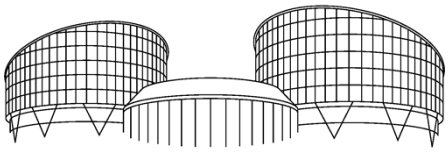

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF BALSAMO v. SAN MARINO

(Applications nos. 20319/17 and 21414/17)

JUDGMENT

STRASBOURG

8 October 2019

FINAL

08/01/2020

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

In the case of Balsamo v. San Marino,

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

Georgios A. Serghides, *President,*
Helen Keller,
Dmitry Dedov,
Branko Lubarda,
Alena Poláčková,
Erik Wennerström, *judges,*
Vincent A. De Gaetano, ad hoc *judge,*

and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 10 September 2019,

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

PROCEDURE

1. The case originated in two applications (nos. 20319/17 and 21414/17) against the Republic of San Marino lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Italian nationals, Ms Valentina Balsamo and Ms Angela Balsamo ("the applicants"), on 8 March 2017 and 10 March 2017 respectively.

2. The applicants were represented by Mr A. Pagliano, a lawyer practising in Naples. The San Marinese Government ("the Government") were represented by their Agent, Mr L. Daniele and their Co-Agent Ms M. Bovi.

3. The applicants alleged, in particular, that a confiscation had been imposed on them, following their acquittal, which they considered had not been in accordance with the law and had been disproportionate.

4. On 19 September 2018 the Government were given notice of the complaints concerning Articles 6 § 2, 7 § 1, alone and in conjunction with Article 13 of the Convention, as well as under Article 1 of Protocol No. 1 to the Convention and the remainder of the applications was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

5. The Italian Government, who had been notified by the Registrar of their right to intervene in the proceedings (Article 36 § 1 of the Convention and Rule 44), did not indicate that they intended to do so.

6. Mr Gilberto Felici, the judge elected in respect of San Marino, withdrew from sitting in the Chamber (Rule 28). The President of the Chamber accordingly appointed V.A. De Gaetano to sit as an *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicants were born in 1986 and 1985 respectively and live in Brescia, Italy.

A. The criminal investigation No. 477/2011

8. On an unspecified date a criminal investigation was instituted against a certain B. and his two daughters (the applicants) for ongoing money laundering under Articles 50, 73 and 199 *bis* of the Criminal Code. According to the prosecution the accused persons had laundered assets which had been obtained, in Italy, by B., through the commission of multiple offences. The total value of the allegedly laundered assets amounted to 2,150,000 euros (EUR).

9. On 28 July 2011 the investigating judge (*Commissario della Legge Inquirente*) seized a current account, a bonds account *(dossier titoli)* and the content of a safe deposit box, all registered in the first applicant's name and in respect of which B. and, subsequently, the second applicant had a mandate. The assets together amounted to a total of EUR 1,920,785.50. It transpired that the first applicant had opened the account on 30 December 2004 at the age of eighteen and on that day she had deposited EUR 500,000 in cash. On 1 August 2005 and 2 March 2006 she had deposited EUR 150,000 and EUR 400,000 respectively, in cash. On 20 April 2006 B. deposited EUR 950,000 in cash and on 1 July 2008 the second applicant deposited EUR 150,000 in cash.

10. On 10 January 2012, in execution of a letter of request - which had been sent on 6 September 2011 by the investigating judge to the Brescia Court of Appeal - the Italian judicial authorities submitted relevant documents and information concerning the alleged criminal origin of the above-mentioned assets. It transpires from the documents in the case-file that included with the above-mentioned documents was a copy of a judgment of the Court of Appeal of Brescia of 6 November 2008 which found B. guilty of theft and receiving stolen goods (*ricettazione*). It further transpires that according to that judgment the proceeds deriving from such offences amounted to EUR 750,000.

11. By a decision of 12 February 2014 the investigating judge archived the proceedings against B. (the documents in the case-file do not provide reasons for this decision) and indicted the first and the second applicants for money laundering.

B. The first-instance criminal proceedings

12. By a judgment no. 139 of 4 November 2014, filed with the registry on 7 August 2015, the first-instance criminal judge (*Commissario della Legge Decidente*) found the first and the second applicant guilty of the offence charged. He sentenced the first applicant to two years and six months' imprisonment, and the second applicant to one year's imprisonment. They were both fined EUR 5,000 and prohibited for one year and four months from holding public office and exercising political rights. The judge, relying on Article 147 § 3 of the Criminal Code, confiscated the sums which had been seized (EUR 1,920,785.50). In addition, the judge issued, in respect of the first applicant, a confiscation by equivalent means of EUR 499,000 given that, before the execution of the seizure she had withdrawn the latter sum from her bank account.

13. The first-instance criminal judge found that the applicants had laundered assets which had been obtained by B., in Italy, through the commission of multiple offences. As to the criminal origin of the assets, the judge held that previous domestic case-law had established that in order to find someone guilty of money laundering it was not necessary to have a previous conviction for the underlying, predicate offence, or to know its perpetrator. It sufficed instead to have reasonable evidence (*prove logiche*) of the criminal origin of the money in question. The criminal origin of the money was an objective prerequisite to be autonomously ascertained by the judge in the money laundering case. It was thus not important to ascertain a specific predicate offence if a plurality of elements showed the illicit origin of the money. In the case at hand, the criminal origin of the assets had been shown by the above-mentioned Italian criminal judgment against B. together with other relevant elements. In particular, the judge quoted a part of the Italian judgment which described the criminal career of B. and his previous convictions for *inter alia*, fighting, causing personal injury, carrying of weapons and, after 1975, handling and receiving stolen goods, multiple instances of theft, owning unjustified assets and drug dealing.

14. The judge acknowledged that the proceeds (EUR 750,000) of the predicate offence - of which B. had been found guilty in Italy by the above-mentioned judgment - were much lower than the sum object of the laundering (EUR 2,150,000). This fact, however, could not lead to exclude the criminal origin of all the sum at issue since, *inter alia*, (i) B.'s criminal record from 1975 included multiple offences each of which was able to produce a relevant criminal profit; (ii) a disproportion existed between the legitimate income of the applicants (and their family) and the assets in their possession; (iii) the applicants had tried to demonstrate the licit origin of the assets (such as from their family business and the sale of immovable property) but their explanation had not relied on any evidence and there had been some contradictions between the statements made by each applicant's

legal counsel in this respect; (iv) it was unreasonable that the applicants had decided to deposit the money in a foreign bank far from the centre of interest of their family's businesses and this was a further indication of their attempt to hide the criminal origin of the assets.

15. The court was also convinced that despite their young age both applicants were well aware of the origin of the money and the objectives behind the transfers of money to San Marino, particularly given that they were well aware of their father's problems with the justice system.

