CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIFTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 696/05
by DASSA FOUNDATION and Others
against Liechtenstein

The European Court of Human Rights (Fifth Section), sitting on 10 July 2007 as a Chamber composed of:

Mr P. LORENZEN, *President*,
Mrs S. BOTOUCHAROVA,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs M. TSATSA-NIKOLOVSKA,
Mr R. MARUSTE,
Mr M. VILLIGER, *judges*,
and Mr J.S. PHILLIPS, *Deputy Section Registrar*,

Having regard to the above application lodged on 23 December 2004,

Having deliberated, decides as follows:

THE FACTS

The first applicant, the Dassa Foundation, and the second applicant, the Lafleur Foundation, are legal entities incorporated under Liechtenstein law in 1996 which have their registered offices in Vaduz. The third applicant, Mr Attilio Pacifico, is an Italian national who was born in 1933 and lives in Monaco. According to the statutes of the first and the second applicant, the third applicant is the sole beneficiary of their assets. The applicants were represented before the Court by Ms Luca Lentini and Mr Giampiero Placidi of Lentini, Placidi & Partners, a law firm practising in Rome.

A. The circumstances of the case

The facts of the case, as submitted by the applicants, may be summarised as follows.

1. First set of proceedings

a. The proceedings before the Regional Court

On 6 June 2001 the Regional Court of the Principality of Liechtenstein (*Fürstliches Landgericht*) in Vaduz, in investigation proceedings on suspicion of money laundering against Z. and unknown further perpetrators committed in the 1990s (file no. 14 UR 2001.0030), ordered the seizure for a duration of two years of all assets which the first and second applicants had deposited with the Neue Bank company and prohibited the latter to dispose of these assets pursuant to section 97a of the Code of Criminal Procedure (see 'Relevant domestic and international law' below). It found that the investigations against Z., the former legal representative of the first and second applicants, had revealed that the third applicant had probably bribed several judges in Rome together with another person. The third applicant was suspected of having transferred the proceeds of these offences to the applicant foundations, which were attributable to him, in order to conceal that the money had originated from criminal acts. Therefore, the accounts of the foundations had to be blocked in order to safeguard the subsequent absorption of the profits (*Abschöpfung der Bereicherung*) or the forfeiture of the assets in accordance with section 97a of the Code of Criminal Procedure.

On 12 May 2003 the Public Prosecutor's Office of the Principality of Liechtenstein requested the Regional Court to extend the seizure of the foundations' assets for at least one year.

On 15 May 2003 the Regional Court, acting in the course of independent objective forfeiture proceedings (*objektives Verfallsverfahren*) under section 356 of the Code of Criminal Procedure (see 'Relevant domestic and international law' below) against the applicant foundations (file no. 14 UR 2002.384), prolonged the seizure of the foundations' assets ordered by it on 6 June 2001 for one year pursuant to section 97a § 4 of the Code of Criminal Procedure.

The Regional Court noted that the third applicant, being the beneficiary of the foundations, had been sentenced by the Milan Criminal Court to eleven years' imprisonment on 29 April 2003 with respect to the assets at issue in the present forfeiture proceedings. This judgment was not final yet. As the present proceedings were complex and involved inter-State relations, it had not yet been possible to terminate the investigations.

b. The proceedings before the Court of Appeal

On 20 May 2003 the Court of Appeal of the Principality of Liechtenstein (*Fürstliches Obergericht*), in the course of the objective forfeiture proceedings concerning the assets of the applicant foundations, endorsed the Regional Court's decision of 15 May 2003, confirming that court's reasoning (section 97a § 4 of the Code of Criminal Procedure).

c. The proceedings before the Supreme Court

On 6 June 2003 the first and the second applicant, represented by counsel, lodged an appeal against the decision of the Regional Court of 15 May 2003 with the Court of Appeal. They argued that the initial seizure of its assets on 6 June 2001 had been ordered by the Regional Court for a period of two years in criminal investigation proceedings on suspicion of money laundering against Z. In its decision of 15 May 2003 the Regional Court had then ordered a prolongation of this seizure. However, this prolongation had been made in different proceedings, namely in the course of objective forfeiture proceedings concerning the foundations' assets, in which there had never been an initial blocking of accounts. Therefore, the prolongation order was unlawful. The criminal proceedings against Z. were terminated by a final judgment so that a continued blocking of accounts in these proceedings was no longer possible.

