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

SECOND SECTION

DECISION

Application no. 41680/13
Milorad ULEMEK
against Serbia

The European Court of Human Rights (Second Section), sitting on 2 February 2021 as a Chamber composed of:

Jon Fridrik Kjølbro, *President,*
Marko Bošnjak,
Aleš Pejchal,
Valeriu Griţco,
Egidijus Kūris,
Carlo Ranzoni,
Pauliine Koskelo, *judges,*

and Stanley Naismith, *Section Registrar,*

Having regard to the above application lodged on 3 June 2013,

Having regard to the observations submitted by the parties,

Having noted that Branko Lubarda, the judge elected in respect of Serbia, withdrew from sitting in the case (Rule 28 § 3 of the Rules of Court) and that, accordingly, the President of the Chamber appointed Carlo Ranzoni to sit as an *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 2 of the Rules of Court),

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Milorad Ulemek, is a Serbian national who was born in 1968 and is currently serving his prison sentence in Zabela prison in Požarevac. He was represented before the Court by Mr A. Kovačević and Mr S. Milivojević, lawyers practising in Belgrade.

2. The Serbian Government ("the Government") were represented by their Agent at the time, Ms N. Plavšić.

3. On 2 December 2015 notice of the applicant's complaints under Article 7 § 1 of the Convention and Article 1 of Protocol No. 1 to the Convention was given to the Government, and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

A. The circumstances of the case

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

1. Proceedings for the forfeiture of the applicant's assets

5. Between 2007 and 2009 the applicant was convicted as a leader of an organised criminal group of a number of serious crimes he had committed between 1999 and 2003 and was sentenced to 40 years' imprisonment.

6. On 29 March 2010 the Office of the Prosecutor for Organised Crime ("the Prosecutor") lodged a request for the forfeiture of the applicant's assets in accordance with the Law on Seizure and Confiscation of the Proceeds from Crime (*Zakon o oduzimanju imovine proistekle iz krivičnog dela*) (hereinafter "2008 Law"; see paragraph 23 below).

7. The subject of the Prosecutor's request was the applicant's house, which he had bought in 1998 for 374,409 German Marks (DM) (approximately 190,000 euros (EUR)). The Prosecutor further claimed that the applicant's aggregate legitimate earnings from 1996, when he had started his employment in the Ministry of Interior Secret Service, until 1998 when he had purchased the house, had been only DM 22,789 (approximately EUR 11,650), less than one-fifteenth of the amount he had paid for the property. Since there was an obvious discrepancy between the applicant's legitimate earnings and the value of his property, and since he had been convicted as a member of the organised criminal group, the Prosecutor sought the forfeiture of the house in question.

8. On 20 May 2010 the special chamber of Belgrade High Court accepted the Prosecutor's request and issued a forfeiture order. The court reasoned that there were obvious discrepancies between the applicant's legitimate earnings and the value of his property. Since the applicant had failed to provide any feasible evidence that he had acquired the impugned property with lawfully earned assets, and since he had been convicted of serious crimes with elements of organised crime through which he had "acquired enormous earnings", the court found that the forfeiture was justified under Article 2 of the 2008 Law (see paragraph 24 below). The court also explained that this kind of forfeiture did not require the establishment of a direct link between the crime for which the applicant had been convicted and the acquisition of property, as was the case with the ordinary confiscation of criminal gains governed by Articles 91 and 92 of

the Criminal Code (see paragraph 22 below). The court stated that the applicant's property was being forfeited under a special procedure targeting the criminal proceeds of persons convicted of organised crime, which was entirely different from ordinary criminal forfeiture.

9. On 27 July 2007 the Belgrade Appellate Court quashed the forfeiture order and ordered a remittal. The Appellate Court found that the High Court had not established the exact time when the applicant's convictions had become final and, consequently, whether the Prosecutor's forfeiture request had been lodged in a timely manner. The Appellate Court further found that the High Court had not sufficiently examined all the evidence offered by the applicant.

10. On 14 February 2011 the Belgrade High Court again accepted the request for the forfeiture of the applicant's property, while remedying the inconsistencies found by the Appellate Court in its decision of 27 July 2007.

