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TEHNICAL PAPER:

EUROPEAN COURT ON HUMAN RIGHTS JURISPRUDENCE AND CIVIL RECOVERY OF ILLICITLY OBTAINED ASSETS (CONFISCATION IN REM)

Prepared by Ms Arvinder Sanbei, CoE expert

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For any additional information please contact:
Economic Crime Unit
Information Society and Action against Crime Directorate
Directorate General I - Human Rights and Rule of Law
Council of Europe
F-67075 Strasbourg Cedex FRANCE
Tel: +33 388 41 29 76/Fax +33 390 21 56 50
Email: lado.lalicic@coe.int
Web: www.coe.int/economiccrime

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INTRODUCTION

Confiscation[1] of both proceeds and instrumentalities of crime is increasingly becoming an integral part of sentencing policies in a number of states as a means of depriving the convicted person from enjoying the fruits of his criminality. Although states had in place confiscation provisions (for example, the forfeiture and destruction orders for drugs, firearms etc), the push to put in place comprehensive confiscation frameworks with corresponding law enforcement measures is largely attributable to a number of international and regional initiatives.

The established, and more readily acceptable, mechanism for confiscation is through criminal proceedings where, at the end of a criminal trial, the Court may upon the application of the prosecution, or as a requirement of law, consider whether property derived from such criminal activity should be forfeited. This is the usual course of events and should be the preferred option where the accused is found in the territory of a State and there is sufficient evidence to support a criminal prosecution.

However, there are instances when such a course of events may not be available to the prosecuting agencies of a State. It then begs the question whether, in such circumstances, it would be sufficient to say 'nothing can be done' and allow the proceeds of the criminal activity to be enjoyed by the suspect (and his associates) abroad or permit its 'inheritance' by successors. Such instances include:

1. the suspect has died
2. the suspect may have fled following the dissipation of his assets;
3. jurisdictional privilege (sometimes referred to as 'domestic immunity') may be a bar to proceedings;
4. there is insufficient evidence to mount a criminal prosecution;
5. the investigation is obstructed or frustrated;
6. the suspect is abroad and a request for extradition either cannot be made (due to lack of bilateral/multilateral arrangement) or the requested State refuses to extradite;
7. the defendant is acquitted following trial (it is important to emphasise that civil forfeiture proceedings do not fall foul of the principle of *res judicata*.)

Civil forfeiture is, therefore, the mechanism by which, in the absence of criminal proceedings, the proceeds of criminal activity can be recovered so as to deprive the person of ill gotten gains. The action is brought against the property that represents the benefit of the unlawful activity, and not against the person.

Civil forfeiture has been in place for some time and has generally been used for organised crime, drug trafficking and certain other crimes in Italy since 1956 and the USA since 1970. Over the past decade or so, it has gained popularity in a number of jurisdictions to allow for a wider recovery of assets (Australia, Canada, Fiji, New Zealand, the Republic of Ireland, South Africa, USA, UK etc) and although very much a common law favourite, it has come to be adopted by some civil law countries (Columbia, Italy, the Netherlands, the Philippines) as a means of recovering assets and instrumentalities in order to compensate victims for losses, where it is not possible to prosecute an individual for the underlying conduct.

[1] Some states prefer to use the term 'forfeiture' rather than confiscation.

All these laws make provision for forfeiture of assets connected to crime without any requirement for a conviction and require the authority exercising these powers to establish that, on the balance of probabilities, the assets claimed derive from unlawful conduct. In doing so, the authority must also prove that a criminal offence was committed, and that the property derives from that offence. Evidence of a specific offence is unnecessary, but the authority must at least prove the class of crime said to constitute 'unlawful conduct' (for example theft, fraud, bribery etc).

The potential advantages of civil forfeiture include:

1. As a criminal conviction is not a condition precedent, it cannot be thwarted by immunities, inability to extradite, the suspect who is beyond reach and insufficient evidence on the criminal standard.

2. It allows for asset recovery where, because of the death or absence of the suspect(s), confiscation and return would not otherwise be possible.

3. It allows for confiscation where an individual(s) has been tried before a criminal court but acquitted, perhaps through a perverse verdict or because the evidence, although probative, fell short of the criminal standard of proof.