Moreover, as the Regional Court's order was made in objective forfeiture proceedings it could only be based on section 20b § 2 of the Criminal Code (see 'Relevant domestic and international law' below). However, this provision had entered into force only on 19 December 2000; before that date, there was no legal basis for ordering the forfeiture of the assets in question. The third applicant and others were suspected of having received money for offences committed in the 1990s and of having transferred 18 and 11 million Swiss francs respectively to the account of the applicant foundations in 1996, that is, long before the year 2000. Therefore, applying section 20b § 2 of the Criminal Code in order to prolong the blocking of the foundations' accounts violated the prohibition of retroactive punishment guaranteed by section 61 read in conjunction with section 1 § 2 of the Criminal Code (see 'Relevant domestic and international law' below) and Article 7 of the Convention.

The Court of Appeal transmitted the appeal to the Supreme Court of Liechtenstein (*Fürstlicher Oberster Gerichtshof*).

On 4 September 2003 the Supreme Court of Liechtenstein dismissed the applicant foundations' appeal. Referring to its previous case-law, it found that it had jurisdiction to deal with the appeal. As an exception from the rule laid down in section 238 § 1 of the Code of Criminal Procedure (see 'Relevant domestic and international law' below), which was authorised by that provision, no appeal lay to the Court of Appeal against the Regional Court's decision on the prolongation of the seizure of the

assets. Otherwise the Court of Appeal would have to decide twice on the same subject matter following its necessary consent to the prolongation of the seizure. Contrary to the wording of section 97a § 6 of the Code of Criminal Procedure, an appeal lay, however, with the Supreme Court itself instead.

The Supreme Court found that measures pursuant to section 97a of the Code of Criminal Procedure were aimed at preventing persons suspected of a criminal offence from frustrating the absorption of the profits or the forfeiture of the assets obtained as a result thereof while the investigations into the offence were pending. As rightly found by the Regional Court and the Court of Appeal, there was a reasonable suspicion of money laundering. The third applicant, being the sole beneficiary of the foundations, had been convicted at first instance by the Milan Criminal Court of having received the money later transferred to the foundations as commissions for criminal acts. There were, therefore, reasonable grounds for the assumption that the assets seized would later be declared forfeited.

The Supreme Court conceded that the seizure of the foundations' assets had initially been ordered in the criminal proceedings against Z. However, it was lawful to prolong the seizure in the present objective forfeiture proceedings as these were the logical continuation of the said criminal proceedings and as the seizure had been made in the criminal proceedings to make the forfeiture possible.

A declaration of forfeiture at a later date pursuant to section 20b of the Criminal Code, which authorised the forfeiture of assets and entered into force on 19 December 2000, was not excluded by the prohibition of retroactivity. The forfeiture of assets was not an additional punishment, but an independent pecuniary consequence of the fact that a perpetrator, his legal successor or other beneficiaries, including legal entities, had obtained assets resulting from an unlawful act. It did not require that the perpetrator had acted with criminal responsibility. In case of a refusal of payment, an order of forfeiture was therefore enforced with the ordinary instruments of execution of payment, not by ordering imprisonment for failure to pay a fine.

As the forfeiture of assets pursuant to section 20b of the Criminal Code was thus not an (additional) penalty for an offence, such a measure did not have to be examined in the light of the prohibition of retroactive punishment enshrined in sections 1 and 61 of the Criminal Code. The new provisions on forfeiture of assets were applicable to all assets which were found to be in Liechtenstein at the time the provisions entered into force. They had not therefore become effective retroactively and had not changed retroactively the consequences of a perpetrator's past conduct, but concerned a persistent state of affairs, namely assets being situated within the country.

