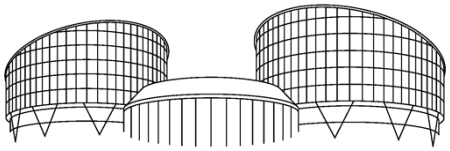

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF MARKUS v. LATVIA

(Application no. 17483/10)

JUDGMENT

Art 1 P1 • Respect for property • Ancillary punishment of mandatory confiscation of property not connected to the crime • Control of the use of property to secure payment of penalties • Enforcement based on the investigator's decision at the pre-trial stage to impose a restriction on property • Regulation leaving uncertainty about the scope of the trial court's competence as to the extent of the confiscation • No individualised assessment of the confiscation at trial, no proportionality analysis and no specification of the property concerned • Lack of clarity, foreseeability and necessary procedural safeguards

STRASBOURG

11 June 2020

FINAL

11/09/2020

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Markus v. Latvia,

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

Síofra O'Leary, *President,*
Gabriele Kucsko-Stadlmayer,
Ganna Yudkivska,
André Potocki,
Mārtiņš Mits,
Lado Chanturia,
Anja Seibert-Fohr, *judges,*

and Victor Soloveytchik, *Deputy Section Registrar,*

Having deliberated in private on 24 March 2020,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 17483/10) against the Republic of Latvia 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 Dainis Markus ("the applicant"), on 17 March 2010.

2. The applicant was represented by Mr A. Laizans, a lawyer practising in Riga. The Latvian Government ("the Government") were represented by their Agent, Ms K. Līce.

3. The applicant alleged, in particular, that the compulsory criminal penalty of confiscation of property, which had led to the confiscation of his legally acquired property, had been disproportionate, violating Article 1 of Protocol No. 1.

4. On 14 January 2013 notice of the application was given to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1953 and lives in Riga.

A. The applicant's criminal conviction

6. On 22 September 2006 criminal proceedings were instituted against the applicant concerning bribery. On 25 September 2006 the investigator registered a restriction against the title to eleven immovable properties belonging to the applicant, effectively seizing them (*uzlika arestu*). This decision was approved by an investigating judge and could not be appealed against.

7. On 22 February 2008 the Riga City Centre District Court convicted the applicant, under section 320(2) of the Criminal Law, of requesting and attempting to receive a bribe of 80,000 Latvian lati (approximately 114,000 euros (EUR)). It was established that as a head of an educational institution he had demanded a bribe from a board member of a private company to conclude a settlement in pending civil proceedings. After finding that there were no mitigating or aggravating circumstances, the court sentenced the applicant to four years' imprisonment. The court also imposed a mandatory ancillary penalty of confiscation of property. The particular property to be confiscated was not specified (see paragraph 25 below regarding execution of that penalty).

8. On 27 April 2009 that judgment was upheld by the Riga Regional Court. It noted that the punishment imposed on the applicant was fair and proportionate. Bearing in mind his personality and health condition, the circumstances of the crime and the harm caused, the penalty had been set close to the minimum margin of the sanction provided for in section 320(2) of the Criminal Law. The Riga Regional Court found no grounds to impose a suspended sentence or to apply a sanction below the margin set forth by the law. No specific comment was made with respect to the ancillary penalty of confiscation of property.

9. On 4 November 2009 the judgment was further upheld by the Senate of the Supreme Court.

B. Constitutional complaints

10. The applicant brought several constitutional complaints challenging the constitutionality of section 320(2) of the Criminal Law. On 26 January 2010 and 3 March 2010 the Constitutional Court declined to institute proceedings, considering the reasoning provided by the applicant evidently insufficient for the claim to be allowed.

11. On 17 March 2010 the applicant submitted an amended constitutional complaint. He objected, in particular, to the disproportionate nature of the penalty and argued that the confiscation of the entirety of his property would make it impossible for him to care for his minor son and disabled parents. Furthermore, the confiscation order also affected a house registered in his name but used by his adult son with his own family. The applicant argued that the compulsory confiscation of property was contrary to the prohibition of discrimination, the right to a fair trial, and the right of property, as guaranteed by the Constitution of Latvia.

12. In relation to the prohibition of discrimination, the applicant complained of the indiscriminate character of the compulsory confiscation. He argued that the courts, when imposing the penalty of confiscation, ought to be able to take into account the material situation of the persons concerned in order to prevent a disproportionate impact. The applicant

considered that confiscation of the entirety of a convicted person's property was a relic of the Soviet criminal-law system.

13. Concerning the right to a fair trial, the applicant contended that it entailed a right to fair punishment. The compulsory nature of confiscation prevented the criminal courts from differentiating and individualising the sanction and did not allow them to take into account the specific circumstances of each case. He further noted that the confiscation of property had, in most cases, an effect on the lives of other persons (relatives and others), and thus the sanction was imposed not only on the criminally culpable person but also on third parties. In addition, Latvian legislation did not contain sufficiently clear regulations on the property that could not be subject to confiscation.