4. Where difficulties have been encountered in trying to mount a criminal prosecution (or in trying to secure extradition) because of political or high level interference in the criminal justice system. It is much more difficult to sabotage an application which only needs to be proved on the lower, civil standard.

5. It complements the system of post-conviction confiscation and completes a comprehensive approach to asset recovery and repatriation.

RELEVANT INTERNATIONAL INSTRUMENTS

The international community has through a number of initiatives(conventions, protocols and Framework Decisions)[2] placed an obligation on States Parties to put in provisions for the confiscation of proceeds and instrumentalities of crime. Although some of the conventions, in particular UNTOC and UNCAC are silent on the need for a conviction as a precondition for the confiscation and seizure of proceeds of crime provided the proceeds are derived from a predicate offence, most legal systems require a criminal conviction as a condition precedent. The development of non-conviction based confiscation has been very much a national initiative; however, the 2008 '*Communication from the Commission to the European*

[2] CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism; EU Framework Decisions: 2001/500/JHA; 2003/577/JHA; 2005/212/JHA; 2006/783/JHA; UN Convention against Transnational Organized Crime (UNTOC) and UN Convention against Corruption

Parliament and the Council"[3] recognises the need to extend the confiscation regime to include confiscation *in rem* with sufficient human rights safeguards[4]. It states:

Based on the practice in MS, the following ideas could be considered for discussion. :

3.3.1. Confiscation without a criminal conviction (civil confiscation)

Under most MS jurisdictions confiscation is a sanction linked to a criminal conviction. However, a new legal instrument could introduce instances where confiscation takes place without a prior criminal conviction (thereby transposing FATF Recommendation 313 into EU legislation). For example:

(i) When there is a suspicion that assets are the proceeds of serious crimes, due to their disproportion with the declared income of their owner and to the fact that he/she has habitual contacts with known criminals. In this instance a case may be brought before a civil court (which may order the confiscation of assets) based on an assumption, on the balance of probabilities, that the assets may be derived from proceeds of crime. In these cases the burden of proof is reversed and the alleged criminal should prove the legitimate origin of the assets

(ii) When the person suspected of certain serious crimes is dead, fugitive for a certain period of time or otherwise not available for prosecution.

(iii) In certain cases, when cash is seized by customs authorities in breach of the EC Regulation on Cash Controls. An administrative decision may empower authorities to detain the amounts above EUR 10 000 which were not declared when entering or leaving the EU. However, if these amounts need to be confiscated (for example as the proceeds from tax evasion) a court order is ultimately needed. As tax evasion is not prosecuted in all EU MS with criminal proceedings, this may be a further case of civil confiscation.

CHALLENGES TO CIVIL FORFEITURE (Confiscation in rem)

The objections to civil forfeiture, which are primarily founded in human rights considerations, have been considered by national appellate and constitutional courts[5] in those countries that permit civil forfeiture. In addition, for those states that are party to the European Convention on Human Rights, the European Court of Human Rights (EctHR)[6] has considered the legality of confiscation (both conviction and non-conviction based) in a number of cases. The overarching consensus of both the national courts and the ECtHR is that civil forfeiture is compatible with human rights law. It must be remembered that the development of non-conviction based confiscation has been very much a national initiative, therefore, an examination of the decisions of national courts is equally relevant and important.

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3 20.11.2008, COM(2008) 766 final, "*Proceeds of organised crime, Ensuring that "crime does not pa*y"'

4 Paragraph 3.3 of the Report

5 In US v Ursery (1996) 135 L Ed 2D549, In the Republic of Ireland: Gilligan v CAB [2001] IESC 82

6 Engel v The Netherlands (No 1) (1976) 1 EHRR 647

The objections can be summarised as follows:

1. Proceedings *'in rem'* are a return to a notion which had largely disappeared from the common law by the end of the 18th century (namely civil recovery based on property and not the individual) and might be viewed as archaic and lacking in the modern protections afforded to property holders.

(3) It contravenes at least the spirit of 'innocent until proved guilty', with few of the safeguards available to the defendant in the criminal court.

(4) The confiscation of 'criminal' property should necessarily involve a criminal finding of guilt against the person owning or holding the property in question.