C. The criminal appeal proceedings

16. By a judgment of 10 October 2016, published on 12 October 2016, the Judge of Criminal Appeals (*Giudice d'Appello Penale*) acquitted both applicants for lack of evidence capable of demonstrating the *mens rea* (subjective element of a crime). In particular it had not been ascertained beyond a reasonable doubt that the applicants had been aware of the criminal origin of the assets in the light, *inter alia*, of their young age. Nevertheless, the court noted that the sum deposited in the bank account had had a criminal origin in the absence of any explanation as to the origin of the money (which led to the purchase of properties, the sale of which resulted in the sums at issue). Indeed the fact that relevant fiscal controls did not exist at the time did not suffice to prove the licit origin of the funds. Further, the transfer of such money into banks in San Marino showed the attempt to make such money untraceable precisely to hide their initial origin. The judge upheld the confiscation of the sums which had been seized.

D. The proceedings before the judge for extraordinary remedies

17. When the applicants introduced their application with the Court (in March 2017) they did not inform the Court about the proceedings they had lodged two months earlier before the judge for extraordinary remedies (criminal competence). Nor did they inform the Court about the matter, and later about the relevant decision, at any other time after that. It was only the Government, in their observations of 9 January 2019, following the communication of the complaints, that brought the following facts to the Court's attention.

18. On 5 January 2017 the applicants applied for revision of the judgment of 12 October 2016 before the judge for extraordinary remedies. They complained in particular that the judgment of 12 October 2016 had breached their rights under Article 6 § 2, and 7 of the Convention and Article 1 of Protocol No. 1 to the Convention. They considered that under domestic law there was no available remedy other than a request for a revision of a judgment, noting that a failure of the judge for extraordinary

remedies to take cognisance of their complaints could make the State liable to a violation of Article 13 of the Convention.

19. By a decree of 16 January 2017 the judge for extraordinary remedies considered that he had competence to decide the case under Article 200 (1) of the Code of Criminal Procedure and considered that the request for revision could not be declared inadmissible under Article 201 (5) of the same Code.

20. In his pleadings of 20 March 2017, the Attorney General requested the judge for extraordinary remedies to declare the request inadmissible, as Article 200 of the Code provided an exhaustive list of four situations in relation to which a revision request could be lodged. None of those reasons referred to alleged violations of Convention rights and thus it could not be applied to the present case.

21. In their written submissions of May 2017 the applicants informed the judge for extraordinary remedies that they had lodged an application with the Court complaining about the same matters, as they were required to respect the six month period for bringing such claim. At the same time they requested the judge for extraordinary remedies to suspend his decision on their request pending the proceedings before the Court. They further informed the judge for extraordinary remedies that if their request to suspend proceedings was not upheld, they would withdraw their application before him.

22. By a judgment of 23 May 2017 the judge for extraordinary remedies rejected their request for the proceedings to be suspended, as well as their request to withdraw the proceedings and, having regard to the merits (seen globally), he rejected their revision request.

23. He noted that no reasons had been put forward by the applicants to contest his competence to decide the case, and that he had to bear in mind the risks the State could incur in relation to, *inter alia*, Article 13 of the Convention. Relying on judgment No. 6 of the constitutional jurisdiction (namely, *il Collegio Garante della Costituzionalita` delle Norme*) of 1 August 2007 the judge considered that he had the competence to examine Convention complaints (see paragraph 34 below) and that this was in accordance with the State's obligation under Article 13 of the Convention.

24. He further considered that the complaints raised by the applicants were arguable and therefore Article 13 was applicable. On the merits he found no violation of the provisions invoked in view of the fact that the appeal judge had made a correct application of the law in the light of relevant international instruments given that the confiscated sums had illicit origins – the facts had been established in fair proceedings, where the applicants' defence rights had been respected. No arbitrary conclusions had been drawn nor had there been any issue of legal certainty. The measure had been proportionate, as well as foreseeable.

25. In particular the judge for extraordinary remedies made the following considerations:

26. The Judge of Criminal Appeals had correctly applied the confiscation in so far as he could not have allowed the funds – whose illicit origin had been proved – to be recirculated by the applicants who at that stage had become aware of the illicit origin of the funds.

27. In this case, although applied at the end of criminal proceedings, the confiscation had no punitive function but merely a preventive one aimed at impeding the illicit use of the property at issue. Similar measures applied in Italy and Germany, countries which have "privileged" such preventive measures to fight against the use of illicit funds – measures which have withstood challenges before the European Court of Human Rights. In the present case the illicit origin of the funds had been ascertained in the ambit of a fair trial.

28. As to the lawfulness of the measure, the judge for extraordinary remedies considered that, while it could appear that the Judge of Criminal Appeals had applied a combination (*assimilazione*) of both provisions, legal doctrine (including Italian jurisprudence concerning analogous provisions in Italian law) had stressed the conceptual independence of the so-called mandatory confiscation of self-evidently illicit things (having a preventive nature) from other forms of confiscation provided for by the same law or by other legal provisions (having a punitive character (*repressive*)). He further considered that the confiscation, independently from any investigation concerning the possessor, his/her criminal liability or dangerousness, constituted a mere consequence of the status (*condizione giuridica*) of the property and therefore was devoid of any punitive nature. As argued by the Attorney General, "crime cannot pay" – in all European States laundered money could not be allowed to circulate. In the light of the applicable law and international norms the Judge of Criminal Appeals had correctly applied the confiscation of those sums having illicit origin, and the measure had been lawful and proportionate.

29. The judge of extraordinary remedies further considered that, even assuming Article 147 (2) of the Criminal Code had been interpreted extensively, such an interpretation had been foreseeable in the light of both domestic and international standards, including the recommendations by MONEYVAL (the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism – a monitoring body of the Council of Europe). Relying on European Court of Human Rights case-law, the judge for extraordinary remedies held that, contrary to the argument raised by the applicants, judicial interpretation of laws did not go against the principle of legal certainty when it was justified by the need to adapt laws to the existing realities, socio-economic needs or international obligations. Given the context, the measure had been necessary in a democratic society. The criminal pervasiveness of the conduct at issue and

the multiplier effect on criminal activities, their adverse impact on the regularity of economic activities, the destabilising effects on the economic market and the negative impact on the image of the country and its international credibility were all convincing and imperative reasons justifying the measure.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Criminal Code

30. Article 199 *bis* of the Criminal Code, as amended by Chapter 2, Article 7 of Law no. 28 of 26 February 2004, and by Article 77 (2) of Law no. 92 of 17 June 2008, read, in so far as relevant, as follows:

Article 199 *bis* (money laundering)

"(1) A person is guilty of money laundering, where, except in cases of aiding and abetting, he conceals, substitutes, transfers or co-operates with others to so do, money which he knows was obtained as a result of crimes not resulting from negligence or contraventions (*misfatto*), with the aim of hiding its origins;

(2) Or whosoever uses, or cooperates or intervenes with the intention of using, in the area of economic or financial activities, money which he knows was obtained as a result of crimes not resulting from negligence or contraventions (*misfatto*).