14. With respect to the right of property, the applicant referred to the fourth sentence of Article 105 of the Constitution, which required property expropriation to be based on a separate law and subject to payment of fair compensation.

C. The decision of the Constitutional Court

15. On 21 April 2010 the Constitutional Court instituted proceedings concerning the right of property, as guaranteed under Article 105 of the Constitution (case no. 2010-31-01). It declined to initiate proceedings with regard to the prohibition of discrimination or the right to a fair trial. On 6 January 2011, after having received observations from the parties to the proceedings and third parties, the Constitutional Court discontinued the proceedings.

16. In its decision the Constitutional Court narrowed the scope of its review – as the claim had been submitted in the applicant's name only, it would not take into account the reasoning provided with respect to the interference with the rights of the applicant's relatives. Nonetheless, the Constitutional Court drew the attention of Parliament to the fact that the legislature had failed to specify what property could not be confiscated, and therefore enforcement of the confiscation penalty could infringe the rights of the convicted person's family members. It referred to a policy document adopted by the Cabinet of Ministers stating that in practice people's homes were also being confiscated.

17. The Constitutional Court then noted that the protection under Article 105 of the Constitution did not cover property that had been acquired illegally. Nonetheless, the punishment of property confiscation was not connected with the manner in which the property had been acquired. The fact that a property had been inherited, received as a gift or purchased using the convicted person's salary did not prevent it from being confiscated. The penalty was comparable to a fine, as its purpose was not to alienate illegally acquired property but to punish the convicted person.

18. The Constitutional Court then found that the confiscation penalty was to be seen as an interference with property rights, rather than as an expropriation of property. That interference was in accordance with the law, since section 320(2) of the Criminal Law had been adopted using the correct procedure, and served the legitimate aims of the protection of democracy, public security and the rights of others. It remained to be determined whether the interference was proportionate to those legitimate aims.

19. The Constitutional Court pointed out that an alternative way of achieving those aims would be improving the legislation with respect to the confiscation of illegally acquired property. However, the mere existence of alternative measures did not mean that the legislature had exceeded its margin of appreciation.

20. The Constitutional Court then noted that there were conflicting opinions about the exact scope of the confiscation penalty. In particular, there was a disagreement as to whether the domestic courts had any discretion to individualise the penalty in order to prevent the outcome from being disproportionate. This was demonstrated by the case-law of the criminal courts, some of which had, on occasion, ordered the confiscation of part of the convicted person's property while others had considered that the Criminal Law did not authorise anything short of confiscation of the entirety of the convicted person's property. An example was cited where a conviction for having received a bribe of 10 Latvian lats (approximately EUR 14) had led to the confiscation of all the property belonging to the person concerned.

21. Further, from section 42(4) of the Criminal Law the Constitutional Court inferred that the legislator's purpose had not been to deprive the person of all belongings. However, the "law" mentioned in that section had never been adopted. In practice, the list of property that could not be confiscated was determined by applying, by analogy, the list of property that could not be subject to seizure. The Constitutional Court pointed out that seizure of property and confiscation had different purposes, and besides, the list of properties not subject to seizure had changed over time, for example, by excluding the person's home. It also pointed to some other shortcomings in the domestic regulation, such as uncertainty as to whether the property that had to be confiscated was supposed to be determined with reference to the time of commission of the crime, the initiation or completion of the criminal proceedings, or the enforcement of the penalty. Accordingly, the Constitutional Court drew the Parliament's attention to the fact that there were "serious deficiencies" in the legal regulation for imposing and executing the confiscation of property penalty.

22. The Constitutional Court then noted that the punishment of confiscation of property was provided for with respect to 164 crimes and therefore the question of the proportionality of the contested provision could not be viewed in isolation. It had to be assessed by analysing the provisions of the General Part of the Criminal Law and their compatibility with the

Constitution. In particular, the following questions would need to be assessed: which institution and which procedure determined the exact property to be confiscated; how to deal with the alienation of property that was already encumbered by civil obligations; whether the law prevented the confiscation of property needed to ensure that the person's basic rights and needs were met; whether the convicted person was given the opportunity, in certain circumstances, to keep property that was necessary for the continuation of a professional activity; whether it was compatible with the principle of proportionality for property to be confiscated in circumstances when the person concerned could prove that the property had been acquired legally.