The Supreme Court further found that sections 1 and 61 of the Criminal Code only played a role in so far as the criminal offence as a result of which

the assets in question were obtained was concerned. Proceeds of offences which had not been punishable before the entry into force of section 20b of the Criminal Code were not liable to forfeiture. However, in the present case the offences which were suspected to have generated the assets at issue had been punishable both in Italy and in Liechtenstein at the time they had been committed.

The seizure of the assets was proportionate because the disadvantages suffered by the applicant foundations as a result of the blocking of their accounts were less important than the damage possibly incurred by the victims of the offences if the seizure was not ordered.

d. The proceedings before the Constitutional Court

On 23 September 2003 the first and second applicants lodged a complaint with the Constitutional Court of the Principality of Liechtenstein (*Staatsgerichtshof des Fürstentums Liechtenstein*). They claimed that the principle of *nulla poena sine lege* as guaranteed by Article 33 § 2 of the Constitution of Liechtenstein (see 'Relevant domestic and international law' below) and Article 7 of the Convention had been violated. They argued that the forfeiture of assets authorised by section 20b of the Criminal Code had to be qualified as an additional punishment. The courts had applied that new penal provision, which had entered into force on 19 December 2000, to assets purportedly obtained by criminal offences committed in the 1990s, that is, before that date, when the forfeiture of such assets had not yet been authorised by law.

Moreover, the applicants claimed that their right to a fair trial and to be heard by the judge having jurisdiction over the case as protected by Article 33 § 1 of the Constitution (see 'Relevant domestic and international law' below) and Article 6 of the Convention had been breached. It had been unlawful and indeed arbitrary to order a prolongation of the seizure of its assets in objective forfeiture proceedings, in which there had not been a seizure yet, the initial seizure having been ordered in criminal proceedings against Z. The Regional Court had therefore not had jurisdiction to order the said prolongation in the objective forfeiture proceedings pending before it. Moreover, the decision on the applicants' appeal against this decision should have been given by the Court of Appeal and not by the Supreme Court.

On 29 June 2004 the Constitutional Court of the Principality of Liechtenstein rejected the foundations' complaint.

It found, firstly, that the prohibition of retroactive punishment laid down in Article 33 § 2 of the Liechtenstein Constitution and Article 7 § 1 of the Convention as well as in sections 1 and 61 of the Criminal Code did not apply to a forfeiture pursuant to section 20b § 2 of the Criminal Code. Referring to the criteria laid down by this Court notably in the case of *Welch v. the United Kingdom* (judgment of 9 February 1995, Series A no. 307,

p. 13, § 28) it found that forfeiture pursuant to section 20b § 2 of the Criminal Code was not a "penalty" within the meaning of Article 7 § 1 of the Convention.

It was not a precondition for an order of forfeiture pursuant to that section that the person concerned was convicted of a criminal offence or that criminal proceedings had been instituted against him at all. The assets concerned had to stem from an act punishable at the place of its commission to which Liechtenstein criminal law was not applicable.

The purpose of the new provision on forfeiture was to comply with the obligations arising notably under the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS no. 141; see 'Relevant domestic and international law' below) and to guarantee that crime did not pay off. Forfeiture was not an additional penalty for offences, the penal sanctions for offences, prison sentences and fines, being sufficient. It was only aimed at absorbing the profits made as a result of an offence. It was therefore not necessary that the person concerned acted with criminal responsibility and forfeiture could also be ordered against the legal successors of a perpetrator. Therefore, forfeiture had to be characterised as a civil law consequence of criminal acts. This was confirmed by the fact that in case of a refusal of payment, an order of forfeiture was enforced with the ordinary instruments of execution of payment orders whereas – other than, for example, in the *Welch* case – it was not authorised to order imprisonment for failure to pay a fine.

The objective forfeiture proceedings were separate proceedings to which the procedural rules of the Code of Criminal Procedure applied, but which were independent of the guilt of the person or legal entity owning the assets in question. As to the severity of the measure in question, it had to be noted that the assets forfeited were often only part of the net proceeds of a criminal offence.