11. On 3 April 2012 the Belgrade Appellate Court confirmed the forfeiture order of 14 February 2011 (see paragraph 10 above). Among other findings, the Appellate Court clarified the nature of the procedure for forfeiture of criminal assets by distinguishing it from the ordinary seizure of criminal proceeds. The court explained that the forfeiture of criminally acquired assets was a special legal institution directed against the property of persons convicted of especially serious crimes, including organised crime, and that once the person had been convicted of organised crime, there was a presumption that his or her property had been illegally acquired until proven otherwise. After a thorough review of the applicant's appeal and the factual and legal findings of the Belgrade High Court, the court found that the applicant had had a reasonable opportunity of putting forward his case and it reiterated the finding of the latter court that the applicant had failed to prove that he had acquired the impugned property lawfully. The court further stated that no specific link between a particular criminal offence and the acquisition of a property was necessary in order to apply the provisions on forfeiture of criminally acquired assets and that the specific criminal offence by which the assets had been acquired did not have to be proven. The court explained that even assets acquired prior to the commission of the offences for which the applicant had been convicted could be seized under the 2008 Law, since no link between those criminal offences and the property was necessary. Finally, the court pointed out that the measure of forfeiture of criminally acquired assets was not a criminal sanction but a special measure for the recovery of criminally acquired wealth. The court concluded that for these reasons, the provisions on prohibition of retroactivity of criminal law were not applicable.

12. On 10 July 2012 the applicant lodged a constitutional appeal in which he complained about the above-mentioned decision of the Appellate Court, claiming that it violated the principle of non-retroactivity of criminal law as well as his procedural rights and right to property.

13. By a decision of 26 November 2012, served on the applicant on 5 December 2012, the Constitutional Court dismissed the applicant's constitutional appeal and upheld the above-mentioned decision of the Appellate Court. In its reasoning, the Constitutional Court accepted the Appellate Court's interpretation according to which the forfeiture of criminal assets was neither a criminal sanction nor penal in nature. It reiterated that this kind of forfeiture did not require the establishment of a direct temporal link between the crime for which the applicant had been convicted and the acquisition of impugned property, as was the case with the ordinary confiscation of criminal gains governed by the Criminal Code, but rather that there was a presumption that the property had been illegally acquired until proven otherwise. For these reasons, the Constitutional Court considered that the principle of non-retroactivity of criminal law was not applicable to the applicant's case. It further found that the applicant's complaints regarding his procedural and property rights were unfounded and that he had had a reasonable opportunity of putting forward his case.

2. The applicant's request for reopening of the proceedings

14. On 28 November 2013 the applicant submitted his first request for reopening of the proceedings on the forfeiture of his assets.

15. On 27 December 2013 the Belgrade High Court rejected this request, holding that such a procedure was not provided for by the law with respect to decisions on the forfeiture of assets. On 22 January 2014 the Belgrade Appellate Court confirmed that decision. On 13 October 2014 the applicant lodged a constitutional appeal against the Appellate Court's decision.

16. On 31 March 2015 the applicant submitted his second request for reopening of the proceedings on the forfeiture of his assets, basing his request on the conclusion of the Supreme Court of Cassation of 16 June 2014 (see paragraph 32 below).

17. On 28 May 2015 the Belgrade High Court rejected this request, finding that there were no reasons to reopen the proceedings. The Belgrade Appellate Court quashed that decision on 6 July 2015 and remitted the case to the Belgrade High Court for a fresh examination.

18. On 16 July 2015 the Belgrade High Court dismissed the applicant's request as groundless. That decision was upheld by the Belgrade Appellate Court on 4 September 2015. The Appellate Court held, *inter alia*, that the allegedly new facts and evidence submitted by the applicant, namely that he had not been the owner of the assets concerned, would not in any case have led to an outcome in his favour, which was the basic condition for the reopening of the proceedings.

19. On 4 July 2016 the Constitutional Court dismissed the applicant's constitutional appeal (see paragraph 15 above). In deciding on this appeal it also took into consideration the conclusion of the Supreme Court of Cassation (see paragraph 32 below), and the decisions of the domestic

courts concerning the applicant's second request for the reopening of the proceedings (see paragraph 16 above).

B. Relevant domestic law and practice

1. The Constitution

20. The relevant provisions of the Constitution, published in the Official Gazette of the Republic of Serbia ("the OG RS"), no. 98/06 – which came into force on 8 November 2006 – read as follows:

Article 34

"No person may be held guilty for any act which did not constitute a criminal offence under law or any other regulation based on the law at the time when it was committed, nor shall a penalty be imposed which was not prescribed for this act.

The penalties shall be determined pursuant to a regulation in force at the time when the act was committed, save when subsequent regulation is more lenient for the perpetrator. Criminal offences and penalties shall be laid down by the law."

Article 58

"Peaceful tenure of personal property and other property rights acquired by law shall be guaranteed.

A property right may only be revoked or restricted in the public interest, as established by law, with [the payment of] compensation, which cannot amount to less than the market value.

Restrictions on the manner of using property may be established by law.

Any seizure of or restriction in respect of property in order to collect taxes and other levies or fines shall only be permitted [when such seizure or restriction is] in accordance with the law."

