CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 69917/01
by Stephen Anthony SACCOCCIA
against Austria

The European Court of Human Rights (First Section), sitting on 5 July 2007 as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mr L. LOUCAIDES,
Mrs N. VAJIĆ,
Mr A. KOVLER,
Mrs E. STEINER,
Mr K. HAJIYEV,
Mr D. SPIELMANN, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having regard to the above application lodged on 27 April 2001,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Stephen Anthony Saccoccia, is a national of the United States of America who was born in 1958. He is currently serving a prison term in the United States. He was represented before the Court by Mr J. Hock, a lawyer practising in Vienna. The respondent Government were represented by Ambassador F. Trauttmansdorff, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

A. The circumstances of the case

1. Background

In 1992, in the context of criminal proceedings for large-scale money laundering conducted against the applicant before the United States District Court for the District of Rhode Island, the Austrian courts were requested under letters rogatory to seize assets which had been found in two safes in Vienna rented by the applicant. On 10 February 1992 the Vienna District Criminal Court ordered the seizure and put the assets, mostly cash and bearer bonds, at the disposal of the Rhode Island Court as evidence in the criminal proceedings against the applicant, on the condition that the assets were to be returned upon termination of the proceedings.

The parties disagree as to whether or not the applicant was the owner of the assets at issue. The applicant claims that the assets stemmed from lawful business activities carried out until 1988, while the Government claim that they stemmed from the money laundering in 1990 and 1991 of which he was convicted (see below) and that he was just holding them as a trustee for the drug cartel for which he had worked.

In February 1993 the United States District Court for the District of Rhode Island convicted the applicant of money laundering and related charges, finding that he had headed an organisation which had laundered more than a hundred million US Dollars in 1990 and 1991, and sentenced him to 660 years' imprisonment. Subsequently, on 30 August 1993, the court issued a preliminary forfeiture order.

On 28 June 1995 the United States Court of Appeals, First Circuit, dismissed the applicant's appeal against his conviction and against the forfeiture order. The reasons, so far as relevant in the context of the present case, were as follows. As to the applicant's claim that he was represented at trial by counsel (H.) who had a conflict of interest, the court noted that the applicant had been informed of his rights but had insisted on being represented by counsel H. Finally, he had executed a written waiver retaining H. as counsel and confirming that he had been fully advised and had considered the possible adverse consequences on his defence. Since counsel H. had only informed the court in vague terms that he feared being charged or called as a witness in the applicant's case, the District Court was justified in accepting the waiver. In any event, the applicant was represented by a second, conflict-free counsel, D. As to the applicant's complaint that he had no hearing in the forfeiture proceedings, the appellate court noted that the applicant, represented by counsel, had waived his right to a jury hearing in the separate forfeiture proceedings on the ground that they purely concerned matters of legal argument. The case was heard on 26 March 1993 in presence of the applicant's counsel. The applicant was not present since he had to appear before another court. Counsel requested that the applicant

be heard but refused the court's offer to have a further hearing in the presence of the applicant before the pronouncement of the judgment.

On 25 March 1996 the United States Supreme Court rejected the applicant's appeal on points of law.

On 7 November 1997 the United States District Court for the District of Rhode Island issued a final forfeiture order relating to a total amount of one hundred and thirty-six million US dollars, including some nine million US dollars in respect of the applicant "being the proceeds of narcotics money laundering for which the following property has been partially substituted". There follows an enumeration of cash amounts in Swiss Francs, US dollars and Austrian Schillings seized in Vienna in 1992 and a list of bearer bonds issued by Austrian banks and, finally a bank account in Vienna.

On 9 December 1997 the Rhode Island District Court issued letters rogatory which, so far as relevant, read as follows:

> "... the United States District Court for the District of Rhode Island requests enforcement in Austria of the enclosed Final Forfeiture Order against said cash, bonds and other financial instruments. To the extent possible under Austrian law and consistent with any sharing agreement between the United States and Austria, please convert the cash and the proceeds of the bonds and other instruments into US dollars and transfer those funds by wire into the above referenced United States Customs Service Account. ..."

The United States Department of Justice transmitted this request to the Austrian authorities on 18 December 1997. On 23 January 1998 the Austrian Ministry of Justice requested the Vienna Senior Public Prosecutor's Office to open "*exequatur"* proceedings to enforce the foreign court's decision.

2. The proceedings before the Austrian courts

(a) Preliminary confiscation in order to secure the enforcement of the final forfeiture order of 7 November 1997

On 12 March 1998 the Vienna Regional Criminal Court (*Landesgericht für Strafsachen*), as an interim measure, ordered the confiscation of the applicant's assets, of a total value of about 80,000,000 Austrian schillings (ATS – approximately 5,800,000 euros), in cash, bearer bonds and a bank account, for the purpose of securing the enforcement of the final forfeiture order of 7 November 1997. It referred to the above request and noted that enforcement proceedings under the Extradition and Legal Assistance Act (*Auslieferungs- und Rechtshilfegesetz* - "the ELAA") were pending.

