claim for innocent third party owners was available, let alone effective, in similar circumstances to the applicant's case.

Given the applicant's behaviour and the required confiscation, seemingly without option for redress under the Criminal Code, the Court found that the confiscation order imposed a disproportionate and excessive burden on the applicant amounting to a violation of Article 1 of Protocol No. 1.

Article 41

The Court awarded the applicant €3,000 in respect of non-pecuniary damage and ordered the respondent State to return the confiscated car in the condition it was in when confiscated or, in default, to pay the applicant €10,000 in respect of pecuniary damage.

Search of law offices and seizure of documents by tax inspectors seeking evidence against one of the firm's corporate clients deemed a violation of Article 6 and Article 8

JUDGMENT IN THE CASE OF
ANDRÉ AND ANOTHER v. FRANCE

(Application no.18603/03)
24 July 2008

1. Principal facts

The applicants were a lawyer and a law firm, based in Marseille. The applicants were representing a company in connection with its dispute with the authorities in relation to suspected tax evasion. In June 2001, the French tax administration obtained authorisation under Article L.16B of the Code of Tax Procedure to search the lawyers' offices with a view to uncovering evidence against the client company. The search was conducted in the presence of the first applicant, the chairman of the Marseilles Bar Association and a senior police officer.

Sixty-six documents were seized in the search, including hand-written notes and a document with a comment in the first applicant's handwriting. The chairman of the Bar Association pointed out that these were the lawyer's personal documents and could not be seized, as the rule of absolute professional confidentiality protected them. The first applicant also protested at how the search had been carried out.

The applicants appealed and argued that the search and the seizures had been unlawful. They stated in particular, relying on professional secrecy and the rights of the defence, that documents sent by a client to that client's lawyer and correspondence between them could not be seized where the search was not aimed at establishing proof that the lawyer in question had been involved in the offence. In December 2022, the case was dismissed by the Court of Cassation.

2. Decision of the Court

The applicants complained that the procedure for the search and seizure at their office amounted to an infringement of their defence rights and a breach of professional confidentiality. They further complained about the lack of an effective remedy. They relied on Articles 6, 8 and 13.

Article 6

Where, as was the case here, Article 6 § 1 applies, it constitutes a *lex specialis* in relation to Article 13 and the Court therefore found it appropriate to examine the complaint under Article 6 § 1 alone. In ascertaining whether the applicants had access to a tribunal in order to receive a decision on their dispute, the Court referred to earlier case law where it had already examined the various judicial remedies in French law.[155] In that case, the Court held that the procedure provided for and outlined in Article L. 16 B of the Code of Tax Procedure did not meet the requirements of Article 6 § 1. It saw no reason to depart from that finding and held there had been a violation of Article 6 § 1 on account of the lack of effective judicial review in the present case.

Article 8

The term "home" appearing in Article 8 may extend to the offices of a member of a profession, for instance, a lawyer. Hence, the search of the applicants' practice and the seizures carried out amounted to an interference with the exercise of their rights under Article 8. This interference was "in accordance with the law", as Article L. 16 B of the Code of Tax Procedure set out the conditions that must be met in the event of a search, and the Code of Criminal Procedure made express provision for the observance of professional secrecy and the professional premises or private home of a lawyer. The interference also pursued a "legitimate aim", the prevention of public disorder and crime.

When examining whether the interference was "necessary", the Court stated that searches and seizures at the premises of a lawyer undoubtedly breach professional secrecy, which is the basis of the relationship of trust existing between a lawyer and his client. Furthermore, the safeguarding of professional secrecy is in particular the corollary of the right of a lawyer's client not to incriminate himself, which presupposes that the authorities seek to prove their case without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the "person charged". It is therefore essential that such searches are accompanied by particular safeguards. Lawyers occupy a vital position in the administration of justice and can, by virtue of their role as intermediaries between litigants and the courts, be described as officers of the law.

[155] *Ravon and Others v. France*, judgment of 21 February 2008, app no.18497/03

In the instant case, the Court noted that the search was accompanied by special procedural safeguards since it was carried out in the presence of the chairman of the Bar Association of which the applicants were members. However, the judge who had authorised the search was not present, and the presence of the chairman of the Bar Association and his specific objections were insufficient to prevent the actual inspection of all the documents at the practice or their seizure. As regards in particular the seizure of the first applicant's handwritten notes, it was not disputed that these were the lawyer's personal documents and subject to professional secrecy.

Furthermore, the search warrant was drawn up in broad terms, the decision being limited to ordering the searches and seizures required to disclose evidence of misconduct at certain places at which documents and data carriers relating to the suspected fraud might be found, in particular at the applicants' place of business. Accordingly, the inspectors and police officers were given extensive powers.

Lastly, and most importantly, the purpose of the search at issue was to discover at the premises of the applicants, purely in their capacity as the lawyers of the company suspected of fraud, documents which could establish the existence of such fraud on the company's part and to use such documents in evidence against it. At no time were the applicants accused or suspected of having committed an offence or being involved in any fraud committed by their client.

Hence, in the context of a tax inspection into the affairs of a company that was the applicants' client, the authorities targeted the applicants solely because of the difficulties encountered both in carrying out the necessary tax inspections and in finding "accounting, legal and corporate documents" confirming the suspicion that the client company was involved in fraud. In the light of this, the search and seizures carried out at the applicants' premises were disproportionate to the aim pursued and there had been a violation of Article 8.

Article 41

The Court awarded the first applicant €5,000 in respect of non-pecuniary damage, and €10,000 to the applicants jointly for costs and expenses.

Complaints concerning the confiscation of assets that were suspected of having been acquired unlawfully, but where the applicants had been able to engage effectively in the confiscation process, were declared inadmissible as manifestly ill-founded under Article 1 of Protocol 1, and Article 6

DECISION IN THE CASE OF
ARCURI AND OTHERS v. ITALY

(Application no. 52024/99)
5 July 2001

1. Principal Facts

The four applicants were Italian nationals living in Turin. The first two applicants were the married parents of the third applicant. The fourth applicant was the daughter of the second applicant.

The Turin public prosecutor applied for preventive measures and the seizure of assets belonging to the applicants due to the first applicant's suspected membership of criminal organisations involved in inter alia drug trafficking, and the discrepancy between their assets and their legitimate income. While the property in question had been acquired by the first applicant, he had transferred a number of his assets to his wife and children.

The special division of the Turin Court with expertise in preventative measures ordered the confiscation of the applicants' seized assets in accordance with domestic law. This was based on evidence supplied by the authorities that the applicants' fortune had been unlawfully acquired and the absence of evidence supplied by the applicants to support their claim that the assets had been lawfully acquired. The Turin Court concluded that the assets belonging to the second, third, and fourth applicants had been acquired by the first applicant and then transferred to the couple's children, with his wife made his business partner in an attempt to protect his property from numerous judicial proceedings against him.

The confiscation order was upheld by the Turin Court of Appeal which concluded that the family's fortune had been amassed through criminal means. The lack of accurate documentation had made it impossible to assess the legitimate income of the first applicant and there was evidence that his legitimate businesses were funded by the proceeds of criminal offences that he had committed.

2. Decision of the Court

The applicants complained that the confiscation had infringed their right to the peaceful enjoyment of possessions under Article 1 of Protocol 1 and their right to a fair trial under Article 6 § 1 and Article 6 § 3.

Article 1 of Protocol No.1

The Court recognised that confiscation amounted to an interference with the right to peaceful enjoyment of possessions. However, in this case, the confiscation was intended to prevent the first applicant from using the family's allegedly unlawfully gained assets to make a profit for himself or for the criminal organisation to which he was suspected of belonging, to the detriment of the community. Accordingly, the measure amounted to a control of the use of property in the general interest in accordance with the second paragraph of Article 1 Protocol 1.

To prevent a violation of Article 1 of Protocol 1 an interference must be proportionate to the legitimate aim pursued. In implementing crime-prevention policies States have a wide margin of appreciation. The Court noted that in Italy the problem of organised crime had reached a very disturbing level, to the extent that organised criminal groups had a level of economic power that placed the rule of law in jeopardy. Thus the Court concluded that confiscation measures were an essential part of the successful prosecution of the battle against organised crime.

Nevertheless, while having regard to these specific circumstances, the Court emphasised its duty to ensure that the rights guaranteed by the Convention were respected in every case. To this end, the Court reiterated the need for effective judicial safeguards, specifically that the domestic court proceedings afforded the applicants a reasonable opportunity to put their case to the authorities. It noted that the applicants, instructing a lawyer of their choice, were able to raise objections and adduce evidence that they considered necessary to protect their interests, and hence the applicants' right to a defence was respected. Moreover, it observed that there was nothing to suggest that the domestic judges had acted arbitrarily in their assessment of the evidence.

The Court concluded that the interference with the applicants' right to peaceful enjoyment of their possessions was not disproportionate to the legitimate aim pursued and rejected the claim under Article 1 of Protocol 1 as manifestly ill-founded.

Article 6

The Court began by emphasising that preventative measures, such as confiscation, do not assume any determination of guilt and therefore the proceedings that govern their application do not afford all the guarantees available in criminal proceedings and Article 6 § 3 was not applicable. Nevertheless, the Court noted that the confiscation proceedings involving the applicants concerned their 'civil rights and obligations' within the meaning of the first paragraph of Article 6 and so Article 6 § 1, under its civil head, was applicable.

In the light of its previous findings under Article 1 of Protocol 1 the Court rejected the complaint under Article 6 as manifestly ill-founded as the confiscation proceedings had been conducted in the presence of both parties, the rights of defence had been respected, and the domestic courts had given full reasons for their decisions.

The mandatory confiscation of a lorry used for drug trafficking violated Article 1 of Protocol No. 1 of the Convention

JUDGMENT IN THE CASE OF

B.K.M. LOJISTIK TASIMACILIK TICARET LIMITED SIRKETI v. SLOVENIA

(Application no.42079/12)

17th January 2017

1. Principal facts

The applicant company was a Turkish business acting out of a registered office in Istanbul. In November 2008, Slovenian customs officers stopped and checked the applicant company's lorry. They found packages of unknown content that, upon a preliminary test, contained heroin. The next day, the lorry was inspected by the police, and 105 kilograms of heroin were found. The driver was arrested, and the lorry was seized. The trailer and its goods became the objects of a customs procedure.

The trailer was returned to the applicant company shortly afterwards. However, the lorry was confiscated under Section 186(5) of the Slovenian Criminal Code, as it had been used to transport illegal narcotic drugs. In December 2008, the Ptuj District Court found the driver guilty of drug trafficking and sentenced him to nine years imprisonment. It ordered that the lorry be returned to the applicant company, as it held that the conditions to confiscate property under the Slovenian Criminal Code had not been met, as there was no indication that the applicant company was aware of the transport of the illegal material.

The Maribor Higher Court overturned the judgment in May 2009, and this decision was upheld by the Constitutional Court in September 2011. The Constitutional Court confirmed that Section 186 of the Slovenian Criminal Code provided for mandatory confiscation of vehicles used for transportation and storage of drugs or illegal substances in sport, regardless of ownership. In its view, the purpose of the impugned measure was to prevent the commission of serious criminal offences in the future and thus to protect critical legal values in society, such as health and life. The nature of the criminal offence in question, how they were committed, and their consequences all justified the interference with the ownership rights of all owners of the means of transport used for drug trafficking. It was also pointed out that the injured owner had

the possibility and the right to exact compensation from the person responsible for the damage (in this case, the lorry driver).

In the meantime, the Ptuj District Court informed the applicant company that the lorry would be sold at a public auction. The Government alleged that the lorry was sold to the applicant company for €12,000, however the applicant company contested that statement, alleging that another company had purchased the lorry.

2. Decision of the Court

The applicant company complained that the confiscation of its lorry amounted to an unlawful and disproportionate interference with its possessions under Article 1 of Protocol No.1. It argued that the Slovenian domestic courts applied domestic law arbitrarily, and the confiscation did not pursue any public interest.

Article 1 of Protocol No. 1.

The Court stated that it had on several occasions examined issues arising from confiscation measures implemented in relation to a possession which had been used unlawfully and aimed at preventing its further unlawful use. In most of these cases, it was found that the measure constituted an instance of control of the use of property. However, it noted that those judgments concerned temporary restrictions on the use of property and by contrast, in the present case the confiscation involved a permanent transfer of ownership and the applicant company had no realistic possibility of recovering its lorry. Confiscation of an instrument for the commission of criminal offences from a third party did not involve the same level of urgency as confiscation of proceeds or objects of a criminal offence, viewed from the perspective of policy responses in the general interest. Thus, it could in certain circumstances be examined under the second sentence of the first paragraph of Article 1 of Protocol No. 1 which covers deprivation of property, and the Court considered that this approach should be adopted in the present case.

The Court then examined whether the interference with the applicant company's property rights was justified. It noted that in the fight against the illegal drug trade, it was acutely aware of the problems confronting States in their efforts to combat the harm caused to their societies through the supply of drugs from abroad and accepted that this could involve adverse consequences for the property of third persons.

Whilst the parties disagreed on whether the measure was prescribed by law, the Court deemed that the provisions of Section 186(6) of the Criminal Code, read in conjunction with Section 73(3) did support the confiscation. The Court also accepted that the interference pursued the legitimate aim of preventing drug-related offences which pose a serious threat to an individual's health and life - a purpose which served the general interest.

The Court then considered the proportionality of the measure. The applicant company had sought to recover its lorry, however, the domestic courts had interpreted the relevant domestic legislation as entailing mandatory confiscation of any vehicle used for drug trafficking, regardless of the diligence and good faith displayed by the owner. Hence, even though there was no indication that the applicant company had been involved in the commission of the criminal offence or that it had any knowledge about the illegal activities of its driver or that it had failed to carry out regular controls of the vehicle, it did not have any effective possibility of securing the return of its lorry.

There could be no doubt that the protection of human health and life – the grounds cited by the Government as justification for the measure – required decisive action on the part of States to reduce drug-related criminal offences. That said, confiscation of property used in the commission of such offences could impose a significant burden on the third parties to whom the property belonged. Imposing such a burden on the owner of the property could be justified only if his interest in having the property returned to him was outweighed by the risk that its return would facilitate drug trafficking and undermine the fight against organised crime. It did not appear that the lorry was adapted for smuggling drugs, nor were there any previous incidents caused by a failure on the part of the applicant company to prevent illegal shipments from being transported. This, coupled with the fact that the lorry driver was convicted of drug trafficking and sentenced to nine years' imprisonment did not allow for the conclusion that the lorry might be used again for transporting illegal substances, and the Court failed to see what adverse effects might be expected to result from the return of the lorry to its owner. This was particularly true if, as argued by the Government, the applicant company was in any event able to buy the lorry back at public auction.

Hence, notwithstanding the wide margin of appreciation, the Court could not accept that the indiscriminate nature of the measure at issue was justified by the circumstances of the present case. Moreover, the opportunity to obtain compensation for its pecuniary loss by seeking it from the driver convicted of drug trafficking, who

was the party responsible for the damage the company sustained only entailed further uncertainty as the driver might be found to be insolvent.

Hence, the mandatory confiscation of the applicant company's vehicle, coupled with the lack of a realistic opportunity to obtain compensation for its loss, did not take sufficient account of the applicant company's interests. A fair balance had not been struck between the demands of the general interests of the public and the applicant company's right to peaceful enjoyment of its possessions and the burden placed on the applicant company was excessive, in violation of Article 1 of Protocol No. 1.

Article 41

The Court awarded the applicant €14,490 in respect of pecuniary damages and €7,000 for costs and expenses.

The confiscation of the applicant's property, cash taken across a border, had no basis in domestic law and hence constituted a violation of Article 1 of Protocol No.1

JUDGMENT IN THE CASE OF
BAKLANOV v. RUSSIA

(Application no.68443/01)
9 June 2005

1. Principal Facts

The applicant was a Latvian national born in 1957 and lived in Riga. In 1997, he decided to move from Latvia to Russia and negotiated a real estate deal with a Moscow agent. On 20 March 1997, the applicant withdrew $250,000 in cash and asked his acquaintance B. to deliver the money to Moscow.

B. arrived at the airport later that day. As he failed to declare the money at the customs checkpoint, he was charged with smuggling. On 13 September 2000, the Golovinskiy District Court of Moscow found B. guilty of smuggling under Article 188-1 of the 1996 Criminal Code and sentenced him to a two-year suspended imprisonment. The money was forfeited to the Treasury as an object of smuggling. The applicant appealed, arguing that no relevant law provided for the confiscation of the money. The appeal was dismissed.

On 1 July 2002, a Deputy President of the Supreme Court applied for supervisory review against the judgments. He claimed that the smuggled money could only be confiscated if proven to have been acquired criminally. The Moscow City Court refused the application on the ground that a Ruling of the Plenary Supreme Court of the USSR issued in 1978 permitted the confiscation of smuggled goods.

2. Decision of the Court

The applicant alleged that the Golovinskiy District Court had forfeited his money without any basis in law, in violation of Article 1 of Protocol No. 1.

Article 1 of Protocol No.1

The Court emphasised that the seizure of the applicant's money was an interference with his property rights within the meaning of Article 1 of Protocol

No.1. The question the Court needed to consider was whether the interference was justified in accordance with the requirements of Article 1 of Protocol No.1.

The Court noted that States did have the right to control the use of property by enforcing laws, but that the first and most important requirement of Article 1 of Protocol 1 was that any interference with the peaceful enjoyment of possessions by a public authority should be lawful – as set out in the second sentence of the first paragraph of Article 1 of Protocol No.1.

Moreover, the Court stated that the issue of whether a fair balance had been struck between the general interest of the community and the individual's fundamental rights became relevant only when it was established that the interference in question was lawful and not arbitrary. The Court stressed that lawfulness requires measures to have a basis in domestic law, with that domestic law to be precise, foreseeable and accessible to the persons concerned.

In this case, the Court noted that the national courts had failed to refer to any legal provision as a basis for the forfeiture of an important sum of money. Although the 1960 Criminal Code clearly provided for the "forfeiture of the goods and other items carried across the border", the 1996 Criminal Code, which provided the basis for the conviction of B., no longer provided for such confiscation. Moreover, the Ruling of the Supreme Court that the domestic courts had relied on referred to the 1960, rather than 1996, legislation. Thus, the Court found that the applicable law in question was not drafted with sufficient precision to have allowed the applicant to reasonably foresee the consequences of his actions in the circumstances.

Thus, the Court found the interference with the applicant's property had no basis in law and so amounted to a violation of Article 1 of Protocol No.1.

Article 41

The applicant was awarded €3,000 in respect of non-pecuniary damages.

The confiscation of the applicants' assets following their acquittal of money laundering did not violate Article 1 of Protocol 1

JUDGMENT IN THE CASE OF
BALSAMO v. SAN MARINO

(Application nos. 20319/17 and 21414/17)
8 October 2019

1. Principal facts

The applicants were born in 1986 and 1985 respectively, and lived in Brescia, Italy. On an unspecified date, a criminal investigation was started against the applicants and their father for ongoing money laundering. According to the prosecution, the accused had laundered assets to the value of €2,150,00.

Initially, the applicants were found guilty on 4 November 2014. The first instance domestic court sentenced the first applicant to two years and six months imprisonment and the second applicant to one year's imprisonment. They were both fined €5,000 and prohibited for one year and four months from holding public office and exercising political rights. The judge, relying on Article 147 § 3 of the Criminal Code, confiscated the sums which had been seized - €1,920,785.50. In addition, the judge issued, in respect of the first applicant, a confiscation by equivalent means of €499,000 given that, before the execution of the seizure she had withdrawn the latter sum from her bank account.

The criminal origin of the assets had been shown by a previous Italian criminal judgment against the applicants' father together with other relevant elements. In particular, the judge quoted a part of the Italian judgment which described the criminal career of the father and his previous convictions for fighting, causing personal injury, carrying weapons, and, after 1975, handling and receiving stolen goods, multiple instances of theft, owning unjustified assets, and drug dealing.

On 10 October 2016, the Judge of Criminal Appeals (Giudice d'Appello Penale) acquitted both applicants for lack of evidence capable of demonstrating the *mens rea*. Nevertheless, the Court of Criminal Appeals noted that the sum deposited in the bank account had a criminal origin in the absence of any explanation as to the origin of the money. The judge upheld the confiscation of the sums which had been seized.

2. Decision of the Court

The applicants complained that the confiscation violated their rights under Article 7, Article 6 § 2, and Article 1 of Protocol No. 1 of the Convention. They further complained they had no effective remedy as required under Article 13.

Article 7

The Court first had to ascertain whether Article 7 applied to the present case. It reiterated that the concept of "penalty" in Article 7 has an autonomous meaning, and that the Court can look beyond appearances and assess whether a measure amounts to a penalty under the Convention. The general starting point for this assessment is whether the measure in question is imposed following a decision that a person is guilty of a criminal offence. However, other factors are also taken into account, namely the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity.