23. Since the applicant had only contested the constitutionality of section 320(2) of the Criminal Law and not the norms of the Criminal Law that established confiscation as a type of criminal penalty, the Constitutional Court turned to the question of whether it was possible and necessary for it to expand, of its own motion, on the claim that had been submitted by the applicant. The Constitutional Court concluded that the legal arguments submitted by the applicant were not sufficient to enable it to assess the constitutionality of the pertinent norms of the General Part of the Criminal Law. Therefore, by its decision of 6 January 2011 it discontinued the proceedings.

24. That decision was final and the applicant could no longer submit an amended claim, since more than six months had elapsed from the date on which his conviction had become final.

D. Enforcement

25. On 13 November 2009 a writ of execution was issued with respect to the judgment convicting the applicant of bribery. On 18 February 2010 the writ of execution was sent to bailiffs for execution. The Government submitted that the exact property to be confiscated was determined on the basis of the decision, taken at the pre-trial stage of the proceedings, concerning the effective seizure of the applicant's property.

26. At the pre-trial stage the investigator had placed restrictions on the titles to eleven immovable properties, effectively seizing them (see paragraph 6 above).

27. With respect to one of those properties, the restriction was lifted, as that property had to be used in the enforcement of a judgment debt in respect of prior legal obligations.

28. With respect to four of those properties, the titles were transferred to the State soon after the completion of the criminal proceedings.

29. With regard to the remaining six properties, several sets of civil proceedings were instituted by the applicant's family members who contested the applicant's title to those properties. While some of those claims were successful, following a challenge by the Prosecutor General,

the judgments were quashed by the Senate of the Supreme Court. Upon retrial most of the applicant's family members' claims failed. With respect to a further four of those properties, the titles were transferred to the State in 2014, 2018 and 2019.

30. With respect to the remaining two properties, no updated information concerning their status has been provided to the Court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution

31. Article 105 of the Latvian Constitution (*Satversme*) protects the right of property and is worded as follows:

> "Everyone has a right of property. Property may not be used contrary to the interests of society. Property rights may be restricted only as provided by law. Expropriation of property for the needs of society is permitted only in exceptional cases, on the basis of a separate law and in return for fair compensation."

B. General Part of the Criminal Law

32. Section 36(2)(1) of the Criminal Law provides that one of the ancillary punishments that can be imposed following conviction is confiscation of property.

33. Section 42 of the Criminal Law contains further regulations for the punishment of property confiscation. At the time the judgment against the applicant took effect, this section provided:

> "(1) Confiscation of property is a compulsory gratuitous transfer to the State of the entirety or part of a convicted person's property. Confiscation of property may be ordered either as the principal sanction or as an additional sanction. Any of the convicted person's property that has been transferred to another physical or legal person can also be confiscated.
>
> (2) Confiscation of property may only be ordered in cases provided for in the Specific Part of this Law.
>
> (3) When ordering partial confiscation of property, the court shall specifically identify the property to be confiscated. When ordering the confiscation of property for a criminal offence in the field of road traffic, the court shall order a partial confiscation of property to apply to the vehicle. When ordering the confiscation of property for [the offence of] cruel treatment of animals, the court shall order a partial confiscation of property to apply to the animals.
>
> (4) The law shall specify the property considered indispensable to the convicted person or to persons under his care, which cannot be confiscated."

34. At the relevant time the "law" mentioned in section 42(4) of the Criminal Law had not been adopted. The types of property that could not be confiscated were specified in a legislative act that took effect on 16 May 2013.

35. By amendments to the Criminal Law of 13 December 2012, which took effect on 1 April 2013, regulation of the confiscation of property was notably altered. Amongst other changes, section 42(3) was amended to extend the court's obligation to specify the property to be confiscated to all situations when confiscation is ordered (for further details see paragraphs 41-42 below).

36. Section 49 of the Criminal Law regulates the discretion of the court to impose a more lenient sanction than the one provided for by the Criminal Law. It states that the court can only go below the minimum sanction if two or more mitigating circumstances are established and there are no aggravating factors. The same criteria have to be fulfilled for the court not to impose a compulsory ancillary punishment.

C. Specific Part of the Criminal Law

37. Section 320 of the Criminal Law provides for criminal liability for bribery. At the time when it was applied to the applicant it was worded as follows:

> "(1) For receiving a bribe ..., –
>
> the punishment shall be deprivation of liberty for up to eight years, with or without confiscation of property.
>
> (2) For the same actions, if they have been carried out repeatedly or on a large scale or if the bribe has been demanded, –
>
> the punishment shall be deprivation of liberty for three to ten years, with confiscation of property".

D. Sentence Enforcement Code

38. Article 144 of the Sentence Enforcement Code regulated the execution of the punishment of property confiscation at the relevant time. It provided:

> "Confiscation shall apply to the property that has been indicated in the judgment of the court and that has been included in the property inventory [*mantas aprakstes akts*] as belonging to the convicted person.
>
> Persons who contest the convicted person's ownership of the property included in the property inventory may bring a claim in a court in accordance with the law.
>
> The first necessity goods and sustenance [*uzturlīdzekļi*], belonging to the convicted person and his dependants shall not be confiscated."