(3) If the crime at the origin of the laundered money has been committed in a foreign country, such a crime has also to constitute a prosecutable criminal offence in San Marino *(deve essere penalmente perseguibile e procedibile anche per l'ordinamento Sammarinese)*.

...

(5) Whosoever commits the offences provided for by the present article is punished by imprisonment of the fourth degree, by a daily fine of the second degree and by a third degree prohibition from holding public office and exercising political rights

(6) The punishments can be diminished by one degree on account of the quantity of the money or the assets and the type of the operations which had been carried out (*indole delle operazioni effettuate*)...

(7) The judge applies the penalty provided for the predicate offence if it is less heavy."

31. Title VI of the Criminal Code, which has the title "Civil obligations and other effects resulting from offences", includes Article 147 of the Criminal Code, which, as amended by Article 42 of the Decree No. 181 of 11 November 2010, and as applicable at the time of the facts of the present case, read, in so far as relevant, as follows:

Article 147 (confiscation)

"(1) In a judgment of conviction, the Judge shall order *(il giudice ordina*) the confiscation of the items belonging to the convicted person which were used or were

intended to be used to commit the crime, as well as the confiscation of the price, the product, and the profit of the crime.

(2) Regardless of conviction, confiscation ensues in the case of any fabrication, use, possession, transfer or commerce, of items, where such act constitutes an offence, even if the items do not belong to the perpetrator of the act in issue (*agente*).

(3) In a judgment of conviction, the judge must always order (*e' sempre obbligatoria*) the confiscation of items which were used or which were intended to be used to commit the offences ex Articles 167, 168, 168 *bis*, 169, 177 *bis*, 177 *ter*, 194, 195, 195 *bis*, 195 *ter*, 196, 199, 199 *bis*, 204 (3-1), 204 *bis*, 207, 212, 305 *bis*, 337 *bis*, 337 *ter*, 371, 372, 373, 374, 374 *ter* (1), 388, 389, or offences connected to terrorism, or offences with the purpose of subverting the constitutional order, or the crime ex Article 1 of Law no. 139 of 26 November 1997, as well as ordering the confiscation of the price, product and profit of the crime. If confiscation is not possible the judge shall order (*impone l'obbligo di*) the payment of an amount of money equivalent to the value of the above-mentioned items."

B. The Code of Criminal Procedure

32. Article 200 of the Code of Criminal procedure, concerning revision proceedings, in so far as relevant reads as follows:

"A revision of a judgment finding guilt or acquittal, with the application of security measures or confiscation, ... which have become res judicata, is permissible:

(a) If new evidence comes to light which alone or in conjunction with the evidence already adduced, show that the applicant must be acquitted...;

(b) If the finding is based on a falsehood or other crime;

(c) If the facts established for the purposes of that finding are not reconcilable with the facts established in another criminal judgment which is final.

(d) If the European Court of Human Rights has found that the criminal proceedings were in violation of the Convention, and the ensuing serious negative consequences can only be remedied by means of the revision of the judgment.

... [concerning who may lodge such a request]"

33. According to Article 202 of the Code of Criminal Procedure, a revision request has to be submitted within one year from the relevant facts leading to the reasons mentioned in the respective sub-articles of Article 200.

C. Relevant case-law

34. By a decree of 3 March 2007 the judge for extraordinary remedies asked for a constitutional reference in respect of Article 200 (1) of the Code of Criminal Procedure in so far as it appeared not to include, within its remit, the situation where a norm, which was determinative in deciding the substance and procedure of a case, had been found to be unconstitutional only after the case had been finally determined.

35. In judgment No. 6 of the constitutional jurisdiction (namely, *il Collegio Garante della Costituzionalita` delle Norme*) of 1 August 2007, the latter held that "in the San Marino judicial system the only means of correcting any possible substantive injustice relating to a final judgment, was by means of a judgment of the judge for extraordinary remedies, via the institution of revision proceedings applicable in the criminal sphere". It noted, however, that the then current formulation of Article 200 of the Code of Criminal Procedure, did not allow for revision of a judgment based on a norm which was subsequently found to be unconstitutional (and which could raise issues under Articles 5 and 7 of the Convention). Nor could Article 200 of the same Code be interpreted extensively or by analogy, given that it provided for a clear and exhaustive list of when a revision request could be lodged. It followed that Article 200 of the Code of Criminal Procedure was unconstitutional, in part, in so far as it did not provide for the possibility of requesting revision in cases where a final judgment in the criminal sphere had been reached on the basis of a norm which was later found to be unconstitutional (and only in respect of cases where the punishment had not already been served – as in such cases it was legitimate not to provide a remedy in the interests of legal certainty).

36. In a judgment No. 6 of 13 August 2018, in a case relating to issues analogous to those which were at issue in the case of *M.N. and Others v. San Marino* (no. 28005/12, 7 July 2015) the judge for extraordinary remedies reiterated his competence to assess human rights issues in the context of a request for revision under Article 200 of the Code of Criminal Procedure, as he had done in the previous cases since 2016, namely in judgments of 10 July 2018 in revision proceedings No. 3/2018, 26 February 2018 in revision proceedings No. 2/2017, 10-23 May 2017 in revision proceedings No. 1/2017 and 13 August 2016 in revision proceedings No. 2/2016. Such interpretation was based on judgment No. 6 of the constitutional jurisdiction (see preceding paragraph), which in his view provided that revision proceedings were the only remedy in cases where there had been a "substantive injustice relating to a final judgment which was in contrast with fundamental human rights". He considered that the effective remedy required by the Convention was guaranteed in San Marino by revision proceedings given that the constitutional jurisdictions had entrusted the judge for extraordinary remedies with the competence to evaluate a situation where a final judgment was in conflict with fundamental human rights, and to examine the complaint where this was based on an arguable claim, and, Article 13 attributed to the judge for extraordinary remedies the power to award adequate redress for the violations upheld.

37. In so doing the judge for extraordinary remedies rejected the objection raised by the Attorney General to the effect that the judge for extraordinary remedies had no such competence given that such a situation

was not listed in the exhaustive list of situations proceeded by Article 200 of the Code of Criminal Procedure.

III. RELEVANT INTERNATIONAL INSTRUMENTS

38. On 12 October 2002 the Republic of San Marino ratified the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg 1990 – ETS No. 141). The Convention aimed to facilitate international co-operation and mutual assistance in investigating crime and tracking down, seizing and confiscating the proceeds thereof. Parties undertake in particular to criminalise the laundering of the proceeds of crime and to confiscate instrumentalities and proceeds (or property the value of which corresponds to such proceeds).