The confiscation in the present case came after the acquittal of the applicants of all criminal charges. However, the absence of a conviction does not suffice to rule out the applicability of Article 7.

As to the nature and purpose of the confiscation measure, the Court considered that the measure was not punitive, but rather preventive, as the confiscation was applied even though the items did not belong to the perpetrator. Domestic law was designed to prevent the unlawful use of the funds and the commission of further crimes. The Criminal Court of Appeals had established that the funds had an illicit origin, and the applicants were aware of that. It followed that the applicants could be charged with new acts of money laundering had they to use or transfer such money. Hence it could not be said that the measure included a punitive purpose.

The fact that the confiscation was meted out by courts of criminal jurisdiction, was not a cause to conclude that it is a penalty as it was a common feature of several jurisdictions.

Lastly, as regards the severity of the measure, the Court reiterated that this factor was not in itself decisive, since many non-penal measures of a preventive nature may have a substantial impact on the person concerned. Confiscation was not a measure restricted to criminal law as it was also prevalent in administrative law, and should

be viewed in a greater context. For example, the Council of Europe has allowed for serious measures to be implemented to prevent money laundering, and in these circumstances the Court considered that the preventive measures could be necessary and appropriate given the public interest involved.

Hence, the measure at issue was not a "penalty" for the purposes of Article 7, and the Court found the complaint inadmissible.

Article 6 § 2

The applicants' presumption of innocence had not been breached by the mere imposition of the confiscation order, and the complaint was declared inadmissible as manifestly ill-founded.

Article 13

The Court ruled that Article 13 was not applicable as the complaints under Article 7 and 6 § 2 had not been found to be arguable, and this complaint was declared inadmissible.

Article 1 of Protocol No. 1

The protection of property 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 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 certain conditions; the third rule, 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 confiscation measure in the present case fell within the third rule. Even though the confiscation was not based on a criminal conviction, nor was it a result of separate "civil" proceedings, it nevertheless fell to be examined as one of control of the use of property.

National courts are entrusted to resolve problems of interpretation and application of domestic legislation, and the Court found nothing arbitrary about the domestic court's reading of Article 147 (2), which provided for the confiscation even in the absence of a conviction, of any items which constituted an offence. There were no issues as to the clarity, precision or foreseeability of that provision.

The Court considered older case law on the procedures for the forfeiture of property linked to the alleged commission of serious offences. In relation to property presumed to have been acquired either in full or in part with the proceeds of drug-trafficking offences or by criminal organisations involved in drug-trafficking or from other illicit mafia-type activities, it accepted that the confiscation measures were proportionate, even in the absence of a conviction establishing the guilt of the accused.

Referring to the standard of evidence required by the domestic court for issuing the confiscation, the Court found it legitimate that the relevant domestic authorities issued the orders based on a preponderance of the evidence, which in the present case suggested that the applicants' lawful incomes could not have sufficed for them to acquire the property in question. Whenever a confiscation order was the result of civil proceedings which related to the proceeds of crime derived from serious offences, the Court did not require proof "beyond reasonable doubt" of the illicit origins, but proof on a balance of probabilities or a high probability of illicit origins, combined with the inability of the owner to prove the contrary. It was reasonable for the applicants to be required to discharge their part of the burden of proof by refuting the prosecutor's substantiated suspicions about the wrongful origins.

The Court then pointed to examples of international legal mechanisms such as the 2005 United Nations Convention against Corruption, the Financial Action Task Force's recommendations and the two relevant Council of Europe Conventions of 1990 and 2005 concerning confiscation of the proceeds of crime cited in other cases. It then observed that there are common European and even universal legal standards which encourage the confiscation of property linked to serious criminal offences without the prior existence of a criminal conviction. The onus of proving the lawful origin of the property presumed to have been wrongfully acquired can legitimately shift onto the respondents in such non-criminal proceedings for confiscation, including civil proceedings in rem. The funds in dispute, in the present case, were found by the domestic courts to have had illicit origins, and during the proceedings, the applicants, who were legally represented, had been afforded a reasonable opportunity of putting their arguments before the domestic courts. The confiscation in the present case aimed to eliminate such funds from circulating into the economy. In this connection, the Court reiterated that States were given a wide margin of appreciation in regard to what constituted appropriate means of applying measures to control the use of property, such as the confiscation of all types of proceeds of crime.

Having regard to the authorities' wide margin of appreciation and to the fact that the domestic courts afforded the applicants a reasonable opportunity to present their case, the Court concluded that the confiscation of the applicants' assets did not violate Article 1 of Protocol No. 1.

The confiscation and impounding of the applicant's aircraft under the implemented European Union Regulation did not constitute a violation of Article 1 of Protocol No.1

GRAND CHAMBER JUDGMENT IN THE CASE OF
BOSPHORUS AIRWAYS v. IRELAND

(Application no.45036/98)
30 June 2005

1. Principal Facts

The applicant was an airline charter company registered in Turkey, Bosphorus Airways. In May 1993, an aircraft leased by the applicant from Yugoslav Airlines (JAT) was seized by the Irish authorities whilst in Ireland for maintenance, under European Community (EC) Council Regulation 990/93, which, in turn, implemented the United Nations sanctions regime against the Federal Republic of Yugoslavia.

The applicant challenged the retention of the aircraft in June 1994 at the High Court. There, it was held the regulation used to seize the aircraft was not applicable. However, the State appealed and the Supreme Court made a referral to the European Court of Justice (ECJ)[156] on the question of whether the aircraft was covered by Regulation 990/93. The ECJ held that the regulation did cover the aircraft, and subsequently, the Supreme Court applied the decision of the ECJ and the State's appeal was successful.

By the time of the final judgment by the Supreme Court, the applicant's lease on the aircraft had expired and the sanctions on the Federal Republic of Yugoslavia had been relaxed. The Irish authorities returned the aircraft to JAT. The applicant consequentially lost three years of the four-year lease, and their aircraft was the only one ever seized under the relevant EC and UN regulations.

2. Decision of the Court

The applicant argued that the manner in which Ireland implemented the sanctions regime to impound the aircraft was a reviewable exercise of discretion within the meaning of Article 1 of the European Convention on Human Rights and a violation of Article 1 of Protocol 1.

[156] Now the Court of Justice of the European Union (CJEU)

Article 1

It was not disputed that the act about which the applicant company complained, the detention of the aircraft leased by it for a period of time, was implemented by the authorities of the respondent State on its territory following a decision made by the Irish Minister for Transport. In such circumstances the applicant company, as the addressee of the impugned act, fell within the "jurisdiction" of the Irish State, with the consequence that its complaint about that act was compatible *ratione loci*, *personae* and *materiae* with the provisions of the Convention.

Article 1 of Protocol No.1

The Court found EC Regulation 990/93, once adopted was generally applicable and binding in its entirety. Thus it applied to all Member States, none of which could lawfully depart from any of its provisions. Its direct applicability could therefore not be disputed. The regulation became a part of Irish domestic law on 28th April 1993, when it was published in the Official Journal, prior to the date of the impoundment and without the need for implementing legislation.

The Court held it was foreseeable the Minister for Transport would implement the impoundment powers contained in Article 8 of EC Regulation 990/93. The Irish authorities rightly considered themselves obliged to impound any departing aircraft to which they considered the regulation applied. Their decision that it did apply was later confirmed by the ECJ. The Court also agreed with the Irish Government and the European Commission that the Supreme Court in Ireland had no discretion to exercise. Thus, the interference was lawful and amounted to compliance by the Irish State under their legal obligations stemming from EC law[157], and EC Regulation 990/93.

Considering whether the impoundment was justified, the Court found that the protection of fundamental rights by EC law could have been considered to be, and had at the relevant time been, "equivalent" to that of the Convention system. A presumption consequently arose that Ireland had not departed from the requirements of the Convention when it implemented legal obligations flowing from its membership of the EC. Such a presumption could be rebutted if, in a particular case, it was considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation was outweighed

[157] Now European Union (EU) law.

by the Convention's role as a "constitutional instrument of European public order" in the field of human rights.

The Court went on to note the nature of the interference, the general interest pursued by the impounding of the aircraft, and the sanctions regime confirmed by the ruling of the ECJ that the Supreme Court was obliged to follow. It considered it clear that there was no dysfunction of the mechanisms of control of the observance of Convention rights. Hence, in the present case it could not be said that the protection of Bosphorus Airway's Convention rights was manifestly deficient, and the presumption of Convention compliance had not been rebutted.

The actions of the Irish authorities did not violate Article 1 of Protocol No.1.

The confiscation of assets on the presumption that they were directly or indirectly the proceeds of illegal activities was not a violation of Article 1 of Protocol 1 as the applicant had the opportunity to rebut that presumption, and Article 6 § 2 was not applicable

DECISION IN THE CASE OF
BUTLER v. THE UNITED KINGDOM

(Application no. 41661/98)
27 June 2002

1. Principal Facts

The case concerned the confiscation from the boot of a car leaving the United Kingdom of £239,010 (approximately €270,000) in cash on the basis that it was presumed to be directly or indirectly the proceeds of drug trafficking and/or intended for use in drug trafficking. Under relevant domestic law, the standard of proof required for making a confiscation order was the balance of probabilities, and such an order could be made whether or not proceedings were brought against any person for an offence connected to the cash in question.

2. Decision of the Court

The applicant complained that his right to the presumption of innocence under Article 6 § 2 had been violated as he had been compelled to bear the burden of proving beyond reasonable doubt (the criminal standard) that the money at issue was not related to drug trafficking, and that the proceedings at issue hence were 'criminal' in nature and should attract the safeguards of the criminal process. The applicant further contended that the order deprived him of the peaceful enjoyment of his property under Article 1 of Protocol 1.

Article 6

The Court first noted that criminal charges had never been brought against the applicant, nor against any other party. The applicant contended that the forfeiture of his money in reality represented a severe criminal sanction, handed down in the absence of the procedural guarantees afforded to him under Article 6, in particular his right to be presumed innocent.

However, in the Court's view, the forfeiture order was a preventive measure and could not be compared to a criminal sanction, since it was designed to take out of circulation money which was presumed to be bound up with the international trade in illicit drugs. Hence, the proceedings which led to the making of the order did not involve "the determination ... of a criminal charge". The applicant had relied on the Court's judgment in the case of *Phillips v. the United Kingdom*[158], however, the confiscation order impugned in that case followed on from the applicant's prosecution, trial and ultimate conviction on charges of importing an illegal drug, and did not give rise to the determination of a separate or new charge against the applicant. The confiscation order in the *Phillips* case was found to be analogous to a sentencing procedure and to that extent attracted the applicability of Article 6, whilst the circumstances of the instant case were different.

As Article 6 under its criminal heading was not applicable, the Court found the complaint incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3, and it was declared inadmissible.

Article 1 of Protocol No. 1

The Court noted that the seizure and forfeiture of the applicant's money clearly amounted to an interference with the peaceful enjoyment of his possessions. However, while noting that the applicant had been permanently deprived of his money through the application of the forfeiture order, that order had been made in accordance with domestic law and in the general interest, specifically to combat international drug trafficking. Therefore the confiscation constituted a control of the use of property in accordance with the general interest as set out in the second paragraph of Article 1 of Protocol 1.

For the authorities' interference with the applicant's rights to be justified the domestic courts had to have struck a fair and proportionate balance between the general interests of the community in the eradication of drug trafficking and the protection of the individual's fundamental right to the peaceful enjoyment of his possessions. The Court noted that States enjoy a wide margin of appreciation in formulating and implementing policy measures to combat serious crime. The Court also noted that it was aware of the difficulties faced by States in their attempts to combat the harm caused by illegal narcotics and recognised that severe sanctions

[158] *Phillips v. the United Kingdom*, judgment of 5 July 2001, no. 41087/98 (included as a summary in this publication)

such as confiscation measures were justified in relation to these attempts. The Court further recognised that domestic law gave clear and defined powers to the authorities to seize and forfeit assets. Furthermore, any seizure was subject to judicial scrutiny, notably a domestic court had to be convinced that the confiscated money was connected with the illicit trafficking of drugs. It also noted that the applicant, assisted by counsel, was able to dispute the reliability of the evidence supporting the confiscation order at oral hearings and that at no stage was he faced with irrebuttable presumptions of fact or law.

Having regard to these considerations, the Court found that the confiscation order did not amount to a disproportionate interference with the applicant's property rights. It followed that the complaint was manifestly ill-founded and was declared inadmissible.

Automatic penalty of property confiscation without criminal conviction after non-compliance with regional land-use regulations constituted a violation of Article 6 § 2, Article 7 and Article 1 of Protocol No. 1

GRAND CHAMBER JUDGMENT IN THE CASE OF
G.I.E.M. S.R.L. AND OTHERS v. ITALY

(Application nos. 1828/06, 34163/07 and 19029/11)
28 June 2018

1. Principal facts

The applicants were four companies with legal personality and a director of the fourth company (Mr Gironda). The applicant companies all had their registered offices in Italy. Mr Gironda lived in Pellaro.

Municipal authorities approved site development plans for commercial properties on land owned by all four of the companies in question. Under Italian planning law, where the offence of "unlawful site development" is materially made out, the criminal court is bound, whether or not the defendants have been convicted, to confiscate the developed land and any buildings thereon, even when it is in the possession of a third party (except one proving to have acted in good faith). As was the case with the present applicants, developers and property owners can have their property confiscated even when they have received proper development authorisation from the relevant municipality if the development plan conflicts with the larger region's land-use laws.

2. Decision of the Court

The applicants submitted that the punitive confiscation of their property despite an absence of criminal conviction breached Article 7 of the Convention. The applicants also submitted that the confiscation did not serve to advance a valid State interest and was disproportionately burdensome, thereby violating Article 1 of Protocol No. 1. Finally, the applicants also submitted complaints under Articles 6 and 13.

Article 7

To determine whether an Article 7 claim is admissible, the Court must first determine if the behaviour that gave rise to the complaints amounted to a "penalty"

within the meaning prescribed by the Convention. The Court reiterated that "penalty" retains an autonomous meaning – a penalty is not simply a penalty because the State imposing the restriction defines it as such, and the Court remains free to assess the issue for itself.

The starting-point in any assessment of the existence of a "penalty" is whether the measure in question is imposed following a decision that a person is guilty of a criminal offence. In the present case, the Court followed the precedent analysis established in *Sud Fondi S.r.l. and Others v. Italy*[159] and took the view that the confiscation for unlawful site development imposed on the applicants could be regarded as a "penalty" within the meaning of Article 7 of the Convention in spite of the fact that no criminal conviction had been handed down against the applicant companies or their representatives.

The nature and the purpose of the confiscation was deterrent and punitive. The deterrent and punitive nature of confiscation was emphasised by the Italian Court of Cassation, acknowledged by the respondent during the proceedings and evidenced by the mandatory and automatic nature of the confiscation, regardless of the actual threat the violation posed to the environment, the protection of which was the State interest that the government claimed to serve by utilising confiscation. Further, the Court found that the national characterisation of the confiscation indicated that it was considered a penalty domestically. The section of the Construction Code that governed the confiscation measure at issue in the present case bore the heading "Criminal sanctions." Additionally, the confiscation of the applicants' property was procedurally authorised by the criminal courts, not by some administrative process. Finally, the Court observed that the confiscation, which applied not only to the developed land but to the entire property, was particularly severe and intrusive.

The confiscation measures could therefore be regarded as "penalties" within the meaning of Article 7 of the Convention., and the applicants' Article 7 claim was admissible.

In order to assess whether Article 7 was complied with in the present case, the Court examined whether the confiscation measures were conditional on the existence of a mental element, whether the measures could be imposed without any prior formal conviction and without the companies being parties to the proceedings in question.

[159] See *Sud Fondi S.r.l. and Others v. Italy*, judgment of 20 January 2009, no. 75909/01

The Court reiterated the importance of the principle that offences and penalties must be provided for by law and the requirement of foreseeability of the effects of the criminal law. As such, a measure can only be regarded as a penalty within the meaning of Article 7 where an element of personal liability on the part of the offender has been established. The Court found that, in the present case, Article 7 required that the confiscation measures had to be foreseeable for the applicants and precluded any decision to impose those measures on the applicants in the absence of a link disclosing an element of liability in their conduct. As the rules that had been breached lacked foreseeability, the accused had committed an unavoidable and excusable error, thus ruling out the mental element that had to be established for the offence to be made out, and their acquittal was justified.

When analysing whether the measures could be imposed without any prior conviction, the Court interpreted Article 7 to require a finding of liability by a domestic authority prior to implementing a punishment. The finding of liability need not come from a criminal court, it can be delivered from an administrative body. Since the applicant companies were not prosecuted themselves, there had not been a prior declaration of their liability. However, proceedings were brought against the individual applicant, Mr Gironda, and a formal case of unlawful land development was established against him. The only reason that the proceedings were set aside was because his case was statute-barred.

When analysing whether the measures could be imposed on the applicant companies, which were not parties to the proceedings, the Court reiterated that no one can be held guilty for a criminal offence of another. In the present case the companies, which had their own legal personalities, were not parties to any of the proceedings. Under Italian law, confiscation of property was a sanction imposed by a criminal court as an automatic consequence of a finding of the offence of unlawful site development. However, no distinction was drawn for the situation where the owner of the property was a company, which could not commit a criminal offence under Italian law. The companies were not parties to proceedings of any kind. Only the legal representative and shareholders of three of the companies were indicted in a personal capacity. Thus the authorities imposed a sanction on the applicant companies for the actions of third parties, that is to say, except in the case of one of the companies, the actions of their legal representatives and/or shareholders acting in a personal capacity.

The Court therefore held that there was a violation of Article 7 with respect to the applicant companies because they were not parties to the criminal proceedings that

resulted in the confiscation orders. However, there had been no violation of Article 7 with respect to the individual applicant, Mr Gironda, as the domestic courts' findings in the proceedings against him could be regarded, in substance, as a declaration of liability meeting the requirements of this Article as proceedings against him made out a formal offense of unlawful site development and were only discontinued because the case was statute-barred.

Article 1 of Protocol No. 1

The Court determined that the second paragraph of Article 1 of Protocol No. 1 applied to the present case as the interference amounted to a control of use of property. Such interference with property rights must be prescribed by law and pursue a legitimate aim. A fair balance must be struck between the demands of the general interest and the interest of the individuals concerned. The State cited environmental protection as its primary goal for the confiscation of the applicants' property. However, the state of the properties (falling into disrepair, still housing their owners, etc.) led the Court to question whether the confiscation of the properties actually contributed to the protection of the environment.

Further, Article 1 of Protocol No. 1 requires a reasonable relationship of proportionality between the means employed and the aim pursued; fair balance will be upset if the person concerned must bear an individual and excessive burden. The following factors may be taken into account in order to assess whether the confiscation was proportionate: the possibility of less restrictive alternative measures such as the demolition of structures that were incompatible with the relevant regulations or the annulment of the development plan; the unlimited nature of the sanction, as it affected both developed and undeveloped land, and even areas belonging to third parties; and the degree of culpability or negligence on the part of the applicants or, at the very least, the relationship between their conduct and the offence in question. Additionally, although Article 1 of Protocol No. 1 contains no explicit procedural requirements, the Court has recognised that judicial proceedings concerning the right to the peaceful enjoyment of one's possessions must also afford the affected individuals a reasonable opportunity of putting their cases to the competent authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision. No such opportunity was available to the applicants.

In the present case, the Court found that the confiscations had violated Article 1 of Protocol No. 1 for all the applicants due to their automatic nature and the disproportionate burden they imposed on the applicants.

Article 6 § 1 and Article 13

It was not necessary to examine these complaints as they were covered by the complaints already examined under Article 7 of the Convention and Article 1 of Protocol No. 1.

Article 6 § 2

Mr Gironda also complained that the principle of the presumption of innocence had been breached by the Court of Cassation in deciding to order the confiscation of his land even though the case against him had been dismissed as statute-barred.

One general aim of the principle of the presumption of innocence is to protect individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of

the offence charged. In this case, the applicant was acquitted on appeal and the confiscation measure was revoked after the development plan had been found compatible with the land-use plan and planning regulations. However, that decision was subsequently quashed by the higher Court of Cassation, which found that the applicant's liability had been proved. The applicant was thus declared guilty, notwithstanding the fact that the prosecution of the offence in question was statute-barred.

The Court determined this series of actions by the Court of Cassation to be a breach of the presumption of innocence and therefore a violation of Article 6 § 2.

Article 41

Application of Article 41 of the Convention was not ready for decision since the State had not yet addressed the parties' request for just satisfaction. As such, the Court reserved the question of just satisfaction and invited the parties to submit written observations on the matter and to notify the Court of any agreement that they may reach.