The applicant appealed on 26 March 1998, submitting in particular that the Regional Court's decision amounted to an unlawful interference with his right to property, as it lacked a legal basis. Moreover, an enforcement of the forfeiture order for the benefit of the United States was not admissible in Austria as section 64 (7) of the ELAA provided that any fines or forfeited

assets obtained by executing a foreign decision fell to the Republic of Austria.

Further, the applicant claimed that the final forfeiture order also included "substitute assets", i.e. assets not connected to or derived from criminal activity. Thus the measure requested did not correspond in any way to forfeiture (*Verfall*) or withdrawal of enrichment (*Abschöpfung der Bereicherung*) within the meaning of the Austrian Criminal Code (*Strafgesetzbuch*). In any event these penalties could not be applied in his case, as the respective provisions had not been in force at the time he committed the offences. Furthermore, he had been convicted of money laundering in the United States, an offence which had not been punishable under Austrian law at the time of its commission.

Relying on section 64 (1) of the ELAA, the applicant also argued that the forfeiture proceedings had failed to comply with the requirements of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), since the proceedings had not been public and he had not been heard. Moreover, his defence rights had been violated in the underlying criminal proceedings, his defence lawyer having been caught in a conflict of interests.

Lastly, the applicant claimed that there was a lack of reciprocity as decisions of Austrian courts were not enforceable in the United States.

Meanwhile, on 12 March 1998, the Vienna Regional Criminal Court had made a formal request to the United States Authorities to hear the applicant in connection with the request for execution of the final forfeiture order. On 16 April 1998 the United States Department of Justice transmitted the applicant's submissions to the Austrian Ministry of Justice.

On 22 May 1998 the United States Department of Justice addressed a note to the Austrian Ministry of Justice concerning reciprocity in providing legal assistance in forfeiture proceedings. The applicant denies that this note contains assurances of reciprocity.

On 1 August 1998 the Treaty between the Government of the Republic of Austria and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters ("the 1998 Treaty") entered into force.

On 12 October 1998 the Vienna Court of Appeal (*Oberlandesgericht*) dismissed the applicant's appeal against the Regional Court's decision of 12 March 1998.

The Court of Appeal found that the Regional Court's decision was based on Article 144a of the Code of Criminal Procedure (*Strafprozeßordnung*). In this connection, the court noted that pursuant to section 9 (1) of the ELAA the provisions of the Code of Criminal Procedure had to be applied *mutatis mutandis* unless explicitly provided otherwise.

As to the applicant's assertion that a forfeiture for the benefit of the United States would be contrary to section 64 (7) of the ELAA, the court observed that the letters rogatory requested first and foremost that any

measures required under Austrian law for the execution of the final forfeiture order be taken. Only as an additional point did they ask for the transfer of the assets, provided that this was admissible under Austrian law or any bilateral treaty. In this connection it referred to Article 17 (3) of the 1998 Treaty.

As regards the applicant's assertion that the final forfeiture order covered substitute assets which could not be subject to forfeiture under Austrian law, the court observed that it followed from the judgment concerning the applicant's conviction that he had led an organisation which had laundered large sums of money derived from drug dealing and had usually received a 10% commission for each amount laundered. Between 1 January 1990 and 2 April 1991 he had transferred more than 136 million United States dollars (USD) of drug-related money from the account of a sham company to various foreign bank accounts. Thus, there were good reasons to assume that the applicant's Austrian assets were monies received for or derived from the commission of a crime and subject to withdrawal of enrichment under Article 20 of the Criminal Code, or monies directly obtained through drug dealing, subject to forfeiture under Article 20 b of the Criminal Code, in the version in force since its 1996 amendment. The final forfeiture order made a clear link between the offence of money laundering of which the applicant had been convicted and the forfeiture of all monies obtained thereby.

Articles 20 and 20b in the version in force since the 1996 amendment of the Criminal Code were not considered as penalties under Austrian law, but as measures *sui generis*. The fact that they had not been in force at the time of the commission of the offences was therefore not material.

Even if one applied the law in force at the time of the commission of the offences, the requirements for withdrawal of enrichment were met. Article 20a (1) of the Criminal Code, in the version in force at that time, provided that an offender who had unjustly enriched himself could be ordered to pay an amount equivalent to the enrichment if the latter exceeded ATS 1 million. Although there had been no offence of money laundering under Austrian law at the time, the facts constituted the offence of receiving stolen property (*Hehlerei*) under Article 164 (1) (4) of the Criminal Code, which made it an offence to assist the perpetrator of an offence (here, the drug dealers) in concealing assets derived from or received for the commission of the offence or to acquire such assets.