Secondly, the Constitutional Court found that the applicants' right to be heard by the judge having jurisdiction over the case under Article 33 § 1 of the Constitution had not been violated. It had been convincing and, in any event, not arbitrary for the Supreme Court to argue that the present objective forfeiture proceedings were the logical continuation of the criminal proceedings against Z. and that it had, therefore, been lawful to order the prolongation of the seizure in the objective forfeiture proceedings. Likewise, having regard to the Supreme Court's reasoning, it had been reasonable and not arbitrary for that court to conclude that an appeal against the decision of the Regional Court to prolong the seizure of the applicants' assets did not lie with the Court of Appeal, but with the Supreme Court itself.

2. Second set of proceedings

a. The proceedings before the Regional Court

On 17 May 2004 the Regional Court of the Principality of Liechtenstein, in the course of the objective forfeiture proceedings against the applicant foundations, prolonged the seizure of the foundations' assets for another year pursuant to section 97a § 4 of the Code of Criminal Procedure (file no. 14 UR 2002.384). Referring to the conviction of the third applicant by the Milan Criminal Court on 29 April 2003, it argued that the assets were suspected of being the pay-back for bribing civil servants. However, the said judgment was not final yet and the investigation proceedings in Liechtenstein depended on the outcome of the proceedings in Italy.

b. The proceedings before the Court of Appeal

On 19 May 2004 the Court of Appeal of the Principality of Liechtenstein, referring to the Regional Court's reasoning and to that of the Supreme Court of Liechtenstein in its decision of 4 September 2003, consented to the Regional Court's decision (section 97a § 4 of the Code of Criminal Procedure).

c. The proceedings before the Supreme Court

On 8 June 2004 the applicant foundations lodged an appeal with the Supreme Court. Disagreeing with the decision given by the Supreme Court of Liechtenstein on 4 September 2003, they reasoned their appeal along the same lines as their appeal of 6 June 2003.

On 23 July 2004 the Supreme Court of Liechtenstein dismissed the foundations' appeal as ill-founded. Referring to its decision given on 4 September 2003, which had meanwhile been confirmed by the Constitutional Court in its decision of 29 June 2004, it found that it had been lawful to order the prolongation of the seizure in the present objective forfeiture proceedings. Moreover, as had been confirmed by the Constitutional Court, the forfeiture of assets pursuant to section 20b of the Criminal Code was not an (additional) penalty for an offence and therefore did not have to be examined in the light of the prohibition of retroactive punishment. The Supreme Court reiterated that it had repeatedly considered it to be disproportionate to freeze assets of Liechtenstein citizens or legal entities for more than three years without the underlying criminal proceedings being terminated. However, the outcome of the criminal proceedings in Italy prejudged the outcome of the present case and it was likely that a final decision would be given shortly. Therefore, the prolongation of the blocking of the foundations' accounts was still proportionate, even though the objective forfeiture proceedings should be terminated soon.

d. The proceedings before the Constitutional Court

On 12 August 2004 the foundations lodged a complaint with the Constitutional Court. They argued again that the application of section 20b of the Criminal Code had violated the principle of *nulla poena sine lege* as guaranteed by Article 33 § 2 of the Constitution of Liechtenstein and Article 7 of the Convention. Invoking Article 33 of the Liechtenstein Constitution and Article 6 of the Convention, they claimed that their right to a fair trial and to be heard by the judge having jurisdiction over the case had been breached. Moreover, the applicants complained that the Supreme Court of Liechtenstein had failed to give sufficient reasons for its view that it had been lawful to order the prolongation of the seizure in the present objective forfeiture proceedings.

On 30 November 2004 the Constitutional Court dismissed the foundations' complaint as ill-founded. It referred to the grounds given in its decision of 29 June 2004. As regards the foundations' claim that the Supreme Court insufficiently reasoned its decision, the court found that the Supreme Court's reference to the grounds given by the Constitutional Court in its decision of 29 June 2004 did not breach the duty to give sufficient reasons. The latter decision concerned the same questions raised by the same parties so that the reference was clear and comprehensible.