A confiscation order implemented despite its subject having been acquitted of the relevant crime, violated the presumption of innocence in Article 6 § 2

JUDGMENT IN THE CASE OF
GEERINGS v. THE NETHERLANDS

(Application no. 30810/03)
1 March 2007

1. Principal Facts

On 20 May 1998 the applicant was convicted by the Regional Court of numerous counts of theft, burglary, handling stolen goods, and being a member of a criminal gang. He was sentenced to five years' imprisonment. This ruling was then quashed on appeal, with the applicant instead being convicted of a number of different thefts and sentenced to thirty-six months' imprisonment with twelve months suspended for two years. In January 1999, the public prosecutor summoned the applicant to appear before the Regional Court so that he could be heard in connection with the prosecutor's request for a confiscation order to correct the illegally obtained advantage he had obtained from stolen goods. The Regional Court issued a confiscation order in March 1999, a decision which was appealed by the applicant.

In March 2001 the Court of Appeal decided to issue a confiscation order amounting to 147,493 Netherlands Guilders (€67,594) to be substituted by 490 days of detention if it were not paid. The confiscation order encompassed the profits that the applicant would have received for the crimes he was charged with by the Regional Court. Despite his acquittal of these crimes, the Court of Appeal justified its decision by concluding that there were strong indications that he had committed them. The applicant had his appeal rejected by the Supreme Court. In 2004 the applicant reached an agreement allowing him to pay €10,000 straight away and to pay off the rest in monthly instalments of €150.

2. Decision of the Court

The applicant, relying on Article 6 § 2 of the Convention (presumption of innocence), argued that the confiscation order was based on charges of which he had been acquitted in criminal proceedings, and therefore violated his Convention rights.

Article 6 § 2

The Court noted that whilst Article 6 § 2 governs criminal proceedings in their entirety, the right to the presumption of innocence only arises in connection with the particular offence with which a person has been charged. Once proven guilty of that offence, the presumption of innocence no longer applies to the sentencing process, unless sentencing procedures amount to the bringing of a new charge.

The present case was different from previous cases the Court had decided in which applicants had been convicted of offences and been unable to prove on the balance of probabilities that the finances in question had not been acquired as a result of the illegal activity of which they had been convicted. Although the applicant had been found guilty of certain offences, it had not been proven that he had in his possession any of the property in question. The Court considered the confiscation of assets which were not known or proven to have been in the possession of the relevant person to be inappropriate, especially if that person had not been found guilty. If it was not beyond reasonable doubt that the relevant person had committed the crime, and if it could not be proven that the person gained advantage from illegal activity, a confiscation measure could only be justified by a presumption of guilt, something that would interfere with Convention rights under Article 6 § 2.

In the applicant's case the confiscation measure had been applied without the applicant having been found guilty according to law. The confiscation measure therefore amounted to a determination of the applicant's guilt in violation of Article 6 § 2.

Article 41

The Court reserved the question of just satisfaction, as it was not ready for decision.

The failure of the State authority to assess proportionality when evicting a bona fide purchaser from a flat, fraudulently obtained by the previous owner, violated Article 1 of Protocol No.1

JUDGMENT IN THE CASE OF
GLADYSHEVA v. RUSSIA

(Application no. 7097/10)
6 December 2011

1. Principal Facts

The applicant was born in 1973. On the 28 September 2005, she bought a flat in Moscow and lived there with her son. At the time of the Court's judgment, they both faced imminent eviction. The flat had previously been owned by the City of Moscow, but was acquired by Ye. – the alleged wife of a deceased occupier, M, to whom it had been allocated for social housing – under a privatisation scheme. Ye had then sold the flat to a third party, V, who had sold it on to the applicant.

In 2008 the Moscow Housing department brought an action against the applicant and the previous owner of the flat, claiming that it had been fraudulently acquired by Ye, as it had come to light that Yehad not in fact been married to M. and that her passport which she had relied on as proof of identify had been declared lost in 1996.

On 25 July 2008, the Cheryomushkinskiy District Court of Moscow dismissed the authorities' claim and allowed the applicant's counterclaim, recognising her as the legitimate owner of the flat. It stated that the applicant had bought the flat in good faith and had paid a purchase price for it. The Moscow Housing Department appealed the decision and subsequently the original decision was quashed before the matter was referred back to the District Court.

On 15 December 2008, criminal proceedings were commenced against an unidentified perpetrator on the basis of fraud in the process of privatisation of the flat. On 9 July 2009, the District Court found that the privatisation of the flat by Ye had been fraudulent. It was found that the civil act registration authority had no record of a marriage between M and Ye and that the marriage certificate had been forged. Thus, Ye had no right to be registered at M's address or indeed to privatise his flat. In the case of the applicant, the District Court found that she was a bona fide purchaser, however as the flat had been fraudulently privatised, the City of Moscow

was the lawful owner and had divested its interest in the flat without knowing. The District Court ordered the applicant's eviction without compensation or any offer of alternative housing.

On 14 December 2010, the Deputy Prosecutor General requested the Supreme Court to review the applicant's case in supervisory review proceedings. The Supreme Court refused the request, and declined to reconsider the case. It stated the applicant's status as a bona fide buyer had not been in doubt at any stage, and the lower courts had applied the law and granted the plaintiff's lawful claims. It was noted the applicant was free to sue for damages. The eviction order was adjourned twice, but still in place at the time of the Court's judgment.

2. Decision of the Court

The applicant complained that she had been deprived of her possessions in violation of Article 1 of Protocol No.1. She further argued that the eviction was a violation of her right to respect her home under Article 8.

Article 1 of Protocol No.1

In response to the Government's argument that the claim fell outside the scope of Article 1 of Protocol No.1, as it concerned a private-law dispute, the Court stated that it was clear from the domestic proceedings that the claim against the applicant had been brought by the Moscow Housing Department - a public authority rather than a private party.

The Court reiterated the established principles on the structure of Article 1 of Protocol No.1 and the manner in which the three rules are to be applied. In order to be compatible with the general rule of Article 1 of Protocol No.1, an interference must comply with the principle of lawfulness and pursue a legitimate aim by means reasonably proportionate to the aim sought to be released. Thus, an interference with the peaceful enjoyment of possessions must strike a fair balance between the demands of the public and general interest of the community and the requirements of the protection on an individual's fundamental rights. There must further be a reasonable relationship of proportionality between the means employed and the aim sought by any measure depriving a person of his possessions or controlling their use.

Moreover, the Court held that the taking of property without payment reasonably related to its value will normally constitute a disproportionate interference that

cannot be justified under Article 1 of Protocol No.1. However, this provision does not guarantee a right to full compensation in all circumstances, as legitimate public interest objectives may call for reimbursement less than the full market value.

Applying these principles to the instant case, the Court observed that the applicant had been recognised as the property's lawful owner by the State (property registration authorities and housing and residence registration bodies). Therefore, it constituted a possession for the purposes of Article 1 of Protocol No.1.

As to the question of the existence and nature of interference, the Court confirmed the instant case fell within the general rule set forth in the first sentence of Article 1 of Protocol No.1. The Court reiterated that an interference with property must be lawful and pursue a legitimate aim, along with satisfying the requirement of proportionality. A fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, and this balance will not be struck where an individual bears an excessive burden.

The Court held that it was up to the State to define the conditions and procedures under which it transferred ownership of its assets to persons it considered eligible and to oversee compliance with those conditions. It was not within the applicant's responsibility to assume the risk of their ownership of a property being revoked on account of defects which should have been resolved in specifically designed procedures. The obligation to remedy such mistakes falls to the State, and not at the expense of the individual. Thus, dispossessing the applicant of her flat placed an excessive individual burden without sufficient justification that it was in the public interest. Moreover, it was hard to see how the Government's suggestion that she pass this excessive individual burden on to V, another bona fide individual buyer, would improve the balance between the public interest and the need to protect individuals' rights. Nor could damages be claimed from those actually guilty of fraud as no culprit had been identified in the criminal proceedings and the chances of identifying them were virtually non-existent as the main witnesses, Ye and her alleged husband, were both deceased.

In light of the above, the Court found a violation of Article 1 of Protocol No.1.

Article 8

The Court reiterated that once an eviction order has been issued, it amounts to an interference with the right to respect for home, regardless of whether it has been carried out. The Convention requires that that an interference is proportionate to the legitimate aim pursued, namely in this case the rights of welfare recipients to whom the flat could be reallocated. The Court found it important to take into account that the flat's intended beneficiaries on the social housing waiting list could not be sufficiently individualised for their personal circumstances to be balanced against those of the applicant. In any event, no individual on the waiting list would have had the same attachment to or vested interest in that particular flat – as opposed to one like it – as the applicant. Nor was she eligible for substitute housing, and the Moscow Housing Department had shown no goodwill to provide her with even a temporary, let alone permanent, solution when she had to move out. The Court therefore found that the authorities had entirely left out of the equation the applicant's right to respect for her home when balancing it against the interests of the City of Moscow.

Based on the above, the Court found a violation of Article 8.

Article 41

The Court ordered Russia to restore the applicant's title to her flat and to annul the eviction order against her. The applicant was awarded €9,000 in respect of non-pecuniary damages and €11,245 in respect of costs and expenses.

The forfeiture of wrongfully acquired property belonging to a former Minister and his close relatives as part of domestic anti-corruption measures was not a violation of Article 1 of Protocol 1

JUDGMENT IN THE CASE OF

GOGITIDZE AND OTHERS v. GEORGIA

(Application no. 36862/05)

12 May 2015

1. Principal Facts

The applicants were four Georgian nationals. The second and fourth applicants were the first applicant's sons, and the third applicant was his brother.

The first applicant was a former government minister and held the posts of Adjarian Deputy Minister of the Interior and President of the Audit Office. In 2004, he was charged with abuse of authority and extortion and the Public Prosecutor's Office initiated proceedings to confiscate his wrongly and inexplicably acquired property as allowed for under domestic law.

It was alleged by the prosecution that there were reasonable grounds to believe the salary the first applicant had received for two positions held between 1994 and 2004 had not been sufficient to finance the acquisition of the property acquired during the same period. The prosecutor demonstrated that the first applicant's official salaries had been €1,644 and €6,023 for the two positions, but the property he had acquired had a value of €450,000; a figure derived from two independent auditors who had conducted an assessment of the disputed property in August 2004.

In September 2004, the Adjarian Supreme Court ordered six properties belonging to the applicants to be confiscated. Only the second applicant had appeared in person in front of the court. In January 2005, following an appeal by all applicants, the Supreme Court of Georgia returned one property but upheld the remaining confiscation orders.

The first applicant lodged a constitutional complaint in December 2004. He complained that the confiscation of his and his family members' property amounted to the imposition of a criminal punishment without any final establishment of guilt and that he should not have borne the burden of proving the lawfulness of the disputed

property. Further, he argued that he and his family had acquired the property in question well before the amendments in domestic law of 13 February 2004 that introduced an administrative confiscation procedure and that the retroactive extension of those provisions to their situation was unconstitutional.

The Constitutional Court concluded that the confiscated order had served the public interest of fighting corruption and that the test of proportionality had been satisfied during the confiscation proceedings, which had been conducted fairly before the domestic courts. Further, the new amendment to the law did not introduced any new concepts but instead regulated more efficiently the existing measures aimed at preventing and eradicating corruption in the public service. Thus, the applicant's complaint was held to be ill-founded and dismissed by the Constitutional Court in July 2005.

2. Decision of the Court

The applicants complained that the confiscation of their property violated Article 1 of Protocol 1, the right to peaceful enjoyment of their possessions, in particular as the administrative confiscation had been arbitrary and that the confiscation of their property had not been a provisional measure but an irreversible act and therefore unjustified, and that domestic proceedings had violated their right to a fair trial under Article 6 § 1 and 6 § 2.

Article 1 Protocol 1

The Court began by noting that the confiscation of the applicants' movable and immovable assets had amounted to an interference with their right to peaceful enjoyment of their possessions, within the meaning of Article 1 of Protocol No.1. The Court then went on to confirm the three rules within Article 1 of Protocol 1: the principle of peaceful enjoyment of property, the conditions placed on the deprivation of possessions, and the entitlement of States to control the use of property in accordance with the general interest by enforcing laws they deem necessary for the purpose. Essential conditions for an interference to be deemed compatible with Article 1 of Protocol 1 were that it should be lawful, serve a legitimate public or general interest, and be proportionate to the legitimate aim pursued through the striking of a fair balance between the general interest of the community and the protection of individual rights. The balance would not be found if an individual or individuals bore an excessive burden.

It was noted by the Court that the forfeiture of the applicant's property had been ordered in line with the applicable Criminal Procedure and Code of Administrative Procedure. The Court then addressed the applicant's argument that applying retroactively the legislative amendment of 13 February 2004 was unlawful, stating that the amendment regulated afresh parts of the existing anti-corruption legislation and standards and that it was within States' ability to control the use of property retrospectively via new provisions regulating continuing factual situations or legal relations. Thus, the forfeiture of the property was in conformity with the "lawfulness" requirement contained in Article 1 of Protocol No. 1.

The Court considered that the confiscation order was justified by the legitimate aim of fighting corruption and ensuring that the property obtained by the applicant had not enabled any personal gain to the detriment of the community.

The Court then considered whether the authorities had struck a fair balance between the confiscation of the applicants' assets and their right to property. The Court noted that the amendment of February 2004 assisted the authorities in combatting corruption and had been implemented in response to reports by international bodies which had highlighted the high levels of corruption in Georgia. States also had a wide margin of appreciation when dealing with crime and corruption. The domestic courts undertook a careful examination of the applicants' financial situation which led to evidence of a considerable discrepancy between their income and wealth, directly leading to and justifying the decision of confiscation. The applicants were also able to effectively challenge this decision and present evidence to support their claims. Therefore, it could not be said the applicants had been denied a reasonable opportunity to put forward their case or that the domestic courts' actions had been arbitrary.

Hence, the Court concluded that a fair balance had been struck between the rights of the applicants over their property and the general interest, and there had been no violation of Article 1 of Protocol No.1.

Article 6

The Court rejected the applicants' complaints under Article 6 § 1 as manifestly ill-founded as the applicants themselves had chosen to waive their right to take part in the proceedings, and it was not arbitrary to expect them to discharge their incumbent burden of proof by refuting the prosecutor's allegations. Furthermore, the applicants' complaint under Article 6 § 2 was not applicable to the forfeiture of property ordered as a result of civil proceedings.

Placing the burden of proof on the defendant to rebut the presumption that his property had been acquired illegally after he had been found guilty of drug-trafficking did not violate Article 6

JUDGMENT IN THE CASE OF

GRAYSON AND BARNHAM v. THE UNITED KINGDOM

(Application nos. 19955/05 and 15085/06)

23 September 2008

1. Principal Facts

The first applicant was convicted in January 2002 of an offence involving the importation of over 28 kg of pure heroin with a wholesale value of £1.2 million (approximately €1.4 million). He was sentenced to 22 years' imprisonment. In July 2002, after considering written and oral submissions form the applicant and prosecution, the judge made a confiscation order under the Drug Trafficking Act 1994. When deciding on the particular sum to be confiscated the judge took into account the applicant's current finances, business ventures, and all the circumstances in the case. The judge was satisfied in the assumption that such a large consignment would not have represented the applicant's first venture into drug trafficking and that he had financed the purchase of this consignment with the proceeds of previous drug dealing. The applicant failed to rebut this assumption. The judge also considered it fair to assume that the money held by the applicant was the proceeds of drug trafficking and that the applicant had money elsewhere that he was not prepared to reveal. The judge concluded that the applicant had benefited and set the confiscation order to the amount of £1,230,748 (approximately €1,407,000), and set an extra term of ten years' imprisonment if the monies were not paid within 12 months, finding that the first applicant had lied persistently throughout the proceedings about his assets. The first applicant appealed the decision but the Court of Appeal dismissed the appeal, holding that the additional accountancy evidence that the applicant sought to have admitted did not rebut the prosecution case, but in fact supported it to a large extent.

The second applicant was convicted of two conspiracy charges involving plans to import large consignments of cannabis into the United Kingdom in July 2001. However, neither of the importations were successful and the whereabouts of the drugs were unknown. During the trial, the applicant was described as the lead organiser in an internationally based drug trafficking business, and an undercover police officer "Murray", who had posed as a money launderer and made contact

with the applicant, gave evidence. Murray stated that the applicant had expected to receive a payment of £12 million (approximately €13.7 million) and that his personal share would be £2 million (approximately €2.3 million). The applicant was sentenced to eleven years imprisonment.

Confiscation proceedings commenced in January 2002. The applicant admitted that he had benefited from drug trafficking within the meaning of the 1994 Act. The trial judge ruled that the total benefit to the applicant amounted to £1.5 million (approximately €1.7 million). In April 2002 the judge resumed proceedings to assess the applicant's realisable assets. The applicant and his wife gave evidence to the effect that their only asset was their house in Spain, which was jointly owned. The judge found that the applicant and his wife had lied about their activities and their sources of income. The judge made a confiscation order of £1,525,615 (approximately €1,744,000), with an additional sentence of over five years if the applicant did not pay within 18 months. The applicant appealed against the ruling, arguing that Article 6 § 1 of the Convention applied to the assessment of realisable property, and that it had not been proven by the prosecution that he was in possession of the assets. The Court of Appeal found that the trial judge made an error of calculation and reduced the order to £1,460,615 (approximately €1,669,000). An appeal to the House of Lords was refused.

2. Decision of the Court

Relying on Article 6 § 1 (right to a fair trial) and Article 1 of Protocol No. 1 (protection of property), the applicants complained that the national courts in making the confiscation orders assumed they had hidden assets in addition to the assets established to be in their possession.

Article 6

The applicants argued that the burden placed on them to prove their realisable property was less than the sum assessed to have been their benefit from drug trafficking, violated their rights to a fair hearing under Article 6 § 1. Referring to its findings in *Phillips v. the United Kingdom*[160], the Court reiterated that the making of a confiscation order under the 1994 Act was analogous to a sentencing procedure, and that Article 6 § 1 was therefore applicable.

[160] *Phillips v. the United Kingdom*, judgment of 5 July 2001, no. 41087/98 (included as a summary in this publication)

The Court noted that during the first stage of the procedure under the 1994 Act, the onus was on the prosecution to establish, on the balance of probabilities, that the money spent or received during the six years preceding the offence was the proceeds of drug trafficking. If this was established then the burden passed to the defendants to show, again on the balance of probabilities, that the money had instead come from a legitimate source.

The making of a confiscation order under the 1994 Act was different from an imposition of a sentence following conviction by a criminal court because the severity of the order depended upon a finding of benefit from past criminal conduct in respect of which the defendant had not necessarily been convicted. For this reason, in addition to being specifically mentioned in Article 6 § 2, a person's right in a criminal case to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her forms part of the general notion of a fair hearing under Article 6 § 1. However, the right to the presumption of innocence is not absolute, since presumptions of fact or of law operate in every criminal-law system.

Throughout the proceedings of both the first and second applicants, the rights of the defence were protected by the safeguards built into the system. The assessment of the amount of benefit the applicants had received from drug trafficking was carried out by a court with a judicial procedure including a public hearing, advance disclosure of the prosecution case and the opportunity for the applicants to adduce documentary and oral evidence, and each applicant was represented by counsel of his choice. The Court did not consider that in either case it was incompatible with the concept of a fair trial under Article 6 to place the onus on the applicant, once he had been convicted of a major offence of drug dealing, to establish that the source of money or assets which he had been shown to have possessed in the years preceding the offence was legitimate. Given the existence of safeguards in the proceedings, the burden on him did not exceed reasonable limits.

The second stage of the procedure involved the calculation of the value of the realisable assets currently available to the applicant. The legislation at this stage did not require the sentencing court to make any assumption about past criminal activity: instead, it had to make an assessment of the applicant's means at the time the order was made, and the burden at this stage was on the defendant to establish to the civil standard that the amount that might be realised was less than the amount assessed as benefit.

Both applicants gave oral evidence relating to their realisable assets. Again, they had the advantage of procedural safeguards, were legally represented and had been informed, through the judges' detailed rulings, exactly how the benefit figure had been calculated. Each applicant was given the opportunity to explain his financial situation and describe what had happened to the assets which the judge had taken into account in setting the benefit figure. In each case, the judge found the applicant's evidence to have been entirely dishonest and lacking in credibility.

The Court found that it was not incompatible with the notion of a fair hearing in criminal proceedings to place the onus on each applicant to give a credible account of his current financial situation. In each case, having been proved to have been involved in extensive and lucrative drug dealing over a period of years, it was not unreasonable to expect the applicants to explain what had happened to all the money shown by the prosecution to have been in their possession, any more than it was unreasonable at the first stage of the procedure to expect them to show the legitimacy of the source of such money or assets. Such matters fell within the applicants' particular knowledge and the burden on each of them would not have been difficult to meet if their accounts of their financial affairs had been true.

Hence, there had been no violation of Article 6 § 1.

Article 1 of Protocol No. 1

Referring again to its findings in *Phillips v. the United Kingdom*, the Court did not find the requirement to pay money under a confiscation order made in compliance with Article 6 § 1 to constitute a disproportionate interference with the right to peaceful enjoyment of possessions, and hence there had been no violation of Article 1 of Protocol No. 1.