(5) There is a danger that a person whose assets are confiscated via the civil route will be viewed as 'convicted' by the public and the media, even though the finding will be that the property is 'probably' criminal property or proceeds.

(6) As a measure which is in fact punitive, it is not proportionate in the sense recognised by the ECHR and other international instruments which address human rights and fundamental freedoms.

NATURE OF IN REM PROCEEDINGS: CRIMINAL OR CIVIL?

Although criminality is at the core of this type of proceedings, they have not been found to amount to the bringing of criminal proceedings. How does a court determine if such proceedings are indeed civil proceedings? The ECtHR in *Engel v The Netherlands (No 1) (1976) 1 EHRR 647* laid down 3 principal criteria for civil proceedings:

(3) the manner in which the domestic state classifies the proceedings (this is a starting point and not a determinative one. Simple classification of the proceedings as civil proceedings is not sufficient; courts will need to examine the true nature of the proceedings);
(4) the nature of the conduct in question classified objectively;
(5) the severity of any possible penalty

In *Walsh v UK*[7]*,* the applicant (W) had been the subject of a recovery order in the UK and complained to the ECtHR on the following grounds:

1. the recovery proceedings are criminal proceedings and fall within Article 6(1)
2. the proceedings were in breach of Article 6(2) and the presumption of innocence had been denied to him as the civil standard, not the criminal standard, applied.
3. the proceedings may be conducted entirely upon affidavit evidence which was contrary to Article 6(3)(d)

[7] Application no. 43384/05 (November 2006)

4. he was subject to a penalty imposed in respect of conduct that predated the entry into force of POCA (retrospectivity)
5. the recovery order violated Article 1 of Protocol No. 1

In 2003, the applicant (W) was tried, together with his co-defendants for offences of dishonesty and a restraint order was placed on his property so that, if convicted, a confiscation order could be made. W was acquitted and the restraint order was discharged.

The Asset Recovery Agency (then the body responsible for asset recovery in England) commenced recovery proceedings for £70,250 (said to have been paid to his solicitor in 2001 to buy a house) and £5,969.10 held in a bank account, on the grounds that the monies were the proceeds of unlawful conduct within the meaning of the Proceeds of Crime Act 2002 ("POCA").

At an interlocutory hearing, W contended that the proceedings for recovery of his assets were not "civil" but criminal in nature and, therefore, the guarantees of Articles 6 (1) and (2)applied, in particular, the standard of proof. The High Court and Court of Appeal, based on an examination of domestic and Strasbourg authority (*Engel* criteria), rejected his claim and concluded that the proceedings were not criminal in nature:

"The essence of article 6 in the criminal dimension is the charging of a person with a criminal offence for the purpose of securing a conviction with a view to exposing that person to criminal sanction. These proceedings are obviously and significantly different from that type of application. They are not directed towards him in the sense that they seek to inflict punishment beyond the recovery of assets that do not lawfully belong to him. As such, while they will obviously have an impact on the appellant, these are predominantly proceedings in rem. They are designed to recover the proceeds of crime, rather than to establish, in the context of criminal proceedings, guilt of specific offences. The cumulative effect of the application of the tests in Engel is to identify these clearly as civil proceedings."

The House of Lords refused leave to appeal, and in 2006 a civil recovery order was made against W based on his earlier convictions (and not for the offences for which he had been acquitted) and criminal lifestyle and the property had been obtained through unlawful conduct.

The ECtHR in dismissing his complaint, made the following observations:

In applying the three guiding criteria[8] set out in *Engel and Others v. the Netherlands ,* the recovery proceedings did not amount to a determination of a criminal charge and, therefore, fell outside Article 6(1):

> *According to domestic law, recovery proceedings are regarded as civil, not criminal. The proceedings may have followed an acquittal for specific criminal offences but were separate and distinct in timing, procedure and content (cf. Phillips v. the United Kingdom, no. 41087/98, §§ 32 and 39, ECHR 2001 VII).*

[8] the classification of the matter in domestic law, the nature of the charge and the penalty to which the person becomes liable

The domestic courts considered that the purpose of the proceedings was not punitive or deterrent but to recover assets which did not lawfully belong to the applicant (see also Butler v. the United Kingdom (dec.), no. 41661/98, ECHR 2002 VI.

