CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FORMER FIRST SECTION

CASE OF BAKLANOV v. RUSSIA

(Application no. 68443/01)

JUDGMENT

STRASBOURG

9 June 2005

FINAL

30/11/2005

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

In the case of Baklanov v. Russia,

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

Mr C.L. ROZAKIS, *President*,
Mr P. LORENZEN,
Mr G. BONELLO,
Mrs F. TULKENS,
Mrs N. VAJIĆ,
Mr A. KOVLER,
Mr V. ZAGREBELSKY, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 16 September 2004 and on 19 May 2005,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 68443/01) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Latvian national, Mr Viktor Mikhaylovich Baklanov ("the applicant"), on 23 March 2001.

2. The applicant was represented by Mr A. N. Gurov, a lawyer practising in Moscow. The Russian Government ("the Government") were represented by Mr P.A. Laptev, the Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged that he was deprived of his money by a judgment which contained no legal grounds for the forfeiture.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 6 May 2003, the Court declared the application admissible.

6. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1), but this case remained with the Chamber constituted within Former First Section.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations. In addition, third-

party comments were received from the Latvian Government, which had exercised its right to intervene (Article 36 § 1 of the Convention and Rule 44 § 1 (b)). The respondent Government replied to those comments (Rule 44 § 5).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1957 and lives in Riga.

9. In 1997 he decided to move from Latvia to Russia. He negotiated a real estate deal with a Moscow-based agent.

10. On 20 March 1997 the applicant withdrew from his bank accounts 250,000 US dollars ("USD") in cash and asked his acquaintance, B., to deliver the money to Moscow.

11. B. arrived in the Sheremetyevo-1 airport later the same day. He failed to declare the money at the customs checkpoint and was charged with smuggling.

12. On 13 September 2000, the Golovinskiy District Court of Moscow found B. guilty of smuggling under Article 188-1 of the Criminal Code and sentenced him to two years' suspended imprisonment. With regard to the money, the court said in the operative part of the judgment:

> "USD 250,000, deposited with the Sheremetyevo Customs Board, are to be forfeited to the Treasury as an object of smuggling."

13. In his appeal against the judgment, B.'s lawyer submitted that the Golovinskiy District Court had failed to indicate any legal ground for the confiscation order. He argued that the money had been included in the case-file as evidence and that no relevant law provided for its confiscation. Moreover, lawfully obtained assets were to be returned to their owners. B.'s lawyer also claimed that Article 188-1 of the Criminal Code did not provide for such a sanction as confiscation.

14. On 25 October 2000, the Moscow City Court refused the appeal. With regard to the money, the court said:

> "USD 250,000, which was the object of the smuggling, was rightfully forfeited to the Treasury."

15. On 1 July 2002 a Deputy President of the Supreme Court lodged an application for supervisory review against the judgments. He claimed that the smuggled money could only be confiscated if proven to have been acquired criminally.

16. On 18 July 2002 the Presidium of the Moscow City Court refused the application on the ground that a Ruling of the Plenary Supreme Court of the USSR issued in 1978 permitted the confiscation of smuggled goods which had been attached to case-files as exhibits.

17. On 15 August 2002 the Deputy President of the Supreme Court lodged another application for supervisory review claiming, among other things, that the Ruling of 1978 was inconsistent with later superseding legislation. However, on an unspecified date the Deputy President of the Supreme Court withdrew his application.

II. RELEVANT DOMESTIC LAW

18. Article 169-1 of the Criminal Code of 1960, as in force from 15 July 1994 to 31 December 1996, provided:

> "The carrying across the [State] border of considerable amounts of goods or other items ... in evasion of customs controls ... or without declaring [them] or with untrue declarations ... shall be penalised by imprisonment of up to five years ... and by forfeiture of the goods and other items carried across the border..."

18. Article 188-1 of the Criminal Code of 1996 ("CrC") provides:

> "Smuggling, i.e. transportation across the customs border of the Russian Federation of considerable amounts of goods and other items ... without due customs control, or in evasion of such control, or with fraudulent use of documents or identification means, or in violation of rules of declaration, shall be penalised by imprisonment of up to five years."