The confiscation and fine imposed on the applicant for failing to declare a sum of money to the customs authorities was disproportionate, in violation of Article 1 of Protocol 1

JUDGMENT IN THE CASE OF
GRIFHORST v. FRANCE

(Application no. 28336/02)
26 February 2009

1. Principal Facts

The applicant was a citizen of the Netherlands and lived in Andorra. On 29 January 1996, on his way into France from Andorra, the applicant was stopped by French customs officers. When asked twice by the customs officers if he had any money to declare, the applicant replied that he did not. The customs officers searched him and his vehicle and found 500,000 Netherlands guilders in his pockets, the equivalent of €233,056. They seized the full amount. The applicant then declared that he had withdrawn the money from the Credit of Andorra Bank to buy a property in Amsterdam.

The Netherlands authorities informed the National Intelligence and Customs Investigation Department that the applicant was known to the Dutch police for activities dating back to 1983 (threats, extortion, kidnapping and possession of a firearm). They added that his only known current activity was related to real estate and that the Dutch police had suspected him of using that activity as a cover for money laundering, but that no further concrete evidence could be produced. In October 1998, the Perpignan Criminal Court found the applicant guilty of failing to comply with the obligation under Article 464 of the Customs Code to declare money, securities or valuables. He was sentenced, under Article 465 of the Customs Code, to the confiscation of the full amount plus a fine equal to half the amount he had failed to declare (225,000 Netherlands guilders, the equivalent of €116,828). The judgment was upheld on appeal in March 2001. In January 2002, the Court of Cassation rejected an appeal on points of law.

2. Decision of the Court

Relying on Article 1 of Protocol 1 (protection of property), the applicant complained that the confiscation and fine amounted to a disproportionate penalty considering the nature of the charge against him.

Article 1 of Protocol No.1

The protection of property, contained in 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 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 certain conditions; the third rule, 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. Governments must balance their right to regulate property for the public interest against an individual's fundamental right to respect for their property.

The Court noted that in the present case, the €116,828 fine imposed upon the applicant fell under the second paragraph of Article 1 of Protocol No. 1, control of property. In relation to the confiscation of the money the applicant had carried on him, worth €233,056, the Court reiterated its position outlined in earlier case law that although it involved deprivation of possessions, the forfeiture of the applicant's money nonetheless amounted to control of the use of property under the third rule, citing cases relating to the fight against drugs, gambling, and mafia-style organisations.

The Court further considered that the interference in question was provided for by French law and pursued a legitimate aim in the public interest, namely combating the laundering of the proceeds of drug trafficking. It was aware of the importance of this issue for the Contracting States and observed that, over the years, an increasing number of international instruments, including United Nations and Council of Europe conventions, recommendations of the Financial Action Task Force and European Union legislation had been engineered to set up effective means of controlling cross-border capital flows. Requiring people to declare any cash they are carrying when they cross a border, and punishing them if they fail to doso was one such measure.

As to whether the French authorities had struck a fair balance between the demands of the general interest and the requirements to protect the applicant's fundamental rights, the Court noted, first, that there was no indication in the case file that the applicant had been tried for, or convicted of, money laundering. The only offence he was known to have committed was that of deliberately not declaring the money he had been carrying. In their submissions before the Criminal Court the customs authorities had even acknowledged that the sum found on him had been in keeping with his personal wealth.

The Court also emphasised the severity of the penalty imposed on the applicant, namely the combined confiscation of the full sum he had been carrying and a fine of half that amount, making a total of €349,584. It observed in particular that in the other Member States of the Council of Europe the penalty most frequently applied in such cases was a fine and that only the part of the sum in excess of the permitted amount was subject to confiscation.

Furthermore, the Court noted that the French authorities had amended Article 465 of the Customs Code in 2004 so that it no longer provided for automatic confiscation, and the fine had been reduced to a quarter of the sum concerned. It further pointed out that the majority of topically relevant international or European Union texts referenced the need for the penalties prescribed by States to be 'proportionate'. The Court, therefore, found that the penalty imposed on the applicant had been disproportionate, in violation of Article 1 of Protocol 1.

Article 41

The Court reserved its decision in relation to pecuniary damage as it was not ready for decision.

The lack of reasons in the judicial approval of the search of the applicants' home did not satisfy the requirements of lawfulness inherent in Article 8

JUDGMENT IN THE CASE OF
GUTSANOV v. BULGARIA

(Application no. 34529/10)
15 October 2013

1. Principal Facts

The four applicants were a well-known local politician, his wife, and their two minor daughters born in 2002 and 2004. The authorities suspected the first applicant of involvement in a criminal group accused of abusing power and embezzling public funds. Pre-dawn, around 6:30 am, on 31 March 2010 a special team which included armed and masked police officers arrived at the applicants' home. A caretaker alerted them of the presence of the wife and children. After the first applicant failed to open the door, the police officers forced entry. The house was searched, and various items of evidence were taken. According to the applicants, masked police entered the bedroom where the parents had brought their children and threatened them with firearms and bright lights. After handcuffing the first applicant the police ordered the second applicant to cover her children with a duvet to prevent them from screaming and crying in fear. The police disputed this, claiming that they did not enter the bedroom to handcuff the first applicant, never spoke to the second, third and fourth applicants, and only entered the bedroom armed with tasers to help the first applicant to get dressed.

The first applicant was eventually arrested and escorted off the premises at 1pm, recorded by journalists and a television crew who had gathered outside the house. A press conference was held on the same day, during which the prosecutor announced that charges would be brought against the arrested individuals, including the first applicant, for their actions as part of a criminal group. At 10:55 pm a prosecutor formally charged the first applicant with various offences and ordered his detention for seventy-two hours to ensure his attendance in court. On 1 April a newspaper published the prosecutor's speech, together with extracts of an interview with the Interior Minister, during which he referred to the closeness of the first applicant with another suspect and their involvement in a "plot". On 3 April 2010, a tribunal placed him in pre-trial detention on the grounds that there was a risk that he might commit new offences. On 5 April 2010, the prime minister gave a live interview on

current affairs, at the end of which he was asked to comment on the recent arrests. He mentioned the closeness of the first applicant with another suspect as well as their "material profit".

The first applicant's appeal against his pre-trial detention on 13 April 2010 and a further request for release on 18 May 2010 were rejected. On 25 May 2010, the Court of Appeal placed the first applicant under house arrest, noting that the danger of him committing new offences no longer existed. On 26 July 2010 the tribunal decided to release him on bail. At the time of the Court's judgment, criminal charges were still pending against the first applicant.

2. Decision of the Court

The applicants complained under Article 3 that they had been subjected to degrading treatment during the police operation at their home. The first applicant further complained under Articles 5 and 6 in relation to a number of issues, including that he had not been brought promptly before a judge and that the statements of public officials to the press had violated his presumption of innocence. Under Article 8 the applicants contended that the search carried out in their house constituted an unjustified interference with the right to respect for their home and family life, and under Article 13 that they had not had an effective remedy.

Article 3

The police operation was determined by the Court to have pursued the legitimate aim of carrying out an arrest and search in the general interest of the prosecution of criminal offences. However, the planning and execution of the police operation did not take into account several important factors, such as the nature of the offences the first applicant was accused of, the fact that he did not have any violent history, and the presence of his wife and young children in the house. These factors indicated that the use of armed and masked agents, and the use of methods such as arriving very early in the morning, were excessive rather than what would have been strictly necessary to apprehend a suspect and gather evidence. The four applicants had been subjected to a psychological ordeal generating feelings of fear, anguish, and helplessness. The police actions were therefore held by the Court to amount to degrading treatment for the purposes of Article 3 and constituted a violation of that Article.

Article 5

Article 5(3) – appearance before a judge

The first applicant was detained without trial for three days and six hours but was not required to participate in any investigatory measures after the first day. He was not suspected of involvement in any violent activity and was in a psychologically fragile state during the initial stages of detention following the degrading treatment he had suffered during the police operation, which had also been exacerbated by his public notoriety. Despite this notoriety, he was also detained in the same city as the tribunal and did not benefit from any exceptional security measures. These elements led the Court to find a violation of the requirement in Article 5 to promptly present a suspect before a judge.

Article 5(3) – length of detention

The first applicant was detained for a period of 118 days (31 March to 30 July 2010), two months of which were under house arrest. The domestic tribunals' decisions to keep him in detention were based on the risk that he might commit a new offence, particularly interference with evidence. However, on 25 May 2010, the Court of Appeal decided that following the applicant's resignation from his post, this danger had passed. Yet, contrary to its obligations under domestic law, the same court placed the applicant under house arrest without offering any particular reason to justify this decision. Hence, the Court concluded that the authorities had failed in their obligation to provide pertinent and sufficient reasons for the first applicant's detention after 25 May 2010, and therefore had violated Article 5(3).

Article 5(5) – compensation

The State Liability Act did not provide the applicant with an effective remedy for the damages suffered by him during detention, as this required a formal finding by a domestic court that the detention had been unlawful. As the proceedings against the applicant were still pending, his detention was still considered lawful by the domestic courts and therefore the State Liability Act did not apply. Since no other domestic provision for compensation existed, the Court found that there had been a violation of Article 5(5).

Article 6

The Court examined the first applicant's claims that various public officials had violated his right to presumption of innocence. After finding no violation regarding the Prime Minister's interview and the prosecutor's conference speech, the Court went on to consider the implications of the Interior Minister's interview, during which he declared that what "[the first applicant and another suspect] have done represents an elaborate plot over a period of several years". The Court distinguished the nature of this interview, exclusively concerned with the police operation, from the spontaneous words of the Prime Minister several days later. In addition, the fact that this speech was published the day after the first applicant's arrest, and before the first applicant's appearance before a court, by a high government official, who in the circumstances should have taken precautions to avoid confusion, was significant. The words of the Interior Minister were more than a simple communication of information and suggested that the first applicant was guilty. Therefore, there had been a violation of Article 6(2). Finally, the judge who rejected an application for release on 18 May 2010 stated that their court "remains of the view that a criminal offence was committed and that the accused was involved". This phrase was more than a mere description of suspicion, but was rather a declaration of the applicant's guilt before any decision on the merits of the case had been made. Consequently, this also breached Article 6(2).

Article 8

The Court noted that the search at issue was based on legislative provisions that posed no problem with regard to their accessibility and predictability for the purposes of the search being "in accordance with the law." As regards the last qualitative condition to be met by domestic legislation, namely compatibility with the rule of law, the Court recalled that in the context of seizures and searches it required that domestic law offer adequate guarantees against arbitrariness. In the instant case, the search of the applicants' house was carried out without a judge's prior authorisation. Such a search was permitted on the condition that a tribunal reviewed the search retrospectively to ensure that it met certain material and procedural conditions. In this case, the judge in question did not, however, give any reasons for his approval - he had simply signed and stamped the record followed by the word "approved". As a result, the Court considered that he did not demonstrate effective control over the lawfulness and necessity of the search. Hence, the interference with the right to respect for home was not "prescribed by law" and therefore violated Article 8.

Article 13 in combination with Articles 3 and 8

No effective remedy existed in domestic law by which the applicants could assert their right not to be submitted to treatment contrary to Article 3 and to the right to respect for their home under Article 8. A violation of Article 13 in combination with these two Articles was therefore found.

Article 41

A joint sum of €40,000 was awarded to the applicants in just satisfaction and €4,281 for costs and expenses.

Shortcomings in procedure meant that the search and seizure carried out in the office of the applicant, a practicing lawyer, violated Article 8

JUDGMENT IN THE CASE OF
ILIYA STEFANOV v. BULGARIA

(Application no. 65755/01)
22 May 2008

1. Principal Facts

The applicant was a practicing lawyer and had been a member of the Sofia Bar since 1994. In November 2000, a Mr R.S complained to the police in Sofia, alleging that he had been abducted by persons working for his former employer, MIG Group AD. An employee of the company, Mr K.G, had threatened him and his family with violence due to his failure to repay money owed to the company. The abductors had then taken him to the office of the applicant, the legal counsel of MIG Group AD, where he was coerced into signing written promises to pay money, as well as a contract to hand over his car. All these documents had supposedly been drafted by the applicant.

Sofia police consequently opened a criminal investigation into allegations of extortion and brought Mr K.G and two other individuals in for questioning. Once he had been informed of Mr K.G's arrest, the applicant went to the police station to offer his assistance at about 2 p.m. on 29 November 2000. He was taken by the police to a room where he could see other people being called for questioning, and while no warrant for his arrest was issued, he was not allowed to leave. The police decided to detain Mr K.G and two other individuals for 24 hours. That evening at 6.30 p.m. the officer in charge of the investigation interviewed the applicant as a witness. The applicant stated that he had not seen Mr R.S on the date in question and denied the allegations that Mr R.S had been coerced into signing any documents in his office. He also said Mr. K.G was a client of his, and that he had a computer in his office. That night, police officers sealed the door of the applicant's office. The applicant alleged that his mobile phone was then tapped, the Government stating that there was no documentary evidence to suggest that this was the case.

The next day, the officer in charge of the case applied to the Sofia District Court for a search warrant for the applicant's office. The judge issued the search warrant, stating that there was sufficient evidence that the office might contain evidence relevant to the case. That evening officers seized the applicant's computer, monitor,

printer, and other items, such as documents and floppy disks. The search was carried out in the presence of two certifying witnesses, who signed the police search inventory. The applicant himself arrived at his office after the search had begun and registered a formal objection to the legality of the search.

In December 2000, the officer in charge of the investigation was informed that no files relating to the case had been found in the search. The applicant then asked for the return of his items. In February 2001 the Prosecutor's office decided to stay the investigation, stating that the identity of the alleged perpetrator had not been determined. It also ordered that the applicant's items be returned to him. The applicant's request for information regarding the alleged tapping of his telephone was left unexamined.

2. Decision of the Court

The applicant complained under Article 8 (right to respect for private and family life) that the search and seizure carried out at this office had been unlawful and that the police had tapped his telephone. He also complained under Articles 3 (prohibition of torture) and 5 (right to liberty and security) that the search of his office had amounted to degrading treatment and that he had been unlawfully deprived of his liberty in the police station. He further complained under Article 6 (right to a fair trial) that he had not had access to a court competent to rule on the criminal charges against him, and under Article 13 that he had not had access to a remedy.

Article 8

The search and seizure of items in the applicant's office amounted to an interference with the applicant's rights under Article 8. This would give rise to a violation unless it could be shown that the authorities' actions were carried out in accordance with law, pursued a legitimate aim, and were necessary in a democratic society. In the present case the search was carried out pursuant to a judicial warrant. The Court also noted that the police applied for the warrant only after obtaining statements from witnesses and the victim of the alleged offence. The information gained from the statements gave rise to the belief that extortion could have been committed in the applicant's office. However, the warrant itself was very broad and did not specify what items and documents were expected to be found in the applicant's office. The warrant also did not mention whether privileged material was to be removed. The Court found that the warrant was drawn up in overly broad terms and was thus not capable of minimising the interference with the applicant's Article 8 rights and his

professional secrecy. The Court also observed that the warrant's excessive breadth was reflected in the way in which it was executed, in that the police had removed the applicant's entire computer as well as other items found in the office. The computer was held for over two months, which must have had a negative impact on the applicant's work. The search was carried out in the presence of two certifying witnesses, however these witnesses were neighbours and not legally qualified. This made it very unlikely that they would be capable of identifying which materials were covered by legal professional privilege, and so could not have provided an effective safeguard against excessive intrusion by the police. The Court also observed that under Bulgarian law the applicant had no means to contest the lawfulness of the warrant or of its execution. As a result, the Court found that the search and seizure had been disproportionate and violated Article 8.

With regard to the alleged telephone tapping, the applicant's complaint related to measures of surveillance which had allegedly been applied to him. The Court had to be satisfied in this situation that there was a reasonable likelihood that such measures had been applied. In this case, the only element which might have suggested that there had been any tapping was the applicant's allegations that there were disturbances on his line the evening of 29 November 2000. However, such disturbances were not necessarily proof of tapping. The categorial denial by the Government that covert surveillance had taken place and the lack of any documents relating to any tapping suggested to the Court that it had not been established that there was an interference with the applicant's rights under Article 8. The complaint was rejected as manifestly ill-founded.

Article 3

For Article 3 to be breached, the applicant's treatment had to attain a minimum level of severity; the suffering and humiliation going beyond what would be inevitable in legitimate treatment. In this case the Court found that whilst the search and seizure carried out might have impinged on the applicant's professional reputation, it clearly fell below the minimum level of severity required to breach Article 3. The complaint was rejected as manifestly ill-founded.

Article 5

Article 5 could apply to a deprivation of liberty that lasted only for a very short period. However, the Court noted that in this case, it did not need to resolve this issue, as it had been satisfied that the deprivation of liberty was justified. The arrest and

detention were prescribed by law and the Court did not consider that the authorities, by keeping the applicant in custody for a total period of five hours in order to take his statement, had overstepped the reasonable balance between the need to question him and his right to liberty. The complaint was rejected as manifestly ill-founded.

Article 6

Criminal proceedings were never directed at the applicant in this case and no criminal charge was ever brought against him. The issuance of a search warrant similarly did not amount to the bringing of a criminal charge. As a result, the proceedings directly involving the applicant did not come within the scope of Article 6. The complaint was rejected and declared inadmissible.

Article 13

Relying on Article 13, the applicant complained that he had no effective remedies for his complaints under Articles 3, 5, 6 and 8. His complaints under the first three articles were rejected as ill-founded. In relation to Article 8 the Court noted that Bulgarian law did not allow the applicant to contest the lawfulness of the search and seizure nor obtain redress if it had been unlawful. Therefore, there was a violation of Article 13 in relation to the complaint under Article 8.

Article 41

The Court awarded the applicant €1,000 in non-pecuniary damages.

Compulsory confiscation of properties as a criminal penalty constituted a violation of the applicant's property rights under Article 1 of Protocol No.1 of the Convention

JUDGMENT IN THE CASE OF
MARKUS v. LATVIA

(Application no.17483/10)
11 June 2020

1. Principal facts

The applicant was a Latvian national born in 1953, living in Riga. In 2008, he was convicted of requesting and attempting to receive a bribe of 80,000 Latvian lati (approximately €114,000), whilst the head of an educational institution, contrary to Section 320(2) of the Latvian Criminal Law. He was sentenced to four years imprisonment, with an ancillary penalty of confiscation of property. However, because under Latvian domestic law, the measure applied to the entirety of a convicted person's property, the particular property to be confiscated from the applicant was not specified.

In 2010, the applicant brought several constitutional complaints challenging the constitutionality of Section 320(2) of the Criminal Law. He challenged the disproportionate nature of the penalty - arguing that the confiscation order also affected his adult son, a third party, as one of the properties confiscated was a house registered in his name but used by his adult son with his own family. Additionally, the applicant argued that the compulsory confiscation of property was contrary to the prohibition of discrimination, the right to a fair trial, and the right to property, as guaranteed by the Constitution of Latvia.

The Constitutional Court instituted proceedings concerning the right of property but declined to initiate proceedings concerning the prohibition of discrimination or the right to a fair trial. In January 2011, the Constitutional Court discontinued the proceedings, drawing the Parliament's attention to the fact that there were "serious deficiencies" in the legal regulation for imposing and executing the confiscation of property penalty, noting the law did not specify what property could not be confiscated and so the measure could infringe the rights of a convicted person's family members. However, under Article 105 of the Constitution, such protection for third parties did not cover property acquired illegally.

Furthermore, the Constitutional Court found that the confiscation penalty was not an expropriation of property but rather an interference with property rights. This meant that the interference was in accordance with the law, since Section 320(2) of the Criminal Law had been adopted using the correct procedure and served the legitimate aims of protecting democracy, public security and the rights of others. Although the Constitutional Court pointed out that an alternative way of achieving those aims would be improving legislation concerning confiscating illegally acquired property, the mere existence of alternative measures did not mean that the legislature had exceeded its margin of appreciation.

2. Decision of the Court

The applicant argued that under Article 1 of Protocol No. 1, the criminal penalty of confiscation of property, which had led to the seizure of his legally acquired property, had been disproportionate. He further noted that the confiscation of property had, in most cases, an effect on the lives of other persons (in this case, his adult son and disabled parents), and thus the sanction was imposed not only on the criminally culpable person but also third parties.

Article 1 of Protocol No. 1

The Court first noted that Article 1 of Protocol No. 1 comprises three distinct rules enunciating the principle of peaceful enjoyment of possessions, regulating the deprivation of possessions, and recognising the State's right to control the use of property. In this case, the Court noted that the third rule applied, as the punishment consisted of the general confiscation of his property imposed on the applicant. Although the domestic courts did not identify the specific property to be subject to the confiscation, in reality, ten of the eleven properties were subjected to a restriction against title during the pre-trial proceedings. The titles to eight of those properties were later transferred to the State. The Court further highlighted that no evidence has been provided to suggest that those properties had any other connection to the crime. Accordingly, the criminal punishment of confiscation of property constituted an interference with the applicant's right to property.

