Criminal Asset Recovery

EUROPEAN COURT OF HUMAN RIGHTS

Selected Judgments and Decisions

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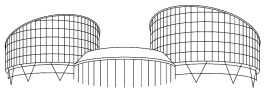

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

CRIMINAL ASSET RECOVERY
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CRIMINAL ASSET RECOVERY

EUROPEAN COURT OF HUMAN RIGHTS

Selected Judgments and Decisions

Belgrade
March 2013

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* Unless otherwise indicated in brackets, all references are to a judgment on the merits delivered by a Chamber of the Court. The abbreviation "(dec.)" indicates that the citation is of a decision. The Court delivers its judgments and decisions in English and/or French, its two official languages. Please note that the texts of judgments and decisions may be subject to editorial revision. The Court's case-law can be found in the HUDOC database (http://hudoc.echr.coe.int). HUDOC also contains translations of many important cases into some twenty non-official languages.

CASE OF

AGOSI v. THE UNITED KINGDOM

(Application no. 9118/80)

JUDGMENT

24 October 1986

PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") on 19 December 1984, within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. The case originated in an application (no. 9118/80) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission on Gold– und Silberscheideanstalt AG ("AGOSI").

2. The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the request was to obtain a decision from the Court as to whether the facts of the case disclosed any violation of Article 1 of Protocol No. 1 to the Convention (P1-1).

3. In response to the inquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicant company stated that it wished to take part in the proceedings pending before the Court and designated the lawyer who would represent it (Rule 30).

4. The Chamber of seven judges to be constituted included, as ex officio members, Sir Vincent Evans, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the then President of the Court (Rule 21 § 3 (b) of the Rules of Court). On 23 January 1985, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. R. Ryssdal, Mr. Thór Vilhjálmsson, Mr. F. Matscher, Mr. J. Pinheiro Farinha and Mr. L.-E. Pettiti (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43).

5. Mr. Wiarda assumed the office of President of the Chamber (Rule 21 § 5). He ascertained, through the Registrar, the views of the Agent of the Government of the United Kingdom ("the Government"), the Delegate of the Commission and the lawyer for the applicant company regarding the need for a written procedure (Rule 37 § 1). Thereafter, in accordance with the Orders and directions of the President of the Chamber, the following documents were lodged at the registry:

– on 26 April 1985, the memorial of the applicant;

– on 6 May, the memorial of the Government;

– on 18 and 19 July, the applicant company's claims under Article 50 (art. 50) of the Convention;

– on 30 December, the Government's written observations on these claims, together with a domestic judgment;

– on 10 January 1986, various documents requested from the Commission.

6. On 22 October 1985, after consulting, through the Registrar, the Agent of the Government, the Delegate of the Commission and the lawyer for the applicant company, the President directed that the oral proceedings should open on 20 January 1986 (Rule 38).

7. The hearings were held in public at the Human Rights Building, Strasbourg, on the appointed day. Immediately before they opened, the Court held a preparatory meeting.

There appeared before the Court:

– for the Government

Mr. M. Eaton, Legal Counsellor,

Foreign and Commonwealth Office, *Agent*,

Mr. D. Latham, Q.C., *Counsel*,

Mr. Fotherby, Customs and Excise,

Mr. Allen, Customs and Excise,

Mr. Robinson, Customs and Excise, *Advisers*;

– for the Commission

Mr. J.A. Frowein, *Delegate*;

– for the applicant company

Mr. R. Graupner, Solicitor, *Counsel*,

Mrs. G. Dymond, Solicitor, *Adviser*.

8. The Court heard addresses by Mr. Eaton and Mr. Latham for the Government, by Mr. Frowein for the Commission and by Mr. Graupner for the applicant company, as well as their replies to questions put by the Court and several judges.

9. On various dates between 15 January and 7 March 1986, the Government and the applicant company, as the case may be, lodged a number of documents with the registry, either at the request of the President or of their own motion.

10. By letter received on 21 March 1986, the applicant sought leave to file a further memorial. Such leave was however refused by the President on 28 June 1986.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

11. The applicant company, AGOSI, is a joint stock company (Aktiengesellschaft) incorporated and having its registered office in the Federal Republic of Germany. Its principal business is metal smelting, but at the relevant time it also dealt in gold and silver coins.

A. The seizure of the coins

12. In 1974, AGOSI began doing business with a British citizen, X. In the course of this business, between August 1974 and May 1975, AGOSI bought from X a large quantity of pre-1947 British coinage which had a high content of silver. However, it appears that unbeknown to the company the coins had been illegally exported from the United Kingdom.

13. On Saturday, 2 August 1975, after normal business hours, X visited AGOSI's factory with Y, whom he introduced as a wealthy businessman. Together they asked to make an immediate purchase of 1,500 Kruegerrands, gold coins minted in South Africa, where they are also legal tender, having a value of some £120,000. The sale was agreed and the coins were loaded into a car bearing United Kingdom number plates. Payment was accepted in the form of an unguaranteed cheque drawn on an English bank. The cheque bore no sign of having been cleared for exchange control purposes. On Monday, 4 August, the cheque was handed to AGOSI's bank for collection. However, on 11 August, the bank notified AGOSI that the cheque had been dishonoured. The contract of sale contained a provision according to which ownership of the coins remained with AGOSI until full payment for them had been received by it.

14. Meanwhile, on 2 August, the buyers attempted to smuggle the gold coins by car into the United Kingdom. The coins were, however, discovered hidden in a spare tyre and were seized by the customs authorities in Dover.

15. On 16 April 1975, the importation of gold coins had been prohibited by the Secretary of State for Trade and Industry, by an amendment to the Open General Import License of 5 July 1973. The prohibition was withdrawn on 16 June 1979.

16. On 14 August 1975, criminal proceedings were instituted in the United Kingdom against X and Y; they were charged, inter alia, with fraudulent evasion of the prohibition on importation of gold coins, contrary to section 304 (b) of the Customs and Excise Act 1952 ("the 1952 Act").

17. On 18 and again on 28 August, AGOSI requested the Customs and Excise to return the coins on the basis that the company was their rightful owner and had been the innocent victim of fraud.

18. On 20 August, officers of the Customs and Excise visited AGOSI's factory in Germany to inquire into the circumstances of the sale. AGOSI

continued to co-operate with the Customs and Excise throughout the criminal investigation.

19. On 1 October, AGOSI made a declaration of avoidance of the contract of sale by virtue of which the sale of the coins became void ab initio under German law.

20. On 13 October 1975, AGOSI's lawyers wrote to the Commissioners of Customs and Excise, who had taken over responsibility for the case, requesting that the Commissioners exercise their discretion under section 288 of the 1952 Act (see paragraph 35 below) and return the coins to the company, as they did not constitute goods liable to forfeiture under the 1952 Act interpreted in the light of the Treaty establishing the European Economic Community (the Treaty of Rome), general principles of public international law and the Convention, especially Article 1 of Protocol No. 1 (P1-1).

21. In their written reply of 29 December 1975, the Commissioners inquired whether it was contended by AGOSI that it had made a valid claim that the coins were not liable to forfeiture. The Commissioners stated that, if so, they would be required to institute condemnation proceedings before the High Court under paragraph 6 of the Seventh Schedule to the 1952 Act in order to have the coins forfeited. With regard to the company's contention that the coins were not liable to forfeiture (see paragraph 20 above), the Commissioners observed, inter alia, that "there [was] no discretion [vested in the courts] to refuse condemnation [of the coins as forfeited] on the ground of hardship to an innocent owner". The coins were not restored.

B. The criminal proceedings against X and Y

22. At their trial in January 1977, at which AGOSI's director Dr. Rose testified for the prosecution, X and Y argued that the prohibition on importation of gold coins was in breach of Article 30 of the Treaty of Rome, which guarantees the free movement of goods, and that accordingly the criminal charges brought against them were void.

23. The judge at first instance did not accept this argument; in his judgment of 31 January 1977, he held that the prohibition fell within the "public policy" provision of Article 36 of the Treaty and that the coins were capital rather than goods within the terms of Article 67.

24. X and Y appealed to the Court of Appeal which, on 15 December 1977, referred the question to the Court of Justice of the European Communities in accordance with Article 177 of the Treaty.

25. The Court of Justice of the European Communities confirmed in its judgment of 23 November 1978 that the Kruegerrands were capital rather than goods (case 7/78, [1978] European Court Reports 2247). Accordingly, X and Y's appeal failed and they were convicted and fined.

C. AGOSI's civil proceedings for recovery of the coins

26. When, at the close of the criminal proceedings at first instance, the Commissioners of Customs and Excise did not return the coins, AGOSI, on 14 April 1977, issued a writ against them in the High Court. The statement of claim, in so far as relevant, read:

> "7. ... the provisions of section 44 and section 275 of the Customs and Excise Act 1952, and the Seventh Schedule to the said Act, are to be construed in the light of and subject to the general principle of public international law which prohibits the unjustified confiscation of property belonging to friendly aliens.
>
> 8. Further or in the alternative the provisions of section 44 and section 275 of the Customs and Excise Act 1952 and the Seventh Schedule to the said Act are to be construed in accordance with Article 1 [of Protocol No. 1] of the European Convention for the Protection of Human Rights and Fundamental Freedoms (P1-1).
>
> 9. In the premises mentioned in paragraphs 7 and 8 herein, the ... coins are not liable to forfeiture.
>
> 10. Alternatively to paragraph 9, if the said coins are liable to forfeiture, then in the premises mentioned in paragraphs 7 and/or 8 herein the Defendant is bound to exercise his powers under section 288 of the Customs and Excise Act 1952 and/or paragraph 16 of the Seventh Schedule to the said Act to restore without imposition of any condition the said coins to the plaintiffs.
>
> And the plaintiffs claim:
>
> (i) a declaration that the ... coins are [AGOSI's] property;
>
> (ii) a declaration that the ... coins are not liable to forfeiture ...;
>
> (iii) a declaration that [AGOSI is] entitled without imposition of any condition to the return of the ... coins".

The Commissioners counterclaimed that the coins should be condemned as forfeited as they were liable to forfeiture, inter alia, under section 44 (b) and section 44 (f) of the 1952 Act (see paragraph 33 below).

27. On 2 February 1978, AGOSI also issued an originating summons requesting the High Court to determine the compatibility with the Treaty of Rome of the prohibition on the importation of Kruegerrands into the United Kingdom and of their confiscation without compensation. The case was heard on 20 February and AGOSI sought to have these questions referred to the Court of Justice of the European Communities for decision.

28. Mr. Justice Donaldson dismissed the originating summons on the same day and indicated that he would also have dismissed the action on the writ had it been brought before him for determination (paragraph 26 above). The applicant company nonetheless pursued the latter action. On 10 March 1978, Mr. Justice Donaldson dismissed the action on the writ and ordered, in accordance with the Commissioners' counterclaim, that the coins be forfeited as constituting goods liable to forfeiture under section 44(f) of the 1952 Act (see paragraph 33 below).

29. AGOSI appealed to the Court of Appeal arguing that, as the European Court of Justice had in the meantime found that the coins were not goods

(see paragraph 25 above), section 44 (f) could not be applied, and reiterated its submissions as to Article 1 of Protocol No. 1 (P1-1) and general principles of international law.

30. The Court of Appeal gave its ruling on 10 December 1979 ([1980] 2 All England Law Reports 138-144). The main judgment was delivered by Lord Denning, with whom the other two judges, Lord Justice Bridge and Sir David Cairns, concurred.

With regard to AGOSI's claim that it was entitled to the restoration of the Kruegerrands in view of its alleged innocence, Lord Denning first made the following observations:

> "Before going further, I may say that in any event the customs authorities have a discretion in the matter. It happens sometimes that goods are forfeited and then afterwards the true owner comes up and says that he was defrauded of them. If the customs authorities are satisfied of his claim, they may waive the forfeiture and hand them to him. There is a very wide discretion given to the commissioners under s 288 of the 1952 Act under which they can forfeit the goods or release them, or pay compensation and so forth. That may arise at a later time. But the German company says that in this case the customs authorities had no right to forfeit the goods at all. It would suit the German company much better to have the actual Kruegerrands returned to them, when you consider the value of gold itself, instead of compensation at 1975 figures."

Lord Denning thereafter went on to deal with the different objections advanced by AGOSI against the Commissioners' contention that the Kruegerrands were liable to forfeiture. Lord Denning held that the definition of goods in the Treaty of Rome was irrelevant for the purposes of section 44 (f) and that there was nothing in Article 1 of Protocol No. 1 (P1-1) or general international law prohibiting forfeiture in the instant case. He concluded:

> "It seems to me that the customs authorities are right. These Kruegerrands are forfeitable to the Crown ... It is entirely a matter for the discretion of the Customs and Excise to consider whether the claim of the German company is so good that they should see fit in this case to release them to the German company or retain them and pay them some compensation. That is within the discretion of the Customs and Excise."

Lord Justice Bridge added:

> "If I were satisfied, which I am not, that there is such a principle in international law as that for which the [German company's counsel] contends, I should still be wholly unconvinced that it would be open to us to write into the Customs and Excise Act 1952 the extensive amendments which it would be necessary to introduce in order to give effect to that principle and to make an exception from liability to forfeiture, where there had been a plain case under the language of the statute giving rise to forfeiture, in favour of a foreign owner of goods who could show he had not been a party to the act out of which the liability to forfeiture arose."

Sir David Cairns remarked:

> "If [a foreign owner] is innocent of any complicity in the smuggling, it is appropriate that there should be an opportunity for him to apply for the exercise of discretion in his favour, but I cannot see that it would be possible so to construe the Act as to exclude from the forfeiture provision any goods belonging to such a [foreigner]."

The appeal was dismissed.

31. The Court of Appeal did not grant leave to appeal to the House of Lords. On 27 March 1980, AGOSI petitioned the House of Lords for leave to appeal, but such leave was refused.

32. On 1 April 1980, AGOSI's solicitors again wrote to the Commissioners of Customs and Excise requesting the return of the goods. The solicitor for the Commissioners replied in the negative on 1 May 1980, without giving any reasons.

II. THE RELEVANT LEGISLATION

A. The condemnation proceedings

33. Under section 275 of the 1952 Act, goods being liable for forfeiture under, inter alia, section 44 of the Act may be seized or detained by the customs authorities.

Section 44 reads in relevant parts:

> "Where:
>
> ...
>
> (b) any goods are imported, landed or unloaded contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment; or
>
> ...
>
> (f) any imported goods are concealed or packed in any manner appearing to be intended to deceive an officer,
>
> those goods shall be liable to forfeiture ..."

34. The procedure to be followed after seizure is set out in the Seventh Schedule to the Act.

According to paragraph 1, the Commissioners of Customs and Excise shall give notice of seizure to any person who to their knowledge was at the time of the seizure the owner of the seized goods.

Any person wishing to claim that the goods are not liable to forfeiture must, in accordance with paragraphs 3 and 4, give the Commissioners notice of his claim in writing within one month of the date of notice of seizure or, if no such notice has been served on him, within one month of the date of seizure.

Paragraph 6 provides that if notice of a claim is duly served, the Commissioners shall take proceedings for the condemnation of the seized goods by the courts. This paragraph further specifies that "if the court finds that the [items were] at the time liable to forfeiture the court shall condemn [them] as forfeited."

According to established case-law, the courts will only examine whether the seized goods fall into any of the categories of goods mentioned in the law as liable to forfeiture; they will not examine the question of the owner's innocence. Condemnation proceedings are, according to paragraph 8, to be considered as civil proceedings.

If no notice of claim has been given to the Commissioners in accordance with paragraphs 3 and 4, then the goods seized are deemed, in accordance with paragraph 5, to have been duly condemned as forfeited.

35. Under section 288 of the 1952 Act:

> "The Commissioners may, as they see fit,
>
> (a) ...
>
> (b) restore, subject to such conditions, if any, as they think proper, any thing forfeited or seized under the said Act ..."

B. Judicial review of administrative decisions

36. Prior to 11 January 1978, judicial review of certain decisions by administrative authorities could be obtained by application for a prerogative order (mandamus, certiorari or prohibition) in accordance with section 10 of the Administration of Justice Act 1938 and Order 53 of the then Rules of the Supreme Court. In addition, litigants were entitled to bring ordinary actions for declarations, injunctions or damages in appropriate cases.

In the words of the Government, "the multiplicity of remedies, each with their own procedural idiosyncracies, was considered to be a real disadvantage to litigants, and an inhibition on the ability of the courts to develop a coherent corpus of law in this area". In particular, an application for a prerogative order might not have been effective if the challenged decision did not contain the reasons on which it was based, since the law did not permit the obtaining of evidence on facts or other matters not appearing on the record of the decision (see Report on Remedies in Administrative Law, Law Commission no. 73, Cmnd. 6407 (1976)).

37. The Rules of the Supreme Court were amended in 1977 by Statutory Instrument so as to provide for one specific procedure, now known formally as judicial review, for all litigants seeking relief in matters relating to public law. The amendments came into force on 11 January 1978 and were thus applicable when the Commissioners took their decision on 1 May 1980 (see paragraph 32 above).

38. According to the Supreme Court Practice, the new Order 53 introduced inter alia, the following changes:

> "– It created a new procedure called 'application for judicial' review and in this single application, the applicant may apply for any of the prerogative orders, either jointly or in the alternative, without having to select any particular one appropriate to his case.
>
> – The machinery of interlocutory applications such as discovery of documents and interrogatories and orders for the respondent of an affidavit to attend

for cross-examination has been introduced into applications for judicial review and such applications may be heard by a Judge or by a Master of the Queen's Bench Division.

– If the claim for relief is an order of certiorari, the Court is empowered, in addition to quashing the decision, to remit the matter to the authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the Court so that the Court may operate not only as a 'Court of Cassation' but also as a Court of review." (Rules of the Supreme Court, RSC, 1985, Vol. 1, Order 53, pp. 757-758 para. 53/1 – 14/6).

39. The procedure whereby an application for judicial review had to be made in two stages was left unchanged by the reform. It is first necessary to obtain leave of the Court, and, according to the Supreme Court Practice, "only if and to the extent that such leave is granted will the Court proceed to hear the substantive application for judicial review". "Leave should be granted, if on the material then available the Court thinks, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant" (RSC, loc. cit., p. 757, para. 53/1 – 14/23).

40. The grounds on which judicial review under the new Order 53 can be granted are the same as those held valid for the earlier applications for prerogative orders. They are stated by the Supreme Court Practice to fall under the following main headings:

"1. Want or excess of jurisdiction ...

2. Where there is an error of law on the face of the record ...

3. Failure to comply with the rules of natural justice ... Broadly the rules of natural justice embody a duty to act fairly ... The rules of natural justice will normally apply where the decision concerned affects a person's rights, for example where his property is taken by compulsory purchase ... The rules of natural justice can also apply where the applicant for judicial review does not have a right, for example where he is applying for some requisite statutory licence: in such cases, although he has no right to a licence unless and until it is granted, there is a duty to comply with the rules of natural justice and to act fairly because a legal power which affects his interests is being exercised. ...

4. The Wednesbury principle – A decision of a public authority will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the Court concludes that the decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it ...."

41. The requirement that administrative authorities direct themselves properly on the relevant law and act reasonably has been expounded upon in several cases before English courts (see also "Administrative Law", H.W.R. Wade, 5th edition (1980), pp. 348-349 and 354-355). Thus in Breen v. Amalgamated Engineering Union [1971] 2 Queen's Bench Division, p. 190, Lord Denning stated:

"The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory

> body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside."

Due regard must be had, inter alia, to the scope and object of the enactment conferring the power. According to Lord Reid in Padfield v. Minister of Agriculture, Fisheries and Food [1968] Appeal Cases p. 997: "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act".

42. The Government have conceded that, except for a decision by the High Court of 17 July 1985 (R v. Commissioners of Customs and Excise, ex parte Leonard Haworth), there have been no cases applying the above-mentioned principles to the exercise of discretion by the Commissioners with regard to restoration of forfeited goods.

The Haworth case concerned the seizure by the customs authorities of a yacht involved in a drug smuggling attempt and the Commissioners' exercise of discretion under section 152 of the Customs and Excise Management Act 1979. Under this provision, the wording of of which is almost identical to that of section 288 of the 1952 Act, "the Commissioners may as they see fit, ... restore subject to such conditions (if any) as they think proper, any thing forfeited or seized". The owner of the yacht, who claimed to be innocent of any smuggling attempt, made an application for judicial review of the Commissioners' failure or refusal to exercise their statutory discretion to restore the yacht. The High Court (Mr. Justice Forbes) found that the exercise of the Commissioners' discretion under section 152 involved a consideration of the culpability of the owner and held that the Commissioners had not properly exercised their discretion under section 152 in the case before it, as they had not provided the owner with the necessary information regarding the matters held against him and had not given him the opportunity to reply thereto.

PROCEEDINGS BEFORE THE COMMISSION

43. In its application of 17 September 1980 to the Commission (no. 9118/80), AGOSI complained that the forfeiture of the coins constituted a breach of Article 6 § 2 of the Convention and of Article 1 of Protocol No. 1 (art. 6-2, P1-1).

44. The application was declared admissible by the Commission on 9 March 1983. In its report of 11 October 1984 (Article 31) (art. 31), the Commission expressed the opinion, by nine votes to two, that there had been a breach of Article 1 of Protocol No. 1 (P1-1). The full text of the Commission's opinion and of the two dissenting opinions contained in the report is reproduced as an annex to the present judgment.

FINAL SUBMISSIONS TO THE COURT

45. At the hearing on 20 January 1986, the Government submitted that Article 6 (art. 6) was not applicable in the present case and they confirmed in substance the final submission set out in their memorial whereby they requested the Court "to decide and declare that there has been no breach of the rights of the applicant company under Article 1 of the First Protocol to the Convention (P1-1)".

46. The applicant company likewise reiterated in substance at the hearing the final submissions made in its memorial whereby it asked the Court "to find that the Government has violated Article 1 of the First Protocol ... and Article 6 of the Convention ... (P1-1, art. 6)".

AS TO THE LAW

I. ARTICLE 1 OF PROTOCOL NO. 1 (P1-1)

47. The applicant company did not complain of the original seizure of the Kruegerrands by the customs authorities. Its grievance is directed at the forfeiture of the coins and the subsequent refusal of the Commissioners of Customs and Excise to restore them. It alleged that these decisions were contrary to Article 1 of Protocol No. 1 of the Convention (P1-1), which reads:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

AGOSI contended that the confiscation of the coins was not justified in accordance with this Article (P1-1), since it was the lawful owner of the coins and innocent of any wrongdoing, and that it was not given the opportunity under the relevant provisions of English law to establish its innocence before a court.

A. General considerations

48. Article 1 (P1-1) in substance guarantees the right of property (see the Marckx judgment of 13 June 1979, Series A no. 31, pp. 27-28, para. 63). It comprises "three distinct rules": the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property

in accordance with the general interest (see, inter alia, the Sporrong and Lönnroth judgment of 23 September 1982, Series A no. 52, p. 24, para. 61). However, the three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see the Lithgow and Others judgment of 8 July 1986, Series A no. 102, p. 46, para. 106).

49. The forfeiture of the smuggled Kruegerrands amounted to an interference with the applicant company's right to peaceful enjoyment of their possessions as protected by the first sentence of Article 1 (P1-1). This point has not been in dispute.

50. The Court must first determine whether the material provision in the present case is the second sentence of the first paragraph or the second paragraph.

51. The prohibition on the importation of gold coins into the United Kingdom clearly constituted a control of the use of property.

The seizure and forfeiture of the Kruegerrands were measures taken for the enforcement of that prohibition. It is true that the High Court based its decision to declare the Kruegerrands forfeited on sub-paragraph (f) of section 44 of the 1952 Act, holding that they had been goods concealed in a manner appearing to be intended to deceive an officer. However, the Commissioners' counterclaim for forfeiture also relied on, inter alia, sub-paragraph (b) of the same section, which provided for the forfeiture of goods imported in contravention of an importation prohibition (see paragraphs 26 and 33 above). It does not appear material in this context that the High Court chose to rely on one of these sub-paragraphs rather than the other.

The forfeiture of the coins did, of course, involve a deprivation of property, but in the circumstances the deprivation formed a constituent element of the procedure for the control of the use in the United Kingdom of gold coins such as Kruegerrands. It is therefore the second paragraph of Article 1 (P1-1) which is applicable in the present case (see, mutatis mutandis, the Handyside judgment of 7 December 1976, Series A no. 24, p. 30, para. 63).

B. Compliance with the requirements of the second paragraph

52. The second paragraph of Article 1 (P1-1) recognises 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".

Undoubtedly the prohibition on the importation of Kruegerrands into the United Kingdom was in itself compatible with the terms of this provision. Nevertheless, as the second paragraph is to be construed in the light of the general principle enunciated in the opening sentence of Article 1 (P1-1) (see paragraph 48 in fine above), there must, in respect of enforcement of this prohibition, also

exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised; in other words, the Court must determine whether a fair balance has been struck between the demands of the general interest in this respect and the interest of the individual or individuals concerned (see the above-mentioned Sporrong and Lönnroth judgment, p. 26, paragraph 69 and p. 28, paragraph 73, and the James and Others judgment of 21 February 1986, Series A no. 98, p. 34, paragraph 50). In determining whether a fair balance exists, the Court recognises that the State enjoys a wide margin of appreciation with regard both to 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.

53. As the Commission pointed out, under the general principles of law recognised in all Contracting States, smuggled goods may, as a rule, be the object of confiscation. However, the Commission and the applicant company took the view that, to justify confiscation, a link must necessarily exist between the behaviour of the owner of the smuggled goods and the breach of the law, so that if the owner is "innocent" he should be entitled as of right to recover the forfeited goods.

The Government contended that no such right is given by the Convention or Protocol No. 1 (P1). They submitted that if the purpose of the interference with the owner's peaceful enjoyment of his possessions is justifiable in the terms of Article 1 (P1-1), then, provided the forfeiture in question can properly be said to further that purpose, the forfeiture is justifiable. However, they conceded that as a practical matter, where a person is free of any fault which could relate in any way to the purpose of the legislation, it is likely that the forfeiture of that property could not on any sensible construction of the legislation further the object thereof.

54. It is first to be observed that although there is a trend in the practice of the Contracting States that the behaviour of the owner of the goods and in particular the use of due care on his part should be taken into account in deciding whether or not to restore smuggled goods – assuming that the goods are not dangerous – different standards are applied and no common practice can be said to exist. For forfeiture to be justified under the terms of the second paragraph of Article 1 (P1-1), it is enough that the explicit requirements of this paragraph are met and that the State has struck a fair balance between the interests of the State and those of the individual (see paragraph 52 above). The striking of a fair balance depends on many factors and the behaviour of the owner of the property, including the degree of fault or care which he has displayed, is one element of the entirety of circumstances which should be taken into account.

55. Accordingly, although the second paragraph of Article 1 (P1-1) contains no explicit procedural requirements, the Court must consider whether the applicable procedures in the present case were such as to enable, amongst other things, reasonable account to be taken of the degree of fault or care of the applicant company or, at least, of the relationship between the company's conduct

and the breach of the law which undoubtedly occurred; and also whether the procedures in question afforded the applicant company a reasonable opportunity of putting its case to the responsible authorities. In ascertaining whether these conditions were satisfied, a comprehensive view must be taken of the applicable procedures (see among other authorities, mutatis mutandis, the X v. United Kingdom judgment of 5 November 1981, Series A no. 46, p. 26, para. 60).

56. In the present case, the question of forfeiture was dealt with in two distinct stages: the condemnation proceedings before the courts and the subsequent determination by the Commissioners under section 288 of the 1952 Act whether or not to exercise their discretion to restore the Kruegerrands to the applicants. It is uncontested that the question of AGOSI's behaviour was irrelevant in the proceedings before the High Court under section 44 of the Act for the condemnation of the Kruegerrands as forfeit. The question of the company's behaviour was, however, implicitly raised in its application to the Commissioners on 1 April 1980, that is after the coins had been formally forfeited by the courts, for the restoration of the Kruegerrands under section 288 (see paragraphs 32 and 35 above). In accordance with the rules of English law, the Commissioners were bound to be guided by relevant considerations (see paragraphs 40 and 41 above). In the present case, the relevant considerations certainly included the alleged innocence and diligence of the owner of the forfeited coins and the relationship between the behaviour of the owner and the breach of the import laws.

57. The applicant company submitted that a purely administrative procedure is insufficient for the purposes of the second paragraph of Article 1 of Protocol No. 1 (P1-1): a judicial remedy is required to protect the innocent owner.

The Government argued in reply that, should the Court accept that contention, English law does ensure adequate control by providing for judicial review of the Commissioners' decisions under section 288. The applicant, however, disputed that judicial review was available in regard to these decisions, and alternatively that, even if such review was available, it was of sufficient scope to provide an effective remedy.

58. The applicant company contended that the unavailability of judicial review is evidenced from the judgments of the High Court and the Court of Appeal in its case, having regard in particular to sub-paragraph 10 of the statement of claim in the writ of summons issued by the company on 14 April 1977 (see paragraph 26 above).

The Government contested AGOSI's interpretation of these judgments. In the Government's submission, these judgments only show that the company's request for a declaration that the Kruegerrands should be restored to it was premature and could not be dealt with until the coins had been condemned as forfeited and the Commissioners had refused to exercise their discretion under section 288.

A reading of the judgments confirms the Government's interpretation (see in particular the quotations from Lord Denning's judgment in the Court of Ap-

peal in paragraph 30 above). Admittedly, the procedural difficulties under English law, notably the fact that the Commissioners did not give any reasons for their decision, might, before the reform of 1977/78, have justified the conclusion that the procedure available to the applicant company did not allow it to pursue the remedy of judicial review effectively (see paragraphs 36-38 above). However, by the time the Commissioners took their decision of 1 May 1980 under section 288, the reform of judicial review had come into effect, so that these difficulties had been removed.

59. The applicant company, however, also argued that a remedy by way of judicial review would have been of no avail because the Commissioners' discretion under section 288 is so wide as to be unreviewable. The Government contested this and submitted that judicial review of the exercise of administrative discretion is always possible.

The Court notes that the availability of the remedy in circumstances comparable to those of the applicant's case was recently demonstrated by the judgment of 17 July 1985 in R. v. H.M. Customs and Excise, ex parte Leonard Haworth (see paragraph 42 above). In this case, the High Court carried out a judicial review of the Commissioners' exercise of discretion under section 152 of the Customs and Excise Management Act 1979, which section confers on the Commissioners the same wide discretion as section 288 of the 1952 Act (see paragraph 35 above). Whilst this judgment was delivered subsequent to the facts of the present case, there is no indication that it marked a new departure in the law.

In these circumstances AGOSI's submission on this point appears unfounded.

60. In the alternative, the company argued that such judicial review as may have been available was of insufficient scope for the purposes of the second paragraph of Article 1 of Protocol No. 1 (P1-1).

In the Court's view, this submission also fails. One of the grounds for challenging the decision of an administrative authority such as the Commissioners is – and on this point there was no dispute – that "the decision was one which a public authority properly directing itself on the relevant law and acting reasonably could not have reached" (the so-called "Wednesbury" principle), for example because the administrative authority exercising discretion had failed to take into account relevant considerations (see paragraph 41 above). More particularly, the nature and effectiveness of the remedy by way of application for judicial review in the context of seizure and forfeiture of goods by the customs authorities are illustrated by the recent judgment in the Haworth case (see paragraphs 42 and 59 above). In that case, the High Court held that, in exercising their discretion in circumstances comparable to the present case, the Commissioners had acted unreasonably, in that they had not given the owner of the goods seized in a smuggling attempt the necessary information about what matters were held against

him and no opportunity to reply thereto or to establish his lack of complicity in anything either criminal or irresponsible.

The Court considers that in the circumstances the scope of judicial review under English law is sufficient to satisfy the requirements of the second paragraph of Article 1 (P1-1).

61. AGOSI further contended that it was not required to pursue this remedy since English law lacked the requisite certainty in the matter. However, as appears from paragraphs 58 to 60 above, this submission is not supported by the evidence adduced.

C. Conclusion

62. The Court finds therefore that the procedure available to the applicant company against the Commissioner's refusal to restore the Kruegerrands cannot be dismissed as an inadequate one for the purposes of the requirements of the second paragraph of Article 1 (P1-1). In particular, it has not been established that the British system failed either to ensure that reasonable account be taken of the behaviour of the applicant company or to afford the applicant company a reasonable opportunity to put its case.

The fact that the applicant, for reasons of its own, chose not to seek judicial review of the Commissioners' decision of May 1980 and hence did not receive full advantage of the safeguards available to owners asserting their innocence and lack of negligence cannot invalidate this conclusion. Accordingly there has been no breach of Article 1 of Protocol No. 1 (P1-1).

II. ARTICLE 6 (art. 6) OF THE CONVENTION

63. The applicant company also alleged a breach of the following provisions of Article 6 (art. 6) of the Convention:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> ..."

AGOSI complained that the decisions taken by the English courts in the condemnation proceedings and by the Commissioners of Customs and Excise on the request for restoration of the Kruegerrands amounted to a determination of a criminal charge, within the meaning of Article 6 (art. 6), against it. Its complaint was mainly that its right to be presumed innocent had not been observed in the first set of proceedings and that its right to have the determination of a criminal charge made by a court had not been respected in the second set of proceedings.

64. It must first be determined whether or not the procedures complained of can be seen, separately or jointly, as involving the determination of a criminal charge against AGOSI, something which both the Government and the Commission's Delegate have contested.

65. On this point, the Court shares the opinion of the Government and the Delegate.

The forfeiture of the Krügerrands by the courts and the subsequent refusal of the Commissioner of Customs and Excise to restore them were measures consequential upon the act of smuggling committed by X and Y (see paragraphs 28 and 32 above). Criminal charges under domestic law were brought against the smugglers but not against AGOSI in respect of that act (see paragraphs 22-25 above).

The fact that measures consequential upon an act for which third parties were prosecuted affected in an adverse manner the property rights of AGOSI cannot of itself lead to the conclusion that, during the course of the procedures complained of, any "criminal charge", for the purposes of Article 6 (art. 6), could be considered as having been brought against the applicant company.

66. The compatibility of the consequential measures with the applicant's Convention rights has been examined in the present judgment on the basis of Article 1 of Protocol No. 1 (P1-1).

None of the proceedings complained of can be considered to have been concerned with "the determination of [a] criminal charge" against the applicant company; accordingly, Article 6 (art. 6) of the Convention did not apply in this respect.

67. The applicant company has not invoked Article 6 (art. 6) in so far as it relates to "civil rights and obligations" and the Court does not find it necessary to examine this issue of its own motion.

FOR THESE REASONS, THE COURT

1. Holds by six votes to one, that there has been no violation of Article 1 of Protocol No. 1 (P1-1);
2. Holds by six votes to one, that Article 6 (art. 6) of the Convention did not apply in the present case in so far as it relates to the determination of a criminal charge;
3. Holds by five votes to two that it is not necessary to take into account Article 6 (art. 6) in so far as it relates to the determination of civil rights and obligations.

Done in English and French, and delivered at a public hearing at the Human Rights Building, Strasbourg, on 24 October 1986.

Gérard WIARDA — President

Marc-André EISSEN — Registrar

In accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 52 § 2 of the Rules of Court, the dissenting opinions of Judges Thór Vilhjálmsson and Pettiti are annexed to the present judgment.

G. W.

M.-A. E.

DISSENTING OPINION OF JUDGE THÓR VILHJÁLMSSON

To my regret, I am not able to agree with the majority of the Chamber in this case. I think that there was a violation of Article 6 § 1 (art. 6-1) under its civil head, but no violation under its criminal head. To my mind, the question whether there was a violation of Article 1 of Protocol No. 1 (P1-1) is absorbed by the issue raised under Article 6 (art. 6). These finding prompted me to join the majority in all but the last vote on the operative part of the judgment.

I concur with the majority when, in paragraph 55 of the judgment, it states that what is decisive for the outcome of the case is whether or not sufficient procedural guarantees were given in English law to the applicant company. But, as already indicated, I part ways with the majority when it reasons on the basis that an insufficiency of procedural guarantees would entail a violation of Article 1 of Protocol No. 1 (P1-1). In my opinion, this would entail a violation of Article 6 § 1 (art. 6-1) in relation to a determination of the applicant company's "civil rights". It is immaterial whether or not this provision was cited in argument by the applicant company, be it under the civil or criminal head or under both. My main reason for applying Article 6 (art. 6) and not Article 1 of Protocol No. 1 (P1-1) is that Article 6 (art. 6) enunciates a clearly stated rule on the right to a fair trial. Such a rule is not expressly set out in the Article relied on by the majority, which finds that it is implied in the provision. Such an interpretation of the Convention is in my opinion not necessary in the present case and somewhat strained.

Having come to the conclusion that Article 6 (art. 6) is the material provision, the next question to be answered is whether or not a civil right of the applicant company was at stake. It would be out of place to try to formulate, in this dissenting opinion, a general rule on the dividing line between civil rights and public-law rights in the field of customs and excise. It suffices to say that the rather special circumstances of the present case lead me without hesitation to classify AGOSI's claim for recovery of the gold coins as an assertion of a "civil right" for the purposes of Article 6 § 1 (art. 6-1) of the Convention.

It then remains to determine whether or not the procedure used or available satisfied the requirements of Article 6 § 1 (art. 6-1). This provision requires, inter alia, a fair hearing before a tribunal. This means that one has to examine the following three questions, as the majority does in paragraphs 58, 59 and 60 of the judgment, namely

- was the remedy of judicial review available?
- was the Commissioners' discretion in the present case so wide as to be unreviewable?
- was such judicial review as may have been available of sufficient scope?

It is strictly speaking correct, as found by the majority in paragraph 58 of the judgment, that judicial review was available according to the law and, as stated in paragraph 59 and shown by the Haworth case in 1985, the decision challenged by the applicant company was in theory reviewable. It is clear, in my opinion, that, under English law as it stands, this is an extraordinary remedy which can be exercised only very rarely. This is of importance especially since circumstances where a judicial remedy could be sought cannot be infrequent. Moreover, the grounds on which review can be granted are limited in scope. They are set out in paragraph 40 of the judgment which cites an extract from the part of the Supreme Court Practice (1985) relating to the so-called Order 53.

Having regard to the content of paragraph 40 of the judgment, I am not satisfied that the applicant company had available to it under English law a judicial remedy of sufficient scope, for the purposes of Article 6 § 1 (art. 6-1) of the Convention, in which the civil right it asserted could be determined.

DISSENTING OPINION OF JUDGE PETTITI

(Translation)

I disagree with the majority in this case, since I consider that there has indeed been a breach of Protocol No. 1 and of Article 6 of the Convention (P1, art. 6).

It is true that the scope of the judgment in relation to rules applicable to customs authorities is limited. The Court has held that Protocol No. 1 (P1) has not been violated and that Article 6 (art. 6) does not apply. Essentially, it takes the view that the applicant company had available to it a procedure allowing adequate judicial review of the decision of May 1980 by the Commissioners of Customs and Excise.

Concerning Article 1 of Protocol No. 1 (P1-1)

With regard to the second paragraph of Article 1 of the Protocol (P1-1), the Court states that forfeiture of goods is permissible only if the explicit requirements of this Article (P1-1) are respected and if the State strikes a fair balance between its own interests and those of the individual concerned (paragraphs 52 and 54).

In the Court's opinion, it has not been established that the British system failed to ensure that reasonable account was taken of the conduct of the applicant company, and the latter must be held responsible for its failure to seek judicial review of the Commissioners' decision of May 1980 and thereby to receive full advantage of the safeguards which ought to be available to property owners who have committed no customs offence.

In my view, however, the applicant company was effectively prevented from availing itself of the safeguards to which it was legitimately entitled.

AGOSI attempted to use all the generally known remedies. Following the decision of the court of first instance, ordering forfeiture of the coins under section 44(b) of the Customs Act 1952, the company took the matter to the Court of Appeal, which rejected the appeal, having considered the legal definition of goods or capital in the Treaty of Rome.

The Court of Appeal refused leave to appeal to the House of Lords. On 27 March 1980, AGOSI unsuccessfully sought leave to appeal from the House of Lords itself.

In the Court of Appeal, however, Sir David Cairns observed:

> "Whatever may be the extent of the principle of international law about the confiscation of goods belonging to aliens, that principle in my view clearly cannot apply to the forfeiture of smuggled goods. If an alien can show that such forfeiture would involve depriving him of his property and that he is innocent of any complicity in the smuggling, it is appropriate that there should be an opportunity for him to apply for the exercise of discretion in his favour, but I cannot

> see that it would be possible so to construe the 1952 Act as to exclude from any forfeiture provision any goods belonging to such an alien" ([1980] All England Law Reports 144).

The following events had pre-dated these proceedings before the Court of Appeal.

AGOSI first applied to the customs authorities for return of the coins on 18 and 28 August 1975. Customs officials inspected AGOSI's factory and found no evidence that an offence had been committed. A further request to the customs authorities on 13 October 1975 was unsuccessful. However, AGOSI co-operated with the customs authorities in the criminal proceedings against X and Y. The civil proceedings for return of the coins were instituted against the Commissioners of Customs and Excise in the High Court on 14 April 1977. This action was dismissed.

A procedure for forfeiture was first introduced in English law by the Customs Consolidation Act 1853, but this Act did not abolish the authorities' discretionary power to restore confiscated property.

Between 1836 (case of R. v. Commissioners of Customs and Another) and 1985 (Haworth case), there was apparently no case involving judicial review of the exercise of the customs authorities' discretionary power to restore seized property.

The judgment in the Haworth case cannot be cited as a precedent against AGOSI, since it came after the High Court's decision in the AGOSI case. AGOSI argued that the word "may" in the Customs Consolidation Act 1876 had to be interpreted as conferring on the courts discretionary power with regard to restoration of seized property. The House of Lords might have given a useful ruling on this important point if it had granted the applicant company leave to appeal.

It seems to me that the procedure followed did not sufficiently distinguish between criminal and administrative law, between confiscation in the English sense of "forfeiture" and final confiscation, with transfer of ownership to the State – a distinction needed to protect the rights of lawful owners innocent of any criminal or customs offence. In the present case and having regard to the goods confiscated, there was no State interest making it necessary to maintain the confiscation. The gold coins in dispute were indeed within the meaning of Article 1 of Protocol No. 1 (P1-1). In my view, this Article (P1-1) implies that an innocent owner, acting in good faith, must be able to recover his property.

Even if the State is allowed a margin of discretion in respect of its administrative regulations, the action taken and maintained against AGOSI violated its right to enjoyment of its possessions and was disproportionate both in its aims and its effects.

At the hearing, the Commission's Delegate argued that judicial review had not been a remedy sufficient, for the purposes of Article 1 of Protocol No. 1 (P1-1), to allow AGOSI to vindicate its rights as an innocent property-owner; this analysis would seem relevant here. Firstly, the United Kingdom Government did

not in fact raise the question of judicial review in connection with the exhaustion of domestic remedies before the Commission. Secondly, to use this argument at the merits stage when it had not earlier been used in connection with Article 26 (art. 26) at the Commission stage would seem contradictory, even if the Government reserved the right to return to this point when the merits were being considered. If the remedy was so obvious, surely failure to use it should have been taken as an argument?

The complexity of the English procedural system in this area was evident both before the Commission and before the Court. It cannot be compared with the continental legal systems which allow judicial control of administrative action in individual cases through administrative dispute procedures. It is true that the judicial review procedure in the United Kingdom is moving in the right direction, but it can still puzzle even experienced British lawyers, the scarcity of decisions in this area being a sign of this.

The Commission's Delegate also noted that the British Government had argued that the principle that confiscated goods must be restored to an innocent owner could not be deduced from Article 1 of Protocol No. 1 (P1-1). He thought this inconsistent with the same Government's claim that the judicial review procedure could be regarded as sufficient.

In its decision on the admissibility of the application (report, page 44), the Commission summed up the Government's position as follows:

> "The respondent Government contend that the applicant has failed to exhaust available and effective domestic remedies within the meaning of Article 26 (art. 26) of the Convention in that it has failed to take proceedings against X and Y either on the cheque which they issued or on the contract. The respondent Government accept for the purposes of admissibility that the possibility to challenge the refusal by the Commissioners of Customs and Excise to exercise their discretion under section 288 of the Customs and Excise Act 1952 by way of judicial review was not a remedy which Article 26 (art. 26) of the Convention required the applicant to pursue.
>
> The respondent Government contend that the requirement of Article 26 (art. 26) is that a remedy should be capable of providing redress for the applicant's complaint, whether or not the remedy relates to the alleged breach of the Convention. Thus a civil action against X and Y would have provided the applicant with the financial remedy, the contract price, to which it was entitled under the contract of sale. Furthermore, this remedy reflects the nature of the applicant's subsisting interest in the coins after their 'sale' to X and Y, which was a contractual right to their return or to payment for them."

Such an action, had it been brought, would have been a subsidiary one, leading only to a possible award of damages. The main civil action was still that brought against the authorities holding the coins, in order to secure their return.

The wording of section 288 of the 1952 Act shows that the discretionary powers of the Commissioners of Customs and Excise are exceedingly wide. In the case of AGOSI, the authorities were not prepared, at any point, to return the coins.

However, the rule of law implies "that an interference by the authorities with an individual's rights should be subject to effective control .... This is especially so where ... the law bestows on the executive wide discretionary powers" (Silver and Others judgment of 25 March 1983, Series A no. 61, p. 34, para. 90).

It does not emerge clearly from the decided authorities that judicial review could have been usefully exercised, even supposing the courts of last instance had jurisdiction in this respect. Order 53 of the Supreme Court Practice spells out the difficulty of applying for judicial review. On 1 May 1980, the Commissioners of Customs and Excise replied that they were not prepared to use their power of returning the coins under section 288 of the 1952 Act, even though AGOSI had also relied on the general principles of English law in asking to have them returned and had again applied unsuccessfully to the High Court to have them returned.

The protection of the first paragraph of Article 1 of Protocol No. 1 (P1-1) does not extend to persons guilty of fraud, but it does extend to property owners who are not guilty of fraud.

There was thus, in my view, a definite breach of Article 1 of Protocol No. 1 (P1-1).

Concerning Article 6 para. 1 (art. 6-1) of the Convention

Apart from the question of Article 1 of Protocol No. 1 (P1-1), the issue of violation of Article 6 (art. 6) of the Convention also arises. Having decided that Protocol No. 1 (P1) had been violated, the Commission did not consider this point.

The criminal proceedings were brought against the importers. AGOSI's legal representative was not prosecuted – indeed, he was called as a witness. AGOSI's claim was not made within the framework of the criminal proceedings, to which it was not a "party" in the procedural sense. On the contrary, its applications to establish title and secure restitution of the gold coins of which it was the lawful owner both under the original contract and in domestic law were clearly concerned with "civil rights and obligations" within the meaning of Article 6 para. 1 (art. 6-1).

This meant that the rules concerning a "fair trial" had to be applied. Yet, in the first place, AGOSI was not able effectively to assert its rights in a civil or administrative procedure allowing proper participation of the contending parties (procès contradictoire) and leading to a decision on its claim. Secondly, a remedy enabling judicial review of the customs authorities' decisions was not effectively available; in any event, such judicial review as was possible was not wide enough in scope and did not satisfy the demands of legal certainty.

The Government had referred, at the admissibility stage, to the possibility of AGOSI's bringing an action against X and Y, but any such action would have encountered insurmountable obstacles, quite apart from the insolvency of X and Y. Moreover, the appropriate civil action was clearly the action brought against the customs authorities for return of the coins.

If the customs authorities had brought criminal proceedings against the director of AGOSI for alleged complicity, the latter would have received a fair trial. But since the customs authorities brought no charges against AGOSI, it is unfair to bar them from civil remedies or to disregard the rules embodied in Article 6 (art. 6) concerning "civil rights and obligations", such rights and obligations undoubtedly being at issue in the present proceedings. The end result here is maintenance of an administrative sanction imposed by the customs authorities and not justified by any guilt on AGOSI's part. Article 6 para. 1 (art. 6-1) definitely implies that one cannot, on the pretext of changing the jurisdictional field and legal classification, deprive a litigant of the safeguards customary in proceedings in connection with such matters. This is the line followed in the European Court's judgment in the Öztürk case. A State which, because of the way in which it has structured its administration of justice, has not prosecuted a person under the criminal law may not deprive him of the guarantees provided by Article 6 (art. 6) on the ground that there have been no criminal proceedings, and yet at the same time prevent the bringing of civil proceedings. Thus, AGOSI was denied the opportunity both of proving its innocence in criminal proceedings and of asserting its rights in civil proceedings. It was treated less well in its case than were the actual offenders.

As the law and the precedents stood prior to 1985, judicial review was an extraordinary remedy and AGOSI's own failure to have recourse to it cannot, in my view, be taken as the reason for considering that it had not received the benefit of the safeguards required by the Convention. In my opinion, there was accordingly a breach of Article 6 para. 1 (art. 6-1).

CASE OF

AIR CANADA v. THE UNITED KINGDOM

(Application no. 18465/91)

JUDGMENT

5 May 1995

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 11 March 1994, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 18465/91) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 (art. 25) by Air Canada, a company incorporated under Canadian law and registered as an overseas company in the United Kingdom, on 2 May 1991.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 (art. 6) of the Convention and Article 1 of Protocol No. 1 (P1-1) to the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that it wished to take part in the proceedings and designated the lawyers who would represent it (Rule 30).

3. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 24 March 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr F. Matscher, Mr B. Walsh, Mr C. Russo, Mr A. Spielmann, Mr S.K. Martens and Mr R. Pekkanen (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the United Kingdom Government ("the Government"), the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence on 11 May 1994, the Registrar received the applicant's memorial on 29 August 1994 and the Government's memorial on 2 September 1994. On 6 October 1994 the Secretary to the Commission indicated that the

Delegate would submit his observations at the hearing.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 21 November 1994. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr M.R. Eaton, Foreign and Commonwealth Office, Agent,

Mr D. Pannick, QC, Counsel,

Mr M. Maynard, HM Customs and Excise,

Mr W. Parker, HM Customs and Excise, Advisers;

(b) for the Commission

Sir Basil Hall, Delegate;

(c) for the applicant

Mr R. Webb, QC, Counsel,

Mr D. Clark, Solicitor.

The Court heard addresses by Sir Basil Hall, Mr Webb and Mr Pannick and also replies to questions put by the President and another judge.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

A. Background to litigation

6. Between 1983 and 1987 a number of incidents gave rise to concern over the adequacy of the applicant company's security procedures at Heathrow Airport, London:

(1) Between November 1983 and September 1984 a series of consignments, believed by Customs and Excise to have contained drugs, disappeared from the Air Canada transit shed.

(2) In March 1986 809 kilograms of cannabis resin were discovered in a consignment from India (New Delhi).

(3) In May 1986 a consignment from Thailand which had been taken out of the controlled area, was intercepted and found to contain 300 kilograms of cannabis resin. Two Air Canada staff were subsequently convicted of offences connected to the importation of cannabis resin.

(4) On 11 June 1986 Customs and Excise wrote to the applicant company's Cargo Terminal Manager expressing concern about the large quantities of drugs being smuggled into the country with the assistance of Air Canada staff. In its reply Air Canada promised to improve its security.

(5) On 15 December 1986 Customs and Excise wrote to all airline operators at Heathrow and Gatwick warning them about the possible penalties if illegal imports were discovered aboard their aircraft.

The letter stated, inter alia, that where an aircraft was used for the carriage of anything liable to forfeiture the Commissioners "will consider exercising their powers under the law, including the seizure and forfeiture of aircraft or the imposition of monetary penalties in lieu of such forfeiture".

(6) On 31 December 1986 Customs and Excise wrote again to the applicant company informing it that £2,000 would be deducted from Air Canada's bond pursuant to section 152 of the Customs and Excise Management Act 1979 ("the 1979 Act") for earlier breaches of security.

(7) Between November 1986 and January 1987 another consignment was removed from the Air Canada transit shed without proper authority and the applicant company failed to inform Customs and Excise for a considerable time. It was decided to deduct £5,000 from Air Canada's bond.

B. Discovery of consignment of cannabis resin

7. On 26 April 1987 a Tristar aircraft owned and operated by the applicant company and worth over £60 million, landed at Heathrow Airport, London, where it discharged cargo including a container which, when opened, was found to contain 331 kilograms of cannabis resin valued at about £800,000. The airway bill number of the container was false, the applicant company's cargo computer did not hold any details of the consignment and no airway bill had been drawn up and despatched for it.

The aircraft was on a regular scheduled flight starting in Singapore and travelling to Toronto landing en route at Bombay and Heathrow. It was carrying both fare-paying passengers and cargo.

C. Action of the Customs and Excise Commissioners

8. On the morning of 1 May 1987 officers of the Commissioners of Customs and Excise ("the Commissioners") acting under powers conferred by section 139 (1) of the 1979 Act seized the aircraft as liable to forfeiture under section 141 (1) of the same Act. Passengers were waiting to board the aircraft.

9. On the same day the Commissioners, acting under powers contained in section 139 (5) and paragraph 16 of Schedule 3 to the 1979 Act, delivered the aircraft back to the applicant company on payment of a penalty, namely a bankers' draft for £50,000.

10. No reasons were given to the applicant company at the time for the decision either to seize the aircraft or to levy the penalty. It was only during the course of proceedings before the European Commission of Human Rights that the Government offered the earlier security problems (see paragraph 6 above) as an explanation for the actions of the Commissioners.

D. Proceedings before the High Court

11. On 20 May 1987 the applicant company gave notice of a claim disputing that the aircraft was liable to forfeiture. The Commissioners therefore brought condemnation proceedings before the court to confirm, inter alia, that

the aircraft was liable to forfeiture at the time of seizure in accordance with paragraph 6 of Schedule 3 (see paragraph 18 below).

12. On 18 June 1988 an order was made by a Master of the High Court with the consent of the parties that the preliminary issues to be decided were as follows:

"(1) Whether the facts that (a) cannabis resin was found in container UL-D6075AC; and (b) that container had been carried by aircraft on Flight AC859 on 26 April 1987, alone constitute 'use of the aircraft for the carriage of a thing liable to forfeiture' within the meaning of section 141 (1) (a) of the Customs and Excise Management Act 1979, such as to justify its subsequent seizure on 1 May 1987;

(2) Whether it is a defence to the Plaintiffs' [the Commissioners] claim in this action if the Defendants establish that they did not know that the aforesaid container contained cannabis resin and were not reckless in failing so to discover;

(3) Whether it is a defence to the Plaintiffs' claim in this action if the Defendants establish that they could not with reasonable diligence have discovered that cannabis had been secreted and hidden or was being carried in the container, nor could they by the exercise of reasonable diligence have prevented its being secreted and hidden in the container;

(4) Whether it is necessary for the Plaintiffs to prove in this action:

(i) that the Defendants knew or ought to have known that cannabis resin was on board the aircraft on 26 April 1987; and/or

(ii) that the aircraft was on other than a regular scheduled and legitimate flight."

13. On 7 November 1988 giving judgment in the High Court ([1989] 2 Weekly Law Reports 589), Mr Justice Tucker concluded:

> "I cannot think that the draughtsman of the 1979 Act had the present situation in mind. I cannot believe that it was the intention of Parliament that the innocent and bona fide operator of an extremely valuable aircraft on an international scheduled flight should be at risk of having the aircraft forfeited if, unknown to him and without any recklessness on his part, some evil-minded person smuggles contraband or prohibited goods aboard the aircraft."

He answered the preliminary questions as follows:

> "1. No. Those facts alone do not constitute 'use of the aircraft for the carriage of a thing liable to forfeiture'.
>
> 2. Yes. It is a defence.
>
> 3. Yes. It is a defence.
>
> 4. It is necessary for the Plaintiffs to prove in this action:
>
> (i) that the defendants knew or ought to have known that cannabis resin was on board the aircraft on 26 April 1987; or (but not and)
>
> (ii) that the aircraft was on other than a regular scheduled and legitimate flight."

E. Proceedings before the Court of Appeal

14. On 14 June 1990 the Court of Appeal overruled the decision of the High Court (Customs and Excise Commissioners v. Air Canada, [1991] 2

Queen's Bench Division 446). Lord Justice Purchas stated as follows (at pp. 467-68):

> "The wording of section 141 is, in my view, clear and unambiguous and does not permit of any implication or construction so as to import an element equivalent to mens rea [criminal intent] nor does it involve in any way any person in the widest sense whether as user, proprietor or owner but depends solely on 'the thing' being used in the commission of the offence which rendered the goods liable to forfeiture ... In my judgment the mitigating provisions included in section 152 and paragraph 16 of Schedule 3, indicate clearly that Parliament intended to trust to the Commissioners the exercise of these matters of discretion.
>
> Apart from this the exercise of this discretion will be readily open to review by the court under R.S.C. Order 53 ... I would only comment that there may well be a case to exclude inter-continental or large passenger jet aircrafts flying on scheduled flights from section 141 (1) in the same way as vessels over a certain size have been excluded and to provide for them in section 142 ..."

The preliminary questions were answered as follows:

1. Yes
2. No
3. No
4. No

15. Although the Court of Appeal condemned the aircraft as forfeited this did not have the effect of depriving Air Canada of ownership since it had paid the sum required for the return of the aircraft (see Schedule 3, paragraph 7 at paragraph 19 in fine below).

16. In the course of his judgment Lord Justice Purchas added (at pp. 464 and 467):

> "Mr Webb, for Air Canada, relying upon the above authorities, made the following submissions ... that in effect if not in form section 141 was a criminal provision under which severe penalties could in practice be inflicted upon the owner or proprietor of vessels, particularly large aircraft and that, therefore, under the authorities just cited there should be implied in the terms of that section a requirement that the Commissioners must establish in their condemnation proceedings knowledge of some sort in the airline by their servants or agents so as to comply with the presumption of mens rea in criminal provisions.
>
> ...
>
> In my judgment, the answer to this submission which demonstrates its fallacy is that the process which is invoked as a result of sections 141 (1), 139 and Schedule 3 is by description a civil process. This of itself would not, if all other matters militated to the contrary, prevent it from being in its nature a criminal provision. Mere words would not necessarily be conclusive although the procedure in the civil courts outlined in Schedule 3 must carry considerable weight. The matter is, however, put beyond argument by the earlier cases ... [which decide

that] section 141 and its predecessor sections in the 1952 Act and the 1876 Act provided a process in rem against any vehicle, container or similar article which was in fact used in the process of smuggling ..."

In their judgments, Lord Justice Balcombe and Sir David Croom-Johnson agreed that section 141 (1) did not create a criminal offence (at pp. 468 and 469).

17. Leave to appeal to the House of Lords was refused by the Court of Appeal on that occasion and on 7 November 1990 by the House of Lords.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Customs and Excise Management Act 1979

18. Liability to forfeiture

Section 141 (1)

"... where any thing has become liable to forfeiture under the Customs and Excise Acts – (a) any ship, aircraft, vehicle, animal, container (including any article of passengers' baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable or for the purpose of the commission of the offence for which it later became so liable; ... shall also be liable to forfeiture."

Schedule 3, paragraph 6

"Where notice of claim in respect of any thing is duly given in accordance with [paragraphs 3 and 4 above] the Commissioners shall take proceedings for the condemnation of that thing by the court, and if the court finds that the thing was at the time of seizure liable to forfeiture the court shall condemn it as forfeited."

19. Powers of Commissioners after seizure

Section 139 (5)

"Subject to subsections (3) and (4) and to Schedule 3 to [the] Act any thing seized or detained under the Customs and Excise Acts shall, pending the determination as to its forfeiture or disposal, be dealt with, and, if condemned or deemed to have been condemned or forfeited, shall be disposed of in such manner as the Commissioners may direct."

Section 152

"The Commissioners may, as they see fit – (a) stay, sist or compound any proceedings for an offence or for the condemnation of any thing as being forfeited under the Customs and Excise Acts; or (b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under those Acts; or (c) after judgment mitigate or remit any pecuniary penalty imposed under those Acts ..."

Schedule 3, paragraph 16

"Where any thing has been seized as liable to forfeiture the Commissioners may at any time if they see fit and notwithstanding that the thing has not yet been condemned, or is not yet deemed to have been condemned, as forfeited – (a) deliver it up to any claimant upon his paying to the Commissioners such sum as

they think proper, being a sum not exceeding that which in their opinion represents the value of the thing, including any duty or tax chargeable thereon which has not been paid ..."

Schedule 3, paragraph 7

"Where any thing is in accordance with either of paragraphs 5 or 6 above condemned or deemed to have been condemned as forfeited, then, without prejudice to any delivery up or sale of the thing by the Commissioners under paragraph 16 ..., the forfeiture shall have effect as from the date when the liability to forfeiture arose."

B. Judicial review

20. The exercise of the powers conferred on the Commissioners of Customs and Excise are subject to judicial review. The three traditional grounds for judicial review as described by Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service ([1985] Appeal Cases 375 (House of Lords)) are illegality, irrationality and procedural impropriety.

"Illegality" means that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

"Irrationality" or what is often also referred to as "Wednesbury unreasonableness" applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

"Procedural impropriety" covers failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision, as well as failure to observe procedural rules that are expressly laid down even where such failure does not involve any denial of natural justice.

21. In the case of R. v. Secretary of State for the Home Department, ex parte Brind ([1991] 1 Appeal Cases 696) the House of Lords held that lack of proportionality is not normally treated as a separate ground of review under English administrative law.

Lord Ackner, while considering that an administrative decision which suffered from a total lack of proportionality would be unreasonable in the Wednesbury sense, indicated that until Parliament incorporates the Convention into domestic law, there was no basis at present upon which the proportionality doctrine applied by the European Court of Human Rights could be followed by the courts of the United Kingdom (at pp. 762-63).

Lord Lowry (at p. 767) cited with approval the following statement from Halsbury's Laws of England (vol. 1 (1) at paragraph 78):

"Proportionality: The courts will quash exercises of discretionary power in which there is not a reasonable relationship between the objective which is sought to be achieved and the means used to that end, or where punishments imposed by administrative bodies or inferior courts are wholly out of proportion to the relevant misconduct. The principle of proportionality is well established in Euro-

pean law, and will be applied by English courts where European law is enforceable in the domestic courts. The principle of proportionality is still at a stage of development in English law; lack of proportionality is not usually treated as a separate ground of review in English law, but is regarded as one indication of manifest unreasonableness."

22. Judicial review proceedings in respect of decisions of the Commissioners have been brought in two cases. In R. v. Commissioners of Customs and Excise, ex parte Haworth (judgment of 17 July 1985), the High Court found that the Commissioners had acted unreasonably in that they had failed to give the owner of goods seized in a smuggling attempt the necessary information about matters held against him and no opportunity to reply thereto.

Similarly in R. v. Commissioners of Customs and Excise, ex parte Tsahl (judgment of 11 December 1989), the High Court required the Commissioners to take as the date of valuation of diamonds which they had seized, for the purpose of determining the amount of the payment for their return, the date of return rather than the date of import.

PROCEEDINGS BEFORE THE COMMISSION

23. The applicant company lodged its application (no. 18465/91) with the Commission on 2 May 1991. The applicant company complained that the seizure of its aircraft and its subsequent return on conditions, violated its right to peaceful enjoyment of its possessions as guaranteed by Article 1 of Protocol No. 1 (P1-1). It further alleged that the proceedings involved did not comply with the requirements of Article 6 para. 1 (art. 6-1) of the Convention.

24. The Commission declared the application admissible on 1 April 1993. In its report of 30 November 1993 (Article 31) (art. 31), the Commission expressed the opinion that there had been no violation of Article 1 of Protocol No. 1 (P1-1) (nine votes to five) and that there had been no violation of Article 6 (art. 6) (eight votes to six).

25. The full text of the Commission's opinion and of the dissenting opinions contained in the report is reproduced as an annex to this judgment (1).

1. Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 316-A of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS BY THE GOVERNMENT TO THE COURT

26. The Government, in their memorial, requested the Court to decide and declare that the facts disclose no breach of the applicant's rights under Article 1 of Protocol No. 1 and Article 6 (P1-1, art. 6) of the Convention.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 (P1-1)

27. The applicant company complained that the seizure of its aircraft and the subsequent requirement to pay £50,000 for its return amounted to an unjustified interference with the peaceful enjoyment of its possessions contrary to Article 1 of Protocol No. 1 (P1-1) to the Convention which reads:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

28. It is not in dispute between those appearing before the Court that the matters complained of constituted an interference with the peaceful enjoyment of the applicant's possessions. However there was disagreement as to whether there had been a deprivation of property under the first paragraph (P1-1) or a control of use under the second paragraph (P1-1).

A. The applicable rule

29. The Court recalls that Article 1 (P1-1) guarantees in substance the right of property and comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph (P1-1) and is of a general nature, lays down the principle of peaceful enjoyment of property. The second, in the second sentence of the same paragraph (P1-1), covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph (P1-1), recognises that the Contracting States are entitled to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

30. However, the three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, among many other authorities, the AGOSI v. the United Kingdom judgment of 24 October 1986, Series A no. 108, p. 17, para. 48).

31. The applicant considered that it had been deprived of its aircraft albeit for a temporary period and, subsequently, as a permanent measure, of the £50,000 that it was required to pay as a condition for the return of its property. There had thus been a deprivation of possessions.

32. For the Government, with whom the Commission agreed, this was not a case involving a deprivation of property since no transfer of ownership of the applicant's aircraft had taken place. The seizure and demand for payment were to

be seen as part of the system for the control of the use of an aircraft which had been employed for the import of prohibited drugs.

33. The Court is of the same view. It observes, in the first place, that the seizure of the aircraft amounted to a temporary restriction on its use and did not involve a transfer of ownership, and, in the second place, that the decision of the Court of Appeal to condemn the property as forfeited did not have the effect of depriving Air Canada of ownership since the sum required for the release of the aircraft had been paid (see paragraph 15 above).

34. In addition, it is clear from the scheme of the legislation that the release of the aircraft subject to the payment of a sum of money was, in effect, a measure taken in furtherance of a policy of seeking to prevent carriers from bringing, inter alia, prohibited drugs into the United Kingdom. As such, it amounted to a control of the use of property. It is therefore the second paragraph of Article 1 (P1-1) which is applicable in the present case (see, mutatis mutandis, the above-mentioned AGOSI judgment, p. 17, para. 51).

B. Compliance with the requirements of the second paragraph

35. It remains to be decided whether the interference with the applicant's property rights was in conformity with the State's right under the second paragraph of Article 1 of Protocol No. 1 (P1-1) "to enforce such laws as it deems necessary to control the use of property in accordance with the general interest".

36. According to the Court's well-established case-law, the second paragraph of Article 1 (P1-1) must be construed in the light of the principle laid down in the Article's (P1-1) first sentence (see, as the most recent authority, the Gasus Dosier– und Fördertechnik GmbH v. the Netherlands judgment of 23 February 1995, Series A no. 306-B, p. 49, para. 62). Consequently, an interference must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

The concern to achieve this balance is reflected in the structure of Article 1 (P1-1) as a whole, including the second paragraph: there must therefore be a reasonable relationship of proportionality between the means employed and the aim pursued.

37. In this regard the applicant considered that the interference with its property rights was not justified under Article 1 of Protocol No. 1 (P1-1). In the first place, it complained that the power to forfeit the aircraft and to require payment as a condition of its return did not depend on showing that the owner, operator or airline was in some way at fault. Indeed it pointed out that the proceedings brought before the United Kingdom courts were conducted on agreed assumptions predicated, in effect, on the fact that Air Canada had not been at fault.

> Secondly, the relevant powers were exercised without a hearing before a judicial body. In particular, there existed no adequate legal safeguards to protect Air Canada from the exercise of discretion by Customs and Excise officials.
>
> Thirdly, the temporary seizure of the aircraft was disproportionate to any wrong that might have been done, as was the requirement to pay £50,000.

38. For the Government, there were strong public interest reasons justifying the actions of the Commissioners in the present case. There had been previous occasions when inadequate Air Canada procedures had led to the carriage of dangerous drugs. Despite promises to improve their procedures they had failed to do so. The events leading to the seizure of the aircraft had involved very serious lapses in security (see paragraph 6 above). Moreover, it was noteworthy that following the events at issue there had been no further security problems with Air Canada. The Commissioners had thus acted within the margin of appreciation conferred on them by the second paragraph of Article 1 of Protocol No. 1 (P1-1) in order to encourage the adoption of higher security standards by the applicant company.

> In addition, it would have been open to Air Canada, if it believed that there was no reasonable basis for the decision to require the payment of money or that there had been an abuse of power, to challenge the exercise of the Commissioners' discretion by instituting proceedings for judicial review. Had Air Canada done so the courts could have examined any disputed questions of fact as well as points of law. Moreover the Commissioners, on the basis of the existing law (see paragraphs 20-22 above), would have been obliged to provide reasons for their actions.
>
> In sum, in the Government's submission, a fair balance had been struck in the present case.

39. The Commission also considered that judicial review proceedings could have been brought and that the actions taken were proportionate to the aim of controlling the use of aircraft involved in the importation of prohibited drugs.

40. The Court first observes that it is clear from the decision of the Court of Appeal that both the seizure of the aircraft and the requirement of payment, in the absence of any finding of fault or negligence on the part of the applicant, were in conformity with the relevant provisions of the 1979 Act (see paragraphs 18-19 above).

41. While the width of the powers of forfeiture conferred on the Commissioners by section 141 (1) of this Act is striking, the seizure of the applicant's aircraft and its release subject to payment were undoubtedly exceptional measures which were resorted to in order to bring about an improvement in the company's security procedures. These measures were taken following the discovery of a container, the shipment of which involved various transport irregularities, holding 331 kilograms of cannabis resin (see paragraph 7 above). Moreover, this incident was the latest in a long series of alleged security lapses which had been brought to Air Canada's attention involving the illegal importation of drugs into the United Kingdom during the period 1983-87 (see paragraph 6 above). In particular, Air Canada – along with other operators – had been warned in a letter dated.

15 December 1986 from the Commissioners that, where prohibited goods have been carried, they would consider exercising their powers under the 1979 Act including the seizure and forfeiture of aircraft.

42. Against this background there can be no doubt that the measures taken conformed to the general interest in combating international drug trafficking.

43. The applicant, however, claimed that no reasons had been given by the Commissioners, at the time of the events complained of, to justify their actions and that they had been, in effect, judge and jury in their own cause. It was only in the course of the proceedings before the Commission that reference was made to earlier security shortcomings (see paragraph 10 above).

44. The Court cannot accept this submission. It notes that it would have been open to Air Canada to have instituted judicial review proceedings to challenge the failure of the Commissioners to provide reasons for the seizure of the aircraft or indeed to contend that the acts of the Commissioners constituted an abuse of their authority.

> Although not an appeal on the merits of the case, the availability and effectiveness of this remedy in respect of the exercise of discretion by the Commissioners under their statutory powers has already been noted by the Court in its AGOSI judgment (loc. cit., pp. 20-21, paras. 59-60).
>
> Moreover, although the provision of reasons from the outset would have contributed to clarifying the situation, the applicant could not have been in any real doubt as to the reasons for the Commissioners' decision having regard to the numerous incidents concerning the various security lapses and irregularities which had occurred in the past (see paragraph 6 above) – which the applicant has not sought to deny in the proceedings before the Court – as well as the warning letter from the Commissioners which had been sent, inter alia, to Air Canada pointing out that forfeiture of an aircraft was a possibility (see paragraph 6 at point (5) above).

45. The applicant next contended that judicial review proceedings only enabled the courts to examine the "reasonableness" of the exercise of discretion. It pointed out that the courts have held that the principle of proportionality was not part of English law (see paragraph 21 above).

46. The Court recalls that on a previous occasion it reached the conclusion that the scope of judicial review under English law is sufficient to satisfy the requirements of the second paragraph of Article 1 of Protocol No. 1 (P1-1). In particular, it is open to the domestic courts to hold that the exercise of discretion by the Commissioners was unlawful on the grounds that it was tainted with illegality, irrationality or procedural impropriety (see paragraph 20 above and the above-mentioned AGOSI judgment, ibid.).

> Furthermore, there have been cases in which the courts have found that the Commissioners had acted unreasonably in the exercise of their powers under the 1979 Act (see paragraph 22 above).
>
> There is no reason to reach a different conclusion on this point in the present case notwithstanding the qualified exclusion of the proportionality principle as a separate ground of review (see paragraph 21 above).

47. Finally, taking into account the large quantity of cannabis that was found in the container, its street value (see paragraph 7 above) as well as the

value of the aircraft that had been seized, the Court does not consider the requirement to pay £50,000 to be disproportionate to the aim pursued, namely the prevention of the importation of prohibited drugs into the United Kingdom.

48. Bearing in mind the above, as well as the State's margin of appreciation in this area, it considers that, in the circumstances of the present case, a fair balance was achieved. There has thus been no violation of Article 1 of Protocol No. 1 (P1-1).

II. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1) OF THE CONVENTION

49. The applicant further complained that it was, in effect, subjected to a criminal penalty. In the alternative, the seizure of the aircraft amounted to a determination, without court proceedings, of the company's civil rights and obligations in breach of Article 6 para. 1 (art. 6-1), the relevant part of which reads:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ..."

A. Applicability

1. Criminal charge

50. Air Canada considered that it had been, in effect, fined by the Commissioners and that neither the condemnation proceedings nor the theoretical possibility of judicial review satisfied the requirements of Article 6 para. 1 (art. 6-1).

51. The Government, on the other hand, with whom the Commission agreed, pointed out that under domestic law no criminal charges had been brought and that the criminal courts had not been involved in the matter.

52. The Court agrees with the Government's observation. It is also noteworthy that the Court of Appeal specifically rejected the argument made by counsel for Air Canada that section 141 of the 1979 Act was tantamount to a criminal provision (see paragraph 16 above). In this connection, the Court of Appeal pointed out that the description of the relevant provisions as being "civil" did not preclude it from finding that a provision was, in effect, "criminal" in nature. However, the matter was resolved with reference to earlier cases which decided that section 141 provided a process in rem against, inter alia, any vehicle used in smuggling.

The Court is, for the same reasons, similarly persuaded. Moreover, the factors referred to above – the absence of a criminal charge or a provision which is "criminal" in nature and the lack of involvement of the criminal courts – taken together with the fact that there was no threat of any criminal proceedings in the event of non-compliance, are sufficient to distinguish the present case from that of Deweer v. Belgium (judgment of 27 February 1980, Series A no. 35) where the applicant was obliged to pay a sum of money under constraint of the provisional closure of his business in order to avoid criminal proceedings from being brought against him.

53. It is further recalled that a similar argument had been made by the applicant in the AGOSI case (loc. cit.). On that occasion the Court held that the forfeiture of the goods in question by the national court were measures consequential upon the act of smuggling committed by another party and that criminal charges had not been brought against AGOSI in respect of that act. The fact that the property rights of AGOSI were adversely affected could not of itself lead to the conclusion that a "criminal charge" for the purposes of Article 6 (art. 6), could be considered as having been brought against the applicant company (loc. cit., p. 22, paras. 65-66).

54. Bearing in mind that, unlike the AGOSI case, the applicant company had been required to pay a sum of money and that its property had not been confiscated, the Court proposes to follow the same approach.

55. Accordingly the matters complained of did not involve "the determination of [a] criminal charge".

2. Civil rights and obligations

56. It has not been disputed by those appearing before the Court that the present case concerns a dispute relating to the applicant company's civil rights.

On the basis of its established case-law the Court sees no reason to differ from this view (see, the Editions Périscope v. France judgment of 26 March 1992, Series A no. 234-B, p. 66, para. 40).

B. Compliance with Article 6 para. 1 (art. 6-1)

57. The applicant further maintained that its civil rights and obligations had been determined by the procedures under the 1979 Act. It contended, in this respect also, that neither the condemnation proceedings nor the remedy of judicial review satisfied Article 6 para. 1 (art. 6-1). In particular, the proportionality of the measures complained of could not be examined in judicial review proceedings and the wider the statutory provisions under scrutiny the narrower the scope of review. Moreover the remedy was discretionary in nature.

58. In the Government's submission, the Commissioners could not forfeit the aircraft until they had taken condemnation proceedings in the High Court which the applicant had the opportunity to defend.

Furthermore, it had the possibility to bring judicial review proceedings to challenge the decision to require the money payment for the return of the aircraft.

59. For the Commission, the applicant's complaint as regards the condemnation proceedings related more to the content of the rights and obligations under domestic law than to any procedural right in connection with the determination of civil rights. Further, as regards judicial review proceedings, it was not prepared to express a view in the abstract since no proceedings had actually been brought by Air Canada.

60. The Court notes that the applicant's complaint related to both the seizure of the aircraft and the payment of £50,000.

61. As regards the seizure, the relevant provisions of United Kingdom law required the Commissioners to take proceedings for forfeiture once the seizure of the aircraft had been challenged (see paragraphs 11 and 18 above). Such proceedings were in fact brought and, with the agreement of the parties, were limited to the determination of specified questions of law. In such circumstances, the requirement of access to court inherent in Article 6 para. 1 (art. 6-1) was satisfied.

62. Furthermore, it was also open to Air Canada to bring judicial review proceedings contesting the decision of the Commissioners to require payment as a condition for the return of the aircraft. As noted above (see paragraph 44 above), had such proceedings been brought, Air Canada could have sought to contest the factual grounds on which the exercise of discretion by the Commissioners was based.

However, for whatever reason, such proceedings were not in fact instituted. Against this background, the Court does not consider it appropriate to examine in the abstract whether the scope of judicial review, as applied by the English courts, would be capable of satisfying Article 6 para. 1 (art. 6-1) of the Convention.

CONCLUSION

63. Accordingly, there has been no violation of Article 6 para. 1 (art. 6-1) of the Convention.

FOR THESE REASONS, THE COURT

1. Holds by five votes to four that there has been no violation of Article 1 of Protocol No. 1 (P1-1);
2. Holds by five votes to four that there has been no violation of Article 6 para. 1 (art. 6-1) of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 5 May 1995.

Signed: Rolv RYSSDAL
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

(a) dissenting opinion of Mr Walsh;

(b) dissenting opinion of Mr Martens, joined by Mr Russo;

(c) dissenting opinion of Mr Pekkanen.

Initialled: R. R.

Initialled: H. P.

DISSENTING OPINION OF JUDGE WALSH

1. I regret that I find it necessary to disagree with the majority of the Court in this case.

2. So far as the applicant company's claim of a breach of Article 1 of Protocol No. 1 (P1-1) is concerned, the Court has decided that the relevant paragraph is the second paragraph of Article 1 (P1-1). Thus the Court is of the opinion that the United Kingdom action in depriving Air Canada of the sum of £50,000 was justifiable under the Convention as a measure conforming to the "general interest in combating international drug trafficking". On the particular facts of the case the Court is in reality holding that in "the general interest" an innocent person's goods or property may be forfeited to the State without compensation and in such cases the provisions of Protocol No. 1 contained in Article 1 (P1-1) are not violated. I fear that such a proposition may lead persons to compare it with the view that it may be "expedient that one innocent man should die for the people".

3. In the present case the United Kingdom has not sought to dispute the innocence of the applicant company. Indeed it could not do so as the domestic courts had already established as a fact the innocence of the applicant company. They were the innocent and bona fide operators of an aircraft, worth many millions of pounds, on an international scheduled flight which was put at risk of forfeiture by the criminal actions of someone, unknown to the applicant company and without recklessness on their part, who smuggled prohibited goods aboard their aircraft and thus secretly used the aircraft for the carriage of the prohibited goods. Under the law of the United Kingdom dealing with the duties and powers of the Customs authorities it is clear that the innocence of the applicant company does not affect the liability to forfeiture of the aircraft. In my opinion the provisions of Article 1 (P1-1) do not permit the action taken.

4. It is to be recalled that the AGOSI case (1) dealt with the forfeiture of contraband. In the present case the drugs constituted the contraband, not the aircraft which was seized as being liable to forfeiture. The seizure was effected five days after the flight complained of, even though the aircraft in question had been free to make several flights in the interval. It appears quite clear from the facts that the action of the Customs authorities was to make an example of Air Canada for the purpose of directing their attention (and the attention of other international airlines) to the importance of careful scrutiny of what was actually carried in aircraft destined to land in the United Kingdom. But at the same time there was no accusation that the applicant company had been less than careful or were other than completely innocent of any wrongdoing. Yet it was decided to penalise them. The method adopted was to seize the aircraft and then to demand

the payment of £50,000 as the price of its release before it was condemned. As the aircraft was still in transit to its final destination and loaded with passengers the applicant company had no alternative to paying the sum demanded. The Customs authorities subsequently brought condemnation proceedings and succeeded in the Court of Appeal. That decision amounted to conclusive evidence that the aircraft was legally seized and that the applicant company's money was lawfully forfeited. The condemnation had a retrospective effect back to the time of the seizure.

1. Series A no. 108.

5. Under the law of the United Kingdom the procedure is deemed to be civil rather than criminal. The Court has expressed the same view so far as the Convention is concerned. I do not agree. In the case of Öztürk v. Germany (Series A no. 73) the Court reaffirmed "the autonomy" of the notion of "criminal" as conceived under Article 6 (art. 6) of the Convention and held that one of the matters to be considered was the nature and severity of the penalty which the person concerned risked incurring. It is abundantly clear in the present case that it was the intention of the authorities to impose a penalty of £50,000 and they succeeded in that. It was upheld by the English Court of Appeal as being correct according to the law. It is clear that judicial review proceedings could not produce a decision to the effect that it was not so. That procedure is confined to testing the legality of the action complained of according to the national law. In the result the applicant company were penalised to the extent of £50,000, in effect, for the criminal act of some person or persons unknown to them and for whose actions they bore no responsibility. While the condemnation is termed a decision in rem the penalty was levied in personam.

6. In my opinion there has been a breach of Article 1 of Protocol No. 1, and also of Article 6 (P1-1, art. 6).

DISSENTING OPINION OF JUDGE MARTENS, JOINED BY JUDGE RUSSO

Introduction

1. This case began with a seizure as a first step to confiscation (1); so the analysis should start there too. That analysis may be facilitated by some introductory remarks of a more or less comparative character (2).