2. Criminal Code

21. Article 4 of the Criminal Code, published in the OG RS nos. 85/05, 88/05, 107/05, 72/09, 111/09, 121/12, 104/13, 108/14, 94/16 and 35/19, lays down the types of sanctions which may be pronounced against the perpetrator of a criminal offence, as follows: punishment (*kazna*), cautions (*mere upozorenja*), security measures (*mere bezbednosti*), and educational measures (*vaspitne mere*). In Article 43 the Criminal Code lists the types of punishments, namely life imprisonment, imprisonment, fine, community service, and revocation of driver's licence.

22. Article 91 lays down the grounds for seizure of material gain obtained by means of a criminal offence, which seizure must be effected pursuant to a court decision establishing the commission of a criminal offence. In Article 92 the Criminal Code regulates the conditions and manner of seizure of such material gain.

3. Law on Seizure and Confiscation of the Proceeds from Crime

23. The 2008 Law on Seizure and Confiscation of the Proceeds from Crime (*Zakon o oduzimanju imovine proistekle iz krivičnog dela*), as in force at the material time, was published in the OG RS no. 97/08. It was adopted on 27 October 2008 and came into force on 1 March 2009.

24. Article 1 of the 2008 Law lays down the procedural requirements for the authorities responsible for tracing, seizing, confiscating and managing the proceeds from crime. Article 2 states that the Law is applicable to a list of qualifying offences, including organised crime, crimes against commerce, trafficking in narcotic drugs, child pornography, crimes against public order, abuse of office, war crimes and crimes against humanity.

25. Article 3 of the 2008 Law provides that "assets" are goods of any kind and instruments in any form. They also include revenue or other gain generated, directly or indirectly, from a criminal offence as well as any property into which it is transformed or with which it is combined. "Proceeds of crime" are the assets of an accused, co-operative witness (*svedok saradnik*) or testator (*ostavilac*) manifestly disproportionate to his/her lawful income. "Owner" refers to an accused person, a co-operative witness, testator or legal successor, or a third party.

26. According to Article 4, the Code of Criminal Procedure is applicable as subsidiary legislation concerning procedural matters not envisaged by the 2008 Law itself. Articles 8 to 14 establish the Directorate for the Management of Seized and Confiscated Assets and regulate its competences and organisation. Articles 15 to 20 regulate financial investigations. Articles 21 to 27 prescribe the conditions and procedure for the temporary seizure of assets.

27. Articles 28 to 36 lay down the procedures for the forfeiture of assets. Under Article 28, the prosecutor may file a request with the courts one year after the indictment and no later than one year after the final judgment in the criminal case. The request is directed against the property and the "owner" (see paragraph 25 above). According to Article 34, the court can issue a forfeiture order once it is satisfied that there is an obvious discrepancy between the owner's legal income and the value of his property, and that there are no other legal grounds for the owner's acquisition of the impugned property. The court can also award the confiscated property to the victims of the crimes committed by the owner if their civil claim has been recognised by a final judicial decision. The court can also decide to let the owner retain part of the property if its complete confiscation would jeopardise the owner's or his or her dependents' livelihood.

4. Practice of the Constitutional Court and the Supreme Court

28. The Constitutional Court elaborated on the nature of forfeiture of criminally acquired assets in its decision of 30 June 2011 (IUz no. 1242/10),

where it found that the 2008 Law was in accordance with the human rights standards flowing from the Constitution and the European Convention on Human Rights. It noted that the relevant international instruments left it to the discretion of the Contracting Parties to decide whether to treat forfeiture as a punishment or as a measure of property control. It then proceeded to analyse the nature of forfeiture in the Serbian legal system by applying the case-law of this Court.

29. The Constitutional Court first established that forfeiture was not listed as a criminal sanction in the relevant parts of the Serbian Criminal Code, that forfeiture proceedings were proceedings *in rem*, that Serbian courts did not initiate such proceedings *ex proprio motu* after a conviction and that the amount of the forfeited property did not depend on the level of culpability of the owner but on the amount of the discrepancy between the owner's legal earnings and the value of his property. The court further found that the measure was directed against "property, regardless of who is its nominal owner, and not a person". The Constitutional Court noted that this indicated that the measure did not have a penal character as it was "not applied *ad personam* against the accused but *in rem*, regardless of his culpability". The court then stated that the measure of forfeiture was preventive in nature, but that its primary purpose was to make sure that "crime does not pay" and hence to "restore the situation that existed prior to the commission of any criminal offence". According to the court, this was clear evidence that the measure is primarily of a "restorative nature". All of this led the Constitutional Court to conclude that "forfeiture of criminally acquired assets in the Serbian legal system is not a criminal sanction but represents a measure *sui generis* for the control of property".