In relation to the applicant's argument that the mandatory criminal confiscation had been disproportionate, the Court noted the Government's argument that the wording of the domestic law appeared to allow the property confiscation to be directed at a part of the convicted person's property.

Nevertheless, the Court pointed to the findings of the Constitutional Court, which concluded that there was uncertainty and divergent case-law concerning the trial court's ability to determine the extent of the property confiscation. The trial courts frequently considered that their competence was limited to ordering the confiscation of the entirety of the person's property and proceeded to do so even when the result could have been considered disproportionate. Thus, as the regulation left such uncertainty about the scope of the trial court's competence, the Court could not consider the measure foreseeable or capable of providing protection against arbitrariness.

Concerning the compulsory nature of the punishment, in following with previous case law, the Court held that a mandatory confiscation of property deprived the applicant of any possibility to argue their cases and of any prospects of success. Furthermore, the exact scope of the punishment being determined at the pre-trial stage of proceedings, could not be regarded as affording the individual a reasonable opportunity of putting his or her case to the competent authorities.

Considering the scope of review carried out by domestic courts, the Court observed that there was no individualised assessment of the property confiscation penalty imposed on the applicant. In the domestic judgments convicting the applicant, the proportionality analysis only concerned the deprivation of his liberty and did not address the ancillary punishment of property confiscation. The domestic courts had never specified the particular property that was to be confiscated, and hence the extent of the punishment was not identified in the domestic judgments. Nor was the question of whether the amount of property to be confiscated corresponded to the gravity of the offence, or whether that imposed an excessive burden on the applicant ever analysed by the domestic courts.

As such, the Court considers that Section 320(2) of the Criminal Law limited the scope of the review carried out by the domestic courts to the extent that it was too narrow to satisfy the requirement of a "fair balance" inherent in Article 1 of Protocol No. 1. It did not allow the applicant a reasonable opportunity of putting his case before the competent authorities.

Thus, the Court concluded that the domestic regulation lacked clarity and foreseeability, did not afford the necessary procedural safeguards, and provided no protection against arbitrariness. As a result, the Court held there had been a violation of Article 1 of Protocol No. 1 to the Convention.

Article 41

The applicant did not submit a claim for just satisfaction and hence the Court did not make an award.

Croatian official was not incited to commit corruption, however his defence rights under Article 6 were restricted due to absence of effective procedure to determine disclosure of evidence gathered by secret surveillance

JUDGMENT IN THE CASE OF
MATANOVIĆ v. CROATIA

(Application no. 2742/12)
4 April 2017

1. Principal facts

The applicant was born in 1949, and at the time of the Court's judgment serving a prison sentence in Lepoglava prison, Croatia. He had been the vice-president of the Croatian Privatisation Fund, a legal entity established by the State and tasked with carrying out the privatisation of publicly owned property. On 3 April 2007, J.K., the representative of an investment project, reported to the State Attorney's Office that the applicant had requested a bribe in order to ensure the realisation of his project. The State Attorney's Office then requested the Zagreb County Court to authorise the use of special investigative measures in respect of the applicant, specifically the tapping of his telephone, covert surveillance, and the use of J.K. as an informant in a simulated purchase operation. The request was authorised on the same day, the order including the statutory phrase "that the investigation [could] not be conducted by other means or that it would be extremely difficult [to do so]." In the course of the investigation, the investigating judge issued several further orders to the same effect.

Various meetings between the applicant and J.K. took place, including one where J.K. gave the applicant €50,000 in connection with his investment project. In June 2007, the investigating judge ordered the termination of the special investigative measures. The applicant was then arrested and detained. He was indicted in February 2008.

In May 2009 the Zagreb County Court found that the applicant in his capacity as a public official had taken bribes, facilitated bribe-taking and abused his power and authority in connection with certain investment and privatisation projects. He was sentenced to eleven years' imprisonment. The court relied extensively on the secret surveillance recordings and in particular on those concerning the first meeting arranged after J.K. had agreed to become an informant. At that meeting the applicant had explained to J.K. how much was expected in payment and that it was usual practice to remunerate for lobbying.

The applicant lodged an appeal with the Supreme Court, which upheld the conviction on charges of bribe-taking and abuse of power and authority. After a constitutional complaint, the Constitutional Court found in June 2011 a violation of the applicant's right to the presumption of innocence but dismissed his other complaints.

2. Decision of the Court

The applicant complained that the domestic authorities' recourse to secret surveillance had been in violation of Article 8 (right to respect for private and family life). He further alleged entrapment and that the non-disclosure and use of evidence obtained by special investigative measures against him had run counter to Article 6 (the right to a fair trial). The applicant also complained that the domestic courts' interpretation of the relevant provisions of the Criminal Code ran counter to the requirements of Article 7 (no punishment without law).

Article 8

The Court referred to its earlier case law[161], in which it had found that the Croatian Criminal Code, as interpreted and applied by the competent courts, did not provide sufficient clarity regarding the scope and manner of exercise of the discretion conferred on public authorities. Similarly, in the present case, the procedure for ordering and supervising the interception of the applicant's telephone did not provide for adequate safeguards against various possible abuses. Specifically, the investigating judge's orders had not provided reasoning relevant to the circumstances of the case, in particular why the investigation could not have been conducted by other, less intrusive, means. There had thus been a violation of Article 8.

Article 6 § 1

The Court first considered the applicant's complaint in relation to possible entrapment. It observed that the prosecuting authorities had only instructed J.K. to act as an informant after he had reported the applicant's corruption. The first meeting between the applicant and J.K. at which J.K. had been acting with the support of the prosecuting authorities occurred on 3 April 2007. The recording of this conversation demonstrated that the applicant was in full control of the corruption related to the investment project at issue, explaining to J.K. the modalities of the illegal activity

[161] *Dragojević v. Croatia*, judgment of 15 January 2015, no. 68955/11.

and insisting on the justification of his request for a bribe. Moreover, there was nothing suggesting that this discussion was the result of J.K. having previously incited the applicant to take bribes. The Court therefore accepted that the actions of the prosecuting authorities had remained within the bounds of undercover work rather than that of *agents provocateurs*. Accordingly, there was no violation of Article 6 § 1 in relation to this aspect of the applicant's complaint under Article 6 § 1.

The Court then moved on to consider the complaint concerning non-disclosure and use of evidence obtained by special investigative measures. The applicant's complaints focused on his impaired access to three main categories of evidence that had been obtained through the use of secret surveillance measures, and the Court addressed each category separately.

The first category of evidence was surveillance recordings, which were relied upon for the applicant's conviction. The defence had access to the transcripts of those recordings, which under domestic law were only an instrument of ancillary technical assistance to the parties, but were denied the possibility of obtaining copies of the recordings themselves. The Court stressed that the transcript of the recordings had been produced by an independent and impartial expert, and the recordings had been played back at the trial, and that this counterbalanced the defence's inability to obtain copies of the recordings. Furthermore, the transcripts had been made available to the defence immediately upon the lodging of the indictment. Additional transcripts were ordered by the trial court after taking into account the parties' arguments and were made available to the defence upon their production. There was therefore nothing to indicate that the applicant was prevented from adequately preparing his defence.

The second category of evidence was the recordings made through secret surveillance which were included in the case file but not relied upon for the applicant's conviction. The Court noted that the applicant had access to reports on his conversations with third parties. These had been sufficiently detailed to allow the applicant to form specific arguments as to the relevance of aspects of the recordings to his case. However, the applicant had not made any such arguments during the domestic proceedings. The applicant's alleged inability to access these recordings was not sufficient to find a breach of Article 6.

The third category of evidence was recordings obtained through secret surveillance but concerning other individuals who were not eventually indicted in the proceedings. These recordings were not relied upon for the applicant's conviction but were also not included in the case file or disclosed to the defence. This was justified on the

grounds that the applicant had no right of access to recordings that touched upon the private lives of others and which had been considered at the outset not to be relevant for the case. At the same time, no procedure was available that would allow the competent court to assess, upon the applicant's request, the evidence's relevance to the case. Furthermore, neither the first-instance court nor the Supreme Court had ever engaged in a balancing exercise between the Article 8 rights of the individuals who had been recorded and the restriction of the applicant's defence rights.

In view of this, the Court held that the proceedings against the applicant, taken as a whole, fell short of the requirements of a fair trial and violated Article 6 § 1.

Article 7

The applicant complained that the domestic courts' interpretation of the relevant provisions of the Criminal Code ran counter to the requirements of Article 7, and that the courts had erroneously proceeded on the assumption that he had the status of a "public official". However, the Court noted that the Supreme Court had rectified this misclassification by the lower court by finding that the applicant's position had not been that of a "public official" but that of a "responsible person" under the Criminal Code. The Supreme Court had then held that the error of the first-instance court concerning the applicant's position had not rendered his conviction unlawful, as the provisions of the Criminal Code under which the applicant had been convicted provided for the same sanctions irrespective of whether the corrupt acts were carried out by an individual acting in his or her capacity as a "public official" or "responsible person." The applicant had had every opportunity to raise his arguments concerning the legal definition of his position and the circumstances of the impugned corruption and those arguments had been duly examined by the Supreme Court. In these circumstances, the Court saw no reason to doubt these findings of the Supreme Court, nor did it find that the error made at first instance, rectified by the Supreme Court's judgment, in and of itself ran counter to the requirements of Article 7. The Court therefore rejected this complaint as manifestly ill-founded.

Article 41

The applicant was awarded €1,500 in respect of non-pecuniary damage and €2,500 for costs and expenses.

The failure of the domestic court to conduct an extensive review as to whether a requisite balance was maintained in a manner consistent with the applicant's right to peaceful enjoyment of property amounted to a violation of Article 1 of Protocol No.1

JUDGMENT IN THE CASE OF

PAULET v. THE UNITED KINGDOM

(Application no.6219/08)

13 May 2014

1. Principal Facts

The applicant was an Ivoirian national born in 1984 who arrived in the United Kingdom on 26 January 2001, and then stayed there illegally. He applied for and obtained employment for three jobs using a false French passport. All the employers stressed that they would not have employed him had they known his true immigration status. Between April 2003 and February 2007, the applicant earned a gross salary of £73,293.17 from his various employment. His total savings amounted to £21,649.60.

The applicant was then apprehended by the police after he submitted false documents to the Driving and Vehicle Licensing Agency in an attempt to obtain a provisional driving licence. In June 2007 the applicant pleaded guilty to three counts of obtaining a pecuniary advantage by deception. He also pleaded guilty to one count of having a false identity document with intent, one count of driving whilst disqualified, and one count of driving a motor vehicle without insurance. At trial, the judge recommended the applicant for deportation.

Further to this recommendation, the prosecution sought a confiscation order under section 6 of the Proceeds of Crime Act 2002 in respect of the applicant's earnings. The trial judge accepted that the applicant had paid all the tax and national insurance due on his earnings and that the money he had made from employment had been truly earned. Of the remaining assets the applicant had, £21,949.60, the trial imposed a confiscation order with a 12-month consecutive sentence in prison to be served in default of payment. This effectively deprived the applicant of all the savings he had accumulated during his years of employment.

The applicant sought leave to appeal, arguing that his earnings should not have come within the meaning of the Proceeds of Crime Act 2002 and that the prosecutor's decision to seek a confiscation order was an abuse of process. The applicant's

subsequent appeals were dismissed, and enforcement proceedings were instigated against him.

2. Decision of the Court

The applicant complained under Article 1 of Protocol 1 that the confiscation order was a disproportionate interference with his right to peaceful enjoyment of his possessions.

Article 1 of Protocol No.1

The Court reiterated that Article 1 of Protocol No.1 was comprised of three distinct rules: the principle of the peaceful enjoyment of property, the conditions for the deprivation of property, and the entitlement of States to control the use of property in accordance with the general interest. The Court reaffirmed that the second and third rules should be interpreted in light of the general principle in the first rule.

In the present case, the confiscation order clearly amounted to an interference with the applicant's right to peaceful enjoyment of his possessions. Further, confiscation orders fell under the Contracting States' right to control the use of property (the third rule), in this case, to secure the payment of penalties. However, it was stressed that there must exist a proportionate relationship between the means employed and the aim sought to be realised. An interference would be disproportionate where the relevant property-owner would have to bear an individual and excessive burden rather than the outcome of a fair balance between the individual's right to property and general interest. An important factor in determining this balance is whether the proceedings as a whole afforded the applicant a reasonable opportunity to put their case to the competent authorities.

In the instant case, the Court observed that at the time the applicant's case was before the English courts, it was appropriate for him to argue abuse of process and oppression. The Court also found however, that while the Court of Appeal assessed whether the confiscation order was an abuse of process and in the public interest, they did not determine whether a requisite balance was maintained in a manner consistent with the applicant's right to peaceful enjoyment of property.

Thus, on this basis, the Court found at the time the applicant brought the domestic proceedings, the scope of the review carried out by the domestic court was too

narrow to satisfy the requirement of seeking the fair balance required by Article 1 of Protocol No.1 and so there had been a violation of Article 1 of Protocol No.1.

Article 41

The violation found in the present case was based upon the lack of review of the confiscation order capable of satisfying the requirements of Article 1 of Protocol No.1. In the absence of a proximate causal link between a procedural violation found and financial loss sustained by the applicant, due to the confiscation order, the Court could not make an award for pecuniary damage. However, the Court awarded €2,000 in respect of non-pecuniary damage. A further €10,000 was awarded to the applicant in relation to costs.

The statutory assumption that all property obtained within the preceding six years by a person convicted of a drug-trafficking offence was illegal did not violate the presumption of innocence or right to fair trial under Article 6

JUDGMENT IN THE CASE OF

PHILLIPS v. THE UNITED KINGDOM

(Application no. 41087/98)

5 July 2001

1. Principal Facts

The applicant was a British national convicted in 1995 of being involved in a scheme to import a large quantity of cannabis resin into the UK. While he had previous convictions this was his first drug-related offence. He was sentenced to nine years' imprisonment.

Under Section 2 of the Drug Trafficking Act 1994, an inquiry was conducted into the applicant's means. At the confiscation hearing before the Crown Court, the judge applied section 4(3) of the 1994 Act, allowing the court to assume that all the property obtained within the preceding six years by the applicant, a person convicted of a drug trafficking offence, was in fact the proceeds of drug trafficking. This sum amounted to £91,400 (approximately €102,700) and a confiscation order was made for that amount. A failure to hand over that amount to the authorities would have resulted in an additional sentence of two years. The applicant was refused leave to appeal against the conviction and sentence.

2. Decision of Court

The applicant complained that the statutory assumption under the 1994 Act violated his right to be presumed innocent, guaranteed under Article 6 § 2 and that there had also been a violation of Article 6 § 1. He further complained that the confiscation order was in breach of Article 1 of Protocol No. 1 to the Convention.

Article 6 § 2

The Court noted that the confiscation order was not related to a further determination of criminal guilt for any other drug-related offence and no further convictions had been added to the applicant's criminal record. It followed that the

assumption under the 1994 Act did not amount to the applicant being "charged with a criminal offence". Instead, the Court accepted that the purpose of the assumption was to enable the domestic court to assess the proper sum to be confiscated, essentially the determination by a court of the amount of a fine or the length of imprisonment imposed upon a convicted offender. As the confiscation procedure was essentially determining the character and conduct of an accused as part of a sentencing process Article 6 § 2 did not apply, as the determination did not amount to the bringing of a new charge within the autonomous meaning of the Convention.

Article 6 § 1

The Court considered that a person's right in a criminal case to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her formed part of the general notion of a fair hearing under Article 6 § 1. The Court reaffirmed that the statutory assumption under the 1994 Act was not a determination of guilt but instead a method of assessing the value at which the confiscation order should be fixed, and although the confiscation order was of a considerable amount and raised the possibility of the applicant serving a further prison term, his conviction of an additional offence was not at stake.

Furthermore, the Court noted that there were domestic safeguards in place to ensure a fair system: the domestic court could order the confiscation of a lesser amount if satisfied, on the balance of probabilities, that only a lesser amount could be produced, and the assumption made by the 1994 Act could have been rebutted if the applicant had shown, on the balance of probabilities, that he had acquired the property through means other than drug trafficking. The judge also had the discretion not to apply the assumption if he considered that it would give rise to a serious risk of injustice.

In this case the trial judge had been satisfied that the applicant owned or had already disposed of the property in question, and that the obvious conclusion was that this property had come from an illegitimate source. If the applicant had evidence to the contrary, rebutting the statutory assumption would have been easy. The Court found that the application of the 1994 Act was reasonable and the rights of the defence were fully respected. Therefore, no violation of Article 6 § 1 was found.

Article 1 of the Protocol No. 1

The applicant alleged that the powers exercised by the domestic court under the 1994 Act were unreasonable and in breach of Article 1 of Protocol No. 1, which stated

that every person was entitled to the peaceful enjoyment of their possessions and that they would not be deprived of these possessions unless it was in the public interest and provided for by law. As previously stated, the confiscation order constituted a penalty within the meaning of the Convention, and therefore, was covered by the second paragraph of Article 1 Protocol No. 1, which allows Contracting States to control the use of property to secure the payment of penalties. However, there still had to be a proportionate relationship between the means employed and the aim sought. In the present case, the aim of the confiscation order was to be a weapon for the courts in fighting drug trafficking by deterring traffickers and confiscating their proceeds to prevent their use in further illegal activities. The Court noted that the confiscation order amounted to the sum by which the applicant had benefitted from drug trafficking over the preceding six years and that the applicant was able to produce the amount from the assets in his possession. Hence the Court did not find that the confiscation order interfered with the applicant's right to peaceful enjoyment of his possessions.

Maintaining the preventative seizure of assets in relation to the proceeds of mafia-type crime 4 years and 8 months after the applicant had been acquitted amounted to a violation of Article 1 of Protocol 1

JUDGMENT IN THE CASE OF
RAIMONDO v. ITALY

(Application no. 12954/87)
22 February 1994

1. Principal Facts

The applicant was arrested in 1984 and charged over his suspected membership of a mafia-type organisation. In relation to this charge the Public Prosecutor sought the preventative seizure of a number of the applicant's assets involving both real estate and vehicles, with a view to their possible confiscation. A confiscation order was granted by the District Court in 1985, however, the applicant was subsequently acquitted of the charges against him in January 1986. This acquittal was then confirmed in January 1987 by the Court of Appeal. In a decision which became final in December 1986, the Court of Appeal ordered the restitution of the property seized and confiscated. However, for some of the property, the revocation of the measure was not entered in the relevant registers until August 1991.

2. Decision of the Court

The applicant complained that the seizure and subsequent confiscation of his assets violated his rights under Article 1 of Protocol 1 (right to peaceful enjoyment of possessions). He also complained under Article 6 § 1 (right to a fair trial) that the length of the proceedings relating to his appeal against the confiscation and the special supervision of his assets had violated the Convention.

Article 1 of Protocol 1

The Court decided to consider the situation up to the decision of the Court of Appeal in December 1986 separately from the situation afterwards that lasted until the revocation of the seizure and confiscation of the property.

The Court found that the initial seizure of the applicant's assets had a basis in legislation and that the authorities had not deprived the applicant of his possessions

but only controlled his use of them. With respect to the proportionality of such measure, given the early stage of criminal proceedings in which it had been ordered, the Court found that the seizure was clearly a provisional measure intended to ensure that property which appeared to be the fruit of unlawful activities, carried out to the detriment of the community, could subsequently be confiscated if necessary. The measure was therefore justified by the general interest and, given the extremely dangerous economic power of an organisation like the Mafia, it could not be said that seizure at an early stage of the proceedings was disproportionate to the aim pursued.

With regard to the confiscation of some of the applicant's assets which followed the initial seizure, the Court confirmed its earlier case law that confiscation of property does not necessarily come within the scope of deprivation of property under Article 1 of Protocol 1. The Court noted that according to Italian case law, confiscation of this kind could not have the effect of transferring ownership to the State until there had been a final decision. There was no such final decision in this case and thus the Court found there had been no deprivation but only a control of property.

When considering the proportionality of the Italian authorities' actions the Court observed that, first, the confiscation pursued an aim that was in the general interest. Namely, it sought to ensure that the use of the property in question did not benefit the applicant, or the criminal organisation to which he was suspected of belonging, to the detriment of the community. The Court further noted the difficulties encountered by the Italian State in the fight against the Mafia, and that this organisation was known to invest the profits of its criminal activities in real estate. The Court noted that confiscation of property is an effective and necessary weapon against the movements of suspect capital. Therefore, the confiscation of the applicant's property was proportionate to the aim pursued. Finally, the Court reiterated that preventative confiscation is usually justified in its immediate application notwithstanding any appeal. In conclusion, the Court found that Italy had acted proportionately. Accordingly, there was no violation of Article 1 of Protocol 1 in the period up until the December 1986 Court of Appeal decision.