19. Article 279 of the Customs Code of 1993, as in force at the material time, provided:

> "Failure to declare or an inadequate declaration of goods ... carried across the customs border ... which disclose no appearance of smuggling ... shall be punished by a fine of 100 to 200 per cent of the cost of the goods which are the object of the offence, with or without their forfeiture..."

20. The Code of Criminal Procedure of 1960 ("CCrP"), in force at the relevant time, provided as follows:

Article 83. Exhibits

> "Exhibits include items which served as instruments of crime, or which have retained traces of the crime, or against which the crime was directed. [Exhibits also include] criminally acquired money and other valuables earned by crime, and any other items which can help detect the crime, establish factual circumstances, reveal the guilty or refute the charges or lessen the responsibility."

Article 86. Destiny of exhibits in criminal proceedings

> "The destiny of exhibits used in criminal proceedings must be determined in a judgment..., and:

1. instruments of the crime which belong to the accused shall be confiscated and passed to a competent agency or destroyed;

2. items prohibited for circulation shall be passed to a competent agency or destroyed;

3. items of no value or use shall be destroyed or returned to interested persons or agencies if they so wish;

4. criminally acquired money and other assets shall be forfeited; other items shall be returned to their lawful owners, or, if the owners are not established, shall become the State's property. In the event of a dispute concerning the ownership of such items, the dispute shall be resolved in civil proceedings;

5. documents which serve as exhibits shall be kept in the case file as long as the case file is archived or shall be passed to interested agencies".

21. The Ruling of the Plenary Supreme Court of the USSR no. 2 of 3 February 1978 ("the Ruling of the Supreme Court", "the Ruling") provides:

"...With a view to ensure a uniform and correct application of laws in proceedings concerning smuggling, the Plenary Supreme Court decides [that]:...

7. In accordance with the legislation in force, smuggled items must be forfeited as exhibits..."

22. Article 243-1 of the Civil Code of 1994 ("CivC") provides:

"In cases established by law, a person may be deprived of his property without compensation pursuant to a court judgment as a sanction for a crime or other offence (confiscation)..."

23. On 10 June 1998 the Presidium of the Supreme Court exercised supervisory review of the criminal case against a certain Mr Petrenko, who had been convicted of smuggling a considerable amount of foreign currency into Russia. After conviction, the trial court returned the money – which had been included in the file as evidence – to its owner, Mr Petrenko. The Supreme Court overturned the judgment having found that the money should have been considered as an instrument of the crime and, as such, it should have been confiscated pursuant to Article 86-1 of the CCrP.

24. On 8 July 2004, the Constitutional Court held that Article 86-1 of the Code of Criminal Procedure was constitutional, even though it permitted to confiscate instruments of crime, for example smuggled money, belonging to other than the accused. In particular, the Constitutional Court said:

"The rule set out in ... Article 86-1 of the Code of Criminal Procedure ... helps Russia implement its international-law obligations in criminal proceedings, does not overrule criminal laws which permit confiscation as a punishment, and, hence, allows the procedural law to regulate confiscation with regard to [international instruments on money laundering and crime control].

...

It is a [criminal] court ... who may determine the procedural status of [smuggled items] under Article 86-1 of the Code of Criminal Procedure....”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

25. The applicant complained under Article 1 of Protocol No. 1 to the Convention that the Golovinskiy District Court forfeited his, an innocent party's, money without any basis in law. 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 property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

A. Arguments of the parties

1. The Government

26. In their pre-admissibility submissions on the admissibility and merits of the case, the Government made no comments on either admissibility or merits, but informed the Court that the Deputy President of the Supreme Court had “taken steps towards the restoration of the applicant's rights presumably violated” and that the domestic proceedings had been resumed.

In the proceedings on the merits, the Government submitted that the applicant's money was seized pursuant to the laws which made smuggling a criminal offence. The Government referred to the case of *AGOSI v. the United Kingdom* (judgment of 24 October 1986, Series A no. 108) claiming that such laws may be regarded as a legitimate control of the use of the property. The balance between the means employed by the State in exercising such control and the interests of the applicant was not upset. Furthermore, when handing the money over to B., the applicant knew perfectly well, or should have known, that moving large amounts of cash

across the border was subject to special regulations. Hence, he was at least guilty of negligence.