As to the applicant's allegation that both the criminal proceedings against him and the proceedings resulting in the final forfeiture order had failed to comply with Article 6 of the Convention, the court referred to the documents of those proceedings contained in its file and noted the following: In the criminal proceedings, the applicant was present and represented by two counsel. It noted that it was the applicant who had insisted on being represented by counsel H. although the latter had voiced

concerns, albeit without substantiating them, that he might himself be charged. In any case, the applicant had been represented by a second counsel, who was free from any potential conflict of interests. In the forfeiture proceedings he waived his right to a public hearing before a jury since they only concerned questions of law. On 26 March 1993 the judge heard the case in the presence of the applicant's counsel but without the applicant being present. The applicant's lawyer requested that the applicant be heard but refused the court's offer to have a further hearing in the presence of the applicant before the pronouncement of the judgment. In sum, the Vienna Court of Appeal found no indication that the proceedings before the United States courts had failed to comply with Article 6 of the Convention.

As regards the alleged lack of reciprocity, the court noted that when the request for enforcement of the final forfeiture order had been made, there had been no bilateral treaty between the United States and the Republic of Austria. Thus, only the provisions of the ELAA had to be applied, which in its section 3 (1) requires reciprocity. The Regional Court had duly investigated the issue in that it had required the United States Department of Justice to submit information as to the possibilities to enforce an Austrian forfeiture order in the United States. Meanwhile, however, the 1998 Treaty had entered into force. Under Article 20 (3) of that Treaty, it applied irrespective of whether the underlying offences were committed before or after its entry into force. Article 17 provided for mutual legal assistance in forfeiture proceedings.

(b) The enforcement of the final forfeiture order of 7 November 1997

On 25 August 1999 the United States central authority, relying on the 1998 Treaty, made a new request for enforcement of the final forfeiture order of 7 November 1997. According to the applicant this second request for legal assistance was not served on him.

The applicant made submissions on 22 December 1998, on 11 March 1999 and on 11 May 2000.

On 14 June 2000 the Vienna Regional Criminal Court, without holding a hearing, decided to take over the enforcement of the final forfeiture order of 7 November 1997 and ordered the forfeiture of the applicant's Austrian assets for the benefit of the United States.

Having regard to the 1998 Treaty, the requirement of reciprocity was fulfilled. The submissions by the applicant which disputed this were no longer relevant as they referred to the legal position before the entry into force of the 1998 Treaty. As to the question of the beneficiary of the forfeiture, it noted that Article 17 (3) of the 1998 Treaty provided optionally that each State party could hand over forfeited assets to the other party.

Referring to the Court of Appeal's decision of 12 October 1998, it noted that the applicant's conduct had been punishable under Austrian law. Thus,

the forfeiture was not contrary to Article 7 of the Convention. Finally, the court noted that the applicant had been given an opportunity to comment on the request for legal assistance.

The applicant appealed on 7 July 2000. He asserted that the 1998 Treaty provided for legal assistance in pending criminal proceedings, but did not contain a legal basis for mutual execution of final decisions. Even assuming that the 1998 Treaty applied in the present case, the enforcement of the final forfeiture order would violate Article 7 of the Convention as the said Treaty had not been in force in 1997 when the forfeiture order was issued. Moreover, money laundering had not been punishable under Austrian law at the time of the commission of the offences. Consequently, his assets could not be subject to forfeiture or withdrawal of enrichment under Austrian law.

Furthermore, the applicant repeated his argument that his Austrian assets were substitute assets and claimed that, at the time of the commission of the offences, such assets had not been subject to forfeiture or withdrawal of enrichment under Austrian law.

Relying on expert opinions submitted by him, the applicant maintained that the condition of reciprocity required by section 3 (1) of the ELAA was not fulfilled, as United States constitutional law did not permit the enforcement of decisions given by foreign criminal courts. He further submitted that the five-year limitation period for enforcement had started running on 30 August 1993, when the preliminary forfeiture order was issued (as it was, despite its name, a final and enforceable decision), and not only on 7 November 1997, when the final forfeiture order was issued.

In addition the applicant alleged that the criminal proceedings and the forfeiture proceedings before the United States courts had not complied with the requirements of Article 6 of the Convention. He submitted the same arguments as in the proceedings relating to the preliminary confiscation of his assets. Moreover, he referred in general terms to the fact that the United States still applied the death penalty.

The applicant also complained about a number of procedural shortcomings as regards the proceedings in Austria. He alleged in particular that the Regional Court had refused to take into account the aforesaid expert opinions submitted by him, which showed that United States constitutional law excluded any enforcement of decisions of foreign criminal courts. Moreover, he had not been given sufficient opportunity to advance his arguments as, in his view, that would have required his personal presence in court. Finally, he complained that the Regional Court had failed to hold a public oral hearing and requested that such a hearing be held by the appellate court.

The Public Prosecutor's Office also appealed. Its appeal was served on the applicant for comments, which he submitted on 21 September 2000.

On 7 October 2000 the Vienna Court of Appeal, sitting *in camera*, dismissed the applicant's appeal. Upon the Public Prosecutor's appeal, it

amended the Regional Court's decision and ordered the forfeiture to the benefit of the Republic of Austria.