3. Subsequent developments

On 13 March 2007 the applicants informed the Court that the seizure of their assets persisted, without a final judgment on the underlying offences having been given.

B. Relevant domestic and international law

1. Provisions of the Constitution of the Principality of Liechtenstein

Pursuant to Article 33 § 1 of the Constitution of the Principality of Liechtenstein, no one may be removed from the jurisdiction of his lawful judge and extraordinary courts shall not be established.

Article 33 § 2 of the Constitution stipulates that the threat or imposition of penalties must be in accordance with the law.

Article 34 § 1 of the Constitution guarantees the inviolability of private property.

2. Provisions of the Criminal Code

a. Provisions concerning the applicability of criminal provisions

Section 1 of the Criminal Code prohibits punishment without law. Pursuant to section 1 § 1 of the Criminal Code, a penalty or a measure of prevention may only be imposed for an act which was punishable according

to law at the time of its commission. Section 1 § 2 of that Code provides that no heavier penalty may be imposed than the one that was applicable at the time the criminal offence was committed. A measure of prevention may only be ordered if, at the time of the commission of the offence, this measure or a comparable penalty or measure of prevention had been provided for by law.

Section 61 of the Criminal Code lays down rules on the temporal applicability of criminal provisions. Criminal laws apply to acts committed after the laws' entry into force. They are applicable to acts committed prior to that date if the laws in force at the time when the offence was committed, having regard to their overall effects, were less favourable to the perpetrator.

b. Provisions on penalties, absorption of profits, forfeiture and preventive measures

Sections 18 to 31a of the Criminal Code, according to their heading, cover penalties, the absorption of profits, forfeiture and preventive measures. Section 18 of that Code regulates prison sentences, section 19 of the Code provides for fines and sections 20 and 20a of the Code contain rules on the absorption of profits. Sections 21 et seq. provide, in particular, for preventive measures such as the placement in an institution for mentally disturbed law breakers, in a detoxification facility or in an institution for dangerous recidivist offenders.

According to section 20b § 2 of the Criminal Code, assets which were derived from an act liable to punishment shall be declared forfeited if the act from which they originate is punishable according to the laws of the place were it was committed, if Liechtenstein criminal law does not apply to that act and if the act did not constitute a fiscal offence. Pursuant to section 20c § 1 no. 1 of the Criminal Code, forfeiture is excluded in so far as third parties, who did not participate in the offences at issue, have legal claims in relation to the assets in question.

Section 20b § 2 of the Criminal Code was introduced into that Code by the Act on Amendments to the Criminal Code of 25 October 2000, which entered into force on 19 December 2000 (see Liechtenstein Federal Gazette (LGBl) 2000, no. 256, issued on 19 December 2000).

c. Provision on money laundering

Money laundering, that is, in particular, hiding assets originating from a criminal offence or concealing the fact that the assets stem from an offence, is punishable pursuant to section 165 § 1 of the Criminal Code. However, a person who has been punished for having participated in the offence which generated such assets is not (also) liable to prosecution for money laundering (section 165 § 5 of the Criminal Code).

3. Provisions of the Code of Criminal Procedure

a. Provisions on the seizure of assets

Section 97a § 1 of the Code of Criminal Procedure provides that if there is a suspicion that assets originate from a punishable act and are likely to be declared forfeited (pursuant to section 20b of the Criminal Code) the court, on a motion of the Public Prosecutor's Office, shall order measures aimed at safeguarding their forfeiture if the recovery of the assets is endangered or rendered considerably more difficult otherwise. Such safeguarding measures comprise, *inter alia*, the seizure of assets or a prohibition on their disposal.

Section 97a § 4 of that Code stipulates that the court is obliged to fix a time-limit for the safeguarding measure ordered, which may be extended on request. If two years have passed following the first order without an indictment having been laid or a request for forfeiture having been lodged in separate objective proceedings, further extensions of the time-limit for one year respectively are only permitted with the consent of the Court of Appeal.