1. Lord Justice Purchas referred to section 141 (1) as: "the confiscatory provisions" ([1991] 2 Queen's Bench 467).

2. These remarks have no further pretension than to facilitate the analysis and have no scientific value. My comparative investigations were, perforce, limited: I only looked into the Austrian, Belgian, French, German, Netherlands and Swiss Criminal Codes as well as handbooks. I have tried to take into account that the relevant provisions have, nearly everywhere, been changed recently in the context of fashionable legislation for depriving criminals of the proceeds of their crimes and that I needed the old texts.

At present, now that confiscation is generally used as a means of depriving certain criminals of the proceeds of their crimes, it may have become controversial whether such confiscations belong to the criminal law (3). However, the present confiscation is based on legislation which antedates this development. The present confiscation is not reparative and, when one rids oneself of national qualifications (4), it clearly falls within the ambit of criminal law (5): its evident purpose was to penalise an offence (drug smuggling) in order to prevent repetition thereof (6).

3. See, however, the Court's judgment of 9 February 1995 in the case of Welch v. the United Kingdom, Series A no. 307-A.

4. According to the Court of Appeal (Lord Justice Purchas) the power under section 141 (1) is a power in rem enforceable as a civil right ([1991] 2 Queen's Bench 460).

5. See the remark made by Sir David Croom-Johnson in his judgment in the present case ([1991] 2 Queen's Bench 469): "It is not possible to say that section 141 of the Act of 1979 has no connection with crime".

6. The 1979 Act intended to prevent smuggling (see the judgment of Mr Justice Tucker, p. 8). In this context I cannot refrain from quoting the Government's enchanting understatement according to which the powers under section 141 (1) are only used in cases where the Commissioners "consider that this is appropriate to encourage the adoption of higher security standards by the company concerned".

Criminal law usually makes it possible to confiscate the physical thing which was the object of the offence (objectum sceleris) as well as the physical thing by means of which the offence was committed (instrumentum sceleris). Presumably, the present confiscation falls within the latter category.

I further note that the object of the confiscation was an aircraft which had landed at a United Kingdom (UK) airport, in the performance of an authorised scheduled international air service (7).

This implies that the aircraft was owned by an airline which is in possession of the operating permissions required under a bilateral agreement between the UK and Canada, after having been designated by Canada and accepted by the UK for operation of agreed services (8).

7. See Article 6 of the 1949 Chicago Convention on International Civil Aviation.

8. See Bin Cheng, The law of international air transport (Stevens & Sons, London/New York, 1962), pp. 290-91 and 363.

This is a material feature of the present case: it shows that there cannot be the slightest doubt as to the owner's respectability. It shows, moreover, that this is not confiscation which finds its justification in the per se illegal nature of the confiscated object, such as when pornography (9) or other forbidden goods (such as certain weapons, explosives or drugs) are seized and confiscated.

9. See the Court's Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, p. 30, para. 66.

A last introductory point to be made is that usually confiscation of an instrumentum sceleris which is not per se unlawful is only allowed when it belongs to the perpetrator of the offence; where it is possible to confiscate such an instrumentum also when it belongs to a third party, as a rule there are safeguards with respect to third parties which are in no way to blame.

The applicable Article 1 of Protocol No. 1 (P1-1) rule

2. For the purpose of Article 1 of Protocol No. 1 (P1-1), confiscations – whether of an objectum or of an instrumentum sceleris – are to be considered "penalties" within the meaning of the second paragraph of this Article (P1-1). I prefer this construction to that of the Court's AGOSI v. the United Kingdom judgment (10).

10. Judgment of 24 October 1986, Series A no. 108.

The AGOSI case concerned a confiscation of the objectum sceleris (forfeiture of gold coins concerning which an attempt had been made to smuggle them into the UK). The Court considered this to be confiscation as an instance of "control of use". It reasoned: (1) the prohibition on the importation of gold coins into the UK is "control of use" of such coins; (2) the forfeiture of the smuggled gold coins forms a constituent element of that "control of use"; (3) ergo the forfeiture of the (smuggled) gold coins is an instance of "control of use" of gold coins.

Obviously, this reasoning (11) cannot be followed with respect to a confiscation of the instrumentum sceleris. The present case makes that clear: the prohibition involved is the prohibition of importation of a controlled drug (cannabis resin) (12); but the forfeiture of an aircraft cannot be said to be an instance of "control of use" of cannabis resin. I therefore prefer to bring both types of confiscation of property under the second part of paragraph 2 of Article 1 (P1-1) where the States have reserved the right to enact such laws as they deem necessary for the purpose of securing the payment of penalties.

11. Which in itself is rather artificial; see also W. Peukert, EuGRZ 1988, p. 510.

12. See the Commission's report, paragraph 24. Absence of defence of innocent ownership

3. Section 141 (1) (13) of the 1979 Act (14) requires that "the thing" to be forfeited "has been used for the carriage, handling, deposit or concealment" of another thing which in its turn is liable to forfeiture under the Customs and Excise Acts, that is, generally speaking, a thing the importation of which into the UK is either prohibited or only permitted after payment of duty (15). In normal language (16): section 141 (1) gives the Commissioners (17) the power to confiscate a thing by means of which an offence (smuggling or an attempt at smuggling) was committed (18).

13. For the text, see paragraph 18 of the judgment.

14. I use "the 1979 Act" and "the Commissioners" in the same sense as does the Court: see paragraphs 6 and 8 of its judgment.

15. See section 49 of the 1979 Act.

16. And leaving aside – as immaterial in the present context – that although importing prohibited goods or importing without payment of duty are criminal offences, in that context also the goods imported are liable to forfeiture even in case of wholly innocent importation: see the judgment of Sir David Croom-Johnson, [1991] 2 Queen's Bench 469-70.

17. See note 13.

18. This interpretation is corroborated by section 142 (1); see for the text: Commission's report, paragraph 23.

Forfeiture under section 141 (1) of the 1979 Act therefore is a confiscation of the instrumentum sceleris and falls to be considered under paragraph 2 of Article 1 of Protocol No. 1 (P1-1) (see paragraph 2 above).

4. Section 141 (1) differs in two respects from the "normal type" of confiscation of the instrumentum sceleris: firstly, it "does not permit of any implication or construction so as to import an element equivalent to mens rea"; secondly, it does not "involve in any way any person in the widest sense whether as user, proprietor or owner" (19).

19. Lord Justice Purchas in his judgment of 14 June 1990 ([1991] 2 Queen's Bench 467); see also the Court's judgment, paragraph 16.

The first difference does not warrant the conclusion that the present confiscation does not belong to the type indicated in paragraph 1 above: that the confiscation does not require the establishment of someone being guilty of an offence does not alter the fact that it presupposes that an offence has been committed (by whoever) and that it purports to prevent such offences by penalising them.

The combination of these two differences has the effect that under section 141 (1) an instrumentum sceleris belonging to another person than the perpetrator of the offence may be confiscated, whether or not the owner is to be

blamed for his property having been used as means to commit the offence. Consequently, the owner of the instrumentum cannot plead "innocence" as a defence against the confiscation. That indeed was established in the proceedings taken by Air Canada in the present case (20).

20. See paragraphs 14-16 of the Court's judgment. This result is the more amazing if one takes into account that under section 141 (3) the owner and the commander of an aircraft which becomes liable to forfeiture "shall each be liable on summary conviction to a penalty equal to the value of the ... aircraft ..."!

5. This raises the question (which was also at the core of the debate in the AGOSI case): whether the power of the executive to confiscate a person's property as instrumentum sceleris without that person even (21) being permitted to prove that he was in no respect whatsoever to blame for his property having been used as means to commit the offence, is compatible with the right guaranteed in the first sentence of the first paragraph of Article 1 of Protocol No. 1 (P1-1)?

21. "even" since, taking into account that the confiscation is, materially, a criminal sanction, it would be normal to require that the authorities bring proof of mens rea of the owner.

I do not hesitate to answer that question in the negative (22).

There is no room for a margin of appreciation here. Confiscating property as a sanction to some breach of the law – however important that breach may be and, consequently, however weighty may be the general interest in preventing it by severely penalising the offence – without there being any "relationship between the behaviour of the owner or the person responsible for the goods and the breach of the law" (23) is definitely incompatible both with the rule of law and with the right guaranteed in Article 1 of Protocol No. 1 (P1-1) (24).

22. See in the same sense: Judge Pettiti in his dissenting opinion in the AGOSI case (loc. cit., p. 27: "In my view, this Article (P1-1) implies that an innocent owner, acting in good faith, must be able to recover his property."). See also in this sense: G. Cohen-Jonathan, La Convention Européenne des Droits de l'Homme (Economica, Paris, 1989), pp. 536-37; Peukert, EuGRZ 1988, p. 510 and (perhaps) Velu-Ergec, La Convention Européenne des Droits de l'Homme (Bruylant, Bruxelles, 1990), p. 686, para. 841 in fine.

23. Quote from the speech made by Mr Frowein in his capacity as Delegate of the Commission during the oral hearings in the AGOSI case (Series B no. 91, p. 103). I fully agree with his arguments and recommend reading pages 102 and 103.

24. See in this context also the Court's Hentrich v. France judgment of 22 September 1994, Series A no. 296-A, p. 21, paras. 47-49. See also the interesting article of Michael Milde "The role of ICAO [i.e. International Civil Aviation Organisation] in the suppression of drug abuse and illicit trafficking" in Annals of Air and Space Law, vol. XIII (1988), pp. 133 et seq. On page 152 he discusses our problem. He argues that an air carrier "should not be responsible automatically if illicit drugs are found concealed in cargo (for example, containers or packed

consignments), the contents of which have been falsely declared by the shipper ... The air carrier is not normally in a position to recognise or prevent a misrepresentation of the nature of the shipment without a detailed cargo inspection. Moreover, such an inspection would be impracticable, especially in case of containerised cargo, since the air carrier has neither the jurisdiction nor the professional competence". He goes on to say: "Air carriers should not be victimised by the process of drug interdiction and should not have their aircrafts seized, unless there is evidence of their fault or that of their employees or agents, or if it is proved that they are accessories to the offence of drug trafficking."

> In paragraphs 54 and 55 of its AGOSI judgment the Court has dealt with this issue, but in my eyes rather ambiguously. If the Court is to be understood to have held that even where there is no relationship whatsoever between the behaviour of the owner of the confiscated property and the offence in consequence whereof that property was confiscated, the confiscation may yet meet the requirements of paragraph 2 of Article 1 (P1-1), I respectfully disagree. In my opinion such a deprivation of property without compensation, by way of "penalty", is only compatible with Article 1 of Protocol No. 1 (P1-1) when the owner somehow is to be blamed in respect of the offence committed by dint of his property. We are in the field of customs legislation and I can therefore accept a reversal of the onus of proof (25), but I think that if the owner proves that he was "innocent" – that is: that he could not reasonably have known or suspected that his property would serve as an instrument for the offence nor, even with due diligence, have prevented that (26) – confiscation of his property by way of sanction is not permissible.

Confiscation as a "sanction", not allowing for some defence of innocent ownership, upsets the fair balance between the protection of the right of property and the requirements of general interest.

25. See the Court's Salabiaku v. France judgment of 7 October 1988, Series A no. 141-A and its Pham Hoang v. France judgment of 25 September 1992, Series A no. 243.

26. I note that Mr Justice Tucker said in his judgment (p. 14) that counsel for the Commissioners had conceded "that in the present case there is nothing to indicate that the defendants [i.e. Air Canada] knew of the existence of the offending container or its contents, or that they were reckless about it".

> The recent wave of legislation for depriving criminals of the proceeds of their crimes makes it all the more necessary to firmly maintain this principle: we know from experience that governments in their struggle with international crime do not always heed the limits set by the Convention. It is the Court's task to ensure that these limits are observed.

Discretion as a proper substitute for absence of defence of innocent ownership?

6. The Court of Appeal, of course, realised that section 141 (1) was open to the above objection and therefore could be qualified as "indeed harsh". However, it suggested, under section 152 and paragraph 16 of Schedule 3 that this harshness was open to mitigation by the Commissioners, be it as a matter of discretion (27). As a further solace the Court of Appeal added that "the exercise of this discretion will be readily open to review by the court under R.S.C. Order 53.

This is a remedy which has developed very considerably in recent years ...".

27. See the judgment of Lord Justice Purchas, [1991] 2 Queen's Bench 468.

7. It is true that under section 152 and paragraph 16 of Schedule 3 (28) the Commissioners may, to put it shortly, "if they see fit" return "the thing" seized as liable to forfeiture to the owner "upon his paying ... such a sum as they think proper, being a sum not exceeding that which in their opinion represents the value of the thing ...".

28. See for the text of these provisions paragraph 19 of the Court's judgment.

Nevertheless, this way out is for two reasons unacceptable. The first and most important reason is that it is incompatible with the rule of law. Section 141 (1) would only be compatible with Article 1 of Protocol No. 1 (P1-1) if "innocent ownership" were a defence against forfeiture (see paragraph 5 above). Under the rule of law "there must be a measure of protection in national law against arbitrary interferences with the rights safeguarded" under Article 1 of Protocol No. 1 (P1-1) (29). This requirement implies that Parliament should have clearly expressed the aforementioned "indispensable restriction" in the 1979 Act itself and, furthermore, that it could not properly substitute such expression of that restriction by leaving it – without in any way indicating that intention – to the (as far as the law goes) completely unfettered discretion of the Commissioners to see to it that their power to confiscate is not used where "innocence" is proved.

29. See the Herczegfalvy v. Austria judgment of 24 September 1992, Series A no. 244, p. 27, para. 89.

The second reason is that, if (notwithstanding the above objection) the aforementioned "substitute" were to be accepted at all, then only under the condition that it is equivalent to the required (indispensable) restriction in the 1979 Act itself. Which means that it should be certain that Commissioners ought to deliver "the thing" "seized as liable to forfeiture" without asking for payment if the owner establishes "innocence".

That condition is, however, by no means fulfilled. As already noted the text of the law gives them complete freedom ("if they think fit") and that strongly suggests that they are under no obligation to release without payment if "innocence" is established (30). In this context I note a conspicuous difference between the pleadings of the Government in the present case and those in the AGOSI case. There the Government argued that "where there is no fault at all on the part of the owner, it is likely that the goods will be returned. That is because it would be perverse, or wholly unreasonable, to retain the goods because to retain the goods would not further the purpose of the legislation in a discernible way" (31).

30. In this context I refer to the judgment of the Court of Appeal in the AGOSI case, especially to the observations made by Lord Denning; see the Court's judgment in that case, loc. cit., p. 11, para. 30.

31. See their memorial, Series B no. 91, p. 83; see also the Commission's rendering of their arguments: Commission's report, paragraph 63, ibid., p. 26.

The Court in paragraph 53 of its AGOSI judgment refers to this passage as a concession of the Government. In the present case the Government have

refrained from making a similar concession. Which reinforces the conclusion that it is far from certain that an owner who can establish that there is no fault at all on his part can be certain that he will get back the sum that he was forced to pay to recover his aircraft that was seized as liable to forfeiture.

Procedural requirements of Article 1 of Protocol No. 1 and Article 6 para. 1 (P1-1, art. 6-1).

8. However, let me assume for a moment that it would be beyond dispute that the Commissioners would act (Wednesbury) unreasonably if they were to refuse to release the aircraft without payment (or when such payment had already been exacted to refund it) to an owner who had established that there was no fault at all on his part. Would that not be sufficient to hold that, although "innocence" does not constitute a defence against the forfeiture itself, the powers of the Commissioners under section 152 and paragraph 16 of Schedule 3 are such as to make the enactment as a whole acceptable under paragraph 2 of

Article 1 of Protocol No. 1 (P1-1)?

In my opinion: no. Even then the enactments would violate Article 1 of Protocol No. 1 in conjunction with Article 6 para. 1 (art. 6-1+P1-1) of the Convention. That is because I disagree with the Court's finding in paragraph 60 of its AGOSI judgment, repeated in paragraph 46 of its present judgment, that the scope of judicial review under English law is sufficient to satisfy the procedural requirements of the second paragraph of Article 1 (P1-1).

I recall that the powers under section 141 (1) are only compatible with the UK's obligations under Protocol No. 1 (P1) if the thing seized as liable to forfeiture is to be returned without payment to an "innocent" owner (see paragraphs 5 and 7 above). It follows that when a dispute arises between the owner and the Commissioners on the question whether or not he has established his "innocence", that dispute concerns a civil right: not only was the confiscation a measure enforceable as a civil right (32), but for the purpose of Article 6 para. 1 (art. 6-1) of the Convention the right of the owner to get back his property which has been confiscated illegally or, as the case may be, to recover the amount exacted which has been paid without lawful cause is a civil right also (33). Consequently, the owner is entitled to have that dispute settled by a court which meets the requirements of Article 6 para. 1 (art. 6-1), that is a court with full jurisdiction with regard to all questions of law and of fact that may arise.

32. See note 3.

33. See, mutatis mutandis, my concurring opinion in the case of Fayed v. the United Kingdom, Series A no. 294-B, pp. 58-59.

There is, obviously, yet another approach which leads to the same conclusion. However the "system" of the combined sections 141 (1) and 152 juncto paragraph 16 of Schedule 3 is to be qualified under national law (as civil, criminal or administrative), the result is that the Commissioners are given the power to prosecute and punish airline operators which (in their opinion) are guilty of some form of participation in offences under the 1979 Act by imposing and ma-

king them pay a considerable fine (34). Under the case-law of the Court giving such power to administrative authorities is, in principle, compatible with Article 6 (art. 6) provided that the airline operator can bring any such decision affecting him before a court that affords the safeguards of that provision (art. 6) (35).

34. It is common ground that the Commissioners referred to the £50,000 as a "penalty".

35. See, inter alia, mutatis mutandis, the Court's Bendenoun v. France judgment of 24 February 1994, Series A no. 284, p. 19, para. 46.

The parties have debated on the scope of judicial review under English law, but that debate is immaterial. Whatever that scope, judicial review is certainly not an appeal on the merits (36). That, however, is what is required: only a court with full jurisdiction as to both the facts and the law "affords the safeguards" of Article 6 (art. 6) (37).

36. See Lord Donaldson of Lymington MR in R. v. Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 722: "... it must never be forgotten that it [i.e. judicial review] is a supervisory and not an appellate jurisdiction" (the italics are in the original).

See further Wade & Forsyth, Administrative Law (Clarendon, London, 1994), pp. 38 and further 284 et seq. (the chapter: "Jurisdiction over fact and law"). See also the Court's O. v. the United Kingdom judgment of 8 July 1987, Series A no. 120, p. 27, para. 63.

37. I refer to my comprehensive dissenting opinion in the case of Fischer v. Austria, Series A no. 312, p. 25.

CONCLUSION

9. For these reasons I have voted for finding a violation both of Article 1 of Protocol No. 1 and of Article 6 para. 1 (P1-1, art. 6-1).

DISSENTING OPINION OF JUDGE PEKKANEN

To my regret I cannot agree with the opinion of the majority in the present case both as to Article 1 of Protocol No. 1 and as to Article 6 (P1-1, art. 6) of the Convention.

1. The aircraft in question was seized by the Commissioners apparently not for the purpose of forfeiture of the aircraft but with the aim of obliging the applicant to pay the "penalty" of £50,000. The "penalty" was, on the other hand, not levied as a fine or other kind of sanction but as a condition for the release of the seized aircraft.

These two decisions taken by the Commissioners on the same day, are in reality parts of one single plan of action with a particular aim. Both decisions were based on the Customs and Excise Management Act 1979 which gives practically unfettered discretion to the Commissioners with regard to both the seizure and the measures to be taken following it. Is this type of legal provision sufficiently precise to satisfy the criterion of "foreseeability" required by the Convention according to the Court's case-law? In the case of Margareta and Roger Andersson v. Sweden (judgment of 25 February 1992, Series A no. 226-A, p. 25, para. 75) this requirement, in so far as it concerns the exercise of discretion, was described as follows: "A law which confers a discretion is not in itself inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference". In my opinion the law in question does not fulfil this criterion of foreseeability.

2. In a situation where statutory powers confer an exceptionally wide discretion on the Commissioners, a defendant should necessarily have the right of access to a court with full jurisdiction to examine all contentious issues. However, this requirement is not, in my opinion, satisfied.

Judicial review seems to be the only judicial remedy open to the applicant in the present case; however, for the reasons developed below, it is not a sufficient remedy. The condemnation proceedings before a court are not adequate in a case where the purpose of the two decisions taken by the Commissioners was not to forfeit the aircraft but to oblige the applicant to pay a "penalty".

3. The intention of the Commissioners was not to deprive the applicant of possession of the aircraft but to limit the use of it until the "penalty" was paid. In this respect the case falls under the second paragraph of Article 1 of Protocol No. 1 (P1-1). The justification of an interference presupposes, according to the Court's case-law, inter alia that a fair balance between the interests of the State and those of the individual has been struck in a manner which reflects the principle of proportionality, and also that the applicant has had a reasonable opportunity of putting his case to the responsible authorities (see the AGOSI v.

the United Kingdom judgment of 24 October 1986, Series A no. 108, pp. 18-19, paras. 54-55).

However, there is no indication that the Commissioners had followed the proportionality doctrine in their decision-making process. As to the scope of judicial review, it is clearly stated in the House of Lord's decision in the Brind case (see paragraphs 21 and 46 of the judgment) that the proportionality test applied by this Court could not be applied by the courts of the United Kingdom since the Convention has not been incorporated into domestic law.

4. With regard to Article 6 (art. 6) of the Convention, my conclusion is that the availability of judicial review does not satisfy the requirements of Article 6 (art. 6) concerning the right of access to a court. Judicial review under English law involves merely a supervisory, as opposed to an appellate, jurisdiction. In addition, taking into account the limited grounds on which judicial review can be sought (see paragraph 20 of the judgment) it cannot be considered to be an effective judicial remedy in the circumstances of this case for the purposes of Article 6 (art. 6).

5. For these reasons I conclude that both Article 1 of Protocol No. 1 and Article 6 (P1-1, art. 6) of the Convention have been violated.

CASE OF

ARCURI AND OTHERS v. ITALY

(Application no. 52024/99)

DECISION

5 July 2001

THE FACTS

The applicants, Rocco Arcuri, Anna Maria Mussurici, Mirko Arcuri and Greta Guarino, are Italian nationals, who were born in 1933, 1951, 1974 and 1970 respectively. They live in Turin. The third applicant is the son of the first two applicants, who are a married couple. The fourth applicant is the daughter of the second applicant. The applicants were represented before the Court by Mr Barone, a lawyer practising in Milan.

A. The circumstances of the case

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

As the first applicant was suspected of being a member of a criminal organisation involved in drug trafficking, the Turin public prosecutor's office instituted proceedings against him on 23 October 1995 for the application of preventive measures available under Act no. 1423 of 27 December 1956 and Act no. 575 of 31 May 1965, as amended by Act no. 646 of 13 September 1982. The public prosecutor's office also requested the seizure of a number of assets belonging to the first applicant and/or the other applicants.

In an order of 31 October 1995 the President of the division of the Turin District Court specialised in preventive measures ordered the seizure of the assets in question, which included eight vehicles, several plots of land and flats, two private company shares and numerous documents. He noted that the inspections carried out by the national anti-mafia brigade (DIA) showed a discrepancy between the first applicant's financial means and his legal business activities and declared income.

During the proceedings before the special division the first two applicants and numerous witnesses were questioned. Accountants' and financial experts' reports were drawn up and transcripts of certain tapped telephone conversations were filed with the court registry. The court also ordered the production of certain documents relating to other judicial proceedings brought against the first applicant and/or other persons suspected of belonging to mafia-type organisations. All the applicants, represented by a lawyer of their choice, participated in the proceedings for the application of preventive measures.

In an order of 13 June 1997 that was deposited with the registry on 24 July 1997 the division of the Turin Court specialised in preventive measures decided to place the first applicant under police supervision, combined with an order for compulsory residence in the district of Turin for four years. The special division also ordered confiscation, pursuant to section 2(3), third paragraph, of Act no. 575 of 1965, of the applicants' previously seized assets.

The judges of the special division pointed out first of all that between 1959 and 1980 the first applicant had been convicted on a number of occasions of fraud, incitement to prostitution, assault, duress, false imprisonment, gross indecency in a public place, uttering worthless cheques, illegal possession of firearms, fraudulent bankruptcy and criminal association. It also emerged from a number of documents found at the first applicant's house that he was in close contact with persons involved in organised crime. Furthermore, proceedings for usury and mafia-type criminal association were pending against the first applicant. Admittedly, in the criminal proceedings for criminal association the applicant's pre-trial detention had been revoked; however, that fact did not prevent the judges from considering it "reasonably probable" that he was involved in a criminal association, that he lent money at excessive interest rates and that he had made death threats in the event of non-payment. Continued detention of an accused was justified where there was a "very high probability" that they were guilty, whereas the application of preventive measures could be based on a lesser degree of probability.

With regard to the Arcuri family's financial situation, the special division of the court observed that it was difficult to reconstruct the history of the various economic activities carried out by the first applicant because he had not kept official accounts of all his operations. In any event, it was clear from the evidence produced that at least part of the first applicant's considerable fortune had been unlawfully acquired, since it was the proceeds from his offences of fraudulent bankruptcy, uttering worthless cheques, illegal trading in diamonds, and usury. Moreover, the applicants had not supplied proof that the seized assets had been lawfully acquired. Admittedly, part of the assets officially belonged to the second, third and fourth applicants; however, the special division found that the Acuri family's entire fortune had been created by the first applicant, who, being the subject of numerous judicial proceedings, had subsequently considered it preferable to transfer certain assets to the couple's two children for no consideration and to make his wife a partner in his business activities.

The applicants appealed against the order of 13 June 1997.

In an order of 2 February 1998 the Turin Court of Appeal upheld the district court's decision. It observed, *inter alia*, that the special division of the court had found that the first applicant was a danger to society on the basis of statements made in other judicial proceedings by certain *pentiti* of the Mafia, which had been corroborated by substantial evidence and showed that the first applicant had moved in criminal circles at least until the beginning of the 1990s. The transcription of the tapped telephone conversations showed, furthermore,

that the first applicant had severely threatened his debtors. With regard to his submission that his financial means could be explained exclusively by his legal activities as a businessman, the Court of Appeal held that the Acuri family's fortune had been amassed from the proceeds of criminal activities. Furthermore, the lack of accurate documentation made it impossible to assess the real profits which the first applicant had made from certain business transactions. There was also evidence showing that the Acuri family's legal activities had been started up, developed and maintained with the proceeds of criminal offences committed by the first applicant.

The Court of Appeal observed lastly that, according to case-law of the Court of Cassation, assets which were the subject of a preventive measure concerning property should not formally belong to the person deemed to be a danger to society, since the latter could simply use them *de facto* as if he were the owner. In the instant case the first applicant had not maintained that the transfer of certain assets to the third and fourth applicants had made it impossible for him to use them as he wished. With regard to the second applicant, even if it was true that she had been involved in a number of business activities, the first applicant had nonetheless maintained a primordial role in the management and organisation of those activities.

The applicants lodged an appeal on points of law. In a judgment of 3 July 1998 that was deposited with the registry on 12 September 1998 the Court of Cassation dismissed the applicants' appeal, holding that the Turin Court of Appeal had given logical and proper reasons for all the points in dispute between the parties.

B. Relevant domestic law

In accordance with section 2(3) of Act no. 575 of 31 May 1965, during the proceedings for the application of preventive measures against a person suspected of belonging to a mafia-type organisation, "the District Court may issue a reasoned decision, even of its own motion, ordering the seizure of property at the direct or indirect disposal of the person against whom the proceedings have been instituted, when there is sufficient circumstantial evidence, such as a considerable discrepancy between his lifestyle and his apparent or declared income, to show that the property concerned forms the proceeds from unlawful activities or their reinvestment. Together with the implementation of the preventive measure the District Court shall order the confiscation of any of the goods seized in respect of which it has not been shown that they were lawfully acquired. ... The District Court shall revoke the seizure order when the application for preventive measures is dismissed or when it has been shown that the property in question was lawfully acquired."

COMPLAINTS

1. The applicants submitted that the preventive confiscation measure infringed their right to peaceful enjoyment of their possessions, as guaranteed by Article 1 of Protocol No. 1.

2. Relying on Article 6 §§ 1 and 3 of the Convention, the applicants complained of the unfairness of the proceedings for the application of preventive measures.

THE LAW

1. The applicants submitted that the preventive confiscation measure infringed their right to peaceful enjoyment of their possessions, as guaranteed by Article 1 of Protocol No. 1. That Article provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The Court notes that the confiscation at issue undoubtedly constituted interference with the applicants' right to peaceful enjoyment of their possessions (see M. v. Italy, application no. 12386/86, Commission decision of 15 April 1991, Decisions and Reports (DR) 70, p. 59, at p. 99).

The Court goes on to note that the confiscation affected assets which had been deemed by the courts to have been unlawfully acquired and was intended to prevent the first applicant, who, according to the Italian courts, could directly or indirectly dispose of the assets, from using them to make a profit for himself or for the criminal organisation to which he is suspected of belonging, to the detriment of the community.

Accordingly, even though the measure in question led to a deprivation of property, this amounted to control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1, which gives the State the right to adopt "such laws as it deems necessary to control the use of property in accordance with the general interest" (see the Agosi v. the United Kingdom judgment of 24 October 1986, Series A no. 108, p. 17, § 51 et seq., and the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, pp. 29 and 30, §§ 62-63).

With regard to compliance with the conditions of that paragraph, the Court notes at the outset that confiscation of the applicants' assets was ordered pursuant to section 2(3) of the 1965 Act. It was therefore an interference prescribed by law.

The Court notes next that the confiscation complained of sought to prevent the unlawful use, in a way dangerous to society, of possessions whose lawful origin has not been established. It therefore considers that the aim of the resulting interference serves the general interest (see the Raimondo v. Italy judgment of 22 February 1994, Series A no. 281-A, p. 17, § 30, and the Commission decision in the M. v. Italy case cited above, p. 59, at p. 100). It remains to be

determined, nevertheless, whether this interference was proportionate to the legitimate aim pursued.

In this connection the Court points out that the impugned measure forms part of a crime-prevention policy; it considers that in implementing such a policy the legislature must have a wide margin of appreciation both with regard to the existence of a problem affecting the public interest which requires measures of control and the appropriate way to apply such measures.

The Court further observes that in Italy the problem of organised crime has reached a very disturbing level.

The enormous profits made by these organisations from their unlawful activities give them a level of power which places in jeopardy the rule of law within the State. The means adopted to combat this economic power, particularly the confiscation measure complained of, may appear essential for the successful prosecution of the battle against the organisations in question (see the Raimondo judgment cited above, p. 17, § 30, and the Commission decision in the M. v. Italy case cited above, p. 101).

The Court cannot therefore underestimate the specific circumstances which prompted the action taken by the Italian legislature. However, it has a duty to satisfy itself that the rights guaranteed by the Convention are respected in every case.

The Court notes that in this case section 2 (3) of the 1965 Act establishes, where there is "sufficient circumstantial evidence", a presumption that the property of a person suspected of belonging to a criminal organisation represents the proceeds from unlawful activities or has been acquired with those proceeds.

Every legal system recognises presumptions of fact or of law. The Convention obviously does not prohibit such presumptions in principle. However, the applicants' right to peaceful enjoyment of their possessions implies the existence of an effective judicial guarantee. Consequently, the Court must consider whether, having regard to the severity of the applicable measure, the proceedings in the Italian courts afforded the applicants a reasonable opportunity of putting their case to the responsible authorities (see, *mutatis mutandis*, the Agosi judgment cited above, p. 18, § 55).

In this connection the Court notes that the proceedings for the application of preventive measures were conducted in the presence of both parties in three successive courts – the District Court, the Court of Appeal and the Court of Cassation. In particular, the applicants, instructing the lawyer of their choice, were able to raise the objections and adduce the evidence which they considered necessary to protect their interests, which shows that the rights of the defence were respected.

In addition, the Court observes that the Italian courts were debarred from basing their decisions on mere suspicions. They had to establish and assess objectively the facts submitted by the parties and there is nothing in the file which suggests that they assessed the evidence put before them arbitrarily.

On the contrary, the Italian courts based their decision on the evidence adduced against the first applicant, which showed that he was in regular contact with members of criminal organisations and that there was a considerable discrepancy between his financial resources and his income. The domestic courts also carefully analysed the financial situation of the other applicants and the nature of their relationship with the first applicant and concluded that all the confiscated assets could only have been purchased by virtue of the reinvestment of Mr Rocco Acuri's unlawful profits and were *de facto* managed by him, with the official attribution of legal title to the last three applicants being merely a legal dodge designed to circumvent the application of the law to the assets in question (see, *mutatis mutandis*, Autorino v. Italy, application no. 39704/98, Commission decision of 21 May 1998, unreported).

Furthermore, the preventive purpose of confiscation justified its immediate application notwithstanding any appeal (see the Raimondo judgment cited above, p. 17, § 30).

That being the case, having regard to the margin of appreciation enjoyed by States when they "control the use of property in accordance with the general interest", particularly in the context of a crime policy designed to combat major crime, the Court concludes that the interference with the applicant's right to peaceful enjoyment of his possessions was not disproportionate to the legitimate aim pursued (see the Raimondo judgment cited above, p. 17, § 30, and the Commission decision in the M. v. Italy case cited above, p. 102).

It follows that this complaint must be rejected as manifestly ill-founded, in accordance with Article 35 §§ 3 and 4 of the Convention.

2. The applicants complained of the unfairness of the proceedings for application of preventive measures. They relied on Article 6 §§ 1 and 3 of the Convention, the relevant parts of which provide:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> 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."

The Court must first determine whether the provision relied on is applicable in the present case.

The Court reiterates that, according to the case-law of the Convention institutions, the preventive measures prescribed by the Italian Acts of 1956, 1965 and 1982, which do not involve a finding of guilt, but are designed to prevent the commission of offences, are not comparable to a criminal "sanction" (see the Raimondo judgment cited above, p. 20, § 43; the Ciulla v. Italy judgment of 22 February 1989, Series A no. 148, p. 17, § 39; the Guzzardi v. Italy judgment of 6 November 1980, Series A no. 39, p. 37, § 100; and the Commission decision in the M. v. Italy case cited above, p. 59, at pp. 94-98).

Accordingly, the proceedings under those provisions did not involve "the determination ... of a criminal charge" (see the Raimondo judgment cited above, p. 20, § 43, and the Guzzardi judgment cited above, p. 40, § 108). The third paragraph of Article 6, which concerns the rights of persons charged with a criminal offence, does not therefore apply to the instant case.

It remains to be established whether the proceedings brought against the applicants concerned "civil rights and obligations" within the meaning of the first paragraph of Article 6.

The Court observes in this connection that Article 6 applies to any action whose subject matter is "pecuniary" in nature and which is founded on an alleged infringement of rights that were likewise of a pecuniary nature (see the Raimondo judgment cited above, p. 20, § 43, and the Editions Périscope v. France judgment of 26 March 1992, Series A no. 234-B, p. 66, § 40).

That being the case here, Article 6 § 1, under its civil head, is applicable to the proceedings in question.

The applicants alleged that the domestic courts' decisions were based on a distortion of the facts and on errors of law, that they were prevented from proving that their property had been lawfully acquired and that, in any event, the authorities reversed the burden of proof by presuming that the property in question had been unlawfully acquired. That presumption had, they alleged, been based on mere suspicions and not on evidence adduced during the proceedings.

The Court reiterates that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation and assess the facts (see, among many other authorities, the Brualla Gómez de la Torre v. Spain judgment of 19 December 1997, *Reports of Judgments and Decisions* 1997-VIII, p. 2955, § 31, and the Edificaciones March Gallego S.A. v. Spain judgment of 19 February 1998, *Reports* 1998-I, p. 290, § 33). It is not the Court's task to substitute its own assessment of the facts for that of the domestic courts or to give a ruling as to whether certain elements were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among other authorities, the Doorson v. the Netherlands judgment of 26 March 1996, *Reports* 1996-II, p. 470, § 67, and the Van Mechelen and Others v. the Netherlands judgment of 23 April 1997, *Reports* 1997-III, p. 711, § 50).

As the Court has noted above, under Article 1 of Protocol No. 1, the proceedings for the application of preventive measures were conducted in the presence of both parties and with respect for the rights of the defence before three successive courts. Those courts could not base their conclusions on mere suspicions and gave full reasons on all the points at issue, which meant that any risk of arbitrariness was avoided.

It follows that this complaint must be rejected as manifestly ill-founded, in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Erik Fribergh
Registrar

Christos Rozakis
President

CASE OF

BUTLER v. THE UNITED KINGDOM

(*Application no. 41661/98)*

DECISION

27 June 2002

THE FACTS

The applicant is a British national, born in 1956 and living in London, England. He is represented before the Court by Mr Keir Starmer, barrister-at-law, instructed by Messrs Hughmans, Solicitors, London. The respondent Government are represented by their Agent, Mr C. Whomersley, Foreign and Commonwealth Office, London.

A. The circumstances of the case

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

The applicant is a heavy gambler on horses and often held large sums of money in cash for this purpose. Apart from his winnings, the applicant also inherited a large sum in cash from his father in 1990 and in 1992 realised a substantial profit on the sale of a house which he bought and had refurbished.

The applicant states that he has never been convicted of any drugs-related offences and maintains that he was wrongly prosecuted and convicted in relation to the handling of cash stolen from a post office in 1985. He was given a five-year prison sentence and was released in 1988.

In July 1994, and in order to avoid off-course betting duty, the applicant decided to open an account under a pseudonym with a specialist bookmaker who conducted business inside racetracks. The applicant on occasions attended race meetings carrying large sums of money. According to the applicant, in July 1994 he had, mainly through his winnings, over GBP 600,000 available to him for betting.

The applicant also used his bookmaker's account for placing bets over the telephone. Such bets were deemed to be off-course bets and were thus subject to tax. Having ascertained that he could avoid tax on off-course betting by gambling off-shore as a non-resident, the applicant decided to buy property in Spain and contacted a lawyer in Spain to this end.

The applicant arranged a meeting with the lawyer in Spain for 23 September 1996. After the meeting the applicant intended to go to a race meeting in Paris.

Having discovered that his partner's brother, H, was intending to take a holiday in Spain, and being nervous about taking the money himself, the applicant enlisted H's help in taking GBP 240,000 to Spain as a favour. According to the applicant, he wanted to look at properties in southern Spain in the price range GBP 40,000 to GBP 150,000 and required the rest for the race meeting in Paris. The applicant arranged to meet H in Spain.

On 17 June 1996 H, who was driving a hired car, was stopped at Portsmouth by a Customs and Excise Officer. When asked how much cash he was carrying, H replied GBP 500. A subsequent search of the boot of the car revealed GBP 240,000 in a green hold-all. H stated that the sum in question belonged to a friend who was meeting him in Spain.

H was subsequently questioned about the money by Customs and Excise officials. H stated that the money belonged to the applicant, that he was taking it out of the country for the applicant, that the latter wanted to use it to buy an apartment in Spain and that he was travelling to Madrid and Barcelona.

The money seized was sent for forensic testing and the sum of GBP 239,010 was deposited with the Midland Bank on 20 September 1996.

The applicant contacted the Customs and Excise authorities to reclaim the money and attended voluntarily for interview on 4 October 1996 together with his solicitor. On that occasion the applicant was told that he was not under arrest. He answered the questions put to him and gave permission to examine his bank accounts as well as his account with his bookmaker.

An order for the detention of the applicant's money was granted by Portsmouth Magistrates' Court on 19 September 1996 on application of the Customs and Excise authorities pursuant to section 42(2) of the Drug Trafficking Act 1994. A further order was made on 17 October 1996.

In February 1997 the Customs and Excise authorities made an application under section 43(1) of the Drug Trafficking Act 1994 for the forfeiture of GBP 239,010 seized from the applicant on the grounds that its officers believed that the money was directly or indirectly the proceeds of drugs trafficking and/or was intended for use in drug trafficking. On 25 and 26 June 1997 the Portsmouth Magistrates' Court made an order for the confiscation of the sum in question and ordered the applicant to pay the costs of the hearing.

The applicant's appeal was heard before Portsmouth Crown Court on 2 and 3 October 1997. The court upheld the forfeiture order and made an order that the applicant pay a further amount towards costs.

In the applicant's opinion, the Crown Court did not find that he or H were going to use the money to purchase drugs but that it was satisfied, on the civil standard of proof, that some unidentified third party was going to use it for this purpose. The Government draw attention to their view that the Crown Court did find that the cash was intended for use in drug trafficking. According to the Government, the Crown Court noted that the money was contaminated to a limited extent by cannabinoids and that H had with him in the hire car a

plan showing a route through Spain to Malaga. The Government further observe that the cash seized included a large proportion of Scottish notes, which are typically used by drug-traffickers to finance drug deals conducted abroad, and that the south coast of Spain is known to Customs officials as the source of a large number of consignments of drugs destined for the United Kingdom. For the Government, and having regard to the strong circumstantial evidence, the Crown Court found the explanations given by the applicant and H as to why cash was being carried by H to Spain wholly unbelievable. Thus, the Crown Court concluded:

> "We do find it more probable than not that this money was to be used for trafficking."

The applicant observes that the Crown Court would appear not to have commented on precisely who they believed would be responsible for using the money for drug purchase.

The Government also point out that, as regards the applicant's claim that he had over GBP 600,000 available to him for gambling in 1994 (see above), the only documentary evidence produced by him in relation to his finances showed that he had lost approximately GBP 160,000 between 1991 and 1993, a further GBP 500,000 in 1994, and a further GBP 11,000 in 1995. The Government state that the applicant has produced no evidence at all to substantiate his claim that he made substantial winnings on cash bets since 1994. According to the Government, at the time of the forfeiture of his cash the applicant was receiving social security benefits of approximately GBP 47 per week.

B. Relevant domestic law

Section 42(1) of the Drug Trafficking Act 1994 provides as follows:

> "A customs officer or constable may seize and, in accordance with this section, detain any cash which is being imported into or exported from the United Kingdom if –
>
> (a) its amount is not less than the prescribed sum – and
>
> (b) he has reasonable grounds for suspecting that it directly or indirectly represents any person's proceeds of drug trafficking, or is intended by any person for use in drug trafficking."

The term "exported" has an extended meaning and includes cash "being brought to any place in the United Kingdom for the purpose of being exported" (section 48(1)). The prescribed sum referred to in section 42(1)(a) is GBP 10,000.

Section 42(2) of the same Act states:

> "Cash seized by virtue of this section shall not be detained for more than 48 hours unless its continued detention is authorised by an order made by a justice of the peace...; and no such order shall be made unless the justice ... is satisfied that
>
> (a) that there are reasonable grounds for the suspicion mentioned in subsection (1) above; and

> (b) that continued detention of the cash is justified while its origin or derivation is further investigated or consideration is given to the institution (whether in the United Kingdom or elsewhere) of criminal proceedings against any person for an offence with which the cash is connected."

The order cannot endure longer than three months (section 42(3)), but further orders can be made by the court provided the total period of detention does not exceed two years from the date of the first order (section 42(3)). These powers may be used even if no criminal proceedings have been instituted (or even contemplated) against any person for a drug trafficking offence in connection with the money seized.

The person from whom the cash was seized, or any person on whose behalf the cash was being exported or imported, may apply to the magistrates' court for the money to be released on the basis that there are no reasonable grounds for suspecting that it directly or indirectly represents any persons' proceeds of drugs trafficking or is intended by any person for use in drug trafficking (sections 42(6)(2) and (1)). Where an application is made to forfeit the money, the cash seized and detained is not to be released until the relevant proceedings have been concluded (and so overrides the two-year restriction set out in section 42(3)).

Section 43 of the Act provides:

> "(1) A Magistrates' court ... may order the forfeiture of any cash which has been seized under section 42 of this Act if satisfied, on an application made while the cash is detained under that section, that the cash directly or indirectly represents any person's proceeds of drug trafficking, or is intended by any person for use in drug trafficking.
>
> ...
>
> (3) The standard of proof in proceedings on an application under this section shall be that applicable to civil proceedings; and an order may be made under this section whether or not proceedings are brought against any person for an offence with which the cash in question is connected."

Direct evidence is not required to establish that cash seized pursuant to section 42 of the 1994 Act is the proceeds of drug trafficking or is intended for use in drug trafficking. The court may draw inferences from circumstantial evidence, so long as the evidence is sufficient to establish the case to the requisite (civil) standard of proof, namely the balance of probabilities. According to domestic case-law, this is a flexible test which is to be adapted to meet the nature and seriousness of the allegations made (see *Re H* [1996] AC 563, *per* Lord Nicholls).

The legal burden of proof rests on the relevant authorities seeking a detention or forfeiture order.

An appeal against the making of a forfeiture order by a magistrates' court lies to the Crown Court. Appeals to the Crown Court are by way of rehearing. A party to proceedings may apply to a magistrates' court for an order permitting

the use of cash which has been seized and detained to pay for legal representation on appeal before the Crown Court (section 44(4)).

A party to the proceedings who wishes to appeal the decision of the Crown Court to make a forfeiture order may apply to the High Court by way of case stated. The High Court on an appeal by way of case stated may overturn the decision of the Crown Court if it is erroneous in law or in excess of jurisdiction (section 28(1) of the Supreme Court Act 1981). A party to the proceedings may also apply to the High Court by way of judicial review to have the decision of the Crown Court quashed on established public law grounds including error of law, procedural unfairness or irrationality (section 29 of the Supreme Court Act 1981). A further appeal lies (with the permission of the court) from the High Court to the Court of Appeal and then to the House of Lords.

COMPLAINTS

1. The applicant complains under Article 6 § 2 of the Convention that the seizure, detention and forfeiture proceedings under sections 42 and 43 of the Drug Trafficking Act 1994 infringed his right to be presumed innocent since he was compelled to bear the burden of proving beyond reasonable doubt (the criminal standard) that the money at issue was unconnected with drug trafficking, whereas the authorities were only required to prove on a balance of probabilities (the civil standard) that the money taken from him directly or indirectly represented any person's proceeds of drug trafficking or was intended by any person for use in drug trafficking.

In connection with the above submissions, the applicant stresses that the proceedings at issue are criminal in nature and, as such, should attract the safeguards of the criminal process.

2. The applicant further contends that the facts of the case also disclose a breach of Article 1 of Protocol No. 1 to the Convention since he, an innocent party, was deprived of the enjoyment of the money which was forfeited in application of the impugned provisions without the benefit of the guarantees contained in criminal law in respect of the burden and standard of proof and in the absence of any public interest justification.

3. The applicant finally states that he has no effective remedy by which to challenge the forfeiture of his money, in breach of Article 13 of the Convention.

THE LAW

The applicant maintains that the seizure, detention and forfeiture proceedings under sections 42 and 43 of the Drug Trafficking Act 1994 ("the 1994 Act") infringed his right to be presumed innocent, in breach of Article 6 § 2 of the Convention which states:

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

A. The Government's preliminary objection: non-exhaustion of domestic remedies

The Government request the Court to declare the complaint inadmissible on account of the applicant's failure to exhaust domestic remedies. In the Government's submission, if it is the applicant's argument that the burden of proof had been reversed in the Crown Court proceedings, the applicant could have appealed to the High Court by way of case stated on this point. He could also have applied for judicial review. Equally, the applicant could have complained that there was insufficient evidence to allow the court to conclude that the Customs Commissioners had made out their case to the standard of proof required.

The applicant states in reply that the hearing in the Crown Court did not disclose any identifiable error of law which could be challenged by way of an application for case stated or judicial review. He stresses that his complaint is directed at the primary legislation and how its provisions operated to his detriment.

The Court recalls that according to its established case-law the only remedies which Article 35 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied (see, among other authorities, the Vernillo v. France judgement of 20 February 1991, Series A no. 198, pp. 11-12, § 27).

The Court observes that the essence of the applicant's complaint is that the relevant domestic law does not treat forfeiture proceedings as involving the determination of a criminal charge, with the consequences which that entails for the operation of the procedural guarantees contained in Article 6 of the Convention, in particular the right to be presumed innocent. Although the remedies mentioned by the Government may have afforded the applicant the opportunity to contest the decision to forfeit his money on the ground that it was against the weight of the evidence or tainted with illegality, the Court is not persuaded that these remedies would have afforded him any prospects of success. In the first place, it is unlikely that the High Court in a judicial review application or on a case stated would have disturbed the facts as found by the Crown Court or the latter's assessment of the evidence. Secondly, the applicant has stated that the Crown Court proceedings did not disclose any error of law or that the decisions taken were in any way *ultra vires* such as to warrant an application to the High Court by way of judicial review proceedings. Thirdly, and more decisively, the High Court, either in case stated or judicial review proceedings, would not have entertained a challenge by the applicant to the evidentiary scheme of the 1994 Act.

For these reasons, the Court dismisses the Government's preliminary objection.

B. Applicability of Article 6 of the Convention under its criminal heading

The Government state that proceedings under sections 42 and 43 of the 1994 Act are classified as "civil" in domestic law. This classification is confirmed in the case-law of the domestic courts. They submit that regard must also be had in this connection to the following considerations: the provisions do not confer on Customs officers or on any other authority a power of arrest; their application does not necessarily involve any allegation of criminal conduct and is not made ancillary to or dependent on any criminal prosecution or conviction; the courts have no power to impose a fine or a term of imprisonment; a detention or forfeiture order cannot result in any party to the proceedings incurring a criminal record of imprisonment. The Government find support for their view in the Court's judgments in the cases of AGOSI v. the United Kingdom (judgment of 24 October 1986, Series A no. 108) and Air Canada v. the United Kingdom (judgment of 13 July 1995, Series A no. 316)).

The Government stress that no "offence" is charged against a person from whom cash is seized and forfeited and that there is no offence in domestic law of intending to use money for drug trafficking or that a third party was to use it for that purpose on his behalf. The forfeiture order made against the applicant was a preventive measure. There was no finding by the domestic courts that the applicant had committed a criminal offence and a perceived association between cash forfeited and criminal activity is not sufficient to make forfeiture proceedings determinative of a criminal charge. The forfeiture order cannot therefore be considered a penalty or punishment. Moreover, the fact that a costs order was imposed on the applicant cannot be said to amount to a criminal penalty. Costs orders are an integral part of civil proceedings in the United Kingdom and simply require the losing party to pay a proportion of the successful party's costs in bringing legal proceedings.

The applicant does not dispute the Government's argument that forfeiture proceedings are classified as "civil" in domestic law. He draws attention, however, to the fact that the domestic courts have begun of late to treat certain matters, for example an income tax penalty assessment, hitherto classified as civil, as constituting a "criminal charge", even though certain of the considerations mentioned by the Government are lacking. The applicant further considers that the factual circumstances underlying the above-mentioned AGOSI and Air Canada judgments are to be distinguished from his case.

In the applicant's submission, even if the Government are correct in their assertion that a forfeiture order can be made independently of any finding of criminal activity, it must nevertheless be the case that a court when considering whether to make a forfeiture order in the circumstances at issue must effectively be asking itself whether the individual concerned was planning at some future stage to use the funds in question for drug-related activity.

The applicant also disputes the Government's view that a forfeiture order is a preventive and not a punitive measure. He recalls in this connection that the Court in *Phillips v. the United Kingdom* (no. 41087/1998, 5 July 2001 (unreported)) found that the confiscation order in that case was part of the sentencing process and therefore punitive in nature.

The Court notes that criminal charges have never been brought against the applicant, nor against any other party. It is the applicant's contention 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 of the Convention, in particular his right to be presumed innocence.

The Court does not accept that view. In its opinion, the forfeiture order was a preventive measure and cannot 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. It follows that the proceedings which led to the making of the order did not involve "the determination ... of a criminal charge (see the Raimondi v. Italy judgment of 22 February 1994, Series A no. 281-A, p. 20, § 43; and, more recently, *Arcuri and Others v. Italy* (no. 54024/99, inadmissibility decision of 5. July 2001 (unreported)); *Riela v. Italy* (no.52439/99, inadmissibility decision of 4 September 2001 (unreported)). It further observes that the applicant's reliance on the above-mentioned *Phillips* judgment does not improve his argument on the applicability of Article 6 under its criminal head to the forfeiture proceedings. 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. It did not give rise to the determination of a separate or new charge against the applicant. The confiscation order was found by the Court in the *Phillips* case to be analogous to a sentencing procedure (*ibid*. §§ 34 and 39), and, to that extent, attracted the applicability of Article 6. As previously noted, the circumstances of the instant case are different.

It also notes that in its *Phillips* judgment the Court attached weight to the facts that the purpose of the confiscation order in that case was not the conviction or acquittal of the applicant and that the making of the confiscation order had no implications for his criminal record (*ibid*. § 34). For the Court, these are also relevant considerations for concluding that Article 6 under its criminal head does not apply to the forfeiture proceedings in the instant case.

The Court finds further support for this conclusion in the above-mentioned Air Canada and AGOSI judgments. It does not consider it decisive for the outcome of the applicability issue in this case that in the Air Canada case the applicant company had by its negligence exposed itself to the threat of seizure of one of its aircraft or that an offence of drug smuggling had been committed through the use of its aircraft or that, as in the AGOSI case, third parties had been prosecuted and convicted of the criminal offences associated with the property forfeited. The Court in its Air Canada judgment did not attach importance to these considerations, preferring to lay stress on the fact that no criminal

charge was ever brought against the applicant company and that the domestic legal provision under which its aircraft was seized provided a process *in rem* against any vehicle used in smuggling (*ibid*. pp. 19-20, § 52). Similarly, in its AGOSI judgment, the Court considered that the fact that measures consequential upon an act for which third parties were prosecuted affected in an adverse manner the property rights of AGOSI "cannot of itself lead to the conclusion that, during the course of the proceedings complained of, any "criminal charge", for the purposes of Article 6, could be considered as having been brought against the applicant company" (*ibid*. p. 22, § 65).

It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 § 4.

The Court notes that the parties have made observations on compliance with Article 6. It considers that these observations are more appropriately dealt with in the context of the applicant's complaints under Article 1 of Protocol No. 1 and Article 13 of the Convention.

C. Article 1 of Protocol No. 1

The applicant maintains that the forfeiture of his money in breach of his rights under Article 6 infringed his rights under Article 1 of Protocol No. 1 to the Convention, which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The Government state that the interference with the applicant's property right was provided by law, pursued a legitimate aim and struck a fair balance between the general interest and the interest of the applicant. As to the latter factor, the Government note that the applicant was able to challenge in adversarial proceedings the forfeiture order first before Portsmouth Magistrates' Court and then before the Crown Court. For the Government, there can be no breach of the presumption of innocence by applying a standard of proof based on the balance of probabilities, especially as that test is flexible and can be adapted to the circumstances of a given case – even to the point of requiring cogent evidence before finding matters proved on the balance of probabilities. Secondly, the Court's case-law makes it clear that it is permissible to find criminal charges proved by applying presumptions of fact or law, provided those presumptions are kept within reasonable limits. Accordingly, in the Government's view, it must equally be acceptable to depart from the criminal standard of proof by applying

within reasonable limits as in the instant case the flexible balance of probabilities standard, the more so since the proceedings at issue were of a civil nature. In this latter connection, the Government stress that the application of that standard is perfectly consistent with the need to combat drug trafficking and to prevent money being generated as profits from drug trafficking and from being used for the purposes of carrying on drug trafficking.

The applicant considers that the forfeiture of money cannot be justified against an innocent party without the criminal guarantees as to the burden and standard of proof and by evidence which would be inadmissible in criminal proceedings. The applicant contends that the scheme of the 1994 Act is such as to lead to an effective shifting of the burden of proof, in breach of Article 6 § 2. As the proceedings are civil, the Crown does not need to adduce direct evidence of the use of the money. It can rely on circumstantial evidence and oblige the defendant to account for its origin and derivation.

The Court notes that the Government do not dispute that the seizure and forfeiture of the applicant's money amounted to an interference with the peaceful enjoyment of his possessions. It further recalls its established case-law on the structure of Article 1 of Protocol No. 1 and the manner in which the three rules contained in that provision are to be applied (see the above-mentioned AGOSI judgment (p. 17, § 48) and Air Canada judgment (p. 15, §§ 29-30). While noting that the applicant has been permanently deprived of his money in application of the forfeiture order, it considers nonetheless that the impugned interference falls to be considered from the standpoint of 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 so-called "third rule" (see the above-mentioned AGOSI judgment (p. 15, § 51 *et seq*; and, as regards an indeterminate confiscation measure, the above-mentioned *Riela* decision).

As to whether the interference with the applicant's property rights was in accordance with the requirements of Article 1 of Protocol No. 1, the Court notes that the forfeiture at issue was effected pursuant to and in compliance with the provisions of the relevant sections of the 1994 Act. The interference was thus in accordance with the domestic law of the respondent State. The applicant has not contested this.

Nor has the applicant contested the public interest considerations which led to the making of the forfeiture order. For the Court, having regard to the scheme of the 1994 Act, there can be no doubt that the seizure and ultimate forfeiture of the applicant's money conformed to the general interest in combating international drug trafficking.

The Court will next assess whether there was a reasonable relationship of proportionality between the means employed by the authorities in the instant case to secure the general interest of the community in the eradication of drug trafficking and the protection of the applicant's fundamental right to the peaceful enjoyment of his possessions. It observes that in assessing whether a fair balance was struck between these interests due weight must be given to the wide

margin of appreciation which the respondent State enjoys in formulating and implementing policy measures in this area. It is acutely aware of the problems confronting Contracting States in their efforts to combat the harm caused to their societies through the supply of drugs from abroad and has recognised that the administration of severe sanctions to persons involved in drug trafficking including drug couriers is a justified response to this scourge (see the D. v. the United Kingdom of 2 May 1997, *Reports of Judgments and Decisions* 1997-III, p.p. 791-2, § 46).

The Court notes that the powers of the Customs' authorities were confined by the terms of the 1994 Act. They did not have an unfettered discretion to seize and forfeit the applicant's money. The exercise of their powers was subject to judicial supervision, in particular the obligation to satisfy the Magistrates' Court of the soundness of their belief that the applicant's money was connected with the illicit trafficking in drugs. Furthermore, the applicant was able to have a re-hearing of the case against him in his appeal to the Crown Court.

The applicant disputes the fairness of these proceedings given that he, unlike the Customs' authorities, was at all times required to bear the burden of proof. As to this argument, the Court recalls that in criminal proceedings against an accused it is not incompatible with the requirements of a fair trial to shift the burden of proof to the defence (see as regards inferences drawn from an accused's silence, *Condron v. the United Kingdom, (*no. 35718/97, § 56, ECHR 2000-IX); nor is the fairness of a trial vitiated on account of the prosecution's reliance on presumptions of fact or law which operate to the detriment of the accused, provided such presumptions are confined within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence (see the Salabiaku v. France judgment of 7 October 1988, Series A, no. 141-A, p. 16, § 28 *in fine*; the Pham Hoang v. France judgment of 25 September 1992, Series A no. 243, p. 21, § 33). These considerations must *a fortiori* apply to the forfeiture proceedings in the instant case, proceedings which did not involve the determination of a "criminal charge" against the applicant.

It is to be noted that the Customs' authorities had to make out their case for the forfeiture of the applicant's money. To this end, they relied on forensic and circumstantial evidence. The applicant, assisted by counsel, was able to dispute the reliability of this evidence at oral hearings before Portsmouth Magistrates' Court and then before the Crown Court. At no stage was the applicant faced with irrebuttable presumptions of fact or law. It was open to the applicant to adduce documentary and oral evidence in order to satisfy the domestic courts of the legitimacy of the purpose of his visit to Spain, the reasons for taking such a substantial amount of money out of the country in the back of a car as well the source of the money. The Court is satisfied that the domestic courts weighed the evidence before them, assessed it carefully and based the forfeiture order on that evidence. The domestic courts refrained from any automatic reliance on presumptions created in the relevant provisions of the 1994 Act and did not apply them in a manner incompatible with the requirements of a fair hearing.

The domestic courts did not accept the applicant's explanations. It is not for the Court to gainsay that conclusion.

Having regard to these considerations, the Court considers that the manner in which the applicant's money was forfeited did not amount to a disproportionate interference with his property rights or, bearing in mind the respondent State's wide margin of appreciation in this area, a failure to strike a fair balance between respect for his rights under Article 1 of Protocol No. 1 and the general interest of the community.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

D. Article 13 of the Convention

The applicant further complains that he was denied an effective remedy, in breach of Article 13 of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Government contend that the applicant was able to challenge the seizure of his cash before the domestic courts. Had he been successful, the courts had the power to order the release of the cash and its repayment to him together with interest accrued.

The Court has already noted that the proceedings before Portsmouth Magistrates' Court and the Crown Court afforded the applicant ample opportunity to contest the evidence against him and to dispute the making of a forfeiture order. It considers that the manner in which these proceedings was conducted guaranteed the applicant an effective remedy in respect of his complaint under Article 1 of Protocol No. 1.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

Vincent Berger
Registrar

Georg ress
President

CASE OF

C.M. v. FRANCE

(Application no. 28078/95)

DECISION

26 June 2001

THE FACTS

The applicant, C. M., is a French national, born in 1939 and living in Grande Synthe (France). He is represented before the Court by Mr W. Watel, a lawyer practising in Lille.

A. The circumstances of the case

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

The applicant is the owner of a private motor vehicle which he also uses in the course of his professional activities with the permission, granted on 1 October 1991, of the regional director for industry, research and the environment.

On 22 September 1994 the applicant's son, accompanied by a friend, was driving the car when he was stopped for a customs inspection. The customs officers found nineteen grams of heroin, whereupon the applicant's son and his friend admitted that they had been to the Netherlands to acquire drugs for their personal use.

On 23 September 1994 the Lille Criminal Court convicted the applicant's son of drug smuggling and drug use. The Court also ordered that the vehicle used to commit the smuggling offence should be forfeited to the customs authorities. The applicant's son lodged an appeal against the judgment relating solely to the forfeiture of the vehicle.

On 18 January 1995 the Douai Court of Appeal upheld the judgment ordering the forfeiture on the following grounds:

> "The vehicle was lawfully seized under Article 323 of the Customs Code.
>
> Under Article 414 of the Customs Code, any smuggling offence involving prohibited goods results in the forfeiture of the vehicle.
>
> Liability to forfeiture is incurred whenever an offence has been committed (Court of Cassation, Criminal Division – "Cass. Crim.", 1980).
>
> Moreover, it is clear that the vehicle was used to commit the offence.
>
> The case law provides the following clarification of the position:
>
> – The statutory provision requiring the forfeiture of vehicles used for smuggling is general and absolute and makes no exception in respect of vehicles without which it would have been impossible to bring smuggled goods in or out. It suffices that they were used in one way or another. (Cass. Crim. 1956)

– Courts which find that a vehicle was used for smuggling cannot refrain from ordering their forfeiture save where they find extenuating circumstances as provided by Article 369 of the Customs Code, which makes no reference to Article 463 of the former Criminal Code and is not covered by section 323 of Law no. 92-1336 of 16 December 1992.

Accordingly, this court allows the authorities' application and upholds the judgment of the Lille Criminal Court since, in view of the seriousness of the offences of which he is accused, [the applicant's son] is not entitled to plead extenuating circumstances under customs law."

The applicant was not notified of either the judgment of 23 September 1994 or that of 18 January 1995.

In a letter of 30 September 1994 the applicant's lawyer asked the customs authorities to return the applicant's private vehicle to him along with some personal effects (a pair of gloves, a pair of hunting boots, two knives and a pack of cards).

On 28 October 1994 the applicant's lawyer sent a further letter repeating his request and stating that the applicant refused to pay any sum, however small, to recover his vehicle.

In a letter of 18 November 1994 the interregional director of customs stated that the applicant could recover his personal effects, as he had already been told during a telephone conversation on 26 September 1994. Regarding the vehicle, the director informed him that he was "prepared to accept a friendly settlement for the transfer of the vehicle ... in return for payment in cash of FRF 3,000 (three thousand francs)".

B. Relevant domestic law and practice

1. The Customs Code

The relevant provisions of the Customs Code read as follows:

Article 326

"1. When seized goods are not prohibited an offer to release the vehicle from judicial seizure shall be made subject to security from a reliable guarantor or deposit of the value.

2. That offer and the reply thereto shall be recorded in the official report.

3. The vehicle shall be returned without the need for a guarantor or a deposit to any owner acting in good faith who has entered into a haulage, rental or leasing contract with the offender in accordance with the laws and regulations in force and the normal practice of the profession. However, restitution is subject to the reimbursement of any costs incurred by the customs authorities for the holding and safe keeping of the seized vehicle."

Article 357 bis

"District courts shall adjudicate disputes relating to the payment or reimbursement of duties, applications to set aside an order to pay and other customs cases not falling within the jurisdiction of the criminal courts."

Article 376

"1. Seized or forfeited objects may not be claimed by the owners, nor may the value of the vehicle, whether deposited or not, be claimed by creditors, including secured creditors, save through action against the party who committed the customs offence.

2. Once time limits for lodging appeals, third party applications and sales have expired, all actions for restitution and other actions shall be inadmissible."

2. The Code of Judicial Organisation

The relevant provisions of the Code of Judicial Organisation read as follows:

Article R. 321-9

"District Courts shall hear the following cases, subject to appeal:

(9) Disputes relating to refusal to pay customs duties, applications to set aside an order to pay, failure to discharge liabilities imposed by transit bonds and other customs cases; ..."

3. Case-law

Finance Amendment Law no. 81-1179 of 31 December 1981 amended Article 326 of the Customs Code by adding a third paragraph providing for the establishment of an exceptional procedure where owners have acted in good faith. The reform was intended to resolve problems in applying Article 376 § 1 resulting from the increase in vehicle rental and leasing contracts by allowing the situation of various vehicle rental, leasing and public transport or freight companies to be resolved by absolving them from guarantor and deposit requirements as long as there was proof of good faith and a contract had been negotiated.

This statutory system has been progressively supplemented by case-law. The Court of Cassation has clarified that this was the only legal remedy that an owner acting in good faith could use to have his vehicle restored as a civil claim in criminal proceedings against a person who had committed a customs offence would be inadmissible because the loss or damage complained of was not the direct result of the offences at issue (Cass. Crim., 6 March 1989, Bulletin criminel – "Bull. crim." no. 101).

On 12 January 1987 the Criminal Division also established the principle that paragraphs 1 and 3 of Article 326 should be read separately:

"Under Article 326 § 3 of the Customs Code, the vehicle must be returned without the need for a guarantor or a deposit to any owner acting in good faith who has entered into a haulage, rental or leasing contract with the offender in accordance with the laws and regulations in force and the normal practice of the profession, regardless of the nature of the goods transported." (Bull. crim. no. 8).

Furthermore, in a judgment of 9 April 1991 the Court of Cassation established the principle that the district courts had jurisdiction to hear applications

for restitution under Articles 326 and 341 bis-2 of the Customs Code which, when combined with Article 357 of the Code,

> "assign[ed] jurisdiction to rule on the restitution of vehicles seized during these operations to the district court of the place in which the seizure took place. Under these circumstances and provided that the ship-owner was not implicated in the criminal proceedings the impugned judgment rightly upheld the District Court's decision that it had jurisdiction".

In this ruling the Court of Cassation also specified that the provisions of Article 326 applied both to the *seizure* carried out by the customs authorities and to the *forfeiture* ordered by the courts and moreover that the civil courts were under no obligation to defer their decision pending the outcome of the criminal proceedings.

> "Under certain circumstances specified therein, Article 362 § 3 of the Customs Code entitles owners acting in good faith of vehicles seized because they were used for smuggling to have their vehicle returned without the need for a guarantor or a deposit even when a criminal court has ordered their forfeiture. It follows that criminal proceedings during which such orders are issued cannot have any influence on any future decisions in civil proceedings to establish ownership." (Cass. Crim. 9 April 1991, Bull. crim. no. 125; JCP 1991-IV, p. 226).

The jurisdiction of the district courts was reconfirmed in a judgment of 21 February 1995 (Crassat case) in the following terms:

> "District courts hear disputes relating to the payment or reimbursement of duties, applications to set aside an order to pay and other customs cases not falling within the jurisdiction of the criminal courts. Under Articles 356 and 357 of the Customs Code, the criminal courts hear cases relating to petty and lesser indictable customs offences and all customs matters raised as a defence. It follows that the district courts have primary jurisdiction to hear these cases provided that they fall within the jurisdiction of the ordinary courts."

In this judgement, the Criminal Division of the Court of Cassation also extended the scope of Article 326 § 3, taking the view that this provision allowed any vehicle to be returned to owners acting in good faith, without the need for a guarantor or a deposit, even if there was no contract between the owner and the offender who had used the vehicle.

COMPLAINTS

1. The applicant complained under Article 1 of Protocol No. 1 that his vehicle had been seized and then forfeited for offences in which he had not been involved and in the course of proceedings to which he had not been a party.

2. The applicant also complained that he had not been able to take part in the criminal proceedings instituted against his son and, more broadly speaking, that there was no remedy available to him by which he could assert his right to peaceful enjoyment of his possessions. He relied on Articles 6 and 13 of the Convention.

THE LAW

1. The applicant complained that his vehicle had been forfeited for offences in which he had not been involved, in the course of proceedings to which he had not been a party and of which he had not been notified. He considered that the authorities had infringed his right to peaceful enjoyment of his possessions. He relied on Article 1 of Protocol No. 1 which provides:

Article 1 of Protocol No. 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.
>
> 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."

It is not in dispute between the parties that the acts complained of constituted an interference with the applicant's right to the peaceful enjoyment of his possessions. However there was disagreement as to whether there had been deprivation of possessions under the first paragraph or control of the use of property under the second paragraph.

1. The applicable rule

The Government argued that, in view of the Court's findings in the case of Air Canada v. the United Kingdom, the court order imposing forfeiture of the vehicle to customs did not entail a transfer of ownership but constituted control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1 (judgment of 5 May 1995, Series A no. 316-A, pp. 15-16, §§ 33 and 34).

The applicant submitted that he had been conclusively deprived of his property by the forfeiture to the customs authorities ordered by the criminal courts conducting the proceedings against his son. He argued that the demand for him to pay FRF 3,000 to have his property returned to him proved that there had been an actual transfer of ownership.

The Court observes that Article 1 of Protocol No. 1 guarantees in substance the right of property and comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

However, the three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see the AGOSI v. the United Kingdom judgment of 24 October 1986, Series A no. 108, p. 17, § 48, and the Air Canada judgment cited above, p. 15, § 30).

The Court notes that Article 376 of the Customs Code provides that "forfeited objects may not be claimed by the owners". This declaration attests to an actual transfer of ownership – a point conceded by the Government. Under these circumstances the requirement to pay a sum of money to have the possession returned might be regarded as a way for the former owner to repurchase his possession, which would distinguish the current case from the Air Canada case.

However, although the forfeiture of goods does involve a deprivation of possessions, it is not necessarily covered by the second sentence of the first paragraph of Article 1 of Protocol No. 1 (see the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, p. 30, § 63, and the AGOSI judgment cited above, p. 17, § 51).

The Government submitted that there was a remedy enabling a vehicle owner to request the unconditional return of his property.

The applicant denied that he had such a remedy.

It is for the Court therefore to verify that there was such a remedy and, if so, what its consequences were with regard to Article 1 of Protocol No. 1. In the instant case, the Court notes that, although Article 376 of the Customs Code imposes a general prohibition on actions by owners to establish their ownership of seized or forfeited goods even if they had nothing to do with the offence committed, Finance Amendment Law no. 81-1179 of 31 December 1981 amended Article 326 of the Customs Code, adding a third paragraph establishing an exceptional procedure in cases where owners have acted in good faith.

Admittedly, Article 326 seems to subject this procedure to restrictions that may prevent the applicant from taking advantage of it. The first paragraph of Article 326 seems to lay down the principle that restitution is reserved for cases in which the "seized goods are not prohibited". However, in a judgment of 12 January 1987 the Court of Cassation held that vehicles should be returned to any owner acting in good faith "regardless of the nature of the prohibited goods". And yet, both that judgment and the third paragraph of Article 326 expressly refer to the existence of a haulage, rental or leasing contract between the owner and the offender, which was most certainly not the position in the case before the Court. However, the scope of Article 326 § 3 was extended beyond any contract negotiated between the owner and the offender by the Court of Cassation's Crassat judgment of 21 February 1995.

Moreover, the Court cannot accept the applicant's objections that district courts do not have jurisdiction where forfeiture is ordered by a criminal court. Apart from the fact that Articles 321-9 of the Code of Judicial Organisation and 357 bis of the Customs Code give the district courts primary jurisdiction, the Court of Cassation ruled, in a judgment of 9 April 1991, that Article 326 § 3

entitled owners acting in good faith to have their vehicles returned "even when a criminal court has ordered their forfeiture".

In the Court's view it follows that the seizure and subsequent forfeiture of the applicant's vehicle did not entail the conclusive transfer of ownership but a temporary restriction on its use.

In view of the foregoing, the vehicle's forfeiture to the customs authorities and the requirement that a sum of money be paid to secure its return were measures taken under legislation intended to prevent prohibited drugs from being brought into France. As such they constituted a control of the use of property. It is therefore the second paragraph of Article 1 which is applicable in the present case (see the Air Canada judgment cited above, pp. 15-16, §§ 33-34).

2. Compliance with the requirements of the second paragraph

It remains to be decided whether the interference with the applicant's property rights was compatible with the State's right under the second paragraph of Article 1 of Protocol No. 1 "to enforce such laws as it deems necessary to control the use of property in accordance with the general interest".

According to the Court's well-established case-law, the second paragraph of Article 1 must be construed in the light of the principle laid down in the Article's first sentence (see, *inter alia*, the Gasus Dosier– und Fördertechnik GmbH v. the Netherlands judgment of 23 February 1995, Series A no. 306-B, p. 49, § 62, and the Air Canada judgment cited above, pp. 15-16, §§ 33-34). Consequently, any interference must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as a whole, including the second paragraph: there must therefore be a reasonable relationship of proportionality between the means employed and the aim pursued (see the Air Canada v. the United Kingdom judgment cited above, p. 16, § 36).

In this connection, the Government said that the customs authorities had accepted the principle that they would return the vehicle on payment of a relatively small sum of money. They submitted that the lack of compensation and the amount of the payment did not exceed the margin of appreciation granted to States, bearing in mind the seriousness of the offences committed and the direct link between their commission and the use of the applicant's car.

The Government also submitted that Article 326 § 3 of the Customs Code and the relevant case-law afforded the applicant a means of getting the District Court to release the vehicle from seizure and forfeiture. Furthermore, Articles 710 and 711 of the Code of Criminal Procedure entitled the applicant to seek an interlocutory ruling from the criminal court.

In short, the Government submitted that the interference with the applicant's right to peaceful enjoyment of his property had achieved a fair balance.

The applicant maintained that the seizure and forfeiture of an item stolen or borrowed from a third party could not in any way serve as a deterrent to drug trafficking. As for achieving a fair balance, he felt that this implied that depriva-

tion of possessions should be offset by reasonable compensation, which had not been the case in this instance because it was in fact the applicant who had had to indemnify the customs authorities in order to recover his vehicle.

Regarding the remedies he could have used, the applicant pointed out that customs seizures, which were carried out by the customs authorities, had been mixed up with forfeiture, which was ordered by a criminal court. In the applicant's opinion, forfeiture ordered in the final judgment of a criminal court was binding on everyone, including owners acting in good faith, and could not be challenged in the civil courts. Moreover, it was implicit from the wording of Article 326 itself that its three paragraphs were inseparable, which restricted the possibility of goods being returned to cases in which they were not prohibited. For this remedy to be available the owner would have to be informed that his vehicle had been seized. The fact that the courts dealt with such cases very rapidly, ordering forfeiture at an immediate summary trial, prevented owners from availing themselves of any kind of remedy. In particular, the applicant submitted that Articles 710 and 711 of the Code of Criminal Procedure did not empower the courts to rescind a decision ordering "forfeiture" to the customs authorities, as opposed to "seizure" by them.

The applicant concluded from the foregoing that the interference with his right to peaceful enjoyment of his property could not be justified under Article 1 of Protocol No. 1.

The Court notes that the forfeiture of property acquired using the proceeds of illegal activities, in particular drug trafficking, is a necessary and effective means of combating such activities (see the Raimondo v. Italy judgment of 22 February 1994, Series A no. 281-A, p. 17, § 30) and that the same can be said of the forfeiture of property belonging to third parties, since, notwithstanding the fact that the second paragraph of Article 1 says nothing about the subject, the procedures applicable in the instant case afforded the applicant a reasonable opportunity of putting his case to the responsible authorities. In ascertaining whether these conditions were satisfied, a comprehensive view must be taken of the applicable procedures (see the AGOSI judgment cited above, p. 19, § 55).

In the case before the Court, the seizure and subsequent forfeiture were carried out as part of criminal proceedings which had nothing to do with the applicant. Although his son lodged an appeal against his conviction relating solely to operative provisions concerning the seizure of the vehicle, the Court of Appeal's review of the lawfulness of this forfeiture and the grounds for the measure taken could not be binding on the applicant as he had neither been informed about, nor given the right to take part in, the proceedings conducted against his son.

The Court observes however that, when considering which of the rules in Article 1 of Protocol No. 1 was applicable, it found that the applicant could have brought proceedings before the District Court to request the return of his vehicle. The Court noted that the third paragraph of Article 326 of the Customs Code established an exceptional procedure when owners were acting in good faith and that there was no dispute over the applicant's good faith in the present case.

The Court noted that the case-law of the Court of Cassation had provided more details about the scope of this provision, specifying that restitution may be requested by owners acting in good faith even if there was no contract between the owner and the offender and regardless of the nature of the goods transported – namely whether they were prohibited or not.

The Court also observed that the district court of the area in which the seizure took place had special jurisdiction to hear requests for the restitution of objects seized by customs or forfeited by a judicial decision. In so doing it was under no obligation to defer its decision pending the outcome of the criminal proceedings and any forfeiture ordered during the criminal proceedings was not allowed to influence its decision in the civil case.

Consequently, in his capacity as an owner acting in good faith, the applicant had a judicial remedy before a civil court with primary jurisdiction, notwithstanding the criminal proceedings instituted against the offender, under statutory provisions whose apparent restrictions were inapplicable in the instant case in view of the case-law of the Court of Cassation.

The Court finds therefore, without having to examine the other remedies mentioned by the Government, that the judicial review available under the provisions of Article 326 § 3 of the Customs Code satisfies the requirements of the second paragraph of Article 1 of Protocol No. 1.

In view of the foregoing and the States' margin of appreciation in such matters, the Court considers that a fair balance was achieved in the circumstances of the case.

Accordingly, this complaint must be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

2. The applicant complained that he had not been able to take part in the criminal proceedings instituted against his son and, more generally, that there had been no remedy whereby he could assert his right to peaceful enjoyment of his possessions. He relied on Articles 6 and 13 of the Convention, the relevant provisions of which provide:

Article 6 § 1

> "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."

Article 13

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Regarding the alleged infringement of the right to a fair hearing, the Government raised the objection that the application was incompatible with the Convention *ratione materiae* because, despite its severity, forfeiture was not in itself a criminal penalty. As he was a third party to the proceedings conducted against his son, the applicant could not expect his case to be heard by a criminal court especially as liability to forfeiture, a measure which relates to the object

not the person, is incurred automatically whenever an offence has been made out. The Government also pointed out that the applicant's son had raised the question of the lawfulness of the vehicle's seizure before the Douai Appeal Court, which had given due reasons for the refusal to return it.

The Government further submitted that the applicant had failed to exhaust domestic remedies because he had not presented the competent district court with a request for the restitution of his vehicle, in accordance with Articles 321-9 of the Code of Judicial Organisation and 357 of the Customs Code.

Since this remedy existed, the Government maintained that there could have been no breach of Article 13. Moreover, the applicant could have appealed to a higher administrative authority against customs' refusal to return the vehicle and subsequently brought proceedings before the district court or, otherwise, brought an action for damages against his son and the joint perpetrator of the offences resulting in the forfeiture.

The applicant noted that the Government did not dispute that it had been impossible for him to take part in the criminal proceedings. As to the objection that there had been a failure to exhaust domestic remedies, the applicant submitted that the district court was not empowered to rescind the criminal court's decision to forfeit the vehicle.

Regarding the complaint under Article 13, the applicant maintained that he had not had a remedy whereby he could rectify the infringement of his right to peaceful enjoyment of his possessions. In particular, he submitted that an action for damages against the co-principal was not an option because the latter had had nothing to do with the loan of the vehicle to the applicant's son and an action against his son would not have made it possible to remedy the decision to confiscate his property.

The Court observes that in the AGOSI case it held that the domestic court's order that the property in question was to be forfeited was the result of an offence committed by another party and that no criminal charge had been brought against the applicant company in respect of that act. These measures undoubtedly affected the applicant company's property rights but this could not of itself lead to the conclusion that any "criminal charge", for the purposes of Article 6, was brought against the applicant company (judgment cited above, p. 22, §§ 65-66). It came to the same conclusion in the Air Canada case (judgment cited above, p. 20, § 55).

The Court sees no reason to depart from its former position in the instant case and considers therefore that Article 6 of the Convention did not apply to these proceedings in so far as a "criminal charge" was concerned.

Furthermore, since the applicant made no express reference to Article 6 in so far as it related to "his civil rights and obligations", the Court does not deem it necessary to consider this matter of its own motion.

The applicant's final complaint was that there was no remedy under domestic law by which he could assert his right to peaceful enjoyment of his possessions, a complaint that comes under Article 13 of the Convention.

However, bearing in mind the conclusion the Court reached regarding the existence of a judicial remedy satisfying the requirements of the second paragraph of Article 1 of Protocol No. 1, the Court is of the view that the applicant had an effective remedy, within the meaning of Article 13 of the Convention, to have his complaints examined.