However, the property was not immediately returned to the applicant after the Court of Appeal decision in December 1986. In fact, some of the property was only returned after a delay of four years and eight months. The Court ruled that this was an interference with the applicant's Convention rights and that it was neither 'provided for by law' nor necessary 'to control the use of property in accordance with the general interest' within the meaning of Article 1 of Protocol No. 1. Accordingly, there had been a violation of that provision.

Article 6

The Court noted that preventative freezing of assets is not comparable to a criminal sanction because it is designed to prevent the commission of offences. Therefore, Article 6 did not apply to this aspect of the case.

On the matter of confiscation, the Court noted that having regard to the fact that the case came before two domestic courts, the total length of the proceedings could not be considered to have been unreasonable. It followed that there had been no violation of Article 6(1).

Article 50 (now Article 41)

The Court awarded the applicant non-pecuniary damage of ten million Italian lire, and five million Italian lire for costs and expenses.

The impossibility of appealing the implementation of a search and seizure order on points of fact was a violation of Article 6 § 1

JUDGMENT IN THE CASE OF
RAVON AND OTHERS v. FRANCE

(Application no. 18497/03)
21 February 2008

1. Principal Facts

The applicant in this case was Mr Ravon and two companies controlled by him, either by share capital or by exercise of statutory management.

On 3 July 2000, suspecting that the applicant companies had been engaged in tax evasion, the French tax authorities requested that the judicial authorities grant authorisation for them to search certain specified addresses and to seize any evidence of tax fraud. The orders were granted, the premises of the applicant companies and the applicant's home were searched, and documents seized. Taking the view that irregularities had occurred during those searches and seizures, the applicants applied to the courts seeking an annulment of the operations. Their application was dismissed by both the Paris Court of First Instance and the criminal division of the Court of Cassation, both of which held that under the relevant Article of the Code of Tax Procedure, the orders authorising searches of residential premises could only be appealed after the fact on points of law, and not to review procedural irregularities. While the Tax Code did not limit courts' jurisdiction by time constraints, the Supreme Court then determined that this type of procedural review of the authorisation and conduct of the search and seizure after the operation was completed constituted an excess of power by the magistrate, who would have been in constant contact with the police and tax authorities during the operation.

2. Decision of the Court

Relying on Article 6 § 1 (right to a fair trial) and Article 13 in conjunction with Article 8, the applicants complained that they did not have access to an effective remedy to challenge the searches and seizures. The Article 8 claim was, however, rejected on procedural grounds.

Article 6 § 1

The Court first noted that Article 6 § 1 was applicable in its civil limb. Although it was true that tax disputes are outside the scope of "civil rights and obligations", the heart of the present dispute were the home searches and seizures which the applicants had been subjected to. The right to respect for their home was clearly of a "civil" nature and the Court further noted that where, as in this case, Article 6 § 1 applied, it constituted a lex specialis with respect to Article 13. It was therefore appropriate to examine the complaint under Article 6 § 1 only and to determine whether the applicants had had access to a "tribunal" as defined under that Article.

The term "tribunal" was defined as a body meeting certain criteria, including independence from the executive and the parties involved and enjoying full jurisdiction. For such a "tribunal" to decide a challenge to civil rights and obligations in accordance with Article 6 § 1, it should have jurisdiction to deal with all relevant questions of fact or law relating to the dispute before it. Moreover, the right of access to court had to be practical and effective. It follows that, in the context of a home search, the persons concerned should have been able to obtain effective judicial review, in fact as well as in law, of the lawfulness of the decision prescribing the search and of the measures taken on its basis. The remedy available had to, in the event of a finding of irregularity, either prevent the occurrence of the operation or, where it has already taken place, provide the person concerned with appropriate redress.

The Court noted that individuals subject to a search of their home were given recourse to appeal only on points of law, but not for a review of factual irregularities in the process of the search and seizure. This did not meet the requirements of Article 6 § 1, as such an appeal did not allow an examination of the factual basis for the disputed order. Whilst the legislation also provided that the operations were carried out under the constant review of the judge who ordered them, the Court held that this did not constitute an independent review of the regularity of the order itself, and in any case, domestic case law showed that access to this judge by the relevant persons was more theoretical than effective. Officers of the law carrying out the searches were under no legal obligation to inform the persons concerned of their rights, the details of the competent judge did not appear on the seizure order, the presence of the people concerned was not required (two third-party witnesses was sufficient), and there was no possibility for the persons concerned to call a lawyer. Moreover, the option to refer the matter to the relevant judge ended after the completion of the seizure, since the judge was considered to have been on call to review any

irregularities and suspend or stop the search during the process. Any challenge to the legality of the seizure proceedings was only possible if and when further proceedings were subsequently instituted against the persons concerned, which did not occur in the present case.

In these circumstances, the Court concluded that the applicants had not had access to a "tribunal". Accordingly, there had been a violation of Article 6 § 1.

Article 41

The first applicant was awarded €5,000 in respect of non-pecuniary damage, however, the Court considered that a finding of a violation was sufficient for the applicant companies.

The seizure and confiscation of the applicant's assets in Austria, following a United States forfeiture order, did not violate Article 1 of Protocol No.1, and the proceedings complied with Article 6

JUDGMENT IN THE CASE OF
SACCOCCIA v. AUSTRIA

(Application no. 69917/01)
18 December 2008

1. Principal Facts

The applicant was a U.S. national, serving a prison sentence in the U.S. at the time of launching his application. In 1992, criminal proceedings for large scale money laundering were pursued against him before the District Court of Rhode Island. The Austrian courts were requested to seize assets held in two safes in Vienna that had been rented by the applicant. On 10 February 1992, the Vienna District Criminal Court ordered the seizure and placed the assets (cash and bearer bonds) at the disposal of the Rhode Island District Court to be used as evidence against the applicant.

The applicant claimed the assets derived from lawful business activities carried out until 1988, whilst the U.S. government claimed they were the result of money laundering activities carried out from 1990 to 1991 and that he held them as a trustee for a drug cartel he had worked for. In February 1993, the Rhode Island District Court convicted the applicant of laundering more than one hundred million U.S dollars, and sentenced him to 660 years' imprisonment. Subsequently, on 30 August 1993, the U.S. court issued a preliminary forfeiture order. The applicant's appeals against his conviction and the forfeiture order were dismissed.

On 7 November 1997, the Rhode Island District Court issued a final confiscation order amounting to $136 million, including $9 million in respect of the applicant's own property, made up of cash amounts in Swiss francs, U.S. dollars, Austrian schillings seized in Vienna in 1992, a list of bearer bonds issued by Austrian banks, and a bank account in Vienna. The United States Department of Justice transmitted the forfeiture request to the Austrian authorities, and the Austrian Ministry of Justice requested the Vienna Senior Public Prosecutor to open proceedings to enforce the foreign court's decision.

On 12 March 1998, the Vienna Regional Criminal Court, as an interim measure, ordered the confiscation of the applicant's assets, 80,000,000 Austrian schillings (€5,800,000). The applicant appealed, arguing the Regional Court's decision amounted to unlawful interference with his right to property and lacked legal foundations. He further argued that the enforcement order for the benefit of the U.S. was not admissible in Austria, as section 64(7) Extradition and Legal Assistance Act (ELAA) stated that any fines or forfeited assets obtained by executing a foreign decision fell to the Republic of Austria. In addition, it was argued that the final forfeiture order included assets not connected or derived from criminal activity and that the forfeiture proceedings had not complied with Article 6 of the ECHR, since he had not been heard. His appeal was dismissed on 12 October 1998.

In the meantime, on 1 August 1998, a treaty between the U.S. and Austria entered into force, namely the Mutual Legal Assistance in Criminal Matters (1998 treaty). On 25 August 1999 the United States central authority, relying on the 1998 Treaty, made a new request for enforcement of the final forfeiture order. On 14 June 2000 the Vienna Regional Criminal Court, without holding a hearing, decided to take over the enforcement of the final forfeiture order and ordered the forfeiture of the applicant's assets for the benefit of the United States. The applicant and the Public Prosecutor's Office appealed, and on 7 October 2000 the Vienna Court of Appeal, sitting *in camera*, dismissed the applicant's appeal but amended the Regional Court's decision and ordered the forfeiture to the benefit of the Republic of Austria.

2. Decision of the Court

The applicant complained under Article 6 § 1 (right to a fair and public hearing) about the lack of a public hearing in the proceedings in Austria concerned with the execution of the forfeiture order. Secondly, the applicant argued the Austrian courts' decisions violated Article 1 of Protocol No.1 (peaceful enjoyment of possessions).

Article 6

It was the applicant's argument that neither the Vienna Regional Criminal Court nor the Vienna Court of Appeal had held a public hearing during the confiscation proceedings against him and that he should have been heard in person during these proceedings in order to show that the assets stemmed from lawful business activities. The Court found that the proceedings feel to be examined under the civil head of Article 6 § 1, and reiterated that a public court hearing is a fundamental principle of this provision, and protects litigants against the administration of justice in secret

with no public scrutiny. Further, it is a means through which public confidence in the courts can be maintained.

The right to a public hearing entails a right to an "oral hearing" unless there are circumstances which justify dispensing with such a hearing. In the present case no oral hearing was held before the Austrian courts. The Court therefore had to examine whether there were circumstances of such a nature as to dispense the courts from holding a hearing. A hearing may not be required where there are no issues of credibility or contested facts and the courts may fairly and reasonably decide the case on the basis of the parties' written submissions, however, the overarching principle of fairness embodied in Article 6 is a key consideration. Disputes of technical nature, and cases raising merely legal issues of a limited nature, were situations more likely to comply with Article 6 if oral hearings were not held.

In the present case, the courts had to examine whether the conditions laid down in the relevant provisions of the ELAA and the 1998 Treaty for execution of the forfeiture order were met. This included questions of reciprocity, whether the acts committed by the applicant were punishable under Austrian law at the time of their commission, compliance with statutory time-limits and whether the proceedings in the U.S. had been in conformity with the standards of Article 6 of the Convention. Hence, the proceedings concerned rather technical issues of inter-State cooperation in combating money-laundering through the enforcement of a foreign forfeiture order. They raised exclusively legal issues of a limited nature and did not require the hearing of witnesses or the taking of other oral evidence. In these circumstances, the courts could fairly and reasonably decide the case on the basis of the parties' written submissions and other written materials and there had been no violation of Article 6 § 1.

Article 1 of Protocol No.1

The applicant argued that he was the owner of the assets in question and that the Austrian courts' decisions had no basis in law. The applicant asserted that the reciprocity requirement of the ELAA was not fulfilled (i.e. when the final forfeiture order had been made, the 1998 Treaty had not been in force and the condition of reciprocity required by section 3(1) of the ELAA had not been fulfilled), the final forfeiture order was time-barred, and that the 1998 Treaty only allowed for the forfeiture of fruits and instrumentalities of an offence – but not the forfeiture of substitute assets.

The Court referred to the established principles of Article 1 of Protocol No.1 and the three distinct rules that lay within the provision. The forfeiture order fell within the third rule, relating to the State's right to enforce such laws as it deems necessary to control the use of property in accordance with the general interest. The Court noted that the execution of the forfeiture order had a basis in Austrian law, namely section 64 of the ELAA and Article 17 of the 1998 Treaty. The Austrian courts had dealt in detail with the applicant's arguments and had given extensive reasons for their findings. There was no evidence that the application of the law was beyond the reasonable limits of interpretation.

What was more, the Court observed that the execution of the forfeiture order had a legitimate aim, namely enhancing international co-operation to ensure that money derived from drug dealing was forfeited. It was acknowledged that States faced difficulties in the fight against drug-trafficking and preventative measures were necessary to combat such practices. A fair balance had been struck between the demands of the general interest and the applicant's interest in the protection of his right to peaceful enjoyment of his possessions, and it was noted that States enjoy a wide margin of appreciation in such matters.

Although Article 1 of Protocol No.1 did not have explicit procedural requirements, the proceedings had to afford the individual a reasonable opportunity to put their case to the relevant authorities for the purpose of challenging the measures infringing their rights. The Court noted that two sets of proceedings had been conducted before the Austrian courts. The first related to the preliminary confiscation of the assets in order to secure the execution of forfeiture, and the second concerned the execution of the Rhode Island District Court's final forfeiture order. Also, it was noted the applicant had been represented throughout the proceedings and had had ample opportunity to submit arguments and challenge the measures interfering with his rights.

The Court therefore concluded that the execution of the forfeiture order did not disclose a failure to strike a fair balance between the general interest and respect for the applicant's rights under Article 1 of Protocol 1. Thus, there was no disproportionate interference with the applicant's property rights and no violation of Article 1 of Protocol No.1.

The State's application of customs laws gave the applicant an avenue for defence and did not impute an assumption of guilt in violation of Article 6 of the Convention

JUDGMENT IN THE CASE OF
SALABIAKU v. FRANCE

(Application no. 10519/83)
7 October 1988

1. Principal facts

The applicant was a national of Zaïre (now the Democratic Republic of the Congo) who was born in 1951 and lived in Paris.

On 29 July 1978, the applicant went to Roissy Airport to collect a parcel containing various African foodstuffs which had been shipped to him on an Air Zaïre flight. Unable to find the parcel, the applicant turned to an Air Zaïre employee who directed him to an uncollected, padlocked trunk that bore an Air Zaïre ticket but no name. The employee warned the applicant that it may contain prohibited goods. The applicant took possession of the padlocked trunk nevertheless and passed through customs, intimating that he had nothing to declare. Customs officials detained the applicant outside of the customs area as he attempted to board an Air France terminal coach, at which point they forced the trunk open and found a false bottom concealing 10 kg of cannabis. The applicant denied having knowledge of the drugs and claimed that he mistook the trunk for the parcel of foodstuffs that he was expecting. The next day, Air Zaïre attempted to notify the applicant, who remained in detention, that a parcel addressed to him had mistakenly arrived in Brussels. Investigators opened the parcel and found only the expected foodstuffs.

On 2 August 1979, the applicant was released and charged with both the criminal offence of illegally importing narcotics and the customs offence of smuggling prohibited goods. On 27 March 1981, the trial court convicted him of both charges, which he subsequently appealed. On 9 February 1982, the Paris Court of Appeal set aside the criminal offence of illegally importing narcotics but upheld the conviction of the customs offence of smuggling prohibited goods. The applicant further appealed the smuggling conviction to the Court of Cassation, citing Article 6 §1 and §2 of the Convention. The Court of Cassation dismissed his appeal on the grounds that the appellate court had properly applied domestic law.

2. Decision of the Court

The applicant submitted that the customs code was applied to him in a manner that was incompatible with Article 6 §1 and §2 by placing on him an almost irrebuttable assumption of guilt.

Article 6

The two relevant paragraphs of Article 6 outline that 1) in the determination of any criminal charge against an individual, they are entitled to a fair trial and 2) that an individual charged with a criminal offence shall be presumed innocent until proven guilty. In the present case, the State did not dispute that the applicant was charged with a criminal offence. Punitive provisions of French Customs law could be considered criminal charges for the purposes of Article 6 because they were regarded domestically as special criminal law given that they required the assignment of punishments and penalties upon conviction. The State did contend, however, that the Customs Code did not establish a presumption of guilt – it established a presumption of liability. Given it was undisputed that criminal charges were brought against the applicant, the case focused on whether the State's application of customs laws were incompatible with the presumption of innocence, which is one aspect of the right to a fair trial.

The State's customs laws did not, in practice, present an irrebuttable presumption of guilt. The applicant was not left entirely without means of defence. The court evaluating the customs offence conviction was authorised to accord the applicant the benefit of the doubt given extenuating circumstances and was required to acquit him if he succeeded in establishing a case of force majeure, showing that it was impossible for him to determine the contents of the parcel. In this case, the appellate court agreed that the factual findings supported the trial court's conviction of the customs offence of smuggling imported goods – the applicant was negligent in his handling of the trunk by failing to heed the Air Zaïre employee's warnings, failing to check to make sure that the trunk was the package he was expecting and the contents were as he expected, and declaring at customs that the trunk was his property and that he had nothing to declare. The appellate court afforded the applicant the benefit of the doubt with regard to the criminal offence of illegally importing narcotics, noting that the factual evidence did not support a conviction of such an offense, which required a higher burden of proof from the prosecution.

The Court found that the court of appeals was careful to avoid resorting automatically to presumptions laid down in the State's customs laws. The court of appeals adhered to case law precedent that sought to enforce customs offence convictions in a way that moderated the irrebuttable nature of the actual language in the statutes. As such, the Court held that there had been no violation of Article 6 §1 and §2.

Order for the freezing of assets following a request by Kazakh authorities constituted a violation of the applicant's property rights under Article 1 of Protocol No.1

JUDGMENT IN THE CASE OF
SHORAZOVA v. MALTA

(Application no.51853/19)
3 March 2022

1. Principal facts

The applicant was born in 1976 in Kazakhstan and lived in Vienna. She was the widow of Rakhat Aliyev (hereinafter referred to as RA). RA had previously been married to the daughter of the then-president of Kazakhstan, Nursultan Nazarbayev (NN). RA held several government positions in Kazakhstan between 1991 and 2007. However, political tensions arose between RA and NN, and in 2007 a warrant was issued for RA's arrest, following which he fled Kazakhstan. He subsequently lived with the applicant in Malta from 2009 to 2013.

Throughout this period, Kazakh authorities investigated allegations of fraud and money laundering on the part of the applicant and RA. They issued multiple extradition requests across European States (such as Austria, Germany, and Liechtenstein). In 2008-2009, after Austria refused to extradite RA, two trials were held in Kazakhstan in absentia, where RA was convicted of political offences and sentenced to a 20-year prison sentence. In 2014, Kazakhstan requested Malta implement a freezing order regarding the applicant's and RA's assets, which Malta complied with.

In 2014, the applicant and RA instituted constitutional redress proceedings regarding the freezing of their assets, which were unsuccessful. RA died in prison in Austria in 2015, awaiting trial on charges of murder. In 2020, the applicant applied with the Maltese Criminal Court, arguing that the freezing order against her should be revoked. On 2 November 2020, Malta was notified of the applicant's application to the European Court of Human Rights. In 2021, the Maltese Criminal Court found no grounds for keeping the order in place, as there had never been any proceedings undertaken against the applicant by the Kazakh authorities. Thus, the freezing order was revoked.

2. Decision of the Court

The applicant complained that Malta's compliance with the request for assistance and consequent freezing order violated her rights under Article 6 § 1 and Article 1 of Protocol No. 1 to the Convention. Moreover, the applicant argued that the constitutional proceedings she had instituted to complain of the breach of her rights had been overly long, lasting four years and ten months, violating her rights under Article 6 § 1.

Article 1 of Protocol No. 1

The Court considered that the freezing order amounted to an interference with the applicant's property rights constituting control of the use of property. Whilst the measure was issued in accordance with domestic law, it was not in accordance with the law *ab initio*, as according to the Maltese Criminal Court, the applicant did not have and never had, the status of a charged or accused person in Kazakhstan, but only that of a suspect, denying the applicant and her husband the legal standing and relevant rights they were entitled to as accused in these proceedings. The Court found it disconcerting that in nearly eight years, no authority or domestic court had thoroughly examined the legality of the applicant's situation. This, in the view of the Court, indicated a serious problem at the domestic level.

Furthermore, the Court questioned whether the measure pursued a general interest. The Court acknowledged that its jurisprudence generally respected State authorities' judgments regarding what is in the general interest. However, in this particular case, it was clear from the material provided to the Court and domestic courts that RA was an established political adversary to the Kazakh regime, so could be subject to reprisals on their part. Thus, whilst a freezing order could be in the general interest, the case's specific circumstances required a careful evaluation by the domestic courts.

The Government argued that the measure sought to combat crime and was undertaken in line with Malta's obligations under Article 18 of the United Nations Convention Against Transnational Organised Crime. However, the Court stressed that any mutual legal assistance needed to comply with international human rights standards. Although there were sufficient grounds to question the genuine nature of the actions undertaken by Kazakhstan, the Maltese courts of constitutional competence proceeded to find that the measure automatically pursued a general interest without a detailed assessment of the situation pertinent to the case.

On the matter of proportionately, the Court considered that the freezing of all of the applicant's property was, by its nature, a harsh and restrictive measure as it was capable of affecting the rights of an owner to such an extent that their main business activity or even living conditions could be put at stake. The procedures before the Maltese Criminal Court, by which the freezing order was issued and repeatedly extended, deprived the applicant of the relevant procedural safeguards against arbitrary or disproportionate interference. The Court held that the constitutional jurisdictions failed to rectify those omissions, providing only lip service to the relevant criteria in their assessment of the impugned measure, which the applicant had claimed was in breach of her rights under Article 1 of Protocol No. 1. Thus, the Court held that the applicant's property rights, as a result, were rendered nugatory. These considerations were sufficient to enable the Court to conclude that there had been a violation of Article 1 of Protocol No. 1 to the Convention.

Article 6 § 1

Given the findings above under Article 1 of Protocol No. 1, the Court considered that it was not necessary to examine the ordinary proceedings in the light of Article 6 § 1.