The seizure order shall be quashed, in particular, if it can be assumed that the forfeiture will not be ordered or if the time-limit for the order has expired (section 97a § 5 of the Code of Criminal Procedure).

b. Provisions regulating the forfeiture proceedings

Section 356 of the Code of Criminal Procedure regulates the forfeiture proceedings. If there are sufficient grounds for the assumption that the preconditions for forfeiture (section 20b of the Criminal Code) are met and if this cannot be determined in the course of criminal proceedings, the Public Prosecutor shall lodge a separate request for a declaration of forfeiture (§ 1 of section 356). It is the court which would have jurisdiction to adjudicate on the offence due to which the forfeiture order shall be made which shall decide on the request in separate proceedings by a judgment following a public hearing (§ 2 of section 356). Persons who argue to have a claim on the assets liable to forfeiture have the rights of an accused in the forfeiture proceedings (section 354 of the Code of Criminal Procedure).

c. Provisions concerning the right to appeal

Pursuant to Section 97a § 6 of the Code of Criminal Procedure, the Public Prosecutor's Office, the defendant or the persons otherwise affected have the right to lodge an appeal with the Court of Appeal against the order of safeguarding measures or its lifting.

According to section 238 § 1 of the Code of Criminal Procedure all judicial decrees, decisions and orders which are not judgments are subject to appeal to the Court of Appeal on grounds of unlawfulness or disproportionality if there are no exceptions provided for by law.

4. International Treaties

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime signed on 8 November 1990 (ETS no. 141) entered into force for Liechtenstein on 1 March 2001. According to its preamble, the objective of this Convention is to fight effectively against serious crime by depriving criminals of the proceeds from crime and to establish a well-functioning system of international co-operation to attain this aim. Parties undertake in particular to criminalise the laundering of the proceeds from crime and to confiscate such proceeds or property the value of which corresponds to such proceeds.

COMPLAINTS

1. Relying on Article 6 § 1 of the Convention, the applicants claimed that in both sets of the objective forfeiture proceedings their case had not been heard by the judge having jurisdiction. The prolongations of the seizure of their assets in these proceedings had been unlawful and arbitrary. Moreover, their appeal against the Regional Court's decision should have been decided by the Court of Appeal and not by the Supreme Court. They further argued that their trial had been unfair in that they had not been able effectively to challenge the courts' assumption that the third applicant had committed the offence which had been the basis of the seizure.

Furthermore, in the applicants' submission, the restriction for a long period of time on the free exercise of their right to property by the seizure of their assets had been in breach of the presumption of innocence guaranteed by Article 6 § 2 of the Convention.

In respect of the second set of the proceedings alone, the applicants also complained under Article 6 § 1 of the Convention that the duration of these proceedings had exceeded a reasonable time and that the domestic courts, by simply referring to previous decisions, had failed to give sufficient reasons for their decisions.

2. Moreover, the applicants argued that the application to their case of section 20b of the Criminal Code, which had entered into force after the purported commission of the criminal offences in question, had violated the principle of *nulla poena sine lege* as guaranteed by Article 7 § 1 of the Convention.

3. Invoking Article 1 of Protocol No. 1 to the Convention, the applicants further claimed that the prolonged unlawful seizure of all their assets violated their right to property.

THE LAW

A. As to the status of "victim" of the third applicant and the exhaustion of domestic remedies

The Court observes that, unlike the first and the second applicant, the third applicant was not a party to the domestic court proceedings under review in the present application, the seizure orders having been directed against the applicant foundations alone.