There was no finding of guilt of specific offences and that the High Court judge in making the order was careful not to take into account conduct in respect of which the applicant had been acquitted of any criminal offence.

The recovery order was not punitive in nature; while it no doubt involved a hefty sum, the amount of money involved is not itself determinative of the criminal nature of the proceedings (see Porter v. the United Kingdom, (dec.), no. 15814/02, 8 July 2003, where the applicant was liable to pay some GBP 33 million in respect of financial losses to the local authority during her mandate as leader).

In respect of the two other remaining grounds, the Court in dismissing those came to the view that Article 7 (retrospectivity) was inapplicable as the proceedings did not involve the determination of a criminal charge, and as W had not previously complained (before the domestic courts) that there had been an interference with his property rights under Article 1 of Protocol No. 1 (right to peaceful enjoyment of possessions) he had failed to exhaust domestic remedies on this ground.

A similar approach is to be found in the decisions of national courts:

US v Ursery (1996) 135 L Ed 2D549 (USA):

In the US, the importance of categorisation between criminal and civil has principally arisen in the context of the double jeopardy prohibition in the 5th Amendment. The defendants had already been prosecuted, yet faced civil forfeiture proceedings. The 5th Amendment (double jeopardy clause) prohibits a second prosecution for the same offence. The issue was therefore whether a civil forfeiture action amounted to a second prosecution. The Supreme Court, by a majority, held it did not[9].

In *Charrington [2005] EWCA Civ 335 (UK)*, the Court of Appeal explained that as there was no charge, arrest, conviction, penalty or criminal record, then absent such hallmarks, the proceedings were civil.

Gilligan v CAB [2001] IESC 82 by the Irish Supreme Court which explained that the civil forfeiture law:

> "*concerns the right of the State to take, or the right of a citizen to resist the State in taking, property which is proved on the balance of probabilities to represent the proceeds of crime. In general such a forfeiture is not a punishment and its operation does not require criminal procedures..... a person in possession of the proceeds of crime can have no constitutional grievance if deprived of their use*."

[9] One dissenting opinion

A similar approach was adopted by the Canadian courts in *Chatterjee v Ontario 2009 SCC 19.*

PRESUMPTION OF INNOCENCE: ARTICLE 6(2) OF ECHR

Butler v UK 41661/98, 27th June 2002: The case concerned a cash seizure of £239,010.The applicant challenged the forfeiture on two grounds. First, that his right to a presumption of innocence under Article 6(2) had been violated because he he had been compelled to prove that the money was not related to drug trafficking to the criminal standard. Secondly, the order deprived him of the enjoyment of his property (Article 1 Protocol 1) without the safeguards applicable to the criminal process. The true nature of such proceedings is that they are criminal and must, therefore, have the necessary safeguards. Furthermore, there was no public interest justification for such forfeiture.

The UK Government submitted that there was no evidence to substantiate his claim that he had won the money from betting since 1994 and, moreover, at the time of the forfeiture he was on social security.

The ECtHR observed that cash forfeiture was a preventive measure and cannot be compared to a criminal sanction. It is designed to take money out of circulation and Article 6 did not apply to such proceedings

In relation to Article1 of Protocol I, the Court applied the test for restrictive rights and considered whether the measure in this case was proportionate. The Court concluded that as drug trafficking is of serious concern in member states, its policy must be capable of balancing the rights of the individual with the wider community interest. The Act gave clear powers to the officers and there was no unfettered discretion to seize and forfeit. Furthermore, the actions of the officers were subject to judicial scrutiny, and the courts weighed the evidence before ordering seizure. The interference with his property rights was not, therefore, a disproportionate interference bearing in mind the balancing exercise between community and him.

In *Geerings v The Netherlands*[10], the applicant had been tried and convicted in The Netherlands for offences of dishonesty (theft, handling stolen goods attempted burglary and membership of a criminal organisation). On appeal, the court quashed his conviction in relation to some of the offences on the basis of insufficient evidence. In separate proceedings, the prosecutor sought a confiscation order in respect of the offences for which he had been acquitted on the grounds 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 objected to the order in so far as it related to the offences for which he had been acquitted.