E. Criminal Procedure Law

39. Section 361(8) of the Criminal Procedure Law prohibits the seizure of essential ("first necessity") items required by the person whose property is being seized or by his or her family members or dependents. This prohibition does not apply to property that has been acquired illegally or is

otherwise connected with the crime. The full list of such items is set out in Appendix No. 1 to the Criminal Procedure Law. It provides:

> "The following property ... shall not be seized:
>
> 1. Household furnishing, household equipment, and clothing that are necessary for the accused, his or her family, and his or her dependents.
>
> 2. Food products necessary for the subsistence of the accused and his or her family.
>
> 3. Money, the total sum of which does not exceed one minimum monthly wage for the accused and each of his or her family members, if he or she has been dependent on the accused and has no other income.
>
> 4. Heating fuel necessary for the family to cook and to heat the residential premises.
>
> 5. Equipment and tools necessary for the accused to continue his or her business or professional activities, except in cases where that undertaking has been found to be insolvent or the accused has been deprived of the rights to carry out certain activities by a court judgment in a criminal case.
>
> 6. For persons whose undertaking is agricultural – one cow, heifer, goat, sheep, pig, poultry, and small stock, feeding stuffs for feeding those animals up to the harvest of new feeding stuffs or the driving to pasture of the livestock, as well as seed and planting material."

40. At the time when the list of property that is not to be subject to confiscation had yet to be adopted, the list included in Appendix No. 1 to the Criminal Procedure Law was applied by analogy.

F. Subsequent ruling of the Constitutional Court

41. The new regulation – adopted after the applicant's case (see paragraph 35 above) – was brought before the Constitutional Court in 2014 (case no. 2014-34-01) by R.K. In that case, the applicant challenged the constitutionality of section 36(2)(1) and section 42 of the Criminal Law, as well as the section of the Specific Part of the Criminal Law that imposed the confiscation punishment for the crime of fraud. By a judgment of 8 April 2015 the Constitutional Court found that the challenged legal provisions, as formulated following the amendments, were compatible with the right of property. The judgment included the following reasoning:

> "14.2. In accordance with the Criminal Law, as in force up to 1 April 2013, the punishment of property confiscation could be applied to the entirety of the convicted person's property (with certain exceptions based in case-law). On 1 April 2013 the amendments to the Criminal Law came into force, whereby the legal regulation of property confiscation was significantly changed. With those [amendments] the legislator reduced the scope of the crimes to which property confiscation could be applied ... In addition, the courts were given broader discretion in the application of property confiscation.
>
> In accordance with section 42(1) and (2) of the Criminal Law, ... the imposition of property confiscation is no longer compulsory. Accordingly, a court, when determining a sentence for an offence may [choose] not to impose property confiscation.

> Section 42(3) of the Criminal Law, in its turn, requires the court, when ordering property confiscation, to specify which property is to be confiscated. Property confiscation no longer necessarily has to be applied to the entirety of the convicted person's property but instead should be applied in proportion to the harm caused by the criminal offence and [in accordance with] other principles of sentencing."

42. The judgment further states that, in accordance with the requirements of section 42(4) of the Criminal Law, the list of property that cannot be confiscated has now been adopted and took effect from 16 May 2013 (see paragraph 34 above). The Constitutional Court considered that this list should be assessed in conjunction with the new obligation to clearly specify which property is to be confiscated. It further noted:

> "14.3. The regulation within the Criminal Law, as currently in force, clearly determines to which criminal offences the measure of property confiscation may be applied. Moreover, the limits of the application of the punishment of property confiscation have been determined, on the one hand, by allowing the court not to impose property confiscation and, on the other hand, by specifying the property that may not be confiscated. This legal regulation allows the person to understand the minimum and maximum limits of the punishment of property confiscation."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

43. Invoking Article 1 of Protocol No. 1 the applicant complained that the criminal penalty of confiscation of property, which had led to the confiscation of his legally acquired property, had constituted a disproportionate interference with his rights of property. He also relied on Article 6 with respect to the reasoning and conclusions of the Constitutional Court. Being the master of the characterisation to be given in law to the facts of a case, the Court considers that this complaint is to be examined solely from the standpoint of Article 1 of Protocol No. 1, 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."