30. The Constitutional Court repeated this finding in its decision of 13 March 2012 (UŽ no. 2805/09), where it held that in the Serbian legal system the measure of forfeiture of criminally acquired assets represented not a criminal sanction but a property control measure, and thus the measure not having a penal nature the question of retroactive application of criminal law could not arise. According to the Constitutional Court, the primary purpose of this measure was to prevent the persons concerned from benefiting from criminal activity.

31. The Supreme Court of Serbia, in its decision KŽ II ok TOI 278/09 of 20 November 2009, also held that forfeiture of criminally acquired assets was not a criminal sanction, as was apparent in the case before it since the confiscated property belonged to the legal successors of two deceased individuals who had never been convicted for organised crime offences. The Supreme Court concluded that forfeiture was a property control measure designed to prevent enrichment through criminal activities.

32. On 16 June 2014 the criminal division of the Supreme Court of Cassation adopted a conclusion that the reopening of proceedings for seizure of proceeds from crime which had ended in a final decision

("*rešenje*") would be permitted according to the rules for the reopening of criminal proceedings which had ended in a final judgment, regardless of the fact that the form of a decision in the former type of proceedings was called a "decision" and not a "judgment", on the grounds that such a final decision in proceedings for seizure of proceeds from crime was legally equivalent to a final judgment in criminal proceedings.

C. Relevant international documents

1. The 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime

33. The 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141), which entered into force in respect of Serbia on 1 February 2004, proclaimed that one of the "modern and effective methods" in the "fight against serious crime ... consists in depriving criminals of the proceeds from crime" (see the Preamble to the Convention).

34. The 1990 Convention called upon the Signatory Parties to "adopt such legislative and other measures as may be necessary to enable [them] to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds" (see Article 2). At the same time, the term "confiscation" was defined as "a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property" (see Article 1).

35. The Explanatory Report to the 1990 Convention further clarified the relevant legal terms:

> "15. ... The experts were also able to identify considerable differences in respect of the procedural organisation of the taking of decisions to confiscate (decisions taken by criminal courts, administrative courts, separate judicial authorities, in civil or criminal proceedings totally separate from those in which the guilt of the offender is determined (these proceedings are referred to in the text of the Convention as 'proceedings for the purpose of confiscation' and in the explanatory report sometimes as 'in rem proceedings'). It was also possible to distinguish differences in respect of the procedural framework of such decisions (presumptions of illicitly acquired property, time-limits, etc.)...
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> 23. The committee discussed whether it was necessary to define 'confiscation' or 'confiscation order' under the Convention. ... The definition of 'confiscation' was drafted in order to make it clear that, on the one hand, the Convention only deals with criminal activities or acts connected therewith, such as acts related to civil in rem actions and, on the other hand, that differences in the organisation of the judicial systems and the rules of procedure do not exclude the application of the Convention. For instance, the fact that confiscation in some States is not considered as a penal sanction but as a security or other measure is irrelevant to the extent that the confiscation is related to criminal activity. It is also irrelevant that confiscation might sometimes be ordered by a judge who is, strictly speaking, not a criminal judge, as long as the decision was taken by a judge. The term 'court' has the same meaning as

in Article 6 of the European Convention on Human Rights. The experts agreed that purely administrative confiscation was not included in the scope of application of the Convention."

2. *The 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism*

36. In 2005 the Council of Europe adopted another, more comprehensive, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (ETS No. 198). It entered into force in respect of Serbia on 1 August 2009.

37. Articles 3 and 5 of the 2005 Convention, in so far as relevant, state as follows:

Article 3 – Confiscation measures

"4. Each Party shall adopt such legislative or other measures as may be necessary to require that, in respect of a serious offence or offences as defined by national law, an offender demonstrates the origin of alleged proceeds or other property liable to confiscation to the extent that such a requirement is consistent with the principles of its domestic law."

Article 5 – Freezing, seizure and confiscation

"Each Party shall adopt such legislative and other measures as may be necessary to ensure that the measures to freeze, seize and confiscate also encompass:

(a) the property into which the proceeds have been transformed or converted;

(b) property acquired from legitimate sources, if proceeds have been intermingled, in whole or in part, with such property, up to the assessed value of the intermingled proceeds;

(c) income or other benefits derived from proceeds, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled, up to the assessed value of the intermingled proceeds, in the same manner and to the same extent as proceeds."