The Court notes that the question whether, in these circumstances, the third applicant can claim to be the "victim" of a violation of his Convention rights for the purposes of Article 34 of the Convention due to the decisions taken by the domestic courts is closely linked to the requirement of exhaustion of domestic remedies contained in Article 35 § 1 of the Convention. It recalls that the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case (see *Van Oosterwijck v. Belgium*, judgment of 6 November 1980, Series A no. 40, p. 18, § 35). This means, in particular, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned, but also of the context in which they operate, as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him to exhaust domestic remedies (see, *mutatis mutandis*, *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1211, § 69; *Baumann v. France*, no. 33592/96, § 40, 22 May 2001, and *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, § 37, ECHR 2004-III). In the light of this case-law, the Court has, for instance, considered it sufficient that an association which had been set up for the specific purpose of defending its members' interests before the domestic courts exhausted domestic remedies in order for its members to claim to be "victims" and to have exhausted domestic remedies for the purposes of Article 34 and 35 of the Convention (see *Gorraiz Lizarraga*, cited above, §§ 37-39).

In the present case, the Court observes that according to the statutes of the first and the second applicant, two legal entities, the third applicant is the sole beneficiary of their assets, a fact which was also taken into account by the domestic courts in their reasoning. The seizure orders in the proceedings before the national courts against the first and the second applicant were made because the foundations were suspected of having received money which originated from the third applicant's offences committed in Italy. From a not strictly legal, economic point of view, it was therefore the third applicant's assets which were seized by the national

courts and which were at issue in these proceedings through the intermediary of the applicant foundations operating to his benefit. The provisions regulating the objective forfeiture proceedings (see 'Relevant domestic and international law' above) are indeed tailored to take account of such situations. Whereas these proceedings are directed against the person or legal entity actually owning the assets in question (section 356 of the Code of Criminal Procedure), persons arguing to have a claim on these assets have the rights of an accused in these proceedings (section 354 of the Code of Criminal Procedure).

Having regard to the particular circumstances of the case, the Court therefore considers that the third applicant can claim to be the "victim", within the meaning of Article 34, of the alleged violations of the Convention, and that he exhausted domestic remedies for the purposes of Article 35 § 1 of the Convention.

B. Complaints under Article 6 of the Convention

The applicants complained that in both sets of proceedings their case had not been heard by the competent courts on all levels of jurisdiction. Moreover, they claimed that they had not had an opportunity effectively to challenge the courts' assumption that the third applicant had committed a criminal offence. They also considered the prolonged seizure of their assets to have breached the presumption of innocence. In respect of the second set of proceedings alone, they argued that these had lasted unreasonably long and that the courts had failed to give sufficient reasons for their decisions.

The applicants invoked Article 6 of the Convention, which, in so far as relevant, reads:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time by [a] ... tribunal established by law. ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The Court must first determine whether or not Article 6 of the Convention is applicable to the seizure orders at issue. In order for an individual to be entitled to the guarantees laid down in that provision, the proceedings must concern "the determination" of either his civil rights and obligations or of any criminal charge against him.

According to the Court's case-law on the applicability of Article 6 under its civil head, proceedings before the domestic courts amount to "the determination" of an applicant's civil rights and obligations if there is a real "dispute" ("*contestation*") over these rights and obligations. The result of the proceedings in question must thus be directly decisive for such a right or obligation (see *Fayed v. the United Kingdom*, judgment of

21 September 1994, Series A no. 294-B, pp. 45-46, § 56; *Zlínsat, spol. s r.o. v. Bulgaria*, no. 57785/00, § 72, 15 June 2006).

Therefore, Article 6 does not apply to proceedings in which only interim or provisional measures are taken prior to the decision on the merits, as such proceedings do not, as a rule, affect the merits of the case and thus do not yet involve the determination of civil rights and obligations (see, among many other authorities, *Kress v. France* (dec.), no. 39594/98, 29 February 2000; *Starikow v. Germany* (dec.), no. 23395/02, 10 April 2003; *Libert v. Belgium* (dec.), no. 44734/98, 8 July 2004; *Dogmoch v. Germany* (dec.), no. 26315/03, ECHR 2006-...). Only exceptionally has the Court considered Article 6 to be applicable to proceedings relating to interim orders. This concerned, in particular, cases in which an interim decision in fact already partially determined the rights of the parties in relation to the final claim (see, in particular, *Markass Car Hire Ltd v. Cyprus* (dec.), no. 51591/99, 23 October 2001, and *Zlínsat*, cited above, § 72) or in which an interim order immediately led to the institution of main proceedings deciding on the dispute in question (see, in particular, *Air Canada v. the United Kingdom*, judgment of 5 May 1995, Series A no. 316-A, p. 21, § 61).