The Regional Court refused the confiscation order, but on appeal, the Court of Appeal granted the confiscation order on the basis that the property had been derived from criminality. The Supreme Court in upholding the confiscation order set out its reasons:

"..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

[10] Application no. 30810/03, 1 March 2007

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 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 having examined whether, and has found that, the statutory conditions, ... 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 for considering those offences, in the framework 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.

….The Supreme Court would add that this is not incompatible with Article 6 § 2 of the Convention..."

The ECtHR upheld G's complaint that the confiscation order violated his right to be presumed innocent under Article 6 (2) given that he had been acquitted. The Court emphasised that whilst the presumption of innocence does not apply to confiscation proceedings, a confiscation order granted in relation to those charges for which the applicant had been acquitted amounted to a '*determination of the applicant's guilt without the applicant having been "found guilty according to law*"'

The Court drew a distinction between those cases where a confiscation order may be granted where an applicant was unable to provide an adequate explanation for the provenance of his assets (*Phillips v. the United Kingdom*[11] and *Van Offeren v. the Netherlands*[12]*),* and the present case where '*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)'*

Since the above decision of the ECtHR, the UK Supreme Court in *Gale & another v SOCA*[13] examined the application of the presumption of innocence in civil recovery proceedings under Part 5 of the Proceeds of Crime Act 2002.

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11 no. 41087/98, § 35, ECHR 2001 V

12 (dec.), no. 19581/04, 5 July 2005

13 [2011] UKSC 49

The Serious and Organised Crime Agency (SOCA)had obtained a recovery order under Part 5 of the Proceeds of Crime Act 2002 (civil forfeiture) in the sum of some £2million as property derived from criminal activity by either David Gale or his former wife Teresa Gale.

David Gale had been prosecuted and acquitted in Portugal for offences of drug trafficking, money laundering and tax evasion; similar proceedings in Spain had been discontinued.

Gale appealed the grant of the recovery order on the basis that it infringed his right to a fair trial under Article 6 of ECHR as the standard of proof ('balance of probabilities') was lower than that which would be applicable in a criminal trial (beyond reasonable doubt) and that notwithstanding the language of the Act, the courts should adopt the higher criminal standard. Furthermore, in granting the recovery order, the underlying presumption was that D was guilty of criminal conduct and this ran counter to the presumption of innocence, particularly as D had been acquitted in Portugal.

The Supreme Court considered the application of article 6(2) after a person has been acquitted in criminal proceedings, and civil proceedings are instituted as in the present case.

The Court examined the decisions of the ECtHR where civil proceedings (for example for costs, compensation etc) have been instituted following an acquittal, and found that there was some inconsistency in the Strasbourg decisions on the application of Article 6(2) in such proceedings. A number of decisions clearly indicate that Article 6(2) is not engaged, whilst other decisions point to an infringement of Article 6(2), which makes it difficult for national courts to distil the principle. The Supreme Court described it as '*a confusing area of Strasbourg law would benefit from consideration by the Grand Chamber....Before the decision of the ECtHR in Geerings v The Netherlands (2007) 46 EHRR 1222 and the decision of the House of Lords in R v Briggs-Price [2009] AC 1026 the law was not in doubt. Confiscation proceedings that proceed on the basis that property in the hands of a convicted criminal was derived from other criminal activity did not involve the defendant being "charged with a criminal offence" in relation to the other offending, or engage article 6(2).'*

The Supreme Court distinguished the case from Geerings; the recovery order in the present case was not founded entirely on the Portuguese prosecution but was much wider, therefore, the '*procedural link between the criminal prosecution and the subsequent confiscation proceedings*' as identified by ECtHR in Geerings was not present.

Lord Dyson was of the view that neither the Geerings case nor R v Briggs-Price (UK decision) had any application to the present case, and found that *'there is no sufficient link between civil recovery proceedings under Part 5 of SOCA and any criminal proceedings to justify the application of article 6(2) to the Part 5 proceedings. Indeed, there is no link at all. The Part 5 proceedings are not a "direct sequel" or "a consequence and the concomitant" of any criminal proceedings. They are free-standing proceedings instituted whether or not there have been criminal proceedings against the respondent or indeed anyone at all.'*

Whilst Lord Dyson rejected the application of Article 6(2) to the recovery proceedings on the Engels test that the proceedings were civil and the '*respondent ...is not charge with any offence. He does not acquire a criminal conviction...at the conclusion of the Part 5 proceedings...These include the express provision that the standard of proof is on the balance of probabilities. The nature of the proceedings is essentially different from that of*

criminal proceedings. The claim can be brought whether a respondent has been convicted or acquitted, and irrespective of whether any criminal proceedings have been brought at all....'