It follows that this part of the application must be declared inadmissible, in accordance with Article 35 § 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

S. Dollé
Registrar

W. Fuhrmann
President

CASE OF

DASSA FOUNDATION and Others v. Liechtenstein

(*Application no. 696/05*)

DECISION

10 July 2007

THE FACTS

The first applicant, the Dassa Foundation, and the second applicant, the Lafleur Foundation, are legal entities incorporated under Liechtenstein law in 1996 which have their registered offices in Vaduz. The third applicant, Mr Attilio Pacifico, is an Italian national who was born in 1933 and lives in Monaco. According to the statutes of the first and the second applicant, the third applicant is the sole beneficiary of their assets. The applicants were represented before the Court by Ms Luca Lentini and Mr Giampiero Placidi of Lentini, Placidi & Partners, a law firm practising in Rome.

A. The circumstances of the case

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

1. First set of proceedings

a. The proceedings before the Regional Court

On 6 June 2001 the Regional Court of the Principality of Liechtenstein (*Fürstliches Landgericht*) in Vaduz, in investigation proceedings on suspicion of money laundering against Z. and unknown further perpetrators committed in the 1990s (file no. 14 UR 2001.0030), ordered the seizure for a duration of two years of all assets which the first and second applicants had deposited with the Neue Bank company and prohibited the latter to dispose of these assets pursuant to section 97a of the Code of Criminal Procedure (see 'Relevant domestic and international law' below). It found that the investigations against Z., the former legal representative of the first and second applicants, had revealed that the third applicant had probably bribed several judges in Rome together with another person. The third applicant was suspected of having transferred the proceeds of these offences to the applicant foundations, which were attributable to him, in order to conceal that the money had originated from criminal acts. Therefore, the accounts of the foundations had to be blocked in order to safeguard the subsequent absorption of the profits (*Abschöpfung der Bereicherung*) or the

forfeiture of the assets in accordance with section 97a of the Code of Criminal Procedure.

On 12 May 2003 the Public Prosecutor's Office of the Principality of Liechtenstein requested the Regional Court to extend the seizure of the foundations' assets for at least one year.

On 15 May 2003 the Regional Court, acting in the course of independent objective forfeiture proceedings (*objektives Verfallsverfahren*) under section 356 of the Code of Criminal Procedure (see 'Relevant domestic and international law' below) against the applicant foundations (file no. 14 UR 2002.384), prolonged the seizure of the foundations' assets ordered by it on 6 June 2001 for one year pursuant to section 97a § 4 of the Code of Criminal Procedure.

The Regional Court noted that the third applicant, being the beneficiary of the foundations, had been sentenced by the Milan Criminal Court to eleven years' imprisonment on 29 April 2003 with respect to the assets at issue in the present forfeiture proceedings. This judgment was not final yet. As the present proceedings were complex and involved inter-State relations, it had not yet been possible to terminate the investigations.

b. The proceedings before the Court of Appeal

On 20 May 2003 the Court of Appeal of the Principality of Liechtenstein (*Fürstliches Obergericht*), in the course of the objective forfeiture proceedings concerning the assets of the applicant foundations, endorsed the Regional Court's decision of 15 May 2003, confirming that court's reasoning (section 97a § 4 of the Code of Criminal Procedure).

c. The proceedings before the Supreme Court

On 6 June 2003 the first and the second applicant, represented by counsel, lodged an appeal against the decision of the Regional Court of 15 May 2003 with the Court of Appeal. They argued that the initial seizure of its assets on 6 June 2001 had been ordered by the Regional Court for a period of two years in criminal investigation proceedings on suspicion of money laundering against Z. In its decision of 15 May 2003 the Regional Court had then ordered a prolongation of this seizure. However, this prolongation had been made in different proceedings, namely in the course of objective forfeiture proceedings concerning the foundations' assets, in which there had never been an initial blocking of accounts. Therefore, the prolongation order was unlawful. The criminal proceedings against Z. were terminated by a final judgment so that a continued blocking of accounts in these proceedings was no longer possible.

Moreover, as the Regional Court's order was made in objective forfeiture proceedings it could only be based on section 20b § 2 of the Criminal Code (see 'Relevant domestic and international law' below). However, this provision had entered into force only on 19 December 2000; before that date, there was no le-

gal basis for ordering the forfeiture of the assets in question. The third applicant and others were suspected of having received money for offences committed in the 1990s and of having transferred 18 and 11 million Swiss francs respectively to the account of the applicant foundations in 1996, that is, long before the year 2000. Therefore, applying section 20b § 2 of the Criminal Code in order to prolong the blocking of the foundations' accounts violated the prohibition of retroactive punishment guaranteed by section 61 read in conjunction with section 1 § 2 of the Criminal Code (see 'Relevant domestic and international law' below) and Article 7 of the Convention.

The Court of Appeal transmitted the appeal to the Supreme Court of Liechtenstein (*Fürstlicher Oberster Gerichtshof*).

On 4 September 2003 the Supreme Court of Liechtenstein dismissed the applicant foundations' appeal. Referring to its previous case-law, it found that it had jurisdiction to deal with the appeal. As an exception from the rule laid down in section 238 § 1 of the Code of Criminal Procedure (see 'Relevant domestic and international law' below), which was authorised by that provision, no appeal lay to the Court of Appeal against the Regional Court's decision on the prolongation of the seizure of the assets. Otherwise the Court of Appeal would have to decide twice on the same subject matter following its necessary consent to the prolongation of the seizure. Contrary to the wording of section 97a § 6 of the Code of Criminal Procedure, an appeal lay, however, with the Supreme Court itself instead.

The Supreme Court found that measures pursuant to section 97a of the Code of Criminal Procedure were aimed at preventing persons suspected of a criminal offence from frustrating the absorption of the profits or the forfeiture of the assets obtained as a result thereof while the investigations into the offence were pending. As rightly found by the Regional Court and the Court of Appeal, there was a reasonable suspicion of money laundering. The third applicant, being the sole beneficiary of the foundations, had been convicted at first instance by the Milan Criminal Court of having received the money later transferred to the foundations as commissions for criminal acts. There were, therefore, reasonable grounds for the assumption that the assets seized would later be declared forfeited.

The Supreme Court conceded that the seizure of the foundations' assets had initially been ordered in the criminal proceedings against Z. However, it was lawful to prolong the seizure in the present objective forfeiture proceedings as these were the logical continuation of the said criminal proceedings and as the seizure had been made in the criminal proceedings to make the forfeiture possible.

A declaration of forfeiture at a later date pursuant to section 20b of the Criminal Code, which authorised the forfeiture of assets and entered into force on 19 December 2000, was not excluded by the prohibition of retroactivity. The

forfeiture of assets was not an additional punishment, but an independent pecuniary consequence of the fact that a perpetrator, his legal successor or other beneficiaries, including legal entities, had obtained assets resulting from an unlawful act. It did not require that the perpetrator had acted with criminal responsibility. In case of a refusal of payment, an order of forfeiture was therefore enforced with the ordinary instruments of execution of payment, not by ordering imprisonment for failure to pay a fine.

As the forfeiture of assets pursuant to section 20b of the Criminal Code was thus not an (additional) penalty for an offence, such a measure did not have to be examined in the light of the prohibition of retroactive punishment enshrined in sections 1 and 61 of the Criminal Code. The new provisions on forfeiture of assets were applicable to all assets which were found to be in Liechtenstein at the time the provisions entered into force. They had not therefore become effective retroactively and had not changed retroactively the consequences of a perpetrator's past conduct, but concerned a persistent state of affairs, namely assets being situated within the country.

The Supreme Court further found that sections 1 and 61 of the Criminal Code only played a role in so far as the criminal offence as a result of which the assets in question were obtained was concerned. Proceeds of offences which had not been punishable before the entry into force of section 20b of the Criminal Code were not liable to forfeiture. However, in the present case the offences which were suspected to have generated the assets at issue had been punishable both in Italy and in Liechtenstein at the time they had been committed.

The seizure of the assets was proportionate because the disadvantages suffered by the applicant foundations as a result of the blocking of their accounts were less important than the damage possibly incurred by the victims of the offences if the seizure was not ordered.

d. The proceedings before the Constitutional Court

On 23 September 2003 the first and second applicants lodged a complaint with the Constitutional Court of the Principality of Liechtenstein (*Staatsgerichtshof des Fürstentums Liechtenstein*). They claimed that the principle of *nulla poena sine lege* as guaranteed by Article 33 § 2 of the Constitution of Liechtenstein (see 'Relevant domestic and international law' below) and Article 7 of the Convention had been violated. They argued that the forfeiture of assets authorised by section 20b of the Criminal Code had to be qualified as an additional punishment. The courts had applied that new penal provision, which had entered into force on 19 December 2000, to assets purportedly obtained by criminal offences committed in the 1990s, that is, before that date, when the forfeiture of such assets had not yet been authorised by law.

Moreover, the applicants claimed that their right to a fair trial and to be heard by the judge having jurisdiction over the case as protected by Article 33 § 1 of the Constitution (see 'Relevant domestic and international law' below) and

Article 6 of the Convention had been breached. It had been unlawful and indeed arbitrary to order a prolongation of the seizure of its assets in objective forfeiture proceedings, in which there had not been a seizure yet, the initial seizure having been ordered in criminal proceedings against Z. The Regional Court had therefore not had jurisdiction to order the said prolongation in the objective forfeiture proceedings pending before it. Moreover, the decision on the applicants' appeal against this decision should have been given by the Court of Appeal and not by the Supreme Court.

On 29 June 2004 the Constitutional Court of the Principality of Liechtenstein rejected the foundations' complaint.

It found, firstly, that the prohibition of retroactive punishment laid down in Article 33 § 2 of the Liechtenstein Constitution and Article 7 § 1 of the Convention as well as in sections 1 and 61 of the Criminal Code did not apply to a forfeiture pursuant to section 20b § 2 of the Criminal Code. Referring to the criteria laid down by this Court notably in the case of *Welch v. the United Kingdom* (judgment of 9 February 1995, Series A no. 307, p. 13, § 28) it found that forfeiture pursuant to section 20b § 2 of the Criminal Code was not a "penalty" within the meaning of Article 7 § 1 of the Convention.

It was not a precondition for an order of forfeiture pursuant to that section that the person concerned was convicted of a criminal offence or that criminal proceedings had been instituted against him at all. The assets concerned had to stem from an act punishable at the place of its commission to which Liechtenstein criminal law was not applicable.

The purpose of the new provision on forfeiture was to comply with the obligations arising notably under the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS no. 141; see 'Relevant domestic and international law' below) and to guarantee that crime did not pay off. Forfeiture was not an additional penalty for offences, the penal sanctions for offences, prison sentences and fines, being sufficient. It was only aimed at absorbing the profits made as a result of an offence. It was therefore not necessary that the person concerned acted with criminal responsibility and forfeiture could also be ordered against the legal successors of a perpetrator. Therefore, forfeiture had to be characterised as a civil law consequence of criminal acts. This was confirmed by the fact that in case of a refusal of payment, an order of forfeiture was enforced with the ordinary instruments of execution of payment orders whereas – other than, for example, in the *Welch* case – it was not authorised to order imprisonment for failure to pay a fine.

The objective forfeiture proceedings were separate proceedings to which the procedural rules of the Code of Criminal Procedure applied, but which were independent of the guilt of the person or legal entity owning the assets in question. As to the severity of the measure in question, it had to be noted that the assets forfeited were often only part of the net proceeds of a criminal offence.

Secondly, the Constitutional Court found that the applicants' right to be heard by the judge having jurisdiction over the case under Article 33 § 1 of the Constitution had not been violated. It had been convincing and, in any event, not arbitrary for the Supreme Court to argue that the present objective forfeiture proceedings were the logical continuation of the criminal proceedings against Z. and that it had, therefore, been lawful to order the prolongation of the seizure in the objective forfeiture proceedings. Likewise, having regard to the Supreme Court's reasoning, it had been reasonable and not arbitrary for that court to conclude that an appeal against the decision of the Regional Court to prolong the seizure of the applicants' assets did not lie with the Court of Appeal, but with the Supreme Court itself.

2. Second set of proceedings

a. The proceedings before the Regional Court

On 17 May 2004 the Regional Court of the Principality of Liechtenstein, in the course of the objective forfeiture proceedings against the applicant foundations, prolonged the seizure of the foundations' assets for another year pursuant to section 97a § 4 of the Code of Criminal Procedure (file no. 14 UR 2002.384). Referring to the conviction of the third applicant by the Milan Criminal Court on 29 April 2003, it argued that the assets were suspected of being the pay-back for bribing civil servants. However, the said judgment was not final yet and the investigation proceedings in Liechtenstein depended on the outcome of the proceedings in Italy.

b. The proceedings before the Court of Appeal

On 19 May 2004 the Court of Appeal of the Principality of Liechtenstein, referring to the Regional Court's reasoning and to that of the Supreme Court of Liechtenstein in its decision of 4 September 2003, consented to the Regional Court's decision (section 97a § 4 of the Code of Criminal Procedure).

c. The proceedings before the Supreme Court

On 8 June 2004 the applicant foundations lodged an appeal with the Supreme Court. Disagreeing with the decision given by the Supreme Court of Liechtenstein on 4 September 2003, they reasoned their appeal along the same lines as their appeal of 6 June 2003.

On 23 July 2004 the Supreme Court of Liechtenstein dismissed the foundations' appeal as ill-founded. Referring to its decision given on 4 September 2003, which had meanwhile been confirmed by the Constitutional Court in its decision of 29 June 2004, it found that it had been lawful to order the prolongation of the seizure in the present objective forfeiture proceedings. Moreover, as had been confirmed by the Constitutional Court, the forfeiture of assets pursuant to section 20b of the Criminal Code was not an (additional) penalty for an

offence and therefore did not have to be examined in the light of the prohibition of retroactive punishment. The Supreme Court reiterated that it had repeatedly considered it to be disproportionate to freeze assets of Liechtenstein citizens or legal entities for more than three years without the underlying criminal proceedings being terminated. However, the outcome of the criminal proceedings in Italy prejudged the outcome of the present case and it was likely that a final decision would be given shortly. Therefore, the prolongation of the blocking of the foundations' accounts was still proportionate, even though the objective forfeiture proceedings should be terminated soon.

d. The proceedings before the Constitutional Court

On 12 August 2004 the foundations lodged a complaint with the Constitutional Court. They argued again that the application of section 20b of the Criminal Code had violated the principle of *nulla poena sine lege* as guaranteed by Article 33 § 2 of the Constitution of Liechtenstein and Article 7 of the Convention. Invoking Article 33 of the Liechtenstein Constitution and Article 6 of the Convention, they claimed that their right to a fair trial and to be heard by the judge having jurisdiction over the case had been breached. Moreover, the applicants complained that the Supreme Court of Liechtenstein had failed to give sufficient reasons for its view that it had been lawful to order the prolongation of the seizure in the present objective forfeiture proceedings.

On 30 November 2004 the Constitutional Court dismissed the foundations' complaint as ill-founded. It referred to the grounds given in its decision of 29 June 2004. As regards the foundations' claim that the Supreme Court insufficiently reasoned its decision, the court found that the Supreme Court's reference to the grounds given by the Constitutional Court in its decision of 29 June 2004 did not breach the duty to give sufficient reasons. The latter decision concerned the same questions raised by the same parties so that the reference was clear and comprehensible.

3. Subsequent developments

On 13 March 2007 the applicants informed the Court that the seizure of their assets persisted, without a final judgment on the underlying offences having been given.

B. Relevant domestic and international law

1. Provisions of the Constitution of the Principality of Liechtenstein

Pursuant to Article 33 § 1 of the Constitution of the Principality of Liechtenstein, no one may be removed from the jurisdiction of his lawful judge and extraordinary courts shall not be established.

Article 33 § 2 of the Constitution stipulates that the threat or imposition of penalties must be in accordance with the law.

Article 34 § 1 of the Constitution guarantees the inviolability of private property.

2. Provisions of the Criminal Code

a. Provisions concerning the applicability of criminal provisions

Section 1 of the Criminal Code prohibits punishment without law. Pursuant to section 1 § 1 of the Criminal Code, a penalty or a measure of prevention may only be imposed for an act which was punishable according to law at the time of its commission. Section 1 § 2 of that Code provides that no heavier penalty may be imposed than the one that was applicable at the time the criminal offence was committed. A measure of prevention may only be ordered if, at the time of the commission of the offence, this measure or a comparable penalty or measure of prevention had been provided for by law.

Section 61 of the Criminal Code lays down rules on the temporal applicability of criminal provisions. Criminal laws apply to acts committed after the laws' entry into force. They are applicable to acts committed prior to that date if the laws in force at the time when the offence was committed, having regard to their overall effects, were less favourable to the perpetrator.

b. Provisions on penalties, absorption of profits,
forfeiture and preventive measures

Sections 18 to 31a of the Criminal Code, according to their heading, cover penalties, the absorption of profits, forfeiture and preventive measures. Section 18 of that Code regulates prison sentences, section 19 of the Code provides for fines and sections 20 and 20a of the Code contain rules on the absorption of profits. Sections 21 et seq. provide, in particular, for preventive measures such as the placement in an institution for mentally disturbed law breakers, in a detoxification facility or in an institution for dangerous recidivist offenders.

According to section 20b § 2 of the Criminal Code, assets which were derived from an act liable to punishment shall be declared forfeited if the act from which they originate is punishable according to the laws of the place were it was committed, if Liechtenstein criminal law does not apply to that act and if the act did not constitute a fiscal offence. Pursuant to section 20c § 1 no. 1 of the Criminal Code, forfeiture is excluded in so far as third parties, who did not participate in the offences at issue, have legal claims in relation to the assets in question.

Section 20b § 2 of the Criminal Code was introduced into that Code by the Act on Amendments to the Criminal Code of 25 October 2000, which entered into force on 19 December 2000 (see Liechtenstein Federal Gazette (LGBl) 2000, no. 256, issued on 19 December 2000).

c. Provision on money laundering

Money laundering, that is, in particular, hiding assets originating from a criminal offence or concealing the fact that the assets stem from an offence, is

punishable pursuant to section 165 § 1 of the Criminal Code. However, a person who has been punished for having participated in the offence which generated such assets is not (also) liable to prosecution for money laundering (section 165 § 5 of the Criminal Code).

3. Provisions of the Code of Criminal Procedure

a. Provisions on the seizure of assets

Section 97a § 1 of the Code of Criminal Procedure provides that if there is a suspicion that assets originate from a punishable act and are likely to be declared forfeited (pursuant to section 20b of the Criminal Code) the court, on a motion of the Public Prosecutor's Office, shall order measures aimed at safeguarding their forfeiture if the recovery of the assets is endangered or rendered considerably more difficult otherwise. Such safeguarding measures comprise, *inter alia*, the seizure of assets or a prohibition on their disposal.

Section 97a § 4 of that Code stipulates that the court is obliged to fix a time-limit for the safeguarding measure ordered, which may be extended on request. If two years have passed following the first order without an indictment having been laid or a request for forfeiture having been lodged in separate objective proceedings, further extensions of the time-limit for one year respectively are only permitted with the consent of the Court of Appeal.

The seizure order shall be quashed, in particular, if it can be assumed that the forfeiture will not be ordered or if the time-limit for the order has expired (section 97a § 5 of the Code of Criminal Procedure).

b. Provisions regulating the forfeiture proceedings

Section 356 of the Code of Criminal Procedure regulates the forfeiture proceedings. If there are sufficient grounds for the assumption that the preconditions for forfeiture (section 20b of the Criminal Code) are met and if this cannot be determined in the course of criminal proceedings, the Public Prosecutor shall lodge a separate request for a declaration of forfeiture (§ 1 of section 356). It is the court which would have jurisdiction to adjudicate on the offence due to which the forfeiture order shall be made which shall decide on the request in separate proceedings by a judgment following a public hearing (§ 2 of section 356). Persons who argue to have a claim on the assets liable to forfeiture have the rights of an accused in the forfeiture proceedings (section 354 of the Code of Criminal Procedure).

c. Provisions concerning the right to appeal

Pursuant to Section 97a § 6 of the Code of Criminal Procedure, the Public Prosecutor's Office, the defendant or the persons otherwise affected have the right to lodge an appeal with the Court of Appeal against the order of safeguarding measures or its lifting.

According to section 238 § 1 of the Code of Criminal Procedure all judicial decrees, decisions and orders which are not judgments are subject to appeal to the Court of Appeal on grounds of unlawfulness or disproportionality if there are no exceptions provided for by law.

4. International Treaties

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime signed on 8 November 1990 (ETS no. 141) entered into force for Liechtenstein on 1 March 2001. According to its preamble, the objective of this Convention is to fight effectively against serious crime by depriving criminals of the proceeds from crime and to establish a well-functioning system of international co-operation to attain this aim. Parties undertake in particular to criminalise the laundering of the proceeds from crime and to confiscate such proceeds or property the value of which corresponds to such proceeds.

COMPLAINTS

1. Relying on Article 6 § 1 of the Convention, the applicants claimed that in both sets of the objective forfeiture proceedings their case had not been heard by the judge having jurisdiction. The prolongations of the seizure of their assets in these proceedings had been unlawful and arbitrary. Moreover, their appeal against the Regional Court's decision should have been decided by the Court of Appeal and not by the Supreme Court. They further argued that their trial had been unfair in that they had not been able effectively to challenge the courts' assumption that the third applicant had committed the offence which had been the basis of the seizure.

Furthermore, in the applicants' submission, the restriction for a long period of time on the free exercise of their right to property by the seizure of their assets had been in breach of the presumption of innocence guaranteed by Article 6 § 2 of the Convention.

In respect of the second set of the proceedings alone, the applicants also complained under Article 6 § 1 of the Convention that the duration of these proceedings had exceeded a reasonable time and that the domestic courts, by simply referring to previous decisions, had failed to give sufficient reasons for their decisions.

2. Moreover, the applicants argued that the application to their case of section 20b of the Criminal Code, which had entered into force after the purported commission of the criminal offences in question, had violated the principle of *nulla poena sine lege* as guaranteed by Article 7 § 1 of the Convention.

3. Invoking Article 1 of Protocol No. 1 to the Convention, the applicants further claimed that the prolonged unlawful seizure of all their assets violated their right to property.

THE LAW

A. As to the status of "victim" of the third applicant and the exhaustion of domestic remedies

The Court observes that, unlike the first and the second applicant, the third applicant was not a party to the domestic court proceedings under review in the present application, the seizure orders having been directed against the applicant foundations alone.

The Court notes that the question whether, in these circumstances, the third applicant can claim to be the "victim" of a violation of his Convention rights for the purposes of Article 34 of the Convention due to the decisions taken by the domestic courts is closely linked to the requirement of exhaustion of domestic remedies contained in Article 35 § 1 of the Convention. It recalls that the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case (see *Van Oosterwijck v. Belgium*, judgment of 6 November 1980, Series A no. 40, p. 18, § 35). This means, in particular, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned, but also of the context in which they operate, as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him to exhaust domestic remedies (see, *mutatis mutandis*, *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1211, § 69; *Baumann v. France*, no. 33592/96, § 40, 22 May 2001, and *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, § 37, ECHR 2004-III). In the light of this case-law, the Court has, for instance, considered it sufficient that an association which had been set up for the specific purpose of defending its members' interests before the domestic courts exhausted domestic remedies in order for its members to claim to be "victims" and to have exhausted domestic remedies for the purposes of Article 34 and 35 of the Convention (see *Gorraiz Lizarraga*, cited above, §§ 37-39).

In the present case, the Court observes that according to the statutes of the first and the second applicant, two legal entities, the third applicant is the sole beneficiary of their assets, a fact which was also taken into account by the domestic courts in their reasoning. The seizure orders in the proceedings before the national courts against the first and the second applicant were made because the foundations were suspected of having received money which originated from the third applicant's offences committed in Italy. From a not strictly legal, economic point of view, it was therefore the third applicant's assets which were seized by the national courts and which were at issue in these proceedings through the intermediary of the applicant foundations operating to his benefit. The provisions regulating the objective forfeiture proceedings (see 'Relevant domestic and international law' above) are indeed tailored to take

account of such situations. Whereas these proceedings are directed against the person or legal entity actually owning the assets in question (section 356 of the Code of Criminal Procedure), persons arguing to have a claim on these assets have the rights of an accused in these proceedings (section 354 of the Code of Criminal Procedure).

Having regard to the particular circumstances of the case, the Court therefore considers that the third applicant can claim to be the "victim", within the meaning of Article 34, of the alleged violations of the Convention, and that he exhausted domestic remedies for the purposes of Article 35 § 1 of the Convention.

B. Complaints under Article 6 of the Convention

The applicants complained that in both sets of proceedings their case had not been heard by the competent courts on all levels of jurisdiction. Moreover, they claimed that they had not had an opportunity effectively to challenge the courts' assumption that the third applicant had committed a criminal offence. They also considered the prolonged seizure of their assets to have breached the presumption of innocence. In respect of the second set of proceedings alone, they argued that these had lasted unreasonably long and that the courts had failed to give sufficient reasons for their decisions.

The applicants invoked Article 6 of the Convention, which, in so far as relevant, reads:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time by [a] ... tribunal established by law. ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The Court must first determine whether or not Article 6 of the Convention is applicable to the seizure orders at issue. In order for an individual to be entitled to the guarantees laid down in that provision, the proceedings must concern "the determination" of either his civil rights and obligations or of any criminal charge against him.

According to the Court's case-law on the applicability of Article 6 under its civil head, proceedings before the domestic courts amount to "the determination" of an applicant's civil rights and obligations if there is a real "dispute" ("*contestation*") over these rights and obligations. The result of the proceedings in question must thus be directly decisive for such a right or obligation (see *Fayed v. the United Kingdom*, judgment of 21 September 1994, Series A no. 294-B, pp. 45-46, § 56; *Zlínsat, spol. s r.o. v. Bulgaria*, no. 57785/00, § 72, 15 June 2006).

Therefore, Article 6 does not apply to proceedings in which only interim or provisional measures are taken prior to the decision on the merits, as such proceedings do not, as a rule, affect the merits of the case and thus do not yet involve the determination of civil rights and obligations (see, among many oth-

er authorities, *Kress v. France* (dec.), no. 39594/98, 29 February 2000; *Starikow v. Germany* (dec.), no. 23395/02, 10 April 2003; *Libert v. Belgium* (dec.), no. 44734/98, 8 July 2004; *Dogmoch v. Germany* (dec.), no. 26315/03, ECHR 2006-...). Only exceptionally has the Court considered Article 6 to be applicable to proceedings relating to interim orders. This concerned, in particular, cases in which an interim decision in fact already partially determined the rights of the parties in relation to the final claim (see, in particular, *Markass Car Hire Ltd v. Cyprus* (dec.), no. 51591/99, 23 October 2001, and *Zlínsat*, cited above, § 72) or in which an interim order immediately led to the institution of main proceedings deciding on the dispute in question (see, in particular, *Air Canada v. the United Kingdom*, judgment of 5 May 1995, Series A no. 316-A, p. 21, § 61)In the instant case, the Court observes that the seizure of the foundations' assets pursuant to section 97a § 1 of the Code of Criminal Procedure was a measure aimed at safeguarding their forfeiture at a late date in the main objective forfeiture proceedings, provided that the suspicion that the assets originated from criminal offences proved to be true. Otherwise, the seizure orders would be quashed and the foundations would again be free to dispose of the assets. Neither the applicants nor the State were entitled to use or dispose of the assets at issue prior to the final decision in the main objective forfeiture proceedings. The seizure orders did not entail any determination, not even in part, of the question whether the assets frozen by the orders in fact stemmed from punishable acts and would, as a consequence, be declared forfeited. Therefore, these orders, which were of a purely provisional nature and neither forestalled nor coincided with a final decision in the main proceedings, cannot be considered as entailing "the determination", for the purposes of Article 6 § 1, of the applicants' civil rights and obligations.

It remains to be established whether the seizure proceedings concerned "the determination" of any criminal charge against the applicants instead. When assessing whether a criminal charge has been determined in proceedings before the domestic courts, the Court, similarly to the approach taken with respect to "the determination" of a civil right, has consistently examined whether the proceedings in question involved a finding of guilt or were aimed at an applicant's conviction or acquittal for an offence and whether the measure taken had any implication for the applicant's criminal record (compare *Zlínsat*, cited above, § 72; *Dogmoch*, cited above, and, *mutatis mutandis*, *Phillips v. the United Kingdom*, no. 41087/98, § 34, ECHR 2001-VII).

As shown above, the seizure orders against the applicants in the present case were of a purely provisional, safeguarding nature. According to section 97a § 1 of the Code of Criminal Procedure, such a measure depended on a suspicion that the assets concerned originated from a punishable act. It did not, however, entail any finding of guilt or conviction of the person or legal entity who owned the assets seized. This is illustrated by the fact that in both sets of proceedings, the domestic courts referred to the mere "suspicion" that the third applicant had received the assets in question as commissions for having bribed judges in Italy. Likewise, the courts took account of the third applicant's conviction in Italy

without any own finding of guilt. Nor is there any indication that the seizure orders were reflected in any of the applicants' criminal records. In these circumstances, the seizure orders did not involve "the determination" of any criminal charge for the purposes of Article 6 § 1 either.

The Court concludes that, irrespective of the question whether the seizure orders are to be qualified as concerning the applicants' "civil rights" or a "criminal charge" against them, Article 6 is not applicable to the proceedings at issue for lack of a "determination" of such a right or charge by the seizure orders. This part of the application must therefore be dismissed as incompatible *ratione materiae* with the provisions of the Convention pursuant to Article 35 §§ 3 and 4 of the Convention.

C. Complaint under Article 7 of the Convention

In the applicants' submission, the application to their case of the provisions on forfeiture laid down in section 20b of the Criminal Code, which had entered into force after the purported commission of the criminal offences in question, amounted to the imposition of a retrospective criminal penalty. They relied on Article 7 § 1 of the Convention which provides:

> "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."

The applicants submitted that the applicable provisions on forfeiture had entered into force on 19 December 2000, that is, long after the purported criminal offences had been committed in the 1990s. Seizure and forfeiture of property had to be considered as penal sanctions which as such reduced the value of the assets concerned. This was illustrated by the fact that they were authorised by the Criminal Code and the Code of Criminal Procedure. Moreover, these sanctions could only be ordered in relation to criminal proceedings and could be justified exclusively by the purpose of repressing criminal offences. The aim of these sanctions was to dissuade the commission of offences by ordering the payment of a sum of money, which was penal in nature. The measures were qualified as criminal ones also under Liechtenstein law.

The applicants further argued, having regard to the procedure involved in the implementation of the measures in question, that it was irrelevant that an order to render assets which had been declared forfeited could not be enforced by an order of imprisonment in default. The prohibition to order imprisonment for debt was already laid down in the Convention provisions themselves. The seizure of the applicants' assets clearly had a punitive character as forfeiture constituted a severe interference with their property.

The Court recalls that section 20b of the Criminal Code, which authorises the forfeiture of assets originating from an act liable to punishment according to the laws of a foreign State, entered into force in December 2000, that is, after

the third applicant purportedly committed the offences in question, namely the bribing of judges in Italy, before 1996. The seizure of such assets in order to safeguard their later forfeiture was therefore not yet permitted at the time when the third applicant had assumedly committed the said offences.

The Court notes that in the proceedings here at issue only a seizure of the applicant foundations' assets, that is, an interim – albeit long-lasting – safeguarding measure, has been ordered, but the decision on the actual forfeiture of the assets has not yet been taken. In view of this, it is questionable whether a penalty could already be considered as having been "imposed" within the meaning of Article 7 § 1, second sentence, of the Convention. It is not, however, necessary for the Court to rule on this issue if it shares the view of the Liechtenstein courts that the seizure orders and any subsequent forfeiture did not constitute a "penalty".

Article 7 § 1, second sentence, of the Convention, is only applicable to measures with retrospective effect if they constitute a "penalty" within the meaning of that Article.

The Court reiterates that the concept of "penalty" in Article 7 § 1 is an autonomous one. To render the protection afforded by that 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" within the meaning of this provision (see *Welch v. the United Kingdom*, judgment of 9 February 1995, Series A no. 307-A, p. 13, § 27; *Jamil v. France*, judgment of 8 June 1995, Series A no. 317-B, p. 27, § 30).

The wording of Article 7 § 1, second sentence, indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question was imposed following conviction for a "criminal offence". Further relevant factors to be examined are the characterisation of the measure under domestic law, its nature and purpose, the procedures involved in its making and implementation, and its severity (see *Welch*, cited above, p. 13, § 28; *Adamson v. the United Kingdom* (dec.), no. 42293/98, 26 January 1999; *Van der Velden v. the Netherlands* (dec.), no. 29514/05, ECHR 2006-...).

As regards the connection of the orders of seizure of the applicants' assets with a criminal offence, the Court notes that a seizure under section 97a of the Code of Criminal Procedure may only be made if there is a suspicion that assets originate from an act liable to punishment and will therefore be declared forfeited pursuant to section 20b § 2 of the Criminal Code once it is proved that they are the proceeds of crimes. The seizure orders are therefore linked to and dependent on the commission of a criminal offence.

This link is not diminished by the fact that the order of seizure (and forfeiture) may affect property belonging to third parties other than the offender himself. Indeed, in the present case, it was only the third applicant who was suspected of having received the money later transferred to the first and second applicants as commissions for having bribed Italian judges. The fact that the seizure order may also be made against the legal successors of a perpetrator does not, however, alter the fact that the order is dependent on there having been a

criminal offence. Likewise, the fact that it is not a precondition for the order that the perpetrator, when committing his offence, acted with criminal responsibility, does not call into question the fact that the order is linked to the objective elements of a criminal offence.

Next, as to the characterisation of the impugned measure under domestic law, the Court notes that the Liechtenstein courts were unanimous in their conclusion that seizure (and subsequent forfeiture) did not constitute a penalty within the meaning of Article 33 § 2 of the Constitution and Article 7 § 1 of the Convention. Having regard to the criteria developed in this Court's case-law, they found that the forfeiture of assets was not an additional punishment, but a civil law consequence of the fact that a perpetrator or other beneficiaries had obtained assets originating from an unlawful act. The Court notes in this connection that penalties and forfeiture are considered to be distinct measures according to the Liechtenstein Criminal Code itself. This is illustrated in the heading to and the wording of sections 18 to 31a of the Criminal Code, which lay down different rules for penalties (prison sentences and fines) as opposed to preventive measures, absorption of profits and forfeiture (see 'Relevant domestic and international law' above).

In assessing the nature and purpose of the seizure orders the Court observes that according to the domestic courts, measures pursuant to section 97a of the Code of Criminal Procedure were aimed at preventing persons suspected of a criminal offence from frustrating the forfeiture of the assets obtained as a result thereof. The measures should comply with the obligations under the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime by depriving the beneficiaries of crime from the proceeds thereof. Thus, the seizure (and forfeiture) orders were aimed at guaranteeing that crime did not pay.

The Court observes that, with forfeiture being excluded pursuant to section 20c of the Criminal Code in so far as third parties have legal claims in relation to the assets in question, the seizure orders are aimed, in the first place, at depriving the person concerned of the profits of his crime. They may, however, as is illustrated in the decision of the Supreme Court of 4 September 2003 (*in fine*), also serve to safeguard the enforcement of civil law claims of third persons. There are in fact several elements which make seizure and forfeiture, in the manner in which these measures are regulated under Liechtenstein law, more comparable to a restitution of unjustified enrichment under civil law than to a fine under criminal law. In particular, seizure and forfeiture under Liechtenstein law are limited to assets which originate from a punishable act (see section 20b § 2 of the Criminal Code). If the suspicion that the seized assets stem from a punishable act proves to be true, forfeiture is thus restricted to the actual enrichment of the beneficiary of an offence – a factor which distinguishes the present case from the case of *Welch* (cited above, at pp. 12, 14, §§ 12, 33) in which such a limitation did not exist. Moreover, other than in the *Welch* case (*ibid.*), there are no statutory assumptions under Liechtenstein law

to the effect that property passing through the offender's hand prior to the offence was the fruit of crime unless he could prove otherwise. Likewise, other than in the *Welch* case (*ibid.*) and other than in the case of criminal-law fines, the degree of culpability of the offender is irrelevant for fixing the amount of assets declared forfeited. Furthermore, unlike the confiscation orders at issue in the case of *Welch* (*ibid.*), the forfeiture orders under Liechtenstein law cannot be enforced by imprisonment in default of payment.

Having regard to the procedures involved in the making and implementation of the measure, the Court observes that the seizure orders were made by the criminal courts in the course of investigations relating to objective forfeiture proceedings pursuant to section 356 of the Code of Criminal Procedure on the motion of the Public Prosecutor's Office. As set out above, the orders could not be enforced by imprisonment in default, but only by the ordinary instruments of execution of payment orders.

As to the gravity of the impugned orders, the Court recalls that the severity of the measure at issue is not in itself decisive, since many non-penal measures may have a substantial impact on the person concerned (compare *Welch*, cited above, p. 14, § 32). The Court notes that an order of seizure may affect assets of a considerable value, without there being an upper limit for the amount of assets of which the person concerned can no longer dispose. However, the seized assets may again be disposed of if the suspicion that they originated from an offence proved to be unfounded. Moreover, given that the seizure order, as set out above, is limited to the actual enrichment of the beneficiary of an offence, this does not provide an indication that it forms part of a regime of punishment.

Having regard to all relevant factors for the assessment of the existence of a penalty, the Court concludes that, given in particular the nature of forfeiture under Liechtenstein law which makes it comparable to a civil law restitution of unjustified enrichment, the orders of seizure made against the applicant foundations in view of a subsequent forfeiture of their assets did not amount to a "penalty" within the meaning of Article 7 § 1, second sentence, of the Convention.

It follows that Article 7 is not applicable in the present case. This part of the application must therefore likewise be rejected as incompatible *ratione materiae* with the provisions of the Convention in accordance with Article 35 §§ 3 and 4 of the Convention.

D. Complaint under Article 1 of Protocol No. 1 to the Convention

In the applicants' view, the protracted unlawful seizure of all their assets was also in breach of their right to property as protected by Article 1 of Protocol No. 1 to the Convention, which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The applicants claimed that the prolonged unlawful seizure of their assets had violated their right to property protected by Article 1 of Protocol No. 1 to the Convention. By the prohibition to use their assets, they had suffered considerable financial losses. The courts had failed to strike a fair balance between the public interest in seizing their property and their own interest in using it.

The Court notes that the applicants did not raise this complaint about a breach of their property rights in either of the two sets of proceedings before the domestic courts. In particular, they did not invoke this right before the Constitutional Court of the Principality of Liechtenstein despite the fact that Article 34 § 1 of the Constitution guarantees the inviolability of private property (see 'Relevant domestic and international law' above).

It follows that this part of the application must be dismissed under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court unanimously

Declares the application inadmissible.

Stephen Phillips
Deputy Registrar

Peer Lorenzen
President

CASE OF

GEERINGS v. THE NETHERLANDS

(Application no. 30810/03)

JUDGMENT

1 March 2007

PROCEDURE

1. The case originated in an application (no. 30810/03) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 23 September 2003 by a Netherlands national, Mr Gerardus Antonius Marinus Geerings ("the applicant").

2. The applicant was represented by Ms T. Spronken, a lawyer practising in Maastricht. The Netherlands Government ("the Government") were represented by their Agents, Mr R.A.A. Böcker and Mrs J. Schukking of the Ministry for Foreign Affairs.

3. The applicant alleged that the confiscation order imposed on him infringed his right to be presumed innocent under Article 6 § 2 of the Convention since it was based on a judicial finding that he had derived advantage from offences of which he had been acquitted in the substantive criminal proceedings that had been brought against him.

4. On 5 July 2006 the Court decided to communicate the application to the Government. Under Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

5. The applicant, Gerardus A.M. Geerings, is a Netherlands national who was born in 1977 and lives in Eindhoven.

A. THE CIRCUMSTANCES OF THE CASE

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

On an unspecified date, the applicant was arrested and placed in pre-trial detention on suspicion of involvement – together with others – in various (attempted) thefts of lorries containing merchandise and thefts of merchandise from lorries (*inter alia*, washing machines, laundry dryers and other household appliances, telephones, computer parts, car radios, audiovisual devices and ma-

terials, clothes, bags, shoes, camping and sports equipment) committed between 1 August 1996 and 28 October 1997.

7. On 23 December 1997 the applicant was summoned to appear before the 's-Hertogenbosch Regional Court (*arrondissementsrechtbank*) on 29 January 1998 in order to stand trial on various charges of (attempted) burglary, deliberately handling stolen goods and membership of a criminal organisation. Separate criminal proceedings were brought against a number of co-accused.

8. In its judgment of 20 May 1998 the 's-Hertogenbosch Regional Court convicted the applicant of several counts of participation in (attempted) burglary, deliberately handling stolen goods and membership of a criminal organisation. The Regional Court found it established that the applicant had been involved in the theft of 120 laundry dryers from a lorry and a trailer; the theft of a lorry; the theft of large numbers of telephones, computer parts and car radios from a lorry; the theft of 300 CD auto changers, 62 radio cassette players and a speaker sound system from a truck; the theft of large quantities of, *inter alia*, audio devices, dishwashers, shoes, vacuum cleaners and clothing from lorries and thefts of lorries; the handling of one or more stolen video cameras; the attempted theft of a lorry and the attempted theft of goods from a lorry. It sentenced the applicant to five years' imprisonment less the time spent in pre-trial detention.

9. The applicant lodged an appeal with the 's-Hertogenbosch Court of Appeal (*gerechtshof*). In its judgment of 29 January 1999 the Court of Appeal quashed the judgment of 20 May 1998, convicted the applicant of having participated on 28 or 29 September 1997 in the theft of a lorry and a trailer containing 120 laundry dryers, of having on 25 September 1997 stolen an articulated lorry and a number of printers and of having handled – in the period between 1 August 1996 and 28 October 1997 – a piece of clothing and a video camera in the knowledge that these items had been obtained through crime. It acquitted the applicant of the remainder of the charges, having found that these had not been lawfully and convincingly proved. The Court of Appeal sentenced him to thirty-six months' imprisonment, of which twelve months were suspended for a probationary period of two years. In addition, it declared inadmissible the compensation claim filed by the civil party (*benadeelde partij*). Finding this claim to be too complicated to be dealt with in criminal proceedings, the Court of Appeal decided that it should be brought before a civil court.

10. In the meantime, on 7 January 1999, the public prosecutor had summoned the applicant to appear before the 's-Hertogenbosch Regional Court on 4 February 1999 in order to be heard in connection with the prosecutor's request for an order for the confiscation of an illegally obtained advantage (*vordering tot ontneming van wederrechtelijk verkregen voordeel*) within the meaning of Article 36e of the Criminal Code (*Wetboek van Strafrecht*), which had been assessed by the public prosecutor at a total amount of 147,493 Netherlands guilders (NLG – equivalent to 67,020.16 euros (EUR)).

11. At the hearing held before the Regional Court on 4 February 1999 the prosecutor maintained the request for a confiscation order, arguing that it also

concerned similar offences as referred to in Article 36e § 2 of the Criminal Code and that, although the Court of Appeal had acquitted the applicant of most of the offences he had been charged with, there remained sufficient indications that he had committed them. The applicant argued that a confiscation order could only be imposed in respect of the offences of which he had been found guilty. This would, according to the prosecutor's assessment, result in a confiscation order for an amount of NLG 13,989 (EUR 6,347.93) at most.

12. In its ruling of 18 March 1999 the Regional Court issued a confiscation order for the amount of NLG 13,789, to be replaced, if this sum was not paid or recovered, by 110 days' detention in lieu. It held that the acquittal in the judgment handed down by the Court of Appeal on 29 January 1999, for which no specific reasons were given, could therefore only be understood as meaning that there were no indications that the applicant had committed the offences concerned, let alone that he might have derived any resulting advantage.

13. The applicant, but not the public prosecutor, filed an appeal against this ruling with the 's-Hertogenbosch Court of Appeal. The applicant denied having derived any advantage from the offences of which he had been convicted.

14. In its decision of 30 March 2001, following a hearing held on 15 February 2001, the Court of Appeal quashed the ruling of 18 March 1999 and imposed a confiscation order in the amount of NLG 147,493, to be replaced, if this sum was not paid or recovered, by 490 days' detention in lieu. Its reasoning included the following:

> "[The applicant's acquittal] on appeal of a number of offences [with which he had been charged] does not lead to the conclusion that those offences, in view of their nature, can no longer be regarded as similar offences within the meaning of Article 36e § 2 of the Criminal Code. The relevant applicable statutory provisions do not oppose this in any way. In addition to the condition of similarity, it is only required that there exist sufficient indications that [the applicant] has committed the offences concerned.
>
> The court is therefore of the opinion that it can still consider, in respect of all offences on which the public prosecutor has based the [request for a confiscation order], whether there exist sufficient indications [that the applicant has committed them].
>
> By judgment of 29 January 1999 of the 's-Hertogenbosch Court of Appeal [the applicant] has been convicted of ...
>
> Pursuant to Article 36e of the Criminal Code it must be examined whether, and if so to what extent, the defendant has illegally obtained an advantage – including savings in costs – by means of or from the proceeds of the offences found proved, of similar offences or of other offences in respect of which there exist sufficient indications that they have been committed by the defendant and for which a fifth-category fine may be imposed.
>
> The court finds that [the applicant] has not only illegally obtained an advantage from the above-mentioned offences ... found proved, but has also obtained an advantage from the following similar offences, all set out in the initiatory summons served on [the applicant] ... in respect of which [offences] there are sufficient indications that they have been committed by him.

The amount fixed by the court as the estimated advantage obtained by [the applicant] is set out after each of the offences.

count 2B of the initiatory summons, referred to as case 5: advantage NLG 12,000;

count 3 of the initiatory summons, referred to as case 23: advantage NLG 3,102;

count 4b of the initiatory summons, referred to as case 10: advantage NLG 12,500;

count 4c of the initiatory summons, referred to as case 13: advantage NLG 8,000;

count 4d of the initiatory summons, referred to as case 16: advantage NLG 1,619;

count 4e of the initiatory summons, referred to as case 17: advantage NLG 12,600;

count 4f of the initiatory summons, referred to as case 20: advantage NLG 17,637;

count 4g of the initiatory summons, referred to as case 22: advantage NLG 4,222;

count 4h of the initiatory summons, referred to as case 27: advantage NLG 30,670;

count 4i of the initiatory summons, referred to as case 31: advantage NLG 20,000;

count 4m of the initiatory summons, referred to as case 43: advantage NLG 11,354.

The court will fix the estimated advantage obtained by [the applicant] from the offences found proved, in accordance with the decision of the Regional Court, in the following amounts:

count 1 of the initiatory summons, referred to as case 3: advantage NLG 3,789;

count 4 of the initiatory summons, referred to as case 9: advantage NLG 10,000.

The court therefore fixes the amount of the estimated advantage illegally obtained by [the applicant] at NLG 147,493.

The court derives the assessment of the [applicant's] illegally obtained advantage *inter alia* from a report of 4 September 1998 by the Organised Crime Unit, Financial Desk/BFO of the Criminal Investigation Department of the South-East Brabant Regional Police (reference PL2219/98-050011), in particular as regards the calculation of the proceeds of the stolen goods and the distribution of the proceeds between those concerned.

The means of evidence used by the court are set out in the addendum as referred to in Article 365a and 365b of the Code of Criminal Procedure (*Wetboek van Strafvordering*); this addendum is appended to this ruling. ...

It was argued in the appeal proceedings by and on behalf of the [applicant] that he had never received pecuniary remuneration for his part in the offences in which he was involved. The court rejects this argument, since the court has become convinced, on the grounds of the evidence cited above, that the [applicant] participated in a group of persons who were systematically involved in a very lucrative manner in the theft of costly goods from lorries, and that it is wholly implausible that the [applicant] should not have obtained his share of the proceeds of those goods that, according to the cited means of evidence, have often demonstrably been sold for good money..."

15. In relevant part, the police report of 4 September 1998, as appended to this ruling, reads as follows:

"**Determination of the illegally obtained benefit:**

A. Where amounts of money received are known

The starting point in determining the amount of an illegally obtained advantage under Article 36e of the Criminal Code is the advantage actually obtained by the suspected/convicted person.

In several of the incidents investigated, the amount of money that was paid by the receivers of stolen goods to the thieves and/or other receivers of stolen goods for the goods stolen appears from recorded intercepted conversations and/or statements.

These amounts have been ascribed, as illegally obtained benefit, to the perpetrator(s) and, where appropriate, divided evenly among the persons concerned.

Relevant costs incurred by the suspect(s) have been taken into account.

B. Where amounts of money received are not specifiable

The following is apparent from the criminal investigation.

It appears from the appended intercepted conversation (appendix 3) that the ... receiver of stolen goods F.T. paid 25% of the wholesale trade value to the thieves....

It appears from the appended intercepted conversation (appendix 4) that a receiver of stolen goods (E.V.), when calculating in accordance with normal practice, reckons one-fifth. This presumably means 1/5 of the retail price ... Where there is no specific information about the amounts of money received by the thieves and/or receivers of stolen goods, the illegally obtained benefit was assessed on the basis of the wholesale purchase value, excluding VAT (value-added tax), of the stolen goods.

Calculation in respect of the thieves

With regard to incidents where the amount paid by the receivers of stolen goods to the thieves does not appear from the investigation, it has been assumed that an amount of 25% of the wholesale purchase value, excluding VAT, of the goods stolen was paid to the thieves.

Applying this estimate results in a lower amount for illegally obtained benefit than an estimate based on 25% of the wholesale trade value or 20% of the retail price as the case may be. This is to the advantage of the suspect(s)."

16. In respect of each of the counts 2B, 3, 4b-i and 4m, as set out in the initiatory summons issued in the applicant's case, the report of 4 September 1998 – in so far as it was used in evidence by the Court of Appeal in the confiscation proceedings – contains a statement that, in the substantive criminal proceedings at first instance, the applicant was convicted of the charge concerned. It further appears from this report that, in respect of each of these counts, the estimate of the illegally obtained advantage was mainly based on the contents of intercepted telephone conversations in which the participants (thieves and handlers of stolen goods) discussed money matters in relation to stolen goods, the presence of some of the stolen goods in the homes of a number of perpetrators, and the wholesale purchase value of the stolen goods.

17. The applicant lodged an appeal in cassation with the Supreme Court (*Hoge Raad*) against the ruling of 30 March 2001, complaining *inter alia* that the imposition of a confiscation order in respect of offences of which he had been acquitted violated his right to be presumed innocent as guaranteed by Article 6 § 2 of the Convention.

18. In his advisory opinion, the Procurator General at the Supreme Court considered – on the basis of the Court's considerations in its judgment in the case of *Phillips v. the United Kingdom* (no. 41087/98, §§ 31-33 and 35, ECHR 2001-VII) – that the scope of Article 6 § 2 of the Convention generally did not extend to confiscation proceedings, but that this did not affect the obligation to verify whether it followed from the particular circumstances of the applicant's case that an issue under Article 6 § 2 arose nevertheless. On this point, the Procurator General considered, on the basis of an extensive analysis of the Court's case-law under Article 6 § 2, that the question arose whether the conclusion of the Court of Appeal that there were sufficient indications that the applicant had committed offences similar to those of which he had been convicted entailed a finding of "guilt", taking into account that the applicant had been acquitted of those similar offences.

19. The Procurator General observed that the Court of Appeal had found that, despite the acquittal, there were sufficient indications that the offences of which the applicant had been acquitted had been committed by him. In his opinion, this was incompatible with the general rule – reaffirmed by the Court in its judgment in the case of *Asan Rushiti v. Austria* (no. 28389/95, § 31, 21 March 2000) – that following a final acquittal, even the voicing of suspicions regarding an accused's innocence was impermissible and incompatible with Article 6 § 2. Furthermore, the Court of Appeal had based its finding in the confiscation proceedings on evidence apparently insufficient for a criminal conviction and this had resulted in a decision imposed on the applicant of such severity that it should be regarded as a "penalty" within the meaning of Article 7 § 1 of the Convention. Further taking into account that the Court of Appeal had also based its finding that there were sufficient indications that similar offences had been committed by the applicant on a convicting, yet subsequently quashed, judgment given by the Regional Court, the Procurator General was of the opinion that the conclusion that Article 6 § 2 had been violated was unavoidable. In his opinion, the possibility under Article 36e § 2 of the Criminal Code to impose a confiscation order was limited to offences not included in a charge brought, such as offences appended to the summons for the court's information (*ad informandum gevoegde feiten*) or other offences that were apparent from the case file (*andere feiten die blijken uit het proces-verbaal*), as mentioned in the Explanatory Memorandum in respect of Article 36e § 2 of the Criminal Code. Consequently, he advised the Supreme Court to accept the applicant's complaint under Article 6 § 2, to quash the decision of 30 March 2001 and to remit the case to a different Court of Appeal for a fresh determination of the applicant's appeal.

20. On 1 April 2003 the Supreme Court rejected the applicant's appeal in cassation. It held, in so far as relevant, as follows:

"3.3. In its ruling of 22 May 2001, NJ [*Nederlandse Jurisprudentie* – Netherlands Law Reports] 2001, no. 575, the Supreme Court held as follows:

– The provisions of Article 36e of the Criminal Code and [Articles 551b – 511i] of the Code of Criminal Procedure concern the imposition of a measure on the person convicted of a punishable offence, namely the obligation to pay a sum of money to the State for the purposes of confiscating an illegally obtained advantage. This does not constitute a penalty, but a measure (*maatregel*) aimed at depriving the person of the illegally obtained advantage. The fact that the imposition of that measure has been given a place in a criminal procedure does not alter its particular character.

– That particular character is also expressed in the requirements set for imposing it. These requirements are less strict than those that must be met for imposing a [criminal-law] penalty. Thus, the rules of evidence applicable in criminal proceedings do not apply in their entirety. Consequently, offences included in a criminal charge that have resulted in an acquittal can still form the basis for the imposition of a (confiscation) measure. Also in such a case, the court will have to determine either that there exist sufficient indications that a similar offence or similar offences, referred to in Article 36e § 2 of the Criminal Code for which a fine of the fifth category may be imposed, has/have been committed by the person concerned, or that it is plausible that the other similar offences, referred to in Article 36e § 3 of the Criminal Code, have in some way resulted in the illegal obtaining of an advantage by the person concerned. Such a determination is preceded by the procedure regulated in Articles 511b *et seq.* of the Code of Criminal Procedure. This serves as a guarantee that the court which must determine a request for a confiscation order filed by the prosecution department will only do so after it has examined whether, and has found that, the statutory conditions, including whether there are indications within the meaning of the second paragraph [of Article 36e] or whether there is plausibility within the meaning of the third paragraph [of Article 36e], have been met.– It follows from the above that the circumstance that the suspect has been acquitted of specific offences does not automatically constitute an obstacle to treating those offences, in the context of the confiscation procedure, as 'similar offences' or 'offences for which a fifth-category fine may be imposed' as referred to in Article 36e § 2 of the Criminal Code.

3.4. The Supreme Court would add that this is not incompatible with Article 6 § 2 of the Convention since the procedure under Articles 511b et seq. of the Code of Criminal Procedure provides the person concerned with the opportunity to defend himself, including the possibility to argue that insufficient indications exist that the similar offence or similar offences for which a fifth-category fine may be imposed, as meant in Article 36e § 2 of the Criminal Code, has/have been committed by [him], or that it is not plausible that the other punishable offences, within the meaning of Article 36e § 3 of the Criminal Code, have resulted in the illegal obtaining of an advantage by [him], and why this is so. The fact that the procedure following a ... [request for a confiscation order] must be regarded as a separate part or a continuation of the same [set of] criminal prosecution [proceedings] that can lead to conviction and sentence (see *Hoge Raad*, 5 December 1995; NJ 1996; no. 411) does not necessitate any different finding.

3.5. Given that it has not been argued, nor is it apparent, that the opportunity referred to in [the above paragraph] 3.4. has not been provided in the instant case, the decision of the Court of Appeal does not disclose an incorrect interpretation of the law. In view of the events of the appeal hearing, as recorded, that decision has been sufficiently reasoned."

This decision was published in the Netherlands Law Reports 2003, no. 497.

21. In 2004 the applicant agreed with the Central Judicial Collection Office (*Centraal Justitiëel Incasso Bureau*) that he would pay EUR 10,000 at once and the remainder in monthly instalments of EUR 150.

B. RELEVANT DOMESTIC LAW AND PRACTICE

22. Article 36e of the Criminal Code (*Wetboek van Strafrecht*) provides:

"1. Upon the application of the Public Prosecutions Department, any person who has been convicted of a criminal offence may be ordered in a separate judicial decision to pay a sum of money to the State so as to deprive him of any illegally obtained advantage.

2. Such an order may be imposed on a person as referred to in paragraph 1 who has obtained an advantage by means of or from the proceeds of the criminal offence in question or similar offences or offences for which a fifth-category fine may be imposed, in connection with which there exist sufficient indications that they were committed by him.

3. Upon the application of the Public Prosecutions Department, any person who has been found guilty of an indictable offence for which a fifth-category fine may be imposed and against whom, in connection with his being suspected of that offence, a criminal financial investigation (*strafrechtelijk financieel onderzoek*) has been instituted, may be ordered in a separate judicial decision to pay a sum of money to the State in order to deprive him of any illegally obtained advantage if, having regard to that investigation, it is likely that other criminal offences have led in whatever way to the convicted person obtaining an illegal advantage.

4. The judge shall determine the amount which the illegally obtained advantage is estimated to represent. The advantage shall be taken to include cost savings. The value of goods which the court deems to form part of the illegally obtained advantage may be estimated to be their market value at the time the decision is taken or may be estimated by reference to the yield to be obtained through public auction if the amount is to be recovered. The court may set the amount to be paid at less than the estimated advantage.

5. The expression 'goods' shall be taken to mean all objects and property rights.

6. In determining the amount which the illegally obtained advantage is estimated to represent, legal claims from disadvantaged third parties awarded by a court shall be deducted.

7. In imposing the order, account shall be taken of orders to pay a sum of money by way of deprivation of illegally obtained advantage imposed under previous decisions."

23. The possibility of depriving a person of proceeds of crime was introduced in 1983 by the Financial Penalties Act (*Wet Vermogenssancties*). On

1 March 1993, the Act of 10 December 1992 on the extension of the possibilities of applying the measure of deprivation of illegally obtained advantage and other financial penalties (*Wet tot verruiming van de mogelijkheden tot toepassing van de maatregel van ontneming van wederrechtelijk verkregen voordeel en andere vermogenssancties*) entered into force. One of the changes brought about by this Act was that the proceedings concerning the measure of deprivation of an illegally obtained advantage were disconnected from the substantive criminal proceedings, among other reasons in order to prevent situations in which issues concerning the illegally obtained advantage would overshadow and affect the duration of the substantive criminal proceedings.

24. The Act established a specific procedure – separate from the criminal proceedings taken against a suspect – for imposing a confiscation order under Article 36e of the Criminal Code. This specific procedure is set out in Articles 511b-511i of the Code of Criminal Procedure (*Wetboek van Strafvordering*). The legislature's choice in setting it out thus was to demonstrate that it concerned a continuation of the criminal prosecution of the convicted person, the purpose being to determine the sanction to be imposed (*Kamerstukken* (Parliamentary Documents) II, 1989/90 session, 21,504 no. 3, p. 14). The confiscation order procedure is not designed or intended to determine a criminal charge or a criminal penalty, but to detect illegally obtained proceeds, to determine their pecuniary value and, by way of a judicial confiscation order, to deprive the beneficiary of these proceeds. The aim pursued by the possibility of imposing confiscation orders is twofold; in the first place to remedy an unlawful situation and, secondly, to bring about a general crime-prevention effect by rendering crime unattractive on account of an increased risk that proceeds of crime will be confiscated.

25. Pursuant to Article 511b § 1 of the Code of Criminal Procedure, a request for a confiscation order under Article 36e of the Criminal Code must be filed by the public prosecutor with the Regional Court as soon as possible and not later than two years after a conviction has been handed down in the substantive criminal proceedings by the first-instance trial court. It is not required that, when such a request is filed, the conviction should have obtained the force of *res judicata*.

26. Article 311 § 1 of the Code of Criminal Procedure obliges the public prosecutor to indicate no later than when delivering the closing speech (*requisitoir*) before the first-instance trial court in the substantive criminal proceedings whether the prosecution intends to seek a confiscation order in the event of a conviction. The purpose of this obligation is to prevent a situation where a convicted person is confronted, at the latest two years after his conviction by a first-instance court, with a request for a confiscation order, and to make clear that a confiscation order procedure does not constitute a fresh, second prosecution based on the same facts but is to be understood as a separate part of the earlier substantive criminal proceedings and that the prosecution does not stop after the end of the substantive criminal proceedings but is pursued in the confiscation order procedure.

27. The notion of "similar offence or offences" under Article 36e § 2 of the Criminal Code relates to offences of a similar nature to those having formed the object of the criminal proceedings against the accused, such as, for instance, drugs offences, property offences and offences involving forgery and fraud.

28. The rules of evidence that apply in criminal proceedings, as set out in Articles 338-344a of the Code of Criminal Procedure, are not applicable to the confiscation order procedure. In that procedure it is for the public prosecutor to establish a *prima facie* case that there are sufficient indications that the person concerned has committed one or more similar offences within the meaning of Article 36e § 2 of the Criminal Code, thereby generating an illegally obtained advantage. It is for the person concerned to rebut the prosecutor's case. The judge will decide the case on the basis of a balancing of probabilities, comparable to the standard of proof applicable in civil proceedings.

29. The fact that the rules of evidence applicable in criminal proceedings do not apply to the confiscation order procedure implies that – if in criminal proceedings an accused has been partly convicted and partly acquitted of the charges brought against him – in subsequent confiscation order proceedings the judge may impose a confiscation order against the person concerned which is not only based on the offence(s) of which he has been convicted, but also on the similar offence(s) of which he has been acquitted but in respect of which the judge is satisfied, on the balance of probabilities, that there exist sufficient indications that he has nonetheless committed them.

30. Pursuant to Article 511f of the Code of Criminal Procedure, the judge can derive the assessment of the actual amount of an illegally obtained advantage under Article 36e of the Criminal Code only from the contents of "lawful means of evidence" (*wettige bewijsmiddelen*). Article 339 of the Code of Criminal Procedure defines "lawful means of evidence" as the personal observations of the judge, statements of the accused, statements of a witness, statements of an expert, and written materials (such as, for instance, judicial decisions and formal minutes and records). However, unlike the requirement in criminal proceedings that a conviction can only be based on evidence that is corroborated by other evidence, the assessment of the amount of an illegally obtained advantage in confiscation order proceedings can be based on only one evidentiary item, such as, for instance, a formal record containing the statement of the person concerned.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

31. The applicant complained that the confiscation order imposed on him infringed his right to be presumed innocent under Article 6 § 2 of the Convention since it was based on a judicial finding that he had derived advantage from offences of which he had been acquitted in the substantive criminal proceedings that had been brought against him.

Article 6 § 2 of the Convention provides as follows:

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

The Government denied that there had been a breach of this provision.

A. Admissibility

32. The application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Argument before the Court

33. Asked to comment as to whether there had been a violation of Article 6 § 2 in that the confiscation order was, for the most part, imposed on the applicant not following a property analysis indicating that he was in possession of assets of untraceable or unexplainable origin but following an assessment of the likely proceeds of "similar offences" of which he had been acquitted, the Government pointed out that the said confiscation order was based not on Article 36e § 3 of the Criminal Code but on Article 36e §§ 1 and 2. A property analysis had therefore not been required under domestic law.

34. The proceeds covered by the confiscation order had been calculated for each unlawful transaction individually. The applicant had thus had the possibility of explaining, in relation to each transaction, that it was implausible that he had been involved in the offences concerned.

35. The measure in question was not a punitive one; its purpose was not to determine guilt but to recreate the *status quo ante* after criminal offences had been committed. Accordingly, the criteria for it to be applied were less strict than those applicable to criminal proceedings in the strict sense of that expression.

36. Even if the applicant had had to answer any "criminal charge" in connection with the confiscation proceedings, he had had the benefit of the guarantees of Article 6 § 2. In particular, it could not be said that the burden of proof had shifted from the prosecution to the defence.

37. The case was similar, in its essentials, to *Van Offeren v. The Netherlands* (dec.), no. 19581/04, 5 July 2005. In both cases there had been confiscation proceedings following an acquittal; in neither case had the confiscation proceedings involved any determination of guilt; the difference with the present case lay solely in the method used to estimate the benefit unlawfully enjoyed.

38. The applicant pointed to the finding of the 's-Hertogenbosch Court of Appeal that "sufficient indications" existed that he had committed the crimes concerned. This, he argued, constituted a determination of his guilt incompatible with Article 6 § 2 given that he had been acquitted of precisely those crimes.

39. Moreover, there had been no comparative analysis of the applicant's assets over time, no assets of untraceable or unknown origin having been found in his possession.

40. Finally, the applicant noted that although his co-accused had all been convicted of one or more of the offences with which he himself had been charged, no confiscation orders had been sought in relation to the offences of which they had been acquitted.

2. The Court's assessment

41. The Court reiterates that the presumption of innocence, guaranteed by Article 6 § 2, will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law (see *Deweer v. Belgium*, judgment of 27 February 1980, Series A no. 35, § 56; and *Minelli v. Switzerland*, judgment of 25 March 1983, Series A no. 62, § 37). Furthermore, the scope of Article 6 § 2 is not limited to criminal proceedings that are pending (see *Allenet de Ribemont v. France*, judgment of 10 February 1995, Series A no. 308, § 35).

42. In certain instances, the Court has also found this provision to be applicable to judicial decisions taken following an acquittal (see *Sekanina v. Austria*, judgment of 25 August 1993, Series A no. 266-A, § 22; *Asan Rushiti v. Austria*, no. 28389/95, § 27, 21 March 2000; and *Lamanna v. Austria*, no. 28923/95, 10 July 2001). The judgments in those particular cases concerned proceedings which related to such matters as an accused's obligation to bear court costs and prosecution expenses, a claim for reimbursement of his necessary costs, or compensation for detention on remand, and which were found to constitute a consequence and the concomitant of the substantive criminal proceedings.

43. However, whilst it is clear that Article 6 § 2 governs criminal proceedings in their entirety, and not solely the examination of the merits of the charge, the right to be presumed innocent under Article 6 § 2 arises only in connection with the particular offence with which a person has been "charged". Once an accused has properly been proved guilty of that offence, Article 6 § 2 can have no application in relation to allegations made about the accused's character and conduct as part of the sentencing process, unless such accusations are of such a nature and degree as to amount to the bringing of a new "charge" within the autonomous Convention meaning referred to in paragraph 32 above (see *Phillips v. the United Kingdom*, no. 41087/98, § 35, ECHR 2001-VII).

44. The Court has in a number of cases been prepared to treat confiscation proceedings following on from a conviction as part of the sentencing process and therefore as beyond the scope of Article 6 § 2 (see, in particular, *Phillips*, cited above, § 34, and *Van Offeren v. the Netherlands* (dec.), no. 19581/04, 5 July 2005). The features which these cases had in common are that the applicant was convicted of drugs offences; that the applicant continued to be suspected of additional drugs offences; that the applicant demonstrably held assets whose provenance could not be established; that these assets were reasonably presumed to have been obtained through illegal activity; and that the applicant had failed to provide a satisfactory alternative explanation.

45. The present case has additional features which distinguish it from *Phillips* and *Van Offeren*.

46. Firstly, the Court of Appeal found that the applicant had obtained unlawful benefit from the crimes in question although in the present case he was never shown to be in possession of any assets for whose provenance he could not give an adequate explanation. The Court of Appeal reached this finding by accepting a conjectural extrapolation based on a mixture of fact and estimate contained in a police report.

47. The Court considers that "confiscation" following on from a conviction – or, to use the same expression as the Netherlands Criminal Code, "deprivation of illegally obtained advantage" – is a measure (*maatregel*) inappropriate to assets which are not known to have been in the possession of the person affected, the more so if the measure concerned relates to a criminal act of which the person affected has not actually been found guilty. If it is not found beyond a reasonable doubt that the person affected has actually committed the crime, and if it cannot be established as fact that any advantage, illegal or otherwise, was actually obtained, such a measure can only be based on a presumption of guilt. This can hardly be considered compatible with Article 6 § 2 (compare, *mutatis mutandis*, *Salabiaku v. France*, judgment of 7 October 1988, Series A no. 141-A, pp. 15-16, § 28).

48. Secondly, unlike in the *Phillips* and *Van Offeren* cases, the impugned order related to the very crimes of which the applicant had in fact been acquitted.

49. In the *Asan Rushiti* judgment (cited above, § 31), the Court emphasised that Article 6 § 2 embodies a general rule that, following a final acquittal, even the voicing of suspicions regarding an accused's innocence is no longer admissible.

50. The Court of Appeal's finding, however, goes further than the voicing of mere suspicions. It amounts to a determination of the applicant's guilt without the applicant having been "found guilty according to law" (compare *Baars v. the Netherlands*, no. 44320/98, § 31, 28 October 2003).

51. There has accordingly been a violation of Article 6 § 2.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

53. As regards pecuniary damage, the applicant sought his release from the confiscation order. By this he meant that the sums which he had paid under the confiscation order should be repaid to him in so far as they exceeded EUR 6,347.93 – the financial advantage yielded by the crimes of which he had been properly found guilty – and the obligation to pay the remainder should be lifted. In the alternative, he claimed the corresponding sums of money.

54. The applicant claimed EUR 10,000 in respect of non-pecuniary damage. The obligation to pay instalments under the confiscation order had made it very difficult for him to start a new life and he and his family had suffered as a result.

55. The Government contested these claims.

56. The Court agrees that the applicant is entitled to reclaim the amount of the confiscation order in so far as it has been paid and relates to crimes of which he was acquitted. However, since it appears that the applicant has been paying in instalments and that part of the total sum remains unpaid, the Court is not in a position to calculate a precise figure.

B. Costs and expenses

57. The applicant claimed a total of EUR 7,497, including value-added tax, invoiced by his lawyer Mr Lina, who had assisted him in the domestic proceedings and who had acted in an advisory capacity in the proceedings before the Court. In addition, he claimed EUR 6,935.72, including value-added tax, invoiced by his lawyer Ms Spronken, his representative before the Court.

58. The Government considered these claims unjustified. They observed that the applicant had had the benefit of legal aid in the domestic proceedings and in the proceedings before the Court.

C. The Court's decision

59. In the circumstances of the case the Court considers that the question of the application of Article 41 is not ready for decision. It is therefore necessary to reserve the matter in its entirety, due regard being had to the possibility of an agreement between the respondent Government and the applicant (Rule 75 §§ 1 and 4 of the Rules of Court).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 § 2 of the Convention;
3. *Holds* that the question of the application of Article 41 of the Convention is not ready for decision; accordingly,
   (a) *reserves* the said question;
   (b) *invites* the Government and the applicant to submit, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
   (c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

Done in English, and notified in writing on 1 March 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Boštjan M. Zupančič
President

CASE OF

GEERINGS v. THE NETHERLANDS

(Application no. 30810/03)

JUDGMENT

14 February 2008

PROCEDURE

1. The case originated in an application (no. 30810/03) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 23 September 2003 by a Netherlands national, Mr Gerardus Antonius Marinus Geerings ("the applicant").

2. In a judgment delivered on 1 March 2007 ("the principal judgment"), the Court held that there had been a violation of Article 6 § 2 of the Convention in that a confiscation order given on 30 March 2001 amounted to a determination of the applicant's guilt without the applicant having been "found guilty according to law" in so far as it related to assets which were not known to have been in the applicant's possession and to charges of which the applicant had actually been acquitted.

3. Under Article 41 of the Convention the applicant sought the following by way of just satisfaction: in respect of pecuniary damage, a sum of money corresponding to the sums paid and payable under the confiscation order which the Court had found to be in violation of his rights under the Convention; in respect of non-pecuniary damage, 10,000 euros (EUR); plus reimbursement of his costs and expenses.

4. Since the question of the application of Article 41 of the Convention was not ready for decision, the Court reserved it and invited the Government and the applicant to submit, within three months, their written observations on that issue and, in particular, to notify the Court of any agreement they might reach (§ 59 and point 3 of the operative provisions). The three-month time-limit was later extended by the President to enable proceedings relevant to the issues remaining before the Court to be pursued to a conclusion before a domestic court.

5. The applicant and the Government each filed observations.

6. Appended to the applicant's observations was a copy of a decision given on 27 September 2007 by the Court of Appeal (*gerechtshof*) of 's-Hertogenbosch in which that court, in proceedings introduced by the Advocate General (*advocaat-generaal*), reduced the amount of the confiscation order of 30 March 2001

to EUR 6,257.18. In view of that decision the applicant withdrew his claim in respect of pecuniary damage.

7. The Government, in their observations, undertook to repay to the applicant any sum paid in excess of the above amount of EUR 6,257.18, in compliance with the decision of the Court of Appeal.

THE FACTS

8. On 23 October 2003 the Legal Aid Council (*Raad voor Rechtsbijstand*) made a conditional grant of legal aid in respect of the proceedings before the Court. It is in the following terms:

> "The grant of legal aid is conditional. The [Legal Aid Council] will not make any final grant of legal aid if it appears after the termination of legal asistance that [the applicant's] financial means are such that they exceed the limits set by and pursuant to [the Legal Aid Act (*Wet op de rechtsbijstand*)] or the cost of legal assistance is reimbursed by a third party."

9. Section 12 of the Legal Aid Act, as relevant to the questions remaining before the Court, provides:

> "...
>
> 2. No legal aid shall be provided if:
>
> ...
>
> *f.* the legal interest at issue is placed before an international body entrusted with jurisdictional tasks by a treaty (*een bij verdrag met rechtspraak belast internationaal college*) or a comparable international body and that body itself provides a claim in respect of legal assistance (*in een aanspraak op vergoeding van rechtsbijstand voorziet*); ..."

THE LAW

10. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

11. Under this head it only remains for the Court to rule on the applicant's claims in respect of non-pecuniary damage, the matter of pecuniary damage now being resolved.

12. The applicant claimed EUR 10,000 in respect of non-pecuniary damage. The obligation to pay instalments under the confiscation order had made it very difficult for him to start a new life and he and his family had suffered as a result.

13. The Government stated that the applicant had in no way been prevented from working and making a living. In their submission, the Court's jud-

gment offered sufficient satisfaction. In the alternative, they argued that the sum claimed was excessive.

14. The Court considers that the applicant has suffered non-pecuniary damage that cannot be made good solely by the finding of a violation of his rights under the Convention. A monetary award is therefore in order.

15. Making its assessment on an equitable basis, the Court awards the applicant EUR 1,000, plus any tax that may be chargeable on that amount.

B. Costs and expenses

1. Domestic proceedings prior to the application to the Court

16. The applicant submitted an unspecified bill in an amount of EUR 3,675 plus value-added tax (VAT) for legal assistance and office expenses relating to the proceedings before the Netherlands Supreme Court (*Hoge Raad*).

17. The Government argued that the applicant had received legal aid from the domestic authorities for these proceedings.

18. Rule 60 of the Rules of Court, in relevant part, provides as follows:

> "1. An applicant who wishes to obtain an award of just satisfaction under Article 41 of the Convention in the event of the Court finding a violation of his or her Convention rights must make a specific claim to that effect.
>
> 2. The applicant must submit itemised particulars of all claims, together with any relevant supporting documents, within the time-limit fixed for the submission of the applicant's observations on the merits unless the President of the Chamber directs otherwise.
>
> 3. If the applicant fails to comply with the requirements set out in the preceding paragraphs the Chamber may reject the claims in whole or in part. ..."

19. The Court notes that the applicant has failed to submit itemised particulars within the time-limit fixed for that purpose. Having regard to Rule 60 § 3, the Court therefore dismisses the applicant's claim in respect of costs and expenses incurred in the domestic proceedings.

2. Proceedings before the Court

20. The applicant submitted the following claims in respect of costs and expenses incurred in the proceedings in Strasbourg:

(a) For assistance rendered at the merits stage of the proceedings by Ms Spronken, his authorised representative before the Court, a detailed fee note in an amount EUR 5,828.33, plus VAT, for a total of twenty-two hours and twenty-five minutes' work at EUR 260 per hour. This covered the preparation and introduction of the application, the preparation and submission of the applicant's observations, and correspondence until the beginning of December 2005;

(b) For assistance rendered at the merits stage by Mr Lina, who had been the applicant's counsel before the Supreme Court, an unspecified fee note in an amount of EUR 2,500 plus EUR 125 for office expenses, not including VAT;

(c) For the assistance rendered by Ms Spronken after the beginning of December 2005, a detailed fee note in an amount of EUR 1,933.75 for seven hours and five minutes' work at EUR 260 per hour plus 5 % for office expenses, not including VAT. This covered correspondence with the applicant and with Mr Lina from December 2005 onwards and the just-satisfaction proceedings.

21. The Government drew the Court's attention to their award of legal aid intended to cover the Strasbourg proceedings. They also referred to their letter dated 3 February 2004 in the case of *Nakach v. the Netherlands*, (no. 5379/02, 30 June 2005) and to *Visser v. the Netherlands* (no. 26668/95, § 59, 14 February 2002).

22. The Government's letter of 3 February 2004 in the *Nakach* case is not in the file of the present case. It would run counter to principles governing judicial proceedings for the Court to take cognisance of a document submitted by one party of which the other has no knowledge.

23. The next matter to consider is the Government's argument that the applicant enjoyed legal aid under domestic legislation and is therefore not entitled to any award from this Court.

24. In *Visser v. the Netherlands* the Court denied the applicant's claims in respect of costs and expenses incurred at the domestic level, since the applicant either had or could have obtained State-financed legal aid to an adequate amount. The Court has already declined on different grounds to make an award in respect of the costs and expenses claimed in relation to the domestic proceedings. The *Visser* precedent is therefore of no relevance.

25. It should be observed in addition that the grant of legal aid in respect of the proceedings before this Court (see paragraph 8 above) was made dependent on the state of the applicant's financial means at the close of the present proceedings and on the absence of reimbursement from any other quarter. It would also appear that section 12 of the Legal Aid Act, as pertinent to the case (see paragraph 9 above), dispenses the domestic authorities responsible for providing legal aid from so doing if an award in respect of costs and expenses is made by this Court. That being so, and although for present purposes there seems nothing improper in the domestic legal position, the Court cannot consider itself prevented from making such an award.

26. It remains for the Court to make its award.

27. As regards item (b) above, the Court again notes the lack of itemised particulars. This part of the claim is therefore rejected in accordance with Rule 60 § 3.

28. As regards items (a) and (c), the Court accepts that the expenses claimed were actually and necessarily incurred. However, an hourly rate of EUR 260 exceeds what the Court is prepared to consider reasonable as to quantum.

29. Basing its calculations on the twenty-nine and one half hours of work claimed and specified by Ms Spronken, the Court considers it reasonable to award the applicant EUR 5,250 not including VAT for the costs and expenses incurred in the Strasbourg proceedings.

3. Domestic proceedings following the Court's judgment on the merits

30. After the Court delivered its judgment on the merits, the applicant sought permission to suspend the payments which he was at that time still making under the confiscation order. Later on, the Public Prosecution Service brought proceedings in the 's-Hertogenbosch Court of Appeal for the mitigation of its confiscation order.

31. The applicant submitted claims in respect of costs incurred in this connection. These were based on the following:

> (a) an unspecified fee note from Mr Lina in an amount of EUR 2,378.83 for legal assistance "in connection with the suspension of the execution of the judgment of the 's-Hertogenbosch Court of Appeal in connection with the judgment of the European Court of 1 March 2007", plus EUR 118.94 for office expenses, not including VAT;
>
> (b) a fee note with itemised particulars relating to the proceedings for the mitigation of the confiscation order, in an amount of EUR 2,100.85 plus VAT for 10.25 hours of work by his counsel.

32. As regards item (a), the applicant has submitted copies of letters sent by Mr Lina to the Central Judicial Collection Office (*Centraal Justitiëel Incasso Bureau*) dated 26 March and 8 May 2007, the latter's replies to these and to some other letters of which copies have not been submitted, and copies of correspondence between Mr Lina and Ms Spronken. The Court has doubts as to whether attempts to obtain the suspension of payments exacted from the applicant before its judgment became final (on 1 June 2007) can properly be said to have been "necessary", the more so since these sums were ultimately repayable. At all events, the Court fails to see how these few letters could justify the amount claimed. Be that as it may, in the absence of itemised particulars the Court considers it appropriate to reject this head of claim under Rule 60 § 3.

33. As regards item (b), it should be noted that the proceedings for mitigation of the confiscation order were nothing more than the means chosen by the respondent Party to acquit itself of its obligations under Article 46 of the Convention; the Court's principal judgment having become final, there could hardly be any uncertainty as to their outcome. Quite apart from any doubts as to whether it is "reasonable" that the applicant should be required to pay for no fewer than 10.25 hours of work in this connection, the Court takes the view that the resulting expense was not necessarily incurred; it therefore rejects this head of claim also.

4. Conclusion as to costs and expenses

34. The Court's total award under the general head of costs and expenses thus comes to EUR 5,250. To that figure should be added any taxes for which the applicant is liable.

C. Default interest

35. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 1,000 (one thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 5,250 (five thousand two hundred and fifty euros) in respect of costs and expenses;
      (iii) any tax that may be chargeable on the above amounts;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
2. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 14 February 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Boštjan M. Zupančič
President

CASE OF

GRAYSON AND BARNHAM
v. THE UNITED KINGDOM

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

JUDGMENT
23 September 2008

PROCEDURE

1. The case originated in two applications (nos. 19955/05 and 15085/06) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two British nationals, Mark William Grayson and John Barnham, on 20 May 2005 and 10 April 2006 respectively

2. The first applicant, who had been granted legal aid, was represented by Mr Q. Whitaker, a lawyer practising in London and the second applicant was represented by Levys Solicitors of Manchester. The United Kingdom Government ("the Government") were represented by their Agent, Ms K. McCleery, Foreign and Commonwealth Office.