38. The Explanatory Report to the 2005 Convention reaffirmed that:

"39. The definition of 'confiscation' was drafted in order to make it clear that, on the one hand, the 1990 Convention only deals with criminal activities or acts connected therewith, such as acts related to civil in rem actions and, on the other hand, that differences in the organisation of the judicial systems and the rules of procedure do not exclude the application of the 1990 Convention and this Convention. For instance, the fact that confiscation in some states is not considered as a penal sanction but as a security or other measure is irrelevant to the extent that the confiscation is related to criminal activity. It is also irrelevant that confiscation might sometimes be ordered by a judge who is, strictly speaking, not a criminal judge, as long as the decision was taken by a judge.

...

71. Paragraph 4 of Article 3 requires Parties to provide the possibility for the burden of proof to be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation in serious offences. ...

76. This provision underlines in particular the need to apply such measures also to proceeds which have been intermingled with property acquired from legitimate sources or which has been otherwise transformed or converted."

COMPLAINTS

39. The applicant complained under Article 7 § 1 of the Convention that the application of the measure of forfeiture in his case violated the principle of non-retroactivity of criminal law. Additionally, relying on Article 1 of Protocol No. 1 to the Convention, the applicant complained that the forfeiture of his property violated his right to peaceful enjoyment of property.

THE LAW

A. Scope of the case

40. In response to the observations submitted by the Government, the applicant reiterated his complaints under Article 6 of the Convention alleging unfairness of the proceedings, which he had already raised in his application form. He also raised a new complaint, in substance under Article 6, in connection with his requests for the reopening of the proceedings (see paragraphs 14-19 above).

41. As to the complaints under Article 6 which were initially raised in the application form, the Court notes that they have already been declared inadmissible (see paragraph 3 above). As to the other complaint relating to the applicant's request for the reopening of the proceedings, in essence under Article 6 of the Convention, the Court notes that this complaint was not part of the initial application on which the Government have already commented. The Court therefore does not consider it appropriate to take this matter up separately at this stage (see, for example, *Maznyak v. Ukraine*, no. 27640/02, § 22, 31 January 2008, and *Kuncheva v. Bulgaria*, no. 9161/02, § 18, 3 July 2008). The applicant had the opportunity to lodge a new application in respect of any other complaints relating to the subsequent events in his case in accordance with the requirements set out in Rule 47 of the Rules of Court.

B. Complaint under Article 7 § 1 of the Convention

42. The applicant complained, under Article 7 § 1 of the Convention, that the forfeiture of his property was contrary to the principle of non-retroactivity of criminal law. He argued that this measure was equivalent to

a criminal sanction and that it would have been impossible to apply it in his case since it had not existed at the time of the commission of the crimes of which he had previously been convicted.

43. Article 7 § 1 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."

1. Arguments of the parties

44. The applicant reiterated his complaint.

45. The Government maintained that the forfeiture of the applicant's assets was a *sui generis* measure which was preventive rather than penal, as was reflected in the descriptive nature and purpose of the measure and also in its characterisation in national legislation and its procedure and application. The Government further held that the scope of the assets which were to be seized was not linked to the degree of guilt of a convicted person, but was established in accordance with entirely different criterion, namely, the extent to which the assets exceeded the original owner's lawful income.

2. The Court's assessment

46. For the purposes of the Convention there can be no "conviction" unless it has been established in accordance with the law that there has been an offence – a criminal or, if appropriate, a disciplinary offence. Similarly, there can be no penalty unless personal liability has been established (see *Varvara v. Italy*, no. 17475/09, § 69, 29 October 2013, and *G.I.E.M. S.R.L. and Others v. Italy* [GC], nos. 1828/06 and 2 others, § 251, 28 June 2018).

47. The concept of a "penalty" in Article 7 has an autonomous meaning. To render the protection offered by this Article effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision. 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 is imposed following a decision that a person is guilty of a criminal offence. However, other factors may also be taken into account as relevant in this connection, namely the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity (see *G.I.E.M. S.R.L. and Others*, cited above, §§ 210-211 and the case-law cited therein, and also *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 203, 4 December 2018).

48. Turning to the present case, as regards the connection between the orders of forfeiture of the applicants' assets and a given criminal offence,

the Court notes that a forfeiture under Article 2 of the 2008 Law may only be made if there is a conviction for one of the serious crimes listed in that provision, including organised crime (see paragraph 24 above). The forfeiture orders are therefore linked to and dependent on the commission of a criminal offence of a sufficient gravity.