27. The Government maintained that the applicant's money was attached to the case-file as an exhibit, pursuant to Article 83 of the CCrP. The Golovinskiy District Court found that the money had been smuggled and was the object of the offence. Therefore the court reasonably forfeited the money to the Treasury as an object of smuggling. Such a practice was confirmed by the recommendations contained in the Ruling of the Supreme Court of 1978, according to which, objects of smuggling, as evidence, should be forfeited to the Treasury. The Ruling should be regarded as "law" for the purposes of the Convention.

28. Furthermore, the applicant's money should be considered as "criminally acquired" within the meaning of Article 86-4 of the CCrP because it found itself in the territory of Russia as a result of B.'s offence. Owners of criminally imported items lose their rights to them.

29. The Government referred to the case of the *Russian Federation v. Petrenko* (paragraph 22 above) claiming that the confiscation of smuggled items used as evidence in criminal proceedings is an established judicial practice.

30. Last, the Government asserted that the Constitutional Court's judgment of 8 July 2004 supported their arguments.

2. The applicant

31. The applicant accepted that forfeiture of smuggled items may be regarded as a control of the use of property. However, such a control must have a basis in law. Russian law in force at the time of B.'s offence and the forfeiture of the applicant's money did not provide for such a measure. Indeed, the judgment of the Golovinskiy District Court did not specify on what legal basis the money was to be confiscated.

32. The applicant accepted furthermore that the money was included in the case-file as an exhibit. Under Article 86 of the CCrP, criminally acquired money and other assets must be forfeited; other items must be returned to their lawful owners. The court did not find that the money had been criminally acquired. Hence, it should have been considered as "other items" and returned to the applicant, its lawful owner.

33. The applicant claimed that the Government's reference to the Ruling of the Supreme Court was misplaced. According to him, Soviet criminal laws in force in 1978 did provide for the forfeiture of smuggled items. However, Russian criminal laws in force at the time of B.'s offence contained no such provision. Furthermore, the Plenary Supreme Court is not a law-making body. It may only clarify existing laws without distorting their substantive meaning. Therefore, the Ruling of the Supreme Court may not be considered as grounds for the forfeiture.

34. The applicant argued, lastly, that the civil legislation, namely Article 243 of the CivC, only permits confiscation as punishment for a crime. Since B.'s offence of smuggling could not, pursuant to Article 188-1 of the CrC, be punished by confiscation, this measure was unlawful.

B. The third party's comments

35. The Latvian Government opined that the applicant's rights were violated.

36. In particular they asserted that at the material time Russian law did not provide for confiscation such as happened in the present case. Thus, Article 188-1 of the CrC did not list confiscation as a sanction for smuggling.

37. As for the Ruling of the Supreme Court, it could not be regarded as "law" for the following reasons. First, in a country governed by the rule of law, decisions of the Plenary Supreme Court may not equal or substitute Acts adopted by the Parliament. Still less may the Supreme Court give decisions which contradict such Acts. Next, Parliament itself passed no rule providing for confiscation of smuggled items, nor did it delegate the power to pass such a rule to any other authority. Lastly, according to the Ruling of 1978, read in conjunction with the criminal laws in force in the 1970s, smuggled items could only be confiscated if proven to have been criminally acquired. The Russian authorities never asked the Latvian authorities whether the applicant had gained the money by crime.

C. The Court's assessment

38. It is not in dispute between the parties that the seizure of the applicant's money constituted an interference with his property rights within the meaning of Article 1 of Protocol No. 1 to the Convention. The Court is accordingly called upon to determine whether this interference was justified in accordance with the requirements of that provision.

39. 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 sentence of the first paragraph authorises a deprivation of possessions only "subject to the conditions provided for by law" and 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 fundamental principles of a democratic society, is inherent in all the Articles of the Convention. It follows that 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 becomes relevant only once it has been established that the interference in question satisfied the requirement of

lawfulness and was not arbitrary (see *Iatridis v. Greece*, judgment of 25 March 1999, *Reports of Judgments and Decisions* 1999-II, § 58).