39. On 27 July 2010 the Republic of San Marino ratified the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw 2005 - CETS No.198). This Convention covers both the prevention and the control of money laundering and the financing of terrorism. State parties to the Convention are asked to adopt legislative and other measures in order to assure that they are able to search, trace, identify, freeze, seize and confiscate property, of a licit or illicit origin, used or allocated to be used for the financing of terrorism; and to provide co-operation as well as investigative assistance to each other.

40. According to these instruments confiscation means "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". In particular in relation to confiscation measures, in so far as relevant, the latter provides that:

Article 3

"1. Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds and laundered property.

2. Provided that paragraph 1 of this article applies to money laundering and to the categories of offences in the appendix to the Convention, each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that paragraph 1 of this article applies

a) only in so far as the offence is punishable by deprivation of liberty or a detention order for a maximum of more than one year. However, each Party may make a declaration on this provision in respect of the confiscation of the proceeds from tax offences for the sole purpose of being able to confiscate such proceeds, both nationally and through international cooperation, under national and international tax-debt recovery legislation; and/or

b) only to a list of specified offences.

3. Parties may provide for mandatory confiscation in respect of offences which are subject to the confiscation regime. Parties may in particular include in this provision the offences of money laundering, drug trafficking, trafficking in human beings and any other serious offence.

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

"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."

THE LAW

I. JOINDER OF THE APPLICATIONS

41. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

II. PRELIMINARY OBJECTIONS

A. Abuse of petition

42. Article 35 § 3 (a) of the Convention provides:

"The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

(a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; ..."

1. The parties' submissions

43. The Government submitted that in their application to the Court the applicants had omitted to mention their application to the judge for extraordinary remedies, which was pending at the time, and wherein they

brought the same complaints brought to the Court under Articles 6 § 2 and 7 of the Convention. Moreover, in their application to the Court they complained specifically that they had no remedy for the purposes of Article 13, concealing to the Court that they had been pursuing precisely such a remedy at the same time. They further failed to inform the Court when a judgment in their case had been issued. The Government noted that following developments in the case-law regarding the way and the conditions to apply for a revision of criminal judgments under Article 200 of the Code of Criminal Procedure (see paragraphs 35 and 36 above) - in particular the judgment of the Constitutional Court of 1 August 2007 the principle of which was interpreted and extended by the judge for extraordinary remedies to make him responsible for human rights violations - that avenue had become an appropriate and effective remedy for Convention complaints. Thus, the Government considered that the applicants, who were aware of the domestic developments to the extent that they attempted such proceedings, had deliberately submitted incomplete and misleading information to the Court. The Government requested the Court to find that there had been an abuse of petition and in consequence to declare the application inadmissible.

44. The applicants considered that according to the ECtHR case-law against San Marino to date, proceedings before the judge for extraordinary remedies were an extraordinary remedy which did not need to be exhausted. In consequence there had been no reason to inform the Court about that further remedy they had pursued. In their view the remedy was unnecessary and could not change their victim status since it could not redress their situation. They submitted that they had not had a fraudulent intent to mislead the Court and that their omission did not deal with the core issue of the case. They distinguished their situation from that where applicants had omitted to inform the Court that they had been successful in pursuing such a remedy, i.e., a situation where domestically the authorities would have had provided redress for the infringements, thus, impinging on their victim status.

2. The Court's assessment

45. The Court reiterates that under Article 35 § 3 (a) an application may be rejected as an abuse of the right of individual application if, among other reasons, it was knowingly based on untrue facts (see *Akdivar and Others v. Turkey*, 16 September 1996, §§ 53-54, *Reports of Judgments and Decisions* 1996-IV; *Varbanov v. Bulgaria*, no. 31365/96, § 36, ECHR 2000-X; *Rehak v. the Czech Republic* (dec.), no. 67208/01, 18 May 2004; *Popov v. Moldova (no. 1)*, no. 74153/01, § 48, 18 January 2005; *Kerechashvili v. Georgia* (dec.), no. 5667/02, ECHR 2006-V; *Miroļubovs and Others v. Latvia*, no. 798/05, § 63, 15 September 2009; and *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 97,

ECHR 2012). The submission of incomplete and thus misleading information may also amount to an abuse of the right of application, especially if the information concerns the very core of the case and no sufficient explanation has been provided for the failure to disclose that information (see *Hüttner v. Germany* (dec.), no. 23130/04, 9 June 2006; *Predescu v. Romania*, no. 21447/03, §§ 25-26, 2 December 2008; and *Kowal v. Poland* (dec.), no. 2912/11, 18 September 2012). The same applies if important new developments have occurred during the proceedings before the Court and where, despite being expressly required to do so by Rule 47 § 7 (former Rule 47 § 6) of the Rules of Court, the applicant has failed to disclose that information to the Court, thereby preventing it from ruling on the case in full knowledge of the facts (see *Centro Europa 7 S.r.l. and Di Stefano*, cited above, and *Miroļubovs and Others*, cited above). However, even in such cases, the applicant's intention to mislead the Court must always be established with sufficient certainty (see *Al-Nashif v. Bulgaria*, no. 50963/99, § 89, 20 June 2002; *Melnik v. Ukraine*, no. 72286/01, §§ 58-60, 28 March 2006; and *Gross v. Switzerland* [GC], no. 67810/10, § 36, ECHR 2014).

46. Turning to the circumstances of the instant case, the Court notes that in their application to the Court lodged in March 2017 the applicants argued, *inter alia*, that they had suffered a violation of Article 13 as they had no effective remedy at the domestic level for their Convention complaints and specifically noted that proceedings under Article 200 of the Code of Criminal Procedure could not be considered effective both because it was an extraordinary remedy and because it did not apply to their case (which was not included in the exhaustive list of circumstances provided by that Article). In so doing, however, they did not inform the Court that they had in any event attempted those proceedings which were pending at the time when they lodged the application to the Court. They also failed to inform the Court when a decision on the matter had been issued.

47. In connection with the applicants' claims as to the extraordinary nature of the remedy which made it irrelevant to their case, the Court notes that it is true that, in previous cases against San Marino, it has held that revision proceedings under Article 200 of the Code of Criminal Procedure amounted to an extraordinary remedy which need not be exhausted (see, for example, the admissibility decision in *Ercolani v. San Marino* ((dec.), no. 35430/97, 28 May 2002). The situation may be different now in the light of the fact that the judge for extraordinary remedies has established his competence to examine human rights issues as happened in the applicants' case, and as appears to be the case since 2016 (see paragraph 36 above). Indeed, it would appear to be in the light of such developments that the applicants attempted the remedy. However, the Court has not yet had the opportunity to examine, on the basis of relevant observations by the parties, whether the revision proceedings are still to be considered an extraordinary

remedy, or whether such proceedings are a remedy for the purposes of Articles 13 and 35 § 1 of the Convention in a given situation, and in such circumstances there is no doubt that the applicants should have informed the Court about the remedy they pursued.