49. As to the characterisation of the impugned measure under domestic law, the Court notes that the Serbian courts were unanimous in their conclusion that forfeiture of criminally acquired assets did not constitute a penalty within the meaning of Article 34 § 2 of the Constitution and Article 7 § 1 of the Convention (see paragraphs 10, 11 and 13 above). 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 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 in the Serbian legal system. This is illustrated by the fact that forfeiture of criminal assets is not included in the list of criminal sanctions provided for in the Criminal Code (see paragraph 21 above). In fact, the institution of forfeiture of criminal assets which was applied in the applicant's case is not regulated by the Serbian Criminal Code, but by an entirely different legislation, namely the 2008 Law. In the Court's view, therefore, there is nothing in the relevant legislation clearly classifying the measure as a penalty (see, *a contrario*, *G.I.E.M. S.R.L. and Others*, cited above, §§ 220-221). The fact that the Code of Criminal Procedure applied as subsidiary legislation and that a special chamber of a criminal court made the forfeiture order (see paragraph 55 below) does not change this conclusion.

50. In assessing the nature and purpose of forfeiture orders, the Court observes that, according to the domestic courts, the measures set out in the 2008 Law were intended to comply with the obligations under the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (see paragraph 33 above) (see *Dassa Foundation and Others v. Liechtenstein* (dec.), no. 696/05, 10 July 2007, concerning a seizure of assets ordered by the criminal courts in the course of investigations relating to objective forfeiture proceedings, and *Balsamo v. San Marino*, nos. 20319/17 and 21414/17, § 62, 8 October 2019, concerning a confiscation applied in criminal proceedings). Thus, the forfeiture orders were intended to ensure that crime does not pay and were primarily of a restorative nature.

51. In *Dassa Foundation and Others* (cited above), the Court found that the seizure orders had not constituted a "penalty" withing the meaning of Article 7 § 1, second sentence, because the nature of forfeiture under domestic law – although regulated in the Criminal Code and linked to and dependent on the commission of a criminal offence – had made it more comparable to a restitution of unjust enrichment under civil law than to a

fine under criminal law. In particular, the Court observed that forfeiture under Liechtenstein law could be excluded in so far as third parties had legal claims in relation to the assets in question; the forfeiture was restricted to the actual enrichment of the beneficiary of an offence; there were no statutory assumptions 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; the degree of culpability of the offender was irrelevant for fixing the amount of assets declared forfeited; and the forfeiture orders could not be enforced by imprisonment in default of payment (ibid.).

52. More recently in *Balsamo* (cited above), the Court also found that the confiscation measure, although meted out by the courts of criminal jurisdiction, could not be considered punitive, but rather preventive, for the following reasons. Firstly, the confiscation under domestic law had been applicable even if the items had not belonged to the perpetrator of the act in issue. Secondly, according to the relevant domestic doctrine it had been a preventive measure, independent of criminal proceedings and a finding of guilt. Thirdly, the Court accepted that the measure had been designed to prevent the unlawful use of the proceeds of crime and the commission of further crimes, which had been an aim also sought by various international instruments. Eventually, it reiterated that the severity of the measure was not in itself decisive (ibid.).

53. The Court also observes that several characteristics of the Serbian criminal assets forfeiture system under the 2008 Law render it comparable to the institution of civil forfeiture *in rem* rather than a fine under criminal law. Firstly, the Court notes that the wording of the relevant legislation strongly suggests that the system is directed against property rather than a person. This is evident from the fact that the forfeiture can be ordered even *vis-à-vis* a property belonging to a third person if such property originates from a crime and the third person has no valid legal claim to it under Article 28 of the 2008 Law (see paragraph 27 above) (compare *Balsamo*, cited above, § 62). Secondly, the 2008 Law recognises the possibility of confiscation of the property of a deceased person who had never been charged with or convicted of any crime, if a suspicion that such property constitutes proceeds from crime arises from the facts established in criminal proceedings against a third party. Thirdly, in the case of the forfeiture of criminal assets, unlike in the case of criminal law fines, the degree of culpability of the offender is irrelevant for fixing the amount of assets declared forfeited (see *Dassa Foundation and Others*, cited above and, *a contrario*, *Welch v. the United Kingdom*, 9 February 1995, § 33, Series A no. 307-A). Fourthly, the forfeiture orders under the 2008 Law cannot be enforced by imprisonment in default of payment which is an important element of criminal law fines (see *Dassa Foundation and Others*, cited above and, *a contrario*, *Welch*, cited above). Finally, when issuing the forfeiture order the Serbian courts may also decide to allocate some or all of

the confiscated assets for the benefit of the victims, if the latter's civil claims have been established by final court decisions, which is more comparable to a restitution of unjust enrichment under civil law than to a fine under criminal law (see *Dassa Foundation and Others*, cited above).