3. Each applicant alleged that, in confiscation proceedings following his conviction for drugs offences, the fact that the legal burden of proof was on him to show that he did not have realisable assets equivalent to the benefit figure offended the basic principles of a fair procedure, in breach of Article 6 of the Convention an4. Each applicant and the Government filed written observations.

5. Under Article 29 § 3 of the Convention, the Chamber decided to examine the merits of each application at the same time as its admissibility. It also decided to join the applications (Rule 42 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The first applicant (Mr Grayson)

6. On 23 January 2002 the applicant and a co-defendant were convicted with intent to supply over 28 kilograms of pure heroin, which was seized by the police at the time of arrest. The heroin was assessed to have a wholesale value in excess of GBP 1.2 million and a street value in excess of GBP 4 million. The following day the applicant was sentenced to 22 years' imprisonment.

7. On 1 July 2002, after considering written and oral submissions from the applicant and the prosecution, the judge made a confiscation order under the Drug Trafficking Act 1994 ("the 1994 Act": see paragraphs 20-22 below). He held that the applicant had benefited from drug trafficking. In assessing the amount of the benefit the judge took into account, *inter alia*, the following sums: GBP 18,000 cash found on the applicant at the time of his arrest; GBP 13,000 that the applicant had paid to his brother when a business partnership between them came to an end; GBP 21,000 that he had spent, in cash, on buying two cars; a further GBP 8,000 which he had spent on another two cars; and GBP 620,445 which was the judge's assessment of the cost to the applicant of purchasing the heroin which had led to the conviction. As regards this last sum, the judge, having heard all the evidence at trial, was satisfied that the applicant had been the principal participant in the offence and must have contributed to a large extent to the purchase of the drugs. However, to be fair to the applicant he took as his share one half of the wholesale value. The judge was further satisfied that so large a consignment would not have represented the applicant's first venture into drug trafficking and that he had financed the purchase with the proceeds of previous drug dealing. The applicant failed to rebut this assumption. The final item of expenditure taken into account by the judge was GBP 70,000 which an associate of the applicant, who claimed to have an income of approximately GBP 40,000 a year, had paid in respect of the applicant's legal fees. The judge found that it was the applicant's money; that it was the proceeds of drug trafficking; and that it demonstrated that the applicant had money elsewhere he was not prepared to reveal.

8. Next, the judge examined property received by the applicant during the six-year statutory period. The largest element emerged from an analysis of 17 bank accounts which the applicant had held at one time or another. The banking records demonstrated unexplained credits to the applicant's account in the two trading years ending April 1998 and April 2000 which exceeded the turnover of his business as recorded in the accounts by approximately GBP 153,000. During the intervening year, ending April 1999, the bank statements showed deposits at GBP 83,000 below the business trading turnover. The judge therefore considered whether it was appropriate to take the three years together but decided that this would not be correct. If the applicant had delayed banking some of his 1999 profits until the following year, one would have expected to have seen a pattern of very heavy deposits in the first part of 2000, but this was not the case. He concluded that the applicant had benefited to the amount of GBP 1,230,748.69.

9. Under the statutory scheme, once the judge had assessed the amount of benefit which the applicant had received from drug trafficking, the burden passed to the applicant to show on the balance of probabilities that his realisable assets were less than the amount of his benefit (see paragraph 23 below). The police, having investigated the applicant's background, had found realisable assets of GBP 236,000, including the cash found on the applicant at the time of his arrest, a car and some business stock. The judge observed:

> "The fact that the police have traced a certain amount of property is not of itself a reason to find it is the only property available to the [applicant]. Also credibility is a real issue. I have given myself a *Lucas* direction [that before reliance can be placed on the fact of a person's lying, it must be shown to be deliberate; it must relate to a material issue; the motive must be a realisation of guilt and a wish to conceal the truth rather than some other reason: *R v Lucas* [1981] QB 720]. This Defendant is cunning, devious and intelligent. He was increasingly unbelievable and offensive to common sense. Giving evidence he sought to mislead at every turn, wary that the truth would reveal assets he didn't want to and that he had hidden assets prior to conviction. He has lied persistently and blatantly and his credibility is nil. He has only himself to blame if I do not accept his evidence. I am convinced that he has tried to mislead me. I do not accept that there were no other assets, so I have reached the conclusion that the appropriate order be the wholesale value of the drugs, that being £1,236,748. He has not satisfied me that his assets are less than his benefit ..."

He set an additional ten years' imprisonment to be served by the applicant if he had not paid within twelve months.

10. The applicant appealed to the Court of Appeal on the grounds, *inter alia*, that the trial judge should have adjourned to allow him to submit additional accountancy evidence and that it had been contrary to Article 6 of the Convention for the judge to hold that it was for the applicant to establish, on the balance of probabilities, that his realisable property was less than his benefit. Although he had been represented throughout the trial and confiscation proceedings, he was unrepresented for the appeal and put his arguments before the court in a series of letters written from prison.

11. On 18 May 2005 the Court of Appeal dismissed the appeal, although it reduced the default sentence of imprisonment from ten years, the statutory maximum, to eight years. The court held that the additional accountancy evidence which the applicant sought to have admitted did not rebut the prosecution case but in fact, to a large extent, supported it. The Court added that although the accountancy report raised a suggestion of possible double-counting by the prosecution when it came to an analysis of realisable property, that was

> "irrelevant, since the judge's order did not depend upon any calculation of realisable property. It depended upon his finding that the applicant had utterly failed to demonstrate that he had not got assets equivalent to his benefit."

The Court of Appeal referred to *Phillips v. the United Kingdom,* no. 41087/98, ECHR 2001-VII, and observed that:

> "In that case the court held that the reverse onus of proof in relation to the statutory assumption at the calculation of the benefit stage is fully Convention compliant. If reverse onus is Convention compliant at the stage at which primary liability is calculated, it is plain that it is equally compliant to require of the defendant evidence to demonstrate that the order for confiscation should be less than the amount of benefit, on the grounds that he does not have enough realisable property to meet it. The level of assets available to a defendant is normally peculiarly a matter within his own knowledge.

> In those circumstances, this was, we are satisfied, a large confiscation order. It was, however, one which it was plainly proper for the judge to make. The judge followed the scheme of the Act in arriving at his conclusions, and in the context of a man who was caught when engaged in importing heroin which had cost well over £1 million with the prospect of a profit of approximately three times that amount, the conclusion that there were large items of unexplained expenditure and hidden assets is, in the circumstances, hardly surprising."

B. The second applicant (Mr Barnham)

12. On 16 July 2001 the second applicant was convicted of two conspiracy charges involving plans to import large consignments of cannabis into the United Kingdom. Neither importation had been successful and the whereabouts of the drugs were unknown. In the course of the trial the jury heard evidence from an undercover police officer, "Murray", who, posing as a money launderer, had made contact with the applicant. Murray's evidence was that the applicant had told him that his organisation was expected to receive payment of GBP 12 million, of which his personal share would be GBP 2 million, which he asked Murray to help him "launder".

13. The applicant was sentenced to eleven years' imprisonment, the judge describing him as the lead organiser in a sophisticated, established and internationally based drug trafficking business.

14. The confiscation proceedings commenced in January 2002, when the first hearing took place to determine the statutory benefit to the applicant from his drug trafficking operations. The applicant was legally represented. He did not give evidence but conceded through his counsel that he had benefited from drug trafficking within the meaning of the 1994 Act. On 8 February 2002, the trial judge ruled that the total benefit to the applicant was GBP 1,525,615. This sum included GBP 27,000 that the applicant had given to Murray to establish his trust; various amounts totalling GBP 59,000 which the applicant had mentioned to Murray during their conversations; a car worth GBP 11,615; GBP 65,000 which the applicant had spent on renovating his house; GBP 23,000 which the applicant had told Murray he had invested in cannabis importation; GBP 500,000 with which the applicant had purchased the consignment of cannabis which formed the basis of the first count of which he had been convicted; GBP 600,000 with which the applicant had purchased another consignment of cannabis which he had mentioned to Murray; a further GBP 240,000 which related to the cost of purchasing yet another consignment of cannabis which the applicant had discussed with Murray. The applicant did not appeal against that ruling.

15. In April 2002, the judge resumed the 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 they owned jointly. The applicant claimed to have been entirely unsuccessful in his attempts at drug dealing and to have earned a living by singing in bars. Since his conviction his wife was living with their son in England and supporting herself with a cleaning job. The defence submitted that there was no evidence capable of supporting a finding of

assumed "hidden" assets and such would lead to a risk of injustice. Of the total benefit figure, it was submitted that 94.4% was expenditure and the remaining 5.6% received had been dissipated over the years of the applicant's imprisonment in Spain and Portugal and in the United Kingdom. His car, worth GBP 11,615, had also been confiscated by the Portuguese authorities.

16. On 12 April 2002, the judge made his ruling. He explained that:

> "In reaching my determination I have to apply the scheme laid down by the 1994 Act, subject to ensuring from the evidence before me that in applying any reverse burden of proof there is no ascertained real or serious risk of injustice resulting from this. Essentially I have to weigh whether the evidence relied on by the defendant is both clear and cogent. In my judgment, it is not, because it fails to explain truthfully what the applicant did in relation to his drug trafficking activities."

The judge found that the applicant and his wife had lied about their activities and their sources of income. The applicant had not explained what had happened to the various consignments of cannabis he had had under his control. The judge continued:

> "In any event, as I do not find Mr and Mrs Barnham are truthful witnesses on material facts I am unable to accept their evidence that no cash assets exist from Mr Barnham's substantial international drug trafficking.
>
> He has failed to explain truthfully what he did and what he did with what he earned from what he did. That has been his choice and if it leaves as it does, this Court with no clear and cogent evidence to persuade it that the benefit is not fully realisable, the responsibility for that is Mr Barnham's and Mr Barnham's alone.
>
> It was his choice whether he told the truth in his evidence and no-one else's. [Counsel for the defence] relies on the lack of assets discovered by the West Yorkshire police ... It is, in my view, not surprising, particularly operating in foreign jurisdictions, that investigators find difficulty in tracing cash assets derived from drug trafficking. It is because of this, indeed, that the scheme of the 1994 Act is what it is.
>
> Whilst I accept [defence counsel's] other submission, that the vast majority of the benefit I assessed, it was on the basis of expenditure on the drugs, that does not explain what happened in the end to those drugs upon which that sum was expended. Unless, which I do not, I was to find that Mr Barnham lived as he did in Spain for all those years, never ever successfully importing cannabis from Morocco to anywhere at all."

He made a confiscation order equal to the amount which he had assessed as the benefit, namely GBP 1,525,615, with five years, three months' imprisonment if the applicant had not paid within 18 months.

17. The applicant appealed against the judge's ruling regarding his realisable assets, asserting that Article 6 § 1 of the Convention applied also when the judge came to assess realisable property, and that it required the prosecution at least to make out a *prima facie* case of realisable assets before the burden of proof shifted to the defendant. It was asserted by the applicant's counsel that there was a difference between cases where the prosecution had proved benefit at the first

stage by evidence and cases where the benefit had been calculated through the use of assumptions. In the second type of case, the assumptions continued to have effect when calculating realisable assets.

18. In its judgment of 28 April 2005, the Court of Appeal rejected this argument, holding as follows:

> "In our judgment the correct approach for the court to take when dealing with confiscation proceedings at the second stage is the same whether the benefit has been proved by evidence in addition to the statutory assumptions. Once the prosecution has established the benefit there is no requirement on it to provide a prima facie case. At the second stage the burden of proof shifts to a defendant to establish, if he can, his realisable assets to the satisfaction of the court. By the second stage a defendant will know exactly how the court has determined benefit attributable to him and must prove by evidence what his realisable assets are. It is for him to show why the confiscation order should not be 'the value of (*his*) proceeds of drug trafficking'. If he proves that he has no, or appreciably less, realisable assets than the amount of the benefit determined by the court the order will be made in a lesser sum. Provided the judge keeps well in mind the principle that the risk of serious injustice to the defendant must be avoided and does not just pay lip service to that principle the order will be in the amount assessed as either the amount of benefit or such other sum as the defendant shows represents his realisable assets.
>
> To hold that the prosecution must, in some way, show a prima facie case that the defendant has hidden assets in our judgment would defeat the object of the legislation. It is designed to enable the court to confiscate a criminal's ill-gotten gains. The expression 'hidden assets' is indicative of the fact that the prosecution can have no means of knowing how and where a defendant may have dealt with or disposed of the proceeds of his criminal activities."

The Court of Appeal found, however, that the judge had made an error of calculation and reduced the order to GBP 1,460,615.

19. On 6 October 2005, the Court of Appeal refused to certify a point of law of general public importance for appeal to the House of Lords concerning Article 6 of the Convention.

II. RELEVANT DOMESTIC LAW

A. The Drug Trafficking Act 1994

20. The 1994 Act set out a scheme for the confiscation of the proceeds of drug trafficking in respects of offences committed before 23 March 2003. Where all the offences charged or indicted in the proceedings were committed after that date, the 1994 Act no longer applies and instead the sentencing court will impose a confiscation order under the Proceeds of Crime Act 2002.

21. Section 2 of the 1994 Act provided that a Crown Court should make a confiscation order in respect of a defendant appearing before it for sentencing in respect of one or more drug-trafficking offences, whom the court found to have received at any time any payment or other reward in connection with drug trafficking.

22. Under section 5 of the 1994 Act, the confiscation order had to be set at a sum corresponding to the proceeds of drug trafficking assessed by the court

to have been gained by the defendant, unless the court was satisfied that, at the time the confiscation order is made, only a lesser sum could be realised.

23. At the first stage of this procedure, the onus was on the prosecution to establish that the defendant had benefited from drug trafficking. However, section 4(2) and (3) of the 1994 Act required the court to assume that any property appearing to have been held by him at any time since his conviction or during the period of six years before the date on which the criminal proceedings were commenced was received as a payment or reward in connection with drug trafficking, and that any expenditure incurred by him during the same period was paid for out of the proceeds of drug trafficking. This statutory assumption could be set aside by the defendant in relation to any particular property or expenditure if it was shown by him to be incorrect or if there would be a serious risk of injustice if it were applied (section 4(4)). At the second stage of the procedure, the burden shifts to the defendant to establish that the amount that might be realised is less than the amount of benefit (see *R. v. Barwick*, paragraphs 24-25 below). The required standard of proof applicable throughout proceedings under the 1994 Act was the balance of probabilities (section 2(8)).

B. *R. v. Barwick*

24. The appellant in *R. v. Barwick* ([2001] 1 Cr App R (S) 129) had, over a period of years, defrauded three women into parting with sums of money totalling in excess of GBP 500,000. He pleaded guilty to a number of offences of dishonesty. The judge made a confiscation order under the Criminal Justice Act 1988 (which set out a scheme for the confiscation of the proceeds of crimes other than drug trafficking). The benefit was assessed as the GBP 500,000 that the appellant had received from the women, adjusted to GBP 600,000 on the assumption that he would have invested it in such a way as to preserve its value against inflation at least. The police were unable to identify any significant assets held by or on behalf of the appellant or to trace where the stolen money had gone, and claimed that he must have hidden it, since he did not appear to have lived extravagantly or spent large sums of money. The appellant claimed that he had lost a considerable part by gambling, but there was no evidence to corroborate his claims. The trial judge found the appellant's evidence to be evasive and dishonest but nonetheless decided to reduce the benefit figure by GBP 150,000 as an acknowledgement that some of the money had probably been spent over the years. The appellant appealed to the Court of Appeal, contending *inter alia* that the judge had been wrong to place the burden on the appellant to establish that his realisable assets were less than the amount of the benefit.

25. The Court of Appeal held that the 1988 Act made it clear that, while the burden of proving the benefit was on the prosecution, it was for the defendant to establish on the balance of probabilities that the amount that might be realised was less. The Court of Appeal observed that, as a matter of principle,

> "... it is likely that an offender may take steps to make the proceeds of crime difficult to trace. Once it is proved that he has received the benefit, it is pragmatic, and entirely fair to the defendant, to place upon him the onus of showing (to the civil standard) that he no longer has the proceeds or that their extent or value has diminished".

It continued:

> "We stress that the scheme of the Act requires the court to perform two distinct and discrete tasks. First, to determine the benefit. Secondly, to determine the amount that might be realised at the time the order is made, which may be very different. Further, the amount that might be realised may be quite unrelated to the identifiable proceeds of the offence, e.g. a lottery win, inheritance, or other lawfully acquired property. In the end, the task of the court at the second stage is to determine the amount 'appearing to the court' to be the amount that might be realised. But once the benefit has been proved, it is permissible and ought normally to be the approach of the court, to conclude that the benefit remains available until the defendant proves otherwise ..."

C. *R. v. Benjafield*

26. In *R. v. Benjafield* [2002] UKHL 2, the House of Lords unanimously held that the confiscation scheme under the 1994 Act was compatible with Article 6 § 1 of the Convention. In *R. v. Rezvi* [2002] EKHL 1 it reached a similar conclusion as regards the confiscation scheme applicable under the Criminal Justice Act 1988 to the proceeds of other types of crime. Lord Steyn, with whom the other Law Lords agreed, observed in *Rezvi*:

> "It is a notorious fact that professional and habitual criminals frequently take steps to conceal their profits from crime. Effective but fair powers of confiscating the proceeds of crime are therefore essential. The provisions of the 1988 Act are aimed at depriving such offenders of the proceeds of their criminal conduct. Its purposes are to punish convicted offenders, to deter the commission of further offences and to reduce the profits available to fund further criminal enterprises. These objectives reflect not only national but also international policy. The United Kingdom has undertaken, by signing and ratifying treaties agreed under the auspices of the United Nations and the Council of Europe, to take measures necessary to ensure that the profits of those engaged in drug trafficking or other crimes are confiscated: see the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (19 December 1988); Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Strasbourg, 8 November 1990. These Conventions are in operation and have been ratified by the United Kingdom.
>
> It is clear that the 1988 Act was passed in furtherance of a legitimate aim and that the measures are rationally connected with that aim ... The only question is whether the statutory means adopted are wider than is necessary to accomplish the objective. Counsel for the appellant submitted that the means adopted are disproportionate to the objective inasmuch as a persuasive burden is placed on the defendant. The Court of Appeal [2001] 3 WLR 75, 103 carefully considered this argument and ruled:
>
> 'The onus which is placed upon the defendant is not an evidential one but a persuasive one, so that the defendant will be required to discharge the burden of proof: see Lord Hope's third category of provisions in *R v Director of Public Prosecutions, Ex Kebilene*, [2000] 2 AC 326, 379. This is therefore a situation where it is necessary carefully to consider whether the public interest in being able to confiscate the ill-gotten gains of criminals justifies the interference with the nor-

mal presumption of innocence. While the extent of the interference is substantial, Parliament has clearly made efforts to balance the interest of the defendant against that of the public in the following respects:

(a) It is only after the necessary convictions that any question of confiscation arises. This is of significance, because the trial which results in the conviction or convictions will be one where the usual burden and standard of proof rests upon the prosecution. In addition, a defendant who is convicted of the necessary offence or offences can be taken to be aware that if he committed the offences of which he has been convicted, he would not only be liable to imprisonment or another sentence, but he would also be liable to confiscation proceedings.

(b) The prosecution has the responsibility for initiating the confiscation proceedings unless the court regards them as inappropriate ...

(c) There is also the responsibility placed upon the court not to make a confiscation order when there is a serious risk of injustice. As already indicated, this will involve the court, before it makes a confiscation order, standing back and deciding whether there is a risk of injustice. If the court decides there is, then the confiscation order will not be made.

(d) There is the role of this court on appeal to ensure there is no unfairness.

It is very much a matter of personal judgment as to whether a proper balance has been struck between the conflicting interests. Into the balance there must be placed the interests of the defendant as against the interests of the public, that those who have offended should not profit from their offending and should not use their criminal conduct to fund further offending. However, in our judgment, if the discretions which are given to the prosecution and the court are properly exercised, the solution which Parliament has adopted is a reasonable and proportionate response to a substantial public interest, and therefore justifiable.' (Emphasis supplied)

For my part I think that this reasoning is correct, notably in explaining the role of the court in standing back and deciding whether there is or might be a risk of serious or real injustice and, if there is, or might be, in emphasising that a confiscation order ought not be made. The Crown accepted that this is how the court, seized with a question of confiscation, should approach its task. In my view this concession was rightly made.

In agreement with the unanimous views of the Court of Human Rights in *Phillips v United Kingdom* (Application No 41087/98) 5 July 2001 I would hold that Part VI of the 1988 Act is a proportionate response to the problem which it addresses."

III. RELEVANT INTERNATIONAL INSTRUMENTS

A. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)

27. The 1988 Convention, to which the United Kingdom is a party, states in Article 5 that:

"1. Each Party shall adopt such measures as may be necessary to enable confiscation of:

a) Proceeds derived from offences established in accordance with article 3, paragraph 1, or property the value of which corresponds to that of such proceeds;

b) Narcotic drugs and psychotropic substances, materials and equipment or other instrumentalities used in or intended for use in any manner in offences established in accordance with article 3, paragraph 1.

2. Each Party shall also adopt such measures as may be necessary to enable its competent authorities to identify, trace, and freeze or seize proceeds, property, instrumentalities or any other things referred to in paragraph 1 of this article, for the purpose of eventual confiscation.

...

7. Each Party may consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation, to the extent that such action is consistent with the principles of its domestic law and with the nature of the judicial and other proceedings.

8. The provisions of this article shall not be construed as prejudicing the rights of bona fide third parties.

9. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a Party."

B. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990)

28. The above Convention, which entered into force in September 1993, aimed to facilitate international co-operation and mutual assistance in investigating crime and tracking down, seizing and confiscating the proceeds thereof. Parties undertake in particular to criminalise the laundering of the proceeds of crime and to confiscate instrumentalities and proceeds (or property the value of which corresponds to such proceeds).

THE LAW

I. ADMISSIBILITY OF THE COMPLAINTS

29. Each applicant alleged that the burden on him to prove that his realisable property was less than the amount to which he had been assessed to have benefited from drug trafficking violated his right to a fair hearing under Article 6 § 1 of the Convention. In addition, they complained that the confiscation proceedings had breached their rights under Article 1 of Protocol No. 1 to the Convention.

30. The Court considers that these complaints raise questions of law which are sufficiently serious that their determination should depend on an examination of the merits. They should therefore be declared admissible. Pursuant to Article 29 § 3 of the Convention, the Court will now consider the merits of the applicants' complaints.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

31. Article 6 § 1 of the Convention provides:

"In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. The parties' submissions

32. The Government submitted that the judgments in *Phillips v. the United Kingdom* (cited above) and in *R. v. Benjafield* (see paragraph 26 above) had recognised that the 1994 Act was designed to combat the serious problem of drug trafficking, by punishing convicted offenders, deterring other offences and reducing the profits available to fund future drug-trafficking ventures. The objectives of the legislation reflected not only national but also international policy, as was made clear by the United Nations Convention against Illicit Traffic in Narcotic Drugs (see paragraph 27 above). Moreover, as also found in those judgments, the operation of the legislation was compatible with Article 6 of the Convention and provided a number of safeguards for the defendant.

33. In respect of the first applicant, Mr Grayson, the Government emphasised that he had been arrested in possession of a massive amount of heroin. The circumstances surrounding the payment of the applicant's legal costs indicated that he had access to funds that he had not revealed and his bank accounts revealed a number of financial transactions that could not be explained. The judge, having heard all the evidence, formed the view that the applicant was a blatant and persistent liar who had failed to produce any documentary evidence to support his case. Once it was established that the applicant had benefited from drug trafficking in excess of GBP 1.2 million and had access to unexplained funds, it was not unfair to place the onus on him to demonstrate, on the balance of probabilities, the extent of his realisable property.

34. In respect of the second applicant, Mr Barnham, the Government submitted that once it was found as a fact that the applicant was the leader of an international group of drug traffickers, that he had benefited from drug trafficking to the extent of GBP 1.5 million and that he had under his control a vast quantity of drugs, then it was for the applicant to demonstrate that the realisable amount was less than his benefit. The applicant, who was legally represented throughout, knew from the judge's ruling exactly how the benefit attributable to him had been determined. At no stage in his evidence did he seek to answer the points raised by the prosecution or produce any evidence, documentary or otherwise, to show that he no longer retained any proceeds of his criminal activities or to explain what had happened to them. His evidence amounted to a bare denial that he had any realisable assets other than his house. Had the applicant's account of his financial dealings been true it would not have been difficult for him to take steps to demonstrate his financial position. Moreover, once it was established that the applicant had received a shipment of cannabis it was not unfair to require him to explain what had happened to it.

35. The first applicant underlined that in respect of his realisable assets he had been required to prove a negative. The judge set the confiscation order at the full amount of the amount of benefit solely on the ground that the applicant had lied.

36. The second applicant contended that the greater part of the benefit which he was assessed to have drawn from drug trafficking consisted of the purchase price of three shipments of cannabis, totalling GBP 1,340,000. Under the 1994 Act, he was assumed to have paid for these shipments with the proceeds of past drug trafficking. These shipments could not, however, be counted towards his realisable assets, since there is no legitimate market in controlled drugs. During the second stage of the confiscation proceedings, the applicant was not required to explain what had become of the 2.5 tonnes of cannabis or the proceeds of its sale; instead he bore the burden of showing that he did not have assets, from whatever source, with which to pay a confiscation order totalling in excess of GBP 1.5 million. In effect the applicant was required to prove a negative: that he had no assets other than the matrimonial home.

B. The Court's assessment

37. In *Phillips v. the United Kingdom* (no. 41087/98, §§ 35 and 39, ECHR 2001-VII) the Court held that the making of a confiscation order under the 1994 Act was analogous to a sentencing procedure. Article 6 § 1, which applies throughout the entirety of proceedings for "the determination of ... any criminal charge", including proceedings whereby a sentence is fixed, was therefore applicable (see also *Welch v. the United Kingdom*, judgment of 9 February 1995, Series A no. 307-A).

38. The Court recalls 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 defendant had spent or received specific sums of money during the six years preceding the trigger offence. The sentencing court was then required, under section 4 of the Act, to assume that these receipts or items of expenditure derived from the proceeds of drug trafficking. The burden then passed to the defendant to show, again on the balance of probabilities, that the money had instead come from a legitimate source (see paragraph 23 above).

39. The making of a confiscation order under the 1994 Act was different from the standard imposition of a sentence following conviction by a criminal court because the severity of the order – both in terms of the amount of money which must be paid and the length of imprisonment to be served in default – depended upon a finding of benefit from past criminal conduct in respect of which the defendant had not necessarily been convicted. For this reason, the Court in *Phillips* observed that, 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 (op. cit., § 40 and see, *mutatis mutandis*, *Saunders v. the United Kingdom*, judgment of 17 December 1996, *Reports of Judgments and Decisions* 1996-VI, § 68).

40. The Court in *Phillips* continued, however, by recalling its case-law to the effect that the right to the presumption of innocence is not absolute, since presumptions of fact or of law operate in every criminal-law system. While the Convention does not regard such presumptions with indifference, they are not prohibited in principle, as long as States remain within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence (see *Salabiaku v. France*, judgment of 7 October 1988, Series A no. 141-A, § 28).

41. In the *Phillips* case the Court found that the operation of this shifting burden of proof was compatible with Article 6 § 1 of the Convention since, when assessing the amount of benefit to be attributed to Mr Phillips, the judge had been satisfied, on the basis either of the applicant's admissions or of evidence adduced by the prosecution, in respect of every item taken into account, that the applicant had owned the property or had spent the money, and that the obvious inference was that it had come from an illegitimate source (op. cit., § 44). Thus, as the Court summarised in *Geerings v. the Netherlands,* no. 30810/03, § 44, 1 March 2007:

> "...the applicant demonstrably held assets whose provenance could not be established; ... these assets were reasonably presumed to have been obtained through illegal activity; and ... the applicant had failed to provide a satisfactory alternative explanation".

42. The Court's task, in a case involving the procedure for the imposition of a confiscation order under the 1994 Act, is to determine whether the way in which the statutory assumptions were applied in the particular proceedings offended the basic principles of a fair procedure inherent in Article 6 § 1 (*Phillips*, § 41). It is not, however, within the province of the European Court to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair (*Edwards v. the United Kingdom*, judgment of 6 December 1992, Series A no. 247-B, § 34).

43. In the present case, the Court notes that the first applicant was convicted of an offence involving the importation of over 28 kilograms of pure heroin with a wholesale value of over GBP 1.2 million. In assessing the amount of benefit which he had received from drug trafficking during the statutory six-year period, the judge, who had heard all the evidence at the trial in addition to considering the oral and written evidence adduced during the confiscation proceedings, found that the applicant had been the principal participant in the deal and held that the fact that he had been able, with his co-accused, to purchase such a large consignment indicated that this was not his first venture into drug trafficking. The judge further found that the prosecution had established, on the balance of probabilities, that during the relevant time the applicant had spent or received a number of large sums of money. The applicant's evidence relating to his business activities did not satisfactorily explain where this money had come from and the judge therefore found that the applicant had benefited from drug trafficking to a total of GBP 1,230,748.69.

44. The second applicant was described by the judge who had presided over his trial as the lead organiser in an internationally based drug trafficking business (see paragraph 13 above). During the first stage of the confiscation proceedings the judge considered evidence from, *inter alia*, the undercover police officer whom the applicant had believed to be a money launderer and found that, over the six-year period, the applicant had spent large sums of money on various cannabis deals and that this money had come in its turn from earlier drug dealing. The applicant chose not to give oral evidence at this stage of the proceedings and did not appeal against the ruling on benefit.

45. Throughout these proceedings, the rights of the defence were protected by the safeguards built into the system. Thus, in each case the assessment 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 applicant to adduce documentary and oral evidence (see also *Phillips*, cited above, § 43). Each applicant was represented by counsel of his choice. The burden was on the prosecution to establish that the applicant had held the assets in question during the relevant period. Although the court was required by law to assume that the assets derived from drug trafficking, this assumption could have been rebutted if the applicant had shown that he had acquired the property through legitimate means. Furthermore, the judge had a discretion not to apply the assumption if he considered that applying it would give rise to a serious risk of injustice (see *R. v. Benjafield*: paragraph 27 above).

46. Before the Court, neither applicant seriously complained about the fairness of this first stage of the confiscation procedure, whereby the benefit from drug trafficking was calculated. The Court does not consider that in either case, in principle or practice, 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 the safeguards referred to above, the burden on him did not exceed reasonable limits.

47. 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. As the Court of Appeal explained in *R. v. Barwick* (see paragraphs 24-25 above), 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.

48. Each of the present applicants chose to give oral evidence relating to his realisable assets. Again, they had the advantage of the safeguards referred to in paragraph 45 above. They 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. The first applicant, who had been found to have had large sums of unexplained money passing through his bank accounts and to have had access, through an associate, to GBP 70,000 for his legal fees, failed to give any credible explanation for these anomalies. The second applicant did not even attempt to explain what had happened to the various consignments of cannabis he had been found to have purchased. In each case the judge found the applicant's evidence to have been entirely dishonest and lacking in credibility (see paragraphs 9 and 16 above). As previously stated, it is not for the European Court to substitute its own assessment of the evidence for that of the national courts.

49. The Court agrees with the judgments of the Court of Appeal in the instant cases (see paragraphs 11 and 18 and see also *R. v. Barwick*, paragraphs 25-26 above), 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.

50. There has, therefore, been no violation of Article 6 § 1 of the Convention in respect of either applicant.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

51. Article 1 of Protocol No. 1 provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

52. The Court recalls that in the *Phillips* case it found that the requirement on Mr Phillips to pay money under a confiscation order made in compliance with Article 6 § 1 did not constitute a disproportionate interference with his right to peaceful enjoyment of his possessions (*Phillips,* cited above, §§ 48-53).

53. The Court does not consider that the present applications can be distinguished from *Phillips* in this respect. It follows that there has been no violation of Article 1 of Protocol No. 1 in this case.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Joins* the applications;
2. *Declares* the case admissible;
3. *Holds* that there has been no violation of Article 6 § 1 of the Convention;
4. *Holds* that there has been no violation of Article 1 of Protocol No. 1 to the Convention.

Done in English, and notified in writing on 23 September 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Lech Garlicki
President

AFFAIRE
GRIFHORST c. FRANCE
(Requête n° 28336/02)

ARRÊT
26 février 2009

PROCÉDURE

1. A l'origine de l'affaire se trouve une requête (n° 28336/02) dirigée contre la République française et dont un ressortissant néerlandais, M. Robert Grifhorst («le requérant»), a saisi la Cour le 23 juillet 2002 en vertu de l'article 34 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales («la Convention»).

2. Le requérant est représenté par M^e^ B.J. Tieman, avocat à Amsterdam. Le gouvernement français («le Gouvernement») est représenté par son agent, M^me^ E. Belliard, directrice des affaires juridiques au ministère des Affaires étrangères.

3. Le requérant alléguait en particulier la violation de l'article 1 du Protocole n° 1 à la Convention, au motif que la sanction dont il avait fait l'objet pour non-déclaration d'une somme au passage de la douane, à savoir la confiscation de la totalité de la somme non déclarée et l'amende correspondant à la moitié de la somme non déclarée, était disproportionnées par rapport à la nature du fait reproché.

4. Par lettre du 30 mai 2005, le gouvernement néerlandais a fait savoir qu'il n'entendait pas exercer son droit d'intervenir dans la procédure. Par une décision du 7 septembre 2006, la chambre a déclaré la requête partiellement recevable.

5. Tant le requérant que le Gouvernement ont déposé des observations écrites complémentaires (article 59 § 1 du règl ement).

EN FAIT

I. LES CIRCONSTANCES DE L'ESPÈCE

6. Le requérant est né en 1949 et réside à Erts la Massana (Andorre).

7. Le 29 janvier 1996, alors qu'il entrait en France en provenance d'Andorre, le requérant fit l'objet d'un contrôle par la douane française à la frontière franco-andorrane.

8. Les douaniers lui ayant demandé en anglais et en espagnol s'il avait des sommes à déclarer, le requérant répondit par la négative.

9. Les agents des douanes fouillèrent la sacoche du requérant et trouvèrent des documents bancaires à son nom et au nom d'une société. Ils réitérèrent leur question, en anglais et en espagnol, quant à la déclaration de sommes ou de valeurs, à laquelle le requérant maintint sa réponse négative.

10. Le véhicule, ainsi que le requérant, furent fouillés et les douaniers découvrirent 500 000 florins dans ses poches, soit 233 056 euros (EUR).

11. Le requérant fut interrogé et déclara être résident à Andorre et avoir retiré la somme du Crédit d'Andorre afin d'acheter un immeuble à Amsterdam.

12. Les agents procédèrent à la saisie de l'intégralité de la somme, soit 500 000 florins (233 056 EUR).

13. Par télécopie du 29 janvier 1996, l'attaché douanier auprès de l'ambassade des Pays-Bas informa le directeur de la direction nationale du renseignement et des enquêtes douanières (DNRED) que le requérant était connu des services de police néerlandais, notamment pour des faits (survenus en 1983) de chantage et extorsion de fonds, enlèvement d'une personne et détention d'une arme à feu.

14. Par une autre télécopie du 23 avril 1997, l'attaché douanier indiqua que, selon la police néerlandaise, la seule activité connue du requérant était en relation avec l'immobilier, qu'une enquête internationale menée par les Pays-Bas, la France et l'Espagne sur ses activités n'avait pas progressé, que les services néerlandais envisageaient de solliciter du parquet d'Amsterdam des moyens plus importants tels que sa mise sur écoute téléphonique, qu'il était soupçonné de blanchir des capitaux pour le compte d'autres personnes mais qu'aucun élément concret supplémentaire ne pouvait être apporté.

15. Le requérant fut cité à comparaître devant le tribunal correctionnel de Perpignan qui, par jugement du 8 octobre 1998, le déclara coupable du délit de non-respect de l'obligation déclarative des sommes, titres ou valeurs prévue par l'article 464 du code des douanes et le condamna à la confiscation de la totalité de la somme et au paiement d'une amende égale à la moitié de la somme non déclarée (225 000 florins, soit 116 828 EUR), sur le fondement de l'article 465 du code des douanes, assortie de la contrainte par corps avec exécution provisoire.

16. Par un arrêt rendu par défaut le 4 novembre 1999, la cour d'appel de Montpellier confirma le jugement.

17. Le 11 octobre 2000, le requérant forma opposition à l'arrêt. Il invoquait l'erreur de droit, au motif que la directive européenne 88/361/CEE supprime toute restriction aux mouvements de circulation des capitaux entre les personnes résidant dans les Etats membres. Il invoquait également sa bonne foi et son absence d'intention frauduleuse et sollicitait sa relaxe et la restitution des sommes saisies et demandait subsidiairement à la cour d'appel de poser une question préjudicielle à la Cour de justice des Communautés européennes (ci-après la CJCE), portant sur la conformité des dispositions du code des douanes avec la libre circulation des capitaux.

18. Par arrêt du 20 mars 2001, la cour d'appel déclara son opposition recevable et statua en ces termes:

«Attendu que (le requérant) qui prétend ignorer la loi française en sa qualité de ressortissant néerlandais, ne peut invoquer avec succès l'article 122-3 du Code pénal dès lors que les douaniers lui ont posé la question de la déclaration de sommes d'argent qu'il transportait, à deux reprises et que (le requérant) a répondu négativement par deux fois, manifestant ainsi son intention délictuelle de cacher le transfert des capitaux aux douanes françaises; qu'il ne s'agit aucunement d'une erreur de droit puisque l'obligation déclarative lui a été rappelée par les douaniers et que (le requérant), ne peut se prévaloir de son ignorance de la loi française.

Attendu que les dispositions des articles 464 et 465 du Code des douanes, dont il n'appartient pas à la cour d'appel d'apprécier la constitutionnalité, entrent dans les prévisions de l'article 58, paragraphe 1, b) du Traité CE et sont conformes à l'article 4 de la directive 88/361/CEE du 24 juin 1988, texte reconnaissant aux États membres le droit de prendre les mesures indispensables pour faire échec aux infractions à leurs lois et règlements;

Attendu que l'obligation de déclaration qui n'empêche aucunement la libre circulation des capitaux, s'impose à toute personne physique, résident ou non-résident français;

Attendu enfin que les obligations et pénalités prévues par l'article 465 du Code des douanes ne sont pas contraires au principe communautaire de proportionnalité dès lors qu'elles ont été instituées en vue de la lutte contre le blanchiment des capitaux, laquelle figure parmi les objectifs de la Communauté européenne;

Attendu que c'est à juste titre et par des motifs pertinents, exacts et suffisants, que les premiers juges, tirant des circonstances de la cause les conséquences juridiques qui s'imposaient, en caractérisant en tous ses éléments tant matériels qu'intentionnels le délit reproché, ont retenu la culpabilité du prévenu et l'ont condamné aux peines sus indiquées, qui apparaissent bien proportionnées à la gravité des faits et bien adaptées à la personnalité de l'intéressé, l'amende douanière ayant été fixée à la moitié de la somme sur laquelle a porté l'infraction (article 465 du Code des douanes).»

La cour dit en outre n'y avoir lieu à saisine de la CJCE.

19. Le requérant se pourvut en cassation. Il alléguait notamment la violation de l'article 7 § 1 de la Convention en ce que le tribunal correctionnel l'avait déclaré coupable du délit de non-respect de l'obligation déclarative alors que, selon la jurisprudence en vigueur à l'époque (et en particulier selon un arrêt de la Cour de cassation du 25 juin 1998), cette obligation n'était applicable qu'aux seuls résidents français. Il invoquait également l'article 6 §§ 1 et 2 de la Convention et l'article 1 du Protocole n° 1 à la Convention car, selon lui, le principe de proportionnalité n'avait pas été respecté en raison de la lourdeur des sanctions qui lui avaient été infligées pour ce qu'il considérait comme un simple manquement à une obligation administrative.

20. Par un arrêt du 30 janvier 2002, la Cour de cassation rejeta le pourvoi du requérant, dans les termes suivants:

«(...) en l'absence de modification de la loi pénale, et dès alors que le principe de non rétroactivité ne s'applique pas à une simple interprétation jurisprudentielle, le moyen est inopérant (...)

Dès lors que les sanctions prévues à l'article 465 du code des douanes, qui ont été instituées notamment en vue de la lutte contre le blanchiment de capitaux, laquelle figure parmi les objectifs de la Communauté européenne, sont conformes au principe communautaire de proportionnalité et non contraires aux dispositions conventionnelles invoquées, la juridiction du second degré a justifié sa décision.»

II. LE DROIT ET LA PRATIQUE INTERNES ET INTERNATIONAUX PERTINENTS

A. Le droit interne

1. Dispositions du code des douanes en vigueur à la date des faits

21. Les dispositions pertinentes du code des douanes, dans sa rédaction en vigueur à la date des faits, se lisent ainsi

Article 323

«1. Les infractions aux lois et règlements douaniers peuvent être constatées par un agent des douanes ou de toute autre administration.

2. Ceux qui constatent une infraction douanière ont le droit de saisir tous objets passibles de confiscation, de retenir les expéditions et tous autres documents relatifs aux objets saisis et de procéder à la retenue préventive des objets affectés à la sûreté des pénalités (...)»

Article 464

«Sans préjudice des dispositions de la loi n° 66-1008 du 28 décembre 1966 relative aux relations financières avec l'étranger, les personnes physiques qui transfèrent vers l'étranger des sommes, titres ou valeurs, sans l'intermédiaire d'un organisme soumis à la loi n° 84-46 du 24 janvier 1984 relative à l'activité et au contrôle des établissements de crédit, ou d'un organisme cité à l'article 8 de ladite loi, doivent en faire la déclaration dans les conditions fixées par décret.

Une déclaration est établie pour chaque transfert à l'exclusion des transferts dont le montant est inférieur à 50 000 FRF.»

Article 465

(issu de l'article 23 de la loi 90-614 du 12 juillet 1990 relative à la participation des organismes financiers à la lutte contre le blanchiment de capitaux provenant du trafic des stupéfiants)

«II. La méconnaissance des obligations énoncées au I. de l'article 98 de la loi de finances pour 1990 (n° 89-935 du 29 décembre 1989), sera punie de la confiscation du corps du délit ou, lorsque la saisie n'aura pu être faite, d'une somme en tenant lieu et d'une amende égale, au minimum, au quart et, au maximum, au montant de la somme sur laquelle a porté l'infraction ou la tentative d'infraction (...)»

2. Dispositions du code des douanes dans leur rédaction de 2004

22. A la suite de l'avis motivé de la Commission européenne (paragraphe 29 ci-dessous), les autorités françaises ont modifié le code des douanes pour en

tirer les conséquences. Ces modifications (introduites par la loi 2004-204 du 9 mars 2004 et le décret 2004-759 du 27 juillet 2004) sont entrées en vigueur le 1er octobre 2004.

23. Ces modifications ont eu pour effet de supprimer la peine de confiscation automatique et de réduire l'amende au quart de la somme sur laquelle a porté l'infraction. Les dispositions modifiées se lisent ainsi:

Article 464

«Les personnes physiques qui transfèrent vers l'étranger ou en provenance de l'étranger des sommes, titres ou valeurs, sans l'intermédiaire d'un organisme soumis à la loi nº 84-46 du 24 janvier 1984 relative à l'activité et au contrôle des établissements de crédit, ou d'un organisme cité à l'article 8 de ladite loi, doivent en faire la déclaration dans des conditions fixées par décret. Une déclaration est établie pour chaque transfert à l'exclusion des transferts dont le montant est inférieur à 7 600 euros.»

Article 465

«I. – La méconnaissance des obligations déclaratives énoncées à l'article 464 est punie d'une amende égale au quart de la somme sur laquelle a porté l'infraction ou la tentative d'infraction.

II. – En cas de constatation de l'infraction mentionnée au I par les agents des douanes, ceux-ci consignent la totalité de la somme sur laquelle a porté l'infraction ou la tentative d'infraction, pendant une durée de trois mois, renouvelable sur autorisation du procureur de la République du lieu de la direction des douanes dont dépend le service chargé de la procédure, dans la limite de six mois au total.

La somme consignée est saisie et sa confiscation peut être prononcée par la juridiction compétente si, pendant la durée de la consignation, il est établi que l'auteur de l'infraction mentionnée au I est ou a été en possession d'objets laissant présumer qu'il est ou a été l'auteur d'une ou plusieurs infractions prévues et réprimées par le présent code ou qu'il participe ou a participé à la commission de telles infractions ou s'il y a des raisons plausibles de penser que l'auteur de l'infraction visée au I a commis une infraction ou plusieurs infractions prévues et réprimées par le code des douanes ou qu'il a participé à la commission de telles infractions.

La décision de non-lieu ou de relaxe emporte de plein droit, aux frais du Trésor, mainlevée des mesures de consignation et saisie ordonnées. Il en est de même en cas d'extinction de l'action pour l'application des sanctions fiscales (...)»

3. Dispositions du code des douanes dans leur rédaction actuelle

24. A la suite de l'entrée en vigueur, le 15 juin 2007, du règlement nº 1889/2005 relatif aux contrôles de l'argent liquide entrant ou sortant de la Communauté (paragraphe 35 ci-dessous), les articles 464 et 465 du code des douanes ont été modifiés par le décret du 28 mars 2007 et se lisent désormais comme suit:

Article 464

«Les personnes physiques qui transfèrent vers un État membre de l'Union européenne ou en provenance d'un État membre de l'Union européenne des sommes, titres ou valeurs, sans l'intermédiaire d'un établissement de crédit, ou d'un organisme ou service mentionné à l'article L. 518-1 du code monétaire et financier doivent en faire la déclaration dans des conditions fixées par décret.

Une déclaration est établie pour chaque transfert à l'exclusion des transferts dont le montant est inférieur à 10 000 euros.»

Article 465

«I. – La méconnaissance des obligations déclaratives énoncées à l'article 464 et dans le règlement (CE) n° 1889/2005 du Parlement européen et du Conseil du 26 octobre 2005 relatif aux contrôles de l'argent liquide entrant ou sortant de la Communauté est punie d'une amende égale au quart de la somme sur laquelle a porté l'infraction ou la tentative d'infraction.

II. – En cas de constatation de l'infraction mentionnée au I par les agents des douanes, ceux-ci consignent la totalité de la somme sur laquelle a porté l'infraction ou la tentative d'infraction, pendant une durée de trois mois, renouvelable sur autorisation du procureur de la République du lieu de la direction des douanes dont dépend le service chargé de la procédure, dans la limite de six mois au total.

La somme consignée est saisie et sa confiscation peut être prononcée par la juridiction compétente si, pendant la durée de la consignation, il est établi que l'auteur de l'infraction mentionnée au I est ou a été en possession d'objets laissant présumer qu'il est ou a été l'auteur d'une ou plusieurs infractions prévues et réprimées par le présent code ou qu'il participe ou a participé à la commission de telles infractions ou s'il y a des raisons plausibles de penser que l'auteur de l'infraction visée au I a commis une infraction ou plusieurs infractions prévues et réprimées par le code des douanes ou qu'il a participé à la commission de telles infractions.

La décision de non-lieu ou de relaxe emporte de plein droit, aux frais du Trésor, mainlevée des mesures de consignation et saisie ordonnées. Il en est de même en cas d'extinction de l'action pour l'application des sanctions fiscales.

III. – La recherche, la constatation et la poursuite des infractions mentionnées au I sont effectuées dans les conditions fixées par le présent code.

Dans le cas où l'amende prévue au I est infligée, la majoration de 40 % mentionnée au premier alinéa de l'article 1759 du code général des impôts n'est pas appliquée.»

4. Jurisprudence de la Cour de cassation citée par les parties

25. Les deux arrêts ci-après ont été rendus dans le cadre d'une même affaire. Par un premier arrêt du 25 juin 1998, auquel l'administration des douanes n'était pas partie, la Cour de cassation a retenu que l'obligation de déclaration ne s'imposait qu'aux résidents français:

«Attendu qu'en se prononçant ainsi, alors que, faute d'être résident français, l'auteur supposé des faits ne pouvait se voir reprocher un défaut de déclaration de transfert de capitaux qui constituait une obligation à laquelle il n'était pas soumis,

et qu'en l'absence de fait principal punissable, D. M. ne peut être retenu comme complice dudit manquement, la cour d'appel n'a pas donné de base légale à sa décision»

26. L'administration des douanes ayant formé opposition à cet arrêt, la Cour de cassation a, par un nouvel arrêt du 29 mars 2000, dit l'opposition recevable, mettant ainsi à néant son précédent arrêt, et a notamment considéré:

«(...) l'obligation de déclarer le transfert vers l'étranger ou en provenance de l'étranger de sommes, titres ou valeurs, à l'exclusion des transferts dont le montant est inférieur à 50.000 FRF, prévue par les articles 98-I de la loi de finances du 29 décembre 1989 et 23-I de la loi du 12 juillet 1990, devenus les articles 464 et 465 du Code des douanes, s'impose à toute personne physique, résident ou non-résident français; (...) les dispositions de ces textes sont compatibles avec les exigences de la directive du Conseil du 24 juin 1988, sur la libre circulation des capitaux, dont l'article 4 autorise les États membres à prendre les mesures indispensables pour faire échec à leurs lois et règlements (...)»

B. Le droit communautaire

1. La libre circulation des capitaux

a) Traité de Rome

27. L'article 58 (ancien article 73D du traité) est ainsi rédigé:

«1. L'article 56 ne porte pas atteinte au droit qu'ont les États membres: (...)

b) de prendre toutes les mesures indispensables pour faire échec aux infractions à leurs lois et règlements, notamment en matière fiscale ou en matière de contrôle prudentiel des établissements financiers, de prévoir des procédures de déclaration des mouvements de capitaux à des fins d'information administrative ou statistique ou de prendre des mesures justifiées par des motifs liés à l'ordre public ou à la sécurité publique (...)

3. Les mesures et procédures visées aux paragraphes 1 et 2 ne doivent constituer ni un moyen de discrimination arbitraire ni une restriction déguisée à la libre circulation des capitaux et des paiements telle que définie à l'article 56.»

b) Directive du Conseil du 24 juin 1988 pour la mise en œuvre de l'article 67 du Traité CEE (88/361/CEE)

28. Les articles pertinents de la directive se lisent ainsi:

Article 4

«Les dispositions de la présente directive ne préjugent pas le droit des États membres de prendre les mesures indispensables pour faire échec aux infractions à leurs lois et règlements, notamment en matière fiscale ou de surveillance prudentielle des établissements financiers, et de prévoir des procédures de déclaration des mouvements de capitaux à des fins d'information administrative ou statistique.

L'application de ces mesures et procédures ne peut avoir pour effet d'empêcher les mouvements de capitaux effectués en conformité avec les dispositions du droit communautaire.»

Article 7

«1. Les États membres s'efforcent d'atteindre, dans le régime qu'ils appliquent aux transferts afférents aux mouvements de capitaux avec les pays tiers, le même degré la libération que celui des opérations intervenant avec les résidents des autres États membres, sous réserve des autres dispositions de la présente directive.

Les dispositions du premier alinéa ne préjugent pas de l'application, vis-à-vis des pays tiers, des règles nationales ou du droit communautaire, et notamment des conditions éventuelles de réciprocité, concernant les opérations d'établissement, de prestation de services financiers et d'admission de titres sur les marchés des capitaux.

2. Au cas où des mouvements de capitaux à court terme de grande ampleur en provenance ou à destination des pays tiers perturbent gravement la situation monétaire ou financière interne ou externe des États membres ou de plusieurs d'entre eux, ou entraînent des tensions graves dans les relations de change à l'intérieur de la Communauté ou entre la Communauté et les pays tiers, les États membres se consultent sur toute mesure susceptible d'être prise pour remédier aux difficultés rencontrées. Cette consultation a lieu au sein du comité des gouverneurs des banques centrales et du comité monétaire à l'initiative de la Commission ou de tout État membre.»

2. Avis motivé rendu par la Commission européenne

29. La Commission européenne a rendu en juillet 2001 l'avis motivé suivant:

«L'article 58 du traité CE stipule que l'article 56, qui instaure la libre circulation des capitaux, ne porte pas atteinte au droit qu'ont les États membres de prévoir des procédures de déclaration des mouvements de capitaux à des fins d'information administrative ou statistique ou de prendre des mesures liées à l'ordre public ou à la sécurité publique. Néanmoins, le même article 58 du traité CE précise que ces procédures de déclaration ne doivent constituer ni un moyen de discrimination arbitraire ni une restriction déguisée à la libre circulation des capitaux et des paiements telle que définie à l'article 56.

C'est ainsi que la Commission considère que les effets d'une telle obligation administrative, en l'occurrence les sanctions douanières, doivent s'apprécier en appliquant le critère de proportionnalité. En effet, selon la jurisprudence de la Cour (arrêts du 16.12.1992 «Commission contre République hellénique», C-210/91, et du 26.10.1995 «Siesse», C-36/94), les mesures administratives ou répressives ne doivent pas dépasser le cadre de ce qui est strictement nécessaire aux objectifs poursuivis et il ne faut pas rattacher aux modalités de contrôle une sanction si disproportionnée à la gravité de l'infraction qu'elle deviendrait une entrave aux libertés consacrées par le traité.

Or, la Commission a constaté que, dans le cas d'espèce, la sanction normalement prévue et appliquée, à savoir la confiscation des fonds, conduit à la négation même de la liberté fondamentale du mouvement des capitaux, de sorte qu'il s'agisse d'une mesure manifestement disproportionnée.

Les autorités françaises défendent le caractère dissuasif que devraient revêtir ces sanctions au vu de l'importance des objectifs visés selon elles par l'introduction de ces obligations déclaratives, à savoir la lutte contre le blanchiment d'argent

et la lutte contre la fraude fiscale. De son côté, la Commission considère que la sanction devrait correspondre à la gravité du manquement constaté, à savoir du manquement à l'obligation de déclaration et non pas à la gravité du manquement éventuel non constaté, à ce stade, d'un délit tel que le blanchiment d'argent ou la fraude fiscale.»

3. La jurisprudence de la Cour de justice des Communautés européennes

30. Les deux arrêts cités ci-dessous concernent respectivement l'exportation de sommes entre Etats membres (affaire *Bordessa*) et entre Etats membres et Etats tiers (affaire *Sanz de Leray*).

a) Arrêt Bordessa e.a. du 23 février 1995
(affaires jointes C-358/93 et C-416/93, Rec. 1995 p. I-361)

«La directive 88/361 pour la mise en œuvre de l'article 67 du traité, et plus particulièrement ses articles 1er, obligeant les États membres à supprimer les restrictions aux mouvements de capitaux, et 4, les autorisant à prendre les mesures indispensables pour faire échec aux infractions aux lois et règlements nationaux, s'opposent à ce que l'exportation de pièces, de billets de banque ou de chèques au porteur soit subordonnée à une autorisation préalable, mais, en revanche, ne s'opposent pas à ce qu'une telle opération soit subordonnée à une déclaration préalable.

En effet, si ledit article 4 s'applique non seulement aux mesures visant à faire échec aux infractions en matière fiscale ou de surveillance prudentielle des établissements financiers, mais également à celles visant à empêcher des activités illicites d'une gravité comparable, tels le blanchiment d'argent, le trafic des stupéfiants et le terrorisme, l'exigence d'une autorisation ne peut être considérée comme une mesure indispensable au sens de cette disposition, car elle reviendrait à soumettre l'exercice de la libre circulation des capitaux à la discrétion de l'administration et serait susceptible, de ce fait, de rendre cette liberté illusoire. En revanche, une déclaration préalable peut constituer une telle mesure indispensable puisque, contrairement à l'autorisation préalable, elle ne suspend pas l'opération en cause, tout en permettant néanmoins aux autorités nationales d'effectuer un contrôle effectif pour faire échec aux infractions à leurs lois et règlements.»

b) Arrêt Sanz de Lera e.a. du 14 décembre 1995
(affaires jointes C-163/94, C-165/94 et C-250/94, Rec. 1995 p. I-4821)

«Les articles 73 B, paragraphe 1, et 73 D, paragraphe 1, sous b) du traité s'opposent à une réglementation nationale qui subordonne, d'une manière générale, l'exportation de pièces, de billets de banque, ou de chèques au porteur à une autorisation préalable, mais, en revanche, ne s'opposent pas à ce qu'une telle opération soit subordonnée à une déclaration préalable.»

c) Sanctions et respect du principe de proportionnalité

31. En ce qui concerne les infractions douanières, la CJCE considère de façon constante qu'en l'absence d'harmonisation de la législation communautaire dans ce domaine, les Etats membres sont compétents pour choisir les sanctions qui leur semblent appropriées. Ils sont toutefois tenus d'exercer cette compétence dans

le respect du droit communautaire et de ses principes généraux et, par conséquent, dans le respect du principe de proportionnalité (cf. arrêts du 16 décembre 1992, *Commission/Grèce*, C-210/91, Rec p. I-6735, point 19, du 26 octobre 1995, *Siesse,* C-36/94, Rec. p. I-3573, point 21, et du 7 décembre 2000, *De Andrade*, C-213/99, Rec. p. I-11083, point 20).

32. La CJCE précise que les mesures administratives ou répressives ne doivent pas dépasser le cadre de ce qui est nécessaire aux objectifs poursuivis et qu'une sanction ne doit pas être si disproportionnée par rapport à la gravité de l'infraction qu'elle devienne une entrave à l'une des libertés consacrées par le traité (voir notamment arrêt *Commission c. Grèce* précité, point 20 et la jurisprudence citée et arrêt du 12 juillet 2001, *Louloudakis*, C-262/99, Rec. p. I-5547; voir également l'arrêt rendu par la CJCE dans l'affaire *Bosphorus Airways* précitée, cité au paragraphe 52 de l'arrêt).

4. La lutte contre le blanchiment de capitaux

33. L'Union européenne a adopté plusieurs instruments pour lutter contre le blanchiment de capitaux, en partant du principe que l'introduction, dans le système financier, du produit d'activités illicites était de nature à nuire à un développement économique sain et durable.

34. Une première étape a consisté en l'adoption de la directive 91/308/CEE du Conseil du 10 juin 1991, relative à la prévention de l'utilisation du système financier aux fins de blanchiment. Cette directive a instauré un mécanisme communautaire de contrôle des transactions effectuées par le biais des établissements de crédits, des institutions financières et de certaines professions, afin de prévenir le blanchiment d'argent.

35. Dans la mesure où, par sa mise en œuvre, ce mécanisme était susceptible d'entraîner un accroissement des mouvements d'argent liquide à des fins illicites, il a été complété par le règlement n° 1889/2005 du 26 octobre 2005 relatif aux contrôles de l'argent liquide entrant ou sortant de l'Union européenne. Ce règlement est entré en vigueur le 15 juin 2007. Il ne concerne pas les mouvements d'argent entre Etats de l'Union européenne.

S'appuyant notamment sur les recommandations du Groupe d'action financière sur le blanchiment de capitaux (GAFI, paragraphes 39-44 ci-dessous) et tirant les conséquences des disparités entre Etats membres, dont tous ne connaissaient pas de procédures de contrôle, ce règlement vise à mettre en place, à l'échelle de l'Union, des mesures de contrôle des mouvements de capitaux aux frontières extérieures de l'Union, à l'entrée comme à la sortie.

Il est fondé sur le principe de la déclaration obligatoire, pour toute personne entrant dans l'Union ou en sortant, de l'argent liquide transporté (qu'elle en soit ou non propriétaire), à partir d'un seuil de 10 000 EUR, permettant ainsi aux autorités douanières de collecter des informations, mais également de les transmettre aux autorités des autres Etats lorsqu'il y a des indices que les sommes en question sont liées à une activité illégale.

36. L'article 9 du règlement prévoit que chaque Etat membre doit introduire des sanctions applicables en cas de non exécution de l'obligation de déclaration. Selon cet article, ces sanctions doivent être «effectives, proportionnées et dissuasives». Les Etats membres sont tenus de les notifier à la Commission européenne au plus tard le 15 juin 2007.

C. Les Conventions des Nations Unies

37. L'article 18 § 2 b) de la Convention des Nations Unies pour la répression du financement du terrorisme, ratifiée par la France le 7 janvier 2002 et entrée en vigueur le 10 avril 2002, dispose:

> «Les États parties coopèrent également à la prévention des infractions visées à l'article 2 en envisageant: (...)
>
> b) Des mesures réalistes qui permettent de détecter ou de surveiller le transport physique transfrontière d'espèces et d'effets au porteur négociables, sous réserve qu'elles soient assujetties à des garanties strictes visant à assurer que l'information est utilisée à bon escient et qu'elles n'entravent en aucune façon la libre circulation des capitaux.»

38. La Convention des Nations Unies contre la criminalité transnationale organisée, ratifiée par la France le 29 octobre 2002 et entrée en vigueur le 29 septembre 2003, dispose dans son article 7 § 2 (mesures de lutte contre le blanchiment d'argent):

> «Les États parties envisagent de mettre en œuvre des mesures réalisables de détection et de surveillance du mouvement transfrontière d'espèces (...), sous réserve de garanties permettant d'assurer une utilisation correcte des informations et sans entraver d'aucune façon la circulation des capitaux licites. Il peut être notamment fait obligation aux particuliers et aux entreprises de signaler les transferts transfrontières de quantités importantes d'espèces (...)»

Aux termes de l'article 12 § 7 de la convention:

> «Les États parties peuvent envisager d'exiger que l'auteur d'une infraction établisse l'origine licite du produit présumé du crime ou d'autres biens pouvant faire l'objet d'une confiscation, dans la mesure où cette exigence est conforme aux principes de leur droit interne et à la nature de la procédure judiciaire et des autres procédures.»

D. Les recommandations du Groupe d'action financière (GAFI)

39. Le Groupe d'action financière (GAFI), créé en juillet 1989 par le sommet du Groupe des Sept (G7) à Paris, est un organisme intergouvernemental (actuellement composé de trente et un pays et deux organisations régionales), qui vise à développer et promouvoir des politiques nationales et internationales afin de lutter contre le blanchiment de capitaux et le financement du terrorisme.

40. Le GAFI a adopté en 1990 quarante recommandations (révisées en 1996 et 2003) qui énoncent les mesures que les gouvernements nationaux doivent prendre pour appliquer des plans efficaces de lutte contre le blanchiment de capitaux.

En octobre 2001, le GAFI a étendu son mandat à la question du financement du terrorisme et a adopté huit recommandations spéciales sur le financement du terrorisme, auxquelles une neuvième a été ajoutée en 2004. Ces recommandations contiennent une série de mesures visant à combattre le financement des actes et des organisations terroristes et complètent les quarante recommandations.

41. La recommandation 3 prévoit que les pays doivent adopter des mesures, y compris législatives, leur permettant de confisquer les biens blanchis ou produits issus du blanchiment, ainsi que de prendre des mesures provisoires (gel, saisie). Aux termes de la recommandation 17 «Les pays devraient s'assurer qu'ils disposent de sanctions efficaces, proportionnées et dissuasives, qu'elles soient pénales, civiles ou administratives, applicables aux personnes physiques ou morales visées par ces Recommandations qui ne se conforment pas aux obligations en matière de lutte contre le blanchiment des capitaux et le financement du terrorisme.»

42. La recommandation spéciale III prévoit des dispositions similaires (gel, saisie et confiscation) pour les biens des terroristes. La recommandation spéciale IX se lit ainsi:

> «Les pays devraient avoir en place des mesures destinées à détecter les transports physiques transfrontaliers d'espèces et instruments au porteur, y compris un système de déclaration ou toute autre obligation de communication.
>
> Les pays devraient s'assurer que leurs autorités compétentes sont dotées du pouvoir de bloquer ou retenir les espèces ou instruments au porteur soupçonnés d'être liés au financement du terrorisme ou au blanchiment de capitaux, ou faisant l'objet de fausses déclarations ou communications.
>
> Les pays devraient s'assurer que des sanctions efficaces, proportionnées et dissuasives peuvent s'appliquer aux personnes qui ont procédé à des fausses déclarations ou communications. Lorsque des espèces ou instruments au porteur sont liés au financement du terrorisme ou au blanchiment de capitaux, les pays devraient aussi adopter des mesures, y compris de nature législative, conformes à la Recommandation 3 et le Recommandation spéciale III, qui autorisent la confiscation de telles espèces ou de tels instruments.»

43. La note interprétative à cette recommandation spéciale indique (au point 9) que les Etats peuvent s'acquitter des obligations prévues dans la recommandation en adoptant l'un des deux systèmes suivants: de déclaration ou de communication. S'ils choisissent le premier, toutes les personnes qui procèdent au transport physique transfrontière d'espèces dont la valeur dépasse un montant déterminé au préalable, qui ne peut être supérieur à 15 000 dollars américains/euros, doivent remettre une déclaration authentique aux autorités compétentes. Les Etats devront s'assurer que le plafond a été fixé à un niveau suffisamment bas pour répondre aux objectifs de la recommandation.

44. Le document relatif aux meilleures pratiques internationales du 12 février 2005 précise, dans son point 15 intitulé «Blocage/Confiscation des espèces»:

> «En cas de fausse déclaration (...) ou lorsqu'il y a des motifs raisonnables de soupçonner des actes de blanchiment de capitaux ou de financement du terrorisme, les pays sont encouragés à imposer un renversement de la charge de la preuve sur la personne portant les espèces (...) lors du franchissement d'une frontière quant à la légitimité de ces espèces (...) En conséquence, si, dans de telles circonstances, une personne est dans l'incapacité de démontrer l'origine et la destination légitime des fonds (.. .), ces fonds (...) peuvent être bloqués ou retenus. Les pays sont invités à envisager la confiscation des espèces (...) même en l'absence de condamnation conformément à la recommandation 3 du GAFI.»

E. Les travaux du Conseil de l'Europe

1. La Convention du 8 novembre 1990 relative au blanchiment, au dépistage, à la saisie et à la confiscation des produits du crime

45. Cette convention, entrée en vigueur le 1er septembre 1993 et ratifiée par la France le 1er février 1997, vise à faciliter la coopération et l'entraide internationales en matière d'enquêtes sur les délits, ainsi que de dépistage, de saisie et de confiscation des produits de ces délits. La convention a pour objet d'aider les Etats à atteindre un degré d'efficacité comparable, même en l'absence d'harmonisation complète des lois.

46. Cette convention est un traité de référence en matière de lutte contre le blanchiment de capitaux. Quarante-huit Etats sont parties à la convention, à savoir les quarante-sept Etats membres du Conseil de l'Europe et un Etat non membre (l'Australie).

2. La Convention du 16 novembre 2005 relative au blanchiment, au dépistage, à la saisie et à la confiscation des produits du crime et au financement du terrorisme

47. Cette convention est issue des travaux menés depuis 2003 pour actualiser et d'élargir la Convention de 1990, afin de prendre en compte le fait que les activités liées au terrorisme pourraient être financées non seulement par le blanchiment de capitaux issus d'activités criminelles, mais aussi par des activités licites. Elle se réfère notamment aux recommandations du GAFI (paragraphes 39-44 ci-dessus). La convention, entrée en vigueur le 1er mai 2008, a été signée par vingt-neuf Etats (dont la France ne fait pas partie) et ratifiée par onze d'entre eux.

L'article 13 § 1 de la convention prévoit notamment que chaque partie adopte les mesures législatives et autres qui se révèlent nécessaires pour mettre en place un régime interne complet de réglementation et de suivi ou de contrôle pour prévenir le blanchiment. Ainsi, les parties à la convention peuvent adopter les mesures législatives ou autres qui se révèlent nécessaires pour détecter les transports transfrontaliers significatifs d'espèces et d'instruments au porteur appropriés (article 13 § 3 de la Convention précitée).

F. Le droit comparé

1. Au moment des faits

48. Parmi les législations des Etats membres du Conseil de l'Europe, un certain nombre avaient institué une obligation de déclaration des moyens de paiement, titres ou valeurs à leurs frontières. Cette déclaration, selon les pays, devait être faite spontanément[2] ou à la demande d'un agent des douanes[3]. Un certain nombre de pays[4] ne prévoyaient pas d'obligation de déclaration.

49. Le montant minimum des sommes soumises à cette déclaration variait de 2 700 EUR en Ukraine ou 4 000 EUR en Bulgarie, à 15 000 EUR au Danemark ou en Allemagne. L'objectif de cette réglementation, ainsi que sa sanction en cas de non-respect, était également variable d'un Etat à l'autre. Ainsi, la lutte contre le blanchiment de capitaux, la lutte anti-terroriste ou la surveillance des importations et exportations de métaux précieux ou de bijoux étaient les principaux buts poursuivis par les Etats réglementant les flux transfrontaliers de capitaux.

50. En règle générale, l'amende était la sanction la plus souvent rencontrée en cas de non-respect de l'obligation déclarative. Selon les Etats, le montant de l'amende était très différent et pouvait varier d'un minimum de 27 EUR en Ukraine à un maximum de 75 000 EUR en Slovaquie. Elle était en général modulée selon la gravité de l'infraction et son caractère intentionnel ou non. Elle pouvait être cumulée avec une peine de confiscation judiciaire. Toutefois, cette peine semblait peu fréquente dans les systèmes juridiques des Etats membres, et lorsqu'elle était prévue, elle ne concernait en général que le reliquat de la somme excédant le montant à déclarer. A part la France, un seul Etat (Bulgarie) prévoyait le cumul d'une amende pouvant aller jusqu'au double de la somme non déclarée avec la confiscation de la totalité de ladite somme.

2. Évolution ultérieure

51. Pour ceux des Etats membres qui sont également ou sont devenus entre-temps membres de l'Union européenne, le régime de la déclaration obligatoire institué par le règlement n° 1889/2005 pour toute somme en liquide au-delà de 10 000 EUR entrant ou sortant de l'Union est entré en vigueur le 15 juin 2007 (paragraphes 35-36 ci-dessus).

52. S'agissant des sanctions en cas de non-déclaration, le règlement prévoyant seulement, dans son article 9, qu'elles doivent «effectives, proportionnées et dissuasives», elles relèvent de la responsabilité des Etats, ceux-ci étant uniquement tenus de les notifier à la Commission européenne.

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2 Bulgarie, Croatie, Danemark, Espagne, France, Italie, Lituanie, Moldova, Monténégro, Pologne, Russie, Serbie, Slovénie, Slovaquie, Ukraine.

3 Allemagne, Autriche, Portugal.

4 Andorre, Belgique, Estonie, Finlande, Géorgie, Irlande, Luxembourg, Pays-Bas, République tchèque, Roumanie, Royaume-Uni, Suède, Suisse, Turquie.

53 Ceux des Etats de l'Union dont le système ne prévoyait pas de déclaration obligatoire ont modifié leur législation en conséquence. Certains Etats n'appartenant par à l'UE ont également modifié le montant minimum sujet à déclaration pour le rapprocher de celui de 10 000 EUR prévu par le règlement n° 1889/2005 (c'est le cas notamment de la Serbie, de la Moldova et de l'Ukraine, la Russie pour sa part ayant opté pour un seuil de 10 000 USD). Le seuil de déclaration le plus bas se rencontre au Monténégro (2 000 EUR).

54. Dans la plupart des Etats, le défaut de déclaration constitue une infraction de nature administrative, punie généralement d'une amende qui, soit est fixée en valeur absolue variant considérablement d'un Etat à l'autre, soit est calculée selon un pourcentage de la somme non déclarée, soit encore est modulée selon la gravité de l'infraction et son caractère intentionnel ou non.

55. Dans quelques rares pays comme les Pays-Bas ou la Lituanie, la non-déclaration est considérée en soi comme une infraction pénale, punissable d'une amende ou d'une peine de prison (pouvant aller, en Lituanie, jusqu'à huit ans). Dans un certain nombre d'autres pays[5], si le défaut de déclaration est lié à d'autres infractions pénales (contrebande, blanchiment d'argent) ou concerne des sommes particulièrement importantes, il peut être puni d'une peine d'emprisonnement pouvant aller, selon les pays, jusqu'à six ans.

56. Plusieurs législations prévoient également des mesures de confiscation (parfois à titre provisoire), notamment si les sommes non déclarées proviennent d'une activité criminelle ou y sont destinées, ou si leur origine légale ne peut pas être prouvée[6]. Le montant confisqué est en général celui qui dépasse le seuil fixé pour la déclaration[7]. Toutefois, les législations de certains Etats[8] disposent qu'en cas de poursuites pénales (pouvant donner lieu à des peines d'emprisonnement) la totalité de la somme est confisquée. La Bulgarie semble être le seul pays qui combine une amende de nature administrative ou pénale pouvant aller jusqu'au double de la somme non déclarée avec la confiscation automatique de l'intégralité de la somme.

EN DROIT

I. SUR LA QUALITÉ DE VICTIME DU REQUÉRANT CONCERNANT L'AMENDE

57. Dans ses observations complémentaires, le Gouvernement a indiqué que, s'agissant de l'amende infligée au requérant, une décision de non-recouvrement avait été prise le 4 août 2005, dont il a transmis copie, dans le cadre d'une action d'apurement comptable. Ce document, intitulé «admission en non-valeur d'une créance irrécouvrable», contient un rappel des faits et de la procédure, la

5 Bulgarie, Finlande, Russie, Ukraine

6 Bulgarie, République Tchèque, Slovaquie, Slovénie, Moldova

7 Croatie, Italie, Roumanie, Slovénie

8 Lituanie, Russie, Ukraine

proposition du comptable compétent d'admettre en non-valeur l'amende infligée au requérant au motif qu'il s'agit d'un débiteur étranger, et la décision du directeur régional des douanes de Perpignan, en date du 10 août 2005, d'autoriser l'admission en non-valeur de l'amende.

Cette décision confirme, selon le Gouvernement, que l'amende ne sera plus recouvrée par l'administration des douanes. Il en conclut que le requérant a perdu à cet égard la qualité de victime, au sens de l'article 34 de la Convention.

58. Le requérant souligne, pour sa part, qu'il n'a eu aucune confirmation formelle de ce que les autorités françaises ne procèderaient en aucune circonstance au recouvrement de l'amende. Il dit ne pas exclure la possibilité que, malgré les affirmations du Gouvernement, les autorités françaises – douanières ou autres – ne lui fassent subir les conséquences de l'imposition de cette amende. Il affirme vouloir éviter de se trouver dans la situation où la Cour tiendrait compte des affirmations du Gouvernement devant elle, mais où les autres autorités françaises – notamment douanières – ne s'estimeraient pas liés par ces affirmations. Selon lui, la Cour doit le considérer victime tant qu'il n'y a pas de certitude absolue que le Gouvernement a renoncé à toute action ou mesure future découlant de l'amende. Il s'étonne enfin de ce que, dans la procédure interne, les autorités n'aient pas fait état de la décision de non-recouvrement, et se demande si le comportement récent du Gouvernement n'est pas destiné à influencer favorablement la Cour quant à la confiscation intervenue en 1996.

59. La Cour rappelle sa jurisprudence selon laquelle une décision ou une mesure favorable au requérant ne suffit à retirer à celui-ci la qualité de «victime» que si les autorités nationales ont reconnu, explicitement ou en substance, puis réparé la violation alléguée de la Convention (cf. *Eckle c. Allemagne* du 15 juillet 1982, série A n° 51, pp. 30-31, § 66; voir également *Amuur c. France*, arrêt du 25 juin 1996, *Recueil* 1996-III, p. 846, § 36; *Dalban c. Roumanie* [GC], n° 28114/95, § 44, CEDH 1999-VI; *Labita c. Italie* [GC], n° 26772/95, § 142, CEDH 2000-IV, et *Senator Lines GmbH c. l'Autriche, la Belgique, le Danemark, la Finlande, la France, l'Allemagne, la Grèce, l'Irlande, l'Italie, le Luxembourg, les Pays-Bas, le Portugal, l'Espagne, la Suède et le Royaume-Uni* (déc.), n° 56672/00, CEDH 2004-IV).

60. Dans l'affaire *Senator Lines* précitée, qui portait sur une amende infligée par la Commission européenne à la requérante, la Cour a considéré que cette dernière ne pouvait pas se prétendre victime, au sens de l'article 34, dans la mesure où elle n'avait pas acquitté l'amende et où non seulement le recours formé par elle contre la décision de la commission avait été examiné, mais il avait donné lieu à l'annulation définitive de l'amende.

61. La Cour observe que tel n'est pas le cas dans la présente affaire, où l'amende demandée par les douanes et infligée par le tribunal correctionnel a été confirmée par la cour d'appel et la Cour de cassation. S'il semble résulter de la décision produite par le Gouvernement que l'amende ne sera pas recouvrée, il s'agit en l'espèce d'une décision purement comptable, qui ne saurait valoir reconnaissance ni *a fortiori* réparation de la violation alléguée.

62. Dès lors, la Cour considère que le requérant peut toujours se prétendre victime, au sens de l'article 34 précité. Il y a donc lieu de rejeter l'exception soulevée par le Gouvernement.

II. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 1 DU PROTOCOLE N° 1 À LA CONVENTION

63. Le requérant se plaint du caractère disproportionné de la confiscation et de l'amende dont il a fait l'objet par rapport au manquement reproché. Il allègue la violation de l'article 1 du Protocole n° 1 à la Convention, qui est ainsi libellé:

> «Toute personne physique ou morale a droit au respect de ses biens. Nul ne peut être privé de sa propriété que pour cause d'utilité publique et dans les conditions prévues par la loi et les principes généraux du droit international.
>
> Les dispositions précédentes ne portent pas atteinte au droit que possèdent les États de mettre en vigueur les lois qu'ils jugent nécessaires pour réglementer l'usage des biens conformément à l'intérêt général ou pour assurer le paiement des impôts ou d'autres contributions ou des amendes.»

A. Arguments des parties

1. Le requérant

64. Le requérant considère que l'argument du Gouvernement tiré de ce que l'obligation légale de déclaration à la douane française des sommes transportées d'un montant supérieur ou égal à 50 000 francs français (FRF), soit 7 600 euros (EUR), viserait à lutter contre les infractions de blanchiment de capitaux constitue un argument de circonstance afin de donner rétroactivement une apparence de légitimité au comportement de l'administration des douanes. Il estime que l'article 465 du code des douanes ne sanctionne qu'un manquement administratif.

65. Il estime que la réglementation en l'espèce était équivoque et trop restrictive. Il fait valoir que l'article 465 précité ne sanctionne que la dissimulation, et qu'un tel manquement administratif est distinct du délit de fraude ou de blanchiment d'argent.

66. Le requérant indique qu'en 1996, il ignorait la réglementation applicable, et que, s'il était censé s'en informer, cette démarche était d'autant moins évidente que cette réglementation était, selon lui, dérogatoire par rapport aux réglementations d'usage dans les autres pays de l'Union européenne. Il soutient qu'il appartenait à la France de spécifier clairement et de manière adéquate la législation applicable en la matière.

67. En outre, le requérant précise que si les arrêts contradictoires rendus successivement en 1998 et en 2000 par la Cour de cassation étaient postérieurs aux faits, survenus en 1996, il n'en demeure pas moins qu'ils traduisent une période au cours de laquelle des opinions divergentes se sont exprimées sur le champ d'application des articles 464 et 465 du code des douanes. Il fait valoir

que si le juge suprême français lui-même donne des interprétations différentes à la question de savoir si les textes susmentionnés s'appliquent aux seuls résidents français ou bien à toute personne physique, quelle que soit sa nationalité, cela montre bien que la législation applicable pouvait ne pas être, à son égard, claire et accessible en 1996.

68. Le requérant souligne que les articles précités du code des douanes ne sanctionnent pas *in abstracto* le blanchiment des capitaux. Il s'agirait d'un argument de circonstance visant à donner rétroactivement une apparence de légitimité au comportement de l'administration des douanes. De plus, le requérant estime qu'une présomption de blanchiment de capitaux ou de fraude fiscale ne peut pas être fondée sur le seul fait qu'il n'aurait pas respecté l'obligation déclarative.

69. Le requérant conçoit qu'un Etat puisse contrôler la circulation des devises, en particulier lorsqu'il s'agit de liquidités. Toutefois, il estime disproportionné d'avoir non seulement été privé de son argent par le jeu de la confiscation, alors que la légalité de son origine était selon lui, prouvée, mais en outre, de s'être vu infliger une amende correspondant à la moitié de la somme saisie alors qu'aucun indice n'étayait l'existence de pratiques de sa part, liées au blanchiment de capitaux.

70. Le requérant conteste les informations qui auraient été fournies par les autorités néerlandaises et auxquelles le Gouvernement se réfère. Il fait valoir qu'il s'agit de calomnies et que, dans la mesure où il n'a jamais fait l'objet d'aucune condamnation en matière de blanchiment d'argent, le Gouvernement ne saurait se fonder sur des informations qui ne seraient pas étayées.

71. D'après lui, la réglementation française est dérogatoire par rapport à celles couramment rencontrées dans les autres pays de l'Union européenne. D'ailleurs, selon lui, le seul fait que le code des douanes a été modifié en 2004 démontre que la loi applicable à l'époque des faits n'était pas compatible avec le principe de liberté de circulation des capitaux, et qu'il n'y avait donc pas de juste équilibre ménagé entre l'intérêt général et le droit du requérant au respect de ses biens garanti par l'article 1 du Protocole n° 1 à la Convention.

2. Le Gouvernement

72. Le Gouvernement convient que la confiscation de la somme transportée par le requérant constitue une ingérence dans le droit au respect de ses biens, au sens de l'article 1 précité. Il estime que la condamnation au paiement d'une amende relève du second alinéa de l'article 1 précité.

73. Le Gouvernement indique que la réglementation douanière mise en cause en l'espèce a été élaborée dans le but de lutter contre le blanchiment des capitaux, et sert à ce titre, un but d'intérêt général. Il rappelle que cet objectif est poursuivi par l'ensemble des Etats membres de l'Union européenne et justifie certains aménagements au principe de libre circulation des capitaux institué par l'article 56 du Traité des Communautés européennes. A cet égard, le Gouvernement rappelle que l'article 58 du traité dispose que l'article 56, consacrant

la liberté de circulation des capitaux, ne porte pas atteinte au droit des Etats membres de prendre toutes les mesures indispensables pour faire échec aux infractions à leurs lois et règlements, notamment en matière fiscale ou en matière de contrôle des établissements financiers, de prévoir des procédures de déclaration des mouvements de capitaux ou de prendre des mesures justifiées par des motifs liés à l'ordre public ou à la sécurité publique.