The court noted at the outset that, pursuant to its Article 20 (3), the 1998 Treaty applied irrespective of whether the underlying offences were committed before or after its entry into force. It dismissed the applicant's argument that the said Treaty did not provide a basis for the mutual enforcement of decisions. Its Article 1, paragraphs (1) and (2) (h), in conjunction with Article 17, regulated legal assistance in forfeiture proceedings. As to the alleged lack of reciprocity, it was sufficient to refer to those provisions. It was therefore not necessary to examine questions of United States constitutional law.

Moreover, referring to its decision of 12 October 1998, the court reiterated that the facts underlying the applicant's conviction for money laundering would have been punishable as receiving stolen property under Article 164 (1) (4) of the Criminal Code at the time of the commission of the offences. Further, it reiterated that withdrawal of enrichment pursuant to Article 20 of the Criminal Code and forfeiture pursuant to Article 20b, both in the version in force since 1996, were not considered as penalties, but served the purpose of neutralising proceeds of criminal activities. These measures covered any proceeds of an offence, irrespective of whether they were directly derived from the offence or given for its commission or whether they had already been converted into other assets.

With regard to the applicant's complaint that the proceedings in the United States had not complied with the requirements of Article 6 of the Convention, the court referred to the reasons given in its previous decision of 12 October 1998.

The court dismissed the applicant's plea that the enforcement of the final forfeiture order was time-barred, noting that the United States Supreme Court, on 25 March 1996, refused leave to appeal against the provisional forfeiture order, whereupon the final forfeiture order was issued on 7 November 1997. Consequently, the five years' limitation period pursuant to section 59 of the Criminal Code had not expired.

As to the applicant's procedural rights, the court noted that he had been represented by counsel throughout the proceedings and had had the opportunity to submit extensive written pleadings.

Finally, the court considered that the Public Prosecutor's appeal was well-founded in that section 64 (7) of the ELAA provided that forfeited assets fell to the Republic of Austria. Thus, forfeiture to the benefit of the United States under Article 17 (3) of the 1998 Treaty was not admissible.

The decision was served on the applicant on 30 October 2000.

B. Relevant domestic law

1. The Extradition and Legal Assistance Act

Section 1 of the Extradition and Legal Assistance Act (Federal Law Gazette no. 529/1979) stipulates that the Act applies where international or bilateral agreements do not provide otherwise.

Section 3

Section 3 carries the heading "reciprocity" and, so far as relevant, provides as follows:

> "(1) Foreign requests may be granted only if it is ensured that the requesting State would also grant an equivalent Austrian request.
>
> ...
>
> (3) If there are doubts regarding compliance with reciprocity, information shall be obtained from the Federal Minister of Justice."

Section 64

> "(1) Enforcement or further enforcement of a decision by a foreign court which was pronounced with final and legal effect, in the form of a money fine or prison sentence, a preventive measure or a pecuniary measure (*vermögensrechtliche Anordnung*), is admissible at the request of another State if:
> 1. the decision of the foreign court was taken in the course of proceedings in compliance with the principles of Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (the Convention) (Federal Law Gazette No. 210/1958);
> 2. the decision was taken for an act that is sanctioned by a court sentence under Austrian law;
> 3. the decision was not taken for one of the offences listed in § 14 and § 15;
> 4. no time lapse has occurred under Austrian law regarding enforceability;
> 5. the person concerned by the decision of the foreign court – regarding this offence – is not prosecuted in Austria, was finally and effectively convicted or adjudicated in this matter or otherwise released from prosecution.
> ...
> (4) Enforcement of a decision by a foreign court which results in pecuniary measures is admissible only to the extent that the requirements under Austrian law for a money fine, a withdrawal of enrichment or forfeiture apply, and that no corresponding Austrian measure has yet been taken.
> ...
> (7) Fines, forfeited assets or enrichment withdrawn shall fall to the Republic of Austria.

2. The Treaty between the Government of the Republic of Austria and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters

The Treaty was signed on 23 February 1995 and, following ratification, entered into force on 1 August 1998 (Federal Law Gazette Part III, no. 107/1998).

Article 1

"(1) The Contracting Parties shall provide mutual assistance, in accordance with the provisions of this Treaty, in connection with the investigation and prosecution of offences, the punishment of which at the time of the request for assistance would fall within the jurisdiction of the judicial authorities of the Requesting State, and in related forfeiture proceedings.

(2) Assistance shall include:

...

(h) assisting in proceedings related to forfeiture and restitution; ..."

Article 17

"(1) If the Central Authority of one Contracting Party becomes aware of fruits or instrumentalities of offences which are located in the territory of the other Party and may be forfeitable or otherwise subject to seizure under the laws of that Party, it may so inform the Central Authority of the other Party. If the other Party has jurisdiction in this regard, it may present this information to its authorities for a determination as to whether any action is appropriate. These authorities shall issue their decision and shall, through their Central Authority, report to the other Party on the action taken.