However, whilst he shared some of the concerns of the lack of clarity in the ECtHR decisions, he was of the view that Strasbourg jurisprudence identified two situations in which Article 6(2) would be engaged in subsequent civil proceedings. The first is where the civil and criminal proceedings are 's*o closely connected ...that the Convention protections available in the criminal proceedings should also be available in the civil proceedings. If the outcome of the criminal proceedings is decisive for the "civil" proceedings, then there is a sufficiently close connection for article 6(2) to apply'.*

Secondly, where the nature of the proceedings (the Engels test) are not the determining factor, and neither is there a close link between the criminal and civil proceedings, but where the decision of the court has the effect of '*imputing the criminal liability of the [applicant]", that of itself will be sufficient to create the necessary link for article 6(2) to apply in those proceedings'.*

INTERFERENCE WITH THE RIGHT TO PROPERTY

The right to the peaceful enjoyment of property[14] '*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,...covers deprivation of possessions and subjects it to certain conditions; the third rule, ...recognises that the Contracting States are entitled, inter alia, to control the use of property in accordance with general interest*...'[15]

As a restricted right t is, therefore, capable of being subject to interference, provided such interference is:

provided by law (legality)
pursues a legitimate aim (necessity)
proportionate

In *Raimondo v Italy*[16], the prosecutor commenced criminal proceedings against R for being suspected of belonging to a mafia-type organisation and applied for a restraint order in respect of his assets (land, buildings & cars). R was subsequently acquitted. In the interim the district court had discharged the restraint order in respect of some of his assets, but ordered the confiscation of the remaining on the basis that the assets had not been acquired lawfully. R appealed and the Court of Appeal ordered restitution of the property confiscated.

R applied to the Commission and complained, *inter alia*,:

- breach of Article 6(1) (length of restraint/confiscation proceedings);
- Interference with property (Article1, Protocol 1)

14 contained in Article 1 of Protocol 1 of ECHR

15 Paragraph 28, Ismayilov v Russia (Application no 30352/03), 6 April 2009

16 12954/87, 22nd February 1994:

- damage to property arising out of negligence

The ECtHR found that there had been no violation of Article 1 of Protocol 1, and made the following observations:

- seizure did not purport to deprive the applicant of the property but to prevent his using it;
- a provisional measure was intended to ensure that property which represents proceeds is available for confiscation, if necessary.
- In the present case, it related to 'mafia' related offences.
- temporary seizure cannot be said to be disproportionate.
- confiscation pursued a legitimate aim and served a general public interest; that of depriving the person convicted of illegitimate property
- confiscation is an 'effective and necessary weapon' in such cases
- seizure/confiscation invariably includes some damage, and there was no evidence adduced to show that the damage was exceptional.
- however, there was a breach of Article 1 Protocol 1 in respect of some of the assets on the basis that they had remained on the register long while after the court had ordered their discharge. This interference was not provided by law and neither was it necessary to 'control the use of the property...'

Similarly in *Arcuri v Italy*[17]*,* Arcuri was suspected of being a member of a criminal organisation engaged in drug trafficking. The prosecutor applied for preventive measures and sought seizure of his assets on the basis of the discrepancy between his assets[18] and financial position when compared with his legitimate business/income. Arcuri had transferred a number of his assets to his wife and children.

The special division of the court in Turin came to the view that the evidence pointed to '*at least part of the first applicant's considerable fortune had been unlawfully acquired.*..'

The Turin Court of Appeal upheld the decision and also came to the view that the family's fortunes had been amassed through proceeds of criminal offences. The relevant law in Italy permits a court to issue an preventive order where there is '*sufficient circumstantial evidence ...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*...'