74. Le Gouvernement considère que le principe de légalité a bien été respecté en l'espèce. L'obligation déclarative et les sanctions qui découlent du non-respect de cette obligation sont prévues aux articles 464 et 465 du code des douanes. Le Gouvernement souligne à ce propos que l'obligation déclarative a été rappelée à deux reprises au requérant par les agents des douanes, en espagnol et en anglais, langues comprises par lui, et qu'il ne pouvait donc prétendre ignorer la loi. Il précise que les peines applicables à l'époque des faits étaient la confiscation des sommes en jeu et une pénalité comprise entre le quart et la totalité de la somme sur laquelle a porté l'infraction.

75. De plus, le Gouvernement considère que le requérant ne saurait se prévaloir de l'insécurité juridique créée par une jurisprudence contradictoire, dans la mesure où les deux arrêts de la Cour de cassation visés par le requérant sont intervenus en 1998 et 2000, soit postérieurement à la date de l'infraction, laquelle a été notifiée au requérant le 29 janvier 1996. En tout état de cause, le Gouvernement fait valoir à cet égard que les deux arrêts successifs de la Cour de cassation n'ont pas, en l'espèce, altéré la lisibilité de la loi. En effet, l'arrêt de la Cour de cassation de 1998 était un arrêt isolé qui avait restreint l'application des articles 464 et 465 du code des douanes aux seuls résidents français de manière totalement contraire à la lettre et à l'esprit de l'article 464, qui ne mentionne aucune précision quant au lieu de résidence des personnes physiques visées dans la disposition précitée. Le Gouvernement estime que cette interprétation jurisprudentielle était peu cohérente avec l'objectif de la loi, qui était de lutter contre le blanchiment des capitaux. Dès lors, il conclut que le revirement de jurisprudence opéré par la Cour de cassation en 2000 était «raisonnablement prévisible», et que l'ingérence dans le droit au respect des biens du requérant était bien prévue par la loi au sens de la jurisprudence de la Cour.

76. En ce qui concerne la proportionnalité de l'ingérence, le Gouvernement se réfère à la jurisprudence de la Cour et cite en particulier l'arrêt *Raimondo c. Italie* (22 février 1994, série A n° 281-A), dans lequel la Cour a reconnu que la confiscation était proportionnée à l'objectif recherché de lutte contre la mafia. Il estime que la lutte contre le blanchiment des capitaux justifie également des aménagements au principe de libre circulation des capitaux, tels que la confiscation. De plus, il se fonde sur la jurisprudence de la Cour de justice des Communautés européennes (CJCE) qui, dans son arrêt *Bordessa*, a admis que les Etats membres mettent en place des procédures de déclaration obligatoire préalablement aux exportations de moyens de paiement. Il indique également que le 28 avril 1997, le groupe multidisciplinaire chargé de mettre en œuvre la politique commune en matière de lutte contre la criminalité a adopté un programme d'action qui souligne l'importance pour chaque Etat de disposer d'une

législation élaborée et étendue en matière de confiscation des produits du crime et du blanchiment de ces produits. L'article 465 du code des douanes s'inscrit dans ces orientations politiques.

77. Selon le Gouvernement, le dispositif applicable permet de trouver un juste équilibre entre l'intérêt général qui s'attache à la lutte contre le blanchiment des capitaux et les droits du requérant. Il indique que l'objectif de lutte contre le blanchiment implique que l'administration puisse prendre des mesures immédiates et préventives, telles que la confiscation du corps du délit. Dans le même temps, le Gouvernement fait valoir que les droits du requérant sont protégés par la marge d'appréciation laissée aux autorités douanières quant au montant de l'amende, et par le contrôle exercé par le juge sur les décisions des autorités douanières, notamment en tenant compte, le cas échéant, de circonstances atténuantes pour prononcer la sanction (article 369 du code des douanes).

78. En l'espèce, le Gouvernement souligne que les autorités administratives et judiciaires se sont prononcées au regard du comportement du requérant qui, alors qu'il détenait sur lui des sommes très importantes en espèces, a tenté d'en dissimuler l'existence aux agents des douanes en répondant par la négative à deux reprises aux questions d'usage posées par les douaniers. Selon le Gouvernement, les informations transmises le jour du contrôle par les autorités néerlandaises sur les activités délictueuses du requérant justifiaient la confiscation des sommes ainsi que l'amende qui lui a été infligée. Ces sanctions ont d'ailleurs ensuite été confirmées par les autorités judiciaires. Le Gouvernement conclut que les sanctions prononcées à l'encontre du requérant étaient, compte tenu du droit applicable en l'espèce, de son comportement et des informations fournies par les autorités néerlandaises, proportionnées à l'objectif poursuivi, à savoir la lutte contre le blanchiment des capitaux.

79. Enfin, il précise subsidiairement qu'à la suite de l'avis motivé de la Commission européenne du 27 juillet 2001, par lequel elle a demandé à la France de revoir le dispositif de sanctions pour non-respect de l'obligation déclarative, les autorités internes ont modifié ce dispositif. Ainsi, la loi du 9 mars 2004 qui a modifié l'article 465 du code des douanes a supprimé la peine de confiscation et réduit l'amende au quart de la somme sur laquelle a porté l'infraction. Toutefois, le Gouvernement ajoute que cette modification est sans rapport avec la présente requête, et qu'il s'agissait de se conformer à la liberté de circulation des capitaux prévue à l'article 56 du Traité et non à l'article 1 du Protocole n° 1 à la Convention, qui n'implique pas la liberté de circulation des capitaux. D'ailleurs, le Gouvernement précise que la confiscation dont le requérant a fait l'objet entrait dans le champ des exceptions à la liberté de capitaux prévues à l'article 58 du Traité.

80. Enfin, le Gouvernement rappelle que dans le cadre d'une action d'apurement comptable intervenue au début de l'année 2005, l'administration des douanes a renoncé au recouvrement de l'amende infligée au requérant, laquelle aurait nécessité une procédure de recouvrement forcé, impossible à mettre en œuvre pour un ressortissant néerlandais résidant en Andorre.

B. Appréciation de la Cour

1. Rappel des principes

81. L'article 1 du Protocole n° 1, qui garantit le droit au respect des biens, contient trois normes distinctes. La première, qui s'exprime dans la première phrase du premier alinéa et revêt un caractère général, énonce le principe du respect de la propriété. La deuxième, figurant dans la seconde phrase du même alinéa, vise la privation de propriété et la soumet à certaines conditions; quant à la troisième, consignée dans le second alinéa, elle reconnaît aux Etats contractants le pouvoir, entre autres, de réglementer l'usage des biens conformément à l'intérêt général. Il ne s'agit pas pour autant de règles dépourvues de rapports entre elles: la deuxième et la troisième ont trait à des exemples particuliers d'atteinte au droit de propriété; dès lors, elles doivent s'interpréter à la lumière du principe général consacré par la première (voir, entre autres, *James et autres c. Royaume-Uni*, arrêt du 21 février 1986, série A n° 98, pp. 29-30, § 37, et les récents arrêts *Anheuser-Busch Inc. c. Portugal* [GC], n° 73049/01, § 62, CEDH 2007-..., et *J.A. Pye (Oxford) Ltd et J.A. Pye (Oxford) Land Ltd c. Royaume-Uni* [GC], n° 44302/02, § 52, CEDH 2007-....).

82. Pour se concilier avec la règle générale énoncée à la première phrase du premier alinéa de l'article 1, une atteinte au droit au respect des biens doit ménager un «juste équilibre» entre les exigences de l'intérêt général de la collectivité et celles de la protection des droits fondamentaux de l'individu (*Beyeler c. Italie* [GC], n° 33202/96, § 107, CEDH 2000-I, et *Air Canada c. Royaume-Uni*, arrêt du 5 mai 1995, série A n° 316-A, p. 16, § 36).

83. Pour ce qui est des ingérences relevant du second alinéa de l'article 1 du Protocole n° 1, lequel prévoit spécialement le «droit que possèdent les Etats de mettre en vigueur les lois qu'ils jugent nécessaires pour réglementer l'usage des biens conformément à l'intérêt général (...)», il doit exister de surcroît un rapport raisonnable de proportionnalité entre les moyens employés et le but visé. A cet égard, les Etats disposent d'une ample marge d'appréciation tant pour choisir les modalités de mise en œuvre que pour juger si leurs conséquences se trouvent légitimées, dans l'intérêt général, par le souci d'atteindre l'objectif de la loi en cause (*AGOSI c. Royaume-Uni*, arrêt du 24 octobre 1986, série A n° 108, § 52).

2. Application au cas d'espèce

a) Sur la norme applicable

84. La Cour considère que l'amende infligée au requérant s'inscrit dans le deuxième alinéa de l'article 1 (cf. *Phillips c. Royaume-Uni*, n° 41087/98, § 51, CEDH 2001-VII, et, *mutatis mutandis, Valico S.r.l. c. Italie* (déc.), n° 70074/01, CEDH 2006-...).

85. S'agissant de la confiscation de la somme transportée par le requérant, la Cour rappelle avoir affirmé dans plusieurs affaires que, même si une telle mesure entraînait une privation de propriété, elle relevait néanmoins d'une régle-

mentation de l'usage des biens (voir *AGOSI* précité, p. 17, § 51, *Raimondo c. Italie*, arrêt du 22 février 1994, série A n° 281-A, p. 16, § 29, *Butler c. Royaume-Uni* (déc.), n° 41661/98, CEDH 2002-VI, *Arcuri c. Italie* (déc.), n° 52024/99, CEDH 2001-VII, et *Riela et autres c. Italie* (déc.), n° 52439/99, 4 septembre 2001, *C.M. c. France* (déc.), n° 28078/95, CEDH 2001-VII). Il s'agissait entre autres dans ces affaires de législations s'inscrivant dans le cadre de la lutte contre le trafic de stupéfiants ou contre les organisations de type mafieux (voir aussi, en matière de non-respect de sanctions internationales *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) c. Irlande* [GC], n° 45036/98, § 142, CEDH 2005-...).

86. La Cour est d'avis que cette approche doit être appliquée à la présente affaire, puisque la confiscation de la somme non déclarée a été prononcée en l'espèce en vertu d'un texte introduit dans le code des douanes (l'article 465) par la loi du 12 juillet 1990 relative à la participation des organismes financiers à la lutte contre le blanchiment des capitaux provenant du trafic des stupéfiants.

b) Sur le respect des exigences de l'article 1 du Protocole no 1

87. La Cour relève que l'obligation de déclaration est prescrite par le droit interne, à savoir l'article 464 du code des douanes et que l'article 465 du même code prévoit les sanctions en cas de non-respect, à savoir la confiscation et l'amende.

88. Le requérant soutient pour sa part que la condition de légalité de l'ingérence n'est pas remplie, aux motifs que la rédaction de l'article 464 au moment des faits ne permettait pas de savoir clairement s'il s'appliquait à lui en tant qu'étranger et par ailleurs la Cour de cassation a rendu elle-même deux arrêts contradictoires sur ce point en 1998 et 2000.

89. La Cour n'est pas convaincue par ces arguments. En premier lieu, dans sa rédaction applicable au moment des faits, l'article 464 précité visait «les personnes physiques» effectuant des transferts, formulation large paraissant devoir s'appliquer à tous, résidents comme non résidents. En second lieu, les arrêts mentionnés par le requérant ont été rendus par la Cour de cassation postérieurement aux faits de la présente requête. En tout état de cause, la Cour observe qu'il ne s'agit pas d'un revirement de jurisprudence, dans la mesure où ces arrêts ont été rendus dans le cadre d'une même affaire, le second arrêt ayant été rendu par la Cour de cassation sur opposition de l'administration des douanes et ayant mis à néant le premier (voir paragraphes 25-26 ci-dessus).

90. La Cour estime devoir également tenir compte de ce que la Cour de justice des Communautés européennes a retenu dans plusieurs arrêts (paragraphes 28-30 ci-dessus) que, contrairement à un système d'autorisation préalable, un système de déclaration préalable tel qu'en l'espèce était compatible avec le droit communautaire et avec la libre circulation des capitaux.

91. Dès lors, la Cour conclut que la loi était suffisamment claire, accessible et prévisible (voir *a contrario Frizen c. Russie*, n° 58254/00, § 36, 24 mars 2005

et, *Baklanov c. Russie*, n° 68443/01, § 46, 9 juin 2005) et que l'ingérence en cause était prévue par la loi, au sens de sa jurisprudence.

92. S'agissant du but visé, la Cour relève que l'article 465 précité a été introduit dans le code des douanes par la loi du 12 juillet 1990 dans le cadre de la lutte contre le blanchiment de capitaux provenant du trafic des stupéfiants. Il ne fait pas de doute pour la Cour qu'il s'agit là d'un but d'intérêt général (cf. notamment *Air Canada* précité, § 42, *Phillips* précité, § 52, et décision *Butler* précitée).

93. La Cour est consciente à cet égard de l'importance que revêt pour les Etats membres la lutte contre le blanchiment de capitaux issus d'activités illicites et pouvant servir à financer des activités criminelles (notamment en matière de trafic de stupéfiants ou de terrorisme international). Elle observe que, depuis quelques années, un nombre croissant d'instruments internationaux (conventions des Nations Unies et du Conseil de l'Europe, recommandations du GAFI) et de normes communautaires (directive du 10 juin 1991 et règlement du 26 octobre 2005) visent à mettre en place des dispositifs efficaces permettant notamment le contrôle de flux transfrontaliers de capitaux. Le système de déclaration obligatoire au passage de la frontière des espèces transportées et de sanction en cas de non déclaration s'inscrit dans ce contexte.

94. Reste à établir si les autorités ont en l'espèce ménagé un rapport raisonnable de proportionnalité entre les moyens employés et le but poursuivi. En d'autres termes, la Cour doit rechercher si un juste équilibre a été maintenu entre les exigences de l'intérêt général et la protection des droits fondamentaux de l'individu, compte tenu de la marge d'appréciation reconnue à l'Etat en pareille matière.

95. La Cour s'est tout d'abord attachée au comportement du requérant. Elle relève qu'il s'est abstenu, malgré les demandes faites à deux reprises par les douaniers, de déclarer les sommes importantes qu'il transportait. Ce faisant, il a enfreint en connaissance de cause l'obligation édictée par l'article 464 du code des douanes, de déclarer au franchissement de la frontière toute somme dépassant un certain plafond (7 600 EUR au moment des faits).

96. Le Gouvernement s'appuie également sur les renseignements transmis par les autorités néerlandaises quant aux activités délictueuses du requérant. A cet égard, la Cour relève que, selon la télécopie de l'attaché douanier de l'ambassade de France aux Pays-Bas du 29 janvier 1996, le requérant est «connu des services judiciaires» pour des faits remontant à 1983 (notamment menaces, extorsion de fonds, enlèvement et détention d'arme à feu). Selon une télécopie du même attaché du 23 avril 1997, sa seule activité connue serait l'immobilier et il serait soupçonné par la police néerlandaise d'utiliser cette façade pour blanchir des capitaux.

97. La Cour note toutefois qu'il ne ressort pas du dossier que le requérant ait fait l'objet de poursuites ni de condamnations de ce chef ou du chef d'infractions liées (notamment trafic de stupéfiants), que ce soit au Pays-Bas ou à Andorre où il réside. La Cour observe d'ailleurs que, dans ses conclusions devant

le tribunal correctionnel, l'administration des douanes a reconnu que la somme saisie sur lui était compatible avec sa fortune personnelle.

98. Le seul comportement délictueux qui puisse donc être retenu à l'encontre du requérant consiste dans le fait de n'avoir pas déclaré au passage de la frontière franco-andorrane les espèces qu'il transportait. Le Gouvernement n'a d'ailleurs pas soutenu que les sommes transportées seraient issues d'activités illicites ou destinées à de telles activités.

99. La Cour estime donc que la présente affaire se distingue des affaires similaires dont elle a eu à connaître jusqu'ici, où les mesures de confiscation ordonnées par les autorités internes étaient de deux ordres: soit elles s'appliquaient à l'objet même du délit (*AGOSI* et *Bosphorus Airways* précités) ou au moyen utilisé pour le commettre (cf. *Air Canada* précité, décision *C.M.* précitée et, *mutatis mutandis, Yildirim c. Italie* (déc.), n° 38602/02, CEDH 2003-IV), soit elles visaient des biens présumés acquis au moyen d'activités délictueuses, (voir en matière de trafic de stupéfiants décision *Phillips* précitée et, *mutatis mutandis, Welch c. Royaume-Uni*, arrêt du 9 février 1995, série A n° 307-A, et en matière d'activités d'organisations de type mafieux arrêt *Raimondo* précité et décisions *Arcuri* et *Riela* précitées), ou des sommes destinées à de telles activités (décision *Butler* précitée).

100. La Cour a également eu égard à l'importance de la sanction qui a été infligée au requérant pour ce défaut de déclaration, à savoir le cumul de la confiscation de l'intégralité de la somme transportée, soit 233 056 EUR, avec une amende égale à la moitié de ce montant (116 528 EUR), soit au total 349 584 EUR. Elle relève qu'en vertu de l'article 465 du code des douanes dans sa rédaction en vigueur au moment des faits, le défaut de déclaration entraînait automatiquement la confiscation de l'intégralité de la somme, seule l'amende pouvant être modulée par les juridictions internes (de 25 à 100 % de la somme non déclarée).

101. La Cour relève que, parmi les autres Etats membres du Conseil de l'Europe, la sanction la plus fréquemment prévue est l'amende. Elle peut être cumulée avec une peine de confiscation, notamment lorsque l'origine licite des sommes transportées n'est pas établie, ou en cas de poursuites pénales à l'encontre de l'intéressé. Toutefois, lorsqu'elle est prévue, la confiscation ne concerne en général que le reliquat de la somme excédant le montant à déclarer; seul un autre Etat (la Bulgarie) prévoit le cumul d'une amende pouvant aller jusqu'au double de la somme non déclarée avec la confiscation automatique de l'intégralité de la somme.

102. La Cour rejoint l'approche de la Commission européenne qui, dans son avis motivé de juillet 2001 (paragraphe 29 ci-dessus), a souligné que la sanction devait correspondre à la gravité du manquement constaté, à savoir le manquement à l'obligation de déclaration et non pas à la gravité du manquement éventuel non constaté, à ce stade, d'un délit tel que le blanchiment d'argent ou la fraude fiscale.

103. La Cour relève qu'à la suite de cet avis motivé, les autorités françaises ont modifié l'article 465 précité. Dans sa rédaction entrée en vigueur le 1er octobre 2004, cet article ne prévoit plus de confiscation automatique et l'amende a été réduite au quart de la somme sur laquelle porte l'infraction. La somme non déclarée est désormais consignée pendant une durée maximum de six mois, et la confiscation peut être prononcée dans ce délai par les juridictions compétentes lorsqu'il y a des indices ou raisons plausibles de penser que l'intéressé a commis d'autres infractions au code des douanes ou y a participé. De l'avis de la Cour, un tel système permet de préserver le juste équilibre entre les exigences de l'intérêt général et la protection des droits fondamentaux de l'individu.

104. La Cour observe enfin que, dans la plupart des textes internationaux ou communautaires applicables en la matière, il est fait référence au caractère «proportionné» que doivent revêtir les sanctions prévues par les Etats.

105. Au vu de ces éléments et dans les circonstances particulières de la présente affaire, la Cour arrive à la conclusion que la sanction imposée au requérant, cumulant la confiscation et l'amende, était disproportionnée au regard du manquement commis et que le juste équilibre n'a pas été respecté (cf. *Ismayilov c. Russie*, no 30352/03, § 38, 6 novembre 2008).

106. Il y a donc eu en l'espèce violation de l'article 1 du Protocole no 1 à la Convention.

III. SUR L'APPLICATION DE L'ARTICLE 41 DE LA CONVENTION

107. Aux termes de l'article 41 de la Convention,

> «Si la Cour déclare qu'il y a eu violation de la Convention ou de ses Protocoles, et si le droit interne de la Haute Partie contractante ne permet d'effacer qu'imparfaitement les conséquences de cette violation, la Cour accorde à la partie lésée, s'il y a lieu, une satisfaction équitable.»

108. Le requérant sollicite, au titre du préjudice matériel, la somme de 226 890,11 euros (EUR) correspondant aux 500 000 florins confisqués, assortie des intérêts. Il demande également 37 772,44 EUR au titre des frais d'avocat et 3 249,89 EUR au titre des frais de traduction.

109. Le Gouvernement considère que le préjudice financier du requérant n'est pas établi dès lors que l'administration des douanes a renoncé au recouvrement de l'amende qui, aux termes de l'article 465 du code des douanes, pouvait atteindre au minimum le quart et au maximum le montant de la somme objet de l'infraction. Il estime qu'un constat de violation vaudrait réparation du préjudice éventuellement subi. Le Gouvernement propose par ailleurs 3 000 EUR au titre des frais d'avocat et 500 EUR pour les frais de traduction.

110. La Cour considère que, dans les circonstances de l'espèce, la question de l'application de l'article 41 de la Convention ne se trouve pas en état. Partant, il y a lieu de réserver la question en tenant compte de l'éventualité d'un accord entre l'Etat défendeur et le requérant (article 75 § 1 du règlement).

PAR CES MOTIFS, LA COUR

1. *Rejette*, à l'unanimité, l'exception préliminaire du Gouvernement relative à la qualité de victime du requérant en ce qui concerne l'amende;
2. *Dit,* à l'unanimité, qu'il y a eu violation de l'article 1 du Protocole n° 1 à la Convention;
3. *Dit*, par six voix contre une, que la question de l'application de l'article 41 de la Convention ne se trouve pas en état; en conséquence,
   a) la *réserve* en entier;
   b) *invite* le Gouvernement et le requérant à lui adresser par écrit, dans le délai de trois mois à compter du jour où l'arrêt sera devenu définitif conformément à l'article 44 § 2 de la Convention, leurs observations sur cette question et notamment à lui donner connaissance de tout accord auquel ils pourraient aboutir;
   c) *réserve* la procédure ultérieure et *délègue* au président de la chambre le soin de la fixer au besoin.

Fait en français, puis communiqué par écrit le 26 février 2009, en application de l'article 77 §§ 2 et 3 du règlement.

Søren Nielsen
Président

Christos Rozakis
Greffier

Au présent arrêt se trouve joint, conformément aux articles 45 § 2 de la Convention et 74 § 2 du règlement, l'exposé de l'opinion en partie dissidente du juge Jebens.

C.L.R.
S.N.

OPINION PARTIELLEMENT DISSIDENTE DU JUGE JEBENS

(Traduction)

Je conviens qu'il y a eu violation de l'article 1 du Protocole n° 1 dans cette affaire en raison du manque de proportionnalité entre le but légitime visé par la législation douanière française et la sanction infligée au requérant. Toutefois, je ne souscris pas entièrement au raisonnement de la majorité et, par ailleurs, je n'approuve pas la décision de celle-ci de réserver la question de l'application de l'article 41.

Tout d'abord, il convient d'apporter quelques éclaircissements quant à la culpabilité du requérant en l'espèce: s'il est vrai que l'intéressé a répété à plusieurs reprises aux douaniers français qui l'interrogeaient qu'il n'avait rien à déclarer, ce qui était faux, il n'a pas été inculpé et encore moins condamné pour s'être procuré cet argent illégalement. Il y a lieu de noter que les autorités françaises ont reconnu que la somme confisquée, équivalente à 233 000 euros, était compatible avec la fortune personnelle du requérant. La Cour n'est pas en mesure de tirer une conclusion différente. Il lui faut donc fonder son raisonnement sur la prémisse selon laquelle le requérant était le propriétaire légitime de l'argent confisqué.

C'est dans cette optique que doit être analysée la décision de confisquer l'intégralité de la somme saisie et d'infliger en outre au requérant une amende correspondant à la moitié de cette somme. Il est également utile à cet égard de rappeler que ces sanctions ont été prononcées sur la base de dispositions strictes du code des douanes qui ont été supprimées par la suite.

A mon avis, ces faits ne sont pas seulement pertinents pour juger de la proportionnalité sous l'angle de l'article 1 du Protocole n° 1 mais militent aussi en faveur de l'adoption d'une décision sur le terrain de l'article 41 au lieu de réserver la question du dédommagement pour qu'elle soit tranchée ultérieurement. Il faut donc aussi tenir dûment compte des intérêts du requérant en la matière, sans oublier que celui-ci attend déjà depuis plus de six ans qu'un arrêt soit rendu.

En outre, la Cour dispose de toutes les informations dont elle a besoin pour terminer l'examen de l'affaire même en ce qui concerne le dédommagement. Le fait que le requérant ne se soit pas acquitté de l'amende infligée ne saurait constituer un obstacle étant donné que cela n'influe pas sur le montant du dédommagement mais seulement sur la question du règlement, qui doit être résolue en déduisant l'amende impayée du total de l'indemnisation octroyéLa majorité ayant décidé de réserver la question de l'article 41, je ne vois pas de raison de l'aborder quant au fond.

CASE OF

ISMAYILOV v. RUSSIA

(Application no. 30352/03)

JUDGMENT

6 November 2008

PROCEDURE

1. The case originated in an application (no. 30352/03) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Azerbaijani national, Mr Adil Yunus oğlu İsmayılov ("the applicant"), on 2 September 2003.

2. The applicant, who had been granted legal aid, was represented by Mr M. Rachkovskiy and Ms O. Preobrazhenskaya from the International Protection Centre, a Moscow-based non-governmental organisation. The Russian Government ("the Government") were represented by Mr P. Laptev, former Representative of the Russian Federation at the European Court of Human Rights.

3. On 20 January 2006 the Court decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3 of the Convention).

4. The Azerbaijani Government did not exercise their right to intervene in the proceedings (Article 36 § 1 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1937 and lives in Moscow.

6. On 17 November 2002 the applicant arrived in Moscow from Baku. He was carrying with him 21,348 US dollars (USD), representing the proceeds from the sale of his ancestral dwelling in Baku. However, he only reported USD 48 on the customs declaration, whereas Russian law required that any amount exceeding USD 10,000 be declared to the customs. A customs inspection uncovered the remaining amount in his luggage. The applicant was charged with smuggling, a criminal offence under Article 188 § 1 of the Criminal Code, and the money was appended to the criminal case as physical evidence (*вещественные доказательства*).

7. On 8 May 2003 the Golovinskiy District Court of Moscow found the applicant guilty as charged and imposed a suspended sentence of six months' imprisonment conditional on six months' probation. As regards the money, it held:

> "Physical evidence – 21,348 US dollars stored in the Central cash desk of the Sheremetyevo Customs Office – shall revert to the State."

8. In his statement of appeal the applicant claimed his innocence and submitted that the confiscation order had no basis in the domestic law because Article 188 of the Criminal Code did not provide for confiscation as punishment.

9. On 29 May 2003 the Moscow City Court upheld the conviction on appeal. As regards the money, it noted that the trial court had not ordered confiscation of the money as a penal sanction, but had rather decided on the destiny of the physical evidence.

10. The applicant sent complaints to various Russian authorities. He pointed out that he had been living below the poverty line and that for this reason he had decided to sell the flat in Baku which he had inherited from his mother. He enclosed copies of the will and the flat sale contract. He asked for return of the lawfully acquired money on humanitarian grounds.

11. On 8 September 2003 the Ombudsman of the Russian Federation wrote a letter on the applicant's behalf to the acting Moscow City prosecutor, asking him to submit a request for institution of supervisory-review proceedings in the part concerning the confiscation order. On 18 September 2003 the deputy Moscow City prosecutor replied to the Ombudsman that there were no reasons to seek institution of supervisory-review proceedings because the confiscation order had been lawful on the basis of paragraph 7 of the USSR Supreme Court's Resolution of 3 February 1978.

12. On 22 October 2003 the Ombudsman asked the Prosecutor General to apply for institution of supervisory-review proceedings. He wrote, firstly, that, contrary to the requirements of the Code of Criminal Procedure, no procedural document indicated what category of physical evidence the applicant's money belonged to. That omission entailed an incorrect decision on the destiny of the physical evidence. The applicant's money had neither been an instrument of the crime – in smuggling cases only a hiding place could be such an instrument – nor had it been criminally acquired. Accordingly, neither paragraph 3 (1) nor paragraph 3 (4) of Article 81 of the Code of Criminal Procedure were applicable in the applicant's situation and the money should have been returned to the lawful owner pursuant to paragraph 3 (6) of that Article. Otherwise, the confiscation order amounted to a *de facto* second punishment for the same offence. Finally, the Ombudsman contested the applicability of the USSR Supreme Court's resolution of 3 February 1978. He pointed out that paragraph 7 expressly provided for application of the "current legislation". As the new Criminal Code did not provide for confiscation in cases of smuggling, paragraph 7 could not be applied.

13. On 9 December 2003 the deputy Prosecutor General replied to the Ombudsman that the Presidium of the Supreme Court had already opined that the object of smuggling should be treated as the instrument of the offence and be liable to confiscation as such (he referred to the judgment in the *Petrenko* case, cited in paragraph 23 below).

14. The Ombudsman lodged a constitutional complaint on behalf of the applicant and another person.

15. On 8 July 2004 the Constitutional Court declared the complaint inadmissible (decision no. 251-O). It held that the legal possibility of confiscating the objects recognised as physical evidence in a criminal case, including instruments and proceeds of offences, was compatible with the international obligations of the Russian Federation undertaken under the United Nations Convention against Transnational Organised Crime and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. Hence, Article 81 of the Code of Criminal Procedure did not permit an arbitrary interference with property rights and did not violate, in itself, the complainants' constitutional rights. The Constitutional Court concluded as follows:

> "Determination of the status of the objects illegally transported across the customs border of the Russian Federation in the criminal proceedings and decision on whether they fit the description of physical evidence liable to criminal confiscation... are to be made by the court of general jurisdiction trying the criminal case... Lawfulness of, and justification for, the judicial decision on confiscation of physical evidence shall be reviewed by higher courts in criminal proceedings. The Constitutional Court of the Russian Federation is not competent to carry out such a review..."

16. On 24 March 2005 the Constitutional Court refused the Ombudsman's further request for a clarification of its decision of 8 July 2004.

II. RELEVANT INTERNATIONAL AND DOMESTIC LAW AND PRACTICE

17. The United Nations Convention against Transnational Organized Crime which concerns the transnational offences and also offences of participation in an organised criminal group, laundering of the proceeds of crime, corruption, and obstruction of justice, ratified by Russia on 26 May 2004, provides as follows:

Article 7 Measures to combat money-laundering

> "2. States Parties shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments."

Article 12 Confiscation and seizure

> "1. States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:
>
> (a) Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds;
>
> (b) Property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention."

18. The Criminal Code of the Russian Federation provides that smuggling, that is movement of large amounts of goods or other objects across the customs border of the Russian Federation, committed by concealing such goods from the customs or combined with non-declaration or inaccurate declaration of such goods, carries a penal sanction of up to five years' imprisonment (Article 188 § 1).

19. The Foreign Currency Act (Federal Law no. 3615-I of 9 October 1992, in force at the material time) provided that Russian residents and non-residents alike had the right to transfer, bring in, and send foreign currency to Russia without any restrictions provided that they have complied with the customs rules (sections 6 § 3 and 8 § 1).

20. The Code of Criminal Procedure of the Russian Federation ("CCrP") provides as follows:

Article 81. Physical evidence

"1. Any object may be recognised as physical evidence –

(1) that served as the instrument of the offence or retained traces of the offence;

(2) that was the target of the criminal acts;

(3) any other object or document which may be instrumental for detecting a crime or establishing the circumstances of the criminal case.

...

3. On delivery of a conviction... the destiny of physical evidence must be decided upon. In such a case –

(1) instruments of the crime belonging to the accused are liable to confiscation, transfer to competent authorities or destruction;

(2) objects banned from circulation must be transferred to competent authorities or destroyed;

(3) non-reclaimed objects of no value must be destroyed...;

(4) criminally acquired money and other valuables must revert to the State by a judicial decision;

(5) documents must be kept with the case file...;

(6) any other objects must be returned to their lawful owners or, if the identity of the owner cannot be established, transferred to the State..."

Similar provisions were previously contained in Article 86 of the RSFSR Code of Criminal Procedure (cited in *Baklanov v. Russia*, no. 68443/01, § 20, 9 June 2005).

21. The Resolution of the Plenary Supreme Court of the USSR "On judicial practice regarding the offence of smuggling" (no. 2 of 3 February 1978) provided as follows:

"7. In accordance with the current legislation, the objects of smuggling are liable to confiscation to the State as physical evidence. Vehicles and other means of transport are also liable to confiscation as instruments of the offence provided that they were equipped with special hiding places for concealing goods or other valuables..."

22. The Resolution of the Plenary Supreme Court of the USSR "On confiscation of the instruments of the offence that were recognised as physical evidence in the case" (no. 19 of 16 August 1984) provided as follows:

> "Having regard to the questions relating to the possibility of applying Article 86 § 1 of the RSFSR Code of Criminal Procedure... in cases of negligent criminal offences, the Plenary USSR Supreme Court resolves –
>
> – to clarify that the objects belonging to the convict and declared to be physical evidence may be confiscated on the basis of Article 86 § 1 of the RSFSR Code of Criminal Procedure... only if the convict or his accomplices deliberately used them as the instruments of the crime with a view to achieving a criminal result."

23. The Presidium of the Supreme Court of the Russian Federation in the case of *Prosecutor General v. Petrenko* (decision no. 446p98pr of 10 June 1998) granted the prosecution's appeal against the judgment, by which Mr Petrenko had been found guilty of smuggling of foreign currency but the money had been returned to him on the ground that Article 188 of the Criminal Code did not provide for confiscation as a penal sanction. The Presidium held as follows:

> "Confiscation of property as a penal sanction must be distinguished from confiscation of smuggled objects which were recognised as physical evidence. These issues must be addressed separately in the judgment...
>
> In the meaning of [Article 86 § 1 of the RSFSR Code of Criminal Procedure] and also Article 83 of the CCrP, an instrument of the offence is any object which has been used for accomplishing publicly dangerous actions, irrespective of the main purpose of the object. Accordingly, the notion of an instrument of the offence comprises the object of the offence.
>
> A mandatory element of a criminal offence under Article 188 of the Criminal Code is an object of smuggling that is being illegally transported across the customs border... The court found Mr Petrenko guilty of [attempted smuggling], noting that the US dollars were the object of the offence. Accordingly, it was required to decide on the destiny of physical evidence in accordance with Article 86 § 1 of the CCrP – that is, according to the rules on the instruments of the offence – but failed to do so."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

24. The applicant complained under Article 1 of Protocol No. 1 that the authorities had unlawfully taken away the money he had obtained from the sale of the inherited flat. Article 1 of Protocol No. 1 reads as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of prop-

erty in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

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

B. Merits

1. Submissions by the parties

26. The applicant submitted firstly that the confiscation measure had been unlawful because, on one hand, Article 188 of the Criminal Code did not provide for confiscation as a sanction for smuggling and, on the other hand, Article 81 of the Code of Criminal Procedure allowed the authorities to confiscate only criminally acquired money, whereas the money taken from him had been the lawful proceeds from the sale of his late mother's flat in Baku. The applicant pointed out that he had had no criminal record nor had been suspected of criminal activities and the United Nations Convention against Transnational Organized Crime had been irrelevant in his case. He finally maintained that the confiscation measure had imposed a disproportionate burden on him, especially taking into account that he had already been punished with a criminal conviction and a suspended sentence of imprisonment.

27. The Government submitted that the money the applicant had carried had been the instrument of the offence and physical evidence in the case. It had been confiscated in accordance with the Article 81 § 3 (1) of the Code of Criminal Procedure and the Supreme Court's case-law in the *Petrenko* case. That decision was compatible with the international-law principles and, in particular, Article 12 of the United Nations Convention against Transnational Organized Crime, which provides for a "possibility to confiscate the proceeds and property of the offence, equipment and other means, used or meant to be used while committing an offence". The confiscation measure had had a lawful basis and had also been foreseeable for the applicant.

2. The Court's assessment

(a) The applicable rule

28. Article 1 of Protocol No. 1 comprises three distinct rules: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, *inter alia*, to control the use of property in accordance with the general interest. The three rules are not, however, distinct in the sense of being unconnected. The second

and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, as a recent authority, *Broniowski v. Poland* [GC], no. 31443/96, § 134, ECHR 2004-V).

29. The "possession" at issue in the present case was an amount of money in US dollars which was confiscated from the applicant by a judicial decision. It is not in dispute between the parties that the confiscation order amounted to an interference with the applicant's right to peaceful enjoyment of his possessions and that Article 1 of Protocol No. 1 is therefore applicable. It remains to be determined whether the measure was covered by the first or second paragraph of that Convention provision.

30. The Court reiterates its constant approach that a confiscation measure, even though it does involve a deprivation of possessions, constitutes nevertheless control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1 (see *Riela and Others v. Italy* (dec.), no. 52439/99, 4 September 2001; *Arcuri and Others v. Italy* (dec.), no. 52024/99, 5 July 2001; *C.M. v. France* (dec.), no. 28078/95, 26 June 2001; *Air Canada v. the United Kingdom*, judgment of 5 May 1995, Series A no. 316-A, § 34; and *AGOSI v. the United Kingdom*, judgment of 24 October 1986, Series A no. 108, § 34). Accordingly, it considers that the same approach must be followed in the present case.

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

31. The Court emphasises that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be "lawful": the second paragraph recognises that the States have the right to control the use of property by enforcing "laws". Moreover, the rule of law, one of the foundations of a democratic society, is inherent in all the Articles of the Convention. The issue of whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights only becomes relevant once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary (see, among other authorities, *Baklanov v. Russia*, no. 68443/01, § 39, 9 June 2005, and *Frizen v. Russia*, no. 58254/00, § 33, 24 March 200532. The money which had been discovered on the applicant was recognised as physical evidence in the criminal case against him in accordance with paragraph 1 of Article 81 of the Code of Criminal Procedure. Pursuant to paragraph 3 of that Article, upon pronouncement of the judgment, the trial court was required to decide on the destiny of physical evidence. It determined that the money was an instrument of the crime liable to confiscation, an eventuality foreseen in subparagraph 1 of paragraph 3 of Article 81. Contrary to the applicant's submission that Article 81 only permitted confiscation of criminally acquired assets, that provision did not contain qualification as to the lawful or unlawful origin of the instruments of the offence. As to whether the non-declared money should have been considered

the instrument or the object of the offence of smuggling, the Court notes that at least since the Supreme Court's judgment in the *Petrenko* case (see paragraph 23 above), the interpretation of the notion of an "instrument of the offence" as comprising also the objects of the offence has been entrenched in the Russian law. Accordingly, the Court finds that the measure had a basis in domestic law which was sufficiently foreseeable in its application.

33. As regards the general interest of the community which the interference may have pursued, the Court observes that the States have a legitimate interest and also a duty by virtue of various international treaties, such as the United Nations Convention against Transnational Organized Crime, to implement measures to detect and monitor the movement of cash across their borders, since large amounts of cash may be used for money laundering, drug trafficking, financing of terrorism or organised crime, tax evasion or commission of other serious financial offences. The general declaration requirement applicable to any individual crossing the State border prevents cash from entering or leaving the country undetected and the confiscation measure which the failure to declare cash to the customs authorities incurs is a part of that general regulatory scheme designed to combat those offences. The Court therefore considers that the confiscation measure conformed to the general interest of the community.

34. The Court will next assess whether there was a reasonable relationship of proportionality between the means employed by the authorities to secure the general interest of the community and the protection of the applicant's right to the peaceful enjoyment of his possessions or, in other words, whether an individual and excessive burden was or was not imposed on the applicant.

35. The criminal offence of which the applicant was found guilty consisted of failure to declare the 21,300 US dollars in cash which he was carrying, to the customs authorities. It is important to note that the act of bringing foreign currency in cash into Russia was not illegal under Russian law. Not only was it lawful to import foreign currency as such but also the sum which could be legally transferred or, as in the present case, physically carried across the Russian customs border, was not in principle restricted (see paragraph 19 above). This element distinguishes the instant case from the cases in which the confiscation measure applied either to goods whose importation was prohibited (see *AGOSI*, cited above, concerning a ban on import of gold coins; *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI, concerning the banning of Yugoslavian aircraft falling under the sanctions regime) or vehicles used for transport of prohibited substances or trafficking in human beings (see *Air Canada*, cited above; *C.M. v. France* (dec.), cited above, and *Yildirim v. Italy* (dec.), no. 38602/02, ECHR 2003-IV).

36. Furthermore, the lawful origin of the confiscated cash was not contested. The applicant possessed documentary evidence, such as the will and the sale contract, showing that he had acquired the money through the sale of a Baku flat which he had inherited from his mother. On that ground the Court distinguishes the present case from the cases in which the confiscation measure extended

to the assets which were the proceeds of a criminal offence (see *Phillips v. the United Kingdom*, no. 41087/98, §§ 9-18, ECHR 2001-VII), which were deemed to have been unlawfully acquired (see *Riela* and *Arcuri*, both cited above, and *Raimondo v. Italy*, judgment of 22 February 1994, Series A no. 281-A, § 29) or were intended for use in illegal activities (see *Butler v. the United Kingdom* (dec.), no. 41661/98, 27 June 2002).

37. The Court further notes that the applicant did not have a criminal record and that he had not been suspected of, or charged with, any criminal offences prior to the incident at issue. There is nothing to suggest that by imposing the confiscation measure on the applicant the authorities sought to forestall any other illegal activities, such as money laundering, drug trafficking, financing of terrorism, or tax evasion. The money he transported had been lawfully acquired and it was permissible to bring that amount into Russia so long as he declared it to the customs authorities. It follows that the only criminal conduct which could be attributed to him was the failure to make a declaration to that effect to the customs authorities.

38. The Court considers that, in order to be considered proportionate, the interference should correspond to the gravity of the infringement, namely the failure to comply with the declaration requirement, rather than to the gravity of any presumed infringement which had not however been actually established, such as an offence of money laundering or tax evasion. The amount confiscated was undoubtedly substantial for the applicant, for it represented the entirety of the proceeds from the sale of his late mother's home in Baku. On the other hand, the harm that the applicant might have caused to the authorities was minor: he had not avoided customs duties or any other levies or caused any other pecuniary damage to the State. Had the amount gone undetected, the Russian authorities would have only been deprived of the information that the money had entered Russia. Thus, the confiscation measure was not intended as pecuniary compensation for damage – as the State had not suffered any loss as a result of the applicant's failure to declare the money – but was deterrent and punitive in its purpose (compare *Bendenoun v. France*, judgment of 24 February 1994, Series A no. 284, § 47). However, in the instant case the applicant had already been punished for the smuggling offence with a term of imprisonment conditional on a period of probation. It has not been convincingly shown or indeed argued by the Government that that sanction alone was not sufficient to achieve the desired deterrent and punitive effect and prevent violations of the declaration requirement. In these circumstances, the imposition of a confiscation measure as an additional sanction was, in the Court's assessment, disproportionate, in that it imposed an "individual and excessive burden" on the applicant.

39. There has therefore been a violation of Article 1 of Protocol No. 1.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

40. The applicant further complained under Article 6 §§ 1 and 3 of the Convention that his right to a fair trial within a reasonable time and his right to

question witnesses for the defence had been breached. Relying on Article 8 § 2 of the Convention, he maintained that his offence had not impaired any public or State interests. The Court considers that these complaints have not been made out and rejects them as manifestly ill-founded.

41. Lastly, the applicant complained under Article 4 § 1 of Protocol No. 7 that confiscation of the money amounted to a second conviction for the offence for which he had already been punished with deprivation of liberty. Since both sanctions were issued in the same proceedings, Article 4 of Protocol No. 7 finds no application. It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

42. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

43. The applicant claimed 679,346.73 Russian roubles in respect of pecuniary damage, representing the confiscated amount calculated at the exchange rate on the date of confiscation. He also claimed EUR 120,000 in respect of non-pecuniary damage, which represented the current value of a one-room flat in Moscow equivalent to one that he had intended to buy with the confiscated money.

44. The Government submitted that the claim was manifestly excessive.

45. The Court has found that that amount was confiscated from him in breach of Article 1 of Protocol No. 1. It accepts therefore the applicant's claim in respect of pecuniary damage and awards him EUR 20,000 under this head. It considers, however, that the claim in respect of non-pecuniary damage is excessive. Making its assessment on an equitable basis, the Court awards the applicant EUR 5,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on it.

B. Costs and expenses

46. The applicant did not make a claim for costs and expenses. Accordingly, there is no call to make an award under this head.

C. Default interest

47. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint concerning an alleged violation of the applicant's right to peaceful enjoyment of his possessions admissible and the remainder of the application inadmissible;
2. *Holds* by six votes to one that there has been a violation of Article 1 of Protocol No. 1;
3. *Holds* by six votes to one
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 25,000 (twenty-five thousand euros), plus any tax that may be chargeable, in respect of pecuniary and non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 6 November 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President

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

C.L.R.

S.N.

DISSENTING OPINION OF JUDGE KOVLER

To my regret I cannot share the conclusions of the Chamber in this case. I did not agree with the conclusions of the majority in the similar case of *Baklanov v. Russia,* no. 68443/01, judgment of 9 June 2005 (which became final on 30 November 2005) in which the Court concluded that "the interference with the applicant's property cannot be considered lawful within the meaning of Article 1 of Protocol 1 to the Convention" (§ 46 of the Baklanov judgment). In the present case the Court concluded differently: " ... the Court finds that the measure had a basis in domestic law which was sufficiently foreseeable in its application" (§ 32). But for the majority "the imposition of a confiscation measure as an additional sanction was, in the Court's assessment, disproportionate..." (§ 38). Nota bene: lawful but disproportionate...

As regards the lawfulness of the interference I refer to the provisions of Article 188 ("Contraband") of the Criminal Code of the Russian Federation and the Foreign Currency Act (reproduced in §§ 18-19 of the judgment). These provisions specify in clear terms in what circumstances the importation of foreign currency in cash was illegal under Russian law. The judgment (§ 20) also reproduces Article 81 of the Code of Criminal Procedure of the Russian Federation, which provides that any object used to commit an offence may be recognised as physical evidence and that instruments of the crime belonging to the accused are liable to confiscation, transfer to the competent authorities or destruction (Article 81 § 3 (1)).

As mentioned in § 15 of the present judgment, the Constitutional Court of the Russian Federation in its Decision (*Opredeleniye)* of 8 July 2004 concluded that the determination of the procedural status of objects illegally transported across the customs border of the Russian Federation in criminal proceedings and the decision as to whether they constitute physical evidence liable to criminal confiscation are to be made by the court of general jurisdiction trying the criminal case. Furthermore, it did not establish any extra-judicial way of confiscation (*vnesudebnyy poriadok konfiskatsiji*) of money in Mr. Izmayilov's case.

On many occasions our Court has observed that the Court's power to review compliance with domestic law is limited, it being in the first place for the national authorities, notably the courts, to interpret and apply that law (see *Chappell v the United Kingdom*, judgment of 30 March 1989, Series A no. 152-A, p. 23; *The Traktorer Aktiebolag v. Sweden*, judgment of 7 July 1989, Series A no. 159, p. 23).

The Golovinskiy District Court of Moscow found the applicant guilty under Article 188 § 1 of the Criminal Code and held that the illegally transported

money was physical evidence to be transferred into the State's possession, strictly applying the national law.

As to disproportionality, Article 188 §1 of the Criminal Code of the Russian Federation carries a penal sanction of up to five years' imprisonment. Thus, the two years' suspended sentence is not really disproportionate punishment even in combination with a confiscation of physical evidence. I do not agree with the interpretation of the AGOSI case given in § 35 of the present judgment. In the mentioned case the Court pointed out in general terms, as the Commission did in the past, that "under the general principles of law recognised in all Contracting States, smuggled goods may, as a rule, be the object of confiscation" (*AGOSI v. the United Kingdom*, judgment of 24 October 1986, Series A no. 108, § 53). In other words, a margin of appreciation of the States is recognised by the Court in this delicate matter, and it does not contravene Article 1 § 2 of the Protocol 1 to the Convention.

In my dissenting opinion on the *Baklanov* case I also drew attention to the international aspects of the case, essentially to the UN and Council of Europe's Conventions on money laundering where the term "confiscation" means not only punishment (or "additional sanction" – the term used by our Court in § 38), but also "a measure ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property" (Article 1 of the Council of Europe Convention of 8 November 1990), a kind of preventive and "pedagogical" measure.

Last but not least, I am really shocked that someone can be awarded a 25,000 Euros prize for illegally transporting money across the customs border premeditatedly, declaring only 48 US dollars in the customs declaration and carrying in reality 21,348 US dollars... Incidentally, in the *Baklanov* case the applicant, for reasons which can readily be understood, did not include the forfeited sum in his claims under Article 41.

CASE OF

PHILLIPS v. THE UNITED KINGDOM

(Application no. 41087/98)

JUDGMENT

5 July 2001

PROCEDURE

1. The case originated in an application (no. 41087/98) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a United Kingdom national, Mr Steven Phillips ("the applicant"), on 20 April 1998.

2. The applicant was represented by Mr R. James, a solicitor practising in Newport, Gwent, and by Mr R. Pearse Wheatley, a barrister practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Ms H. Fieldsend, of the Foreign and Commonwealth Office.

3. The applicant alleged, *inter alia*, that the statutory assumption made against him by the court which issued a confiscation order following his conviction for a drug offence violated his right to the presumption of innocence under Article 6 § 2 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). It was declared partly admissible on 30 November 2000 [*Note by the Registry*. The Court's decision is obtainable from the Registry].

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 8 February 2001 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*

Ms H. Fieldsend, Foreign and Commonwealth Office, *Agent*,

Mr D. Perry, *Counsel*,

Ms M. Dyson, Home Office,

Mr P. Vallance, Home Office, *Advisers*;

(b) *for the applicant*

Mr R. Pearse Wheatley, *Counsel*,

Mr Y. Chandarana, *Junior Counsel*,

Mr R. James, *Solicitor*.

The Court heard addresses by Mr Pearse Wheatley and Mr Perry.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. On 27 June 1996, at Newport Crown Court, the applicant was convicted of being concerned in the importation in November 1995 of a large quantity of cannabis resin, contrary to section 170(2) of the Customs and Excise Management Act 1979. On 12 July 1996 he was sentenced to nine years' imprisonment in respect of this offence. The applicant had previous convictions, but none in respect of a drug-related offence.

9. An inquiry was conducted into the applicant's means, pursuant to section 2 of the Drug Trafficking Act 1994 ("the 1994 Act" – see below).

On 15 May 1996 a Customs and Excise appointed drug financial investigation officer advised the applicant's solicitors that he was carrying out an investigation into their client's financial affairs and that he wished to interview him in order to assist the court in determining whether he had benefited from drug trafficking. The applicant declined to take part in the interview.

10. The investigation officer prepared a written statement pursuant to section 11 of the 1994 Act which was served on the applicant and filed with the court.

In the statement the investigation officer observed that the applicant had no declared taxable source of income, although he was the registered owner of a house converted into four flats from which he had started a bed-and-breakfast business in December 1991. Examination of the applicant's building society account showed cash and cheque deposits in the period from August 1994 to November 1995 totalling over 17,000 pounds sterling (GBP), which the investigation officer suggested might represent rental income from the four flats. The applicant was found to have become a director of a newsagents business in July 1992 of which his parents were the sole shareholders and to have bought a shop in September 1992 for GBP 28,493.25, of which GBP 12,200 was paid in cash. He was the registered owner of five cars, of an estimated total value of approximately GBP 15,000, and was found to have spent GBP 2,000 on a BMW 520i in October 1995, and approximately GBP 88,400 on expenses related to the November 1995 importation of cannabis (in respect of which he had been convicted). The investigation officer concluded that the applicant had benefited from drug trafficking and that the total benefit was GBP 117,838.27.

In respect of the applicant's realisable assets, the investigation officer observed:

> "The size of Phillips' realisable assets is likely to be peculiarly within the defendant's own knowledge and I feel it reasonable to suppose that any successful drug trafficker (in as much as the defendant is) may take care to ensure, so far as he can, that the proceeds of his trade will be hidden away so as to be untraceable. Examples include the fact that his business dealings are always conducted in cash, that no records are ever maintained, and that some assets, for example the BMW 520i, are registered in false names."

11. The applicant filed a written statement in response, in which he denied having benefited from drug trafficking. He explained that in 1990-91 he had been convicted of car theft and required to pay GBP 25,000 to the insurance company which had indemnified the victims. He claimed that he had sold the house for GBP 50,000 to X in order to clear this debt and had used the GBP 12,000 residue from the sale to purchase the newsagents premises for his parents because he owed them money too. He denied owning any part in the newsagents business. When he was released from prison in April 1994 he began trading in telephones; this was the source of the GBP 17,000 in his building society account. He denied owning any of the cars registered in his name, claiming variously that each had been purchased and sold on behalf of a friend or stolen without insurance. In conclusion, he alleged that his only realisable assets were some GBP 200 in a building society account and the fittings of a garage rented from the local authority. The applicant filed documentary evidence and affidavits in support, primarily, of his claim no longer to own the house.

12. The investigation officer filed a second statement in accordance with section 11(1) of the 1994 Act. He stated, *inter alia*, that the applicant was still the owner of the house and that the conveyance to X had never been registered.

13. At the confiscation hearing in the Crown Court the applicant gave evidence and called witnesses. Giving judgment on 24 December 1996 the judge observed:

> "It is for the prosecution to establish, of course, on a balance of probabilities that he has benefited from drug trafficking, that is received any payment or reward in connection with drug trafficking. Here there is no direct evidence of that so the Crown invite me to make the assumptions required by section 4(3) of the Act, namely (a) that property held by him since his conviction, and property transferred to him since 18 November 1989, the appropriate date, was received as such a benefit; (b) that any expenditure of his since that date in 1989 was met out of payments received by him in connection with any drug trafficking carried on by him. I must do so unless either he shows on a balance of probabilities that the assumption is incorrect, or I am satisfied that there would be a serious risk of injustice to him if the assumption was made."

The judge commented generally that, in seeking to displace the assumption and to counter the prosecutor's allegations, the applicant had failed to take obvious, ordinary and simple steps which would clearly have been taken if his account of the facts had been true. For example, instead of calling as witnesses the alleged purchaser of the house, X, and other individuals for whom he claimed to

have bought and sold cars, the applicant had called only himself, his father and a solicitor.

14. The judge found the prosecution's allegation that the applicant still owned the house to be correct and held that X's purported purchase payment of GBP 50,000 had in fact been a benefit of drug trafficking. The judge stated:

> "The assumption to be made is plain, and the accused has neither shown that it is incorrect nor demonstrated a risk of injustice.
>
> There are real indications on the civil basis of proof that [X] was complicit in the crime of which the accused was convicted. They travelled to Jamaica together at about the time when arrangements for shipment of the load of compressed herbal cannabis would be likely to be made. A mobile phone at the heart of the arrangements for the haulage of the drugs was registered in the name of [X]. Just as the jury did not believe Mr Phillips, neither do I. What has happened here, in my judgment, is a device of just the sort providing a cover to explain the transfer of money which one would expect to find in concealing benefit from drug trafficking. There is an apparently ordinary, formal, commercial transfer of property, appropriately done through solicitors in the ordinary way, which has never ultimately been formally finalised, and my judgment is that it was indeed a sham, that the property ... is still owned by the accused ..."

15. The prosecution alleged that the applicant had received a further GBP 28,000 in cash from X. The applicant accepted that he had received this money, but claimed that X had merely been cashing a cheque drawn by the applicant's father to buy out the applicant's share in the family business for a total of GBP 50,000. In connection with this transaction, the judge observed:

> "No sensible explanation for the involvement of [X] in that cashing of that cheque was given to me at all, and it is impossible, in my judgment, to see any sensible reason other than that he did not cash a cheque; that it was a simple payment. It involves my disbelieving not only the accused but also his father, but I do. I think family loyalty has overcome his honesty.
>
> Although the accused now has no formal interest in the remaining shop premises from which the family business is conducted, I do not accept the account of himself and his father that he has no interest in the business. Even within a family I find the purchase of a share of a business for GBP 50,000 entirely without documentation simply unbelievable. Again, on the balance of probabilities it is a device to conceal the true reason for the payment by [X] to the accused of GBP 28,000 which was that it was a payment for drug trafficking."

16. In respect of the applicant's dealings with cars, the judge remarked:

> "Accepting his lowest estimates of those sums which he has paid out, a total of GBP 11,400 in cash is reached. He told the jury that he always dealt in cash in all his transactions, not only dealing with these but other transactions, he presenting himself to the jury as a general wheeler-dealer, having specialised at one stage in cars, more recently in mobile telephones, but willing to deal in anything which would offer a profit. He says he never kept records at all. He accepts and asserts that he dealt dishonestly in cars, as well as legitimately, and that is certainly so. He has been convicted during the relevant period of offences of dishonesty in relation to ringing cars and was sentenced to a substantial term of imprisonment

in respect of that. There are also in the papers before me indications of earning legitimate commissions in ordinary sales of cars.

But the fact that he may have had other sources of cash, both legitimate and illegitimate, does not, in my judgment, displace the second assumption in a case such as this where no sort of account, complete or partial, is available or possible. I have seen what must have been a fraction of his dealings, and I am satisfied that the GBP 11,400 must be treated as a benefit."

17. The judge assessed the applicant to have benefited from drug trafficking to the extent of GBP 91,400.

He next calculated the value of the realisable property held by the applicant as follows:

"For the reasons that I have given above I am satisfied that [the applicant] is in fact the beneficial owner of [the house]. In the absence of a current valuation, but taking judicial notice of a recent modest recovery in the housing market after a long, flat period, I am satisfied that the GBP 50,000 which he said in evidence was what such a property was worth in 1992, that is to say during the long, flat period, I am satisfied that GBP 50,000 is a fair estimate of the likely net proceeds of a sale of that property now or in the relatively near future.

Again for the reasons that I have given above, I am satisfied that the accused still has a one-third interest with his parents in the [newsagents business]. He and his father said that the business was worth GBP 150,000 in 1993. That is what was purported to be the basis of the GBP 50,000 he was to be given for it. There is no evidence that it is worth any less now, and I therefore find his realisable share in the equity in that business to be worth GBP 50,000. Since I am satisfied as to GBP 100,000 realisable sums, that figure exceeds the GBP 91,400 and under section 5 I find the amount to be recovered to be that figure."

In view of the difficulties inherent in realising the applicant's share of the family business, the judge allowed him three years in which to pay the confiscation order, with a period of two years' imprisonment to be served in default of payment.

18. On 28 January 1997 the applicant was refused leave to appeal against conviction and sentence (including the imposition of the confiscation order). His application to renew leave to appeal against conviction and sentence was refused on 22 January 1998 after a full hearing before the Court of Appeal.

II. RELEVANT DOMESTIC LAW

A. The Drug Trafficking Act 1994

19. Section 2 of the 1994 Act provides that a Crown Court should make a confiscation order in respect of a defendant appearing before it for sentencing in respect of one or more drug-trafficking offences, whom the court finds to have received at any time any payment or other reward in connection with drug trafficking.

20. Under section 5 of the 1994 Act, the confiscation order should be set at a sum corresponding to the proceeds of drug trafficking assessed by the court to have been gained by the defendant, unless the court is satisfied that, at the time the confiscation order is made, only a lesser sum could be realised.

21. In determining whether and to what extent the defendant has benefited from drug trafficking, section 4(2) and (3) of the 1994 Act require the court to assume that any property appearing to have been held by the defendant at any time since his conviction or during the period of six years before the date on which the criminal proceedings were commenced was received as a payment or reward in connection with drug trafficking, and that any expenditure incurred by him during the same period was paid for out of the proceeds of drug trafficking. This statutory assumption may be set aside by the defendant in relation to any particular property or expenditure if it is shown to be incorrect or if there would be a serious risk of injustice if it were applied (section 4(4)).

22. The required standard of proof applicable throughout the 1994 Act is that applied in civil proceedings, namely on the balance of probabilities (section 2(8)).

23. Provisions broadly similar to the above were previously included in the Drug Trafficking Offences Act 1986 ("the 1986 Act", considered by the Court in *Welch v. the United Kingdom*, judgment of 9 February 1995, Series A no. 307-A).

B. Recent British case-law on the application of the Convention to drug confiscation orders

1. McIntosh v. Her Majesty's Advocate – judgment of the Scottish Court of Appeal

24. In its judgment of 13 October 2000 the Scottish Court of Appeal, by a majority of two to one, held that a confiscation procedure similar to that applied in the present case was incompatible with Article 6 § 2 of the Convention. Lord Prosser, with whom Lord Allanbridge agreed, observed, *inter alia*:

> "... By asking the court to make a confiscation order, the prosecutor is asking it to assess the value of the proceeds of the petitioner's drug trafficking. It is therefore asking the court to reach the stage of saying that he has trafficked in drugs. If that is criminal, that seems to me to be closely analogous to an actual charge of an actual crime, in Scottish terms. There is of course no indictment or complaint, and no conviction. And the advocate depute pointed out a further difference, that a Scottish complaint or indictment would have to be specific, and would require evidence, whereas this particular allegation was unspecific and based on no evidence. But the suggestion that there is less need for a presumption of innocence in the latter situation appears to me to be somewhat Kafkaesque, and to portray vice as a virtue. With no notice of what he is supposed to have done, or of any basis which there might be for treating him as having done it, the accused's need for the presumption of innocence is in my opinion all the greater ... I can see no basis upon which it could be said that [such] assumptions ... would not offend against the presumption of innocence, leaving it to the accused to show that these assumptions were incorrect. ..."

2. R. v. Benjafield and Others – judgment of the English Court of Appeal

25. On 21 December 2000 the Court of Appeal held unanimously that the imposition of a drug confiscation order did not give rise to a violation of Article 6 of the Convention. Giving judgment, the Lord Chief Justice examined the confiscation process on the basis that Article 6 as a whole, including Article 6 §

2, applied. He concluded that, considered as a whole, the confiscation scheme struck a fair balance between justice for the defendant and the public interest in controlling the proceeds of drug trafficking.

3. Her Majesty's Advocate v. McIntosh – judgment of the Privy Council

26. The prosecution appealed from the Court of Appeal's decision (see paragraph 24 above) and on 5 February 2001 the Judicial Committee of the Privy Council held, unanimously, that Article 6 § 2 did not apply, since during the confiscation proceedings the accused was not "charged with a criminal offence" but was, instead, faced with a sentencing procedure in respect of the offence of which he had been convicted. Moreover, the Privy Council held that even if Article 6 § 2 could be said to apply, the assumption involved in the making of the confiscation order was not unreasonable or oppressive.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

27. The applicant alleged that the statutory assumption applied by the Crown Court when calculating the amount of the confiscation order breached his right to the presumption of innocence under Article 6 § 2 of the Convention. The relevant parts of Article 6 provide:

> "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. ...
>
> 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;
>
> ..."

A. Applicability of Article 6 § 2

28. The Government submitted that the confiscation order should be regarded as a penalty for the drug-trafficking offence for which the applicant had been tried and found guilty; the confiscation proceedings did not amount to his being charged with any additional offence and Article 6 § 2 did not, therefore, apply.

29. The applicant contended that, rather than simply forming part of the sentence for the crime of which he had been convicted, the proceedings leading to the setting of the confiscation order were a discrete judicial process which involved his being "charged with a criminal offence" within the meaning of Article 6 § 2 of the Convention. He relied on the analysis of Lord Prosser in the Scottish Court of Appeal's *McIntosh* judgment (see paragraph 24 above).

30. It is not in dispute that, during the prosecution which led to his conviction on 27 June 1996 of being concerned in the importation of cannabis resin contrary to section 170(2) of the Customs and Excise Management Act 1979, the applicant was "charged with a criminal offence" and was therefore entitled to – and received – the protection of Article 6 § 2. The questions for the Court regarding the applicability of this Article to the confiscation proceedings are, firstly, whether the prosecutor's application for a confiscation order following the applicant's conviction amounted to the bringing of a new "charge" within the meaning of Article 6 § 2, and secondly, even if that question must be answered in the negative, whether Article 6 § 2 should nonetheless have some application to protect the applicant from assumptions made during the confiscation proceedings.

31. In order to determine whether in the course of the confiscation proceedings the applicant was "charged with a criminal offence" within the meaning of Article 6 § 2, the Court must have regard to three criteria, namely, the classification of the proceedings under national law, their essential nature and the type and severity of the penalty that the applicant risked incurring (see *A.P., M.P. and T.P. v. Switzerland*, judgment of 29 August 1997, *Reports of Judgments and Decisions* 1997-V, p. 1488, § 39, and, *mutatis mutandis*, *Welch*, cited above, p. 13, §§ 27-28).

32. As regards the first of the above criteria – the classification of the proceedings under domestic law – while recent United Kingdom judicial decisions have been divided as to whether the application by the prosecution for a confiscation order amounts to the bringing of a "criminal charge" within the autonomous meaning of Article 6 § 2 (see paragraphs 24-26 above), it is clear that such an application does not involve any new charge or offence in terms of the criminal law. As the Lord Chief Justice observed in *Benjafield and Others* (see paragraph 25 above), "[i]n English domestic law, confiscation orders are part of the sentencing process which follow upon the conviction of the defendant of the criminal offences with which he is charged".

33. Turning to the second and third relevant criteria – the nature of the proceedings and the type and severity of the penalty at stake – it is true that the assumption provided for in the 1994 Act, that all property held by the applicant within the preceding six years represented the proceeds of drug trafficking, required the national court to assume that he had been involved in other unlawful drug-related activities prior to the offence of which he was convicted. In contrast to the usual obligation on the prosecution to prove the elements of the allegations against the accused, the burden was on the applicant to prove, on the balance of probabilities, that he acquired the property in question other than through drug trafficking. Following the judge's inquiry, a substantial confiscation order – in the amount of GBP 91,400 – was imposed. If the applicant failed to pay this amount he was to serve an extra two years' imprisonment, consecutive to the nine-year term he had already received in respect of the November 1995 offence.

34. However, the purpose of this procedure was not the conviction or acquittal of the applicant for any other drug-related offence. Although the Crown

Court assumed that he had benefited from drug trafficking in the past, this was not, for example, reflected in his criminal record, to which was added only his conviction for the November 1995 offence. In these circumstances, it cannot be said that the applicant was "charged with a criminal offence". Instead, the purpose of the procedure under the 1994 Act was to enable the national court to assess the amount at which the confiscation order should properly be fixed. The Court considers that this procedure was analogous to the determination by a court of the amount of a fine or the length of a period of imprisonment to be imposed on a properly convicted offender. This, indeed, was the conclusion which it reached in *Welch* (judgment cited above) when, having examined the reality of the situation, it decided that a confiscation order constituted a "penalty" within the meaning of Article 7.

35. The Court has also considered whether, despite its above finding that the making of the confiscation order did not involve the bringing of any new "charge" within the meaning of Article 6 § 2, that provision should nonetheless have some application to protect the applicant from assumptions made during the confiscation proceedings.

However, whilst it is clear that Article 6 § 2 governs criminal proceedings in their entirety, and not solely the examination of the merits of the charge (see, for example, *Minelli v. Switzerland*, judgment of 25 March 1983, Series A no. 62, pp. 15-16, § 30; *Sekanina v. Austria*, judgment of 25 August 1993, Series A no. 266-A; and *Allenet de Ribemont v. France*, judgment of 10 February 1995, Series A no. 308), the right to be presumed innocent under Article 6 § 2 arises only in connection with the particular offence "charged". Once an accused has properly been proved guilty of that offence, Article 6 § 2 can have no application in relation to allegations made about the accused's character and conduct as part of the sentencing process, unless such accusations are of such a nature and degree as to amount to the bringing of a new "charge" within the autonomous Convention meaning referred to in paragraph 32 above (see *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22, pp. 37-38, § 90).

36. In conclusion, therefore, the Court holds that Article 6 § 2 of the Convention was not applicable to the confiscation proceedings brought against the applicant.

B. Applicability of Article 6 § 1

37. Although the applicant did not rely on the right to a fair trial under Article 6 § 1 in his original application, at the hearing before the Court his counsel submitted that this provision was also applicable and had been violated. The Government did not deny that Article 6 § 1 applied, although they disputed that there had been a breach.

38. In any event, the Court reiterates that it is master of the characterisation to be given in law to the facts of a case and is not bound by the approach taken by an applicant or Government (see, for example, *Guerra and Others v. Italy*, judgment of 19 February 1998, *Reports* 1998-I, p. 223, § 44). It considers

that, given the nature of the proceedings in question, it is appropriate to examine the facts of the present case from the standpoint of the right to a fair hearing under Article 6 § 1 of the Convention.

39. Article 6 § 1 applies throughout the entirety of proceedings for "the determination of ... any criminal charge", including proceedings whereby a sentence is fixed (see, for a recent example, *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports* 1997-I, p. 279, § 69). The Court recalls its above finding that the making of the confiscation order was analogous to a sentencing procedure (see paragraph 32 above). It follows, therefore, that Article 6 § 1 of the Convention applies to the proceedings in question.

C. Compliance with Article 6 § 1

40. The Court considers that, 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 (see, *mutatis mutandis*, *Saunders v. the United Kingdom*, judgment of 17 December 1996, *Reports* 1996-VI, p. 2064, § 68). This right is not, however, absolute, since presumptions of fact or of law operate in every criminal-law system and are not prohibited in principle by the Convention, as long as States remain within certain limits, taking into account the importance of what is at stake and maintaining the rights of the defence (see *Salabiaku v. France*, judgment of 7 October 1988, Series A no. 141-A, pp. 15-16, § 28).

41. The Court is not called upon to examine *in abstracto* the compatibility with the Convention of the provisions of the 1994 Act, which require a court sentencing a person convicted of a drug-trafficking offence to assume that any property appearing to have been held by him at any time since his conviction, or during the period of six years before the date on which the criminal proceedings were commenced, was received as a payment or reward in connection with drug trafficking, and that any expenditure incurred by him during the same period was paid for out of the proceeds of drug trafficking. Instead, the Court must determine whether the way in which this assumption was applied in the applicant's case offended the basic principles of a fair procedure inherent in Article 6 § 1 (see *Salabiaku*, cited above, pp. 17-18, § 30, and *Saunders*, cited above, pp. 2064-65, § 69).

42. The Court's starting-point in this examination is to repeat its above observation that the statutory assumption was not applied in order to facilitate finding the applicant guilty of an offence, but instead to enable the national court to assess the amount at which the confiscation order should properly be fixed (see paragraph 34 above). Thus, although the confiscation order calculated by way of the statutory assumption was considerable –GBP 91,400 – and although the applicant risked a further term of two years' imprisonment if he failed to make the payment, his conviction of an additional drug-trafficking offence was not at stake.

43. Further, whilst the assumption was mandatory when the sentencing court was assessing whether and to what extent the applicant had benefited from the proceeds of drug trafficking, the system was not without safeguards. Thus, the assessment 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 applicant to adduce documentary and oral evidence. The court was empowered to make a confiscation order of a smaller amount if satisfied, on the balance of probabilities, that only a lesser sum could be realised. The principal safeguard, however, was that the assumption made by the 1994 Act could have been rebutted if the applicant had shown, again on the balance of probabilities, that he had acquired the property other than through drug trafficking. Furthermore, the judge had a discretion not to apply the assumption if he considered that applying it would give rise to a serious risk of injustice.

44. The Court notes that there was no direct evidence that the applicant had engaged in drug trafficking prior to the events which led to his conviction. In calculating the amount of the confiscation order based on the benefits of drug trafficking, therefore, the judge expressed himself to be reliant on the statutory assumption (see paragraph 13 above). In reality, however, and looking in detail at the steps taken by the judge to reach the final figure of GBP 91,400, the Court notes that in respect of every item taken into account the judge was satisfied, on the basis either of the applicant's admissions or of evidence adduced by the prosecution, that the applicant owned the property or had spent the money, and that the obvious inference was that it had come from an illegitimate source. Thus, the judge found "real indications on the civil basis of proof" that the sale of the house to X had not been genuine and was instead a cover for the transfer of drug money (see paragraph 14 above). As for the additional GBP 28,000 which the applicant admitted receiving in cash from X, the judge said: "No sensible explanation for the involvement of [X] ... was given to me at all, and it is impossible, in my judgment, to see any sensible reason other than that ... it was a simple payment." Similarly, when assessing the amount of the applicant's expenditure on cars, the judge based himself on the lowest of the applicant's estimates as to how much he had spent (see paragraph 16 above). Since the applicant was not able to provide any record explaining the source of this money, the judge assumed that it was a benefit of drug trafficking. On the basis of the judge's findings, there could have been no objection to including the matters in a schedule of the applicant's assets for the purpose of sentencing, even if the statutory assumption had not applied.

45. Furthermore, the Court notes that, had the applicant's account of his financial dealings been true, it would not have been difficult for him to rebut the statutory assumption; as the judge stated, the evidentiary steps which he could have taken to demonstrate the legitimate sources of his money and property were "perfectly obvious and ordinary and simple" (see paragraph 13 above). It is not open to the applicant to complain of unfairness by virtue of the fact that the judge may have included in his calculations assets purchased with the proceeds of other, undocumented forms of illegal activity, such as "car ringing".

46. Finally, when calculating the value of the realisable assets available to the applicant, it is significant that the judge took into account only the house and the applicant's one-third share of the family business, specific items which he had found on the evidence still to belong to the applicant. The judge accepted the applicant's evidence when assessing the value of these assets. Whilst the Court considers that an issue relating to the fairness of the procedure might arise in circumstances where the amount of a confiscation order was based on the value of assumed hidden assets, this was far from being the case as regards the present applicant.

47. Overall, therefore, the Court finds that the application to the applicant of the relevant provisions of the Drug Trafficking Act 1994 was confined within reasonable limits given the importance of what was at stake and that the rights of the defence were fully respected.

It follows that the Court does not find that the operation of the statutory assumption deprived the applicant of a fair hearing in the confiscation procedure. In conclusion, there has been no violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

48. The applicant also alleged that the powers exercised by the court under the 1994 Act were unreasonably extensive, in breach of Article 1 of Protocol No. 1, which states:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

He submitted that the principles raised under the above Article were almost identical to those under Article 6 § 2, and that a fair balance had not been struck between public policy and individual rights.

49. The Government stated that the 1994 Act was designed to combat the serious problem of drug trafficking, by punishing convicted offenders, deterring other offences and reducing the profits available to fund future drug-trafficking ventures. The application of the statutory assumption was proportionate to this aim given, *inter alia*, the difficulty in establishing the link between assets and drug trafficking.

50. The Court observes that the "possession" which forms the object of this complaint is the sum of money, namely GBP 91,400, which the applicant has been ordered by the Crown Court to pay, in default of which payment he is liable to be imprisoned for two years. It considers that this measure amounts to an interference with the applicant's right to peaceful enjoyment of his possessions and that Article 1 of Protocol No. 1 is therefore applicable.

51. As previously stated, the confiscation order constituted a "penalty" within the meaning of the Convention. It therefore falls within the scope of the

second paragraph of Article 1 of Protocol No. 1, which, *inter alia*, allows the Contracting States to control the use of property to secure the payment of penalties. However, this provision must be construed in the light of the general principle set out in the first sentence of the first paragraph and there must, therefore, exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, among many examples, *Allan Jacobsson v. Sweden (no. 1)*, judgment of 25 October 1989, Series A no. 163, p. 17, § 55).

52. As to the aim pursued by the confiscation order procedure, as the Court observed in *Welch* (judgment cited above, pp. 14-15, § 36), these powers were conferred on the courts as a weapon in the fight against the scourge of drug trafficking. Thus, the making of a confiscation order operates in the way of a deterrent to those considering engaging in drug trafficking, and also to deprive a person of profits received from drug trafficking and to remove the value of the proceeds from possible future use in the drugs trade.

53. The Court has already noted that the sum payable under the confiscation order was considerable, namely GBP 91,400. However, it corresponded to the amount which the Crown Court judge found the applicant to have benefited from through drug trafficking over the preceding six years and was a sum which he was able to realise from the assets in his possession. The Court refers to its above finding that the procedure followed in the making of the order was fair and respected the rights of the defence.

54. Against this background, and given the importance of the aim pursued, the Court does not consider that the interference suffered by the applicant with the peaceful enjoyment of his possessions was disproportionate.

It follows that there has been no violation of Article 1 of Protocol No. 1.

FOR THESE REASONS, THE COURT

1. *Holds* by five votes to two that Article 6 § 2 of the Convention is not applicable;
2. *Holds* unanimously that Article 6 § 1 of the Convention is applicable but has not been violated;
3. *Holds* unanimously that there has been no violation of Article 1 of Protocol No. 1.

Done in English, and notified in writing on 5 July 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent Berger
Registrar

Georg Ress
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Sir Nicolas Bratza joined by Mrs Vajić is annexed to this judgment.

G.R.
V.B.

PARTLY DISSENTING OPINION OF JUDGE Sir Nicolas BRATZA JOINED BY JUDGE VAJIĆ

While I agree with the majority of the Court in their conclusion that there has been no violation of the Convention in the present case, I cannot fully share the reasoning of the majority in respect of the complaint under Article 6. In particular, I cannot accept the majority's view that Article 6 § 2 had no application to the confiscation proceedings against the applicant.

The view of the majority is based on the proposition that, while Article 6 § 2 governs criminal proceedings in their entirety and not solely the examination of the merits of the charge, once an accused has been proved guilty of the offence charged Article 6 § 2 can have no application in relation to allegations made about the accused's character and conduct as part of the sentencing process, unless the allegations are of such a nature and degree as to amount to the bringing of a new "charge" within the autonomous meaning of Article 6.

In my opinion, this is to take too narrow a view of the role of Article 6 § 2 in the context of proceedings relating to a criminal charge.

In his judgment in the Privy Council in *H.M. Advocate and Advocate General for Scotland v. McIntosh*, Lord Bingham of Cornhill correctly observed that the European Court's judgment in *Engel and Others v. the Netherlands* (judgment of 8 June 1976, Series A no. 22) was "plainly unhelpful" to the respondent, suggesting as it did in the passage quoted from paragraph 90 of that judgment that Article 6 § 2 becomes irrelevant once a person is found guilty according to law, and that, as part of the sentencing process, a court can take into account facts, including those suggesting the commission of other criminal offences, without the risk of violating the requirements of that paragraph.

However, the passage from *Engel and Others* should, I consider, be read with some caution for several reasons.

It is clear from the passage that the facts which were taken into account in fixing the sentence were not in dispute – they were "established facts the truth of which [the two applicants] did not challenge". In this respect they did not differ materially from other "facts" which a sentencing court routinely takes into account in fixing sentence, as for instance a defendant's previous convictions. In *Engel and Others*, the undisputed "facts" in question were the distribution by the applicants on previous occasions of two writings which had been "provisionally forbidden under the 'Distribution of Writings Decree' ". These prior examples of misconduct on the part of the applicants were taken into account by the sentencing court in fixing the sentence only as being an "indication of [the applicants'] general behaviour", that is, apparently, a readiness to break rules and a general disrespect for authority. Hence the Court's reference to their being "factors relating to the individual['s] personality".

Here the situation, as the applicant correctly argues, is very different. The essential "facts", namely whether property or assets in the applicant's possession were the proceeds of drug trafficking, are directly in issue. They are at the heart of the confiscation proceedings and are facts which the sentencing court is required to determine. Moreover, unlike the position in *Engel and Others*, the underlying facts are determined and taken into account not merely for the purpose of assessing the applicant's personality in fixing the period of detention, but for the purpose of stripping him of substantial sums of money which the court determines, with the assistance of the statutory presumptions, have been derived from essentially criminal activities.

Engel and Others was in any event decided in the relatively early days of the Court and was the first case in which Article 6 § 2 had been directly addressed. The scope and field of application of paragraph 2 of Article 6 have undergone substantial development in the more recent case-law. In particular, in *Minelli v. Switzerland* (judgment of 25 March 1983, Series A no. 62) and *Sekanina v. Austria* (judgment of 25 August 1993, Series A no. 266-A), Article 6 § 2 was held to have an application even after the acquittal of a person on a criminal charge and where the proceedings against the defendant were at an end.

Perhaps more importantly, in *Engel and Others* the Court considered the complaint concerning the violation of presumption of innocence exclusively under paragraph 2 of Article 6 and did not view that paragraph in the light of the general obligation of a fair trial in paragraph 1. Since the Court's decision in that case there have been two important developments.

In the first place it is now well established that the general requirements of Article 6 apply at all stages of criminal proceedings until the final disposal of any appeal, including questions of sentencing. This was established by the Court in *Eckle v. Germany* (judgment of 15 July 1982, Series A no. 51) in relation to the requirement that proceedings should be determined within a reasonable time. This principle was applied in *Findlay v. the United Kingdom* (judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I) in the context of a complaint about the independence and impartiality of a tribunal before which the applicant pleaded guilty and where the only issue was one of sentence. More recently, it was applied in *T. v. the United Kingdom* ([GC], no. 24724/94, 16 December 1999, unreported) and *V. v. the United Kingdom* ([GC], no. 24888/94, ECHR 1999-IX), where the fixing of the tariff was held to be part of the determination of a criminal charge, which therefore had to be carried out by a judicial body satisfying the requirements of independence and impartiality.