54. The Court notes that in *Dassa Foundation and Others* (cited above) the absence of statutory assumptions that property held by an offender prior to the offence represented the proceeds of crime unless he could prove otherwise was one of the factors which distinguished that case from the case of *Welch* (cited above) in which such assumptions had existed. Although the 2008 Law does not provide for a list of mandatory assumptions similar to that in the *Welch* case (cited above, §§ 12 and 33), it does have a rather broad definition of "proceeds of crime" (see paragraph 25 above) under which the Serbian courts may apply a forfeiture order in respect of any assets held by the offender (or any transferee who has not paid full value for them) which are not explicable by his or her legitimate income. This, indeed, is the only aspect of making an order under the 2008 Law which is different from that in the *Dassa Foundation and Others* case (cited above). The Court observes that, unlike in the above-mentioned case, the 2008 Law sets forth criminal offences to which the provisions thereof may apply, in particular the criminal offences containing the element of organised crime, some criminal offences committed against commerce and crimes against humanity, as well as crimes in public office (see paragraph 24 above). The Court notes that, specifically within the context of organised crime, the accumulation of financial resources is essential for the functioning of the criminal network. Striking at the funds of criminal groups and ensuring that criminals will not profit from illicit activities is therefore a key issue for the prevention of criminality. In order to combat this crime more effectively, the 2008 Law entitles the courts to make a forfeiture order based on sufficient evidence that the origin of property is illicit. This evidence, according to consistent case-law, may be the discrepancy between the value of property and a criminal's legitimate income and his or her inability to prove the lawful origin of the property (see *M. v. Italy*, no. 12386/86, Commission decision of 15 April 1991, concerning a confiscation of property from a person suspected of being a member of a mafia-type organisation, and *Balsamo*, cited above, § 63). The Court considers that this legal background confirms the preventive character of forfeiture and shows that it is designed to prevent the unlawful use of the property which is subject of the order (see *M. v. Italy*, cited above). In view of this, and in particular taking into consideration the combination of all other non-punitive elements outlined above (see paragraph 53 above), the possibility of relying on an assumption under the 2008 Law cannot in itself be regarded as decisive when it comes to establishing the nature and purpose of the measure.

55. As regards the procedures involved in ordering and implementing the measure, the Court observes that the forfeiture order was made by a special chamber of a criminal court in special forfeiture proceedings, the assessment of which had been objective and based on relevant evidence in the absence of a successful rebuttal, and following the final conviction of the applicant (see, *mutatis mutandis*, *Balsamo*, cited above, § 63). The proceedings were conducted in accordance with the legislation specifically designed for the regulation of objective forfeiture proceedings, namely the 2008 Law.

56. 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 (see *Del Río Prada v. Spain* [GC], no. 42750/09, § 82, ECHR 2013, and *Balsamo*, cited above, § 64). The Court notes that a forfeiture order may affect assets of a considerable value, without there being an upper limit for the amount of confiscated assets. However, the forfeiture is only applicable to property of which the legal origins cannot be traced. In addition, the Court notes that, according to Article 34 of the 2008 Law (see paragraph 27 above), the Serbian courts are entitled to spare a certain amount of property, albeit originating from criminal activities, if complete forfeiture would jeopardize the owner's or his dependents' livelihood.

57. Having regard to all the relevant factors for the assessment of the existence of a penalty, the Court concludes that, given, in particular, the nature of forfeiture under the 2008 Law, which renders it comparable to a civil forfeiture *in rem*, the forfeiture order issued against the applicant did not amount to a "penalty" within the meaning of Article 7 § 1, second sentence, of the Convention.

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

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

59. The applicant complained that the forfeiture of his property violated his right to the peaceful enjoyment of property, in particular that it was arbitrary to extend the scope of the confiscation mechanism retrospectively. He relied on Article 1 of Protocol No. 1 to the Convention, which 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 property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

1. Arguments of the parties

60. The applicant reiterated his complaint.

61. The Government did not contest that the measure at issue in the present case constituted an interference with the applicant's peaceful enjoyment of his property. They held, nevertheless, that the proceedings for the seizure of the proceeds from crime conducted against the applicant had fully complied with substantive and procedural provisions of domestic law and with the provisions of the Convention. Since the applicant had failed to prove the lawful origin of the funds used to purchase the assets in question, the assumption provided for by the 2008 Law was fulfilled. In conclusion, the Government deemed the forfeiture of the applicant's assets to be a measure proportionate to the legitimate aim pursued.