48. However, and more importantly, the Court notes that, as submitted by the applicants, the outcome of those proceedings has not had any impact on their victim status (see, *a contrario*, *Kerechashvili.* cited above). Moreover, in the circumstances of the present case the applicants had nothing to gain by hiding such information. The Court, thus, considers that the omission could be due to inadvertence or inexperience and thus the applicants' intention to mislead the Court cannot be established with sufficient certainty.

49. Accordingly, the Government's objection is dismissed.

B. Exhaustion of domestic remedies

1. The parties submissions'

50. In respect of their complaints under Articles 6 § 2 and 7, the Government submitted that at the time when the application was lodged, the applicants had not yet exhausted domestic remedies, as the proceedings they pursued before the judge for extraordinary remedies were still pending at the time.

51. The applicants submitted that the judge for extraordinary remedies was an extraordinary jurisdiction both under domestic-law and according to the Court's case-law. In particular they noted that its extraordinary nature was evident given that Article 2 of Constitutional Law No. 144 of 2003 did not list such a remedy with the ordinary remedy and precisely established that the judge for extraordinary remedies has extraordinary jurisdiction. Its extraordinary nature was further confirmed by the fact that, until the time of observations, never had the San Marino Government invoked non-exhaustion of domestic remedies before the Court for failure to undertake a request for revision (with the exception of cases where this jurisdiction had to decide on a request for withdrawal of a judge pending proceedings, in which context it was considered as an ordinary remedy), nor had the Court ever found an application inadmissible on that ground.

2. The Court's assessment

52. The Court reiterates that the requirement for the applicant to exhaust domestic remedies is normally determined with reference to the date on which the application was lodged with the Court (see *Baumann v. France*, no. 33592/96, § 47, ECHR 2001‑V (extracts)). However, the Court also accepts that the last stage of the exhaustion of domestic remedies may be reached shortly after the lodging of the application but before the Court

determines the issue of admissibility (see, for instance, *Zalyan and Others v. Armenia*, nos. 36894/04 and 3521/07, § 238, 17 March 2016, with further references).

53. The Court notes that – without prejudice as to whether or not proceedings before the judge for extraordinary remedies lodged under Article 200 of the Code of Criminal Procedure are still to be considered an extraordinary remedy and whether they are an Article 13 compliant remedy – those proceedings ended just a few months after the introduction of the application and before the Court had determined the admissibility of the relevant complaints. In those circumstances, there are no grounds for dismissing the applicants' complaint for failure to comply with the requirements of Article 35 § 1 of the Convention (see, for instance, *Milić and Nikezić v. Montenegro*, nos. 54999/10 and 10609/11, § 74, 28 April 2015, and *Zalyan and Others*, cited above, §§ 238-239).

54. Accordingly, the Government's objection is dismissed.

III. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

55. The applicants complained that they had been punished despite having been acquitted. They relied on Article 7 of the Convention which 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.
>
> 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

A. The parties' submissions

56. The applicants complained that they had been subjected to a confiscation despite having been acquitted. They considered that the confiscation amounted to a penalty which was punitive in nature and serious in its consequences. It had been meted out during criminal proceedings and therefore was clearly punitive. In their view its criminal nature was also evident from the fact that it was tied to a criminal conviction, although not that of the applicants, but of their father. Moreover, the measure was grounded on Article 147 (2) of the Criminal Code which allowed such measures even in cases of acquittal. However, according to the applicants that provision was intended to provide for the confiscation of possessions destined to committing crimes or which constituted a crime or which where dangerous, and thus the confiscation of sums of money should not have fallen under its remit. In their view by relying on that provision the judge was extending the domestic court's remit by analogy, which was not

possible in the criminal law sphere. In their view he had applied something in between Article 147 (1) which was a punitive measure and Article 147 (2) which was a preventive measure despite both provisions not being applicable in their case. Thus, while the measure had not been provided by law, it had been clearly punitive in nature.

57. The Government submitted that confiscation under Article 147 (2) of the Criminal Code was not a sanction and was not punitive in nature. They relied on the findings of the judge for extraordinary remedies (see paragraphs 28 above). Referring to the Court's criteria to prove the non-criminal nature of the measure, the Government submitted that i) the confiscation had not arisen from a finding of guilt; ii) under domestic law it was classified as a civil obligation not a punishment as evident by its positioning in Title VI of the Criminal Code entitled "Civil obligations and other effects resulting from offences" (paragraph 31 above); iii) the nature and purpose of the measure was preventive, in particular to prevent the accumulation of illicit property solely based on its illicit origin as established by domestic provisions and international conventions; iv) the Government also considered that the confiscation of sums of money indisputably consisting of proceedings of numerous serious crimes could not be defined as having a "serious" consequence, but merely an adequate measure to contrast and repress the accumulation of assets deriving from serious crimes, such as trafficking in drugs and weapons, which are shared objectives in the international community; v) lastly, such sums, had been confiscated only after a prudent and careful assessment within which in the face of multiple and serious indications of the illegal and criminal original of the funds the applicants had failed to submit sufficient evidence of their lawful origin.

B. The Court's assessment

1. General principles

58. 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).

59. 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 *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 203, 4 December 2018, and *G.I.E.M S.R.L. and Others*, cited above, §§ 210-211 and the case-law cited therein).

2. Application to the present case

60. As noted above, as to whether the confiscation in question was imposed following a conviction for criminal offences, the Court has generally found that this is only one criterion among others to be taken into consideration (see *Saliba v. Malta* (dec.), no. 4251/02, 23 November 2004; and *Berland v. France,* no. 42875/10, § 42, 3 September 2015), without it being regarded as decisive when it comes to establishing the nature of the measure (see *Valico S.r.l. v. Italy* (dec.), no. 70074/01, ECHR 2006-III, and *Société Oxygène Plus*, (dec.) no. 76959/11, § 47, 17 May 2016). It is only more rarely that the Court has found this aspect decisive in declaring Article 7 inapplicable (see *Yildirim v. Italy* (dec.), no. 38602/02, ECHR 2003-IV, and *Bowler International Unit v. France*, no. 1946/06, § 67, 23 July 2009). In the present case the applicants have been acquitted of the offence of money laundering. However, the absence of a conviction does not suffice to rule out the applicability of that provision (see *G.I.E.M S.R.L. and Others*, cited above, § 217). In the present case therefore, where no conviction came to play because the applicants were acquitted, the Court must examine whether the confiscation amounted to a penalty in the light of the other factors established in its case-law.