The complaint of the Arcuris' rested on two grounds:

- the preventive measure infringed his right to the peaceful enjoyment of his possessions (Article 1 of Protocol 1)
- the proceedings were inherently unfair and in breach of Article 6(1) and (3) of ECHR

17 52024/99, 5th July 2001:

18 The assets included 8 vehicles, several plots of land and flats, 2 private company shares and a number of documents

The ECtHR recognised that confiscation does indeed amount to an interference with the right to peaceful enjoyment of possessions, however, Article 1 of Protocol 1 permits Member States to adopt "*such laws as it deems necessary to control the use of property in accordance with the general interest", provided the interference was prescribed by law, is necessary and proportionate. Therefore, where the 'impugned measure forms part of the 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....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...particularly the confiscation measure...may appear essential*...."

The Court re-emphasised the preventive nature of such proceedings which do not any determination of guilt or otherwise and are, therefore, not criminal proceedings.

PROPORTIONALITY

As a general rule, confiscation laws are generally held to be proportionate, but where they impose an excessive burden on the citizen[19] or where high value assets are the subject of an order and there is a tenuous or weak connection to the criminal conduct (usually in relation to instrumentalities), the courts have found such confiscation in rem actions to be disproportionate. Examples include:

(1) forfeiture of a car because it was being driven by a drunk driver. *(NDPP v Vermaak (1996) 386/06 (South Africa);* however in Canada and the US, the courts were of the view that forfeiture of the car in similar instances was not disproportionate.

(2) an order forfeiting a factory running a legitimate business simply because unlicensed gaming machines were in the rest-room used by the workers *(Mohunram v NDPP [2007] 2 ACC 4 (South Africa).*

(3) *Director of ARA v John & Lord [2007] EWHC 360* (UK)*:* the court found that it was doubtful that monies received from unlicensed street trading would amount to property obtained through unlawful conduct as the penalty for unlicensed trading is set by Parliament, and the sentence must be proportionate to the offender's culpability. The court was of the view that 'i*t cannot have been the intention of parliament that a breach of regulatory statute for which, on conviction, a fine of £50 is appropriate should automatically result in a civil recovery order in respect of all the money he received in making lawful sales while committing that offence*'.

[19] Jucys v Lithuania 5457/03, 8th January 2008: Mr Jucys was arrested in December 1995 on suspicion of smuggling mink furs. He was ultimately acquitted in 1997. The applicant's complaint was about the excessive length of the civil proceedings (over eight years and six months) to obtain compensation for the furs which had been auctioned by the State during the criminal proceedings against him. The Court held unanimously that there had been a violation of Article 1 of Protocol No. 1 (protection of property) & was awarded 25,000 euros (EUR) in respect of pecuniary and non-pecuniary damage and EUR 810.94 for costs and expenses

CAN CIVIL RECOVERY POWERS BE USED RETROSPECTIVELY?

Retrospectivity may arise where the enforcement authority seeks civil forfeiture in respect of proceeds, instrumentality or terrorist property prior to its establishment but the conduct is already classified as criminal. In such circumstances, it is still possible to seek a recovery order as the establishment of the authority is procedural rather than substantive. It follows, therefore, that where the conduct was not classified as a crime at the time the property was acquired, the prohibition against retrospectivity will apply.[20]

CONCLUSION

Confiscation *in rem* can be an effective remedy where prosecuting agencies are unable to proceed with criminal proceedings for the reasons set out above. However, it must be emphasised that first recourse must be criminal prosecution and only where it is not possible to proceed with that (for the narrow range of reasons listed above), should enforcement authorities resort to civil forfeiture. Any confiscation *in rem* framework must meet the three criteria contained in the ECHR of legality, necessity and proportionality. In addition, to work effectively the following international standards should be included:

1. The The authorities must prove its case on a balance of probabilities;
2. Interim and final orders should be made by a court;
3. No particular crime need be identified or proven, but the court must be satisfied that the property is the proceeds of, or traceable to, crime;
4. Rights of all owners or claimed owners to participate in proceedings;
5. Innocent owner defence.

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[20] Walsh v UK (ECtHR) see above; 2 UK cases that address this point: Jia Jin He [2004] EWHC 3021 (Admin) and The Director of ARA v Szepietowski and others [2007] EWCA 766