40. When speaking of "law", Article 1 of Protocol No. 1 alludes to the same concept to be found elsewhere in the Convention (see *Špaček, s.r.o. v. the Czech Republic*, no. 26449/95, § 54, 9 November 1999).

41. This concept requires firstly that the impugned measures should have a basis in domestic law. It also refers to the quality of the law in question, requiring that it be accessible to the persons concerned, precise, and foreseeable (see *Beyeler v. Italy* [GC], no. 33202/96, § 109, ECHR 2000-I).

42. In assessing the requirement of lawfulness in the present case the Court recalls that Article 169-1 of the Criminal Code of 1960, as in force until 31 December 1996, clearly provided for the "forfeiture of the goods and other items carried across the border..." Likewise Article 279 of the Customs Code of 1993 provided for the possibility of forfeiting goods carried across the border in circumstances which cannot be classified as smuggling. In addition the Plenary of the Supreme Court had in its Ruling of 1978 clarified that in accordance with the legislation in force, smuggled items presented as exhibits must be forfeited.

43. However, the Court recalls that with the entry into force of the Criminal Code of 1996 the confiscation of forfeited goods is no longer provided for in the Code itself. It is not for the Court to speculate in the legislator's intentions when redrafting the Criminal Code, but Article 188-1 of the Criminal Code, which was the basis for the conviction of B. in the present case, would not appear to be able to serve as the legal basis for the forfeiture of the applicant's money.

44. As regards the provisions of the Code of Criminal Procedure of 1960 of relevance to the present case (see § 20 above) the Court recalls that instruments of the crime which belong to the defendant (Article 86 § 1) and criminally acquired money and other assets shall be forfeited whereas other items shall be returned to their lawful owner (Article 86 § 4). It has not been argued, nor is there any evidence to that effect, that the applicant's money was "criminally acquired" and it does not appear that the national courts relied thereon when deciding to forfeit the sum in question. Thus, it remains unclear what legal basis served as the basis therefore other than a Ruling of the Supreme Court which, however, appears to relate to legislation no longer in force. It is true that the Government have referred to a decision of the Presidium of the Supreme Court of 10 June 1998 following which certain amounts of foreign currency was forfeited after the owner had been convicted of smuggling. Leaving aside the fact that this decision relates to later period of time the Court notes that such forfeiture appears to be clearly provided for in Article 86 § 1 of the Criminal Code of Procedure which refers to instruments of the crime which belongs to the accused, a situation different from that of the present case.

45. Finally, as regards the Russian Constitutional Court's judgment of 8 July 2004 to which the Government have also referred, the Court recalls that the forfeiture of the applicant's money took place several years prior to that judgment. Thus, it cannot serve as an established interpretation of domestic legislation on the basis of which the forfeiture could be effected.

46. The Court accepts that its power to review compliance with domestic law is limited as it is in the first place for the national authorities to interpret and apply that law. However, having regard to the national courts' lack of reference to any legal provision as a basis for the forfeiture of an important sum of money and to the apparent inconsistencies of case-law compared to the national legislation, the Court considers that the law in question was not formulated with such precision as to enable the applicant to foresee, to a degree that is reasonable in the circumstances, the consequences of his actions. It follows that the interference with the applicant's property cannot be considered lawful within the meaning of Article 1 of Protocol No. 1 to the Convention. This conclusion makes it unnecessary to ascertain 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.

47. There has, accordingly, been a breach of Article 1 of Protocol No. 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. 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. Non-pecuniary damage

49. The applicant claimed 100,000 euros by way of non-pecuniary damage. He submitted that, because his money was forfeited, he could not buy a flat in Moscow. If he had moved to Moscow, he would have been able to reunite with his ill, aged father before he died in a home in June 2003.

50. The Government dismissed this claim as "fabulous".

51. The Court takes the view that the applicant has suffered some non-pecuniary damage as a result of the violation found which cannot be made good by the Court's mere finding of a violation. The particular amount claimed is, however, excessive. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant the sum of 3,000 euros.