(2) The Contracting Parties shall assist each other to the extent permitted by their respective laws in proceedings relating to the forfeiture of the fruits and instrumentalities of offences, restitution to the victims of crime, and the collection of fines imposed as sentences in criminal prosecutions.

(3) A Requested State in control of forfeited proceeds or instrumentalities shall dispose of them in accordance with its law. To the extent permitted by its laws and upon such terms as it deems appropriate, either Party may transfer forfeited assets or the proceeds of their sale to the other Party."

Article 20

"(3) This Treaty shall apply to requests whether or not the relevant offences occurred prior to the entry into force of this Treaty."

COMPLAINTS

1. The applicant complained under Article 6 of the Convention about the proceedings concerning the forfeiture of his assets in Austria. He submitted that these proceedings related to a criminal charge against him and also involved the determination of his civil rights and obligations.

(a) The applicant complained about the length of the proceedings and argued in particular that the Vienna Regional Criminal Court remained inactive from the beginning of 1998 until the 1998 Treaty entered into force on 1 August 1998.

(b) He further complained that the proceedings were unfair in that the 1998 Treaty, which entered into force while the proceedings were already pending, was applied retroactively. Moreover, the letters rogatory of

25 August 1999 were not served on him and the courts disregarded the expert opinions submitted by him.

(c) Lastly, the applicant complained about the lack of a public hearing before both the Vienna Regional Criminal Court and the Vienna Court of Appeal.

2. In addition, he claimed that the proceedings before the United States courts did not comply with the requirements of a fair trial and that the Austrian courts failed to take that into account.

3. Relying on Article 7 of the Convention, the applicant asserted that the forfeiture of his assets constituted a penalty for an offence, namely money-laundering, which had not been punishable in Austria at the material time.

4. The applicant also complained, under Article 1 of Protocol No. 1, that the Austrian courts' decisions constituted an interference with his property in that they made the final forfeiture order enforceable.

He asserted that the impugned decisions lacked a legal basis, firstly in that the condition of reciprocity was not fulfilled, secondly in that the final forfeiture order was time-barred, and thirdly in that Article 17 of the 1998 Treaty permitted the forfeiture only of "fruits and instrumentalities" of an offence, not of "substitute assets". Finally, the procedure had not given him a reasonable opportunity to present his arguments, in particular as the courts disregarded the expert opinion submitted by him and no hearing was held.

5. Lastly, he complained, under Article 13 of the Convention, that he could not bring his case before the Constitutional Court, the sole court competent to review the conformity of the relevant provisions with the Convention.

THE LAW

1. The applicant complained about the proceedings concerning the forfeiture of his assets in Austria. He relied on Article 6 § 1 of the Convention which, so far as material, reads as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...."

As a preliminary remark, the Government noted that only the proceedings relating to the enforcement of the final forfeiture order, which were terminated by the Vienna Court of Appeal's decision of 7 October 2000, were the subject of the present application. They noted further that the applicant referred also to the proceedings in which the assets where seized in 1992 as evidence for the criminal proceedings against him and put at the disposal of the United States courts. However, in respect of those

proceedings the six-month period laid down in Article 35 § 1 of the Convention had not been complied with.

The applicant submitted that the application was directed against the Vienna Court of Appeal's decision of 7 October 2000, but appeared to argue that all proceedings and events from 1992 onward were relevant for the examination of the case.

The Court notes that the applicant did not appeal against the Vienna District Court's decision of 10 February 1992 ordering the seizure of his assets as evidence in the criminal proceedings against him. Nor did he introduce his application within six months after that date. It follows that in that regard the requirements of Article 35 § 1 of the Convention are not fulfilled.

Consequently, the Court is called upon to examine only the proceedings relating to the enforcement of the final forfeiture order. The Court notes that the proceedings relating to the preliminary confiscation of the applicant's assets (see above, A.2.a.) and the proceedings relating to the actual enforcement of the final forfeiture order (see above A.2.b.) are intrinsically linked and should therefore be considered as a whole.

1. Applicability of Article 6

The Government asserted that Article 6 did not apply to the *exequatur* proceedings relating to the enforcement of the final forfeiture order.

As to the criminal limb of Article 6, the Government argued that the *exequatur* proceedings did not involve a determination of a criminal charge. The charge against the applicant had been determined and the sentence fixed by the competent United States court. The proceedings at issue concerned exclusively the question whether the formal conditions laid down in Section 64 § 1 of the ELAA for executing a foreign judgment were met. The *exequatur* proceedings were comparable to extradition proceedings to which, according to the Court's well-established case-law, Article 6 did not apply.

Furthermore, it could not be argued that the execution of the forfeiture order in the present case amounted to a new sentencing procedure. The Austrian courts had no discretion as regards the amount or the assets to be forfeited. The forfeiture served to neutralise gains obtained through criminal offences. Its nature was not punitive but compensatory and it was therefore not to be considered as a penalty.

Turning to the civil limb of Article 6, the Government contended that the determination of the applicant's rights had already taken place before the Rhode Island District Court which ordered the forfeiture of his assets. In contrast, the proceedings before the Austrian courts related to the question whether the formal requirements laid down in the ELAA for executing the

forfeiture order were met and did therefore not concern a dispute over any right of the applicant.

