



THE AIRE CENTRE
Advice on Individual Rights in Europe



**REGIONAL
ANTI-CORRUPTION
INITIATIVE**

Case study

Serbia

- Evidentary standards -

This confiscation case has been selected because it raises the issues of proving the lawful acquisition of property by the convicted individual and the application of the law more favourable to him.

The case has been ultimately decided by the Supreme Court of Cassation, which ruled on the request for the protection of legality, an extraordinary legal remedy. The proceedings concern the confiscation of property of a convicted individual, after the judgment handed down by the Special Organised Crime Department became final.

In its judgment K-Po1 140 /016 of 13 April 2017, the Belgrade Higher Court Special Organised Crime Department found the defendant, A.A., guilty of fraud under Article 208(4) of the Criminal Code in conjunction with paragraph 1 of that Article and of criminal complicity under Article 346(2) of the Criminal Code in the January 2004-13 November 2009 period. The defendant appealed the judgment with the Belgrade Court of Appeals Special Department, which delivered its judgment Kž Po1 26/017 on 5 March 2018; this Court partly upheld the defendant's claims, modified the first-instance judgment and found the defendant guilty only of fraud, but not of criminal complicity. Under this final judgment, the defendant was sentenced to three years and six months imprisonment and a one million RSD fine (app €8,500).

After the judgment became final, the Deputy Organised Crime Prosecutor on 9 May 2018 filed a motion for the confiscation of the defendant's proceeds of crime.

Upon the completion of the confiscation proceedings, the Special Department of the Belgrade Higher Court issued Ruling Toi-Po1 3/018, upholding the Prosecutor's request and ordering the confiscation of the defendant's property, notably: a 218 m² apartment in Belgrade, a 12 m² garage space, and a 4,850 m² plot of land in Ostružnica near Belgrade; the details of the property were specified in the ruling. The Court decided that the confiscated property was to be managed by the Assets Management Directorate until its ruling became final.

The Belgrade Court of Appeals issued a ruling Kž-Po1-Toi 3/18 on 30 January 2019, dismissing the defendant's appeal and confirming the first-instance court's ruling. The decision of the Belgrade Court of Appeals shows that the findings of fact regarding the confiscated apartment during the confiscation proceeding were disputable given that the first-instance court had dismissed the claims of the defendant and his witness B.B. - that the latter had bought the apartment from the former ten years earlier and that the defendant was not the owner of either the apartment or the garage.

The Court of Appeals concurred with the first-instance court, which had concluded that the analysis of all the presented evidence, especially the statements made by witness B.B.

and the defendant, both in the seizure and the confiscation proceedings, showed that the real estate sale contract concluded between the defendant and the witness could not be deemed valid on legal grounds for the acquisition of property in this specific case, because the contract had not been certified by a court. The Court came to this conclusion after analysing the facts, notably allegations that the defendant had sold the apartment to the witness back in 2009, but that the latter had neither tried to have the sale contract certified, nor to register the apartment in the real estate registry, and that it was only in June 2018 that the witness sued the defendant, demanding he cede him possession of the apartment or repay the money he had given him for the apartment. The Court qualified the witness's statement as unconvincing, in the light of the defendant's statement during the 2011 seizure proceedings, when he made no mention of selling the apartment to the witness; actually, the defendant then claimed that he had bought the apartment while it was still under construction, that he had not paid for it yet and that he would become its owner once it was built and he paid the contracted price. The defendant mentioned the witness for the first time in June 2018, during the confiscation proceedings, wherefore the Court concluded that both these statements and the witness's allegations had been made to preclude the confiscation of the apartment. According to a certified sales contract, the defendant bought the apartment for €309,100 on 5 April 2007.

Such an analysis of the facts by the Court is of major relevance to national case-law, because defendants in seizure/confiscation proceedings have increasingly been submitting to the courts uncertified contracts, together with witness statements corroborating their authenticity, wherefore this case is an illustration of the numerous facts the Court had taken into account and ruled on. National case-law on such issues is not fully aligned.

Furthermore, the Court dismissed the defendant's allegations that he had earned a profit of €1,444,864 as a co-owner of a company in Montenegro from 1998 to 1 September 2009, and that it was with this money that he had lawfully bought the seized property (to corroborate these claims, the defendant's counsel had wanted to call to the stand a financial expert). The Court found that no reliable evidence corroborating such allegations had been presented by the defendant during the seizure and confiscation proceedings, while, on the other hand, the prosecutor had submitted reliable proof, notably public documents on the legal incomes of the defendant and his wife, proving that the value of the acquired property by far exceeded their combined legal incomes. The Court found that, during the confiscation proceedings, the defendant had failed to submit to the court original documents on the business operations of the company in Montenegro, including its book-keeping records in any format, or, for that matter, any other documents having the force of public documents and proving the existence and business operations of the company. The Court found that the defendant had wanted to call the expert witness to protract the proceedings, all the more since it established, on the basis of a report by the Ministry of Finance Anti-Laundering Administration, that the defendant had indeed co-founded a company in Montenegro, but that such a company

was established in August 2007, after the defendant had bought the impugned apartment in Belgrade.

The Court found that the Prosecution Office had proven the existence of a manifest disproportion between the value of the defendant's property and his legal income, which, coupled with the fact that he had been found guilty of fraud, showed that his property constituted proceeds of crime.

Finally, the defendant claimed, both before the Court of Appeals and the Supreme Court of Cassation, that the law was violated because the 2016 Law on Confiscation of Proceeds of Crime (LCPC) - rather than the 2008 LCPC - was applied in his case. He claimed that the 2008 CPC, which was valid at the time he committed the crime he was convicted of, was more favourable to him, because it was not applicable to fraud incriminated in Article 208(4) of the Criminal Code, as opposed to the 2016 LCPC. Therefore, the defendant claimed that violations of Article 5 of the Criminal Code and Article 2 of the LCPC, i.e. that the milder law was not applied in his case.

Both the Court of Appeals and the Supreme Court of Cassation took the same view in response to these allegations by the defendant. They found that the provision on the application of the milder law had not been violated. The Court's explanation of its view is relevant to national case-law, because this is the first time this issue was raised before and ruled on by the Serbian Supreme Court of Cassation.

Both Courts held that the LCPC laid down two separate proceedings, one for the seizure and the other for the confiscation of proceeds of crime. In their view, these proceedings differ in legal effects, the circumstances in which the assets are seized/confiscated and functional jurisdiction, and they are not mutually contingent. The LCPC prescribes that confiscation proceedings shall ensue after the judgment becomes final, wherefore such proceedings are conducted separately and may be conducted only in the given procedural situation. Therefore, the initiation and implementation of confiscation proceedings is exclusively linked to the moment of adoption of the final condemnatory judgment for a crime listed under Article 2 of the LCPC.

Therefore, the law valid at the time of adoption of the final judgment applies in confiscation proceedings. Given that the prosecutor applied for confiscation on 9 May 2018, after the judgment finding the defendant guilty of fraud became final, the Court was found to have correctly applied the 2016 LCPC (Official Gazette of the Republic of Serbia No. 94/2016), which, in Article 2(1(4)), lays down that it shall apply, inter alia, to the criminal offence of fraud, incriminated in Article 208(4) of the Criminal Code.