B. Pecuniary damage

52. The applicant did not include the sum unlawfully forfeited, that is USD 250,000 in his claims under Article 41.

53. However, he claimed USD 57,988.88. This amount, according to the applicant's calculations, was the profit which the State had gained by unlawfully retaining his money for the period until 1 July 2003.

54. In the Government's contention, this claim was also "fabulous".

55. In the Court's opinion, this claim is linked to the restitution of the sum unlawfully forfeited which the applicant has not yet claimed. Accordingly, the Court cannot entertain this claim.

56. Consequently, the Court makes no award under this head.

C. Costs and expenses

57. The applicant made no claims under this head. Accordingly, the Court will make no award under this head.

FOR THESE REASONS, THE COURT

1. *Holds* by six votes to one that there has been a violation of Article 1 of Protocol no. 1 to the Convention;

2. *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 according to Article 44 § 2 of the Convention, EUR 3,000 (three thousand euros) in respect of non-pecuniary damage, to be converted into Latvian lati at the rate applicable at the date of settlement, plus any tax that may be chargeable;
   (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;

3. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 9 June 2005, 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 Mr Kovler is annexed to this judgment.

C.L.R.
S.N.

DISSENTING OPINION OF JUDGE KOVLER

To my big regret I cannot agree with the conclusion of the majority of the Chamber that there has been a violation of Article 1 of Protocol No. 1 on the ground that the interference (the forfeiture order) was not "lawful".

The Court recalled on many occasions the importance of a legal basis for interferences with the rights guaranteed by the Convention. Only without a basis in the domestic law the interference will not comply with the basic requirements of "lawfulness" and the question of its justification will not arise.

As regards the present case, I would note that the penalty for the substantive offence of a non-declaration of goods under Article 279 of the Customs Code of 1993 as in force at the material time made clear provision for the forfeiture of goods concealed from customs control. The problem of the Court seems to be that the articles of the Criminal Code of 1996 concerning smuggling, as opposite to the Article 169-1 of the Criminal Code of the RSFSR of 1960, do not contain such a provision. At the same time Article 86-4 of the CCrP provided for the forfeiture of the criminally acquired exhibits.

However, the Court's competence to review compliance with domestic law is limited. It is in the first place for the national authorities to interpret and apply this law (see *Tre Traktorer Aktiebolag v. Sweden*, judgment of 7 July 1989, Series A no.159, § 58).

I agree with the Court's opinion that the above mentioned provisions of the national law left a certain ambiguity as to the destiny of smuggled money in cases similar to the applicant's. Under such circumstances it was only appropriate for the Supreme Court to give its own interpretation of the law by issuing the Ruling of 2 February 1978, since the Supreme Court may interpret statutes to fill legal lacunas and such interpretation should be considered as "law". As to the decision of the Presidium of the Supreme Court of 10 June 1998 in the *Petrenko case* cited in § 23, the convicted person himself had recourse to domestic remedies available to him under the national law, which is not the case of Mr. Baklanov. For instance, Article 429 of the Code of Civil Procedure of the RSFSR offered him as a third person the possibility to challenge the court judgment regarding confiscation of his property (regretfully, this provision is not mentioned in our Judgment). The applicant failed to exhaust the domestic remedies available to him and did not appeal against the trial court judgment.

As to the third party's comments that the smuggled items could only be confiscated if proven to have been criminally acquired, I am satisfied that the Judgment cites the Decision (*Opredelenije*) of the Constitutional Court of the Russian Federation of 8 July 2004 where money smuggling is qualified as a criminal offence in the light of the Council of Europe

Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (8 November 1990) and of the UN Convention against Transnational Organised Crime (15 November 2000). According to the Article 1 of the CE Conventions the term "confiscation" means not only punishment, 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 12 of the UN Convention recognises "the possibility of confiscation of proceeds from crimes, as well as of property, equipment or other means used or intended for use in committing crimes".

Taking into account both national and international aspects of the case I have decided not to join the majority of the Chamber in its reasoning.