A. Admissibility

1. The parties' submissions

44. The Government relied on several inadmissibility grounds. Firstly, they contended that the complaint was inadmissible *ratione personae*, as the applicant complained of the impact that the confiscation penalty had had on his family members, none of whom had lodged applications before the Court. Secondly, the applicant had not exhausted the available domestic remedies, as he could have lodged an application before the Constitutional Court while his criminal proceedings were still pending. That would have resulted in the suspension of the criminal proceedings for the duration of the examination of his constitutional complaint. Thirdly, the applicant had abused the right of petition, as he had not informed the Court of the above-mentioned civil proceedings (see paragraph 29 above). Fourthly, the applicant could not be considered a victim as seven of his properties had not been confiscated and hence the general confiscation complained of had not taken place.

45. The applicant responded that the infringement of third-party interests was a consequence created by the confiscation of his property and was an illustration of the disproportionate nature of the penalty. In relation to the non-exhaustion objection, the applicant considered that a complaint to the Constitutional Court either during his criminal proceedings or after their completion was not a remedy to be exhausted under Article 35 § 1 of the Convention. With respect to his victim status, the applicant emphasised that his complaint was not about the confiscation of any particular property but about the fact that the confiscation penalty that had been applied to him was in itself contrary to Article 1 of Protocol No. 1. On the same grounds, he considered that the information about the civil litigation with respect to specific properties was not relevant to the case. In any event, he would have informed the Court of those developments when notice of the case was given to the Government.

46. In their additional observations and submissions on just satisfaction the Government raised another non-exhaustion argument, referring to the civil proceedings concerning certain of the properties held in the applicant's name (see paragraph 29 above), which at that time were still pending.

2. The Court's assessment

47. The Court observes that, following his conviction, the applicant was punished by means of a judgment ordering the confiscation of his property, and that judgment had taken effect. At the time when the Government submitted their observations, that measure had resulted in the loss of the applicant's title to four immovable properties. His title to a further four properties was also subsequently lost. The status of the remaining two properties has not been clarified to the Court. Accordingly, the Court

dismisses the Government's inadmissibility pleas with respect to incompatibility *ratione personae* or a lack of victim status. The Court also notes that the arguments concerning the confiscation's impact on the applicant's family members, while prominent in his constitutional complaint, were not raised in the application before this Court.

48. The question of whether a complaint before the Constitutional Court is a remedy that has to be exhausted in any particular case depends on the source of the alleged interference – where the alleged breach of a Convention right emanates from a provision of Latvian legislation, proceedings should, in principle, be brought before the Constitutional Court (see *Ēcis v. Latvia*, no. 12879/09, § 49, 10 January 2019, and contrast *Schmidt v. Latvia*, no. 22493/05, § 61, 27 April 2017). Following a successful constitutional complaint the applicants have the right to request the criminal proceedings against them to be reopened and a new ruling to be made. In the renewed examination of the case the domestic courts are bound by the findings of the Constitutional Court (see *Larionovs and Tess v. Latvia* (dec.), nos. 45520/04 and 19363/05, § 166, 25 November 2014).

49. In the present case, the applicant's complaint pertains to the confiscation penalty as it was formulated in the domestic law, in particular, its compulsory and indiscriminate nature. With respect to this complaint the Constitutional Court was an effective remedy that had to be exhausted pursuant to Article 35 § 1 of the Convention. That being said, the Court fails to see how the applicant could be regarded as having failed to exhaust this remedy merely for not having pursued it prior to the completion of the criminal proceedings. The applicant did submit a timely constitutional complaint on the basis of which constitutional proceedings were instituted. A potential temporary suspension of the criminal proceedings would have had no impact on the issue of which the applicant complained. Accordingly, this argument as to non-exhaustion is dismissed. The Court notes that no other non-exhaustion plea concerning the Constitutional Court was raised by the Government.

50. With respect to the Government's non-exhaustion plea concerning the civil proceedings on the ownership rights over some of the properties, the Court points out that under Rule 55 of the Rules of Court, any plea of inadmissibility must be raised by the respondent Contracting Party, in so far as the nature of the objection and the circumstances so allow, in its written or oral observations on the admissibility of the application (see *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 51, 15 December 2016, and *N.C. v. Italy* [GC], no. 24952/94, § 44, ECHR 2002-X). In the present case, the Government raised this particular objection – as to the non-exhaustion of domestic remedies before the civil courts – for the first time in their additional observations and submissions on just satisfaction. The Government provided no explanation for the delay. It follows that the Government are precluded from relying on this non-exhaustion ground.

51. With respect to the Government's argument that the applicant had abused his right of petition, the Court agrees with the applicant that the above-mentioned civil proceedings, which were instituted by the applicant's family members who contested the applicant's title to six of the seized properties, were not decisive for the applicant's complaint before the Court. In particular, the applicant's complaint focused on the fact that, in accordance with domestic law, the courts had ordered the confiscation of all of his properties. Accordingly, even if it had been determined that any specific immovable property did not belong to him, it would not have affected the ruling whereby all properties owned by the applicant had been confiscated. Therefore, while those proceedings provide important factual context to the applicant's case, his failure to inform the Court of them before notice of the case was given to the Government cannot be regarded as an abuse of his right to individual petition.