For his part, the applicant argued that Article 6 applied both under its criminal and under its civil limb.

Firstly, he asserted that the contested proceedings fell into the criminal sphere and that the term *exequatur* proceedings was misleading in that it implied that the Austrian courts merely enforced the final forfeiture order of 7 November 1997. However, this was not the case, as they did not declare the assets forfeited in favour of the United States but in favour of the Republic of Austria. Moreover, the proceedings under the ELAA did not only relate to the examination of formal requirements but also had to address the question whether the applicant's acts would have been punishable under Austrian law. In any case the forfeiture at issue was to be considered as falling within the criminal sphere, having regard to its very nature and severity.

Secondly, the applicant argued that the proceedings also involved a determination of his civil rights, since the interference with his property rights only became effective through the Vienna Court of Appeal's decision of 7 October 2000.

(a) Criminal limb

The Court will first examine whether the proceedings at issue fall under the criminal limb of Article 6.

As regards the applicability of the criminal limb of Article 6 to forfeiture proceedings in general, the Court reiterates that it has been found not to apply to forfeiture proceedings unrelated to any criminal proceedings against the applicant (see *AGOSI v. the United Kingdom*, judgment of 24 October 1986, Series A no. 108, p. 22, § 65; *Air Canada v. the United Kingdom*, judgment of 5 May 1995, Series A no. 316-A, p. 19, §§ 51-52; and, as a recent authority, *Butler v. the United Kingdom* (dec.), no. 41661/98, ECHR 2002-VI).

In contrast, Article 6 applies where the confiscation procedure follows upon the applicant's conviction. In the case of *Phillips v. the United Kingdom* (no. 41087/98, §§ 32 and 39, ECHR 2001-VII) the Court based that conclusion on the consideration that Article 6 applied throughout the entirety of the proceedings for the determination of a criminal charge, including proceedings whereby a sentence was fixed, and that the making of the confiscation order was analogous to a sentencing procedure.

In the present case, the final forfeiture order was issued by a United States court in criminal proceedings following upon the applicant's conviction for money laundering. However, it remains open to doubt whether the proceedings before the Austrian courts relating to the enforcement of the forfeiture order still come within the scope of Article 6.

The Court agrees with the respondent Government that the proceedings before the Austrian courts did not involve the determination of a new criminal charge against the applicant (see, *mutatis mutandis*, *Phillips*, cited above, § 32). The applicant argues that the proceedings under the ELAA involved an examination of whether or not his acts would have been punishable under Austrian law. However, this assessment is an abstract one and does not relate to a determination of the individual's guilt. Such an abstract assessment of criminal liability is also typical for extradition proceedings, which, according to the court's established case-law, do not involve a "determination of a criminal charge" (see, *Peñafiel Salgado v. Spain* (dec.), no. 65964/01, 16 April 2002, with further references).

The present proceedings were not akin to a sentencing procedure either (see, *mutatis mutandis*, *Phillips,* § 39) since the Austrian courts had no discretion to determine the amount or the assets to be forfeited. The Court is not convinced by the applicant's argument that the proceedings went beyond a mere execution of the forfeiture order, since the Rhode Island District Court's request of 9 December 1997 asked in the first place for an execution of the forfeiture order in Austria. A transfer of funds to the United States was requested only "to the extent possible under Austrian law".

Finally, the Court reiterates that matters relating to the execution of a sentence do not fall under the criminal limb of Article 6 (see, *Montcornet de Caumont v. France* (dec.), no. 59290/00, ECHR 2003-VII, with further references). It does not see any reasons to draw a different conclusion where the *exequatur* of a sentence imposed by a foreign court is concerned.

The Court therefore concludes that the proceedings relating to the enforcement of the forfeiture order do not fall under the criminal limb of Article 6 § 1.

(b) Civil limb

Turning to the civil limb of Article 6, the Court reiterates that the civil limb of Article 6 has been found to apply to confiscation proceedings (see *Air Canada*, cited above, § 56).

Thus, the United States court's final forfeiture order involved a determination of the applicant's civil rights and obligations. In this connection the Court notes that the Government dispute the applicant's ownership of the assets at issue. It is not for the Court to examine the question. It is sufficient to note that the competent United States court had considered the assets to be the applicant's gains from money-laundering and that no other person had raised any claims to them.

However, the question arises whether the proceedings before the Austrian courts relating to the enforcement of the forfeiture order fall under the civil limb of Article 6.

The applicant relied on the Court's case-law according to which it is the moment when the right asserted actually becomes effective which

constitutes determination of a civil right (see, for instance, *Pérez de Rada Cavanilles v. Spain*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p.3253, § 39, relating to the execution of a settlement agreement; *Estima Jorge v. Portugal*, judgment of 21 April 1998, *Reports of Judgments and Decisions* 1998-II, p. 772, § 37, relating to the enforcement of a notarial deed; and *Di Pede v. Italy*, judgment of 26 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1384, § 22, relating to the enforcement of a judgment).