The other development has been the readiness of the Court to see the requirements in other paragraphs of Article 6 as but specific aspects of the requirements of fairness in paragraph 1. This is particularly so as regards the provisions of paragraph 3, where the Court has invariably considered complaints of violations of the requirements of individual sub-paragraphs in conjunction with the overall requirement of fairness in paragraph 1. Admittedly, one does not find case-law which so clearly spells out the link between paragraph 2 and paragraph 1. But such

a link plainly exists, the presumption of innocence being a fundamental element of a fair trial. Moreover, there are clear indications to this effect in the Court's case-law. In *Lutz v. Germany* (judgment of 25 August 1987, Series A no. 123, p. 22, § 52), the Court noted that it had "consistently held paragraph 1 to embody the basic rule of which paragraphs 2 and 3 represented specific applications". In *John Murray v. the United Kingdom* (judgment of 8 February 1996, *Reports* 1996-I), the drawing of adverse inferences from an accused's silence was considered by the Court in terms of both paragraphs 1 and 2, the right to silence, the right not to incriminate oneself and the principle that the prosecution should bear the burden of proof being seen as aspects of a fair trial in paragraph 1, as well as specific requirements of the presumption of innocence in paragraph 2. Closer to the present case, in *Salabiaku v. France* (judgment of 7 October 1988, Series A no. 141-A) and *Pham Hoang v. France* (judgment of 25 September 1992, Series A no. 243), the Court examined the applicants' complaints about the application of presumptions against them under both paragraphs, noting in the former case that it started its examination under paragraph 2 because "the presumption of innocence, which is one aspect of the right to a fair trial secured under paragraph 1 of Article 6 ... is the essential issue in the case" (paragraph 25; see also paragraph 31).

It is true that in *Salabiaku* and *Pham Hoang*, in contrast to the present case, the Court was concerned with the application of presumptions not at the stage of sentencing but in the course of a trial on the merits and before the applicants had been convicted. However, as the Court of Appeal pointed out in *R. v. Benjafield and Others*, the European Court in *Minelli* emphasised that Article 6 § 2, like Article 6 § 1, "governs criminal proceedings in their entirety irrespective of the outcome of the prosecution and not solely the examination of the merits of the charge". More specifically, I see a close relationship between cases where presumptions are applied at the trial stage for the purpose of determining a defendant's guilt of the offence charged and cases such as the present where presumptions are applied after conviction and as part of the sentencing process for the purposes of determining what assets of the defendant are to be regarded as derived from the proceeds of drug trafficking and thus liable to confiscation. In my view, the Court of Appeal in *Benjafield and Others* was correct in holding that the confiscation procedure had to be considered on the basis that it was subject to the requirements of both paragraph 1 and paragraph 2 of Article 6 read together and in seeing the requirement of "fairness" in this context as substantially importing the requirements laid down by the Court in *Salabiaku* and *Pham Hoang*.

As to the question whether the statutory presumptions as applied in the applicant's case exceeded the reasonable limits within which they are required to be confined and whether the rights of the defence were respected, I fully share the conclusion and reasoning of the majority of the Court.

CASE OF

RAIMONDO v. ITALY

(Application no. 12954/87)

JUDGMENT

22 February 1994

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 18 January 1993, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 12954/87) against the Italian Republic lodged with the Commission under Article 25 (art. 25) by an Italian national, Mr Giuseppe Raimondo, on 23 April 1987.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Italy recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 (art. 6-1) of the Convention, Article 1 of Protocol No. 1 (P1-1) and Article 2 of Protocol No. 4 (P4-2).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, Mrs Pittelli, Mr Raimondo's wife, and their three sons informed the Registrar on 7 June 1993 of the death of their husband and father. They stated that they wished to continue the proceedings and to take part in them and be represented by the lawyer whom they had appointed (Rule 30). For reasons of convenience Mr Raimondo will continue to be referred to as the "applicant", although it is now his widow and his three sons who are to be regarded as having that status (see, inter alia, the Pandolfelli and Palumbo v. Italy judgment of 27 February 1992, Series A no. 231-B, p. 16, para. 2).

Mrs Pittelli and her sons also consented to the disclosure of the identity of Mr Raimondo, who had at first been designated by the initials G. R.

3. The Chamber to be constituted included ex officio Mr C. Russo, the elected judge of Italian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 27 February 1993 Mr R. Bernhardt, the Vice-President of the Court, drew by lot, in the presence of the Registrar, the names of the other seven members, namely Mr Bernhardt, Mr F. Matscher, Mrs E. Palm, Mr I. Foighel, Mr F. Bigi, Mr L. Wildhaber and Mr D. Gotchev (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Italian Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 12 July 1993 and the Government's memorial on 30 July. The Delegate of the Commission did not submit observations in writing.

5. On 6 September 1993 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the decision of the President – who had given the applicant leave to use the Italian language (Rule 27 para. 3) –, the hearing took place in public in the Human Rights Building, Strasbourg, on 20 September 1993. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

– for the Government

Mr G. Raimondi, magistrato,

on secondment to the Diplomatic Legal Service of the

Ministry of Foreign Affairs, *Co-Agent*,

Mr E. Selvaggi, Head of the Human Rights Department,

Directorate General of Criminal Affairs, Ministry of

Justice, *Counsel*;

– for the Commission

Mr E. Busuttil, *Delegate*;

– for the applicant

Mr M. Mellini, avvocato, *Counsel*.

The Court heard addresses by the above-mentioned representatives, who also replied to its questions.

On 14 October 1993 the Government provided additional information. The Commission submitted its written comments thereon on 11 December.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

7. Mr Giuseppe Raimondo, a building entrepreneur, lived in Davoli (Catanzaro) until his death on 11 July 1992.

Criminal proceedings were brought against him as he was suspected of belonging to a mafia-type organisation operating in the Soverato region. At the same time various preventive measures were taken concerning him.

A. The criminal proceedings

8. On 24 July 1984 the Catanzaro Public Prosecutor issued a warrant for the arrest of seventeen persons including the applicant. After initially evading arrest under this warrant, the applicant gave himself up to the authorities on 7 November 1984 and was immediately remanded in custody.

9. The investigation was closed on 24 July 1985 and Mr Raimondo was committed for trial in the Catanzaro District Court with fourteen co-defendants. His detention on remand was replaced by house arrest (arresti domiciliari).

10. On 8 October 1985, at the first hearing, the District Court ordered the joinder of the case with two others and directed that certain documents be included in the file. It then adjourned the proceedings to 16 January 1986.

On 30 January 1986 the District Court acquitted Mr Raimondo on the ground of insufficient evidence (assoluzione per insufficienza di prove) and revoked the order placing him under house arrest.

11. Giving judgment on 16 January 1987 on the appeals of the public prosecutor and Mr Raimondo, the Catanzaro Court of Appeal acquitted the latter on the ground that the material facts of the offence had not been established (perchè il fatto non sussiste). No appeal was filed in the Court of Cassation.

B. The proceedings concerning the preventive measures

1. In the Catanzaro District Court

12. On 16 January 1985 the Catanzaro Public Prosecutor applied to the District Court for an order placing Mr Raimondo under special police supervision and for the preventive seizure of a number of assets with a view to their possible confiscation (Act no. 1423 of 27 December 1956 and Act no. 575 of 31 May 1965, as amended by Act no. 646 of 13 September 1982 – see paragraphs 16-18 below). He based his application on a report by the Soverato carabinieri dated 27 December 1984.

13. On 13 May 1985 the District Court ordered the seizure of sixteen items of real property (ten plots of land and six buildings) and of six vehicles, all of which appeared to be at the applicant's disposal. The measure was entered in the relevant public registers on 15 May 1985.

On 16 October the District Court revoked the seizure of certain property belonging to third parties; on the other hand, it ordered the confiscation of some of the buildings seized of which the applicant and his wife were the owners and four vehicles, on the ground that it had not been proved that the assets in question had been "lawfully acquired". The confiscation was recorded in the register on 9 November 1985.

By the same decision Mr Raimondo was placed under special police supervision, which however did not become effective until 30 January 1986, the day on which he was acquitted by the District Court (see paragraph 10 above);

he was also required to lodge a security of 2,000,000 lire as a guarantee to ensure that he complied with the constraints attaching to this measure, namely a prohibition on leaving his home without informing the police; an obligation to report to the police on the days indicated to that effect; an obligation to return to his house by 9 p.m. and not to leave it before 7 a.m. unless he had valid reasons for doing so and had first informed the relevant authorities of his intention.

2. In the Catanzaro Court of Appeal

14. On an appeal by the applicant, the Catanzaro Court of Appeal gave judgment at a private hearing on 4 July 1986. It annulled the special supervision measure and ordered the restitution of the security and the property seized and confiscated. Its decision (decreto) referred to the "disconcertingly casual way in which the contested preventive measures concerning the person and property of Mr Raimondo had been adopted thereby effectively decreeing his civil and economic death".

The decision was filed with the registry on 2 December 1986 and signed by the relevant official of the prosecuting authority on 10 December. Again on 2 December the Court of Appeal registry notified it to the competent police authorities (questura) who, on 5 December, advised the local carabinieri of the decision. The latter informed the applicant on 20 December.

The decision became final on 31 December 1986.

15. The revocation of the seizure of the real property and of the confiscation of the vehicles was entered in the relevant registers on 2 February (real property), 10 February (two cars and a van) and 10 July 1987 (a lorry).

The security was returned to the applicant on 24 April 1987.

As regards the real property that had been confiscated, the applications for the entry in the register of the revocation of the measure are dated 9 August 1991.

II. RELEVANT DOMESTIC LAW

A. The legislation in force at the material time

1. The Act of 27 December 1956

16. Act no. 1423 of 27 December 1956 ("the 1956 Act") provides for various preventive measures in respect of "persons presenting a danger for security and public morality". The relevant provisions are summarised in the Guzzardi v. Italy judgment of 6 November 1980 (Series A no. 39, pp. 17-19, §§ 46-49):

> "46. Under section 1, the Act applies to, amongst others, ... individuals who, by reason of their behaviour and style of life (tenore di vita), must be considered as habitually living, even in part, on the proceeds of crime or on the rewards of complicity therein (con il favoreggiamento), or whose outward conduct gives good reason to believe that they have criminal tendencies (che, per le manifestazioni cui abbiano dato luogo, diano fondato motivo di ritenere che siano proclivi a delinquere).

The Chief of Police [(questore)] may send such persons a warning (diffida) ...

...

47. ...

48. ... [such a person] may, under section 3, be placed under special police supervision (sorveglianza speciale della pubblica sicurezza); if need be, this may be combined either with a prohibition on residence in one or more given districts or provinces or, in the case of a particularly dangerous person (particolare pericolosità), with an order for compulsory residence in a specified district (obbligo del soggiorno in un determinato comune).

Only the District Court of the chief town of the province has power to order these measures; it will do so on the basis of a reasoned application by the [questore] to its president (section 4, first paragraph). The District Court must give a reasoned decision (provvedimento) in chambers within thirty days. It will first hear the Public Prosecutor's department and the person concerned, the latter being entitled to submit written pleadings and to be assisted by a lawyer (section 4, second paragraph).

The prosecuting authorities and the person concerned may, within ten days, lodge an appeal which does not have suspensive effect; the Court of Appeal has to give a reasoned decision (decreto) in chambers within thirty days (section 4, fifth and sixth paragraphs). That decision may in turn and on the same conditions be the subject of a further appeal to the Court of Cassation, which must give its ruling in chambers within thirty days (section 4, seventh paragraph).

49. When adopting one of the measures listed in section 3, the District Court will specify for how long it is to remain in force – not less than one and not more than five years (section 4, fourth paragraph) – and will give directives with which the person in question must comply (section 5, first paragraph).

..."

2. The Act of 31 May 1965

17. Act no. 575 of 31 May 1965 ("the 1965 Act") supplements the 1956 Act by adding clauses directed against the Mafia (disposizioni contro la mafia). Section 1 states that it is applicable to persons – such as Mr Raimondo – against whom there is evidence showing that they belong to "mafia-type" groups (indiziati di appartenere ad associazioni mafiose).

18. The above legislation was strengthened by Act no. 646 of 13 September 1982 ("the 1982 Act") which inserted, inter alia, a section 2 ter in the 1965 Act. It makes provision for various measures to be used in the course of proceedings relating to the application of the preventive measures available under the 1956 Act in respect of a person suspected of belonging to such an organisation:

"... the District Court may issue a reasoned decision, even of its own motion, ordering the seizure of property at the direct or indirect disposal of the person against whom the proceedings have been instituted, when there is sufficientcircumstantial evidence, such as a considerable discrepancy between his lifestyle and his apparent or declared income, to show that the property concerned forms the proceeds from unlawful activities or their reinvestment.

Together with the implementation of the preventive measure the District Court shall order the confiscation of any of the goods seized in respect of which it has not been shown that they were lawfully acquired. Where the inquiries are complex, this measure may also be taken at a later date, but not more than one year after the date of the seizure.

The District Court shall revoke the seizure order when the application for preventive measures is dismissed or when it has been shown that the property in question was lawfully acquired."

B. The case-law concerning the application of preventive measures, particularly of a pecuniary nature

19. In its report (paragraph 43), the Commission sets out a summary of the case-law in this area:

"... The existence of preventive measures is not in itself contrary to the Italian Constitution. The Constitutional Court has ruled that the basis for these measures is the need to guarantee the orderly and peaceful course of social relations, not only through a body of legislation penalising unlawful acts, but also through provisions intended to prevent the commission of such acts (Constitutional Court, judgment no. 27 of 1959 and judgment no. 23 of 1964).

Because of their particular object, preventive measures do not relate to the commission of a specific unlawful act but to a pattern of behaviour defined by law as conduct indicating the existence of danger to society (Constitutional Court, judgment no. 23 of 1964).

Consequently, in the Italian legal system, there is a fundamental difference between criminal penalties and preventive measures. The former constitute the response to an unlawful act and the consequences of that act; the latter are a means of preventing the commission of such an act.

In other words, a criminal penalty relates to an offence already committed, whereas a preventive measure is intended to reduce the risk of future offences (see, mutatis mutandis, Constitutional Court, judgment no. 53 of 1968, concerning security measures).

...

Because criminal penalties and preventive measures are essentially different, not all the constitutional principles which should underpin the former necessarily apply to the latter. For example, the presumption of innocence enunciated in Article 27 of the Constitution does not concern preventive measures, which are not based on the criminal liability or guilt of the person concerned (Constitutional Court, judgment no. 23 of 1964).

Similarly, such measures do not fall within the scope of Article 25 para. 2 of the Constitution, which prohibits the retroactive application of criminal provisions. The violation of this principle has been alleged on a number of occasions in the Court of Cassation with regard to confiscation orders under section 2 ter of the 1965 Act. The Court of Cassation has ruled, firstly, that the above principle is not applicable to preventive measures (see, for example, Court of Cassation, Piraino judgment of 30 January 1985). Secondly, the Court of Cassation has pointed out that the impugned provision is not in fact retroactive, as it relates to the property in the possession of the person concerned at the time when confiscation is

ordered (Court of Cassation, Oliveri judgment of 12 May 1986) and to the unlawful use of that property after its entry into force (Court of Cassation, Pipitone judgment of 4 January 1985).

In spite of these limitations, preventive measures remain open to thorough scrutiny of their compatibility with the Constitution.

As far back as 1956 the Constitutional Court ruled that in no case could the right to liberty be restricted except where such restriction was prescribed by law, where lawful proceedings had been instituted to that end and where the reasons therefor had been set out in a judicial decision (Constitutional Court, judgment no. 11 of 1956).

It subsequently ruled that preventive measures could not be adopted on the basis of mere suspicion and are justified only when based on the objective establishment and assessment of facts which reveal the behaviour and lifestyle of the person concerned (Constitutional Court, judgment no. 23 of 1964).

More recently it confirmed that the constitutionality of preventive measures still depends on respect of the rule of law and the possibility of applying to the courts for a remedy. Furthermore, the above two conditions are closely linked. Thus it is not enough for the law to indicate vague criteria for the assessment of danger; it must set them forth with sufficient precision to make the right of access to a court and adversarial proceedings a meaningful one (Constitutional Court, judgment no. 177 of 1980).

The case-law of the Court of Cassation is in this respect entirely consistent with that of the Constitutional Court; it affirms quite clearly that proceedings for the application of preventive measures must be adversarial and conducted with respect for the rights of the defence, any violation of those rights entailing their nullity (see, for example, Court of Cassation, judgment no. 1255 of 29 June 1984 in the Santoro case).

The Court of Cassation has dismissed a number of complaints alleging the unconstitutionality of the seizure and confiscation measures provided for in section 2 ter of the 1965 Act. In particular, it has ruled that the presumption concerning the unlawful origin of the property of persons suspected of belonging to organisations of the mafia type is not incompatible with Article 24 of the Constitution, which guarantees the rights of the defence, since confiscation can only take place when there is sufficient circumstantial evidence concerning the unlawful origin of the property in question and in the absence of a rebuttal (Court of Cassation, previously cited Pipitone judgment).

...

With regard to the compatibility of seizure and confiscation measures with the right to free exercise of private economic activities and the right to peaceful enjoyment of private property (Articles 41 and 42 of the Constitution), the Court of Cassation has ruled that these rights are not absolute and may be limited in accordance with the general interest. This applies in connection with possessions of unlawful origin or their use (Court of Cassation, previously cited Oliveri and Pipitone judgments).

..."

20. In its opinion no. 1489/86 of 18 November 1986 the Consiglio di Stato stated that "although confiscation by definition enables the State to ac-

quire the item of property in question ..., it does not in itself have the effect of transferring ownership to the public authorities ...". It will only have such effect if in addition the decision ordering it is irrevocable (Palermo District Court, order of 19 April 1989).

PROCEEDINGS BEFORE THE COMMISSION

21. Mr Raimondo applied to the Commission on 23 April 1987. He complained of the following: (a) the unlawfulness and the length of his detention (Article 5 paras. 1 and 3 of the Convention) (art. 5-1, art. 5-3); (b) the length of various proceedings concerning him and in particular the criminal proceedings (Article 6 para. 1) (art. 6-1); (c) the failure to respect the right to be presumed innocent inasmuch as preventive measures were applied to him (Article 6 para. 2) (art. 6-2); (d) the obligation to lodge a security in order to ensure compliance with the above measures (Article 1 of Protocol No. 4) (P4-1); (e) an interference with his property resulting from the seizure and confiscation of certain of his possessions (Article 1 of Protocol No. 1) (P1-1); and (f) the fact that he had been deprived of his right to freedom of movement (Article 2 of Protocol No. 4) (P4-2).

22. On 6 December 1991 the Commission declared the application (no. 12954/87) admissible as regards the complaints based on the applicant's right to peaceful enjoyment of his possessions, to the freedom of movement and to a decision on the application of preventive measures within a reasonable time; it found the rest of the application inadmissible. In its report of 21 October 1992 (made under Article 31) (art. 31), it expressed the following opinion:

(a) that there had been no violation of Article 1 of Protocol No. 1 (P1-1) with regard to the seizure (eighteen votes to one) and the confiscation (sixteen votes to three) of the applicant's property up to 31 December 1986 and on account of the damage occasioned by the administration of the seized and confiscated assets until that date (eighteen votes to one);

(b) that there had been a violation of Article 1 of Protocol No. 1 (P1-1) in so far as the confiscation of nine items of real property and one lorry had continued to take effect after 31 December 1986 (unanimously);

(c) that there had been a violation of Article 2 of Protocol No. 4 (P4-2) inasmuch as the applicant had been deprived of his right to freedom of movement from 4 July to 20 December 1986 (unanimously);

(d) that there had been no violation of Article 6 para. 1 (art. 6-1) as regards the length of the proceedings relating to the seizure and confiscation (unanimously).

The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to the present judgment[1*].

1 Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 281-A of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

23. In their memorial, the Government asked the Court "to hold and adjudicate that there had been no infringement either of the Convention or of Protocols Nos. 1 and 4".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 (P1-1)

24. Mr Raimondo complained of the seizure on 13 May 1985 of sixteen items of real property and six vehicles, and the confiscation of several of these assets ordered on 16 October 1985 (see paragraph 13 above). He relied on Article 1 of Protocol No. 1 (P1-1), which provides as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

25. In order to determine whether the contested measures amounted to controlling the "use of property" within the meaning of the second paragraph or constituted deprivation of possessions under the first paragraph, the Court will first examine their application up to 31 December 1986, when the decision of the Catanzaro Court of Appeal became final (see paragraph 14 above). It will then consider the matter of their remaining entered in the public registers subsequent to that date (see paragraph 15 above).

A. The application of the preventive measures concerning property up to 31 December 1986

26. The Government did not deny that there had been an interference with the applicant's right to peaceful enjoyment of his possessions. They contended, however, that the seizure and confiscation was justified on the basis of the exceptions allowed under Article 1 (P1-1) to the principle set forth in the first sentence of that provision.

1. The seizure

27. Like the Commission, the Court finds that the seizure was provided for in section 2 ter of the 1965 Act (see paragraph 18 above) and did not purport to deprive the applicant of his possessions but only to prevent him from using them. It is therefore the second paragraph of Article 1 of Protocol No. 1 (P1-1) which is relevant here.

In addition, the applicant did not contend that on 13 May 1985 it was unreasonable for the District Court to hold that there was sufficient circumstantial evidence to show that the possessions seized represented the proceeds from unlawful activities or their reinvestment. What he complained about is, rather, that such a drastic measure was taken at this stage of the proceedings. However, seizure under section 2 ter of the 1965 Act is clearly a provisional measure intended to ensure that property which appears to be the fruit of unlawful activities carried out to the detriment of the community can subsequently be confiscated if necessary. The measure as such was therefore justified by the general interest and, in view of the extremely dangerous economic power of an "organisation" like the Mafia, it cannot be said that taking it at this stage of the proceedings was disproportionate to the aim pursued.

Accordingly, on this point no violation of Article 1 of Protocol No. 1 (P1-1) has been established.

2. The confiscation

28. In the applicant's submission, even if it was accepted that the confiscation had not deprived him of the ownership of his possessions, the entry in the public registers represented a form of enforcement of the measure before any decision had been given on his appeal.

29. Although it involves a deprivation of possessions, confiscation of property does not necessarily come within the scope of the second sentence of the first paragraph of Article 1 of Protocol No. 1 (P1-1) (see the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, p. 30, para. 63, and the AGOSI v. the United Kingdom judgment of 24 October 1986, Series A no. 108, p. 17, para. 51).

According to Italian case-law, confiscation of the kind which is in issue in this case could not moreover have the effect of transferring ownership to the State until there had been an irrevocable decision (see paragraph 20 above). There was no such decision in this instance because Mr Raimondo had challenged the order of the Catanzaro District Court of 16 October 1985 (see paragraph 13 above). Here too therefore it is the second paragraph of Article 1 (P1-1) which applies.

30. Like the Government and the Commission, the Court observes that the confiscation – also provided for in section 2 ter of the 1965 Act –pursued an aim that was in the general interest, namely it sought to ensure that the use of the property in question did not procure for the applicant, or the criminal organisation to which he was suspected of belonging, advantages to the detriment of the community.

The Court is fully aware of the difficulties encountered by the Italian State in the fight against the Mafia. As a result of its unlawful activities, in particular drug-trafficking, and its international connections, this "organisation" has an enormous turnover that is subsequently invested, inter alia, in the real property sector. Confiscation, which is designed to block these movements of suspect capital, is an effective and necessary weapon in the combat against this cancer. It

therefore appears proportionate to the aim pursued, all the more so because it in fact entails no additional restriction in relation to seizure.

Finally, the preventive purpose of confiscation justifies its immediate application notwithstanding any appeal.

In conclusion, the respondent State did not overstep the margin of appreciation left to it under the second paragraph of Article 1 (P1-1).

3. The surveillance of the property seized or confiscated

31. Again relying on Article 1 of Protocol No. 1 (P1-1), Mr Raimondo alleged that, as the municipal police had failed to carry out any proper surveillance, the property subject to the preventive measures had been the target of extensive vandalism.

32. The Government denied this. In view of the official status of those responsible for guarding the property – officers of the municipal police designated by the judicial authorities – no accusation of negligence against them was warranted. Furthermore in 1989 legislation had been enacted to regulate this question, firstly by protecting the interests of persons whose property was returned to them after seizure and secondly by indicating a public-interest use for property which had been seized and then confiscated on a permanent basis.

33. Like the Commission, the Court observes that any seizure or confiscation inevitably entails damage. The Commission found that the applicant's allegations did not provide a sufficiently clear basis for examining whether the actual damage sustained in the present case exceeded such inevitable damage. Before the Court the applicant did not furnish any more specific information. The Court therefore cannot but adopt the Commission's approach and hold that on this point too no violation of Article 1 of Protocol No. 1 (P1-1) has been established.

B. The fact that the contested measures remained entered in the public registers after 31 December 1986

34. According to the applicant the competent authorities delayed giving effect to the decision of the Catanzaro Court of Appeal of 4 July 1986.

35. The Government maintained that the real property and the movable goods had been returned on 2 February 1987, only two months after the above-mentioned decision had been filed with the registry. They conceded that the formalities for entering in the public registers the revocation of the contested measures had taken some time, but Mr Raimondo could and should have contacted the appropriate department with a copy of the decision revoking the measures. Article 619 of the former Code of Criminal Procedure, cited by his lawyer at the hearing, was not applicable because it concerned exclusively the cancellation by the prosecuting authorities of mortgages or seizures ordered to secure the payment of the debts of a defendant after his conviction (court costs, fine and prison expenses).

36. The Court notes in the first place that the possessions in question were returned to the applicant on 2 February 1987, two months after the Court of Ap-

peal's decision was filed with the registry. It must nevertheless consider whether the fact that the entries remained in the relevant registers constituted an interference with the right guaranteed under Article 1 of Protocol No. 1 (P1-1).

No such interference occurred in relation to the real property seized on 13 May 1985 and three of the vehicles confiscated on 16 October 1985, because the requisite entries were made rapidly, on 2 and 10 February 1987 (see paragraph 15 above). On the other hand, there was an interference as regards the lorry and the nine items of real property confiscated on 16 October 1985 inasmuch as the entry concerning the lorry was not made until 10 July 1987 and that concerning the real property not until after 9 August 1991 (see paragraph 15 above).

It is not for the Court to determine who should have taken the appropriate steps in this case. However, and notwithstanding the reasons advanced by the Government, the responsibility of the public authorities was engaged. The Court finds it hard to see why it was necessary to wait respectively more than seven months (2 December 1986 – 10 July 1987) and four years and eight months (2 December 1986 – 9 August 1991) before regularising the legal status of some of Mr Raimondo's possessions, when the Catanzaro Court of Appeal had ordered that all the property be returned to the owners "after the entries had been removed from the registers" (previa cancellazione delle formalità concernenti le eseguite trascrizioni).

In addition, this interference 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 (P1-1).

Accordingly, there has been a violation of that provision.

II. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL No. 4 (P4-2)

37. The applicant complained that the special police supervision under which he had been placed had constituted a violation of Article 2 of Protocol No. 4 (P4-2), according to which:

> "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> ...
>
> 3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
>
> ..."

38. The Government disputed this view. The decision, adopted in private session, revoking the special supervision had not acquired legal force, according to the relevant provisions, until the day on which it had been filed with the registry, namely 2 December 1986. Up to that point it had remained "a purely internal event". The Catanzaro Court of Appeal could not be criticised for failing

to give its decision within thirty days, as provided for in section 4 of the 1956 Act, because that time-limit was not a mandatory one.

39. The Court considers in the first place that, notwithstanding the applicant's assertion to the contrary, the measure in issue did not amount to a deprivation of liberty within the meaning of Article 5 para. 1 (art. 5-1) of the Convention. The mere restrictions on the liberty of movement resulting from special supervision fall to be dealt with under Article 2 of Protocol No. 4 (P4-2) (see the Guzzardi v. Italy judgment, cited above, p. 33, para. 92).

In view of the threat posed by the Mafia to "democratic society", the measure was in addition necessary "for the maintenance of ordre public" and "for the prevention of crime". It was in particular proportionate to the aim pursued, up to the moment at which the Catanzaro Court of Appeal decided, on 4 July 1986, to revoke it (see paragraph 14 above).

It remains to consider the period between 4 July and 20 December 1986, when the decision was notified to the applicant (see the same paragraph). Even if it is accepted that this decision, taken in private session, could not acquire legal force until it was filed with the registry, the Court finds it hard to understand why there should have been a delay of nearly five months in drafting the grounds for a decision which was immediately enforceable and concerned a fundamental right, namely the applicant's freedom to come and go as he pleased; the latter was moreover not informed of the revocation for eighteen days.

40. The Court concludes that at least from 2 to 20 December 1986 the interference in issue was neither provided for by law nor necessary. There has accordingly been a violation of Article 2 of Protocol No. 4 (P4-2).

III. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 OF THE CONVENTION (art. 6-1)

41. Mr Raimondo finally criticised the length of the proceedings relating to his appeal against the confiscation and the special supervision. He relied on Article 6 para. 1 (art. 6-1) of the Convention, which provides as follows:

> "In the determination of his civil rights and obligations and of any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

42. The period to be taken into consideration began on 16 October 1985, the date on which the Catanzaro District Court ordered the measures in question (see paragraph 13 above). It ended on 31 December 1986, when the decision of the Court of Appeal became final. It therefore lasted one year, two months and two weeks.

43. The Court shares the view taken by the Government and the Commission that special supervision is not comparable to a criminal sanction because it is designed to prevent the commission of offences. It follows that proceedings concerning it did not involve "the determination ... of a criminal charge" (see the Guzzardi judgment cited above, p. 40, para. 108).

On the matter of confiscation, it should be noted that Article 6 (art. 6) applies to any action whose subject matter is "pecuniary" in nature and which is founded on an alleged infringement of rights that were likewise of a pecuniary character (see the Editions Périscope v. France judgment of 26 March 1992, Series A no. 234-B, p. 66, para. 40). That was the position in the instant case.

44. However, having regard to the fact that the case came before two domestic courts, the Court does not consider the total length of the proceedings to have been unreasonable (see, mutatis mutandis, the Salerno v. Italy judgment of 12 October 1992, Series A no. 245-D, p. 56, para. 21).

It follows that there has been no violation of Article 6 para. 1 (art. 6-1).

IV. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

45. Under Article 50 (art. 50) of the Convention,

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

46. Mr Raimondo claimed compensation for pecuniary and non– pecuniary damage without giving any figures. The fact that he had to halt his construction work following the confiscation of his property and the unsatisfactory conditions in which it had been kept had resulted in substantial deterioration of the buildings and the vehicles. The imposition of the special supervision had made it difficult for him to move around and impossible for him to conduct his business. In addition, the delay in entering the revocation of the confiscation had meant that any attempt to dispose of the property in question had been bound to fail, which had led to an increase in his already heavy debts.

47. According to the Government, the applicant failed to show that the alleged violations had resulted in pecuniary damage. As regards any non-pecuniary damage, they were of the opinion that, if a violation were to be found, the finding would in itself afford sufficient just satisfaction.

48. The Delegate of the Commission considered that the applicant had undoubtedly sustained pecuniary and non-pecuniary damage. However, in the absence of any specific claim, he was uncertain of the approach to be adopted.

49. The Court dismisses the claims for pecuniary damage as the terms in which they are formulated are too vague and the information contained in the file does not help to clarify the matter. On the other hand, it takes the view that Mr Raimondo suffered some non– pecuniary damage for which it awards him 10,000,000 Italian lire.

B. Costs and expenses

50. At the hearing the applicant's lawyer sought the reimbursement of 10,552,325 lire (inclusive of value added tax) in respect of the costs and expenses incurred before the Convention institutions.

51. The Government left this matter to the discretion of the Court, but pointed out that the sum awarded should be proportionate to the degree of success, if any, of Mr Raimondo's application.

The Delegate of the Commission did not express an opinion on the question.

52. In view of the failure of some of Mr Raimondo's complaints, the Court, having regard to the available evidence and to its relevant case-law, awards him 5,000,000 lire.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that no violation of Article 1 of Protocol No. 1 (P1-1) has been established either in respect of the seizure and the confiscation of the applicant's property up to 31 December 1986 or in respect of the damage occasioned by those measures;
2. Holds that there has been a breach of that same Article (P1-1) inasmuch as the confiscation, on 16 October 1985, of a lorry and nine items of real property remained entered in the relevant registers after 31 December 1986 and that no other violation of that provision has been established;
3. Holds that there has been a violation of Article 2 of Protocol No. 4 (P4-2) at least in so far as the special police supervision of the applicant continued after 2 December 1986;
4. Holds that Article 6 (art. 6) of the Convention does not apply to the said special supervision;
5. Holds that there has been no violation of that provision as regards the length of the confiscation proceedings;
6. Holds that the respondent State is to pay to Mr Raimondo, within three months, 10,000,000 (ten million) Italian lire for non-pecuniary damage and 5,000,000 (five million) lire for costs and expenses;
7. Dismisses the remainder of the applicant's claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 February 1994.

Marc-André EISSEN
Registrar

Rolv RYSSDAL
President

CASE OF

RANTSEV v. CYPRUS AND RUSSIA

(Application no. 25965/04)

JUDGMENT

7 January 2010

PROCEDURE

1. The case originated in an application (no. 25965/04) against the Republic of Cyprus and the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Nikolay Mikhaylovich Rantsev ("the applicant"), on 26 May 2004.

2. The applicant, who had been granted legal aid, was represented by Ms L. Churkina, a lawyer practising in Yekaterinburg. The Cypriot Government were represented by their Agent, Mr P. Clerides, Attorney-General of the Republic of Cyprus. The Russian Government were represented by their Agent, Mr G. Matyushkin.

3. The applicant complained under Articles 2, 3, 4, 5 and 8 of the Convention about the lack of sufficient investigation into the circumstances of the death of his daughter, the lack of adequate protection of his daughter by the Cypriot police while she was still alive and the failure of the Cypriot authorities to take steps to punish those responsible for his daughter's death and ill-treatment. He also complained under Articles 2 and 4 about the failure of the Russian authorities to investigate his daughter's alleged trafficking and subsequent death and to take steps to protect her from the risk of trafficking. Finally, he complained under Article 6 of the Convention about the inquest proceedings and an alleged lack of access to court in Cyprus.

4. On 19 October 2007 the Cypriot and Russian Governments were requested to submit the entire investigation file together with all correspondence between the two Governments on this matter. On 17 December 2007 and 17 March 2008, the Cypriot and Russian Governments respectively submitted a number of documents.

5. On 20 May 2008 the President of the First Section decided to accord the case priority treatment in accordance with Rule 41 of the Rules of Court.

6. On 27 June 2008 the President of the First Section decided to give notice of the application to each of the respondent Governments. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

7. On 27 and 28 October 2008 respectively, the Cypriot and Russian Governments submitted their written observations on the admissibility and merits of the application. In addition, third-party comments were received from two London-based non-governmental organisations, Interights and the AIRE Centre, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

8. On 12 December 2008, the President of the First Section decided that legal aid should be granted to the applicant for his representation before the Court.

9. On 16 December 2008 the applicant lodged written observations in reply together with his claims for just satisfaction.

10. The Cypriot and Russian Governments lodged observations on the applicant's just satisfaction submissions.

11. By letter of 10 April 2009, the Cypriot Government requested the Court to strike the case out of its list and enclosed the text of a unilateral declaration with a view to resolving the issues raised by the applicant. The applicant filed written observations on the Cypriot Government's request on 21 May 2009.

12. The applicant requested an oral hearing but prior to adopting the present judgment the Court decided that it was not necessary to hold one.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

13. The applicant, Mr Nikolay Mikhaylovich Rantsev, is a Russian national who was born in 1938 and lives in Svetlogorsk, Russia. He is the father of Ms Oxana Rantseva, also a Russian national, born in 1980.

14. The facts of the case, as established by the submissions of the parties and the material submitted by them, in particular the witness statements taken by the Cypriot police, may be summarised as follows.

A. The background facts

15. Oxana Rantseva arrived in Cyprus on 5 March 2001. On 13 February 2001, X.A., the owner of a cabaret in Limassol, had applied for an "artiste" visa and work permit for Ms Rantseva to allow her to work as an artiste in his cabaret (see further paragraph 115 below). The application was accompanied by a copy of Ms Rantseva's passport, a medical certificate, a copy of an employment contract (apparently not yet signed by Ms Rantseva) and a bond, signed by [X.A.] Agencies, in the following terms (original in English):

> "KNOW ALL MEN BY THESE PRESENTS that I [X.A.] of L/SSOL Am bound to the Minister of the Interior of the Republic of Cyprus in the sum of £150 to be paid to the said Minister of the Interior or other the [sic] Minister of Interior for the time being or his attorney or attorneys.

> Sealed with my seal.
>
> Dated the 13th day of February 2001
>
> WHEREAS Ms Oxana RANTSEVA of RUSSIA
>
> Hereinafter called the immigrant, (which expression shall where the context so admits be deemed to include his heirs, executors, administrators and assigns) is entering Cyprus and I have undertaken that the immigrant shall not become in need of relief in Cyprus during a period of five years from the date hereof and I have undertaken to replay [sic] to the Republic of Cyprus any sum which the Republic of Cyprus may pay for the relief or support of the immigrant (the necessity for which relief and support the Minister shall be the sole judge) or for the axpenses [sic] of repatriating the immigrant from Cyprus within a period of five years from the date hereof.
>
> NOW THE CONDITION OF THE ABOVE WRITTEN BOND is such that if the immigrant or myself, my heirs, executors, administrators and assigns shall repay to the Republic of Cyprus on demand any sum which the Republic of Cyprus may have paid as aforesaid for the relief or Support of the immigrant or for the expenses of repatriation of the immigrant from Cyprus then the above written bond shall be void but otherwise shall remain in full force."

16. Ms Rantseva was granted a temporary residence permit as a visitor until 9 March 2001. She stayed in an apartment with other young women working in X.A.'s cabaret. On 12 March 2001 she was granted a permit to work until 8 June 2001 as an artiste in a cabaret owned by X.A. and managed by his brother, M.A. She began work on 16 March 2001.

17. On 19 March 2001, at around 11a.m., M.A. was informed by the other women living with Ms Rantseva that she had left the apartment and taken all her belongings with her. The women told him that she had left a note in Russian saying that she was tired and wanted to return to Russia. On the same date M.A. informed the Immigration Office in Limassol that Ms Rantseva had abandoned her place of work and residence. According to M.A.'s subsequent witness statement, he wanted Ms Rantseva to be arrested and expelled from Cyprus so that he could bring another girl to work in the cabaret. However, Ms Rantseva's name was not entered on the list of persons wanted by the police.

B. The events of 28 March 2001

18. On 28 March 2001, at around 4 a.m., Ms Rantseva was seen in a discotheque in Limassol by another cabaret artiste. Upon being advised by the cabaret artiste that Ms Rantseva was in the discotheque, M.A. called the police and asked them to arrest her. He then went to the discotheque together with a security guard from his cabaret. An employee of the discotheque brought Ms Rantseva to him. In his subsequent witness statement, M.A. said (translation):

> "When [Ms Rantseva] got in to my car, she did not complain at all or do anything else. She looked drunk and I just told her to come with me. Because of the fact that she looked drunk, we didn't have a conversation and she didn't talk to me at all."

19. M.A. took Ms Rantseva to Limassol Central Police Station, where two police officers were on duty. He made a brief statement in which he set out the circumstances of Ms Rantseva's arrival in Cyprus, her employment and her subsequent disappearance from the apartment on 19 March 2001. According to the statement of the police officer in charge when they arrived (translation):

> "On 28 March 2001, slightly before 4a.m., [M.A.] found [Ms Rantseva] in the nightclub Titanic ... he took her and led her to the police station stating that Ms Rantseva was illegal and that we should place her in the cells. He ([M.A.]) then left the place (police station)."

20. The police officers then contacted the duty passport officer at his home and asked him to look into whether Ms Rantseva was illegal. After investigating, he advised them that her name was not in the database of wanted persons. He further advised that there was no record of M.A.'s complaint of 19 March 2001 and that, in any case, a person did not become illegal until 15 days after a complaint was made. The passport officer contacted the person in charge of the AIS (Police Aliens and Immigration Service), who gave instructions that Ms Rantseva was not to be detained and that her employer, who was responsible for her, was to pick her up and take her to their Limassol Office for further investigation at 7 a.m. that day. The police officers contacted M.A. to ask him to collect Ms Rantseva. M.A. was upset that the police would not detain her and refused to come and collect her. The police officers told him that their instructions were that if he did not take her they were to allow her to leave. M.A. became angry and asked to speak to their superior. The police officers provided a telephone number to M.A. The officers were subsequently advised by their superior that M.A. would come and collect Ms Rantseva. Both officers, in their witness statements, said that Ms Rantseva did not appear drunk. The officer in charge said (translation):

> "Ms Rantseva remained with us ... She was applying her make-up and did not look drunk ... At around 5.20a.m. ... I was ... informed that [M.A.] had come and picked her up..."

21. According to M.A.'s witness statement, when he collected Ms Rantseva from the police station, he also collected her passport and the other documents which he had handed to the police when they had arrived. He then took Ms Rantseva to the apartment of M.P., a male employee at his cabaret. The apartment M.P. lived in with his wife, D.P., was a split-level apartment with the entrance located on the fifth floor of a block of flats. According to M.A., they placed Ms Rantseva in a room on the second floor of the apartment. In his police statement, he said:

> "She just looked drunk and did not seem to have any intention to do anything. I did not do anything to prevent her from leaving the room in [the] flat where I had taken her."

22. M.A. said that M.P. and his wife went to sleep in their bedroom on the second floor and that he stayed in the living room of the apartment where he fell asleep. The apartment was arranged in such a way that in order to leave

the apartment by the front door, it would be necessary to pass through the living room.

23. M.P. stated that he left his work at the cabaret "Zygos" in Limassol at around 3.30 a.m. and went to the "Titanic" discotheque for a drink. Upon his arrival there he was informed that the girl they had been looking for, of Russian origin, was in the discotheque. Then M.A. arrived, accompanied by a security guard from the cabaret, and asked the employees of "Titanic" to bring the girl to the entrance. M.A., Ms Rantseva and the security guard then all got into M.A.'s car and left. At around 4.30 a.m. M.P. returned to his house and went to sleep. At around 6 a.m. his wife woke him up and informed him that M.A. had arrived together with Ms Rantseva and that they would stay until the Immigration Office opened. He then fell asleep.

24. D.P. stated that M.A. brought Ms Rantseva to the apartment at around 5.45 a.m.. She made coffee and M.A. spoke with her husband in the living room. M.A. then asked D.P. to provide Ms Rantseva with a bedroom so that she could get some rest. D.P. stated that Ms Rantseva looked drunk and did not want to drink or eat anything. According to D.P., she and her husband went to sleep at around 6 a.m. while M.A. stayed in the living room. Having made her statement, D.P. revised her initial description of events, now asserting that her husband had been asleep when M.A. arrived at their apartment with Ms Rantseva. She stated that she had been scared to admit that she had opened the door of the apartment on her own and had had coffee with M.A..

25. At around 6.30 a.m. on 28 March 2001, Ms Rantseva was found dead on the street below the apartment. Her handbag was over her shoulder. The police found a bedspread looped through the railing of the smaller balcony adjoining the room in which Ms Rantseva had been staying on the upper floor of the apartment, below which the larger balcony on the fifth floor was located.

26. M.A. claimed that he woke at 7 a.m. in order to take Ms Rantseva to the Immigration Office. He called to D.P. and M.P. and heard D.P. saying that the police were in the street in front of the apartment building. They looked in the bedroom but Ms Rantseva was not there. They looked out from the balcony and saw a body in the street. He later discovered that it was Ms Rantseva.

27. D.P. claimed that she was woken by M.A. knocking on her door to tell her that Ms Rantseva was not in her room and that they should look for her. She looked for her all over the apartment and then noticed that the balcony door in the bedroom was open. She went out onto the balcony and saw the bedspread and realised what Ms Rantseva had done. She went onto another balcony and saw a body lying on the street, covered by a white sheet and surrounded by police officers.

28. M.P. stated that he was woken up by noise at around 7 a.m. and saw his wife in a state of shock; she told him that Ms Rantseva had fallen from the balcony. He went into the living room where he saw M.A. and some police officers.

29. In his testimony of 28 March 2001, G.A. stated that on 28 March 2001, around 6.30 a.m., he was smoking on his balcony, located on the first floor of M.P. and D.P.'s building. He said:

> "I saw something resembling a shadow fall from above and pass directly in front of me. Immediately afterwards I heard a noise like something was breaking ... I told my wife to call the police ... I had heard nothing before the fall and immediately afterwards I did not hear any voices. She did not scream during the fall. She just fell as if she were unconscious ... Even if there had been a fight (in the apartment on the fifth floor) I would not have been able to hear it."

C. The investigation and inquest in Cyprus

30. The Cypriot Government advised the Court that the original investigation file had been destroyed in light of the internal policy to destroy files after a period of five years in cases where it was concluded that death was not attributable to a criminal act. A duplicate file, containing all the relevant documents with the exception of memo sheets, has been provided to the Court by the Government.

31. The file contains a report by the officer in charge of the investigation. The report sets out the background facts, as ascertained by forensic and crime scene evidence, and identifies 17 witnesses: M.A., M.P. D.P., G.A., the two police officers on duty at Limassol Police Station, the duty passport officer, eight police officers who attended the scene after Ms Rantseva's fall, the forensic examiner and the laboratory technician who analysed blood and urine samples.

32. The report indicates that minutes after receiving the call from G.A.'s wife, shortly after 6.30 a.m., the police arrived at the apartment building. They sealed off the scene at 6.40 a.m. and began an investigation into the cause of Ms Rantseva's fall. They took photographs of the scene, including photographs of the room in the apartment where Ms Rantseva had stayed and photographs of the balconies. The forensic examiner arrived at 9.30 a.m. and certified death. An initial forensic examination took place at the scene

33. On the same day, the police interviewed M.A., M.P. and D.P. as well as G.A.. They also interviewed the two police officers who had seen M.A. and Ms Rantseva at Limassol Police Station shortly before Ms Rantseva's death and the duty passport officer (relevant extracts and summaries of the statements given is included in the facts set out above at paragraphs 17 to 29). Of the eight police officers who attended the scene, the investigation file includes statements made by six of them, including the officer placed in charge of the investigation. There is no record of any statements being taken either from other employees of the cabaret where Ms Rantseva worked or from the women with whom she briefly shared an apartment.

34. When he made his witness statement on 28 March 2001, M.A. handed Ms Rantseva's passport and other documents to the police. After the conclusion and signature of his statement, he added a clarification regarding the passport, indicating that Ms Rantseva had taken her passport and documents when she left the apartment on 19 March 2001.

35. On 29 March 2001 an autopsy was carried out by the Cypriot authorities. The autopsy found a number of injuries on Ms Rantseva's body and to her internal organs. It concluded that these injuries resulted from her fall and that the

fall was the cause of her death. It is not clear when the applicant was informed of the results of the autopsy. According to the applicant, he was not provided with a copy of the autopsy report and it is unclear whether he was informed in any detail of the conclusions of the report, which were briefly summarised in the findings of the subsequent inquest.

36. On 5 August 2001 the applicant visited Limassol Police Station together with a lawyer and spoke to the police officer who had received Ms Rantseva and M.A. on 28 March 2001. The applicant asked to attend the inquest. According to a later statement by the police officer, dated 8 July 2002, the applicant was told by the police during the visit that his lawyer would be informed of the date of the inquest hearing before the District Court of Limassol.

37. On 10 October 2001 the applicant sent an application to the District Court of Limassol, copied to the General Procurator's Office of the Republic of Cyprus and the Russian Consulate in the Republic of Cyprus. He referred to a request of 8 October 2001 of the Procurator's Office of the Chelyabinsk region concerning legal assistance (see paragraph 48 below) and asked to exercise his right to familiarise himself with the materials of the case before the inquest hearing, to be present at the hearing and to be notified in due time of the date of the hearing. He also advised that he wished to present additional documents to the court in due course.

38. The inquest proceedings were fixed for 30 October 2001 and, according to the police officer's statement of 8 July 2002 (see paragraph 36 above), the applicant's lawyer was promptly informed. However, neither she nor the applicant appeared before the District Court. The case was adjourned to 11 December 2001 and an order was made that the Russian Embassy be notified of the new date so as to inform the applicant.

39. In a facsimile dated 20 October 2001 and sent on 31 October 2001 to the District Court of Limassol, copied to the General Procurator's Office of the Republic of Cyprus and the Russian Consulate in the Republic of Cyprus, the applicant asked for information regarding the inquest date to be sent to his new place of residence.

40. On 11 December 2001 the applicant did not appear before the District Court and the inquest was adjourned until 27 December 2001.

41. On 27 December 2001 the inquest took place before the Limassol District Court in the absence of the applicant. The court's verdict of the same date stated, inter alia (translation):

> "At around 6.30 a.m. on [28 March 2001] the deceased, in an attempt to escape from the afore-mentioned apartment and in strange circumstances, jumped into the void as a result of which she was fatally injured...
>
> My verdict is that MS OXANA RANTSEVA died on 28 March 2001, in circumstances resembling an accident, in an attempt to escape from the apartment in which she was a guest (*εφιλοξενείτο*).
>
> There is no evidence before me that suggests criminal liability of a third person for her death".

D. Subsequent proceedings in Cyprus and Russia

42. Ms Rantseva's body was transferred to Russia on 8 April 2001.

43. On 9 April 2001 the applicant requested the Chelyabinsk Regional Bureau of Medical Examinations ("the Chelyabinsk Bureau") to perform an autopsy of the body. He further requested the Federal Security Service of the Russian Federation and the General Prosecutor's Office to investigate Ms Rantseva's death in Cyprus. On 10 May 2001 the Chelyabinsk Bureau issued its report on the autopsy.

44. In particular the following was reported in the forensic diagnosis (translation provided):

> "It is a trauma from falling down from a large height, the falling on a plane of various levels, politrauma of the body, open cranial trauma: multiple fragmentary comminuted fracture of the facial and brain skull, multiple breeches of the brain membrane on the side of the brain vault and the base of the skull in the front brain pit, haemorrhages under the soft brain membranes, haemorrhages into the soft tissues, multiple bruises, large bruises and wounds on the skin, expressed deformation of the head in the front-to-back direction, closed dull trauma of the thorax with injuries of the thorax organs..., contusion of the lungs along the back surface, fracture of the spine in the thorax section with the complete breach of the marrow and its displacement along and across ...
>
> Alcohol intoxication of the medium degree: the presence of ethyl alcohol in the blood 1,8%, in the urine –2,5%."

45. The report's conclusions included the following:

> "The color and the look of bruises, breaches and wounds as well as hemorrhages with the morphological changes of the same type in the injured tissues indicates, without any doubt, that the traumas happened while she was alive, as well as the fact, that they happened not very long before death, within a very short time period, one after another.
>
> During the forensic examination of the corpse of Rantseva O.N. no injuries resulting from external violence, connected with the use of various firearms, various sharp objects and weapons, influence of physical and chemical reagents or natural factors have been established. ... During the forensic chemical examination of the blood and urine, internal organs of the corpse no narcotic, strong or toxic substances are found. Said circumstances exclude the possibility of the death of Rantseva O.N. from firearms, cold steel, physical, chemical and natural factors as well as poisoning and diseases of various organs and systems. ...
>
> Considering the location of the injuries, their morphological peculiarities, as well as certain differences, discovered during the morphological and histological analysis and the response of the injured tissues we believe that in this particular case a trauma from falling down from the great height took place, and it was the result of the so-called staged/bi-moment fall on the planes of various levels during which the primary contact of the body with an obstacle in the final phase of the fall from the great height was by the back surface of the body with a possible sliding and secondary contact by the front surface of the body, mainly the face with the expressed deformation of the head in the front-to-back direction due to shock-compressive impact...

> During the forensic chemical examination of the corpse of Rantseva O.N. in her blood and urine we found ethyl spirits 1,8 and 2,5 correspondingly, which during her life might correspond to medium alcohol intoxication which is clinically characterized by a considerable emotional instability, breaches in mentality and orientation in space in time."

46. On 9 August 2001 the Russian Embassy in Cyprus requested from the chief of Limassol police station copies of the investigation files relating to Ms Rantseva's death.

47. On 13 September 2001 the applicant applied to the Public Prosecutor of the Chelyabinsk region requesting the Prosecutor to apply on his behalf to the Public Prosecutor of Cyprus for legal assistance free of charge as well as an exemption from court expenses for additional investigation into the death of his daughter on the territory of Cyprus.

48. By letter dated 11 December 2001 the Deputy General Prosecutor of the Russian Federation advised the Minister of Justice of the Republic of Cyprus that the Public Prosecutor's Office of the Chelyabinsk region had conducted an examination in respect of Ms Rantseva's death, including a forensic medical examination. He forwarded a request, dated 8 October 2001, under the European Convention on Mutual Assistance in Criminal Matters ("the Mutual Assistance Convention" – see paragraphs 175 to 178 below) and the Treaty between the USSR and the Republic of Cyprus on Civil and Criminal Matters 1984 ("the Legal Assistance Treaty" – see paragraphs 179 to 185 below), for legal assistance for the purposes of establishing all the circumstances of Ms Rantseva's death and bringing to justice guilty parties, under Cypriot legislation. The request included the findings of the Russian authorities as to the background circumstances; it is not clear how the findings were reached and what, if any, investigation was conducted independently by the Russian authorities.

49. The findings stated, *inter alia*, as follows (translation provided):

> "The police officers refused to arrest Rantseva O.N. due to her right to stay on the territory of Cyprus without the right to work for 14 days, i.e. until April 2, 2001. Then Mr [M.A.] suggested to detain Rantseva O.N. till the morning as a drunken person. He was refused, since, following the explanations provided by the police officers Rantseva O.N. looked like a sober person, behaved decently, was calm, was laying make-up. M.A., together with an unestablished person, at 5.30a.m. on March 28, 2001 took Rantseva O.N. from the regional police precinct and brought her to the apartment of [D.P.] ... where [they] organised a meal, and then, at 6.30a.m. locked Rantseva O.N. in a room of the attic of the 7th floor of said house."

50. The request highlighted the conclusion of the experts at the Chelyabinsk Bureau of Forensic Medicine that there had been two stages in Ms Rantseva's fall, first on her back and then on her front. The request noted that this conclusion contradicted the findings made in the Cypriot forensic examination that Ms Rantseva's death had resulted from a fall face-down. It further noted:

> "It is possible to suppose, that at the moment of her falling down the victim could cry from horror. However, it contradicts the materials of the investigation, which contain the evidence of an inhabitant of the 2nd floor of this row of loggias, saying that a silent body fell down on the asphalt ..."

51. The report concluded:

> "Judging by the report of the investigator to Mr Rantsev N.M., the investigation ends with the conclusion that the death of Rantseva O.N. took place under strange and un-established circumstances, demanding additional investigation."

52. The Prosecutor of the Chelyabinsk region therefore requested, in accordance with the Legal Assistance Treaty, that further investigation be carried out into the circumstances of Ms Rantseva's death in order to identify the cause of death and eliminate the contradictions in the available evidence; that persons having any information concerning the circumstances of the death be identified and interviewed; that the conduct of the various parties be considered from the perspective of bringing murder and/or kidnapping and unlawful deprivation of freedom charges, and in particular that M.A. be investigated; that the applicant be informed of the materials of the investigation; that the Russian authorities be provided with a copy of the final decisions of judicial authorities as regards Ms Rantseva's death; and that the applicant be granted legal assistance free of charge and be exempted from paying court expenses.

53. On 27 December 2001 the Russian Federation wrote to the Cypriot Ministry of Justice requesting, on behalf of the applicant, that criminal proceedings be instituted in respect of Ms Rantseva's death, that the applicant be joined as a victim in the proceedings and that he be granted free legal assistance.

54. On 16 April 2002 the Russian Embassy in Cyprus conveyed to the Cypriot Ministry of Justice and Public Order the requests dated 11 December and 27 December 2001 of the General Prosecutor's Office of the Russian Federation, made under the Legal Assistance Treaty, for legal assistance concerning Ms Rantseva's death.

55. On 25 April 2002 the Office of the Prosecutor General of the Russian Federation reiterated its request for the institution of criminal proceedings in connection with Ms Rantseva's death and the applicant's request to be added as a victim to the proceedings in order to submit his further evidence, as well as his request for legal aid. It requested the Cypriot Government to provide an update and advise of any decisions that had been taken.

56. On 25 November 2002, the applicant applied to the Russian authorities to be recognised as a victim in the proceedings concerning his daughter's death and reiterated his request for legal assistance. The request was forwarded by the Office of the Prosecutor General of the Russian Federation to the Cypriot Ministry of Justice.

57. By letter of 27 December 2002 the Assistant to the Prosecutor General of the Russian Federation wrote to the Cypriot Ministry of Justice referring to the detailed request made by the applicant for the initiation of criminal proceedings in connection with the death of his daughter and for legal aid in Cyprus, which had previously been forwarded to the Cypriot authorities pursuant to the Mutual Assistance Convention and the Legal Assistance Treaty. The letter noted that no information had been received and requested that a response be provided.

58. On 13 January 2003 the Russian Embassy wrote to the Cypriot Ministry of Foreign Affairs requesting an expedited response to its request for legal assistance in respect of Ms Rantseva's death.

59. By letters of 17 and 31 January 2003 the Office of the Prosecutor General of the Russian Federation noted that it had received no response from the Cypriot authorities in relation to its requests for legal assistance, the contents of which it repeated.

60. On 4 March 2003 the Cypriot Ministry of Justice informed the Prosecutor General of the Russian Federation that its request had been duly executed by the Cypriot police. A letter from the Chief of Police, and the police report of 8 July 2002 recording the applicant's visit to Limassol Police Station in August 2001 were enclosed.

61. On 19 May 2003 the Russian Embassy wrote to the Cypriot Ministry of Foreign Affairs requesting an expedited response to its request for legal assistance in respect of Ms Rantseva's death.

62. On 5 June 2003 the Office of the Prosecutor General of the Russian Federation submitted a further request pursuant to the Legal Assistance Treaty. It requested that a further investigation be conducted into the circumstances of Ms Rantseva's death as the verdict of 27 December 2001 was unsatisfactory. In particular, it noted that despite the strange circumstances of the incident and the acknowledgment that Ms Rantseva was trying to escape from the flat where she was held, the verdict did not make any reference to the inconsistent testimonies of the relevant witnesses or contain any detailed description of the findings of the autopsy carried out by the Cypriot authorities.

63. On 8 July 2003 the Russian Embassy wrote to the Cypriot Ministry of Foreign Affairs requesting a reply to its previous requests as a matter of urgency.

64. On 4 December 2003 the Commissioner for Human Rights of the Russian Federation forwarded the applicant's complaint about the inadequate reply from the Cypriot authorities to the Cypriot Ombudsman.

65. On 17 December 2003, in reply to the Russian authorities' request (see paragraph 52 above), the Cypriot Ministry of Justice forwarded to the Prosecutor General of the Russian Federation a further report prepared by the Cypriot police and dated 17 November 2003. The report was prepared by one of the officers who had attended the scene on 28 March 2001 and provided brief responses to the questions posed by the Russian authorities. The report reiterated that witnesses had been interviewed and statements taken. It emphasised that all the evidence was taken into consideration by the inquest. It continued as follows (translation):

> "At about 6.30a.m. on 28 March 2001 the deceased went out onto the balcony of her room through the balcony door, climbed down to the balcony of the first floor of the apartment with the assistance of a bedspread which she tied to the protective railing of the balcony. She carried on her shoulder her personal bag. From that point, she clung to the aluminium protective railing of the balcony so as to climb down to the balcony of the apartment on the floor below in order to

> escape. Under unknown circumstances, she fell into the street, as a result of which she was fatally injured."

66. The report observed that it was not known why Ms Rantseva left the apartment on 19 March 2001 but on the basis of the investigation (translation):

> "... it is concluded that the deceased did not want to be expelled from Cyprus and because her employer was at the entrance of the flat where she was a guest, she decided to take the risk of trying to climb over the balcony, as a result of which she fell to the ground and died instantaneously."

67. As to the criticism of the Cypriot autopsy and alleged inconsistencies in the forensic evidence between the Cypriot and Russian authorities, the report advised that these remarks had been forwarded to the Cypriot forensic examiner who had carried out the autopsy. His response was that his own conclusions were sufficient and that no supplementary information was required. Finally, the report reiterated that the inquest had concluded that there was no indication of any criminal liability for Ms Rantseva's death.

68. By letter of 17 August 2005 the Russian Ambassador to Cyprus requested further information about a hearing concerning the case apparently scheduled for 14 October 2005 and reiterated the applicant's request for free legal assistance. The Cypriot Ministry of Justice responded by facsimile of 21 September 2005 indicating that Limassol District Court had been unable to find any reference to a hearing in the case fixed for 14 October 2005 and requesting clarification from the Russian authorities.

69. On 28 October 2005 the applicant asked the Russian authorities to obtain testimonies from two young Russian women, now resident in Russia, who had been working with Ms Rantseva at the cabaret in Limassol and could testify about sexual exploitation taking place there. He reiterated his request on 11 November 2005. The Russian authorities replied that they could only obtain such testimonies upon receipt of a request by the Cypriot authorities.

70. By letter of 22 December 2005 the Office of the Prosecutor General of the Russian Federation wrote to the Cypriot Ministry of Justice seeking an update on the new inquest into Ms Rantseva's death and requesting information on how to appeal Cypriot court decisions. The letter indicated that, according to information available, the hearing set for 14 October 2005 had been suspended due to the absence of evidence from the Russian nationals who had worked in the cabaret with Ms Rantseva. The letter concluded with an undertaking to assist in any request for legal assistance by Cyprus aimed at the collection of further evidence.

71. In January 2006, according to the applicant, the Attorney-General of Cyprus confirmed to the applicant's lawyer that he was willing to order the reopening of the investigation upon receipt of further evidence showing any criminal activity.

72. On 26 January 2006 the Russian Embassy wrote to the Cypriot Ministry of Justice requesting an update on the suspended hearing of 14 October 2005. The Ministry of Justice replied by facsimile on 30 January 2006 confirming that

neither the District Court of Limassol nor the Supreme Court of Cyprus had any record of such a hearing and requesting further clarification of the details of the alleged hearing.

73. On 11 April 2006 the Office of the Prosecutor General of the Russian Federation wrote to the Cypriot Ministry of Justice requesting an update on the suspended hearing and reiterating its query regarding the appeals procedure in Cyprus.

74. On 14 April 2006, by letter to the Russian authorities, the Attorney-General of Cyprus advised that he saw no reason to request the Russian authorities to obtain the testimonies of the two Russian citizens identified by the applicant. If the said persons were in the Republic of Cyprus their testimonies could be obtained by the Cypriot police and if they were in Russia, the Russian authorities did not need the consent of the Cypriot authorities to obtain their statements.

75. On 26 April 2006 the Cypriot Ministry of Justice replied to the Office of the Prosecutor General of the Russian Federation reiterating its request for more information about the alleged suspended hearing.

76. On 17 June 2006 the Office of the Prosecutor General of the Russian Federation wrote to the Attorney-General of Cyprus reminding him of the outstanding requests for renewal of investigations into Ms Rantseva's death and for information on the progress of judicial proceedings.

77. On 22 June and 15 August 2006 the applicant reiterated his request to the Russian authorities that statements be taken from the two Russian women.

78. On 17 October 2006 the Cypriot Ministry of Justice confirmed to the Office of the Prosecutor General of the Russian Federation that the inquest into Ms Rantseva's death was completed on 27 December 2001 and that it found that her death was the result of an accident. The letter noted:

> "No appeal was filed against the decision, because of the lack of additional evidence".

79. On 25 October 2006, 27 October 2006, 3 October 2007 and 6 November 2007 the applicant reiterated his request to the Russian authorities that statements be taken from the two Russian women.

II. REPORTS ON THE SITUATION OF "ARTISTES" IN CYPRUS

A. *Ex Officio* report of the Cypriot Ombudsman on the regime regarding entry and employment of alien women as artistes in entertainment places in Cyprus, 24 November 2003

80. In November 2003, the Cypriot Ombudsman published a report on "artistes" in Cyprus. In her introduction, she explained the reasons for her report as follows (all quotes are from a translation of the report provided by the Cypriot Government):

"Given the circumstances under which [Oxana] Rantseva had lost her life and in the light of similar cases which have been brought into publicity regarding violence or demises of alien women who arrives in Cyprus to work as 'artistes', I have decided to undertake an *ex officio* investigation ..."

81. As to the particular facts of Ms Rantseva's case, she noted the following:

"After formal immigration procedures, she started working on 16 March 2001. Three days later she abandoned the cabaret and the place where she had been staying for reasons which have never been clarified. The employer reported the fact to the Aliens and Immigration Department in Limassol. However, [Oxana] Rantseva's name was not inserted on the list comprising people wanted by the Police, for unknown reasons, as well."

82. She further noted that:

"The reason for which [Oxana] Rantseva was surrendered by the police to her employer, instead of setting her free, since there were [neither] arrest warrant [nor] expulsion decree against her, remained unknown."

83. The Ombudsman's report considered the history of the employment of young foreign women as cabaret artistes, noting that the word "artiste" in Cyprus has become synonymous with "prostitute". Her report explained that since the mid-1970s, thousands of young women had legally entered Cyprus to work as artistes but had in fact worked as prostitutes in one of the many cabarets in Cyprus. Since the beginning of the 1980s, efforts had been made by the authorities to introduce a stricter regime in order to guarantee effective immigration monitoring and to limit the "well-known and commonly acknowledged phenomenon of women who arrived in Cyprus to work as artistes". However, a number of the measures proposed had not been implemented due to objections from cabaret managers and artistic agents.

84. The Ombudsman's report noted that in the 1990s, the prostitution market in Cyprus started to be served by women coming mainly from former States of the Soviet Union. She concluded that:

"During the same period, one could observe a certain improvement regarding the implementation of those measures and the policy being adopted. However, there was not improvement regarding sexual exploitation, trafficking and mobility of women under a regime of modern slavery."

85. As regards the living and working conditions of artistes, the report stated:

"The majority of the women entering the country to work as artistes come from poor families of the post socialist countries. Most of them are educated ... Few are the real artistes. Usually they are aware that they will be compelled to prostitute themselves. However, they do not always know about the working conditions under which they will exercise this job. There are also cases of alien women who come to Cyprus, having the impression that they will work as waitresses or dancers and that they will only have drinks with clients ('consomation'). They are made by force and threats to comply with the real terms of their work ...

Alien women who do not succumb to this pressure are forced by their employers to appear at the District Aliens and Immigration Branch to declare their

wish to terminate their contract and to leave Cyprus on ostensible grounds ... Consequently, the employers can replace them quickly with other artistes ...

The alien artistes from the moment of their entry into the Republic of Cyprus to their departure are under constant surveillance and guard of their employers. After finishing their work, they are not allowed to go wherever they want. There are serious complaints even about cases of artistes who remain locked in their residence place. Moreover, their passports and other personal documents are retained by their employers or artistic agents. Those who refuse to obey are punished by means of violence or by being imposed fees which usually consist in deducting percentages of drinks, 'consommation' or commercial sex. Of course these amounts are included in the contracts signed by the artistes.

...

Generally, artistes stay at one or zero star hotels, flats or guest-houses situated near or above the cabarets, whose owners are the artistic agents or the cabaret owners. These places are constantly guarded. Three or four women sleep in each room. According to reports given by the Police, many of these buildings are inappropriate and lack sufficient sanitation facilities.

...Finally, it is noted that at the point of their arrival in Cyprus alien artistes are charged with debts, for instance with traveling expenses, commissions deducted by the artistic agent who brought them in Cyprus or with commissions deducted by the agent who located them in their country etc. Therefore, they are obliged to work under whichever conditions to pay off at least their debts." (*footnotes omitted)*

86. Concerning the recruitment of women in their countries of origin, the report noted:

"Locating women who come to work in Cyprus is usually undertaken by local artistic agents in cooperation with their homologues in different countries and arrangements are made between both of them. After having worked for six months maximum in Cyprus, a number of these artistes are sent to Lebanon, Syria, Greece or Germany." (*footnotes omitted)*

87. The Ombudsman observed that the police received few complaints from trafficking victims:

"The police explain that the small number of complaints filed is due to the fear that artistes feel, since they receive threats against their lives on the part of their procurer."

88. She further noted that protection measures for victims who had filed complaints were insufficient. Although they were permitted to work elsewhere, they were required to continue working in similar employment. They could therefore be easily located by their former employers.

89. The Ombudsman concluded:

"The phenomenon of trafficking in person has so tremendously grown worldwide. Trafficking in persons concerns not only sexual exploitation of others but also exploitation of their employment under conditions of slavery and servitude ...

From the data of this report it is observed that over the last two decades Cyprus has not been only a destination country but a transit country where women are systematically promoted to the prostitution market. It follows also that this is also due to a great extent to the tolerance on the part of the immigration authorities, which are fully aware of what really happens.

On the basis of the policy followed as for the issue of entry and employment permits to entertainment and show places, thousands of alien women, with no safety valve, have entered by law the country to work as artistes unlawfully. In various forms of pressure and coercion most of these women are forced by their employers to prostitution under cruel conditions, which infringe upon the fundamental human rights, such as individual freedom and human dignity." (*footnotes omitted)*

90. Although she considered the existing legislative framework to combat trafficking and sexual exploitation satisfactory, she noted that no practical measures had been taken to implement the policies outlined, observing that:

"...The various departments and services dealing with this problem, are often unaware of the matter and have not been properly trained or ignore those obligations enshrined in the Law ..."

B. Extracts of report of 12 February 2004 by the Council of Europe Commissioner for Human Rights on his visit to Cyprus in June 2003 (CommDH(2004)2)

91. The Council of Europe Commissioner for Human Rights visited Cyprus in June 2003 and in his subsequent report of 12 February 2004, he referred to issues in Cyprus regarding trafficking of women. The report noted, *inter alia*, that:

"29. It is not at all difficult to understand how Cyprus, given its remarkable economic and tourist development, has come to be a major destination for this traffic in the Eastern Mediterranean region. The absence of an immigration policy and the legislative shortcomings in that respect have merely encouraged the phenomenon."

92. As regards the legal framework in place in Cyprus (see paragraphs 127 to 131 below), the Commissioner observed:

"30. The authorities have responded at the normative level. The Act of 2000 (number 3(I), 2000) has established a suitable framework for suppression of trafficking in human beings and sexual exploitation of children. Under the Act, any action identifiable as trafficking in human beings in the light of the Convention for the Suppression of Trafficking in Persons and of the Exploitation and Prostitution of Others, together with other acts of a similar nature specified by law, are an offence punishable by 10 years' imprisonment, the penalty being increased to 15 years where the victim is under 18 years of age. The offence of sexual exploitation carries a 15 year prison sentence. If committed by persons in the victim's entourage or persons wielding authority or influence over the victim, the penalty is 20 years in prison. According to the provisions of Article 4, using children for the production and sale of pornographic material is an offence. Article 7 grants State aid, within reasonable limits, to victims of exploitation; such aid comprises subsistence allow-

ance, temporary accommodation, medical care and psychiatric support. Article 8 reaffirms the right to redress by stressing the power of the court to award punitive damages justified by the degree of exploitation or the degree of the accused person's constraint over the victim. A foreign worker lawfully present in Cyprus who is a victim of exploitation can approach the authorities to find other employment up until the expiry of the initial work permit (Article 9). Lastly, the Council of Ministers, under Article 10, appoints a guardian for victims with the principal duties of counselling and assisting them, examining complaints of exploitation, and having the culprits prosecuted, as well as for pinpointing any deficiency or loophole in the law and for making recommendations with a view to their removal."

93. Concerning practical measures, the Commissioner noted:

"31. At a practical level, the Government has made efforts to protect women who have laid a complaint against their employers by permitting them to remain in the country in order to substantiate the charges. In certain cases, the women have remained in Cyprus at government expense during the investigation."

94. However, he criticised the failure of the authorities to tackle the problem of the excessive number of young foreign women coming to work in Cypriot cabarets:

"32. However, apart from punitive procedures, preventive control measures could be introduced. By the authorities' own admission, the number of young women migrating to Cyprus as nightclub artistes is well out of proportion to the population of the island."

C. Extracts of follow-up report of 26 March 2006 by the Council of Europe Commissioner for Human Rights on the progress made in implementing his recommendations (CommDH(2006)12)

95. On 26 March 2006, the Council of Europe Commissioner for Human Rights published a follow-up report in which he assessed the progress of the Cypriot Government in implementing the recommendations of his previous report. As regards the issue of trafficking, the report observed that:

"48. The Commissioner noted in his 2003 report that the number of young women migrating to Cyprus as nightclub artistes was well out of proportion to the population of the island, and that the authorities should consider introducing preventive control measures to deal with this phenomenon, in conjunction with legislative safeguards. In particular, the Commissioner recommended that the authorities adopt and implement a plan of action against trafficking in human beings."

96. The report continued:

"49. The so called 'cabaret artiste' visas are in fact permits to enter and work in nightclubs and bars. These permits are valid for 3 months and can be extended for a further 3 months. The permit is applied for by the establishment owner on behalf of the woman in question. Approximately 4,000 permits are issued each year, with 1,200 women working at a given time and most women originating from Eastern Europe. A special information leaflet has been prepared by the Migration Service and translated into four languages. The leaflet is given to women

entering the country on such permits, is also available on the website of the Ministry of the Interior and the Ministry of Foreign Affairs and copies of the leaflet are sent to the consulates in Russia, Bulgaria, the Ukraine and Romania in order for women to be informed before they enter Cyprus. The leaflet sets out the rights of the women and the responsibilities of their employers. The authorities are aware that many of the women who enter Cyprus on these artistes visas will in fact work in prostitution."

97. The Commissioner's report highlighted recent and pending developments in Cyprus:

"50. A new Law on Trafficking in Human Beings is currently being discussed. The new law will include other forms of exploitation such as labour trafficking as well as trafficking for sexual exploitation. Cyprus has signed but not ratified the Council of Europe Convention on Action Against Trafficking in Human Beings.

51. The Attorney General's Office has prepared a National Action Plan for the Combating of Human Trafficking. The Action Plan was presented and approved by the Council of Ministers in April 2005. Some NGOs complained of their lack of involvement in the consultation process. The Ministry of the Interior is responsible for the implementation of the Action Plan. According to the Action Plan, women involved in cases of sexual exploitation or procuring are not arrested or charged with any offence, but are considered as victims and are under the care of the Ministry of Labour and Social Security. Victims who will act as witnesses in court trials can reside in Cyprus until the end of the case. They have the possibility of working, or if they do not wish to work, the Ministry will cover all their residential, health and other needs. A special procedures manual has been drafted for the treatment of victims of trafficking, and has been circulated to all ministries and government departments, as well as NGOs for consultation.

52. There is no specific shelter for victims of trafficking at present, although victims may be accommodated by the authorities in two rooms in state-owned retirement homes, which are available in each major town. A shelter in Limassol is due to be opened soon, which will provide accommodation for 15 women, as well as providing the services of a social worker, lawyer, and vocational advisor."

98. As regards steps taken to improve information collection and research into trafficking, he noted:

"53. An Office for the Prevention and Combating of Human Trafficking was set up by the police in April 2004. The office's role is to collect and evaluate intelligence regarding trafficking in human beings, to co-ordinate operations of all police divisions and departments, to organise and participate in operations, and to follow-up on cases that are under investigation, pending trial or presented to the courts. The office also prepares reports on trafficking and investigates child pornography on the Internet. In addition, the office organises educational seminars carried out at the Cyprus Police Academy.

54. According to statistical information provided by the police from 2000 to 2005, there is a clear increase in the number of cases reported concerning offences of sexual exploitation, procuring, and living on the earnings of prostitution, etc. NGOs confirm that awareness about issues relating to trafficking has increased."

99. Finally, in respect of preventative measures, the Commissioner highlighted recent positive developments:

> "55. Preventive and suppressive measures are also undertaken by the police, such as raids in cabarets, inspections, interviews with women, co-operation with mass media, and control of advertisements found in different newspapers. The police provide an anonymous toll-free hotline where anybody can call to seek help or give information. Cabarets which are under investigation are put on a black list and are unable to apply for new visas.
>
> 56. Some efforts have been made by the Cypriot authorities to improve victim identification and referral, and in particular, 150 police officers have been trained on this issue. However, according to NGOs a culture still prevails in which women are seen by the police to have 'consented' to their predicament and victim identification remains inadequate."

100. The report reached the following conclusions:

> "57. Trafficking in human beings is one of the most pressing and complex Human Rights issues faced by Council of Europe member states, including Cyprus. There is obviously a risk that the young women who enter Cyprus on artiste visas may be victims of trafficking in human beings or later become victims of abuse or coercion. These women are officially recruited as cabaret dancers but are nevertheless often expected also to work as prostitutes. They are usually from countries with inferior income levels to those in Cyprus and may find themselves in a vulnerable position to refuse demands from their employers or clients. The system itself, whereby the establishment owner applies for the permit on behalf of the woman, often renders the woman dependent on her employer or agent, and increases the risk of her falling into the hands of trafficking networks.
>
> 58. The Commissioner urges the Cypriot authorities to be especially vigilant about monitoring the situation and ensuring that the system of artiste visas is not used for facilitating trafficking or forced prostitution. In this context, the Commissioner recalls the exemplary reaction of the Luxembourg authorities to similar concerns expressed in his report on the country and their withdrawal of the cabaret artiste visa regime. Changes to the current practice might, at the very least, include women having to apply for the visa themselves, and the information leaflet being given to the women, if possible, before they enter the country.
>
> 59. The Commissioner welcomes the new National Action Plan for the Combating of Human Trafficking as a first step in addressing this issue and encourages the Ministry of the Interior to ensure its full implementation. The new law on trafficking, once enacted, will also play an important role. The variety of police activities in response to this phenomenon, such as the setting up of the Office for the Prevention and Combating of Human Trafficking, should also be welcomed.
>
> 60. In order to respect the human rights of trafficked persons, the authorities need to be able to identify victims and refer them to specialised agencies which can offer shelter and protection, as well as support services. The Commissioner urges the Cypriot authorities to continue with the training of police officers in victim identification and referral, and encourages the authorities to include women police officers in this area. More effective partnerships with NGOs and other civil society actors should also be developed. The Commissioner expresses his hope that the shelter in Limassol will be put into operation as soon as possible."

D. Extracts of report of 12 December 2008 by the Council of Europe Commissioner for Human Rights on his visit to Cyprus on 7-10 July 2008 (CommDH(2008)36)

101. The Commissioner of Human Rights has recently published a further report following a visit to Cyprus in July 2008. The report comments on the developments in respect of issues relating to trafficking of human beings, emphasising at the outset that trafficking of women for exploitation was a major problem in many European countries, including Cyprus. The report continued as follows:

> "33. Already in 2003, the Commissioner for Administration (Ombudswoman) stated that Cyprus had been associated with trafficking both as a country of destination and transit, the majority of women being blackmailed and forced to provide sexual services. In 2008, the island still is a destination country for a large number of women trafficked from the Philippines, Russia, Moldova, Hungary, Ukraine, Greece, Vietnam, Uzbekistan and the Dominican Republic for the purpose of commercial sexual exploitation ... Women are reportedly denied part or all of their salaries, forced to surrender their passports, and pressed into providing sexual services for clients. Most of these women are unable to move freely, are forced to work far above normal working hours, and live in desperate conditions, isolated and under strict surveillance.
>
> 34. Victims of trafficking are recruited to Cyprus mainly on three-month so-called 'artiste' or 'entertainment' visas to work in the cabaret industry including night clubs and bars or on tourist visas to work in massage parlours disguised as private apartments ... The permit is sought by the owner of the establishment, in most cases so-called 'cabarets', for the women in question.
>
> 35. The study conducted by the Mediterranean Institute of Gender Studies (MIGS) led to a report on trafficking in human beings published in October 2007. It shows that an estimated 2 000 foreign women enter the island every year with short term 'artiste' or 'entertainment' work permits. Over the 20-year period 1982-2002, there was a dramatic increase of 111% in the number of cabarets operating on the island ...
>
> 36. During his visit the Commissioner learned that there are now approximately 120 cabaret establishments in the Republic of Cyprus, each of them employing around 10 to 15 women ..." *(footnotes omitted)*

102. The Commissioner noted that the Government had passed comprehensive anti-trafficking legislation criminalising all forms of trafficking, prescribing up to 20 years' imprisonment for sexual exploitation and providing for protection and support measures for victims (see paragraphs 127 to 131 below). He also visited the new government-run shelter in operation since November 2007 and was impressed by the facility and the commitment shown by staff. As regards allegations of corruption in the police force, and the report noted as follows:

> "42. The Commissioner was assured that allegations of trafficking-related corruption within the police force were isolated cases. The authorities informed the Commissioner that so far, three disciplinary cases involving human trafficking/prostitution have been investigated: one resulted in an acquittal and two are still under investigation. In addition, in 2006, a member of the police force was

sentenced to 14 months imprisonment and was subsequently dismissed from service following trafficking related charges."

103. The report drew the following conclusions in respect of the artiste permit regime in Cyprus:

"45. The Commissioner reiterates that trafficking in women for the purposes of sexual exploitation is a pressing and complex human rights issues faced by a number of Council of Europe member States, including Cyprus. A paradox certainly exists that while the Cypriot government has made legislative efforts to fight trafficking in human beings and expressed its willingness through their National Action Plan 2005, it continues to issue work permits for so-called cabaret artistes and licences for the cabaret establishments. While on paper the permits are issued to those women who will engage in some type of artistic performance, the reality is that many, if not most, of these women are expected to work as prostitutes.

46. The existence of the 'artiste' work permit leads to a situation which makes it very difficult for law enforcement authorities to prove coercion and trafficking and effectively combat it. This type of permit could thus be perceived as contradicting the measures taken against trafficking or at least as rendering them ineffective.

47. For these reasons, the Commissioner regrets that the 'artiste' work permit is still in place today despite the fact that the government has previously expressed its commitment to abolish it. It seems that the special information leaflet given to women entering the country on such a permit is of little effect, even though the woman needs to have read and signed the leaflet in the presence of an official.

48. The Commissioner calls upon the Cypriot authorities to abolish the current scheme of cabaret 'artistes' work permits ..."