Regarding the length of the constitutional proceedings, the Court noted that, except for six months, which could be explained by the complexity of the case and new submissions, there was no particular period of inactivity, nor had the applicant pointed to any other deficient conduct on behalf of the authorities. Thus, whilst the Court considered four years and ten months to be a long period to have an issue determined over two levels of jurisdiction, the duration was not excessive and there had been no violation of Article 6 § 1 in relation to the length of the constitutional redress proceedings.

Article 41

The Court awarded the applicant €2,000 in respect of non-pecuniary damages and €586 for costs and expenses.

The confiscation of property from the wife of a man involved in smuggling, who had died before criminal proceedings were finalised, was not a violation of the Convention

JUDGMENT IN THE CASE OF
SILICKIENĖ v. LITHUANIA

(Application no. 20496/02)
10 July 2012

1. Principal Facts

The applicant was a Lithuanian national born in 1971. Her husband was a high-ranking tax police officer, prosecuted for several serious offences, including involvement in a criminal group for the smuggling of large quantities of alcohol and cigarettes. He was detained in August 2000.

In 2000, the investigator froze certain items of property belonging to the applicant, her husband and his mother. In 2002, as a result of an appeal by the applicant's mother-in-law, the court released some of her property. The applicant herself did not appeal against the property seizure. Following the death of the applicant's husband in 2003 in prison, the Lithuanian courts decided to continue the criminal proceedings as they concerned the activities of a criminal association. The Court convicted and sentenced three members of the group to several years in prison, and ordered the confiscation of certain property, as it found that it had been acquired as a result of the criminal organisation's activities. The applicant hired a new lawyer to appeal on behalf of all the people affected by the confiscation. The appeal was dismissed, as the domestic court reasoned that the convicted individuals had acted as an organised group, and they had been unable to explain how the property had been obtained. In addition, the applicant had been fully aware of her husband's criminal activities.

The appellate court also dismissed the lawyer's argument that the confiscation had been unlawful because the criminal proceedings against the applicant's husband had been discontinued. It referred to Article 72 of the Criminal Code, which obliged courts to confiscate property which was the proceeds of crime if the people to whom that property had been transferred knew about its unlawful origin. A cassation appeal brought by the same lawyer was dismissed by the Supreme Court. In separate criminal proceedings, the applicant was convicted of misappropriating property and falsifying documents and sentenced to four years' imprisonment. She was, however, later pardoned under an amnesty act.

2. Decision of the Court

The applicant complained that she could not adequately defend her rights as she had not been a party to the criminal proceedings against her late husband and that she had been forced to assume liability for crimes allegedly committed by her husband who had not been convicted. She relied on Article 6 § 1 and § 2 and Article 1 of Protocol No.1.

Article 6 § 1

The applicant's complaint fell under Article 6 § 1, as the dispute at hand concerned a civil right. The question before the Court was whether the confiscation proceedings had respected the basic principles of fair trial, and namely whether the applicant had been given an adequate opportunity to put her case to the courts, rather than to examine in abstract terms the compatibility of the Convention with Lithuanian criminal law, which obliged courts to confiscate property acquired unlawfully, including property transferred to third persons.

Although the applicant had not been a party to the proceedings against the criminal organisation, the Court found that the system in place had ensured safeguards. In particular, the applicant could have brought judicial review proceedings to challenge the property seizure, something she had not done.

In addition, on appeal her lawyer, representing her interests, had specifically raised the question of the confiscated property in respect of each and every item. Had the applicant had evidence showing the legitimate source of her property, she could have given it to the lawyer at the appeal proceedings. Consequently, the Court concluded that the applicant had been given a reasonable and sufficient opportunity to present her case and that there had therefore been no violation of Article 6 § 1.

Article 6 § 2

The applicant argued that she had been compelled to assume liability for criminal actions allegedly committed by her late husband. Recalling the fundamental rule of criminal law that criminal liability does not survive the person who has committed the criminal act, the Court recalled that while the criminal proceedings against the applicant's husband had been discontinued, they had not been terminated altogether, and three of his associates had been convicted of forming a criminal organisation with him. The Lithuanian courts had found that the confiscated property had been

obtained from illicit proceeds of criminal activities of the entire criminal organisation, and not just through the acts of the applicant's husband alone.

The Court concluded that the applicant had not been punished for criminal acts committed by her late husband, and thus had not "inherited" his guilt, and the confiscation order could not be seen as a finding of her personal guilt for any offence. There had accordingly been no violation of Article 6(2).

Article 1 of Protocol No.1

The confiscation of the applicant's property had been ordered in accordance with Article 72 of the Criminal Code, and had hence been lawful. The confiscation had affected assets which had been unlawfully acquired by the criminal organisation led by the applicant's late husband and had pursued the legitimate aim of ensuring that the applicant did not profit from the proceeds of crime to the detriment of the community.

The domestic courts had found that the applicant had personally participated in making payments for smuggled goods; therefore, she had to have been aware that the confiscated property could only have been bought with the proceeds of the criminal organisation's activities. She had also been found guilty of misappropriation and falsification of documents in separate proceedings. In addition, the confiscation had been ordered in proceedings before three separate domestic courts, which had found that the confiscated assets had been bought with the criminal organisation's unlawful profits. Finally, the illicit activities had been on a large scale and systematic. Consequently, the confiscation appeared to be an essential measure in the fight against organised crime, and the Court concluded that it did not breach the applicant's right to the peaceful enjoyment of her possessions.

There had, therefore, been no violation of Article 1 of Protocol No. 1.

The courts' refusal to award compensation for pre-trial detention and the loss and damage of property seized during criminal proceedings after acquittal constituted violations of Article 6 and Article 1 of Protocol No.1

JUDGMENT IN THE CASE OF
TENDAM v. SPAIN

(Application no.25720/05)
13 July 2010

1. Principal Facts

Two sets of criminal proceedings were brought against the applicant in 1986, both for theft and handling stolen goods. As part of the first set of proceedings, he was detained pending trial for 135 days, convicted by a first instance court on 12 April 1993, but then acquitted on appeal on 9 September 1993. As part of the second set of proceedings, several searches of the applicant's home and electronics shop were authorised in March 1986 while he was in pre-trial detention, taking place in the presence of the applicant's wife. During the searches, several items, many electronics, were seized and held by the Civil Guard pending the conclusion of the proceedings. He was acquitted also of the second charge on 29 October 1993, and on 19 November 1993 sought the recovery of possessions seized from him during the investigation.

The seized items were returned on 22 January 1994. However, some items had disappeared, having been given to people claiming to be owners who had reported their theft prior to their seizure. Of those returned to the applicant, many were damaged or in poor condition, and many were rusty. The applicant applied to the Ministry of Justice and the Interior for compensation, for damages relating to his pre-trial detention, for the failure to return the seized items, and for the damage to the items that had been returned. The applicant's domestic complaint was dismissed and his further appeals were unsuccessful. It was held the applicant had not proved the seized items had disappeared or been damaged.

2. Decision of the Court

The applicant argued that the refusal to award compensation for pre-trial detention and loss resulting from the deterioration of property seized in criminal proceedings amounted to a violation of both Article 6 § 2 and Article 1 of Protocol 1.

Article 6

The Court confirmed that the right to presumption of innocence is violated if a judicial decision reflects the idea that the defendant is guilty even though their guilt has not been established (i.e. after acquittal or before a determination of guilt). Article 6 § 2 extends beyond the original criminal procedure, and includes judicial proceedings after acquittal where the questions raised are corollaries to those original proceedings. Therefore, after an acquittal is final, judicial expressions of suspicion over the innocence of an accused are no longer acceptable. This is true for acquittals for lack of evidence as much as for acquittals resulting from a finding of innocence.

The Court noted that the refusal on the part of the Minister of Justice and Interior to grant compensation for the applicant's pre-trial detention had been based on the fact that he had been acquitted on appeal due to lack of sufficient evidence. This distinction between an acquittal for lack of evidence and an acquittal based on a finding that the alleged offence had not been committed cast doubt on the applicant's innocence. Moreover, the national courts had endorsed the Ministry's reasoning without remedying the issue at hand. The Court accordingly found a violation of Article 6 § 2 of the Convention.

Article 1 of Protocol No.1

The Court noted the seizure complained of was not designed to deprive him of his possessions but to temporarily control his use of them. Moreover, there was no indication that the seizure lacked a basis in law. However, the Court reiterated that the means employed by the State must be proportionate to the aim pursued. In addition, notwithstanding the silence of Article 1 of Protocol No. 1 on procedural requirements, the procedures applicable must also afford the person concerned an adequate opportunity to present his case to the competent authorities in order to challenge the measures infringing the rights guaranteed by that provision.

The Court reiterated that an owner acquitted of smuggling must in principle have the right to recover the seized items following his acquittal. Article 1 of Protocol No. 1 does not establish a right for the acquitted person to obtain compensation for any damage resulting from the seizure of his property made during the investigation into criminal proceedings. However, the authorities seizing the property must take reasonable measures for their preservation, in particular by drawing up an inventory of the property at the time of seizure, as well as when it is returned to the owner after acquittal. Moreover, domestic legislation must provide an avenue to commence

proceedings against the State in order to obtain compensation for damage to confiscated property that results from the State not maintaining such property in reasonably good condition. It is, however, up to the Contracting States to define the precise conditions of the right to compensation in such circumstances.

In the present case, the Court considered that the burden of proof regarding the missing or damaged items rested with the judicial authorities, who were responsible for the preservation of the property throughout the duration of the seizure. As the authorities had not provided any justification for the disappearance of and damage to the seized items, they were liable for any losses resulting from the seizure. It was held that by refusing the compensation claim, the State had caused the applicant to bear a disproportionate and excessive burden. In light of the above, a violation of Article 1 of Protocol No.1 was found.

Article 41

The Court reserved the question of pecuniary damage as it was not ready for decision, allowing for the possibility of an agreement between the applicant and the State, but awarded the applicant €15,600 in non-pecuniary damage.

The confiscation of the applicant's assets after the enactment of a new forfeiture law did not engage Article 7 or breach Article 1 of Protocol 1

DECISION IN THE CASE OF
ULEMEK v. SERBIA

(Application no. 41680/13)
2 February 2021

1. Principal facts

The applicant was a Serbian national born in 1968. At the time of the European Court's judgment, he was serving a prison sentence in Požarevac. Between 2007 and 2009, the applicant was convicted as the leader of an organised criminal group for several serious crimes committed between 1999 and 2003 and was sentenced to 40 years imprisonment.

On 29 March 2010, the Office of the Prosecutor for Organised Crime lodged a request for the forfeiture of the applicant's assets in accordance with the Law on Seizure and Confiscation of the Proceeds from Crime (the 2008 Law). The subject of the Prosecutor's request was the applicant's house, which he had bought in 1998 for 374,409 German Marks (approximately €190,000). The Prosecutor claimed that the applicant's aggregate legitimate earnings from 1996 until 1998, when he had purchased the house, had been only 22,789 German Marks (approximately €11,650), less than one-fifteenth of the amount he had paid for the property. Since there was an obvious discrepancy between the applicant's legitimate earnings and the value of his property, and since he had been convicted as a member of the organised criminal group, the Prosecutor sought the forfeiture of the house in question.

On 20 May 2010, Belgrade High Court accepted the Prosecutor's request and issued a forfeiture order. The court reasoned that there were obvious discrepancies between the applicant's legitimate earnings and the value of his property. Since the applicant had failed to provide any feasible evidence that he had acquired the impugned property with lawfully earned assets, and since he had been convicted of serious crimes with elements of organised crime through which he had "acquired enormous earnings," the forfeiture was justified. The Belgrade High Court also explained that this kind of forfeiture did not require the establishment of a direct link between the crime for which the applicant had been convicted and the acquisition of property. The applicant's property was forfeited under a special procedure targeting

the criminal proceeds of persons convicted of organised crime, which was entirely different from ordinary criminal forfeiture.

On appeal, the forfeiture order was upheld by the higher courts on the same grounds. This culminated with a decision by the Constitutional Court on 26 November 2012 which dismissed all the applicant's complaints regarding the lower court's order.

2. Decision of the Court

The applicant complained under Article 7 § 1 that the application of the measure of forfeiture in his case violated the principle of non-retroactivity of criminal law. Additionally, relying on Article 1 of Protocol No. 1, the applicant complained that the forfeiture of his property violated his right to peaceful enjoyment of property.

Article 7

For the purposes of the Convention, there can be no "conviction" unless it has been established in accordance with the law that there has been an offence - a criminal or, if appropriate, a disciplinary offence. Similarly, there can be no penalty unless personal liability has been established. The concept of a "penalty" in Article 7 has an autonomous meaning. To render the protection offered by this Article effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty". The starting point in this assessment is whether the measure in question is imposed following a decision that a person is guilty of a criminal offence. However, other factors may also be taken into account as relevant in this connection, namely the nature, and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity.

In the present case, the Court noted that forfeiture under Article 2 of the 2008 Law only applied if there was a conviction for one of the serious crimes listed in that provision, including organised crime. The forfeiture orders were therefore linked to and dependent on the commission of a criminal offence of sufficient gravity.

As for the characterisation of the measure under domestic law, the Serbian courts were unanimous in their conclusion that forfeiture of criminally acquired assets did not constitute a penalty within the meaning of Article 34 § 2 of the Constitution and Article 7 § 1 of the Convention. The courts found that the forfeiture of assets was not an additional punishment, but a consequence of the fact that a perpetrator or

other beneficiaries had obtained assets originating from an unlawful act. The Court noted that the institution of forfeiture of criminal assets which was applied in the applicant's case was not regulated by the Serbian Criminal Code but by an entirely different legislation, namely the 2008 Law. Hence, there was nothing in the relevant legislation clearly classifying the measure as a penalty.

In assessing the nature and purpose of forfeiture orders, the Court observed that the measures set out in the 2008 Law were intended to comply with the obligations under the Council of Europe Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime. Hence, the forfeiture orders were intended to ensure that crime did not pay and was primarily of a restorative nature, not a penal one.

The Court also observed that several characteristics of the Serbian criminal assets forfeiture system under the 2008 Law were comparable to civil forfeiture rather than a fine under criminal law. Firstly, the relevant legislation suggested that the system was directed against property rather than against the person, evident from the fact that the forfeiture could be ordered on property belonging to a third person if the property originated from a crime and the third person had no valid legal claim to it. Secondly, the 2008 Law recognised the possibility of confiscation of the property of a deceased person who had never been convicted of any crime, if the property was purchased with proceeds from a crime of a third party. Thirdly, the degree of culpability of the offender was irrelevant to fixing the amount of assets declared forfeited. Fourthly, the forfeiture orders could not be enforced by imprisonment in default of payment. Finally, when issuing the forfeiture order, the Serbian courts could also decide to allocate some or all of the confiscated assets for the benefit of the victims which was more comparable to restitution in civil law than to a fine under criminal law.

In regards to the procedures involved in ordering and implementing the measure, the forfeiture order was made by a special chamber of a criminal court in special forfeiture proceedings, the assessment of which had been objective and based on relevant evidence in the absence of a successful rebuttal, and following the final conviction of the applicant.

In regards to the gravity of the forfeitures, the Court recalled that the severity of the measure at issue is not in itself decisive since many nonpenal measures may have a substantial impact on the person concerned.

Having weighed all the significant factors, the Court concluded that the forfeiture order issued against the applicant did not amount to a "penalty" under Article 7, and that Article 7 was not applicable.

Article 1 of Protocol No. 1

The Court observed that the forfeiture order in the present case amounted to an interference with the applicant's right to peaceful enjoyment of his possessions. There was no doubt about the clarity, precision, or foreseeability of the domestic court's forfeiture order based on the forfeiture laws. In consideration of the applicant's argument that it was arbitrary to extend the scope of the confiscation mechanism retrospectively to property that he had acquired prior to the entry into force of the Forfeiture Law, the Court reiterated that the "lawfulness" requirement contained in Article 1 of Protocol No. 1 is not normally construed as preventing the legislature from controlling the use of property or otherwise interfering with rights via new retrospective provisions regulating continuing factual situations or legal relations. Thus the Court considered that the forfeiture of the applicant's property was in full conformity with the "lawfulness" requirement contained in Article 1 of Protocol No. 1.

Regarding the legitimacy of the law, the measure formed an essential part of a larger legislative package aimed at intensifying the fight against organised crime. It was primarily designed to deprive a person of profits received from engaging in criminal activities and, more importantly, to remove the value of the proceeds from possible future use in criminal activities. The aim of the measure was, accordingly, not only to make sure that crime does not pay but also to prevent the circulation of assets for the furtherance of criminal enterprise. In addition, the measure had clear restorative elements since the courts were able to award the confiscated property to the victims of the crimes.

The Court further noted that the applicant confined his complaint to the "retroactive" application of the forfeiture. There was nothing to suggest that the forfeiture measure was disproportionate to the legitimate aims pursued.

The complaint under Article 1 of Provision No. 1 was therefore rejected.

The applicant's complaints as to lack of reasoning in confiscation order declared inadmissible due to non-exhaustion of domestic remedies

DECISION IN THE CASE OF

WEBB v. THE UNITED KINGDOM

(Application no. 56054/00)

10 February 2004

1. Principal Facts

The applicant was stopped at Dover Eastern Docks by a customs officer on 26 October 1994. After initial questioning, he explained that he had about £27,000 (approximately €44,000) in cash for investment abroad. He corrected this to £39,000 (approximately €63,000) moments later and stated that the money was only partly his and that he was travelling to buy furniture or an antique car. He declined to name the other part-owner of the cash. The money was seized under the Criminal Justice (International Co-operation) Act 1990 ('the 1990 Act'), later replaced by the Drug Trafficking Act 1994 ('the 1994 Act'). HM Customs and Excise made an application to confiscate the money, arguing that the seized cash represented the proceeds of drug trafficking and/or was intended for use in drug trafficking.

Dover Magistrates' Court ordered the confiscation of the money after Customs and Excise brought evidence that the seized bank notes had traces of illegal drugs on them, the applicant had been evasive when stopped, and had admitted to having been convicted of drug-related offences in the United Kingdom and Germany. The applicant was represented by counsel throughout the proceedings and was allowed to present evidence to support his case. The Magistrates' Court ordered the confiscation of the money but did not publicly provide any reasons for its decision.

The domestic court mistakenly recorded that the confiscation order was made under the 1990 Act, which, unlike the correct 1994 Act, did not provide for a re-hearing appeal to a higher court but only allowed for an application for judicial review of the decision. The applicant sought judicial review of the forfeiture decision on the grounds that the domestic court had not given reasons for its decision. In the course of the judicial review application, HM Customs and Excise submitted that in fact, the applicant did have a right of appeal to the Crown Court for a re-hearing under the 1994 Act. In response, the applicant amended the grounds of his judicial review to argue that the confiscation order should be nullified as the domestic court

had made its decision under the 1990 Act when in fact the 1994 Act had already replaced it.

The High Court dismissed this application on the grounds that the domestic court's reference to the wrong statute was a mere formality and that the proceedings had applied the correct law. The applicant appealed this decision by arguing that the reference to the 1990 Act had prejudiced him by misleading him and his advisers into believing that a right to a re-hearing appeal did not exist. However, this appeal was similarly dismissed.

2. Decision of the Court

The applicant complained under Article 6 § 1 (right to a fair trial) that no reasoned judgment had been delivered to him by the Magistrates' court in regard to the confiscation order. He also complained that the standard of proof required to confiscate the money had been on the balance of probabilities, the civil standard, despite the proceedings being criminal in nature and the criminal standard being higher, beyond reasonable doubt. Further, the applicant complained under Article 1 of Protocol 1 (protection of property) that the confiscation of his property on the basis of the civil standard of proof violated his rights under the Convention.

Article 6

The Court began by reiterating that Article 6 under its criminal head did not apply to the forfeiture proceedings as a confiscation order did not imply a determination of criminal guilt. Accordingly, the application of the civil standard of proof was correct, and the applicant's complaint was inadmissible. In considering whether the proceedings were fair under the civil limb of Article 6 the Court considered that that matter should be addressed in the context of the applicant's complaint under Article 1 of Protocol 1.

Article 1 Protocol 1

The Court noted that the essence of the applicant's argument was that he had been deprived of his property in the absence of sufficient procedural safeguards. The Court established that the confiscation order was based on domestic law and had a legitimate aim, specifically the fight against drug trafficking, and then went on to assess whether a fair balance had been struck between achieving that aim and the applicant's rights. The proceedings before the Magistrates' Court had been

adversarial and the applicant had effectively participated and been represented by counsel in these proceedings. The burden of proof during the proceedings had been placed on Customs and Excise and the fact that the confiscation proceedings had been conducted according to the civil standard of proof did not compromise their fairness or support the argument that the confiscation order had been disproportionate.