2. The Court's assessment

62. The Court is not called upon to examine in the abstract the compatibility with the Convention of the provisions of the 2008 Law. Instead, it must determine whether the way in which those provisions were applied in the applicant's case gave rise to a violation of the Convention (see, among other authorities, *Phillips v. the United Kingdom*, no. 41087/98, § 41, ECHR 2001-VII, and *Lekić v. Slovenia* [GC], no. 36480/07, § 107, 11 December 2018). The Court observes, as was not disputed by the parties, that the forfeiture order concerning the applicant's assets amounted to an interference with his right to peaceful enjoyment of possessions, and that Article 1 of Protocol No. 1 is therefore applicable. The Court also notes that the interference constituted the control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1 (see, among many other authorities, *Air Canada v. the United Kingdom*, 5 May 1995, § 34, Series A no. 316-A; *Veits v. Estonia*, no. 12951/11, § 70, 15 January 2015; *Gogitidze and Others v. Georgia*, no. 36862/05, § 94, 12 May 2015; *Telbis and Viziteu v. Romania*, no. 47911/15, § 69, 26 June 2018; and *Riela and Others v. Italy* (dec.), no. 52439/99, 4 September 2001).

63. As to the lawfulness of the interference, the Court notes that the forfeiture of the applicant's property was ordered by the domestic courts on the basis of the 2008 Law. Having regard to the wording of its provisions, the Court considers that there cannot be any doubt about their clarity, precision or foreseeability (see, for instance, *Khoniakina v. Georgia*, no. 17767/08, § 75, 19 June 2012, and *Grifhorst v. France*, no. 28336/02, § 91, 26 February 2009)

64. As to the applicant's argument that it was arbitrary to extend the scope of the confiscation mechanism retrospectively to property that he had acquired prior to the entry into force of the 2008 Law, the Court reiterates that the "lawfulness" requirement contained in Article 1 of Protocol No. 1 cannot normally be construed as preventing the legislature from controlling the use of property or otherwise interfering with pecuniary rights via new retrospective provisions regulating continuing factual situations or legal relations anew (see *Arras and Others v. Italy*, no. 17972/07, § 81, 14 February 2012*; Azienda Agricola Silverfunghi S.a.s. and Others v. Italy*, nos. 48357/07 and 3 others, § 104, 24 June 2014; *Khoniakina*, cited above, § 74; *Huitson v. the United Kingdom* (dec.), no. 50131/12, §§ 31-35, 13 January 2015; and *Gogitidze and Others*, cited above, § 99). It sees no reason to find otherwise in the present case. The Court therefore considers that the forfeiture of the applicant's property was in full conformity with the "lawfulness" requirement contained in Article 1 of Protocol No. 1.

65. As regards the legitimacy of the aim pursued by the impugned confiscation, the Court observes that the measure formed an essential part of a larger legislative package aimed at intensifying the fight against organised crime. It was primarily designed to deprive a person of profits received from engaging in criminal activities and, more importantly, to remove the value of the proceeds from possible future use in criminal activities. The aim of the measure was, accordingly, not only to make sure that crime does not pay, but also to prevent the circulation of the assets for furtherance of criminal enterprise (see, *mutatis mutandis*, *Phillips*, cited above, § 52). Thus, having in mind the Court's conclusions as to the nature of the measure under the 2008 Law (see paragraph 57 above), it notes that the aim of the impugned proceedings was furthermore to prevent unjust enrichment through serious crimes as such, by sending a clear signal to persons already involved in such crimes or considering so doing that their wrongful acts, even if they passed unscathed by the criminal justice system, would nevertheless not procure pecuniary advantage either for them or for their families (see, *mutatis mutandis*, *Gogitidze and Others*, cited above, § 102). In addition, the measure had clear restorative elements, since the Serbian courts were able to award the confiscated property to the victims of the crimes committed by the owners or their predecessors (see paragraph 27 above).

66. The Court accordingly finds that the forfeiture measure in the instant case was effected in accordance with the general interest in ensuring that the use of the property in question did not procure an advantage for the applicant to the detriment of the community (compare *Raimondo v. Italy*, 22 February 1994, § 30, Series A no. 281-A; *Arcuri and Others v. Italy* (dec.), no. 52024/99, 5 July 2001; *Phillips*, cited above, § 52; and *Gogitidze and Others*, cited above, § 103).

67. As to the proportionality of the impugned forfeiture to the above-mentioned aim pursued, the Court notes that the applicant confined his arguments to complaining about the retrospective application of the confiscation mechanism under the 2008 Law. In view of the information available in the case file there is nothing to suggest that the forfeiture of the applicant's house was disproportionate nor did he claim so. In this respect, the Court observes in particular that according to the domestic courts' findings, the applicant had acquired enormous earnings through crimes he had committed. That being the case, the Court concludes that the interference with the applicant's property rights was not disproportionate to the legitimate aim pursued.

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

For these reasons, the Court,

Declares, by a majority, the complaint concerning Article 7 of the Convention inadmissible;

Declares, unanimously, the complaint concerning Article 1 of Protocol No. 1 to the Convention inadmissible.

Done in English and notified in writing on 11 March 2021.

Stanley Naismith Registrar	Jon Fridrik Kjølbro President