52. Accordingly, the Court dismisses the Government's objections. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other ground. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

53. The applicant submitted that the law that formally established the confiscation punishment did not comply with the requisite "quality of law" requirement. He referred to the Constitutional Court's decision of 6 January 2011, arguing that, in substance, that court had acknowledged that the provision was unconstitutional.

54. In particular, the applicant complained that the ancillary punishment of confiscation of property was mandatory. Moreover, it entailed the confiscation of the entirety of the convicted person's property – according to the applicant, the courts had no discretion when imposing this punishment and were not authorised to order a partial confiscation. Furthermore, as the punishment was applied irrespective of the manner of acquisition of the property, in the applicant's case it had resulted in the confiscation of legally acquired property. The applicant viewed such a punishment as disproportionate and contrary to the principles governing democratic societies.

55. The applicant emphasised that property confiscation as a criminal punishment had been adapted from the Soviet Union, where private property had not existed as an institution. Confiscation of legally acquired property was characteristic of totalitarian and authoritarian government systems. In democratic societies it should be regarded as immoral and

contrary to Article 1 of Protocol No. 1, and such societies should limit the exercise of confiscation to illegally acquired property.

56. In his additional submissions of 1 February 2017 and 6 June 2019 the applicant raised further complaints concerning the enforcement of the confiscation penalty, particularly with respect to the timing of the transfer of ownership rights and the continuation of the penalty notwithstanding an alleged lapse of the limitation period. He also complained of the losses caused by the delay in transferring title and by the restrictions emanating from the property seizure.

(b) The Government

57. The Government submitted that the confiscation constituted control of use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1. The restriction had a legal basis in national law, which satisfied the requisite quality requirements.

58. In particular, the punishment of confiscation of property was defined in section 42 of the Criminal Law. Section 320(2) – which had been applied to the applicant – established the measure as a compulsory ancillary punishment for the specific crime of which the applicant had been convicted. Further, Article 144 of the Sentence Enforcement Code provided that the property to be subject to confiscation had to be specified in the judgment and in a property inventory (*mantas aprakstes akts*). According to the Government, the property inventory was the same document as the record of the restriction and effective seizure of property (*protokols par aresta uzlikšanu mantai*) that had been drawn up during the pre-trial proceedings. They argued that the investigator or other competent investigative authority had an indirect right to determine the property to be subject to confiscation, as in cases of a general confiscation only previously specified property could be confiscated. Furthermore, section 361(8) of the Criminal Procedure Law precluded the confiscation of objects used for basic necessities, which were listed in Appendix No. 1 to the Criminal Procedure Law.

59. In the present case, the applicant's property that was subject to confiscation had been indicated in the investigator's record of the restriction and effective seizure of property of 25 September 2006 (see paragraph 6 above). According to the Government, it was standard practice not to reproduce this list in the judgment as, by the time of enforcement, the situation might have changed.

60. The purpose of the confiscation punishment was not to alienate funds obtained by criminal means, as this sanction was not linked with the manner of acquisition of the property. Instead, the aim was to punish the convicted person by material means. Accordingly, the legitimate aim of the restriction was the protection of the democratic system of the State, public safety, and the rights of other persons.

61. With respect to proportionality, the Government submitted that the domestic courts were not obliged to impose the penalty if they found mitigating circumstances. In the applicant's case no mitigating circumstances had been found. The Government also drew attention to the seriousness of the crime – the applicant had been convicted of large-scale bribery that qualified as a serious crime under the Criminal Law, for which he had been sentenced to four years' imprisonment. In addition, as the case had concerned the confiscation of possessions, the owner's behaviour and the degree of fault had had to be taken into account, and it had been noted that the applicant had had a central role in the offence of which he had been convicted. The punishment of confiscation was necessary as without it the applicant would fail to comply with the law and would not refrain from committing further criminal offences. The Government also pointed out that in the applicant's case only four properties had actually been confiscated. Therefore, the penalty imposed on the applicant could not be described as confiscation of the entirety of his property.

62. The Government considered that, having regard to the margin of appreciation enjoyed by States in the field of penal policy, the interference was not disproportionate to the legitimate aim pursued.

2. The Court's assessment

(a) The scope of the case

63. At the outset, the Court notes that the scope of a case referred to the Court in the exercise of the right of individual application is determined by the applicant's complaint or "claim" (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 108-09 and 120-22, 20 March 2018). In the Court's view, the new complaints which the applicant raised after notice of the case had been given to the Government (see paragraph 56 above) concern previously unmentioned issues and are not an elaboration of his original complaint to the Court. Accordingly, the Court will not take them into account in its assessment (compare *Piryanik v. Ukraine*, no. 75788/01, § 20, 19 April 2005).