The Court observes that the present case concerned a dispute between the applicant and the Austrian authorities as to whether or not the conditions for enforcing the United States court's final forfeiture order were met. The outcome of the dispute was decisive for whether or not the applicant could exercise his rights as regards the assets at issue. It was through the Austrian courts' decisions that the forfeiture order became effective and that the applicant was permanently deprived of those assets.

For these reasons, the Court concludes that Article 6 § 1 applies under its civil limb.

2. Compliance with Article 6 § 1

(a) The Court notes that although the applicant complained about the length of the proceedings, he did not file an application for the acceleration of the proceedings under Section 91 of the Courts Act (see *Holzinger v. Austria (no. 1)*, no. 23459/94, § 25, ECHR 2001-I).

It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

(b) The applicant further raised a number of complaints about the alleged unfairness of the proceedings. In so far as he complains that the 1998 Treaty entered into force while the proceedings were already pending, the Court observes that the present case is not one of interference of retroactive legislation in pending proceedings (see *Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 9 December 1994, Series A no. 301-B, p. 82, § 49; and the *National & Provincial Building Society v. the United Kingdom*, judgment of 23 October 1997, Reports 1997-VII, § 112). It is true that the 1998 Treaty on Mutual Legal Assistance between the Republic of Austria and the United States did not enter into force until 1 August 1998, when the proceedings had already been pending for about half a year. Moreover, it merely supplemented the legal basis already existing in Austrian law for the enforcement of the forfeiture order, namely the Extradition and Legal Assistance Act.

Turning to the applicant's complaint about the courts' refusal to take expert opinions submitted by him into account, the Court finds that the courts duly motivated their decision. They found in particular that the expert

opinions at issue dealt mainly with questions of United States constitutional law which were not relevant to the proceedings.

It follows that these complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

Furthermore, the applicant complained that the second request for legal assistance of 25 August 1999 was not served on him. The Court notes that he did not raise this complaint in the domestic proceedings.

It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

(c) The applicant finally complained about the lack of a public oral hearing.

The Government contended that the right to a public hearing or any hearing at all is not absolute. In the present case the courts were justified in dispensing with a hearing, since the case concerned exclusively legal questions. Moreover, a personal appearance of the applicant was neither necessary, since he had been heard under letters rogatory, nor feasible as he was serving his prison term in the United States.

For his part, the applicant maintained that there were no special circumstances that justified foregoing a hearing. Moreover, he should have been heard in person in order to give him an opportunity to show that the assets stemmed from lawful business activities. The applicant contested that he was heard under letters rogatory.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

2. The applicant complained that the proceedings before the United States courts did not comply with the requirements of a fair trial and that the Austrian court did not duly examine this issue.

The Government noted that pursuant to Section 64 § 1 of the ELAA only decisions of foreign criminal courts which are given in proceedings complying with Article 6 of the Convention may be enforced in Austria. The Austrian courts examined this issue, first in the proceedings concerning the preliminary confiscation order and then in the proceedings relating to the actual enforcement of the forfeiture order. The same arguments had already been raised by the applicant in the appeal proceedings before the United States Court of Appeals, First Circuit. In its decision of 28 June 1995 the latter had given detailed reasons for dismissing the applicant's arguments. The Austrian courts had the documents of the contested proceedings before them, including not only the judgments given by the United States courts but also the minutes of the hearings held in the criminal

proceedings and in the separate forfeiture proceedings. On the basis of all the material before them, they could rightly conclude that the proceedings before the United States courts had complied with Article 6 of the Convention.

The applicant contested the Government's argument and maintained that the Austrian courts did not duly examine the issue in sufficient detail. He claimed that the reasons given by them were no more than an assumption not supported by the documents in the case file.

The Court observes at the outset that its task does not consist in examining whether the proceedings before the United States courts complied with Article 6 of the Convention, but whether the Austrian courts, before authorising the enforcement of the forfeiture order, duly satisfied themselves that the decision at issue was not the result of a flagrant denial of justice. A review of this kind is required where a decision in respect of which enforcement is requested emanates from the courts of a country which does not apply the Convention (see *Drozd and Janousek v. France and Spain*, judgment of 26 June 1992, Series A no. 240, p. 34, § 110, concerning the enforcement in France of a prison sentence given by a court of Andorra which was not a Member State of the Convention at the material time). The Court's subsequent case-law indicates that, before granting the execution of a decision emanating from the courts of a country not applying the Convention, the courts may even be required to examine whether the relevant proceedings fulfilled all the guarantees of Article 6 (see *Pellegrini v. Italy*, no. 30882/96, §§ 40 and 47, ECHR 2001-VIII, relating to the granting of *exequatur* for a decision given by the ecclesiastical courts declaring a marriage null and void).