61. As regards the classification of confiscation under Article 147 (2), the Court notes that under domestic law the entire provision, including with reference to confiscations applied on conviction, fell within Title VI of the Criminal Code entitled "Civil obligations and other effects resulting from offences" (paragraph 31 above). It follows that this title may cover both punitive and preventive, or other type of measures. In the Court's view therefore, this does not indicate that the confiscation in the present case was surely a penalty (see, *a contrario*, *G.I.E.M S.R.L. and Others*, cited above, § 221).

62. As to the nature and purpose of the confiscation measure, the Court considers that the measure was not punitive, but rather preventive, for the following reasons:

Firstly, the confiscation under Article 147 (2) was to be applied even if the items did not belong to the perpetrator of the act in issue;

Secondly, according to the relevant doctrine in San Marino (see paragraphs 27 and 28 above) this was a preventive measure, independent of

criminal proceedings and a finding of guilt (compare, *M. v. Italy*, no. 12386/86, Commission decision of 15 April 1991);

Thirdly, the Court accepts that the measure is designed to prevent the unlawful use of the funds, and in consequence also preventing the commission of further crimes. In this connection the Court notes that Article 199*bis* states that the use or transfer of money which one knows was obtained as a result of crimes constitutes money laundering (see paragraph 30 above). The Court observes that it has been established that the funds have an illicit origin and the applicants are aware of that now. It follows that the applicants could be charged with new acts of money laundering had they to use or transfer such money. Against this legal background, the Court confirms the preventive character of such a confiscation designed to prevent the unlawful use of these proceeds, an aim also sought by various international instruments (see paragraphs 38 - 40 above) (compare also, *Gogitidze and Others v. Georgia*, no. 36862/05, § 101, 12 May 2015). In such circumstances and particularly in view of the applicant's acquittal precisely on the basis of the lack of intention, it cannot be said that the measure also included a punitive purpose (see, *a contrario*, *Sofia v. San Marino* (dec.), no. 38977/15, § 63, 2 May 2017, and *Vannucci v. San Marino*, (dec.), no. 33898/15, 28 March 2017, concerning a confiscation of laundered assets, or the equivalent, respectively, under Article 147 (3) of the Criminal Code which were applicable after conviction, and *Welch v. the United Kingdom*, 9 February 1995, § 27, Series A no. 307-A, where the confiscation of the proceeds of drug trafficking followed a finding of guilt and its amount depended on the degree of culpability of the applicant).

63. As regards the procedures for the adoption and enforcement of the confiscation measure, the Court observes that, undeniably, the measure is meted out by the courts of criminal jurisdiction. However, this cannot in itself be decisive (see by implication, *Dassa Foundations and Others v. Liechtenstein*, (dec.), no. 696/05, 10 July 2007). Indeed, it is a common feature of several jurisdictions for criminal courts to take decisions of a non-punitive nature as, for example, the possibility for criminal courts to order civil reparation measures for the victim of the criminal act. Furthermore, the Court observes that in the present case those courts had to assess the origin of the funds, and during those proceedings, which the applicants have not considered unfair, and during which the applicants have had the right to present their defence, it was established that the origin of the funds had been illicit. This decision was based on the evidence related to their father's dealings, including a criminal judgment against him, and the applicants' inability to prove the lawful origin of the money. Thus, the assessment had been objective and based on relevant evidence in the absence of a successful rebuttal, and therefore must be distinguished from

mere suspicions or subjective speculation (see, *mutatis mutandis*, *M. v. Italy*, cited above).

64. Lastly, as regards the severity of the measure, the Court reiterates that this factor is not in itself decisive, since many non-penal measures of a preventive nature may have a substantial impact on the person concerned (see *Del Río Prada v. Spain* [GC], no. 42750/09, § 82, ECHR 2013). The Court considers that the confiscation of the sums in the present case is not sufficiently severe as to warrant its classification as a criminal penalty. The Court has previously held that confiscation is not a measure confined to the sphere of criminal law, but that it is encountered widely in the sphere of administrative law where items liable to confiscation include illegally imported goods (see *AGOSI v. the United Kingdom*, 24 October 1986, Series A no. 108), items considered dangerous in themselves (such as weapons, explosive or infected cattle) and property connected, even if only indirectly, with a criminal activity (see *M. v. Italy*, *Yildirim*, and *Bowler International Unit*, all cited above, and more recently *Gogitidze and Others*, cited above, § 126). Each confiscation must be seen in its context; money laundering directly threatens the rule of law as is also evident by the action of the Council of Europe and other international bodies in this field. In particular the Council of Europe Conventions on the matter have bound States to criminalise the laundering of the proceeds of crime and provide for other measures aimed at having a strong criminal policy to combat this growing national and international phenomenon the complexities of which are unprecedented (see *Podeschi v. San Marino*, no. 66357/14, § 181, 13 April 2017). In such circumstances the Court considers that the preventive measure was necessary and appropriate given the public interest involved (see, *mutatis mutandis*, *M. v. Italy* (cited above) and *Gogitidze and Others,* cited above, § 103).

65. It follows from the above considerations that the measure at issue was not a "penalty" in its autonomous Convention meaning and therefore Article 7 is not applicable in the present case.

66. This complaint 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.

IV. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

67. The applicants complained about a violation of the presumption of innocence since a confiscation of their assets had been applied irrespective of their acquittal, thus, raising doubts as to their innocence. They relied on Article 6 § 2 which reads as follows:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

A. The parties submissions

68. The applicants submitted that since a criminal sanction had been applied to them, they had been stigmatised and their presumption of innocence had been breached.

69. The Government submitted that while the applicants had been declared innocent, the same judge had confirmed the illicit origin of the funds. Those funds had been generated by crimes for which the applicants' father had been found guilty and the applicants had failed to prove any alternative legitimate origin. The proceeds of the crimes committed by the father were in themselves unlawful and thus subject to confiscation under Article 147 (2). The measure was independent of any liability of the applicants for the offence of money laundering and did not reflect the opinion that the applicants were guilty of such offence, in respect of which they were acquitted by the same judge. This was even more so given the preventive nature of the measure. The Government relied on the findings of the judge for extraordinary remedies and reiterated their submissions under Article 7.

70. Without prejudice to the above, they noted that the applicants had been given the opportunity to prove the licit origin of the funds they were in possession of but they failed to satisfy the burden of proof. The situation was therefore different from that in *Geerings v. the Netherlands* (no. 30810/03, 1 March 2007) and the presumption of innocence had been respected as was the case in *Silickienė v. Lithuania* (no. 20496/02, 10 April 2012).