(b) The applicable principles

64. The Court has frequently held that Article 1 of Protocol No. 1 comprises three distinct rules enunciating the principle of peaceful enjoyment of possessions, regulating the deprivation of possessions and recognising the State's right to control the use of property (see, among other authorities, *G.I.E.M. S.R.L. and Others v. Italy* [GC], nos. 1828/06 and 2 others, § 289, 28 June 2018).

65. It is also well established that an interference with property rights must be prescribed by law, it must pursue one or more legitimate aims, and there must be a reasonable relationship of proportionality between the means employed and the aims sought to be realised. In other words, the

Court must determine whether a fair balance was struck between the demands of the general interest and the interest of the individuals concerned. The requisite balance will not be found if the person or persons concerned have had to bear an individual and excessive burden (see *James and Others v. the United Kingdom*, 21 February 1986, § 50, Series A no. 98; *Waldemar Nowakowski v. Poland*, no. 55167/11, § 47, 24 July 2012; and *Andonoski v. the former Yugoslav Republic of Macedonia*, no. 16225/08, § 31, 17 September 2015).

66. With respect to the requirement that the interference be prescribed by law, the Court has held that the existence of a legal basis in domestic law does not suffice, in itself, to satisfy the principle of lawfulness. In addition, the legal basis must have a certain quality, namely it must be compatible with the rule of law and must provide guarantees against arbitrariness. It follows that, in addition to being in accordance with the domestic law of the Contracting State, including the Constitution, the legal norms upon which the interference is based should be sufficiently accessible, precise and foreseeable in their application. A rule is "foreseeable" when it affords a measure of protection against arbitrary interferences by the public authorities. Similarly, the applicable law must provide minimum procedural safeguards commensurate with the importance of the principle at stake (see *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, §§ 95-97, 25 October 2012).

67. Furthermore, while bearing in mind the discretion the national authorities enjoy in the area of penal policy, the Court has nonetheless held that the financial obligation resulting from the payment of a penalty may prejudice the right of property if it imposes an excessive burden on the person concerned or has a fundamental adverse effect on his financial situation (see *Mamidakis v. Greece*, no. 35533/04, § 45, 11 January 2007). In order to be proportionate, the interference should correspond to the severity of the infringement, and the sanction to the gravity of the offence it is designed to punish (see *Grifhorst v. France*, no. 28336/02, § 102, 26 February 2009, *Gabrić v. Croatia*, no. 9702/04, § 39, 5 February 2009, and *Ismayilov v. Russia*, no. 30352/03, § 38, 6 November 2008). Additionally, Article 1 of Protocol No. 1 requires that judicial proceedings afford the individual a reasonable opportunity of putting his or her case to the competent authorities for the purpose of effectively challenging the measures interfering with these rights (see *G.I.E.M. S.R.L. and Others*, cited above, § 302, and the references cited therein).

(c) The application of those principles to the present case

68. In the context of his conviction, a punishment consisting of the general confiscation of his property was imposed on the applicant. While the judgment did not identify the specific property to be subject to the confiscation, in reality it concerned ten of the eleven immovable properties that had been subjected to a restriction against title during the pre-trial

proceedings. The titles to eight of those properties have since been transferred to the State. Accordingly, the criminal punishment of confiscation of property constituted an interference with the applicant's right of property.

69. The Court further notes that the legality of the acquisition of those properties by the applicant has not been called into question, and it also has not been suggested that those properties had any other connection to the crime. Accordingly, the present case should be distinguished from cases in which the confiscation measure extended to the proceeds of a criminal offence (*productum sceleris*) (see *Phillips v. the United Kingdom*, no. 41087/98, ECHR 2001-VII; *Silickienė v. Lithuania*, no. 20496/02, 10 April 2012; and *Gogitidze and Others v. Georgia*, no. 36862/05, 12 May 2015), property that was presumed to be of unlawful origin (see *Raimondo v. Italy*, 22 February 1994, Series A no. 281-A; *Riela and Others v. Italy* (dec.), no. 52439/99, 4 September 2001; and *Arcuri and Others v. Italy* (dec.), no. 52024/99, ECHR 2001-VII), property that was the object of the offence (*objectum sceleris*) (see *AGOSI v. the United Kingdom*, 24 October 1986, Series A no. 108; *Sun v. Russia*, no. 31004/02, 5 February 2009; and *Ismayilov*, cited above), or property that had served, or had been intended to serve, for the commission of the crime (*instrumentum sceleris*) (see *Andonoski*, cited above; *B.K.M. Lojistik Tasimacilik Ticaret Limited Sirketi v. Slovenia*, no. 42079/12, 17 January 2017; and *S.C. Service Benz Com S.R.L. v. Romania*, no. 58045/11, 4 July 2017; see also *Butler v. the United Kingdom* (dec.), no. 41661/98, ECHR 2002-VI).