The Court accepted the possibility that the refusal by the domestic court to publish its reasoning for the confiscation order might have impaired the fairness of the procedure, notwithstanding the fact that no criminal sanction was imposed on the applicant. This conclusion was based on the principle that the giving of reasons for decisions reached in civil proceedings was also part of the fairness requirement contained in Article 6 § 1. Nevertheless, the applicant had both a statutory right of appeal to the Crown Court and the possibility of judicial review but had not effectively pursued either in relation to the domestic court's failure to publish its reasoning. It was precisely the role of a legal representative to be alert to defects in proceedings which might prejudice his client's interests and to bring these to the attention of the court. However, the applicant's legal representatives had not raised any objections but were content for the proceedings to be dealt with under the 1990 Act. The failure of the applicant's lawyers to appreciate the importance of this point in time meant that they surrendered an opportunity to have a full re-hearing appeal and secure redress for their complaint about the lack of reasons given by the domestic court.

As to the judicial review of the magistrate's decision, the Court observed that the applicant had chosen to argue that the confiscation order should be quashed as it had been made under the wrong Act. The Court noted that had he instead continued his application for judicial review over the failure of Dover Magistrates' Court to give reasons for its decision, the High Court could have required the magistrates to provide a statement of the facts and their reasoning in order to ascertain whether an error of law had been made. Thus, the Court concluded that the applicant had deprived himself of an opportunity to obtain those reasons and a ruling on whether the magistrates' decision was correct in law.

The applicant's complaint under Article 1 of Protocol 1 focused on the lack of reasons provided for the order to confiscate his money. However, he had not pursued domestic remedies for this specific issue, instead, his judicial review complaint focused on the misapplication of the 1990 Act. Therefore, the applicant was found to have failed to exhaust domestic remedies and the Court declared the application inadmissible.

Prolonged stay of an administrative-offence proceedings that prevented the applicant from retrieving temporarily confiscated money constituted a violation of Article 1 of Protocol No. 1

JUDGMENT IN THE CASE OF
ZAKLAN v. CROATIA

(Application no. 57239/13)
16 December 2021

1. Principal facts

The applicant was a Croatian national who was born in 1944 and lived in Pakrac.

On 28 January 1991, the customs authorities of the former Socialist Federal Republic of Yugoslavia (SFRY) temporarily confiscated 4,350 Deutschmarks and 100 US dollars from the applicant as he attempted to take the money across the State border in contravention of the law. On 27 March 1991, the Zagreb Department of the Federal Foreign-Currency Operations Inspectorate brought administrative-offence proceedings against the applicant. On 8 October 1991, Croatia declared independence and severed all ties with SFRY. One month later, the government of Croatia issued a decree that stayed all administrative-offence proceedings pending before the Zagreb Department until the completion of the succession process. The Agreement on Succession Issues between the Successor States to the SFRY, which governed the management of the financial assets of the SFRY and the property rights of citizens of the SFRY, entered into force on 2 June 2004.

While the succession process continued, the administrative-offence charge against the applicant became time-barred. In 2007, the applicant submitted to the municipal State Attorney's Office a request for the return of his confiscated money. In 2008, the State Attorney's Office denied the request, noting that the confiscated funds had been deposited in (and remained in) the account of the Foreign-Currency Operations Inspectorate in Belgrade, Serbia. The applicant brought a civil action against the State seeking the return of his funds, which was denied because the confiscated funds could only be returned after the administrative-offence proceedings had been concluded, and these were still stayed pending the completion of the succession process. The applicant appealed, which was subsequently dismissed in 2011.

2. Decision of the Court

Relying on Article 1 of Protocol No. 1, the applicant submitted that the Croatian authorities should have discontinued the administrative-offence proceedings against him because the offence he was charged with had long ago become time-barred. Had the Croatian authorities properly discontinued the proceedings, the State would have been obliged to return his confiscated funds.

Article 1 of Protocol No. 1

The first question that the Court examined was whether the violation complained of could be attributed to the respondent State. It found that was the case for several reasons. First, the Croatian authorities assumed the administrative-offence proceedings against the applicant from the federal authorities of the former SFRY. Second, the Croatian authorities had been conducting the proceedings in accordance with Croatian law since the initial assumption from the former SFRY. Third, temporarily confiscated items had to be returned once the offence in question became time-barred under both Croatian and Serbian law. Finally, the stay imposed by Croatian law had prevented the relevant authorities from issuing a decision to discontinue the time-barred administrative-offence proceedings against the applicant.

Finding that the situation that the applicant complained of was attributable to the respondent State, the Court then turned to the issue of whether the prolonged stay of the administrative-offence proceedings against the applicant, and his resultant inability to recover the temporarily confiscated money, was in compliance with Article 1 of Protocol No. 1.

The parties did not contest that the confiscation of the applicant's money was of a temporary character and did not amount to deprivation of property. As such, the confiscated money remained the private property of the applicant. The Court therefore determined that the confiscated property was the applicant's "possessions" within the meaning of Article 1 of Protocol No. 1. The Court further determined that the applicant's prolonged inability to access and use his confiscated possessions should be examined in the light of the general principle laid down in the first rule of Article 1 of Protocol No. 1. The first rule, set out in the first sentence of the first paragraph of the article, enunciates the general principle of the peaceful enjoyment of property.

When analysing a potential violation of Article 1 of Protocol No. 1, the Court must examine whether the State's actions were lawful, pursued an aim that was in the general interest and whether a "fair balance" was struck between the general interest in question and the applicant's property rights.

In the present case, the Court found that the stay of the administrative-offence proceedings was enacted in accordance with domestic legislation. The Court also found that, by delaying the repayment of temporarily confiscated sums deposited in accounts outside of its territory until the succession of the former SFRY was completed and the assets of the former federation were distributed, the State pursued aims of protecting the public purse and the national economy, which are aimed in the general interest. However, the Court found that the extent to which the stay of the administrative-offence proceedings had been prolonged did not strike a fair balance between the general interest and the property right of the applicant, who was made to bear a disproportionate burden. The Court came to this conclusion because a) the prolonged stay prevented the applicant from seeking the return of his temporarily confiscated money from both Croatian and Serbian authorities and b) successor States had undertaken measures at the national level to provide solutions for individuals in some circumstances to recover funds, but not for an individual in the applicant's situation (see *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia*).[162] Accordingly, the Court concluded that there had been a violation of Article 1 of Protocol No. 1.

Article 41

The Court awarded the applicant €1,327 in respect of non-pecuniary damages and €4,365 in respect of costs and expenses. The Court did not award pecuniary damages as it found that there was no direct causal link between the actual violation, which was the prolonged stay of the proceedings imposed by the State authorities, and the applicant's claim for pecuniary damage.

[162] *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia*, Grand Chamber judgment of 16 July 2014, no. 60642/08

The imposition of a fine corresponding to 60% of the amount of cash which was undeclared when crossing an external border into the EU was found to be disproportionate, with Hungarian law infringing EU law.

JUDGMENT OF THE COURT (SECOND CHAMBER)- REQUEST FOR A PRELIMINARY RULING FROM THE KECSKEMÉTI KÖZIGAZGATÁSI ÉS MUNKAÜGYI BÍRÓSÁG (ASMINISTRATIVE AND LABOUR COURT, KECSKEMÉT, HUNGARY), IN

CASE C-255/14 ROBERT MICHAL CHMIELEWSKI v NEMZETI ADÓ- ÉS VÁMHIVATAL DÉL-ALFÖLDI REGIONÁLIS VÁM- ÉS PÉNZÜGYŐRI FŐIGAZGATÓSÁGA

(Case C-255/14)
16 July 2015

1. Principal facts

On 9 August 2012, Mr Chmielewski entered into the territory of Hungary from Serbia and in doing so, failed to declare the amount of cash that he carried with him. This totalled €147,492, consisting of 249,150 Bulgarian leva (BGN), 30,000 Turkish lira (TRY) and 29,394 Romanian lei (RON). As a result, Mr Chmielewski was ordered to pay an administrative fine of HUF 24,532,000 (approximately €78,000) by a decision of 4 October 2013 of the Nemzeti Adó- és Vámhivatal Dél-alföldi Regionális Vám- és Pénzügyőri Főigazgatósága (customs and finance directorate-general for the region of Dél-Alföld of the National Tax and Customs Office). The fine was imposed on the ground that he had failed to declare that sum at the time of entry into EU territory and consequently had not complied with the obligations of Regulation No 1889/2005, in addition to those of Law No XLVIII of 2007 ('Law No XLVIII').

With the objective of preventing unlawful movements of cash, EU Regulation No 1889/2005 provides that any person crossing an external border into the EU with at least €10,000 in cash must declare that sum to the relevant authorities upon crossing the border (recital 6 of the preamble to the Regulation). In the absence of harmonisation at EU level of the penalties applicable where such a breach of the obligation to declare is committed, Member States are required to provide for effective, proportionate and dissuasive penalties, under Article 9(1) of the Regulation. Law No XLVIII of 2007 implemented Regulation No1889/2005 in domestic law. In particular, paragraph 5/A(1)(c) provides that anyone entering into EU territory without correctly fulfilling the obligation to declare cash carried as laid down by Article 3(1) of the

Regulation, shall pay an on-the-spot fine of 60% of the amount held where the cash sum is more than €50,000.

Subsequently, Mr Chmielewski brought an action against that decision before the referring court, in which he claimed that, inter alia, the provisions of Law No XLVIII were not compatible with EU law.

2. Questions posed by the national courts

The Administrative and Labour Court, Kecskemét, referred two questions to the CJEU for a preliminary ruling.

First, it was asked if the amount of the fine imposed by Paragraph 5/A of law No XLVIII, implementing Regulation No 1889/2005, was commensurate with the requirements of Article 9(1) of that Regulation. Namely, were the penalties imposed by national law effective, dissuasive and yet proportionate to the infringement and to the objective pursued?

Finally, it was asked if Paragraph 5/A of Law No XLVIII did not infringe, as a result of the amount of the fine it establishes, the prohibition on disguised restrictions on the free movement of capital in the [EU] Treaty and in Article 65(3) of the Treaty on the Functioning of the European Union (TFEU)?

3. Decision of the CJEU

The Court noted that in the absence of harmonisation of EU legislation providing for penalties to be applied where declaration obligations are not complied with, Member States are empowered to choose the penalties which seem to them to be most appropriate. However, they must exercise that power in accordance with EU law and its general principles, namely, in the instant case, the principle of proportionality. Consequently, the administrative or punitive measures provided for under national legislation must not go further than what is necessary in order to achieve the objectives legitimately pursued by that legislation. The severity of the penalties must correspond to the seriousness of the infringements for which they are imposed and must be genuinely dissuasive in effect whilst respecting the principle of proportionality.

Considering the requirements of Article 9(1) of the Regulation, the Court acknowledged that the penalties in issue seemed to be an appropriate means of

attaining the objectives pursued by Regulation 1889/2005, given that they were likely to dissuade from the declaration obligation being breached. With regard to proportionality requirements, it was noted that a system within which the amount of the penalty imposed varied in accordance with the amount of undeclared cash did not in itself seem disproportionate. In addition, the Court clarified that the requirement for proportionate penalties, as provided for by Article 9 of Regulation 1889/2005, did not mean that the competent authorities must take into account the specific individual circumstances of each case, such as intention or recidivism.

Despite these considerations, however, in light of the obligation to declare as set out in Article 3 of Regulation No 1889/2005, a fine equivalent to 60% of the amount of undeclared cash, where that amount is more than €50,000, could not be said to be proportionate, going beyond what was necessary in order to ensure compliance with that obligation and the fulfilment of the objectives that the regulation pursued. The Court highlighted that Article 9 of the Regulation did not seek to penalise possible fraudulent or unlawful activities, but rather a breach of the obligation to declare.

The Court noted that, in order to allow the competent authorities to carry out the necessary controls and checks relating to the provenance, intended use and destination of undeclared cash, Article 4(2) of Regulation 1889/2005 provided for the possibility to detain undeclared cash in accordance with Article 3 of the Regulation following an administrative decision and in accordance with the conditions set out in domestic legislation. Consequently, a penalty consisting of a fine of a lower amount in addition to a measure to detain undeclared cash, is capable of achieving the objectives pursued by that regulation without exceeding what is necessary for that purpose. In the instant case, it was clear from the dossier submitted to the Court that the legislation in issue did not make a provision for such a possibility.

Consequently, the Court concluded that it was not necessary to examine further the second question. Article 9(1) of Regulation No 1889/2005 on controls of cash entering or leaving the Community must be interpreted as precluding national legislation, such as that at issue, which imposes payment of an administrative fine in order to penalise a failure to comply with the obligation to declare provided for in Article 3 of that regulation, the amount of which corresponding to 60% of the amount of undeclared cash, where that sum is more than €50,000.

The Court clarified the interpretation of the scope of Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. It confirmed the applicability of the Directive when the commission of all elements of the relevant offence occurred in the territory of a single Member State. Furthermore, it clarified the jurisdictional scope of domestic courts in relation to the confiscation of economic benefit derived from the commission of a criminal offence of which the perpetrator has been prosecuted, and the rights of third parties to appear in confiscation proceedings when it is claimed that the property concerned belongs not to the perpetrator, but to them.

JUDGMENT OF THE COURT (THIRD CHAMBER) – REQUESTS FOR A PRELIMINARY RULING FROM THE APELATIVEN SAD – VARNA (COURT OF APPEAL, VARNA, BULGARIA) IN

JOINED CASES OF THE CRIMINAL PROCEEDINGS AGAINST DR (C-845/19) AND TS (C-863/19)

(Case Nos C-845/19 and C-863/19)
21 October 2021

1. Principal facts

These two cases were preliminary references emanating from the Apelativen sad ('Court of Appeal') of Varna, Bulgaria, with regard to the interpretation of Directive 2014/42/EU of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, and of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). The applications were made in the context of criminal proceedings following the conviction of DR and TS ('the persons concerned') and concerned applications for the confiscation of sums of money for possession of narcotics for the purposes of their distribution, sums that the persons concerned claimed belonged to third parties.

In particular, the ruling concerned the interpretation of Article 5 of the Directive, entitled 'Extended Confiscation' which provides, *inter alia*, that Member States must adopt the necessary measures to enable confiscation of property belonging to a person convicted of a criminal offence which is liable to give rise to economic benefit, directly or indirectly, where a court is satisfied that the property in question is derived from criminal conduct following examination of the specific facts of each case. The relevant provision of domestic law in light of which the Directive was interpreted in the instant case, was Article 53 of the Nakazatelen kodeks (Criminal Code; 'the NK'),

concerning, in particular, the classification of 'direct proceeds' and 'indirect proceeds' of a criminal offence for the purposes of confiscation.

On 21 February 2019, DR and TS were found, in Varna, to be in possession of highly dangerous narcotics without authorisation, with a view to their distribution. They were subsequently convicted of that offence. In the course of pre-trial proceedings, a search was conducted at DR's place of residence and of his car by the competent authorities. At the material time, he lived with his mother and grandparents. A sum of money amounting to BGN 4,447.06 (approximately €2,200) was recovered. A pre-trial search conducted at the premises where TS lived with his mother led to the authorities discovering a sum of money amounting to BGN 9,324.25 (approximately €4,800).

Following the criminal conviction of the persons concerned, the Okrazhna prokuratora – Varna (Regional Public Prosecutor's Office of Varna) applied to the Okrazhen sad Varna (Regional Court of Varna), for the confiscation of those sums of money in favour of the State, in accordance with the relevant provision of domestic law. The Regional Court examined the application at a public hearing attended by the persons concerned. During proceedings, DR submitted that the sum of money discovered belonged to his grandmother who had obtained it under a bank loan, adducing evidence establishing that, in December 2018, his grandmother had withdrawn the sum of BGN 7,000.06 (approximately €3,500) from her bank account. DR's grandmother was unable to take part in proceedings given that Bulgarian law did not permit her to do so as a party distinct from the perpetrator of the offence concerned, nor was she heard as a witness. In addition, TS claimed that the sum of money in issue belonged to his mother and sister, submitting written evidence establishing that, in March 2018, his mother had taken out a consumer loan for the sum of BGN 17,000 (approximately €8,500). Although TS's mother was also unable to participate in proceedings, she was heard as a witness on this point.

The Regional Court of Varna refused to authorise the confiscation of the sums of money in issue, finding that the criminal offence of possessing narcotics for the purposes of their distribution, of which the persons concerned had been convicted, was not as such to generate an economic benefit. Although evidence was adduced that they had been selling narcotics, the conditions for confiscation in favour of the State referred to under the relevant provision under Article 53(2) of the NK were not met, given that the Public Prosecutor's Office had not charged the persons concerned with selling narcotics, nor had the criminal convictions confirmed the trafficking of narcotics.

The Public Prosecutor's Office appealed this decision before the referring court, the Varna Court of Appeal, submitting that the Regional Court had not applied the provision in light of Directive 2014/42. The persons concerned, on the other hand, submitted that only material property which is directly derived from the offence of which they had been convicted may be confiscated.

2. Questions posed by the national courts

The Varna Court of Appeal stayed the proceedings to refer the following questions to the CJEU for a preliminary ruling:

Firstly, it was asked whether Directive 2014/42/EU and the Charter were applicable with respect to a criminal offence consisting of possession of narcotics and for the purpose of their redistribution, committed by a Bulgarian citizen in Bulgarian territory, where the potential economic proceeds are realised and located in Bulgaria.

Consequently, should those provisions of EU law apply in the instant case, the CJEU was asked how the concept of "economic advantage derived... indirectly from a criminal offence" in Article 2(1) of the relevant Directive should be understood, and whether a sum of money found and confiscated from the home of a convicted person and their family, or a car driven by him, could constitute such an advantage.

Thirdly, the Court was asked whether Article 2 of The Directive was to be interpreted as precluding a domestic provision such as Article 53(2) of the NK, which does not provide for the confiscation of an economic advantage derived indirectly from a criminal offence.

Finally, was Article 47 of the Charter to be interpreted as precluding a domestic provision such as Article 306 (1) (1) of the Nakazatelno-protsesualen kodeks (Code of Criminal Procedure; 'the NPK'), which allows for the confiscation for the benefit of the State a sum of money which is claimed to belong to a person other than the perpetrator of a criminal offence, without that third party being able to take part in those proceedings in their own right and having direct access to the domestic Courts?

3. Decision of the CJEU

In response to the first question, the CJEU held that Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union must be interpreted as meaning that the possession of narcotics for

the purposes of their distribution comes within its material scope, even though all the elements of the commission of that offence are confined within a single Member State. The Court noted that the Directive was based, inter alia, on Article 83(1) of the Treaty on the Functioning of the European Union (TFEU), enabling the European Union to establish minimum harmonisation rules concerning the definition of criminal offences and sanctions for particularly serious crime with a cross-border dimension, either due to the nature or impact of such offences, or due to the necessity for a common-basis to tackle them, within which 'illicit drug trafficking' fell.

In response to the second and third questions, regarding the interpretation of the concept of an economic advantage derived indirectly from a criminal offence, in the light of Article 2(1) of Directive 2014/42, the Court noted that although the persons concerned were convicted of the possession of dangerous narcotics with view to their redistribution, that criminal offence did not of itself create economic advantage. The sums of money whose confiscation was sought could not, therefore, have arisen from that criminal offence. Furthermore, although there was evidence that the persons concerned had been selling narcotics, they were neither prosecuted nor convicted of such a criminal offence. In the instant case, the CJEU noted that it was for the referring court to assess whether the offence at issue in the main proceedings is liable to give rise, directly or indirectly, to economic benefit, taking into account the circumstances of the commission of the offence.

The CJEU held that the Directive must be interpreted as meaning that it not only provided for the confiscation of property constituting an economic benefit derived from the criminal offence of which the perpetrator had been convicted, but it also provided for the confiscation of property belonging to a perpetrator where the national court hearing the case is satisfied that the property derives from other criminal conduct. The safeguards provided for by Article 8 of the Directive must, however, be complied with, and the offence of which the perpetrator has been convicted must be listed in Article 5(2) and be liable to give rise, directly or indirectly, to economic benefit within the meaning established by the Directive.

With regard to the fourth question, the CJEU held that Article 8(1), (7) and (9) of Directive 2014/42, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding national legislation which allows for the confiscation, in favour of the State, of property which is claimed to belong to a person other than the perpetrator of the criminal offence, without that person having the right to appear as a party in the confiscation proceedings. In particular, intrinsic to the Directive was the recognition that it substantially affected

the rights of persons, not only the accused but also the rights of third parties claiming to be the owners of the property concerned. Article 8 of the Directive enshrines safeguards to protect those third parties. In light of these provisions of Article 8, cited above, a third party in the context of confiscation proceedings who claims, or in respect of whom it is claimed, to be the owner of the property subject to confiscation must be informed of their right to appear as a party in those proceedings and of their right to be heard. They must be placed in a position to exercise those rights and claim ownership before a confiscation order is made. In the instant case, the Court held that these requirements of Article 8 of the Directive are not satisfied in circumstances in which under domestic law the third party may not appear as a party in the actual confiscation proceedings and must instead bring their claim before a civil court.

The preparation of this publication has been supported by the UK Government.
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