However, in the present case the Court is not called upon to decide in the abstract which level of review was required from a Convention point of view, since – in any event – domestic law, namely Section 64 § 1 of the ELAA, required the Austrian courts to satisfy themselves that the decision to be enforced was given in proceedings complying with the principles of Article 6 of the Convention.

The applicant claimed in both sets of proceedings before the Austrian courts that neither the criminal proceedings against him nor the forfeiture proceedings conducted before the United States courts fulfilled the requirements of a fair trial. The Vienna Court of Appeal in its decision of 12 October 1998 dealt in detail with the applicant's allegations. It followed in essence the reasons given by the United States Court of Appeals, First Circuit, in its judgment of 28 June 1995. As to the applicant's assertion that, in the criminal proceedings, he had been represented by counsel who was caught in a conflict of interest, it noted that the concerns voiced by counsel H. had been vague and unsubstantiated, that the applicant himself had insisted on being represented by counsel H. despite the court's cautioning as to his rights and that, in any case, he had been represented by a second

counsel who had not been in any potential conflict of interests. As to the applicant's allegations concerning the forfeiture proceedings, the court noted that he waived his right to a public hearing. The judge heard the case in the presence of the applicant's counsel, who refused the court's offer to have a further hearing in the presence of the applicant. In sum, they found no indication that the proceedings before the Untied States Courts had failed to comply with the requirements of Article 6 of the Convention.

In these circumstances the Court considers that the Austrian courts duly satisfied themselves, before authorising enforcement of the forfeiture order, that the applicant had had a fair trial under United States law.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

3. The applicant complained that the forfeiture of his assets in Austria violated Article 7 of the Convention which, so far as relevant, 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."

The Government contended that Article 7 did not apply. Distinguishing the present case from *Welch v. the United Kingdom* (judgment of 9 February 1995, Series A no. 307-A), the Government argued that the forfeiture ordered by the United States could not be regarded as a "penalty" within the meaning of Article 7. Follow though it did upon the applicant's conviction, it merely aimed at neutralising the proceeds of the applicant's criminal conduct. It was therefore of a compensatory and not a punitive nature. Even if the final forfeiture order were to be considered as a penalty, the proceedings in Austria concerned its enforcement only, while the guarantees of Article 7 concerned the imposition of a penalty, not its enforcement.

In the applicant's contention, Article 7 applied to the proceedings at issue. He argued that this provision had been violated because the forfeiture of his assets constituted a penalty for an offence, namely money-laundering, which had not been punishable in Austria at the material time.

The Court considers that the present case has to be distinguished from *Welch* albeit for reasons differing from those relied on by the Government. In *Welch* the confiscation order was based on legal provisions which had entered into force after the commission of the offences. Given that it was punitive in nature this amounted to the retroactive imposition of a penalty (*Welch*, cited above, p. 14, §§ 34-35). In the present case, it has not been alleged that the forfeiture of the applicant's assets had not been foreseen in the relevant laws of the United States at the time of the commission of his offences. The applicant complained in essence that the enforcement of the

forfeiture order in Austria was not foreseeable. However this issue does not concern the penalty itself but its execution.

The Court has already held that Article 7 does not apply to the enforcement of a sentence (see *Grava v. Italy* (dec.), no. 43522/98, 5 December 2002).

It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

4. The applicant complained that the Austrian courts' decisions constituted an interference with his property in that they made the final forfeiture order enforceable. He relied on 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."

The Government asserted in the first place that the applicant had failed to show that he was the owner of the assets at issue. It is established only that the key to the safe in Vienna in which the assets were stored was discovered in the applicant's apartment in London. In the Government's view he held the assets only as a trustee for the drug cartel for whom he had been laundering money. Even assuming that the applicant was the owner of the assets at issue, there was nothing to indicate that they stemmed from any legal activities. In sum, the execution of the forfeiture order did not interfere with the applicant's right to peaceful enjoyment of his property.

The applicant contested the Government's view and asserted that the Austrian courts' decisions constituted an interference with his property rights. He maintained that the impugned decisions lacked a legal basis, firstly in that the condition of reciprocity was not fulfilled, secondly in that the final forfeiture order was time-barred, and thirdly in that Article 17 of the 1998 Treaty permits the forfeiture only of "fruits and instrumentalities" of an offence, not of "substitute assets". Finally, the procedure did not give him a reasonable opportunity to present his arguments.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

5. Finally, the applicant complained under Article 13 of the Convention, that he could not have a review by the Constitutional Court as regards the conformity of the relevant domestic provisions with the Convention.

The Court reiterates that Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's primary legislation to be challenged before a national authority on grounds that it is contrary to the Convention (*Roche v. the United Kingdom* [GC], no. 32555/96, § 137, ECHR 2005-…).

It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaint under Article 6 of the Convention about the lack of a hearing in the proceedings relating to the enforcement of the United States court's final forfeiture order in Austria and his complaint under Article 1 of Protocol No. 1;

Declares the remainder of the application inadmissible.

Søren NIELSEN
Registrar

Christos ROZAKIS
President