70. Instead, the measure applied to all properties owned by the applicant, regardless of the manner of their acquisition and of any relation to any offence. Its purpose was deterrent and punitive, and it was intended to punish the offender by material means. Accordingly, the measure is a "penalty" within the meaning of the Convention and falls within the scope of the second paragraph of Article 1 of Protocol No. 1, which, *inter alia*, allows the Contracting States to control the use of property to secure the payment of penalties (compare *Phillips*, § 51; *Mamidakis*, § 44, both cited above; and *Moon v. France*, no. 39973/03, § 44, 9 July 2009).

71. The Court considers, and it is not in dispute between the parties, that this interference was based on section 320(2) of the Criminal Law and other provisions regulating the ancillary punishment of confiscation of property. Referring to the findings of the Constitutional Court, the applicant argued that the domestic law had not complied with the necessary quality of law requirements. He emphasised, in particular, the compulsory, indiscriminate and disproportionate character of the punishment.

72. Save for situations where at least two mitigating, and no aggravating, circumstances could be established, the Government did not contest that the punishment of property confiscation was compulsory. As to the extent of the punishment, the Government appeared to argue that it had been determined indirectly at the pre-trial stage of the proceedings. They

submitted, in essence, that the usual practice was to disregard the requirement set out in the domestic law that the property to be confiscated be indicated in the judgment. Instead, enforcement was based on the investigator's decision to impose a restriction on property. Furthermore, the Government did not specify whether the trial courts had the competence to assess the proportionality of such a sanction. While the wording of the domestic law appeared to allow the property confiscation to be directed at a part of the convicted person's property (see paragraph 33 above), the Court points to the findings of the Constitutional Court, which concluded that there was uncertainty and divergent case-law concerning the trial court's ability to determine the extent of the property confiscation. In particular, the trial courts frequently considered that their competence was limited to ordering confiscation of the entirety of the person's property and had proceeded to do so even when the result could have been considered disproportionate (see paragraph 20 above).

73. The Court considers that where regulation leaves such uncertainty about the scope of the trial court's competence, it cannot be regarded as foreseeable and does not provide protection against arbitrariness. It may also seriously impede a person's ability to present his or her case effectively before the court. With regard to the compulsory nature of the punishment, the Court has previously held that a mandatory confiscation of property deprived the applicants concerned of any possibility to argue their cases and of any prospects of success (see *Andonoski*, §§ 37-38, and *G.I.E.M. S.R.L. and Others*, § 303, both cited above; and compare *Denisova and Moiseyeva v. Russia*, no. 16903/03, §§ 61-64, 1 April 2010). Furthermore, the exact scope of the punishment being determined at the pre-trial stage of proceedings, by a decision that is designed to serve a different purpose, as argued by the Government (see paragraph 58 above), cannot be regarded as affording the individual a reasonable opportunity of putting his or her case to the competent authorities.

74. In relation to the scope of review carried out by the domestic courts in the applicant's case, the Court observes that there was no individualised assessment of the penalty of confiscation of property that was imposed on him. In the judgments convicting the applicant, the proportionality analysis only concerned the deprivation of his liberty and did not address the ancillary punishment of property confiscation (see paragraphs 7-8 above). The courts never specified the particular property that was to be confiscated and hence the extent of the punishment was not identified in the domestic judgments. Neither the question of whether the amount of property to be confiscated corresponded to the gravity of the offence, nor whether that imposed an excessive burden on the applicant was ever analysed. Accordingly, the Court considers that the above-mentioned legislative deficiencies limited the scope of the review carried out by the domestic courts to the extent that it was too narrow to satisfy the requirement of a "fair balance" inherent in Article 1 of Protocol No. 1 and therefore did not

afford the applicant a reasonable opportunity of putting his case before the competent authorities (compare *Paulet v. the United Kingdom*, no. 6219/08, §§ 67-68, 13 May 2014).

75. In these circumstances, the Court concludes that the domestic regulation, on the basis of which the confiscation punishment was imposed on the applicant, lacked clarity and foreseeability, did not afford the necessary procedural safeguards, and provided no protection against arbitrariness. There has therefore been a violation of Article 1 of Protocol No. 1 to the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

76. 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."

77. The applicant did not submit a claim for just satisfaction. Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning the right of property admissible;

2. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention.

Done in English, and notified in writing on 11 June 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik	Síofra O'Leary
Deputy Registrar	President