B. The Court's assessment

1. General principles

71. Article 6 § 2 protects the right of any person to be "presumed innocent until proved guilty according to law". Regarded as a procedural safeguard in the context of the criminal trial itself, the presumption of innocence also has another aspect. Its general aim, in this second aspect, is to protect individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence charged. In these cases, the presumption of innocence has already operated, through the application at trial of the various requirements inherent in the procedural guarantee it affords, to prevent an unfair criminal conviction being imposed. Without protection to ensure respect for the acquittal or the discontinuance decision in any other proceedings, the fair-trial guarantees of Article 6 § 2 could risk becoming theoretical and illusory. What is also at stake once the criminal proceedings have concluded is the person's reputation and the way in which that person is perceived by

the public. To a certain extent, the protection afforded under Article 6 § 2 in this connection may overlap with the protection afforded by Article 8 (see *G.I.E.M S.R.L. and Others*, cited above, § 314).

72. The Court reiterates that whilst it is clear that Article 6 § 2 governs criminal proceedings in their entirety, and not solely the examination of the merits of the charge, the right to be presumed innocent under Article 6 § 2 arises only in connection with the particular offence with which a person has been "charged" (see *Phillips v. the United Kingdom*, no. 41087/98, § 35, ECHR 2001-VII).

2. Application to the present case

73. The Court considers that in the present case there is no doubt that the applicants have been acquitted of the charges related to money laundering and nothing in the appeal judgment suggests otherwise, including the order for the confiscation of their assets. Indeed the Court notes that the confiscation measure in the present case was not based on a judicial finding that the applicants had derived any advantage from offences of which they had been acquitted (see, *a contrario*, *Geerings*, cited above, §§ 46-50) but solely on the basis that, according to domestic law and in the spirit of international standards in the battle against money laundering, those funds should not remain in circulation since they had been found to be illicit and their use - after such provenance had been established - would have been constitutive of an offence. Moreover, quite apart from being preventive and not punitive (see paragraph 65 above), the confiscation concerned funds in the applicants' possession which were found to be illicit as a result of crimes not attributed to the applicants, but to third persons (who had committed the predicate offence of the money laundering with which the applicants were charged). In the circumstances of the case, therefore, the applicants' presumption of innocence has not been breached by the mere imposition of a confiscation order over the illicit assets.

74. It follows that the complaint under Article 6 § 2 is manifestly ill-founded and must be rejected in accordance with Article 35 § 4.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

75. The applicants complained that the domestic system did not provide them with an effective remedy in respect of their Convention complaints, under Articles 6 § 2 and 7 of the Convention contrary to that provided in Article 13 of the Convention, which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

76. The Government contested that argument.

77. The Court reiterates that Article 13 does not apply if there is no arguable claim (see see *Boyle and Rice v. the United Kingdom*, 27 April 1988, Series A no. 131, § 52 and *Brincat and Others v. Malta*, nos. 60908/11 and 4 others, § 139, 24 July 2014). As it has found above, the complaints under Article 7 and 6 § 2 were inadmissible *ratione materiae* and manifestly ill-founded respectively. Consequently there was no such claim. It follows that in the present case Article 13 is not applicable in conjunction with the mentioned provisions.

78. Accordingly, the complaint under Article 13 is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

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

79. The applicants further complained that the interference with their right of property had been unlawful and disproportionate. They 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."

A. Admissibility

80. The Court reiterates that Article 1 of Protocol No. 1 to the Convention, which guarantees in substance the right to property, comprises three distinct rules. The first one, which is expressed in the first sentence of the first paragraph, lays down the principle of peaceful enjoyment of property in general. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, among other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, must be construed in the light of the general principle laid down in the first rule (see, among many authorities, *Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 44, ECHR 1999-V).

81. The Court notes that in cases where the confiscation followed a conviction, and thus constituted a penalty, the Court found that such interference fell 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. That provision had to be construed in the light of the general principle set out in the first sentence of the first paragraph which requires that there exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, among many examples, *Sofia*, cited above and *Phillips*, cited above, § 51). In other cases, where a confiscation measure had been imposed independently of the existence of a criminal conviction but rather as a result of separate "civil" (within the meaning of Article 6 § 1 of the Convention) judicial proceedings aimed at the recovery of assets deemed to have been acquired unlawfully, the Court has again held that such a measure, even if it involves the irrevocable forfeiture of possessions, constitutes nevertheless control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1 and in such cases, also, the measure had to be reasonably proportionate to the aim sought to be realised (see *Gogitidze and Others*, cited above, §§ 94 and 97).

82. The Court first observes that it is not in dispute between the parties that the confiscation order concerning the applicants' assets amounted to interference with their right to peaceful enjoyment of their possessions and that Article 1 of Protocol No. 1 is therefore applicable. The Court further notes that in the present case the confiscation was not based on a criminal conviction, nor was it a result of separate "civil" proceedings, but that the case nevertheless falls to be examined as one of control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1.

83. The Court finds that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The applicant's submissions

84. The applicants considered that the measure applied to them had not been lawful as, on appeal, the judge had applied something in between Article 147 (1) and (2) of the Criminal Code, even though neither provision was applicable in their case. In their view the Criminal Code did not provide for a situation as the one in the present case where the sums were assumed to be "profit" of other crimes which were not examined in the context of the procedure during which the measure was applied. They considered that the sums had been confiscated because they were the product of illegal activity (Article 147 (1)), and not because they were in themselves dangerous or constituting a crime as required by Article 147 (2), which was applied to them.

85. The Government submitted that the interference was in accordance with the law, namely Article by Article 147 (2) of the Criminal Code which was precise and foreseeable in ordering the mandatory confiscation given the illicit origin of the sums. They noted that such interpretation had been consistent with domestic case law (Judgment of 18 April 2016 of the Judge of Criminal Appeals in proceedings no. 229/2012).

86. They also considered that the measure was justified for the reasons set out at domestic level (see paragraph 29 above), noting that the need to eliminate the highly negative impact of criminal activities at all levels was undoubtedly important. The measure had struck a fair balance in so far as the applicants had had the opportunity to prove the lawfulness of the funds but had failed to do so.

2. The Court's assessment

(a) General principles

87. An essential condition for interference to be deemed compatible with Article 1 of Protocol No. 1 is that it should be lawful: the second paragraph recognises that States have the right to control the use of property by enforcing "laws". Furthermore, any interference by a public authority with the peaceful enjoyment of possessions can only be justified if it serves a legitimate public (or general) interest. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to decide what is "in the public interest". Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures interfering with the peaceful enjoyment of possessions (see *Terazzi S.r.l. v. Italy*, no. 27265/95, § 85, 17 October 2002, and *Wieczorek v. Poland*, no. 18176/05, § 59, 8 December 2009).