104. The Commissioner also reiterated the importance of a well-trained and motivated police force in the fight against trafficking in human beings and encouraged the authorities to ensure adequate and timely victim identification.

E. *Trafficking in Persons Report*, U.S. State Department, June 2008

105. In its 2008 report on trafficking, the U.S. State Department noted that:

"Cyprus is a destination country for a large number of women trafficked from the Philippines, Russia, Moldova, Hungary, Ukraine, Greece, Vietnam, Uzbekistan, and the Dominican Republic for the purpose of commercial sexual exploitation ... Most victims of trafficking are fraudulently recruited to Cyprus on three-month 'artiste' work permits to work in the cabaret industry or on tourist visas to work in massage parlors disguised as private apartments."

106. The report found that Cyprus had failed to provide evidence that it had increased its efforts to combat severe forms of trafficking in persons from the previous year.

107. The report recommended that the Cypriot Government:

"Follow through with plans to abolish, or greatly restrict use of the artiste work permit—a well-known conduit for trafficking; establish standard operating

procedures to protect and assist victims in its new trafficking shelter; develop and launch a comprehensive demand reduction campaign specifically aimed at clients and the larger public to reduce wide-spread misconceptions about trafficking and the cabaret industry; dedicate more resources to its anti-trafficking unit; and improve the quality of trafficking prosecutions to secure convictions and appropriate punishments for traffickers."

III. RELEVANT DOMESTIC LAW AND PRACTICE

A. Cyprus

1. Extracts of the Constitution

108. Under the Cypriot Constitution the right to life and corporal integrity is protected by Article 7.

109. Article 8 provides that no person shall be subjected to torture or to inhuman or degrading punishment or treatment.

110. Article 9 guarantees that:

"Every person has the right to a decent existence and to social security. A law shall provide for the protection of the workers, assistance to the poor and for a system of social insurance."

111. Article 10 provides, in so far as relevant, that:

"1. No person shall be held in slavery or servitude.

2. No person shall be required to perform forced or compulsory labour ..."

112. Article 11(1) provides that every person has the right to liberty and security of person. Article 11(2) prohibits deprivation of liberty except in cases permitted under Article 5 § 1 of the Convention and as provided by law.

2. Applications for entrance, residence and work permits for artistes

a. The procedure at the relevant time

113. In 2000, the Civil Registry and Migration Department defined "artiste" as:

"any alien who wishes to enter Cyprus in order to work in a cabaret, musical-dancing place or other night entertainment place and has attained the age of 18 years."

114. Under Article 20 of the Aliens and Immigration Law, Cap. 105, the Council of Ministers has jurisdiction to issue regulations concerning entry requirements for aliens, monitoring the immigration and movements of aliens, regulating warranties in respect of aliens holding permits and determining any relevant fees. Notwithstanding the existence of these powers, at the material time the entry procedures for those entering Cyprus to work as cabaret artistes were regulated by decisions or instructions of the Minister of Interior, immigration officers and the general directors of the Ministry.

115. In line with a procedure introduced in 1987, applications for entry, temporary residence and work permits had to be submitted by the prospective

employer (the cabaret manager) and the artistic agent, accompanied by an employment contract recording the exact terms agreed between the parties and photocopies of relevant pages of the artiste's passport. Artistic agents were also required to deposit a bank letter guarantee in the sum of 10,000 Cypriot pounds (CYP) (approximately EUR 17,000) to cover possible repatriation expenses. Cabaret managers were required to deposit a bank warranty in the sum of CYP 2,500 (approximately EUR 4,200) to cover a repatriation for which the manager was responsible.

116. If all the conditions were fulfilled, an entry and temporary resident permit valid for five days was granted. Upon arrival, the artiste was required to undergo various medical tests for AIDS and other infectious or contagious diseases. Upon submission of satisfactory results, a temporary residence and work permit valid for three months was granted. The permit could be renewed for a further three months. The number of artistes who could be employed in a single cabaret was limited.

117. In an effort to prevent artistes from being forced to leave the cabaret with clients, artistes were required to be present on the cabaret premises between 9 p.m. and 3 a.m., even if their own performance lasted for only one hour. Absence due to illness had to be certified by a doctor's letter. Cabaret managers were required to advise the Immigration Office if an artiste failed to show up for work or otherwise breached her contract. Failure to do so would result in the artiste being expelled, with her repatriation expenses covered by the bank guarantee deposited by the cabaret manager. If an artistic agent had been convicted of offences linked to prostitution, he would not be granted entry permits for artistes.

b. Other relevant developments

118. In 1986, following reports of prostitution of artistes, the Police Director proposed establishing an *ad hoc* committee responsible for assessing whether artistes seeking to enter Cyprus held the necessary qualifications for the grant of an artiste visa. However, the measure was never implemented. A committee with a more limited remit was set up but, over time, was gradually weakened.

119. Under the procedure introduced in 1987, an application for an entry permit had to be accompanied by evidence of artistic competency. However, this measure was indefinitely suspended in December 1987 on the instructions of the then General Director of the Ministry of the Interior.

120. In 1990, following concerns about the fact that artistic agents also owned or managed cabarets or owned the accommodation in which their artistes resided, the Civil Registry and Immigration Department notified all artistic agents that from 30 June 1990 cabaret owners were not permitted to work also as artistic agents. They were requested to advise the authorities which of the two professions they intended to exercise. Further, the level of the bank guarantees was increased, from CYP 10,000 to CYP 15,000 in respect of artistic agents and from CYP 2,500 to CYP 10,000 in respect of cabaret managers. However, these

measures were never implemented following objections from artistic agents and cabaret managers. The only change which was made was an increase in the level of the bank guarantee by cabaret managers from CYP 2,500 to CYP 3,750 (approximately EUR 6,400).

3. Law on inquests

121. The holding of inquests in Cyprus is governed by the Coroners Law of 1959, Cap. 153. Under section 3, every district judge and magistrate may hold inquests within the local limits of his jurisdiction. Section 3(3) provides that any inquest commenced by a coroner may be continued, resumed, or reopened in the manner provided by the Law.

122. Section 14 sets out the procedure at the inquest and provides as follows (all quotes to Cypriot legislation are translated):

> "At every inquest–
>
> (a) the coroner shall take on oath such evidence as is procurable as to the identity of the deceased, and the time, place and manner of his death;
>
> (b) every interested party may appear either by advocate or in person and examine, cross-examine or re-examine, as the case may be, any witness."

123. Section 16 governs the extent of the coroner's powers and provides that:

> "(1) A coroner holding an inquest shall have and may exercise all the powers of a district judge or magistrate with regard to summoning and compelling the attendance of witnesses and requiring them to give evidence, and with regard to the production of any document or thing at such inquest."

124. Under section 24, where the coroner is of the opinion that sufficient grounds are disclosed for making a charge against any person in connection with the death, he may issue a summons or warrant to secure the attendance of such person before any court having jurisdiction.

125. Section 25 provides that following the hearing of evidence, the coroner shall give his verdict and certify it in writing, showing, so far as such particulars have been proved to him, who the deceased was, and how, when and where the deceased came by his death. Under section 26, if at the close of the inquest the coroner is of the opinion that there are grounds for suspecting that some person is guilty of an offence in respect of the matter inquired into, but cannot ascertain who such person is, he shall certify his opinion to that effect and transmit a copy of the proceedings to the police officer in charge of the district in which the inquest is held.

126. Section 30 allows the President of the District Court, upon the application of the Attorney-General, to order the holding, re-opening or quashing of an inquest or verdict. It provides that:

> "(1) Where the President, District Court, upon application made by or under the authority of the Attorney-General, is satisfied that it is necessary or desirable to do so, he may–
>
> (a) order an inquest to be held touching the death of any person;

(b) direct any inquest to be reopened for the taking of further evidence, or for the inclusion in the proceedings thereof and consideration with the evidence already taken, of any evidence taken in any judicial proceedings which may be relevant to any issue determinable at such inquest, and the recording of a fresh verdict upon the proceedings as a whole;

(c) quash the verdict in any inquest substituting therefor some other verdict which appears to be lawful and in accordance with the evidence recorded or included as hereinbefore in this section provided; or

(d) quash any inquest, with or without ordering a new inquest to be held."

4. Trafficking in human beings

127. Legislation on human trafficking was introduced in Cyprus under Law No. 3(1) of 2000 on the Combating of Trafficking in Persons and Sexual Exploitation of Children. Section 3(1) prohibits:

"a. The sexual exploitation of adult persons for profit if:

i. it is done by the use of force, violence or threats; or

ii. there is fraud; or

iii. it is done through abuse of power or other kind of pressure to such an extent so that the particular person would have no substantial and reasonable choice but to succumb to pressure or ill-treatment;

b. the trafficking of adult persons for profit and for sexual exploitation purposes in the circumstances referred to in subsection (a) above;

c. the sexual exploitation or the ill-treatment of minors;

d. the trafficking of minors for the purpose of their sexual exploitation or ill-treatment."

128. Section 6 provides that the consent of the victim is not a defence to the offence of trafficking.

129. Under section 5(1), persons found guilty of trafficking adults for the purposes of sexual exploitation may be imprisoned for up to ten years or fined CYP 10,000, or both. In the case of a child, the potential prison sentence is increased to fifteen years and the fine to CYP 15,000. Section 3(2) provides for a greater penalty in certain cases:

"For the purposes of this section, blood relationship or relationship by affinity up to the third degree with the victim and any other relation of the victim with the person, who by reason of his position exercises influence and authority over the victim and includes relations with guardian, educators, hostel administration, rehabilitation home, prisons or other similar institutions and other persons holding similar position or capacity that constitutes abuse of power or other kind of coercion:

a. a person acting contrary to the provisions of section 1(a) and (b) commits an offence and upon conviction is liable to imprisonment for fifteen years;

b. a person acting contrary to the provisions of section 1(c) and (d) commits an offence and upon conviction is liable to imprisonment for twenty years."

130. Section 7 imposes a duty on the State to protect victims of trafficking by providing them with support, including accommodation, medical care and psychiatric support.

131. Under sections 10 and 11, the Council of Ministers may appoint a "guardian of victims" to advise, counsel, and guide victims of exploitation; to hear and investigate complaints of exploitation; to provide victims with treatment and safe residence; to take the necessary steps to prosecute offenders; to take measures aimed at rehabilitating, re-employing or repatriating victims; and to identify any deficiencies in the law to combat trafficking. Although a custodian was appointed, at the time of the Cypriot Ombudsman's 2003 Report (see paragraphs 80 to 90 above), the role remained theoretical and no programme to ensure protection of victims had been prepared.

B. Russia

1. Jurisdiction under the Russian Criminal Code

132. Articles 11 and 12 of the Criminal Code of the Russian Federation set out the territorial application of Russian criminal law. Article 11 establishes Russian jurisdiction over crimes committed in the territory of the Russian Federation. Article 12(3) provides for limited jurisdiction in respect of non-Russian nationals who commit crimes outside Russian territory where the crimes run counter to the interests of the Russian Federation and in cases provided for by international agreement.

2. General offences under the Criminal Code

133. Article 105 of the Russian Criminal Code provides that murder shall be punishable with a prison term.

134. Article 125 of the Russian Criminal Code provides that deliberate abandonment and failure to provide assistance to a person in danger is punishable by a fine, community service, corrective labour or a prison term.

135. Articles 126 and 127 make abduction and illegal deprivation of liberty punishable by prison terms.

3. Trafficking in human beings

136. In December 2003, an amendment was made to the Russian Criminal Code by the insertion of a new Article 127.1 in the following terms:

> "1. Human beings' trafficking, that is, a human being's purchase and sale or his recruiting, transportation, transfer, harbouring or receiving for the purpose of his exploitation ... shall be punishable by deprivation of liberty for a term of up to five years.
>
> 2. The same deed committed:
>
> a) in respect of two or more persons;
>
> ...
>
> d) moving the victim across the State Border of the Russian Federation or illegally keeping him abroad;
>
> ...
>
> f) with application of force or with the threat of applying it;

...

shall be punishable by deprivation of liberty for a term from three to 10 years.

3. The deeds provided for by Parts One and Two of this Article:

a) which have entailed the victim's death by negligence, the infliction of major damage to the victim's health or other grave consequences;

b) committed in a way posing danger to the life or health of many people;

c) committed by an organized group–

shall be punishable by deprivation of liberty for a term from eight to 15 years."

IV. RELEVANT INTERNATIONAL TREATIES AND OTHER MATERIALS

A. Slavery

1. Slavery Convention 1926

137. The Slavery Convention, signed in Geneva in 1926, entered into force on 7 July 1955. Russia acceded to the Slavery Convention on 8 August 1956 and Cyprus on 21 April 1986. In the recitals, the Contracting Parties stated as follows:

> "Desiring to ... find a means of giving practical effect throughout the world to such intentions as were expressed in regard to slave trade and slavery by the signatories of the Convention of Saint-Germain-en-Laye, and recognising that it is necessary to conclude to that end more detailed arrangements than are contained in that Convention,
>
> Considering, moreover, that it is necessary to prevent forced labour from developing into conditions analogous to slavery ..."

138. Article 1 defines slavery as:

> "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised".

139. Under Article 2, the parties undertake to prevent and suppress the slave trade and to bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms.

140. Article 5 deals with forced or compulsory labour and provides, inter alia, that:

> "The High Contracting Parties recognise that recourse to compulsory or forced labour may have grave consequences and undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage, to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery."

141. Article 6 requires States whose laws do not make adequate provision for the punishment of infractions of laws enacted with a view to giving effect to the purposes of the Slavery Convention to adopt the necessary measures in order that severe penalties can be imposed in respect of such infractions.

2. Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia

142. In the first case to deal with the definition of enslavement as a crime against humanity for sexual exploitation, Prosecutor v. Kunarac, Vukovic and *Kovac*, 12 June 2002, the International Criminal Tribunal for the Former Yugoslavia observed that:

> "117. ...the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as 'chattel slavery' has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership. In the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with 'chattel slavery', but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of 'chattel slavery' but the difference is one of degree ..."

143. It concluded that:

> "119. ... the question whether a particular phenomenon is a form of enslavement will depend on the operation of the factors or indicia of enslavement [including] the 'control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour'. Consequently, it is not possible exhaustively to enumerate all of the contemporary forms of slavery which are comprehended in the expansion of the original idea ..."

3. The Rome Statute

144. The Statute of the International Criminal Court ("the Rome Statute"), which entered into force on 1 July 2002, provides that "enslavement" under Article 7(1)(c) of the Rome Statute:

> "means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children."

145. Cyprus signed the Rome Statute on 15 October 1998 and ratified it on 7 March 2002. Russia signed the Statute on 13 September 2000. It has not ratified the Statute.

B. Trafficking

1. Early trafficking agreements

146. The first international instrument to address trafficking of persons, the International Agreement for the Suppression of White Slave Traffic, was adopted in 1904. It was followed in 1910 by the International Convention for the Suppression of White Slave Traffic. Subsequently, in 1921, the League of Nations adopted a Convention for the Suppression of Trafficking in Women and Children, affirmed in the later International Convention for the Suppression of Traf-

fic in Women of Full Age of 1933. The 1949 Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others brought the former instruments under the auspices of the United Nations.

2. The Convention on the Elimination of All Forms of Discrimination Against Women

147. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted in 1979 by the UN General Assembly. Russia ratified CEDAW on 23 January 1981 and Cyprus acceded to it on 23 July 1985.

148. Article 6 CEDAW provides that:

> "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."

3. The Palermo Protocol

149. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children ("the Palermo Protocol"), supplementing the United Nations Convention against Transnational Organised Crime 2000 was signed by Cyprus on 12 December 2000 and by Russia on 16 December 2000. It was ratified by them on 26 May 2004 and 6 August 2003 respectively. Its preamble notes:

> "Declaring that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights."

150. Article 3(a) defines "trafficking in persons" as:

> "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."

151. Article 3(b) provides that the consent of a victim of trafficking to the intended exploitation is irrelevant where any of the means set out in Article 3(a) have been used.

152. Article 5 obliges States to:

> "adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally."

153. Assistance and protection for victims of trafficking is dealt with in Article 6, which provides, in so far as relevant:

"2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:

(a) Information on relevant court and administrative proceedings;

(b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.

3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons ...

...

5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.

..."

154. Article 9, on the prevention of trafficking in persons, provides that:

"1. States Parties shall establish comprehensive policies, programmes and other measures:

(a) To prevent and combat trafficking in persons; and

(b) To protect victims of trafficking in persons, especially women and children, from revictimization.

2. States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.

3. Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

4. States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.

5. States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking."

155. Article 10 emphasises the need for effective exchange of information between relevant authorities and training of law enforcement and immigration officials. It provides, in so far as relevant:

"1. Law enforcement, immigration or other relevant authorities of States Parties shall, as appropriate, cooperate with one another by exchanging information, in accordance with their domestic law, to enable them to determine:

...

(c) The means and methods used by organized criminal groups for the purpose of trafficking in persons, including the recruitment and transportation of victims, routes and links between and among individuals and groups engaged in such trafficking, and possible measures for detecting them.

2. States Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons.

> The training should focus on methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers. The training should also take into account the need to consider human rights and child– and gender-sensitive issues and it should encourage cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.
>
> ..."

4. European Union action to combat trafficking

156. The Council of the European Union has adopted a Framework Decision on combating trafficking in human beings (Framework Decision 2002/JHA/629 of 19 July 2002). It provides for measures aimed at ensuring approximation of the criminal law of the Member States as regards the definition of offences, penalties, jurisdiction and prosecution, protection and assistance to victims.

157. In 2005, the Council adopted an action plan on best practices, standards and procedures for combating and preventing trafficking in human beings (OJ C 311/1 of 9.12.2005). The action plan proposes steps to be taken by Member States, by the Commission and by other EU bodies involving coordination of EU action, scoping the problem, preventing trafficking, reducing demand, investigating and prosecuting trafficking, protecting and supporting victims of trafficking, returns and reintegration and external relations.

5. Council of Europe general action on trafficking

158. In recent years, the Committee of Ministers of the Council of Europe has adopted three legal texts addressing trafficking in human beings for sexual exploitation: Recommendation No. R (2000) 11 of the Committee of Ministers to member states on action against trafficking in human beings for the purpose of sexual exploitation; Recommendation Rec (2001) 16 of the Committee of Ministers to member states on the protection of children against sexual exploitation; and Recommendation Rec (2002) 5 of the Committee of Ministers to member states on the protection of women against violence. These texts propose, inter alia, a pan-European strategy encompassing definitions, general measures, a methodological and action framework, prevention, victim assistance and protection, criminal measures, judicial cooperation and arrangements for international cooperation and coordination.

159. The Parliamentary Assembly of the Council of Europe has also adopted a number of texts in this area, including: Recommendation 1325 (1997) on traffic in women and forced prostitution in Council of Europe member States; Recommendation 1450 (2000) on violence against women in Europe; Recommendation 1523 (2001) on domestic slavery; Recommendation 1526 (2001) on the campaign against trafficking in minors to put a stop to the east European route: the example of Moldova; Recommendation 1545 (2002) on the campaign against trafficking in women; Recommendation 1610 (2003) on migration connected with trafficking in women and prostitution; and Recommendation 1663 (2004) on domestic slavery: servitude, au pairs and "mail-order brides".

6. The Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005

160. The Council of Europe Convention on Action against Trafficking in Human Beings ("the Anti-Trafficking Convention") was signed by Cyprus on 16 May 2005 and ratified on 24 October 2007. It entered into force in respect of Cyprus on 1 February 2008. Russia has yet to sign the Convention. A total of 41 member States of the Council of Europe have signed the Anti-Trafficking Convention and 26 have also ratified it.

161. The explanatory report accompanying the Anti-Trafficking Convention emphasises that trafficking in human beings is a major problem in Europe today which threatens the human rights and fundamental values of democratic societies. The report continues as follows:

> "Trafficking in human beings, with the entrapment of its victims, is the modern form of the old worldwide slave trade. It treats human beings as a commodity to be bought and sold, and to be put to forced labour, usually in the sex industry but also, for example, in the agricultural sector, declared or undeclared sweatshops, for a pittance or nothing at all. Most identified victims of trafficking are women but men also are sometimes victims of trafficking in human beings. Furthermore, many of the victims are young, sometimes children. All are desperate to make a meagre living, only to have their lives ruined by exploitation and rapacity.
>
> To be effective, a strategy for combating trafficking in human beings must adopt a multi-disciplinary approach incorporating prevention, protection of human rights of victims and prosecution of traffickers, while at the same time seeking to harmonise relevant national laws and ensure that these laws are applied uniformly and effectively."

162. In its preamble, the Anti-Trafficking Convention asserts, *inter alia*, that:

> "Considering that trafficking in human beings constitutes a violation of human rights and an offence to the dignity and the integrity of the human being;
>
> Considering that trafficking in human beings may result in slavery for victims;
>
> Considering that respect for victims' rights, protection of victims and action to combat trafficking in human beings must be the paramount objectives;
>
> ..."

163. Article 1 provides that the purposes of the Anti-Trafficking Convention are to prevent and combat trafficking in human beings, to protect the human rights of the victims of trafficking, to design a comprehensive framework for the protection and assistance of victims and witnesses and to ensure effective investigation and prosecution of trafficking.

164. Article 4(a) adopts the Palermo Protocol definition of trafficking and Article 4(b) replicates the provision in the Palermo Protocol on the irrelevance of the consent of a victim of trafficking to the exploitation (see paragraphs 150 to 151 above).

165. Article 5 requires States to take measures to prevent trafficking and provides, inter alia, as follows:

"1. Each Party shall take measures to establish or strengthen national coordination between the various bodies responsible for preventing and combating trafficking in human beings.

2. Each Party shall establish and/or strengthen effective policies and programmes to prevent trafficking in human beings, by such means as: research, information, awareness raising and education campaigns, social and economic initiatives and training programmes, in particular for persons vulnerable to trafficking and for professionals concerned with trafficking in human beings.

..."

166. Article 6 requires States to take measures to discourage the demand that fosters trafficking and provides, in so far as relevant, as follows:

"To discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking, each Party shall adopt or strengthen legislative, administrative, educational, social, cultural or other measures including:

a. research on best practices, methods and strategies;

b. raising awareness of the responsibility and important role of media and civil society in identifying the demand as one of the root causes of trafficking in human beings;

c. target information campaigns involving, as appropriate, inter alia, public authorities and policy makers;

..."

167. Article 10 sets out measures regarding training and cooperation and provides that:

"1. Each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims, including children, and shall ensure that the different authorities collaborate with each other as well as with relevant support organisations, so that victims can be identified in a procedure duly taking into account the special situation of women and child victims ...

2. Each Party shall adopt such legislative or other measures as may be necessary to identify victims as appropriate in collaboration with other Parties and relevant support organisations. Each Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence provided for in Article 18 of this Convention has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 and 2.

..."

168. Article 12 provides that:

1. Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery....

2. Each Party shall take due account of the victim's safety and protection needs.

..."

169. Articles 18 to 21 require States to criminalise specified types of conduct:

> "18. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct contained in article 4 of this Convention, when committed intentionally.
>
> 19. Each Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences under its internal law, the use of services which are the object of exploitation as referred to in Article 4 paragraph a of this Convention, with the knowledge that the person is a victim of trafficking in human beings.
>
> 20. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the following conducts, when committed intentionally and for the purpose of enabling the trafficking in human beings:
>
> a. forging a travel or identity document;
>
> b. procuring or providing such a document;
>
> c. retaining, removing, concealing, damaging or destroying a travel or identity document of another person.
>
> 21(1). Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences when committed intentionally, aiding or abetting the commission of any of the offences established in accordance with Articles 18 and 20 of the present Convention.
>
> (2). Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences when committed intentionally, an attempt to commit the offences established in accordance with Articles 18 and 20, paragraph a, of this Convention."

170. Article 23 requires States to adopt such legislative and other measures as may be necessary to ensure that the criminal offences established in accordance with Articles 18 to 21 are punishable by effective, proportionate and dissuasive sanctions. For criminal offences established in accordance with Article 18, such sanctions are to include penalties involving deprivation of liberty which can give rise to extradition.

171. Article 27 provides that States must ensure that investigations into and prosecution of offences under the Anti-Trafficking Convention are not dependent on a report or accusation made by a victim, at least when the offence was committed in whole or in part on its territory. States must further ensure that victims of an offence in the territory of a State other than their State of residence may make a complaint before the competent authorities of their State of residence. The latter State must transmit the complaint without delay to the competent authority of the State in the territory in which the offence was committed, where the complaint must be dealt with in accordance with the internal law of the State in which the offence was committed.

172. Article 31(1) deals with jurisdiction, and requires States to adopt such legislative and other measures as may be necessary to establish jurisdiction over any offence established in accordance with the Anti-Trafficking Convention when the offence is committed:

"a. in its territory; or

...

d. by one of its nationals or by a stateless person who has his or her habitual residence in its territory, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State;

e. against one of its nationals."

173. States may reserve the right not to apply, or to apply only in specific cases or conditions, the jurisdiction rules in Article 31(1)(d) and (e).

174. Article 32 requires States to co-operate with each other, in accordance with the provisions of the Convention, and through application of relevant applicable international and regional instruments, to the widest extent possible, for the purpose of:

"– preventing and combating trafficking in human beings;

– protecting and providing assistance to victims;

– investigations or proceedings concerning criminal offences established in accordance with this Convention."

C. Mutual legal assistance

1. European Convention on Mutual Assistance in Criminal Matters, CETS No. 30, 20 May 1959 ("Mutual Assistance Convention")

175. The Mutual Assistance Convention was signed by Cyprus on 27 March 1996. It was ratified on 24 February 2000 and entered into force on 24 May 2000. The Russian Federation signed the Convention on 7 November 1996 and ratified it on 10 December 1999. It entered into force in respect of Russia on 9 March 2000.

176. Article 1 establishes an obligation on contracting parties to:

"afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party".

177. Article 3 provides that:

"1. The requested Party shall execute in the manner provided for by its law any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting Party for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents.

2. If the requesting Party desires witnesses or experts to give evidence on oath, it shall expressly so request, and the requested Party shall comply with the request if the law of its country does not prohibit it."

178. Article 26 allows States to enter into bilateral agreements on mutual legal assistance to supplement the provisions of the Mutual Assistance Convention.

2. Treaty between the USSR and the Republic of Cyprus on Legal Assistance in civil, family and criminal law matters of 19 January 1984 ("Legal Assistance Treaty")

179. Article 2 of the Legal Assistance Treaty (ratified by Russia following the dissolution of the USSR) establishes a general obligation for both parties to provide each other with legal assistance in civil and criminal matters in accordance with the provisions of the Treaty.

180. Article 3 sets out the extent of the legal assistance required under the Treaty and provides as follows:

> "Legal assistance in civil and criminal matters shall include service and sending of documents, supply of information on the law in force and the judicial practice and performance of specific procedural acts provided by the law of the requested Contracting Party and in particular the taking of evidence from litigants, accused persons, defendants, witnesses and experts as well as recognition and enforcement of judgments in civil matters, institution of criminal prosecutions and extradition of offenders."

181. The procedure for making a request is detailed in Article 5(1), which provides, in so far as relevant, that:

> "A request for legal assistance shall be in writing and shall contain the following:-
>
> (1) The designation of the requesting authority.
>
> (2) The designation of the requested authority.
>
> (3) The specification of the case in relation to which legal assistance is requested and the content of the request.
>
> (4) Names and surnames of the persons to whom the request relates, their citizenship, occupation and permanent or temporary residence.
>
> ...
>
> (6) If necessary, the facts to be elucidated as well as the list of the required documents and any other evidence.
>
> (7) In criminal matters, in addition to the above, particulars of the offence and its legal definition.

182. Article 6 sets out the procedure for executing a request:

> "1. The requested authority shall provide legal assistance in the manner provided by the procedural laws and rules of its own State. However, it may execute the request in a manner specified therein if not in conflict with the law of its own State.
>
> 2. If the requested authority is not competent to execute the request for legal assistance it shall forward the request to the competent authority and shall advise the requesting authority accordingly.
>
> 3. The requested authority shall, upon request, in due time notify the requesting authority of the place and time of the execution of the request.
>
> 4. The requested authority shall notify the requesting authority in writing of the execution of the request. If the request cannot be executed the requested authority shall forthwith notify in writing the requesting authority giving the reasons for failure to execute it and shall return the documents."

183. Under Article 18 Contracting Parties are obliged to ensure that citizens of one State are exempted in the territory of the other State from payment of fees and costs and are afforded facilities and free legal assistance under the same conditions and to the same extent as citizens of the other State. Article 20 provides that a person requesting free legal assistance may submit a relevant application to the competent authority of the State in the territory of which he has his permanent or temporary residence. This authority will then transmit the application to the other State.

184. Chapter VI of the Treaty contains special provisions on criminal matters concerning, in particular, the institution of criminal proceedings. Article 35(1) provides that:

> "Each Contracting Party shall institute, at the request of the other Contracting Party, in accordance with and subject to the provisions of its own law, criminal proceedings against its own citizens who are alleged to have committed an offence in the territory of the other Contracting Party.

185. Article 36 sets out the procedure for the making of a request to institute criminal proceedings:

> "1. A request for institution of criminal proceedings shall be made in writing and contain the following:-
>
> (1) The designation of the requesting authority.
>
> (2) The description of the acts constituting the offence in connection with which the institution of criminal proceedings is requested.
>
> (3) The time and place of the committed act as precisely as possible.
>
> (4) The text of the law of the requesting Contracting Party under which the act is defined as an offence.
>
> (5) The name and surname of the suspected person, particulars regarding his citizenship, permanent or temporary residence and other information concerning him as well as, if possible, the description of the person's appearance, his photograph and fingerprints.
>
> (6) Complaints, if any, by the victim of the criminal offence including any claim for damages.
>
> (7) Available information on the extent of the material damage resulting from the offence."

V. THE CYPRIOT GOVERNMENT'S UNILATERAL DECLARATION

186. By letter of 10 April 2009 the Attorney-General of the Republic of Cyprus advised the Court as follows:

> "Please note that the Government wishes to make a unilateral declaration with a view to resolving the issues raised by the application. By the Unilateral Declaration the Government requests the Court to strike out the application in accordance with Article 37 of the Convention. "

187. The relevant parts of the appended a unilateral declaration read as follows:

"... (a) The Government regrets the decision taken by the police officers on 28 March 2001 not to release the applicant's daughter but to hand her over to [M.A.], from whom she sought to escape. The Government acknowledges that the above decision violated its positive obligation towards the applicant and his daughter arising from Article 2 of the Convention to take preventive measures to protect the applicant's daughter from the criminal acts of another individual.

(b) The Government acknowledges that the police investigation in the present case was ineffective as to whether the applicant's daughter was subjected to inhuman or degrading treatment prior to her death. As such the Government acknowledges that it violated the procedural obligation of Article 3 of the Convention in respect of the failure to carry out an adequate and effective investigation as to whether the applicant's daughter was subjected to inhuman or degrading treatment prior to her death.

(c) The Government acknowledges that it violated its positive obligations towards the applicant and his daughter arising out of Article 4 of the Convention in that it did not take any measures to ascertain whether the applicant's daughter had been a victim of trafficking in human beings and/or been subjected to sexual or any other kind of exploitation.

(d) The Government acknowledges that the treatment of applicant's daughter at the police station on 28 March 2001 in deciding not to release her but to hand her over to [M.A.] although there was not any basis for her deprivation of liberty, was not consistent with Article 5(1) of the Convention.

(e) The Government acknowledges that it violated the applicant's right to an effective access to court in failing to establish any real and effective communication between its organs (i.e. the Ministry of Justice and Public Order and the police) and the applicant, regarding the inquest proceedings and any other possible legal remedies that the applicant could resort to.

3. In regard to the above issues, the Government recalls that the Council of Ministers has followed the advice of the Attorney General – Government Agent, and has thus appointed on 5 February 2009 three independent criminal investigators whose mandate is to investigate:

(a) The circumstances of death of applicant's daughter and into any criminal responsibility by any person, authority of the Republic, or member of the police concerning her death,

(b) the circumstances concerning her employment and stay in Cyprus in conjunction with the possibility of her subjection to inhuman or degrading treatment or punishment and/or trafficking and/or sexual or other exploitation, (by members of the police, authorities of the Republic or third persons) contrary to relevant laws of the Republic applicable at the material time, and

(c) into the commission of any other unlawful act against her, (by members of the police, authorities of the Republic or third persons) contrary to relevant laws of the Republic applicable at the material time.

4. The Government recalls that the investigators are independent from the police (the first investigator is the President of the Independent Authority for the Investigation of Allegations and Complaints Against the Police, the second is a Member of the said Authority, and the third is a practicing advocate with experi-

ence in criminal law). The Government recalls that the investigators have already commenced their investigation.

5. In these circumstances and having regard to the particular facts of the case the Government is prepared to pay the applicant a global amount of 37,300 (thirty seven thousand and three hundred) EUR (covering pecuniary and non pecuniary damage and costs and expenses). In its view, this amount would constitute adequate redress and sufficient compensation for the impugned violations, and thus an acceptable sum as to quantum in the present case. If, the Court however considers that the above amount does not constitute adequate redress and sufficient compensation, the Government is ready to pay the applicant by way of just satisfaction such other amount of compensation as is suggested by the Court ..."

THE LAW

I. APPLICATION OF ARTICLE 37 § 1 OF THE CONVENTION

188. Article 37 § 1 of the Convention allows the Court to strike an application out of its list of cases and provides, in so far as relevant, as follows:

"1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that

...

(b) the matter has been resolved; or

(c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.

..."

A. Submissions to the Court

1. The Cypriot Government

189. The Cypriot Government submitted that where efforts with a view to securing a friendly settlement of the case had been unsuccessful, the Court could strike an application out of the list on the basis of a unilateral declaration on the ground that there existed "'any other reason", as referred to in Article 37 § 1 (c) of the Convention, justifying a decision by the Court to discontinue the examination of the application. On the basis of the contents of the unilateral declaration and the ongoing domestic investigation into the circumstances of Ms Rantseva's death (see paragraph 187 above), the Cypriot Government considered that the requirements of Article 37 § 1 (c) were fully met.

2. The applicant

190. The applicant requested the Court to reject the request of the Cypriot Government to strike the application out of the list of cases on the basis of the unilateral declaration. He argued that the proposals contained in the declaration

did not guarantee that the responsible persons would be punished; that the declaration did not contain any general measures to prevent similar violations from taking place in the future, even though trafficking for sexual exploitation was a recognised problem in Cyprus; and that if the Court declined to deliver a judgment in the present case, the Committee of Ministers would be unable to supervise the terms proposed by the Cypriot Government.

3. Third party submissions by the AIRE Centre

191. The AIRE Centre submitted that the extent of human trafficking in Council of Europe member States and the present inadequate response of States to the problem meant that respect for human rights as defined in the Convention required continued examination of cases that raised trafficking issues where they might otherwise be struck out of the list in accordance with Article 37 § 1.

192. In its submissions, the AIRE Centre referred to the factors taken into consideration by the Court when taking a decision under Article 37 § 1 as to whether a case merits continued examination, highlighting that one such factor was "whether the issues raised are comparable to issues already determined by the Court in previous cases". The AIRE Centre highlighted the uncertainty surrounding the extent of member States' obligations to protect victims of trafficking, in particular as regards protection measures not directly related to the investigation and prosecution of criminal acts of trafficking and exploitation.

B. The Court's assessment

1. General principles

193. The Court observes at the outset that the unilateral declaration relates to the Republic of Cyprus only. No unilateral declaration has been submitted by the Russian Federation. Accordingly, the Court will consider whether it is justified to strike out the application in respect of complaints directed towards the Cypriot authorities only.

194. The Court recalls that it may be appropriate in certain circumstances to strike out an application, or part thereof, under Article 37 § 1 on the basis of a unilateral declaration by the respondent Government even where the applicant wishes the examination of the case to be continued. Whether this is appropriate in a particular case depends on whether the unilateral declaration offers a sufficient basis for finding that respect for human rights as defined in the Convention does not require the Court to continue its examination of the case (Article 37 § 1 *in fine*; see also, *inter alia*, *Tahsin Acar v. Turkey* (preliminary objection) [GC], no. 26307/95, § 75, ECHR 2003-VI; and *Radoszewska-Zakościelna v. Poland*, no. 858/08, § 50, 20 October 2009).

195. Relevant factors in this respect include the nature of the complaints made, whether the issues raised are comparable to issues already determined by the Court in previous cases, the nature and scope of any measures taken by the respondent Government in the context of the execution of judgments delivered by the Court in any such previous cases, and the impact of these measures on

the case at issue. It may also be material whether the facts are in dispute between the parties, and, if so, to what extent, and what prima facie evidentiary value is to be attributed to the parties' submissions on the facts. Other relevant factors may include whether in their unilateral declaration the respondent Government have made any admissions in relation to the alleged violations of the Convention and, if so, the scope of such admissions and the manner in which the Government intend to provide redress to the applicant. As to the last-mentioned point, in cases in which it is possible to eliminate the effects of an alleged violation and the respondent Government declare their readiness to do so, the intended redress is more likely to be regarded as appropriate for the purposes of striking out the application, the Court, as always, retaining its power to restore the application to its list as provided in Article 37 § 2 of the Convention and Rule 44 § 5 of the Rules of Court (see Tahsin Acar, cited above, § 76).

196. The foregoing factors are not intended to constitute an exhaustive list of relevant factors. Depending on the particular facts of each case, it is conceivable that further considerations may come into play in the assessment of a unilateral declaration for the purposes of Article 37 § 1 of the Convention (see Tahsin Acar, cited above, § 77).

197. Finally, the Court reiterates that its judgments serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (see Ireland v. the United Kingdom, 18 January 1978, § 154, Series A no. 25; Guzzardi v. Italy, 6 November 1980, § 86, Series A no. 39; and Karner v. Austria, no. 40016/98, § 26, ECHR 2003-IX). Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States (see Karner, cited above, § 26; and Capital Bank *AD v. Bulgaria*, no. 49429/99, §§ 78 to 79, ECHR 2005-XII (extracts)).

2. Application of the general principles to the present case

198. In considering whether it would be appropriate to strike out the present application in so far as it concerns complaints directed against the Republic of Cyprus on the basis of the Cypriot unilateral declaration, the Court makes the following observations.

199. First, the Court emphasises the serious nature of the allegations of trafficking in human beings made in the present case, which raise issues under Articles 2, 3, 4 and 5 of the Convention. In this regard, it is noted that awareness of the problem of trafficking of human beings and the need to take action to combat it has grown in recent years, as demonstrated by the adoption of measures at international level as well as the introduction of relevant domestic legislation in a number of States (see also paragraphs 264 and 269 below). The reports

of the Council of Europe's Commissioner for Human Rights and the report of the Cypriot Ombudsman highlight the acute nature of the problem in Cyprus, where it is widely acknowledged that trafficking and sexual exploitation of cabaret artistes is of particular concern (see paragraphs 83, 89, 91, 94, 100 to 101 and 103 above).

200. Second, the Court draws attention to the paucity of case-law on the interpretation and application of Article 4 of the Convention in the context of trafficking cases. It is particularly significant that the Court has yet to rule on whether, and if so to what extent, Article 4 requires member States to take positive steps to protect potential victims of trafficking outside the framework of criminal investigations and prosecutions.

201. The Cypriot Government have admitted that violations of the Convention occurred in the period leading up to and following Ms Rantseva's death. They have taken additional recent steps to investigate the circumstances of Ms Rantseva's death and have proposed a sum in respect of just satisfaction. However, in light of the Court's duty to elucidate, safeguard and develop the rules instituted by the Convention, this is insufficient to allow the Court to conclude that it is no longer justified to continue the examination of the application. In view of the observations outlined above, there is a need for continued examination of cases which raise trafficking issues.

202. In conclusion, the Court finds that respect for human rights as defined in the Convention requires the continuation of the examination of the case. Accordingly, it rejects the Cypriot Government's request to strike the application out under Article 37 § 1 of the Convention.

II. THE ADMISSIBILITY OF THE COMPLAINTS UNDER ARTICLES 2, 3, 4 AND 5 OF THE CONVENTION

A. The Russian Government's objection ratione loci

1. The parties' submissions

203. The Russian Government argued that the events forming the basis of the application having taken place outside its territory, the application was inadmissible ratione loci in so far as it was directed against the Russian Federation. They submitted that they had no "actual authority" over the territory of the Republic of Cyprus and that the actions of the Russian Federation were limited by the sovereignty of the Republic of Cyprus.

204. The applicant rejected this submission. He argued that in accordance with the Court's judgment in Drozd and Janousek v. France and Spain, 26 June 1992, Series A no. 240, the Russian Federation could be held responsible where acts and omissions of its authorities produced effects outside its own territory.

2. The Court's assessment

205. Article 1 of the Convention provides that:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

206. As the Court has previously emphasised, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. Accordingly, a State's competence to exercise jurisdiction over its own nationals abroad is subordinate to the other State's territorial competence and a State may not generally exercise jurisdiction on the territory of another State without the latter's consent, invitation or acquiescence. Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction (see Banković and Others v. Belgium and 16 Other Contracting States (dec.) [GC], no. 52207/99, §§ 59-61, ECHR 2001-XII).

207. The applicant's complaints against Russia in the present case concern the latter's alleged failure to take the necessary measures to protect Ms Rantseva from the risk of trafficking and exploitation and to conduct an investigation into the circumstances of her arrival in Cyprus, her employment there and her subsequent death. The Court observes that such complaints are not predicated on the assertion that Russia was responsible for acts committed in Cyprus or by the Cypriot authorities. In light of the fact that the alleged trafficking commenced in Russia and in view of the obligations undertaken by Russia to combat trafficking, it is not outside the Court's competence to examine whether Russia complied with any obligation it may have had to take measures within the limits of its own jurisdiction and powers to protect Ms Rantseva from trafficking and to investigate the possibility that she had been trafficked. Similarly, the applicant's Article 2 complaint against the Russian authorities concerns their failure to take investigative measures, including securing evidence from witnesses resident in Russia. It is for the Court to assess in its examination of the merits of the applicant's Article 2 complaint the extent of any procedural obligation incumbent on the Russian authorities and whether any such obligation was discharged in the circumstances of the present case.

208. In conclusion, the Court is competent to examine the extent to which Russia could have taken steps within the limits of its own territorial sovereignty to protect the applicant's daughter from trafficking, to investigate allegations of trafficking and to investigate the circumstances leading to her death. Whether the matters complained of give rise to State responsibility in the circumstances of the present case is a question which falls to be determined by the Court in its examination of the merits of the application below.

B. The Russian Government's objection *ratione materiae*

1. The parties' submissions

209. The Russian Government argued that the complaint under Article 4 of the Convention was inadmissible *ratione materiae* as there was no slavery, servitude or forced or compulsory labour in the present case. They pointed to the fact that Ms Rantseva had entered the Republic of Cyprus voluntarily, having voluntarily obtained a work permit to allow her to work in accordance with an employment contract which she had concluded. There was no evidence that Ms Rantseva had been in servitude and unable to change her condition or that she was forced to work. The Russian Government further highlighted that Ms

Rantseva had left, unimpeded, the apartment where she was residing with the other cabaret artistes. They therefore contended that there were insufficient grounds to assert that the cabaret artistes were being kept in the apartment against their will. The Russian Government added that the fact that Ms Rantseva left the police station with M.A. was insufficient to support the conclusion that Ms Rantseva was in servitude and forced to work. Had she feared for her life or safety, she could have informed the police officers while she was at the police station.

210. The applicant insisted that the treatment to which Ms Rantseva had been subjected fell within the scope of Article 4.

2. The Court's assessment

211. The Court finds that the question whether the treatment about which the applicant complains falls within the scope of Article 4 is inextricably linked to the merits of this complaint. Accordingly, the Court holds that the objection *ratione materiae* should be joined to the merits.

C. Conclusion

212. The complaints under Articles 2, 3, 4 and 5 cannot be rejected as incompatible *ratione loci* or *ratione materiae* with the provisions of the Convention concerning Russia. The Court notes, in addition, that they are not manifestly ill-founded within the meaning of Article 35 § 3. It further notes they are not inadmissible on any other grounds. They must therefore be declared admissible.

III. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

213. The applicant contended that there had been a violation of Article 2 of the Convention by both the Russian and Cypriot authorities on account of the failure of the Cypriot authorities to take steps to protect the life of his daughter and the failure of the authorities of both States to conduct an effective investigation into her death. Article 2 provides, *inter alia*, that:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
> ...."

A. Alleged failure to take measures to protect against a risk to life

1. Submissions of the parties

a. The applicant

214. Relying on Osman v. the United Kingdom, 28 October 1998, Reports 1998-VIII, the applicant referred to the positive obligations arising under Article 2 which required States to take preventative operational measures to protect an individual whose life was at risk from the criminal acts of another private individual where the State knew or ought to have known of a real and immediate

threat to life. The applicant argued that in failing to release Ms Rantseva and handing her over instead to M.A., the Cypriot authorities had failed to take reasonable measures within their powers to avoid a real and immediate threat to Ms Rantseva's life.

b. The Cypriot Government

215. The Cypriot Government did not dispute that Article 2 § 1 imposed a positive obligation on the relevant authorities to take preventative operational measures to protect an individual whose life was at risk from the criminal acts of another individual. However, for such an obligation to arise, it had to be established that the authorities knew, or ought to have known, of a real and immediate risk to the life of an identified individual and that they had failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (citing Osman, above).

216. In their written submissions, the Cypriot Government argued that there was no failure to protect the life of the applicant's daughter. On the information available to the police officers who had contact with Ms Rantseva on 28 March 2001, there was no reason to suspect a real or immediate risk to Ms Rantseva's life. The testimony of the police officers revealed that Ms Rantseva was calmly applying her make-up and that the behaviour of M.A. towards her appeared normal (see paragraphs 20 and 49 above). Although Ms Rantseva had left her employment at the cabaret, she had not submitted any complaint regarding her employer or the conditions of her work. She did not make a complaint to the police officers while at the station and she did not refuse to leave with M.A.. The decision not to release Ms Rantseva but to hand her over to M.A. did not violate any obligation incumbent on the Cypriot authorities to protect her life.

217. In their subsequent unilateral declaration, the Cypriot Government acknowledged that the decision of the police officers to hand Ms Rantseva over to M.A. was in violation of the positive obligation incumbent on Cyprus under Article 2 to take preventative measures to protect Ms Rantseva from the criminal acts of another individual (see paragraph 187 above).

2. The Court's assessment

a. General principles

218. It is clear that Article 2 enjoins the State not only to refrain from the intentional and unlawful taking of life but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see L.C.B. v. the United Kingdom, 9 June 1998, § 36, Reports 1998-III; and Paul and Audrey Edwards, cited above, § 54). In the first place, this obligation requires the State to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. However, it also implies, in appropriate circumstances, a positive obligation on the authorities to take preventive operational measures to protect an individual

whose life is at risk from the criminal acts of another individual (see Osman, cited above, § 115; Medova v. Russia, no. 25385/04, § 95, 15 January 2009; Opuz v. Turkey, no. 33401/02, § 128, 9 June 2009).

219. The Court reiterates that the scope of any positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources. Not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For the Court to find a violation of the positive obligation to protect life, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (Osman, cited above, § 116; Paul *and Audrey Edwards*, cited above, § 55; and *Medova*, cited above, § 96).

b. Application of the general principles to the present case

220. The Court must examine whether the Cypriot authorities could have foreseen that in releasing Ms Rantseva into the custody of M.A., her life would be at real and immediate risk.

221. The Court observes that in Opuz, the responsibility of the State was engaged because the person who subsequently went on to shoot and kill the applicant's mother had previously made death threats and committed acts of violence against the applicant and her mother, of which the authorities were aware (Opuz, cited above, §§ 133 to 136). Conversely, in Osman, the Court found that there was no violation of Article 2 as the applicant had failed to point to any stage in the sequence of events leading to the shooting of her husband where it could be said that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk (Osman, cited above, § 121).

222. Although it is undisputed that victims of trafficking and exploitation are often forced to live and work in cruel conditions and may suffer violence and ill-treatment at the hands of their employers (see paragraphs 85, 87 to 88 and 101 above), in the absence of any specific indications in a particular case, the general risk of ill-treatment and violence cannot constitute a real and immediate risk to life. In the present case, even if the police ought to have been aware that Ms Rantseva might have been a victim of trafficking (a matter to be examined in the context of the applicant's Article 4 complaint, below), there were no indications during the time spent at the police station that Ms Rantseva's life was at real and immediate risk. The Court considers that particular chain of events leading to Ms Rantseva's death could not have been foreseeable to the police officers when they released her into M.A.'s custody. Accordingly, the Court concludes that no obligation to take operational measures to prevent a risk to life arose in the present case.

223. For the above reasons, the Court concludes that there has been no violation of the Cypriot authorities' positive obligation to protect Ms Rantseva's right to life under Article 2 of the Convention.

B. The procedural obligation to carry out an effective investigation

1. Submissions of the parties

a. The applicant

224. The applicant claimed that Cyprus and Russia had violated their obligations under Article 2 of the Convention to conduct an effective investigation into the circumstances of Ms Rantseva's death. He pointed to alleged contradictions between the autopsies of the Cypriot and Russian authorities (see paragraph 50 above) and his requests to Cyprus, via the relevant Russian authorities, for further investigation of apparent anomalies, requests which were not followed up by the Cypriot authorities (see paragraphs 52 and 62 above). He also complained about the limited number of witness statements taken by the police (see paragraphs 31 and 33 above), highlighting that five of the seven relevant statements were either from the police officers on duty at Limassol Police Station or those present in the apartment at the time of his daughter's death, persons who, in his view, had an interest in presenting a particular version of events. The applicant further argued that any investigation should not depend on an official complaint or claim from the victim's relatives. He contended that his daughter clearly died in strange circumstances requiring elaboration and that an Article 2-compliant investigation was accordingly required. The Cypriot investigation did not comply with Article 2 due to the inadequacies outlined above, as well as the fact that it was not accessible to him, as a relative of the victim.

225. Specifically, as regards the inquest, the applicant complained that he was not advised of the date of the final inquest hearing, which prevented his participation in it. He was not informed of the progress of the case or of other remedies available to him. He alleged that he only received the District Court's conclusion in the inquest proceedings on 16 April 2003, some 15 months after the proceedings had ended. Furthermore, the Cypriot authorities failed to provide him with free legal assistance, when the cost of legal representation in Cyprus was prohibitive for him.

226. As regards the Russian Federation, the applicant argued that the fact that his daughter was a citizen of the Russian Federation meant that even though she was temporarily resident in Cyprus and her death occurred there, the Russian Federation also had an obligation under Article 2 to investigate the circumstances of her arrival in Cyprus, her employment there and her subsequent death. He submitted that the Russian authorities should have applied to the Cypriot authorities under the Legal Assistance Treaty to initiate criminal proceedings in accordance with Articles 5 and 36 (see paragraphs 181 and 207 above), as he had requested. Instead, the Russian authorities merely sought information concerning the circumstances of Ms Rantseva's death. The applicant's subsequent application to the relevant authorities in Russia to initiate criminal

proceedings was refused by the Chelyabinsk Prosecutor's Office as Ms Rantseva died outside Russia. His repeated requests that Russian authorities take statements from two Russian nationals resident in Russia were refused as the Russian authorities considered that they were unable to take the action requested without a legal assistance request from the Cypriot authorities. The applicant concluded that these failures meant that the Russian authorities had not conducted an effective investigation into the death of his daughter, as required by Article 2 of the Convention.

b. The Cypriot Government

227. In their written submissions, the Cypriot Government conceded that an obligation to conduct an effective investigation arose under Article 2 where State agents were involved in events leading to an individual's death, but contended that not every tragic death required that special steps by way of inquiry should be taken. In the present case, the Cypriot authorities did not have an obligation to conduct an investigation into the circumstances of Ms Rantseva's death but nonetheless did so. Although the exact circumstances leading to Ms Rantseva's death remained unclear, the Cypriot Government contested the allegation that there were failures in the investigation. The investigation was carried out by the police and was capable of leading to the identification and punishment of those responsible. Reasonable steps were taken to secure relevant evidence and an inquest was held.

228. As far as the inquest was concerned, the Cypriot Government submitted that the applicant was advised by the Cypriot authorities of the date of the inquest hearing. Moreover, the inquest was adjourned twice because the applicant was not present. The Cypriot Government pointed to the delay of the Russian authorities in advising the Cypriot authorities of the applicant's request for adjournment: the request only arrived four months after the inquest had been concluded. Had the court been aware of the applicant's request, it might have adjourned the hearing again. All other requests by the applicant had been addressed and relevant Cypriot authorities had sought to assist the applicant where possible. In respect of the applicant's complaint regarding legal aid, the Cypriot Government pointed out that the applicant did not apply through the correct procedures. He should have applied under the Law on Legal Aid; the Legal Assistance Treaty, invoked by the applicant, did not provide for legal aid but for free legal assistance, which was quite different.

229. In their unilateral declaration (see paragraph 187 above), the Cypriot Government confirmed that three independent criminal investigators had recently been appointed to investigate the circumstances of Ms Rantseva's death and the extent of any criminal responsibility of any person or authority for her death.

c. The Russian Government

230. The Russian Government accepted that at the relevant time, Russian criminal law did not provide for the possibility of bringing criminal procee-

dings in Russia against non-Russian nationals in respect of a crime committed outside Russian territory against a Russian national, although the law had since been changed. In any event, the applicant did not request the Russian authorities to institute criminal proceedings themselves but merely requested assistance in establishing the circumstances leading to his daughter's death in Cyprus. Accordingly, no preliminary investigation into Ms Rantseva's death was conducted in Russia and no evidence was obtained. Although the applicant requested on a number of occasions that the Russian authorities take evidence from two young Russian women who had worked with Ms Rantseva, as he was advised, the Russian authorities were unable to take the action requested in the absence of a legal assistance request from the Cypriot authorities. The Russian authorities informed the Cypriot authorities that they were ready to execute any such request but no request was forthcoming.

231. The Russian Government contended that the Russian authorities took all possible measures to establish the circumstances of Ms Rantseva's death, to render assistance to the Cypriot authorities in their investigations and to protect and reinstate the applicant's rights. Accordingly, they argued, Russia had fulfilled any procedural obligations incumbent on it under Article 2 of the Convention.

2. The Court's assessment

a. General principles

232. As the Court has consistently held, the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see *McCann and Others v. the United Kingdom*, 27 September 1995, § 161, Series A no. 324; *Kaya v. Turkey*, 19 February 1998, § 86, *Reports* 1998-I; *Medova v. Russia*, cited above, § 103). The obligation to conduct an effective official investigation also arises where death occurs in suspicious circumstances not imputable to State agents (see *Menson v. the United Kingdom* (dec.), no. 47916/99, ECHR 2003-V). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. The authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (see, for example, *İlhan v. Turkey* [GC], no. 22277/93, § 63, ECHR 2000-VII; *Paul and Audrey Edwards*, cited above, § 69).

233. For an investigation to be effective, the persons responsible for carrying it out must be independent from those implicated in the events. This requires not only hierarchical or institutional independence but also practical independence (see *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 120, ECHR

2001-III (extracts); and *Kelly and Others v. the United Kingdom*, no. 30054/96, § 114, 4 May 2001). The investigation must be capable of leading to the identification and punishment of those responsible (see *Paul and Audrey Edwards*, cited above, § 71). A requirement of promptness and reasonable expedition is implicit in the context of an effective investigation within the meaning of Article 2 of the Convention (see *Yaşa v. Turkey*, 2 September 1998, §§ 102-104, *Reports* 1998-VI; *Çakıcı v. Turkey* [GC], no. 23657/94, §§ 80-87 and 106, ECHR 1999-IV; and *Kelly and Others*, cited above, § 97). In all cases, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his legitimate interests (see, for example, *Güleç v. Turkey*, 27 July 1998, § 82, *Reports of Judgments and Decisions* 1998-IV; and *Kelly and Others*, cited above, § 98).

b. Application of the general principles to the present case

i. Cyprus

234. The Court acknowledges at the outset that there is no evidence that Ms Rantseva died as a direct result of the use of force. However, as noted above (see paragraph 232 above), this does not preclude the existence of an obligation to investigate her death under Article 2 (see also *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, §§ 48 to 50, ECHR 2002-I; and *Öneryıldız v. Turkey* [GC], no. 48939/99, §§ 70 to 74, ECHR 2004-XII). In light of the ambiguous and unexplained circumstances surrounding Ms Rantseva's death and the allegations of trafficking, ill-treatment and unlawful detention in the period leading up to her death, the Court considers that a procedural obligation did arise in respect of the Cypriot authorities to investigate the circumstances of Ms Rantseva's death. By necessity, the investigation was required to consider not only the immediate context of Ms Rantseva's fall from the balcony but also the broader context of Ms Rantseva's arrival and stay in Cyprus, in order to assess whether there was a link between the allegations of trafficking and Ms Rantseva's subsequent death.

235. As to the adequacy of the investigation, the Court notes that the police arrived quickly and sealed off the scene within minutes. Photographs were taken and a forensic examination was carried out (see paragraph 32 above). That same morning, the police took statements from those present in the apartment when Ms Rantseva died and from the neighbour who had witnessed the fall. The police officers on duty at Limassol Police Station also made statements (see paragraph 33 above). An autopsy was carried out and an inquest was held (see paragraphs 35 to 41 above). However, there are a number of elements of the investigation which were unsatisfactory.

236. First, there was conflicting testimony from those present in the apartment which the Cypriot investigating authorities appear to have taken no steps to resolve (see paragraphs 22 to 24 and 26 to 28 above). Similarly, inconsistencies emerge from the evidence taken as to Ms Rantseva's physical condition, and in particular as to the extent of the effects of alcohol on her conduct (see paragraphs 18, 20 to 21 and 24 above). There are other apparent anomalies, such as the alleged inconsistencies between the forensic reports of the Cypriot and

Russian authorities and the fact that Ms Rantseva made no noise as she fell from the balcony, for which no satisfactory explanation has been provided (see paragraphs 29, 50 to 52 and 67 above).

237. Second, the verdict at the inquest recorded that Ms Rantseva had died in "strange circumstances" in an attempt to escape from the apartment in which she was a "guest" (see paragraph 41 above). Despite the lack of clarity surrounding the circumstances of her death, no effort was made by the Cypriot police to question those who lived with Ms Rantseva or worked with her in the cabaret. Further, notwithstanding the striking conclusion of the inquest that Ms Rantseva was trying to escape from the apartment, no attempt was made to establish why she was trying to escape or to clarify whether she had been detained in the apartment against her will.

238. Third, aside from the initial statements of the two police officers and passport officer on duty made on 28 and 29 March 2001, there was apparently no investigation into what had occurred at the police station, and in particular why the police had handed Ms Rantseva into the custody of M.A.. It is clear from the witness statements that the AIS considered M.A. to be responsible for Ms Rantseva but the reasons for, and the appropriateness of, this conclusion have never been fully investigated. Further, the statements of the police officers do not refer to any statement being taken from Ms Rantseva and there is nothing in the investigation file to explain why this was not done; a statement was made by M.A. (see paragraph 19 above). The Court recalls that the Council of Europe Commissioner reported in 2008 that he was assured that allegations of trafficking-related corruption within the police force were isolated cases (see paragraph 102 above). However, in light of the facts of the present case, the Court considers that the authorities were under an obligation to investigate whether there was any indication of corruption within the police force in respect of the events leading to Ms Rantseva's death.

239. Fourth, despite his clear request to the Cypriot authorities, the applicant was not personally advised of the date of the inquest and as a consequence was not present when the verdict was handed down. The Cypriot Government do not dispute the applicant's claim that he was only advised of the inquest finding 15 months after the hearing had taken place. Accordingly, the Cypriot authorities failed to ensure that the applicant was able to participate effectively in the proceedings, despite his strenuous efforts to remain involved.

240. Fifth, the applicant's continued requests for investigation, via the Russian authorities, appear to have gone unheeded by the Cypriot authorities. In particular, his requests for information as to further remedies open to him within the Cypriot legal order, as well as requests for free legal assistance from the Cypriot authorities, were ignored. The Cypriot Government's response in their written observations before the Court that the request for legal assistance had been made under the wrong instrument is unsatisfactory. Given the applicant's repeated requests and the gravity of the case in question, the Cypriot Government ought, at the very least, to have advised the applicant of the appropriate procedure for making a request for free legal assistance.

241. Finally, for an investigation into a death to be effective, member States must take such steps as are necessary and available in order to secure relevant evidence, whether or not it is located in the territory of the investigating State. The Court observes that both Cyprus and Russia are parties to the Mutual Assistance Convention and have, in addition, concluded the bilateral Legal Assistance Treaty (see paragraphs 175 to 185 above). These instruments set out a clear procedure by which the Cypriot authorities could have sought assistance from Russia in investigating the circumstances of Ms Rantseva's stay in Cyprus and her subsequent death. The Prosecutor General of the Russian Federation provided an unsolicited undertaking that Russia would assist in any request for legal assistance by Cyprus aimed at the collection of further evidence (see paragraph 70 above). However, there is no evidence that the Cypriot authorities sought any legal assistance from Russia in the context of their investigation. In the circumstances, the Court finds the Cypriot authorities' refusal to make a legal assistance request to obtain the testimony of the two Russian women who worked with Ms Rantseva at the cabaret particularly unfortunate given the value of such testimony in helping to clarify matters which were central to the investigation. Although Ms Rantseva died in 2001, the applicant is still waiting for a satisfactory explanation of the circumstances leading to her death.

242. The Court accordingly finds that there has been a procedural violation of Article 2 of the Convention as regards the failure of the Cypriot authorities to conduct an effective investigation into Ms Rantseva's death.

ii. Russia

243. The Court recalls that Ms Rantseva's death took place in Cyprus. Accordingly, unless it can be shown that there are special features in the present case which require a departure from the general approach, the obligation to ensure an effective official investigation applies to Cyprus alone (see, *mutatis mutandis*, *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 38, ECHR 2001-XI).

244. As to the existence of special features, the applicant relies on the fact that Ms Rantseva was a Russian national. However, the Court does not consider that Article 2 requires member States' criminal laws to provide for universal jurisdiction in cases involving the death of one of their nationals. There are no other special features which would support the imposition of a duty on Russia to conduct its own investigation. Accordingly, the Court concludes that there was no free-standing obligation incumbent on the Russian authorities under Article 2 of the Convention to investigate Ms Rantseva's death.

245. However, the corollary of the obligation on an investigating State to secure evidence located in other jurisdictions is a duty on the State where evidence is located to render any assistance within its competence and means sought under a legal assistance request. In the present case, as noted above, the Prosecutor General of the Russian Federation, referring to the evidence of the two Russian women, expressed willingness to comply with any mutual legal assistance request forwarded to the Russian authorities and to organise the taking of the witness testimony, but no such request was forthcoming (see paragraph

241 above). The applicant argued that the Russian authorities should have proceeded to interview the two women notwithstanding the absence of any request from the Cypriot authorities. However, the Court recalls that the responsibility for investigating Ms Rantseva's death lay with Cyprus. In the absence of a legal assistance request, the Russian authorities were not required under Article 2 to secure the evidence themselves.

246. As to the applicant's complaint that the Russian authorities failed to request the initiation of criminal proceedings, the Court observes that the Russian authorities made extensive use of the opportunities presented by mutual legal assistance agreements to press for action by the Cypriot authorities (see, for example, paragraphs 48, 52, 55, 57 and 61 to 62 above). In particular, by letter dated 11 December 2001, they requested that further investigation be conducted into Ms Rantseva's death, that relevant witnesses be interviewed and that the Cypriot authorities bring charges of murder, kidnapping or unlawful deprivation of freedom in respect of Ms Rantseva's death (see paragraph 52 above). By letter dated 27 December 2001, a specific request was made to institute criminal proceedings (see paragraph 53 above). The request was reiterated on several occasions.

247. In conclusion, the Court finds that there has been no procedural violation of Article 2 by the Russian Federation.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

248. The applicant alleged a violation of Article 3 of the Convention by the Cypriot authorities in respect of their failure to take steps to protect Ms Rantseva from ill-treatment and to investigate whether Ms Rantseva was subject to inhuman or degrading treatment in the period leading up to her death. Article 3 provides that:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. The parties' submissions

1. The applicant

249. The applicant argued that a positive obligation arose in the present case to protect Ms Rantseva from ill-treatment from private individuals. He contended that the two forensic reports conducted following Ms Rantseva's death revealed that the explanation of her death did not accord with the injuries recorded. He argued that the witness testimony gathered did not provide a satisfactory response to the question whether there were injuries present on Ms Rantseva's body prior to her death. Despite this, no investigation was conducted by the Cypriot authorities into whether Ms Rantseva had been subjected to inhuman or degrading treatment. Further, no steps were taken to avoid the risk of ill treatment to Ms Rantseva in circumstances where the authorities knew or ought to have known of a real and immediate risk. Accordingly, in the applicant's submission, there was a breach of Article 3 of the Convention.

2. The Cypriot Government

250. In their written submissions, the Cypriot Government denied that any violation of Article 3 had occurred. They pointed out that nothing in the investigation file suggested that Ms Rantseva had been subjected to inhuman or degrading treatment prior to her death. In any event, a thorough investigation, capable of leading to the identification and punishment of those responsible, was conducted into the circumstances of Ms Rantseva's death. The investigation therefore complied with Article 3.

251. In their subsequent unilateral declaration (see paragraph 187 above), the Cypriot Government acknowledged that there had been a breach of the procedural obligation arising under Article 3 of the Convention in so far as the police investigation into whether Ms Rantseva was subjected to inhuman or degrading treatment prior to her death was ineffective. They also confirmed that three independent investigators had been appointed to investigate the circumstances of Ms Rantseva's employment and stay in Cyprus and whether she had been subjected to inhuman or degrading treatment.

B. The Court's assessment

252. The Court notes that there is no evidence that Ms Rantseva was subjected to ill-treatment prior to her death. However, it is clear that the use of violence and the ill-treatment of victims are common features of trafficking (see paragraphs 85, 87 to 88 and 101 above). The Court therefore considers that, in the absence of any specific allegations of ill-treatment, any inhuman or degrading treatment suffered by Ms Rantseva prior to her death was inherently linked to the alleged trafficking and exploitation. Accordingly, the Court concludes that it is not necessary to consider separately the applicant's Article 3 complaint and will deal with the general issues raised in the context of its examination of the applicant's complaint under Article 4 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 4 OF THE CONVENTION

253. The applicant alleged a violation of Article 4 of the Convention by both the Russian and Cypriot authorities in light of their failure to protect his daughter from being trafficked and their failure to conduct an effective investigation into the circumstances of her arrival in Cyprus and the nature of her employment there. Article 4 provides, in so far as relevant, that:

> "1. No one shall be held in slavery or servitude.
>
> 2. No one shall be required to perform forced or compulsory labour.
>
> ..."

A. Submissions of the parties

1. The applicant

254. Referring to *Siliadin v. France*, no. 73316/01, ECHR 2005-VII, and the Anti-Trafficking Convention (see paragraphs 162 to 174, above), the applicant contended that the Cypriot authorities were under an obligation to adopt

laws to combat trafficking and to establish and strengthen policies and programmes to combat trafficking. He pointed to the reports of the Council of Europe's Commissioner on Human Rights (see paragraphs 91 to 104 above), which he said demonstrated that there had been a deterioration in the situation of young foreign women moving to Cyprus to work as cabaret artistes. He concluded that the obligations incumbent on Cyprus to combat trafficking had not been met. In particular, the applicant pointed out that the Cypriot authorities were unable to explain why they had handed Ms Rantseva over to her former employer at the police station instead of releasing her (see paragraph 82 above). He contended that in so doing, the Cypriot authorities had failed to take measures to protect his daughter from trafficking. They had also failed to conduct any investigation into whether his daughter had been a victim of trafficking or had been subjected to sexual or other exploitation. Although Ms Rantseva had entered Cyprus voluntarily to work in the cabaret, the Court had established that prior consent, without more, does not negate a finding of compulsory labour (referring to *Van der Mussele v. Belgium*, 23 November 1983, § 36, Series A no. 70).

255. In respect of Russia, the applicant pointed out that at the relevant time, the Russian Criminal Code did not contain provisions which expressly addressed trafficking in human beings. He argued that the Russian authorities were aware of the particular problem of young women being trafficked to Cyprus to work in the sex industry. Accordingly, the Russian Federation was under an obligation to adopt measures to prevent the trafficking and exploitation of Russian women but had failed to do so. In the present case, it was under a specific obligation to investigate the circumstances of Ms Rantseva's arrival in Cyprus and the nature of her employment there, but no such investigation had been carried out.

2. The Cypriot Government

256. In their written observations, the Cypriot Government confirmed that no measures were taken in the period prior to or following Ms Rantseva's death to ascertain whether she had been a victim of trafficking in human beings or whether she had been subjected to sexual or other forms of exploitation. However they denied that there had been a violation of Article 4 of the Convention. They conceded that there were positive obligations on the State which required the penalisation and effective prosecution of any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour. However, they argued by analogy with Articles 2 and 3 that positive obligations only arose where the authorities knew or ought to have known of a real and immediate risk that an identified individual was being held in such a situation. These positive obligations would only be violated where the authorities subsequently failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

257. In the present case, there was nothing in the investigation file, nor was there any other evidence, to indicate that Ms Rantseva was held in slavery or servitude or was required to perform forced or compulsory labour. The Cypriot Government further pointed to the fact that no complaint had been lodged with

the domestic authorities by the applicant that his daughter had been a victim of trafficking or exploitation and that none of the correspondence from the Russian authorities made any reference to such a complaint. Ms Rantseva herself had made no allegations of that nature prior to her death and the note she left in her apartment saying she was tired and was going back to Russia (see paragraph 17 above) was inadequate to support any such allegations. The Government claimed that the first time that any complaint of this nature was made to the authorities was on 13 April 2006, by a Russian Orthodox priest in Limassol. They argued that the Russian authorities had failed to cooperate with the Cypriot authorities and take witness statements from two Russian women who had worked with Ms Rantseva at the cabaret.

258. In their subsequent unilateral declaration (see paragraph 187 above), the Cypriot Government accepted that they had violated their positive obligations under Article 4 in failing to take any measures to ascertain whether Ms Rantseva had been a victim of trafficking in human beings or had been subjected to sexual or any other kind of exploitation. They also confirmed that three independent investigators had been appointed to investigate the circumstances of Ms Rantseva's employment and stay in Cyprus and whether there was any evidence that she was a victim of trafficking or exploitation.

3. The Russian Government

259. As noted above, the Russian Government contested that Ms Rantseva's treatment in the present case fell within the scope of Article 4 (see paragraph 209 above).

260. On the merits, the Russian Government agreed that the positive obligations arising under Article 4 required member States to ensure that residents were not being kept in slavery or servitude or being forced to work. Where such a case did occur, member States were required to put in place an effective framework for the protection and reinstatement of victims' rights and for the prosecution of guilty persons. However, in so far as the applicant's complaint was directed against Russia, his argument was that the Russian authorities ought to have put in place a system of preventative measures to protect citizens going abroad. The Russian Government pointed out that any such measures would have had to strike a balance between Article 4 and the right to free movement guaranteed by Article 2 of Protocol No. 4 of the Convention, which provides that "[e]veryone shall be free to leave any country, including his own". They also argued that the scope of any such measures was significantly restricted by the need to respect the sovereignty of the State to which the citizen wished to travel.

261. According to the Russian Government, there was a wealth of measures set out in Russian criminal law to prevent violations of Article 4, to protect victims and to prosecute perpetrators. Although at the relevant time Russian criminal law did not contain provisions on human trafficking and slave labour, such conduct would nonetheless have fallen within the definitions of other crimes such as threats to kill or cause grave harm to health, abduction, unlawful dep-

rivation of liberty and sexual crimes (see paragraphs 133 to 135). The Russian Government also pointed to various international treaties ratified by the Russian Federation, including the Slavery Convention 1926 (see paragraphs 137 to 141above) and the Palermo Protocol 2000 (see paragraphs 149 to 155 above), and highlighted that Russia had signed up to a number of mutual legal assistance agreements (see paragraphs 175 to 185 above). In the present case, they had taken active measures to press for the identification and punishment of guilty persons within the framework of mutual legal assistance treaties. They further explained that on 27 July 2006, the application of the Criminal Code was extended to allow the prosecution of non-nationals who had committed crimes against Russian nationals outside Russian territory. However, the exercise of this power depended on the consent of the State in whose territory the offence was committed.

262. As regards the departure of Ms Rantseva for Cyprus, the Russian authorities pointed out that they only became aware of a citizen leaving Russia at the point at which an individual crossed the border. Where entry requirements of the State of destination were complied with, and in the absence of any circumstances preventing the exit, the Russian authorities were not permitted to prohibit a person from exercising his right of free movement. Accordingly, the Russian authorities could only make recommendations and warn its citizens against possible dangers. They did provide warnings, via the media, as well as more detailed information regarding the risk factors.

263. The Russian Government also requested the Court to consider that there had been no previous findings of a violation of Article 4 against Cyprus. They submitted that they were entitled to take this into consideration in the development of their relations with Cyprus.

4. Third party submissions

a. Interights

264. Interights highlighted the growing awareness of human trafficking and the adoption of a number of international and regional instruments seeking to combat it. However, they considered national policies and measures in the field to be at times inadequate and ineffective. They argued that the paramount requirement for any legal system effectively to address human trafficking was recognition of the need for a multidisciplinary approach; cooperation among States; and a legal framework with an integrated human rights approach.

265. Interights emphasised that a distinctive element of human trafficking was the irrelevance of the victim's consent to the intended exploitation where any of the means of coercion listed in the Palermo Protocol had been used (see paragraph 151 above). Accordingly, a person who was aware that she was to work in the sex industry was not excluded by virtue of that awareness from being a victim of trafficking. Of further importance was the distinction between smuggling, which concerned primarily the protection of the State against illegal migration, and trafficking, which was a crime against individuals and did not necessarily involve a cross-border element.

266. Asserting that human trafficking was a form of modern-day slavery, Interights highlighted the conclusions of the International Criminal Tribunal for the Former Yugoslavia in the case of *Prosecutor v Kunarac et al* (see paragraphs 142 to 143 above) and argued that the necessary consequence of that judgment was that the definition of slavery did not require a right of ownership over a person to exist but merely that one or more of the powers attached to such a right be present. Thus the modern-day understanding of the term "slavery" could include situations where the victim was subject to violence and coercion thereby giving the perpetrator total control over the victim.

267. Interights addressed the positive obligations of member States under the Convention in the context of trafficking in human beings. In particular, there was, Interights contended, an obligation to enact appropriate legislation on trafficking in human beings, as set out in the Anti-Trafficking Convention (see paragraphs 160 to 174 above) and supported by the case-law of the Court. Such legislation was required to criminalise trafficking in human beings, establishing liability of legal as well as natural persons; to introduce review procedures in respect of the licensing and operation of businesses often used as a cover for human trafficking; and to establish appropriate penalties. Other positive obligations included obligations to discourage demand for human trafficking, to ensure an adequate law enforcement response to identify and eradicate any involvement of law enforcement officials in human trafficking offences and build victims' confidence in the police and judicial systems and to ensure that the identification of victims of trafficking took place efficiently and effectively by introducing relevant training. Research on best practices, methods and strategies, raising awareness in the media and civil society, information campaigns involving public authorities and policy makers, educational programmes and targeting sex tourism were also areas of possible State action identified by Interights.

268. Finally, Interights argued that there was an implied positive obligation on States to carry out an effective and diligent investigation into allegations of trafficking. Such investigation should comply with the conditions of investigations required under Article 2 of the Convention.

b. The AIRE Centre

269. The AIRE Centre highlighted the increasing number of people, the majority of whom were women and children, who fell victim to trafficking for the purposes of sexual or other exploitation each year. They pointed to the severe physical and psychological consequences for victims, which frequently rendered them too traumatised to present themselves as victims of trafficking to the relevant authorities. They referred in particular to the conclusions of a report by the U.S. State Department in 2008, *Trafficking in Persons Report*, which found that Cyprus had failed to provide evidence that it had increased its efforts to combat severe forms of trafficking in persons from the previous year (see paragraph 106 above).

270. More generally, the AIRE Centre highlighted their concern that the rights of victims of human trafficking were often subordinated to other goals in the fight against trafficking. International and regional instruments on human trafficking often lacked practical and effective rights for the protection of victims. Apart from requirements regarding the investigation and prosecution of trafficking offences, the provisions of the Palermo Protocol on protection of victims were, the AIRE Centre argued, "generally either hortatory or aspirational", obliging States to "consider" or "endeavour to" introduce certain measures.

271. Finally, the AIRE Centre noted that the jurisprudence of supervisory bodies for international instruments against trafficking had yet to address fully the extent and content of positive obligations owed by States in the circumstances arising in the present application. As regards the jurisprudence of this Court, the AIRE Centre noted that although the Court had already been called upon to consider the extent of the application of Article 4 in a trafficking case (*Siliadin*, cited above), that case had dealt exclusively with the failure of the State to put in place adequate criminal law provisions to prevent and punish the perpetrators. Referring to the case-law developed in the context of Articles 2, 3 and 8 of the Convention, the AIRE Centre argued that States had a positive obligation to provide protection where they knew or ought to have known that an individual was, or was at risk of being, a victim of human trafficking. The particular measures required would depend on the circumstances but States were not permitted to leave such an individual unprotected or to return her to a situation of trafficking and exploitation.

B. The Court's assessment

1. Application of Article 4 of the Convention

272. The first question which arises is whether the present case falls within the ambit of Article 4. The Court recalls that Article 4 makes no mention of trafficking, proscribing "slavery", "servitude" and "forced and compulsory labour".

273. The Court has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein (*Demir and Baykara v. Turkey* [GC], no. 34503/97, § 67, 12 November 2008). It has long stated that one of the main principles of the application of the Convention provisions is that it does not apply them in a vacuum (see *Loizidou v. Turkey*, 18 December 1996, *Reports of Judgments and Decisions* 1996-VI; and *Öcalan v. Turkey* [GC], no. 46221/99, § 163, ECHR 2005-IV). As an international treaty, the Convention must be interpreted in the light of the rules of interpretation set out in the Vienna Convention of 23 May 1969 on the Law of Treaties.

274. Under that Convention, the Court is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn (see *Golder v. the United Kingdom*, 21 February 1975, § 29, Series A no. 18; *Loizidou*, cited above, § 43; and Article 31 § 1 of the Vienna Convention). The Court must have

regard to the fact that the context of the provision is a treaty for the effective protection of individual human rights and that the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (*Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 48, ECHR 2005-X). Account must also be taken of any relevant rules and principles of international law applicable in relations between the Contracting Parties and the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part (see *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI; *Demir and Baykara*, cited above, § 67; *Saadi v. the United Kingdom* [GC], no. 13229/03, § 62, ECHR 2008-...; and Article 31 para. 3 (c) of the Vienna Convention).

275. Finally, the Court emphasises that the object and purpose of the Convention, as an instrument for the protection of individual human beings, requires that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, *inter alia*, *Soering v. the United Kingdom*, 7 July 1989, § 87, Series A no. 161; and *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37).

276. In *Siliadin*, considering the scope of "slavery" under Article 4, the Court referred to the classic definition of slavery contained in the 1926 Slavery Convention, which required the exercise of a genuine right of ownership and reduction of the status of the individual concerned to an "object" (*Siliadin*, cited above, § 122). With regard to the concept of "servitude", the Court has held that what is prohibited is a "particularly serious form of denial of freedom" (see *Van Droogenbroeck v. Belgium*, Commission's report of 9 July 1980, §§ 78-80, Series B no. 44). The concept of "servitude" entails an obligation, under coercion, to provide one's services, and is linked with the concept of "slavery" (see *Seguin v. France* (dec.), no. 42400/98, 7 March 2000; and *Siliadin*, cited above, § 124). For "forced or compulsory labour" to arise, the Court has held that there must be some physical or mental constraint, as well as some overriding of the person's will (*Van der Mussele v. Belgium*, 23 November 1983, § 34, Series A no. 70; *Siliadin*, cited above, § 117).

277. The absence of an express reference to trafficking in the Convention is unsurprising. The Convention was inspired by the Universal Declaration of Human Rights, proclaimed by the General Assembly of the United Nations in 1948, which itself made no express mention of trafficking. In its Article 4, the Declaration prohibited "slavery and the slave trade in all their forms". However, in assessing the scope of Article 4 of the Convention, sight should not be lost of the Convention's special features or of the fact that it is a living instrument which must be interpreted in the light of present-day conditions. The increasingly high standards required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably require greater firmness in assessing breaches of the fundamental values of democratic societies (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, § 101, ECHR 1999-V; *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 71, ECHR 2002-VI; and *Siliadin*, cited above, § 121).

278. The Court notes that trafficking in human beings as a global phenomenon has increased significantly in recent years (see paragraphs 89, 100, 103 and 269 above). In Europe, its growth has been facilitated in part by the collapse of former Communist blocs. The conclusion of the Palermo Protocol in 2000 and the Anti-Trafficking Convention in 2005 demonstrate the increasing recognition at international level of the prevalence of trafficking and the need for measures to combat it.

279. The Court is not regularly called upon to consider the application of Article 4 and, in particular, has had only one occasion to date to consider the extent to which treatment associated with trafficking fell within the scope of that Article (*Siliadin*, cited above). In that case, the Court concluded that the treatment suffered by the applicant amounted to servitude and forced and compulsory labour, although it fell short of slavery. In light of the proliferation of both trafficking itself and of measures taken to combat it, the Court considers it appropriate in the present case to examine the extent to which trafficking itself may be considered to run counter to the spirit and purpose of Article 4 of the Convention such as to fall within the scope of the guarantees offered by that Article without the need to assess which of the three types of proscribed conduct are engaged by the particular treatment in the case in question.