88. Article 1 of Protocol No. 1 also requires that any interference be reasonably proportionate to the aim sought to be realised. In other words, a "fair balance" must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The requisite balance will not be found if the person or persons concerned have had to bear an individual and excessive burden (see, amongst many other authorities, *The Former King of Greece and Others v. Greece* [GC], no. 25701/94, §§ 79 and 82, ECHR 2000-XII, and *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, §§ 81-94, ECHR 2005-VI). Furthermore, a wide margin of appreciation is usually allowed to the State under the Convention when it comes to general measures of political, economic or social strategy, and the Court generally respects the legislature's policy choice unless it is "manifestly without reasonable foundation" (see *Azienda Agricola Silverfunghi S.a.s. and Others*

v. Italy, nos. 48357/07, 52677/07, 52687/07 and 52701/07, § 103, 24 June 2014).

(b) Application to the present case

89. The Court notes that the forfeiture of the applicants' property was ordered by the domestic court on the basis of Article 147 (2) of the Criminal Code. In the light of the applicant's submissions, it must be recalled that the national courts are entrusted to resolve problems of interpretation and application of domestic legislation as well as rules of general international law or international agreement (see *Maumousseau and Washington v. France*, no. 39388/05, § 79, 6 December 2007). Having regard to the wording of that provision, the Court finds nothing arbitrary in the interpretation given to Article 147 (2) which provided for the confiscation, in the absence of conviction, of any items which constituted an offence. The fact that the sums of money fell into the remit of the word "items" is wholly plausible irrespective of whether those items constituted the "proceeds of a crime", a concept referred to in Article 147 (1). The Court considers that in the light of the wording of Article 147 (2) the applicants could not have imagined that the sums – the licit origin of which they could not prove - would have remained in their possession. In the Court's view there is therefore no doubt about the clarity, precision or foreseeability of that provision.

90. The Court recalls previous cases in which it was required to examine, from the standpoint of the proportionality test of Article 1 of Protocol No. 1, procedures for the forfeiture of property linked to the alleged commission of various serious offences. As regards property presumed to have been acquired either in full or in part with the proceeds of drug-trafficking offences (see *Webb v. the United Kingdom* (dec.), no. 56054/00, 10 February 2004; and *Butler v. the United Kingdom* (dec.), no. 41661/98) or by criminal organisations involved in drug-trafficking (see *Arcuri and Others v. Italy* (dec.), no. 52024/99, ECHR 2001 VII and *Morabito and Others v. Italy* (dec.), 58572/00, ECHR 7 June 2005) or from other illicit mafia-type activities (see *Raimondo v. Italy*, 22 February 1994, § 30, Series A no. 281-A), the Court accepted that the confiscation measures were proportionate, even in the absence of a conviction establishing the guilt of the accused.

91. The Court also found it legitimate for the relevant domestic authorities to issue confiscation orders on the basis of a preponderance of evidence which suggested that the respondents' lawful incomes could not have sufficed for them to acquire the property in question. Indeed, whenever a confiscation order was the result of civil proceedings *in rem* which related to the proceeds of crime derived from serious offences, the Court did not require proof "beyond reasonable doubt" of the illicit origins of the property in such proceedings. Instead, proof on a balance of probabilities or a high

probability of illicit origins, combined with the inability of the owner to prove the contrary, was found to suffice for the purposes of the proportionality test under Article 1 of Protocol No. 1 (compare also with the case of *Silickienė*, cited above, §§ 60-70, where a confiscation measure was applied to the widow of an alleged corrupt public official). More recently in *Gogitidze and Others* (cited above, § 108, concerning a confiscation applied in civil proceedings), the Court also found that the civil proceedings *in rem* through which the applicants - one of whom had been directly accused of corruption in a separate set of criminal proceedings, and two other applicants, were presumed, as the accused's family members, to have benefited unduly from the proceeds of his crime - had suffered confiscations of their property, could not be considered to have been arbitrary or to have upset the proportionality test under Article 1 of Protocol No. 1. The Court found that it was reasonable for all three applicants to be required to discharge their part of the burden of proof by refuting the prosecutor's substantiated suspicions about the wrongful origins of their assets.

92. In *Gogitidze and Others* (cited above, § 105) having regard to such international legal mechanisms as the 2005 United Nations Convention against Corruption, the Financial Action Task Force's (FATF) Recommendations and the two relevant Council of Europe Conventions of 1990 and 2005 concerning confiscation of the proceeds of crime (ETS No. 141 and ETS No. 198) (see paragraphs 38 and 39 above), the Court observed that "common European and even universal legal standards can be said to exist which encourage, firstly, the confiscation of property linked to serious criminal offences such as corruption, money laundering, drug offences and so on, without the prior existence of a criminal conviction. Secondly, the onus of proving the lawful origin of the property presumed to have been wrongfully acquired may legitimately be shifted onto the respondents in such non-criminal proceedings for confiscation, including civil proceedings *in rem*. Thirdly, confiscation measures may be applied not only to the direct proceeds of crime but also to property, including any incomes and other indirect benefits, obtained by converting or transforming the direct proceeds of crime or intermingling them with other, possibly lawful, assets. Finally, confiscation measures may be applied not only to persons directly suspected of criminal offences but also to any third parties which hold ownership rights without the requisite *bona fide* with a view to disguising their wrongful role in amassing the wealth in question".

93. The Court notes that in the present case the sums were found by the domestic courts to have illicit origins and that during such proceedings the applicants, who were legally represented, have been afforded a reasonable opportunity of putting their arguments before the domestic courts (see *Piras v San. Marino*, (dec.) no. 27803/16, § 59, 27 June 2017 and *Jokela v. Finland*, no. 28856/95, § 45, ECHR 2002-IV). The aim of the confiscation was to eliminate such funds from circulating further into the

economy, a measure in line with the international standards mentioned-above. In this connection the Court reiterates that respondent States must be given a wide margin of appreciation with regard to what constitutes the appropriate means of applying measures to control the use of property such as the confiscation of all types of proceeds of crime (see, for instance, *Yildirim*, and *Butler*, both cited above).

94. In the light of the foregoing, having regard to the authorities' wide margin of appreciation and to the fact that the domestic courts afforded the applicants a reasonable opportunity of putting their case through adversarial proceedings, the Court concludes that the confiscation of the applicants' assets, did not upset the requisite fair balance.

95. Accordingly, there has been no violation of Article 1 of Protocol No. 1.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Declares* the complaints concerning Article 1 of Protocol No. 1 admissible and the remainder of the applications inadmissible;

3. *Holds* that there has been no violation of Article 1 of Protocol No. 1.

Done in English, and notified in writing on 8 October 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Georgios A. Serghides
President