280. The Court observes that the International Criminal Tribunal for the Former Yugoslavia concluded that the traditional concept of "slavery" has evolved to encompass various contemporary forms of slavery based on the exercise of any or all of the powers attaching to the right of ownership (see paragraph 142 above). In assessing whether a situation amounts to a contemporary form of slavery, the Tribunal held that relevant factors included whether there was control of a person's movement or physical environment, whether there was an element of psychological control, whether measures were taken to prevent or deter escape and whether there was control of sexuality and forced labour (see paragraph 143 above).

281. The Court considers that trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere (see paragraphs 101 and 161 above). It implies close surveillance of the activities of victims, whose movements are often circumscribed (see paragraphs 85 and 101 above). It involves the use of violence and threats against victims, who live and work under poor conditions (see paragraphs 85, 87 to 88 and 101 above). It is described by Interights and in the explanatory report accompanying the Anti-Trafficking Convention as the modern form of the old worldwide slave trade (see paragraphs 161 and 266 above). The Cypriot Ombudsman referred to sexual exploitation and trafficking taking place "under a regime of modern slavery" (see paragraph 84 above).

282. There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible

with a democratic society and the values expounded in the Convention. In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes "slavery", "servitude" or "forced and compulsory labour". Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention. The Russian Government's objection of incompatibility *ratione materiae* is accordingly dismissed.

2. General principles of Article 4

283. The Court reiterates that, together with Articles 2 and 3, Article 4 enshrines one of the basic values of the democratic societies making up the Council of Europe (*Siliadin*, cited above, § 82). Unlike most of the substantive clauses of the Convention, Article 4 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation.

284. In assessing whether there has been a violation of Article 4, the relevant legal or regulatory framework in place must be taken into account (see, *mutatis mutandis*, *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 93, ECHR 2005-VII). The Court considers that the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking. Accordingly, in addition to criminal law measures to punish traffickers, Article 4 requires member States to put in place adequate measures regulating businesses often used as a cover for human trafficking. Furthermore, a State's immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking (see, *mutatis mutandis*, *Guerra and Others v. Italy*, 19 February 1998, §§ 58 to 60, *Reports of Judgments and Decisions* 1998-I; *Z and Others v. the United Kingdom* [GC], no. 29392/95, §§ 73 to 74, ECHR 2001-V; and *Nachova and Others*, cited above, §§ 96 to 97 and 99-102).

285. In its *Siliadin* judgment, the Court confirmed that Article 4 entailed a specific positive obligation on member States to penalise and prosecute effectively any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour (cited above, §§ 89 and 112). In order to comply with this obligation, member States are required to put in place a legislative and administrative framework to prohibit and punish trafficking. The Court observes that the Palermo Protocol and the Anti-Trafficking Convention refer to the need for a comprehensive approach to combat trafficking which includes measures to prevent trafficking and to protect victims, in addition to measures to punish traffickers (see paragraphs 149 and 163 above). It is clear from the provisions of these two instruments that the Contracting States, including almost all of the member States of the Council of Europe, have formed the view that only a combination of measures addressing all three aspects can be effective in the fight

against trafficking (see also the submissions of Interights and the AIRE Centre at paragraphs 267 and 271 above). Accordingly, the duty to penalise and prosecute trafficking is only one aspect of member States' general undertaking to combat trafficking. The extent of the positive obligations arising under Article 4 must be considered within this broader context.

286. As with Articles 2 and 3 of the Convention, Article 4 may, in certain circumstances, require a State to take operational measures to protect victims, or potential victims, of trafficking (see, *mutatis mutandis*, *Osman*, cited above, § 115; and *Mahmut Kaya v. Turkey*, no. 22535/93, § 115, ECHR 2000-III). In order for a positive obligation to take operational measures to arise in the circumstances of a particular case, it must be demonstrated that the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention. In the case of an answer in the affirmative, there will be a violation of Article 4 of the Convention where the authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk (see, *mutatis mutandis*, *Osman*, cited above, §§116 to 117; and *Mahmut Kaya*, cited above, §§ 115 to 116).

287. Bearing in mind the difficulties involved in policing modern societies and the operational choices which must be made in terms of priorities and resources, the obligation to take operational measures must, however, be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities (see, *mutatis mutandis*, *Osman*, cited above, § 116). It is relevant to the consideration of the proportionality of any positive obligation arising in the present case that the Palermo Protocol, signed by both Cyprus and the Russian Federation in 2000, requires States to endeavour to provide for the physical safety of victims of trafficking while in their territories and to establish comprehensive policies and programmes to prevent and combat trafficking (see paragraphs 153 to 154 above). States are also required to provide relevant training for law enforcement and immigration officials (see paragraph 155 above).

288. Like Articles 2 and 3, Article 4 also entails a procedural obligation to investigate situations of potential trafficking. The requirement to investigate does not depend on a complaint from the victim or next-of-kin: once the matter has come to the attention of the authorities they must act of their own motion (see, *mutatis mutandis*, *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 69, ECHR 2002-II). For an investigation to be effective, it must be independent from those implicated in the events. It must also be capable of leading to the identification and punishment of individuals responsible, an obligation not of result but of means. A requirement of promptness and reasonable expedition is implicit in all cases but where the possibility of removing the individual from the harmful situation is available, the investigation must be undertaken as a matter of urgency. The victim or the next-of-kin must be involved in

the procedure to the extent necessary to safeguard their legitimate interests (see, *mutatis mutandis*, *Paul and Audrey Edwards*, cited above, §§ 70 to 73).

289. Finally, the Court reiterates that trafficking is a problem which is often not confined to the domestic arena. When a person is trafficked from one State to another, trafficking offences may occur in the State of origin, any State of transit and the State of destination. Relevant evidence and witnesses may be located in all States. Although the Palermo Protocol is silent on the question of jurisdiction, the Anti-Trafficking Convention explicitly requires each member State to establish jurisdiction over any trafficking offence committed in its territory (see paragraph 172 above). Such an approach is, in the Court's view, only logical in light of the general obligation, outlined above, incumbent on all States under Article 4 of the Convention to investigate alleged trafficking offences. In addition to the obligation to conduct a domestic investigation into events occurring on their own territories, member States are also subject to a duty in cross-border trafficking cases to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories. Such a duty is in keeping with the objectives of the member States, as expressed in the preamble to the Palermo Protocol, to adopt a comprehensive international approach to trafficking in the countries of origin, transit and destination (see paragraph 149 above). It is also consistent with international agreements on mutual legal assistance in which the respondent States participate in the present case (see paragraphs 175 to 185 above).

3. Application of the general principles to the present case

Cyprus

i. Positive obligation to put in place an appropriate legislative and administrative framework

290. The Court observes that in Cyprus legislation prohibiting trafficking and sexual exploitation was adopted in 2000 (see paragraphs 127 to 131 above). The law reflects the provisions of the Palermo Protocol and prohibits trafficking and sexual exploitation, with consent providing no defence to the offence. Severe penalties are set out in the legislation. The law also provides for a duty to protect victims, *inter alia* through the appointment of a guardian of victims. Although the Ombudsman criticised the failure of the authorities to adopt practical implementing measures, she considered the law itself to be satisfactory (see paragraph 90 above). The Council of Europe Commissioner also found the legal framework established by Law 3(1) 2000 to be "suitable" (see paragraph 92 above). Notwithstanding the applicant's complaint as to the inadequacy of Cypriot trafficking legislation, the Court does not consider that the circumstances of the present case give rise to any concern in this regard.

291. However, as regards the general legal and administrative framework and the adequacy of Cypriot immigration policy, a number of weaknesses can be identified. The Council of Europe Commissioner for Human Rights noted in his

2003 report that the absence of an immigration policy and legislative shortcomings in this respect have encouraged the trafficking of women to Cyprus (see paragraph 91 above). He called for preventive control measures to be adopted to stem the flow of young women entering Cyprus to work as cabaret artistes (see paragraph 94 above). In subsequent reports, the Commissioner reiterated his concerns regarding the legislative framework, and in particular criticised the system whereby cabaret managers were required to make the application for an entry permit for the artiste as rendering the artiste dependent on her employer or agent and increasing her risk of falling into the hands of traffickers (see paragraph 100 above). In his 2008 report, the Commissioner criticised the artiste visa regime as making it very difficult for law enforcement authorities to take the necessary steps to combat trafficking, noting that the artiste permit could be perceived as contradicting the measures taken against trafficking or at least as rendering them ineffective (see also the report of the U.S. State Department at paragraphs 105 and 107 above). The Commissioner expressed regret that, despite concerns raised in previous reports and the Government's commitment to abolish it, the artiste work permit was still in place (see paragraph 103 above). Similarly, the Ombudsman, in her 2003 report, blamed the artiste visa regime for the entry of thousands of young foreign women into Cyprus, where they were exploited by their employers under cruel living and working conditions (see paragraph 89 above)292. Further, the Court emphasises that while an obligation on employers to notify the authorities when an artiste leaves her employment (see paragraph 117 above) is a legitimate measure to allow the authorities to monitor the compliance of immigrants with their immigration obligations, responsibility for ensuring compliance and for taking steps in cases of non-compliance must remain with the authorities themselves. Measures which encourage cabaret owners and managers to track down missing artistes or in some other way to take personal responsibility for the conduct of artistes are unacceptable in the broader context of trafficking concerns regarding artistes in Cyprus. Against this backdrop, the Court considers that the practice of requiring cabaret owners and managers to lodge a bank guarantee to cover potential future costs associated with artistes which they have employed (see paragraph 115 above) particularly troubling. The separate bond signed in Ms Rantseva's case is of equal concern (see paragraph 15 above), as is the unexplained conclusion of the AIS that M.A. was responsible for Ms Rantseva and was therefore required to come and collect her from the police station (see paragraph 20 above).

293. In the circumstances, the Court concludes that the regime of artiste visas in Cyprus did not afford to Ms Rantseva practical and effective protection against trafficking and exploitation. There has accordingly been a violation of Article 4 in this regard.

ii. Positive obligation to take protective measures

294. In assessing whether a positive obligation to take measures to protect Ms Rantseva arose in the present case, the Court considers the following to be significant. First, it is clear from the Ombudsman's 2003 report that here has

been a serious problem in Cyprus since the 1970s involving young foreign women being forced to work in the sex industry (see paragraph 83 above). The report further noted the significant increase in artistes coming from former Soviet countries following the collapse of the USSR (see paragraph 84 above). In her conclusions, the Ombudsman highlighted that trafficking was able to flourish in Cyprus due to the tolerance of the immigration authorities (see paragraph 89 above). In his 2006 report, the Council of Europe's Commissioner for Human Rights also noted that the authorities were aware that many of the women who entered Cyprus on artiste's visas would work in prostitution (see paragraph 96 above). There can therefore be no doubt that the Cypriot authorities were aware that a substantial number of foreign women, particularly from the ex-USSR, were being trafficked to Cyprus on artistes visas and, upon arrival, were being sexually exploited by cabaret owners and managers.

295. Second, the Court emphasises that Ms Rantseva was taken by her employer to Limassol police station. Upon arrival at the police station, M.A. told the police that Ms Rantseva was a Russian national and was employed as a cabaret artiste. Further, he explained that she had only recently arrived in Cyprus, had left her employment without warning and had also moved out of the accommodation provided to her (see paragraph 19 above). He handed to them her passport and other documents (see paragraph 21 above).

296. The Court recalls the obligations undertaken by the Cypriot authorities in the context of the Palermo Protocol and, subsequently, the Anti-Trafficking Convention to ensure adequate training to those working in relevant fields to enable them to identify potential trafficking victims (see paragraphs 155 and 167 above). In particular, under Article 10 of the Palermo Protocol, States undertake to provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. In the Court's opinion, there were sufficient indicators available to the police authorities, against the general backdrop of trafficking issues in Cyprus, for them to have been aware of circumstances giving rise to a credible suspicion that Ms Rantseva was, or was at real and immediate risk of being, a victim of trafficking or exploitation. Accordingly, a positive obligation arose to investigate without delay and to take any necessary operational measures to protect Ms Rantseva.

297. However, in the present case, it appears that the police did not even question Ms Rantseva when she arrived at the police station. No statement was taken from her. The police made no further inquiries into the background facts. They simply checked whether Ms Rantseva's name was on a list of persons wanted by the police and, on finding that it was not, called her employer and asked him to return and collect her. When he refused and insisted that she be detained, the police officer dealing with the case put M.A. in contact with his superior (see paragraph 20 above). The details of what was said during M.A.'s conversation with the officer's superior are unknown, but the result of the conversation was that M.A. agreed to come and collect Ms Rantseva and subsequently did so.

298. In the present case, the failures of the police authorities were multiple. First, they failed to make immediate further inquiries into whether Ms Rantseva had been trafficked. Second, they did not release her but decided to confide her to the custody of M.A.. Third, no attempt was made to comply with the provisions of Law 3(1) of 2000 and to take any of the measures in section 7 of that law (see paragraph 130 above) to protect her. The Court accordingly concludes that these deficiencies, in circumstances which gave rise to a credible suspicion that Ms Rantseva might have been trafficked or exploited, resulted in a failure by the Cypriot authorities to take measures to protect Ms Rantseva. There has accordingly been a violation of Article 4 in this respect also.

iii. Procedural obligation to investigate trafficking

299. A further question arises as to whether there has been a procedural breach as a result of the continuing failure of the Cypriot authorities to conduct any effective investigation into the applicant's allegations that his daughter was trafficked.

300. In light of the circumstances of Ms Rantseva's subsequent death, the Court considers that the requirement incumbent on the Cypriot authorities to conduct an effective investigation into the trafficking allegations is subsumed by the general obligation arising under Article 2 in the present case to conduct an effective investigation into Ms Rantseva's death (see paragraph 234 above). The question of the effectiveness of the investigation into her death has been considered above in the context of the Court's examination of the applicant's complaint under Article 2 and a violation has been found. There is therefore no need to examine separately the procedural complaint against Cyprus under Article 4.

b. Russia

i. Positive obligation to put in place an appropriate legislative and administrative framework

301. The Court recalls that the responsibility of Russia in the present case is limited to the acts which fell within its jurisdiction (see paragraphs 207 to 208 above). Although the criminal law did not specifically provide for the offence of trafficking at the material time, the Russian Government argued that the conduct about which the applicant complained fell within the definitions of other offences.

302. The Court observes that the applicant does not point to any particular failing in the Russian criminal law provisions. Further, as regards the wider administrative and legal framework, the Court emphasises the efforts of the Russian authorities to publicise the risks of trafficking through an information campaign conducted through the media (see paragraph 262 above).

303. On the basis of the evidence before it, the Court does not consider that the legal and administrative framework in place in Russia at the material time failed to ensure Ms Rantseva's practical and effective protection in the circumstances of the present case.

ii. Positive obligation to take protective measures

304. The Court recalls that any positive obligation incumbent on Russia to take operational measures can only arise in respect of acts which occurred on Russian territory (see, *mutatis mutandis*, *Al-Adsani,* cited above, §§ 38 to 39).

305. The Court notes that although the Russian authorities appear to have been aware of the general problem of young women being trafficked to work in the sex industry in foreign States, there is no evidence that they were aware of circumstances giving rise to a credible suspicion of a real and immediate risk to Ms Rantseva herself prior to her departure for Cyprus. It is insufficient, in order for an obligation to take urgent operational measures to arise, merely to show that there was a general risk in respect of young women travelling to Cyprus on artistes' visas. Insofar as this general risk was concerned, the Court recalls that the Russian authorities took steps to warn citizens of trafficking risks (see paragraph 262 above).

306. In conclusion, the Court does not consider that the circumstances of the case were such as to give rise to a positive obligation on the part of the Russian authorities to take operational measures to protect Ms Rantseva. There has accordingly been no violation of Article 4 by the Russian authorities in this regard.

iii. Procedural obligation to investigate potential trafficking

307. The Court recalls that, in cases involving cross-border trafficking, trafficking offences may take place in the country of origin as well as in the country of destination (see paragraph 289 above). In the case of Cyprus, as the Ombudsman pointed out in her report (see paragraph 86 above), the recruitment of victims is usually undertaken by artistic agents in Cyprus working with agents in other countries. The failure to investigate the recruitment aspect of alleged trafficking would allow an important part of the trafficking chain to act with impunity. In this regard, the Court highlights that the definition of trafficking adopted in both the Palermo Protocol and the Anti-Trafficking Convention expressly includes the recruitment of victims (see paragraphs 150 and 164 above). The need for a full and effective investigation covering all aspects of trafficking allegations from recruitment to exploitation is indisputable. The Russian authorities therefore had an obligation to investigate the possibility that individual agents or networks operating in Russia were involved in trafficking Ms Rantseva to Cyprus.

308. However, the Court observes that the Russian authorities undertook no investigation into how and where Ms Rantseva was recruited. In particular, the authorities took no steps to identify those involved in Ms Rantseva's recruitment or the methods of recruitment used. The recruitment having occurred on Russian territory, the Russian authorities were best placed to conduct an effective investigation into Ms Rantseva's recruitment. The failure to do so in the present case was all the more serious in light of Ms Rantseva's subsequent death and the resulting mystery surrounding the circumstances of her departure from Russia.

309. There has accordingly been a violation by the Russian authorities of their procedural obligation under Article 4 to investigate alleged trafficking.

VI. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

310. The applicant complained that there was a violation of Article 5 § 1 of the Convention by the Cypriot authorities in so far as his daughter was detained at the police station, released into the custody of M.A. and subsequently detained in the apartment of M.A.'s employee. Article 5 § 1 provides, *inter alia*, that:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

A. The parties' submissions

1. The applicant

311. The applicant submitted that his daughter's treatment at the police station and subsequent confinement to the apartment of M.A.'s employee violated Article 5 § 1 of the Convention. He emphasised the importance of Article 5 in protecting individuals from arbitrary detention and abuse of power. Ms Rantseva was legally on the territory of the Republic of Cyprus and was, the applicant contended, unreasonably and unlawfully detained by M.A., escorted to the police station, released into M.A.'s custody and detained in the apartment of M.A.'s employee. He further observed that no document had been produced by the Cypriot authorities setting out the grounds on which Ms Rantseva had been detained and subsequently handed over to M.A..

2. The Cypriot Government

312. In their written submissions, the Cypriot Government denied that there had been a violation of Article 5 in the present case. They argued that it was not clear from the established facts of the case whether the police had

exercised any power over Ms Rantseva. Nor was it clear what would have happened had Ms Rantseva refused to leave with M.A..

313. In their unilateral declaration (see paragraph 187 above), the Government accepted that Ms Rantseva's treatment at the police station and the decision not to release her but to hand her over to M.A., even though there was no legal basis for her deprivation of liberty, was not consistent with the requirements of Article 5.

B. The Court's assessment

1. The existence of a deprivation of liberty in the present case

314. The Court reiterates that in proclaiming the "right to liberty", Article 5 § 1 aims to ensure that no-one should be dispossessed of his physical liberty in an arbitrary fashion. The difference between restrictions on movement serious enough to fall within the ambit of a deprivation of liberty under Article 5 § 1 and mere restrictions of liberty which are subject only to Article 2 of Protocol No. 4 is one of degree or intensity, and not one of nature or substance (*Guzzardi v. Italy*, 6 November 1980, § 93, Series A no. 39). In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be her concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question (see *Engel and Others v. the Netherlands*, 8 June 1976, §§ 58-59, Series A no. 22; *Guzzardi*, cited above, § 92; and *Riera Blume and Others v. Spain*, no. 37680/97, § 28, ECHR 1999-VII).

315. In the present case, the Court observes that the applicant was taken by M.A. to the police station where she was detained for about an hour. There is no evidence that Ms Rantseva was informed of the reason for her detention; indeed, as the Court has noted above (see paragraph 297) there is no record that she was interviewed by the police at all during her time at the police station. Despite the fact that the police concluded that Ms Rantseva's immigration status was not irregular and that there were no grounds for her continued detention, she was not immediately released. Instead, at the request of the person in charge of the Aliens and Immigration Service ("AIS"), the police telephoned M.A. and requested that he collect her and take her to the AIS office at 7 a.m. for further investigation. M.A. was advised that if he did not collect her, she would be allowed to leave. Ms Rantseva was detained at the police station until M.A.'s arrival, when she was released into his custody (see paragraph 20 above).

316. The facts surrounding Ms Rantseva's subsequent stay in M.P.'s apartment are unclear. In his witness statement to the police, M.A. denied that Ms Rantseva was held in the apartment against her will and insists that she was free to leave (see paragraph 21 above). The applicant alleges that Ms Rantseva was locked in the bedroom and was thus forced to attempt an escape via the balcony. The Court notes that Ms Rantseva died after falling from the balcony of the apartment in an apparent attempt to escape (see paragraph 41 above). It is

reasonable to assume that had she been a guest in the apartment and was free to leave at any time, she would simply have left via the front door (see *Storck v. Germany*, no. 61603/00, §§ 76-78, ECHR 2005-V). Accordingly, the Court considers that Ms Rantseva did not remain in the apartment of her own free will.

317. In all, the alleged detention lasted about two hours. Although of short duration, the Court emphasises the serious nature and consequences of the detention and recalls that where the facts indicate a deprivation of liberty within the meaning of Article 5 § 1, the relatively short duration of the detention does not affect this conclusion (see *Järvinen v. Finland*, no. 30408/96, Commission decision of 15 January 1998; and *Novotka v. Slovakia* (dec.), no. 47244/99, 4 November 2003, where the transportation to the police station, search and temporary confinement in a cell lasting around one hour was considered to constitute a deprivation of liberty for the purposes of Article 5).

318. Accordingly, the Court finds that the detention of Ms Rantseva at the police station and her subsequent transfer and confinement to the apartment amounted to a deprivation of liberty within the meaning of Article 5 of the Convention.

2. Responsibility of Cyprus for the deprivation of liberty

319. In so far as Ms Rantseva was detained by private individuals, the Court must examine the part played by the police officers and determine whether the deprivation of liberty in the apartment engaged the responsibility of the Cypriot authorities, in particular in light of their positive obligation to protect individuals from arbitrary detention (see *Riera Blume*, cited above, §§ 32-35).

320. The Court has already expressed concern that the police chose to hand Ms Rantseva into M.A.'s custody rather than simply allowing her to leave (see paragraph 298 above). Ms Rantseva was not a minor. According to the evidence of the police officers on duty, she displayed no signs of drunkenness (see paragraph 20 above). It is insufficient for the Cypriot authorities to argue that there is no evidence that Ms Rantseva did not consent to leaving with M.A.: as the AIRE Centre pointed out (see paragraph 269 above), victims of trafficking often suffer severe physical and psychological consequences which render them too traumatised to present themselves as victims. Similarly, in her 2003 report the Ombudsman noted that fear of repercussions and inadequate protection measures resulted in a limited number of complaints being made by victims to the Cypriot police (see paragraphs 87 to 88 above).

321. Taken in the context of the general living and working conditions of cabaret artistes in Cyprus, as well as in light of the particular circumstances of Ms Rantseva's case, the Court considers that it is not open to the police to claim that they were acting in good faith and that they bore no responsibility for Ms Rantseva's subsequent deprivation of liberty in M.P.'s apartment. It is clear that without the active cooperation of the Cypriot police in the present case, the deprivation of liberty could not have occurred. The Court therefore considers that the national authorities acquiesced in Ms Rantseva's loss of liberty.

3. Compatibility of the deprivation of liberty with Article 5 § 1

322. It remains to be determined whether the deprivation of liberty fell within one of the categories of permitted detention exhaustively listed in Article 5 § 1. The Court reiterates that Article 5 § 1 refers essentially to national law and lays down an obligation to comply with its substantive and procedural rules. It also requires, however, that any measure depriving the individual of his liberty must be compatible with the purpose of Article 5, namely to protect the individual from arbitrariness (see *Riera Blume*, cited above, § 31*)*.

323. By laying down that any deprivation of liberty should be "in accordance with a procedure prescribed by law", Article 5 § 1 requires, first, that any arrest or detention should have a legal basis in domestic law. The Cypriot Government did not point to any legal basis for the deprivation of liberty but it can be inferred that Ms Rantseva's initial detention at the police station was effected in order to investigate whether she had failed to comply with immigration requirements. However, having ascertained that Ms Rantseva's name was not included on the relevant list, no explanation has been provided by the Cypriot authorities as to the reasons and legal basis for the decision not to allow Ms Rantseva to leave the police station but to release her into the custody of M.A.. As noted above, the police found that Ms Rantseva did not exhibit signs of drunkenness and did not pose any threat to herself or others (see paragraphs 20 and 320 above). There is no indication, and it has not been suggested, that Ms Rantseva requested that M.A. come to collect her. The decision of the police authorities to detain Ms Rantseva until M.A.'s arrival and, subsequently, to consign her to his custody had no basis in domestic law.

324. It has not been argued that Ms Rantseva's detention in the apartment was lawful. The Court finds that this deprivation of liberty was both arbitrary and unlawful.

325. The Court therefore concludes that there has been a violation of Article 5 § 1 on account of Ms Rantseva's unlawful and arbitrary detention.

VII. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

326. The applicant contended that the Cypriot authorities violated his right of access to court under Article 6 of the Convention by failing to ensure his participation in the inquest proceedings, by failing to grant him free legal aid and by failing to provide him with information on available legal remedies in Cyprus. Article 6 provides, in so far as relevant, as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. The parties' submissions

1. The applicant

327. The applicant highlighted the importance of the right of access to court in a democratic society. Such a right entailed an opportunity for an individual to have a clear, practical opportunity to challenge an act which interfered

with his rights. The applicant pointed out that there had been no trial in respect of his daughter's death. He further complained about the failure of the Cypriot authorities to ensure his effective participation in the inquest proceedings and to provide free legal assistance. Accordingly, he submitted, the Cypriot authorities had violated his right of access to court guaranteed under Article 6 of the Convention.

2. The Cypriot Government

328. In their written observations, the Cypriot Government submitted that Article 6 did not apply to inquest proceedings as they were not proceedings that determined civil rights and obligations. Accordingly, the applicant could not claim a right of access to the proceedings in respect of his daughter's death.

329. If, on the other hand, inquest proceedings did engage Article 6, the Cypriot Government contended that the applicant's right of access to court was ensured in the present case.

330. In their subsequent unilateral declaration (see paragraph 187 above), the Cypriot Government acknowledged a violation of the applicant's right to an effective access to court by the failure of the Cypriot authorities to establish any real and effective communication between them and the applicant as regards the inquest and any other possible legal remedies available to the applicant.

B. Admissibility

331. The Court observes at the outset that Article 6 does not give rise to a right to have criminal proceedings instituted in a particular case or to have third parties prosecuted or sentenced for a criminal offence (see, for example, *Rampogna and Murgia v. Italy* (dec.), no. 40753/98, 11 May 1999; *Perez v. France* [GC], no. 47287/99, § 70, ECHR 2004-I; and *Dinchev v. Bulgaria*, no. 23057/03, § 39, 22 January 2009). To the extent that the applicant complains under Article 6 § 1 about the failure of the Cypriot authorities to bring criminal proceedings in respect of his daughter's death, his complaint is therefore inadmissible *ratione materiae* and must be rejected under Article 35 §§ 3 and 4 of the Convention.

332. As regards the complaint regarding participation in the inquest proceedings, the Court observes that procedural guarantees in inquest proceedings are inherent in Article 2 of the Convention and the applicant's complaints have already been examined in that context (see paragraph 239 above). As to the applicability of Article 6 to inquest proceedings, the Court considers there is no criminal charge or civil right at stake for the applicant in the context of such proceedings. Accordingly, this part of the complaint is also inadmissible *ratione materiae* and must be rejected under Article 35 §§ 3 and 4 of the Convention.

333. Finally, as regards the applicant's complaints that he was not informed of other remedies available to him and was not provided with free legal assistance, when the cost of legal representation in Cyprus was prohibitive, the Court considers that these complaints are inherently linked to the applicant's complaint under Article 2 of the Convention and recalls that they have been

addressed in that context (see paragraph 240 above). It is therefore not necessary to consider the extent to which any separate issue may arise under Article 6 in such circumstances.

334. Accordingly, the complaints under Article 6 § 1 must be declared inadmissible and rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

VIII. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

335. The applicant also invoked Article 8 of the Convention, which provides as follows:

> "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."

336. The applicant has provided no further details of the nature of his complaint under this Article. In the light of all the material in its possession, and in so far as the matters complained of were within its competence, the Court finds no appearance of a violation of the rights and freedoms set out in the Convention or its Protocols arising from this complaint. The complaint must therefore be declared inadmissible pursuant to Article 35 §§ 3 and 4 of the Convention.

IX. APPLICATION OF ARTICLE 41 OF THE CONVENTION

337. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

1. The parties' submissions

338. The applicant sought EUR 100,000 in respect of non-pecuniary damage resulting from the death of his daughter. He pointed to the serious nature of the alleged violations in the present case and the fact that his daughter was the sole provider for the family. He also highlighted the emotional anguish occasioned by his daughter's death and his subsequent efforts to bring those responsible to justice.

339. The Cypriot Government argued that the sum claimed was excessive, having regard to the Court's case-law. They further pointed out that the applicant had provided no evidence that he was financially dependent upon his daughter. In their unilateral declaration (see paragraph 187 above), they offered to pay the applicant EUR 37,300 in respect of pecuniary and non-pecuniary damage and costs and expenses, or such other sum as suggested by the Court.

340. The Russian Government submitted that any non-pecuniary damages should be paid by the State which failed to ensure the safety of the applicant's daughter and failed to perform an effective investigation into her death. They noted that they were not the respondent State as far as the applicant's substantive Article 2 complaint was concerned.

2. The Court's assessment

341. The Court notes that a claim for loss of economic support is more appropriately considered as a claim for pecuniary loss. In this respect, the Court reiterates that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention and that this may, in the appropriate case, include compensation in respect of loss of earnings (see, *inter alia*, *Aktaş v. Turkey*, no. 24351/94, § 352, ECHR 2003-V (extracts)). In the present case the Court has not found Cyprus responsible for Mr Rantseva's death, holding that there was a procedural, and not a substantive, violation of Article 2 in the present case. Accordingly, the Court does not consider it appropriate to make any award to the applicant in respect of pecuniary damage arising from Ms Rantseva's death.

342. As regards non-pecuniary damage, the Court has found that the Cypriot authorities failed to take steps to protect Ms Rantseva from trafficking and to investigate whether she had been trafficked. It has further found that the Cypriot authorities failed to conduct an effective investigation into Ms Rantseva's death. Accordingly, the Court is satisfied that the applicant must be regarded as having suffered anguish and distress as a result of the unexplained circumstances of Ms Rantseva's death and the failure of the Cypriot authorities to take steps to protect her from trafficking and exploitation and to investigate effectively the circumstances of her arrival and stay in Cyprus. Ruling on an equitable basis, the Court awards the sum of EUR 40,000 in respect of the damage sustained by the applicant as a result of the conduct of the Cypriot authorities, plus any tax that may be chargable on that amount.

343. The Court recalls that it has found a procedural violation of Article 4 in respect of Russia. Ruling on an equitable basis, it awards the applicant EUR 2,000 in non-pecuniary damage in respect of the damage sustained by him by the conduct of the Russian authorities, plus any tax that may be chargable on that amount.

B. Costs and expenses

1. The parties' submissions

344. The applicant requested reimbursement of costs and expenses incurred in the sum of around 485,480 Russian roubles (RUB) (approximately EUR 11,240), including travel, photocopying, translation and services of a notary. The sum also included the sum of RUB 233,600 in respect of the sale of his home in Russia, which he claimed was necessary in order to obtain necessary funds; funeral costs in the sum of about RUB 46,310; and RUB 26,661 spent on attending a conference on trafficking in Cyprus in 2008. Relevant receipts were provided.

345. The Cypriot Government argued that the applicant could only claim for costs which were necessarily incurred to prevent or redress a breach of the Convention, reasonable as to quantum and causally linked to the violation in question. As such, they contested the applicant's claim of RUB 233,600 in respect of the sale of his flat, the sums expended on attending the 2008 conference and any costs and expenses not substantiated by receipts or not reasonable as to quantum.

346. The Russian Government contended that the applicant had failed to substantiate his allegation that he was required to sell his flat and travel to Cyprus. In particular, they submitted that the applicant could have applied to relevant law enforcement authorities in Russia to request necessary documents and evidence from the Cypriot authorities and could have instructed a lawyer in Cyprus. The Russian Government also contested the applicant's claim for the costs of the 2008 conference on the ground that it was not directly linked to the investigation of Ms Rantseva's death.

2. The Court's assessment

347. The Court recalls that the applicant is entitled to the reimbursement of costs and expenses in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the applicant is not entitled to claim the proceeds of the sale of his house or for the expenses of travelling to the conference in Cyprus in 2008, such conference not being directly linked to the investigation of Ms Rantseva's death. Further, the Court recalls that it found only a procedural breach of Article 2. Accordingly, the applicant is not entitled to reimbursement of funeral expenses.

348. Having regard to the above, the Court considers it reasonable to award the sum of EUR 4,000 in respect of costs and expenses plus any tax that may be chargeable to the applicant on that amount, less EUR 850 received by way of legal aid from the Council of Europe. In the circumstances of this case the Court considers it appropriate that the costs and expenses are awarded against Cyprus.

C. Default interest

349. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Rejects* the Cypriot Government's request to strike the application out of the list;
2. *Decides* to join to the merits the Russian Government's objection *ratione materiae* as to Article 4 of the Convention, and rejects it;
3. *Declares* the complaints under Articles 2, 3, 4 and 5 admissible and the remainder of the application inadmissible.
4. *Holds* that there has been no violation of the Cypriot authorities' positive obligation to protect Ms Rantseva's right to life under Article 2 of the Convention;

5. *Holds* that there has been a procedural violation of Article 2 of the Convention by Cyprus because of the failure to conduct an effective investigation into Ms Rantseva's death;
6. *Holds* that there has been no violation of Article 2 of the Convention by Russia;
7. *Holds* that it is not necessary to consider separately the applicant's complaint under Article 3 of the Convention;
8. *Holds* that there has been a violation of Article 4 of the Convention by Cyprus by not affording to Ms Rantseva practical and effective protection against trafficking and exploitation in general and by not taking the necessary specific measures to protect her;
9. *Holds* that there is no need to examine separately the alleged breach of Article 4 concerning the continuing failure of the Cypriot authorities to conduct an effective investigation;
10. *Holds* that there has been no breach by Russia of its positive obligations under Article 4 of the Convention to take operational measures to protect Ms Ranseva against trafficking;
11. *Holds* that there has been a violation of Article 4 of the Convention by Russia of its procedural obligations to investigate the alleged trafficking;
12. *Holds* that there has been a violation of Article 5 of the Convention by Cyprus;
13. *Holds*
    (a) that the Cypriot Government is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 40,000 (forty thousand euros) in respect of non-pecuniary damage and EUR 3,150 (three thousand one hundred and fifty euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant on these amounts;
    (b) that the Russian Government is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros) in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement, plus any tax that may be chargeable to the applicant on this amount;
    (c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
14. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 7 January 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President

CASE OF
SALABIAKU v. FRANCE
(Application no. 10519/83)

JUDGMENT
7 October 1988

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 23 October 1987, within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 10519/83) against the Republic of France lodged with the Commission under Article 25 (art. 25) by a Zaïrese national, Mr Amosi Salabiaku, on 29 July 1983.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision from the Court as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 paras. 1 and 2 (art. 6-1, art. 6-2).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 30 November 1987, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mr Thór Vilhjálmsson, Mrs D. Bindschedler-Robert, Mr F. Gölcüklü, Mr F. Matscher and Mr B. Walsh (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the French Government ("the Government"), the Delegate of the Commission and Mr Salabiaku's lawyers on the need for a written procedure (Rule 37 para. 1). In accordance with his orders and directives, the registry received the Government's memorial on 21 March 1988 and the applicant's claims under Article 50 (art. 50) of the Convention on 20 June. By a letter dated 27 April, the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. Having consulted – through the Registrar – those who would be appearing before the Court, the President directed on 28 April 1988 that the oral proceedings should commence on 20 June 1988 (Rule 38).

6. On 26 May, and subsequently 20 and 29 June, the Government and the Commission communicated to the Registrar various documents whose production the President of the Court had requested.

7. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

– for the Government
Mr J.-P. Puissochet, Director
of Legal Affairs at the Ministry of Foreign Affairs,
Agent and *Counsel*,
Mr J.-C. Chouvet, Assistant Director
of Human Rights, in the same Directorate,
Mr M. Dobkine, Magistrat, Directorate
of Criminal Affairs and Pardons, Ministry of Justice,
Mr C. Merlin, Assistant Secretary,
Legal and Litigation Department, Directorate-General of
Customs and Indirect Taxes of the Ministry of the Economy,
Finances and the Budget, *Advisers*;

– for the Commission
Mr A. Weitzel, *Delegate*;

– for the applicant
Mr J.-P. Combenègre, avocat, *Counsel*.

The Court heard addresses by Mr Puissochet and Mr Chouvet for the Government, Mr Weitzel for the Commission and Mr Combenègre for the applicant, as well as their replies to its questions and to that of one of its members.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. Mr Amosi Salabiaku, a Zaïrese national born in 1951, resides in Paris with his family.

9. On 28 July 1979, Mr Salabiaku went to Roissy Airport to collect a parcel which he had been informed by telex message was to arrive on board an Air Zaïre flight. According to the applicant, he expected the parcel to contain samples of African food sent to him through the intermediary of one of his relatives who

was an Air Zaïre employee. As he was unable to find it, he approached an airline official who directed him to a padlocked trunk which had remained uncollected and bore an Air Zaïre luggage ticket but no name. The official, acting on the advice of police officers watching the trunk, suggested that he left it where it was, intimating to him that it might contain prohibited goods.

The applicant took possession of it nevertheless, and passed through customs without difficulty. He had chosen to go through the "green channel" for passengers having nothing to declare. He was accompanied by three other Zaïrese nationals whom he had met there for the first time. Immediately afterwards he telephoned to his brother Lupia to come and meet him at a terminal near their home in order to help him since the package had proved heavier than expected.

10. Customs officials then detained Mr Amosi Salabiaku and his three companions as they were about to board the Air France terminal coach. Mr Salabiaku identified himself as the person for whom the trunk had been intended and denied that it was anything to do with his three compatriots who were immediately released.

Customs officials forced the lock of the trunk and found, lying underneath victuals, a welded false bottom which concealed 10 kg of herbal and seed cannabis. The applicant asserted that he was unaware of the presence of the cannabis and that he had mistaken the trunk for the parcel of whose arrival he had been advised. His brother was also arrested at the Porte Maillot (Paris).

11. On 30 July 1979, Air Zaïre telephoned to Mr Amosi and Mr Lupia Salabiaku's landlord, informing him that a parcel bearing the applicant's name and his address in Paris had arrived by mistake in Brussels. It was opened by an investigating judge but was found to contain only manioc flour, palm oil, pimento and peanut butter.

12. Mr Amosi and Mr Lupia Salabiaku were released on 2 August 1979 and, together with a certain K., also a Zaïrese national, were charged with both the criminal offence of illegally importing narcotics (Articles L. 626, L. 627, L. 629, L. 630-1, R. 5165 et seq. of the Public Health Code) and the customs offence of smuggling prohibited goods (Articles 38, 215, 414, 417, 419 and 435 of the Customs Code, Articles 42, 43-1 et seq. and 44 of the Penal Code). By an order dated 25 August 1980, they were committed for trial before the Tribunal de Grande Instance, Bobigny.

13. On 27 March 1981, the 16th Chamber of this court acquitted Mr Lupia Salabiaku and K. giving them the benefit of the doubt but found the applicant guilty. It stated in particular:

> "The accused's bad faith is evidenced by the fact that he showed no surprise when the first package opened in his presence turned out to contain none of the foodstuffs contained in the second package, although he described clearly what he claimed to be expecting from Zaïre and received in the second.
>
> The latter package arrived in Brussels in circumstances which it has not been possible to determine and its existence cannot rebut presumptions which are sufficiently serious, precise and concordant to justify a conviction ...."

Consequently, the court imposed on Mr Amosi Salabiaku a sentence of two years' imprisonment and a definitive prohibition on residing in French territory. Furthermore, in respect of the customs offence, it imposed on him a fine of 100,000 French francs (FF), under Article 414 of the Customs Code, to be paid to the customs authorities, which had joined the proceedings as a civil party.

14. The applicant and the Public Prosecutor appealed.

On 9 February 1982, the Paris Court of Appeal (10th Chamber) set aside the judgment with regard to the criminal offence of illegal importation of narcotics, on the following grounds:

> "... the facts alleged against the accused are not sufficiently proven; ... in fact, although Mr Amosi Salabiaku, who had been expecting only a parcel of victuals, took possession of a very heavy trunk secured by a padlock to which he did not have the keys, which bore no name of any addressee and for which he did not have the corresponding luggage ticket counterfoil, it has been established that a package in his name containing victuals arrived two days afterwards in Brussels on an Air Zaïre flight from Kinshasa. This package had apparently been sent to Brussels in error, its intended destination being Paris;
>
> ... in those circumstances, it is not impossible that Mr Amosi Salabiaku might have believed, on taking the trunk, that it was really intended for him; ... there is at least a doubt the benefit of which should be granted to him, resulting in his acquittal ..."

The court, on the other hand, upheld the first-instance decision as regards the customs offence of smuggling prohibited goods:

> "... any person in possession (détention) of goods which he or she has brought into France without declaring them to customs is presumed to be legally liable unless he or she can prove a specific event of force majeure exculpating him; such force majeure may arise only as a result of an event beyond human control which could be neither foreseen nor averted ...;
>
> ...
>
> ... Mr Amosi Salabiaku went through customs with the trunk and declared to the customs officials that it was his property; ... he was therefore in possession of the trunk containing drugs;
>
> ... he cannot plead unavoidable error because he was warned by an official of Air Zaïre ... not to take possession of the trunk unless he was sure that it belonged to him, particularly as he would have to open it at customs. Thus, before declaring himself to be the owner of it and thereby affirming his possession within the meaning of the law, he could have checked it to ensure that it did not contain any prohibited goods;
>
> ... by failing to do so and by having in his possession a trunk containing 10 kg of herbal and seed cannabis, he committed the customs offence of smuggling prohibited goods ..."

The Court of Appeal also confirmed the fine of 100,000 FF imposed on the applicant; it fixed at the minimum period the duration of imprisonment for non-payment.

15. Mr Amosi Salabiaku appealed on points of law. He relied on paragraphs 1 and 2 of Article 6 (art. 6-1, art. 6-2) of the Convention: in his submission, by placing upon him an "almost irrebuttable presumption of guilt", which "operated in favour of the customs authorities", the Court of Appeal had violated both his right to a fair trial and his right to be presumed innocent until proved guilty.

The Court of Cassation (Criminal Chamber) dismissed the appeal on 21 February 1983, finding that the judgment appealed against had "properly" applied Article 392 para. 1 of the Customs Code, under the terms of which "the person in possession of contraband goods shall be deemed liable for the offence":

> "... contrary to what is alleged, the aforementioned Article was not repealed by implication by France's adhesion to the Convention ... and had to be applied since the Court of Appeal, which reached its decision on the basis of the evidence adduced by the parties before it, found that the accused was in possession of the trunk and inferred from the fact of possession a presumption which was not subsequently rebutted by any evidence of an event responsibility for which could not be attributed to the perpetrator of the offence or which he would have been unable to avoid."

II. THE RELEVANT LEGISLATION AND CASE-LAW

16. Infringements under the French Customs Code constitute criminal offences with various specific characteristics.

The Customs Code essentially prohibits smuggling (Articles 417 to 422) and undeclared importation or exportation (Articles 423 to 429). This case is concerned solely with smuggling. The notion of smuggling covers "any importation or exportation effected outside official customs premises and any infringement of the provisions or regulations concerning the possession and transport of goods within the customs territory" (Article 417 para. 1), for example, but not exclusively, where the goods concerned are "prohibited on importation" (Article 418 para. 1, to be read in conjunction with Article 38).

17. At the material time Article 408 classified these infringements in five classes of petty offences (contraventions) and three of more serious offences (délits). Articles 410 to 416 imposed "primary penalties" which varied according to the gravity of the infringement: such penalties included fines fixed either within set maximum and minimum limits (Articles 410 para. 1, 412 and 413 bis) or at "between one and three times the amount of duty and taxes evaded or unpaid" (Article 411 para. 1), "the value of the disputed goods" (Article 413), of "the contraband article" (Articles 414 and 415) or of "the confiscated articles" (Article 416), with a fixed minimum (Article 437); confiscation of "the disputed goods" (Article 412) or "the contraband article", "the means of transport" and "articles used to conceal the offence" (Articles 414, 415 and 416); and imprisonment for terms of up to one month (Article 413 bis), three months (Article 414), one year (Article 415) or three years (Article 416), according to the type of offence involved.

Mr Salabiaku was charged under Article 414, according to which:

> "Any act of smuggling and any undeclared importation or exportation of goods falling within the category of goods which are prohibited ..., on importation, ..., shall be punishable by the confiscation of the contraband article, confiscation of the means of transport employed, confiscation of articles used to conceal the offence, a fine of not less than the value of the contraband article and not more than three times its value and a term of imprisonment of up to three months."

Certain of these punitive measures – fines not fixed in advance and confiscations – are also described as "fiscal penalties" (Articles 343 para. 2 and 415). In general they are regarded as being compensatory in nature in so far as they are intended to make good loss sustained by the customs authorities.

There are also a number of "additional penalties" (Articles 430 to 433), including in particular measures of disqualification (Article 432).

Both primary and additional penalties may give rise to an entry in the criminal record of the person concerned.

18. Seizure "reports" drawn up "by a customs officer or any other official" may constitute – and usually do – evidence of customs offences (Articles 323 to 333). Depending on whether they are issued by one or more officials, they attest "the facts which they record" merely until "the contrary is proved" or until "forgery proceedings have been instituted" (Articles 336 para. 1 and 337 para. 1). They are "remitted to the Public Prosecutor and the persons charged with the offence are brought" before him (Article 333 para. 1).

The initiative for instituting prosecution lies with the Public Prosecutor's Office for "criminal penalties", stricto sensu, and with the customs authorities – or the Public Prosecutor's Office, "in conjunction with the criminal proceedings" – for "fiscal penalties" (Article 343). District courts have jurisdiction to try petty customs offences, and criminal courts, more serious customs offences (Articles 356 and 357). In principle the procedure follows the rules of the ordinary law (Articles 363, 365 and 366).

19. The offence with which the applicant was charged – the smuggling of narcotics, "prohibited goods" (Article 414) – does not necessarily require possession. However, where possession is established, "the person in possession ... is deemed liable for the offence", without prejudice to any penalties which may be incurred by other persons, for example any accomplices (Article 398) or "persons with an interest in the offence" (Article 399). This principle is set out in Article 392 para. 1.

The provision in question appears in Chapter V ("Liability and Joint Liability") of Title XII ("Contentious Proceedings") of the Customs Code, at the beginning of Section I ("Criminal Liability"), and not among the "punitive provisions" of Chapter VI. It is a general clause which applies both to smuggling offences and undeclared importation or exportation as well as to any "unlawfully imported or exported goods", irrespective of whether they are prohibited as such.

Read strictly this provision would appear to lay down an irrebuttable presumption, but, in any event, its severity has been to some extent moderated by the decisions of the courts. Thus the Court of Cassation now upholds the trial court's unfettered power of assessment with regard to "evidence adduced by the parties before it" (see, for example, the Abadie judgment of 11 October 1972, Bulletin no. 280, p. 723) and recognises that the accused may exculpate himself by establishing "a case of force majeure" resulting "from an event responsibility for which is not attributable" to him and which "it was absolutely impossible for him to avoid", such as "the absolute impossibility ... of knowing the contents of [a] package" (see, for example, the Massamba Mikissi and Dzekissa judgment of 25 January 1982, Gazette du Palais, 1982, jurisprudence, pp. 404-405, and the judgment delivered in this case on 21 February 1983, paragraph 15 above; see further Court of Appeal, Paris, 10 March 1986, Chen Man Ming and Others, Gazette du Palais, 1986, jurisprudence, pp. 442-444). At the same time Article 399, which concerns third parties "with an interest in the offence" and not "persons in possession", states in paragraph 3 thereof that "the interest in the offence cannot be imputed to a person who has acted out of necessity or as a result of unavoidable error".

On the other hand under paragraph 2 of Article 369 the courts were required to refrain from "acquitting offenders for lack of intent". While it is true that Law no. 87-502 of 5 July 1987 repealed this provision, clearly this had no effect on the present case.

It is necessary to distinguish between the possibility of a simple acquittal and that provided for in Article 369 para. 1: namely recognition of extenuating circumstances. In such cases the court may, inter alia, "refrain from imposing on the accused the criminal penalties laid down in the ... Code", order that their enforcement be suspended or decide "that the conviction should not be entered in 'Bulletin no. 2' of the criminal record", order the return to the person concerned of certain confiscated goods or reduce the amount of the "fiscal fines".

PROCEEDINGS BEFORE THE COMMISSION

20. In his application of 29 July 1983 to the Commission (no. 10519/83), Mr Salabiaku complained that the way in which Article 392 para. 1 of the Customs Code had been applied to him was incompatible with Article 6 oaras. 1 and 2 (art. 6-1, art. 6-2) of the Convention; he repeated in substance the argument which he had put forward unsuccessfully before the Court of Cassation (see paragraph 15 above).

21. The Commission declared the application admissible on 16 April 1986. In its report of 16 July 1987 (Article 31) (art. 31), it found no breach of paragraph 1 (by ten votes to three) or paragraph 2 (by nine votes to four) of Article 6 (art. 6-1, art. 6-2). The full text of its opinion and of the dissenting opinion accompanying it is reproduced as an annex to this judgment.

FINAL SUBMISSIONS TO THE COURT

22. At the hearing on 20 June 1988 the Government essentially confirmed the concluding submission in their memorial to the effect that the application should be dismissed. According to them, the applicant "has not been the victim of a violation of Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the Convention".

For his part Mr Amosi Salabiaku requested the Court, through his counsel, to "find that there has been a violation" of the above-mentioned provisions.

AS TO THE LAW

23. The applicant relied on paragraphs 1 and 2 of Article 6 (art. 6-1, art. 6-2) of the Convention, which are worded as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by a ... tribunal ....
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

24. The Government contended that Article 392 para. 1 of the Customs Code establishes not a presumption of guilt, but one of liability. In their view this distinction is "crucial": "the persons in question do not commit the offence themselves", but "answer for it before the courts" (page 4 of the written observations of June 1985 submitted to the Commission). They did not however argue that there was no "criminal charge" within the meaning of paragraph 1 of Article 6 (art. 6-1) of the Convention; nor did they claim that the dispute fell outside the scope of paragraph 2 (art. 6-2) thereof on the ground that this provision referred to the notion of "guilt" and not that of "liability".

It is not therefore disputed that these provisions are applicable in this instance. In any event, the punitive provisions of French Customs law (see paragraphs 16-19 above) may give rise to "criminal charges" for the purposes of Article 6 (art. 6) (see most recently, mutatis mutandis, the Lutz judgment of 25 August 1987, Series A no. 123-A, pp. 21-23, paras. 50-55). In France these provisions are regarded as constituting special criminal law. They list a number of wrongful acts, classify them in various categories of petty or more serious offences and penalise their commission by imposing not only "fiscal penalties", which in certain cases are regarded as compensatory in nature, but also primary or additional "penalties" which are entered in the criminal records of the persons concerned. Such primary or additional penalties may include fines, disqualification and imprisonment for terms of up to three years (Articles 408 to 433 of the Customs Code). In respect of "criminal penalties", the initiative for instituting prosecution lies with the Public Prosecutor's Office, and, in respect of "fiscal penalties", with the customs authorities – or the Public Prosecutor's Office, "in conjunction with the criminal proceedings" – (Article 343). Article 392, for its part, appears in a section entitled "Criminal Liability".

25. The Court proposes in the first place to examine the case under paragraph 2 of Article 6 (art. 6-2). It appears from the argument presented that the

presumption of innocence, which is one aspect of the right to a fair trial secured under paragraph 1 of Article 6 (art. 6-1) (see, inter alia, the Lutz judgment cited above, ibid., p. 22, para. 52), is the essential issue in the case.

I. ALLEGED VIOLATION OF PARAGRAPH 2 OF ARTICLE 6 (art. 6-2)

26. Mr Salabiaku maintained that the "almost irrebuttable" presumption on the basis of which the Bobigny Tribunal de Grande Instance and subsequently the Paris Court of Appeal convicted him of a customs offence was incompatible with Article 6 (art. 6).

In the view of the Government and of the majority of the Commission, he was indeed proved guilty "according to law". They considered that under Article 392 para. 1 of the Customs Code an offence was committed by virtue of the "mere ("objective") fact" of "possession of prohibited goods when passing through customs", "without its being necessary to establish fraudulent intent or negligence" on the part of the "person in possession" (paragraphs 66 and 68 of the Commission's report). It fell to the Public Prosecutor to furnish proof of this fact. In this instance he had done so by producing the customs authorities' report and the accused had not succeeded in establishing a case of "force majeure beyond his control" of such a nature as to "exculpate him" (paragraph 74 of the report). In their view Article 392 para. 1 did not establish an irrebuttable presumption of guilt, but "a rebuttable presumption of fact and liability", "strictly defined by the case-law" and justified "by the very nature of the subject-matter" of the law in question. This implied no more than "a sharing" of the burden of proof and not its "reversal" (memorial of the Government to the Court).

27. As the Government and the Commission have pointed out, in principle the Contracting States remain free to apply the criminal law to an act where it is not carried out in the normal exercise of one of the rights protected under the Convention (Engel and Others judgment of 8 June 1976, Series A no. 22, p. 34, para. 81) and, accordingly, to define the constituent elements of the resulting offence. In particular, and again in principle, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence. Examples of such offences may be found in the laws of the Contracting States.

However, the applicant was not convicted for mere possession of unlawfully imported prohibited goods. Article 392 para. 1 of the Customs Code does not appear under the heading "Classification of Customs Offences" (Title XII, Chapter VI, Section I), but under that of "Criminal Liability" (Title XII, Chapter V, Section I). Under this provision a conclusion is drawn from a simple fact, which in itself does not necessarily constitute a petty or a more serious offence, that the "criminal liability" for the unlawful importation of goods, whether they are prohibited or not, or the failure to declare them, lies with the person in whose possession they are found. It infers therefrom a legal presumption on the basis of which the Bobigny Tribunal de Grande Instance and subsequently the Paris

Court of Appeal found the applicant "guilty ... of smuggling prohibited goods" (see paragraphs 13-14 above), a customs offence for whose commission possession is not essential and which is covered by Articles 414 and 417. Moreover the judgment of 27 March 1981 and that of 9 February 1982 refer, inter alia, to these two provisions and not to Article 392 para. 1.

28. This shift from the idea of accountability in criminal law to the notion of guilt shows the very relative nature of such a distinction. It raises a question with regard to Article 6 para. 2 (art. 6-2) of the Convention.

Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. If, as the Commission would appear to consider (paragraph 64 of the report), paragraph 2 of Article 6 (art. 6-2) merely laid down a guarantee to be respected by the courts in the conduct of legal proceedings, its requirements would in practice overlap with the duty of impartiality imposed in paragraph 1 (art. 6-1). Above all, the national legislature would be free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance, if the words "according to law" were construed exclusively with reference to domestic law. Such a situation could not be reconciled with the object and purpose of Article 6 (art. 6), which, by protecting the right to a fair trial and in particular the right to be presumed innocent, is intended to enshrine the fundamental principle of the rule of law (see, inter alia, the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 34, para. 55).

Article 6 para. 2 (art. 6-2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence. The Court proposes to consider whether such limits were exceeded to the detriment of Mr Salabiaku.

29. For the purposes of Article 392 para. 1 of the Customs Code it falls to the prosecuting authority to establish possession of the "smuggled goods". This is a simple finding of fact, which in general raises few problems because it is made on the basis of a report which is deemed to constitute sufficient evidence until forgery proceedings are instituted, if it has been drawn up by more than one official (Articles 336 para. 1 and 337 para. 1, paragraph 18 above). In this instance this finding was not challenged.

Even though the "person in possession" is "deemed liable for the offence" this does not mean that he is left entirely without a means of defence. The competent court may accord him the benefit of extenuating circumstances (Article 369 para. 1), and it must acquit him if he succeeds in establishing a case of force majeure.

This last possibility is not to be found in the express wording of the Customs Code, but has evolved from the case-law of the courts in a way which moderates the irrebuttable nature previously attributed by some academic writers to the presumption laid down in Article 392 para. 1. Several decisions to which the

Government referred concerned other provisions, principally Article 399 which covers "persons with an interest in the offence" and not "persons in possession" (see paragraph 19 above), or postdate the contested conviction. On the other hand, one of them concerns Article 392 para. 1 and dates from 11 October 1972. It confirms, in passing, the trial court's unfettered power of assessment with regard to "evidence adduced by the parties before it" (Court of Cassation, Criminal Chamber, Abadie, Bulletin no. 280, p. 723). The Court for its part would cite a judgment of 25 January 1982, also concerning Article 392 para. 1. Reference is made therein to the absence of "a case of force majeure" resulting from "an event responsibility for which is not attributable to the perpetrator of the offence and which it was absolutely impossible for him to avoid", such as "the absolute impossibility ... of knowing the contents of [a] package" (Court of Cassation, Criminal Chamber, Massamba Mikissi and Dzekissa, Gazette du Palais, 1982, jurisprudence, pp. 404-405). A similar formula may be found in the judgment which the Court of Cassation delivered in the present case on 21 February 1983 (see paragraph 15 above). The Paris Court of Appeal repeated it in its Guzman judgment of 12 July 1985, which was cited by the Government. More recently, it has held that "the specific character of [customs] offences does not deprive ... the offender of every possibility of defence since ... the person in possession may exculpate himself by establishing a case of force majeure" and, with regard to third parties with an interest in the offence, such "interest ... cannot be imputed to a person who has acted out of necessity or as a result of unavoidable error" (10 March 1986, Chen Man Ming and Others, Gazette du Palais, 1986, jurisprudence, pp. 442-444).

As the Government argued at the hearing on 20 June 1988, the French courts thus do enjoy a genuine freedom of assessment in this area and "the accused may ... be accorded the benefit of the doubt, even where the offence is one of strict liability". The Law of 8 July 1987, which was adopted and promulgated after the events in this case, significantly extended this freedom by repealing paragraph 2 of Article 369, under which the courts were prevented "from acquitting offenders for lack of intent" (see paragraph 19 above).

30. However, the Court is not called upon to consider in abstracto whether Article 392 para. 1 of the Customs Code conforms to the Convention. Its task is to determine whether it was applied to the applicant in a manner compatible with the presumption of innocence (see most recently, mutatis mutandis, the Bouamar judgment of 29 February 1988, Series A no. 129, p. 20, para. 48).

The Bobigny Tribunal de Grande Instance noted that the accused had "showed no surprise when the first package opened in his presence proved to contain none of the foodstuffs contained in the second", whilst he had "described clearly what he claimed to be expecting from Zaïre and received in the second". This attitude appeared to the court to establish the applicant's "bad faith" and it considered that there were "presumptions ... sufficiently serious, precise and concordant to justify a conviction" (see paragraph 13 above). It is true that the Bobigny court tried the criminal offence stricto sensu (Articles L. 626, L. 627 and L. 630-1 of the Public Health Code) and the customs offence together, which

somewhat reduces the relevance of this decision for the purposes of the present case.

The Paris Court of Appeal, for its part, drew a clear distinction between the criminal offence of unlawful importation of narcotics and the customs offence of smuggling prohibited goods. On the first head, it acquitted Mr Salabiaku, giving him the benefit of the doubt, and in so doing showed scrupulous respect for the presumption of innocence. On the other hand, as regards the second head, it upheld the conviction handed down by the Bobigny court, and did so without contradicting itself because the facts and the action incriminated under this head were different. It noted in particular that he "went through customs with the trunk and declared to the customs officers that it was his property". It added that he could not "plead unavoidable error because he was warned by an Air Zaïre official ... not to take possession of the trunk unless he was sure that it belonged to him, particularly because he would have to open it in customs. Thus, before declaring himself to be the owner of the trunk and thereby affirming his possession within the meaning of the law, he could have checked it to ensure that it did not contain any prohibited goods". The court inferred therefrom that "by failing to do so and by having in his possession a trunk containing 10 kg of herbal and seed cannabis, he committed the customs offence of smuggling prohibited goods" (see paragraph 14 above).

It is clear from the judgment of 27 March 1981 and that of 9 February 1982, that the courts in question were careful to avoid resorting automatically to the presumption laid down in Article 392 para. 1 of the Customs Code. As the Court of Cassation observed in its judgment of 21 February 1983, they exercised their power of assessment "on the basis of the evidence adduced by the parties before [them]". They inferred from the "fact of possession a presumption which was not subsequently rebutted by any evidence of an event responsibility for which could not be attributed to the perpetrator of the offence or which he would have been unable to avoid" (see paragraph 15 above). Moreover, as the Government said, the national courts identified in the circumstances of the case a certain "element of intent", even though legally they were under no obligation to do so in order to convict the applicant.

It follows that in this instance the French courts did not apply Article 392 para. 1 of the Customs Code in a way which conflicted with the presumption of innocence.

II. ALLEGED VIOLATION OF PARAGRAPH 1 OF ARTICLE 6 (art. 6-1)

31. The applicant's complaints under paragraph 1 of Article 6 (art. 6-1) of the Convention to a large extent correspond to those which he formulated under paragraph 2 (art. 6-2) thereof. Essentially he challenges the presumption established in Article 392 para. 1 of the Customs Code "in favour" of the prosecuting authorities, and this complaint has already been examined above. The Court therefore finds no ground for departing, on the basis of the general principle of a fair trial, from the conclusion which it has reached in considering specifically

the presumption of innocence. For the rest, the evidence adduced does not in its view disclose any failure to comply with the various requirements of Article 6 para. 1 (art. 6-1). In particular, the proceedings at first instance, on appeal and in the Court of Cassation were fully judicial and adversarial in nature, which, furthermore, is not contested by the applicant.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no breach of either paragraph 2 or paragraph 1 of Article 6 (art. 6-2, art. 6-1).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 7 October 1988.

Marc-André Eissen
Registrar

Rolv Ryssdal
President

CASE OF
WELCH v. THE UNITED KINGDOM
(Application no. 17440/90)

JUDGMENT
9 February 1995

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 15 January 1994, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 17440/90) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 (art. 25) by a British citizen, Mr Peter Welch, on 22 June 1990.

2. The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 7 (art. 7) of the Convention.

3. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

4. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 28 January 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Matscher, Mr R. Macdonald, Mr N. Valticos, Mr I. Foighel, Mr R. Pekkanen, Mr L. Wildhaber and Mr K. Jungwiert (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

Subsequently Mr J. De Meyer, substitute judge, replaced Mr Valticos, who was unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1).

5. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the United Kingdom Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 20 June 1994 and the applicant's memorial on 24 June. On 15 September the applicant's submissions under Article 50 (art. 50) were received. The Secretary of the Commission subsequently informed the Court that the Delegate would make his comments at the hearing.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 24 October 1994. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

– for the Government
Mr M. Eaton, Foreign and Commonwealth Office, *Agent*,
Mr A. Moses, QC, *Counsel*,
Mr H. Giles, Home Office,
Mr P. Vallance, Home Office,
Mr S. Jones, Home Office, *Advisers*;

– for the Commission
Mr Gaukur Jörundsson, *Delegate*;

– for the applicant
Mr B. Emmerson, *Counsel*,
Mr R. Atter, Solicitor,
Mr J. Cooper, *Adviser*.

The Court heard addresses by Mr Gaukur Jörundsson, Mr Emmerson and Mr Moses and also replies to questions put by the President and another judge.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

7. On 3 November 1986 Mr Welch was arrested for suspected drug offences. On 4 November he was charged in respect of offences concerning the importation of large quantities of cannabis. Prosecuting Counsel advised, prior to February 1987, that there was insufficient evidence to charge Mr Welch with possession of cocaine with intent to supply.

8. After further investigations, including forensic examinations, further evidence came to light and on 24 February 1987 the applicant was charged with the offence of possession with intent to supply cocaine alleged to have been committed on 3 November 1986. Subsequently, on 5 May 1987, he was charged with conspiracy to obtain cocaine within intent to supply in respect of activities which occurred between 1 January 1986 and 3 November.

9. On 24 August 1988, Mr Welch was found guilty on five counts and was given an overall sentence of twenty-two years' imprisonment. In addition, the trial judge imposed a confiscation order pursuant to the Drug Trafficking Offences Act 1986 ("the 1986 Act") in the amount of £66,914. In default of the payment of this sum he would be liable to serve a consecutive two years' prison sentence. The operative provisions of the 1986 Act had come into force on 12

January 1987. The Act applies only to offences proceedings for which were instituted after this date.

10. On 11 June 1990 the Court of Appeal reduced Mr Welch's overall sentence by two years. In addition it reduced the confiscation order by £7,000 to £59,914.

II. RELEVANT DOMESTIC LAW

11. The intended purpose of the 1986 Act was to extend existing confiscation powers to enable the court to follow drug trafficking money which had been "laundered" into legitimate property. In the words of the Secretary of State who introduced the Bill in the House of Commons:

> "By attacking the profits made from drug trafficking, we intend to make it much less attractive to enter the trade. We intend to help guard against the possibility that the profits from one trafficking operation will be used to finance others, and, not least, to remove the sense of injury which ordinary people are bound to feel at the idea of traffickers, who may have ruined the lives of children, having the benefit of the profits that they have made from doing so.
>
> ...
>
> We need the legislation because the forfeiture powers in existing law have proved inadequate. The courts cannot order the forfeiture of the proceeds of an offence once they have been converted into another asset – a house, stocks and shares, or valuables of any sort. The Operation Julie case was the most notorious example of the courts being unable to deprive convicted traffickers, as they wished, of the proceeds of their offences ... the Bill is designed to remedy those defects. It will provide powers for courts to confiscate proceeds even after they have been converted into some other type of asset." (Hansard of 21 January 1986, Cols 242 and 243)

A. Drug Trafficking Offences Act 1986

12. The relevant parts of the 1986 Act provide as follows:

> "1. Confiscation orders
>
> (1) ... where a person appears before the Crown Court to be sentenced in respect of one or more drug trafficking offences (and has not previously been sentenced or otherwise dealt with in respect of his conviction for the offence or, as the case may be, any of the offences concerned), the court shall act as follows:
>
> (2) the court shall first determine whether he has benefited from drug trafficking.
>
> (3) For the purposes of this Act, a person who has at any time (whether before or after the commencement of this section) received any payment or other reward in connection with drug trafficking carried on by him or another has benefited from drug trafficking.
>
> (4) If the court determines that he has so benefited, the court shall, before sentencing ... determine ... the amount to be recovered in his case by virtue of this section.
>
> (5) The court shall then in respect of the offence or offences concerned –

(a) order him to pay that amount ...

...

2. Assessing the proceeds of drug trafficking

(1) For the purposes of this Act –

(a) any payments or other rewards received by a person at any time (whether before or after the commencement of section 1 of this Act) in connection with drug trafficking carried on by him or another are his proceeds of drug trafficking, and

(b) the value of his proceeds of drug trafficking is the aggregate of the values of the payments or other rewards.

(2) The court may, for the purpose of determining whether the defendant has benefited from drug trafficking and, if he has, of assessing the value of his proceeds of drug trafficking, make the following assumptions, except to the extent that any of the assumptions are shown to be incorrect in the defendant's case.

(3) Those assumptions are –

(a) that any property appearing to the court –

(i) to have been held by him at any time since his conviction, or

(ii) to have been transferred to him at any time since the beginning of the period of six years ending when the proceedings were instituted against him,

was received by him, at the earliest time at which he appears to the court to have held it, as a payment or reward in connection with drug trafficking carried on by him,

(b) that any expenditure of his since the beginning of that period was met out of payments received by him in connection with drug trafficking carried on by him, and

(c) that, for the purpose of valuing any property received or assumed to have been received by him at any time as such a reward, he received the property free of any other interests in it ...

...

4. Amount to be recovered under confiscation order

(1) Subject to subsection (3) below, the amount to be recovered in the defendant's case shall be the amount the Crown Court assesses to be the value of the defendant's proceeds of drug trafficking.

(2) If the court is satisfied as to any matter relevant for determining the amount that might be realised at the time the confiscation order is made ... the court may issue a certificate giving the court's opinion as to the matters concerned and shall do so if satisfied as mentioned in subsection (3) below.

(3) If the court is satisfied that the amount that may be realised at the time the confiscation order is made is less than the amount the court assesses to be the value of his proceeds of drug trafficking, the amount to be recovered in the defendant's case under the confiscation order shall be the amount appearing to the court to be the amount that might be so realised."

B. Discretion of the trial judge

13. In determining the amount of the confiscation order the trial judge may take into consideration the degree of culpability of the offender. For example, in R. v. Porter ([1990] 12 Criminal Appeal Reports (sentencing) 377) the

Court of Appeal held that where more than one conspirator was before the court the total proceeds of a drug trafficking conspiracy could be unequally allocated as their respective share of the proceeds if there was evidence that the defendants had played unequal roles and had profited to a different extent. Similarly, in the present case, the trial judge made a much smaller order in respect of the applicant's co-defendant in recognition of his lesser involvement in the offences.

C. Imprisonment in default of payment

14. After a confiscation order has been made, the Crown Court decides upon the period of imprisonment which the offender has to serve if he fails to pay. The maximum periods of imprisonment are provided for in section 31 of the Powers of Criminal Courts Act 1973. The maximum period for an order between the sums of £50,000 and £100,000 is two years.

D. Statements by domestic courts concerning the nature of forfeiture and confiscation provisions

15. Prior to the passing of the 1986 Act, Lord Salmon expressed the view that forfeitures of money had both a punitive and deterrent purpose (House of Lords decision in R. v. Menocal, [1979] 2 Weekly Law Reports 876).

16. The domestic courts have commented in various cases on the draconian nature of the confiscation provisions in the 1986 Act and have occasionally referred to the orders, expressly or impliedly, as constituting penalties (R. v. Dickens [1990] 91 Criminal Appeal Reports 164; R. v. Porter [1990] 12 Criminal Appeal Reports 377; In Re Lorenzo Barretto, High Court decision of 30 November 1992 and Court of Appeal decision of 19 October 1993).

In the Court of Appeal decision in the last-mentioned case, which concerned the question whether a power to vary confiscation orders introduced by the Criminal Justice (International Co-operation) Act 1990 could be applied retrospectively, the Master of the Rolls (Sir Thomas Bingham) stated as follows (at p. 11):

> "While it is true that a confiscation order is made before sentence is passed for the substantive offence, and the term of imprisonment in default is passed to procure compliance and not by way of punishment, these are in a broad sense penal provisions, inflicting the vengeance of society on those who have transgressed in this field."

17. However, the domestic courts have also referred to the confiscation provisions as not being punitive but reparative in purpose (Re T (Restraint Order; Disclosure of Assets) [1992] 1 Weekly Law Reports 949).

PROCEEDINGS BEFORE THE COMMISSION

18. Mr Welch lodged his application (no. 17440/90) with the Commission on 22 June 1990. He complained under Article 7 (art. 7) of the Convention that the confiscation order imposed upon him constituted the imposition of a retrospective criminal penalty. He further complained of violations of his rights under Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the Convention.

19. On 12 February 1993 the Commission declared the applicant's complaint admissible in so far as it raised issues under Article 7 (art. 7) of the Convention. The remainder of the application was declared inadmissible.

In its report of 15 October 1993 (Article 31) (art. 31), it expressed the opinion that there had been no violation of Article 7 (art. 7) (seven votes to seven with the casting vote of the Acting President being decisive). The full text of the Commission's opinion and of the two dissenting opinions contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

20. In their memorial, the Government requested the Court to find that there has been no violation of Article 7 (art. 7) of the Convention in the present case.

21. The applicant submitted in his memorial that his rights under Article 7 (art. 7) have been violated by the application of an enactment which was expressly retrospective in its effect.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 7 PARA. 1 (art. 7-1) OF THE CONVENTION

22. The applicant complained that the confiscation order that was made against him amounted to the imposition of a retrospective criminal penalty, contrary to Article 7 (art. 7) which reads as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national 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 (art. 7) 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."

He emphasised that his complaint was limited to the retrospective application of the confiscation provisions of the 1986 Act and not the provisions themselves.

23. He submitted that in determining whether a confiscation order was punitive the Court should look beyond its stated purpose and examine its real effects. The severity and extent of such an order identified it as a penalty for the purposes of the Convention.

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1 Note by the Registrar: For practical reasons this annex will appear only with the printed version of the judgment (volume 307-A of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

In the first place, under section 2 (3) of the 1986 Act the national court was entitled to assume that any property which the offender currently held or which had been transferred to him in the preceding six years, or any gift which he had made during the same period, were the proceeds of drug trafficking (see paragraph 12 above). In addition by seeking to confiscate the proceeds, as opposed to the profits, of drug dealing, irrespective of whether there had in fact been any personal enrichment, the order went beyond the notions of reparation and prevention into the realm of punishment.

Moreover, the fact that an order could not be made unless there had been a criminal conviction and that the degree of culpability of an accused was taken into consideration by the court in fixing the amount of the order also pointed in the direction of a penalty. Indeed prior to the passing of the 1986 Act the courts had regarded forfeiture orders as having the dual purpose of punishment and deterrence (see paragraph 15 above). Finally, confiscation orders had been recognised as having a punitive character in various domestic court decisions (see paragraph 16 above) and in several decisions of the Supreme Court of the United States concerning similar legislation (Austin v. the United States and Alexander v. the United States, decisions of 28 June 1993, 125 Led 2d 441 and 488).

24. The Government contended that the true purpose of the order was twofold: firstly, to deprive a person of the profits which he had received from drug trafficking and secondly, to remove the value of the proceeds from possible future use in the drugs trade. It thus did not seek to impose a penalty or punishment for a criminal offence but was essentially a confiscatory and preventive measure. This could be seen from the order in the present case, which had been made for the purpose of depriving the defendant of illegal gains. Had no order been made, the money would have remained within the system for use in further drug-dealing enterprises.

It was stressed that a criminal conviction for drug trafficking was no more than a "trigger" for the operation of the statutory provisions. Once the triggering event had occurred, there was no further link with any conviction. Thus, the court could consider whether a person had benefited from drug trafficking at any time and not merely in respect of the offence with which he had been charged. Moreover, an order could be made in relation to property which did not form part of the subject-matter of the charge against the defendant or which had been received by him in a period to which no drug-dealing conviction related.

Furthermore, the fact that a period of imprisonment could be imposed in default of payment could be of no assistance in characterising the nature of the confiscation order since there were many non-penal court orders which attracted such a penalty in the event of non-compliance. Similarly the harsh effect of the order was of no assistance, since the effectiveness of a preventive measure required that a drug trafficker be deprived not only of net profits but of money which would otherwise remain available for use in the drug trade.

25. For the Commission, the order in the present case was not punitive in nature but reparative and preventive and, consequently, did not constitute a penalty within the meaning of Article 7 para. 1 (art. 7-1) of the Convention.

26. The Court first observes that the retrospective imposition of the confiscation order is not in dispute in the present case. The order was made following a conviction in respect of drugs offences which had been committed before the 1986 Act came into force (see paragraph 11 above). The only question to be determined therefore is whether the order constitutes a penalty within the meaning of Article 7 para. 1 (art. 7-1), second sentence.

27. The concept of a "penalty" in this provision is, like the notions of "civil rights and obligations" and "criminal charge" in Article 6 para. 1 (art. 6-1), an autonomous Convention concept (see, inter alia, – as regards "civil rights" – the X v. France judgment of 31 March 1992, Series A no. 234-C, p. 98, para. 28, and – as regards "criminal charge" – the Demicoli v. Malta judgment of 27 August 1991, Series A no. 210, pp. 15-16, para. 31). To render the protection offered by Article 7 (art. 7) effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision (see, mutatis mutandis, the Van Droogenbroeck v. Belgium judgment of 24 June 1982, Series A no. 50, p. 20, para. 38, and the Duinhof and Duijf v. the Netherlands judgment of 22 May 1984, Series A no. 79, p. 15, para. 34).

28. The wording of Article 7 para. 1 (art. 7-1), second sentence, indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a "criminal offence". Other factors that may be taken into account as relevant in this connection are 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.

29. As regards the connection with a criminal offence, it is to be observed that before an order can be made under the 1986 Act the accused must have been convicted of one or more drug-trafficking offences (see section 1 (1) of the 1986 Act at paragraph 12 above). This link is in no way diminished by the fact that, due to the operation of the statutory presumptions concerning the extent to which the applicant has benefited from trafficking, the court order may affect proceeds or property which are not directly related to the facts underlying the criminal conviction. While the reach of the measure may be necessary to the attainment of the aims of the 1986 Act, this does not alter the fact that its imposition is dependent on there having been a criminal conviction.

30. In assessing the nature and purpose of the measure, the Court has had regard to the background of the 1986 Act, which was introduced to overcome the inadequacy of the existing powers of forfeiture and to confer on the courts the power to confiscate proceeds after they had been converted into other forms of assets (see paragraph 11 above). The preventive purpose of confiscating prop-

erty that might be available for use in future drug-trafficking operations as well as the purpose of ensuring that crime does not pay are evident from the ministerial statements that were made to Parliament at the time of the introduction of the legislation (see paragraph 11 above). However it cannot be excluded that legislation which confers such broad powers of confiscation on the courts also pursues the aim of punishing the offender. Indeed the aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment.

31. In this connection, confiscation orders have been characterised in some United Kingdom court decisions as constituting "penalties" and, in others, as pursuing the aim of reparation as opposed to punishment (see paragraphs 16 and 17 above). Although on balance these statements point more in the direction of a confiscation order being a punitive measure, the Court does not consider them to be of much assistance since they were not directed at the point at issue under Article 7 (art. 7) but rather made in the course of examination of associated questions of domestic law and procedure.

32. The Court agrees with the Government and the Commission that the severity of the order is not in itself decisive, since many non-penal measures of a preventive nature may have a substantial impact on the person concerned.

33. However, there are several aspects of the making of an order under the 1986 Act which are in keeping with the idea of a penalty as it is commonly understood even though they may also be considered as essential to the preventive scheme inherent in the 1986 Act. The sweeping statutory assumptions in section 2 (3) of the 1986 Act that all property passing through the offender's hands over a six-year period is the fruit of drug trafficking unless he can prove otherwise (see paragraph 12 above); the fact that the confiscation order is directed to the proceeds involved in drug dealing and is not limited to actual enrichment or profit (see sections 1 and 2 of the 1986 Act in paragraph 12 above); the discretion of the trial judge, in fixing the amount of the order, to take into consideration the degree of culpability of the accused (see paragraph 13 above); and the possibility of imprisonment in default of payment by the offender (see paragraph 14 above) – are all elements which, when considered together, provide a strong indication of, inter alia, a regime of punishment.

34. Finally, looking behind appearances at the realities of the situation, whatever the characterisation of the measure of confiscation, the fact remains that the applicant faced more far-reaching detriment as a result of the order than that to which he was exposed at the time of the commission of the offences for which he was convicted (see, mutatis mutandis, the Campbell and Fell v. the United Kingdom judgment of 28 June 1984, Series A no. 80, p. 38, para. 72).

35. Taking into consideration the combination of punitive elements outlined above, the confiscation order amounted, in the circumstances of the present case, to a penalty. Accordingly, there has been a breach of Article 7 para. 1 (art. 7-1).

36. The Court would stress, however, that this conclusion concerns only the retrospective application of the relevant legislation and does not call into question in any respect the powers of confiscation conferred on the courts as a weapon in the fight against the scourge of drug trafficking.

II. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

37. Article 50 (art. 50) provides as follows:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

38. The applicant claimed an unspecified amount of compensation and/or restitution of the sum confiscated. However, in the course of the hearing before the Court he pointed out that the confiscation order had not yet been enforced because of the present proceedings.

The Government, like the Delegate of the Commission, made no observations.

39. The Court considers that in these circumstances the matter is not ready for decision. The question must accordingly be reserved and the further procedure fixed, with due regard to the possibility of an agreement being reached between the Government and the applicant (Rule 54 paras. 1 and 4 of Rules of Court A).

B. Costs and expenses

40. The applicant claimed £13,852.60 by way of costs and expenses in respect of the Strasbourg proceedings.

Neither the Government nor the Delegate of the Commission had any comments to make.

41. The Court considers that the sum is reasonable and that the full amount claimed should be awarded less the sums paid by way of legal aid.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 7 para. 1 (art. 7-1) of the Convention;
2. Holds that the respondent State is to pay, within three months, 13,852 (thirteen thousand eight hundred and fifty-two) pounds sterling and 60 (sixty) pence, together with any value-added tax that may be chargeable, for costs and expenses, less 10,420 (ten thousand four hundred and twenty) French francs to be converted into pounds sterling at the rate of exchange applicable on the date of delivery of the present judgment;

3. Holds that the question of the application of Article 50 (art. 50) of the Convention is not ready for decision as regards damage;

   accordingly,

   (a) reserves the said question in that respect;

   (b) invites the Government and the applicant to submit,within the forthcoming three months, their writtenobservations on the matter and, in particular, tonotify the Court of any agreement they may reach;

   (c) reserves the further procedure and delegates to thePresident of the Chamber the power to fix the sameif need be.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 9 February 1995.

Herbert PETZOLD
Registrar

Rolv RYSSDAL
President

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the concurring opinion of Mr De Meyer is annexed to this judgment.

R. R.

H. P.

CONCURRING OPINION OF JUDGE DE MEYER

There could be no doubt that the confiscation order inflicted upon the applicant was a sanction following conviction for a criminal offence, and that it had the nature of a penalty.

Taking into consideration factors such as its "purpose", its "characterisation under national law", its "severity", or the elements involved in the making of the order referred to in paragraph 33 of the judgment, could not be "relevant in this connection".

I did not need these "other factors" (see paragraph 28 of the present judgment) to reach a conclusion which was, in my view, self-evident.

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