In the instant case, the Court observes that the seizure of the foundations' assets pursuant to section 97a § 1 of the Code of Criminal Procedure was a measure aimed at safeguarding their forfeiture at a late date in the main objective forfeiture proceedings, provided that the suspicion that the assets originated from criminal offences proved to be true. Otherwise, the seizure orders would be quashed and the foundations would again be free to dispose of the assets. Neither the applicants nor the State were entitled to use or dispose of the assets at issue prior to the final decision in the main objective forfeiture proceedings. The seizure orders did not entail any determination, not even in part, of the question whether the assets frozen by the orders in fact stemmed from punishable acts and would, as a consequence, be declared forfeited. Therefore, these orders, which were of a purely provisional nature and neither forestalled nor coincided with a final decision in the main proceedings, cannot be considered as entailing "the determination", for the purposes of Article 6 § 1, of the applicants' civil rights and obligations.

It remains to be established whether the seizure proceedings concerned "the determination" of any criminal charge against the applicants instead. When assessing whether a criminal charge has been determined in proceedings before the domestic courts, the Court, similarly to the approach taken with respect to "the determination" of a civil right, has consistently examined whether the proceedings in question involved a finding of guilt or were aimed at an applicant's conviction or acquittal for an offence and whether the measure taken had any implication for the applicant's criminal record (compare *Zlínsat*, cited above, § 72; *Dogmoch*, cited above, and,

mutatis mutandis, *Phillips v. the United Kingdom*, no. 41087/98, § 34, ECHR 2001-VII).

As shown above, the seizure orders against the applicants in the present case were of a purely provisional, safeguarding nature. According to section 97a § 1 of the Code of Criminal Procedure, such a measure depended on a suspicion that the assets concerned originated from a punishable act. It did not, however, entail any finding of guilt or conviction of the person or legal entity who owned the assets seized. This is illustrated by the fact that in both sets of proceedings, the domestic courts referred to the mere "suspicion" that the third applicant had received the assets in question as commissions for having bribed judges in Italy. Likewise, the courts took account of the third applicant's conviction in Italy without any own finding of guilt. Nor is there any indication that the seizure orders were reflected in any of the applicants' criminal records. In these circumstances, the seizure orders did not involve "the determination" of any criminal charge for the purposes of Article 6 § 1 either.

The Court concludes that, irrespective of the question whether the seizure orders are to be qualified as concerning the applicants' "civil rights" or a "criminal charge" against them, Article 6 is not applicable to the proceedings at issue for lack of a "determination" of such a right or charge by the seizure orders. This part of the application must therefore be dismissed as incompatible *ratione materiae* with the provisions of the Convention pursuant to Article 35 §§ 3 and 4 of the Convention.

C. Complaint under Article 7 of the Convention

In the applicants' submission, the application to their case of the provisions on forfeiture laid down in section 20b of the Criminal Code, which had entered into force after the purported commission of the criminal offences in question, amounted to the imposition of a retrospective criminal penalty. They relied on Article 7 § 1 of the Convention which provides:

> "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 applicants submitted that the applicable provisions on forfeiture had entered into force on 19 December 2000, that is, long after the purported criminal offences had been committed in the 1990s. Seizure and forfeiture of property had to be considered as penal sanctions which as such reduced the value of the assets concerned. This was illustrated by the fact that they were authorised by the Criminal Code and the Code of Criminal Procedure. Moreover, these sanctions could only be ordered in relation to criminal proceedings and could be justified exclusively by the purpose of repressing criminal offences. The aim of these sanctions was to dissuade the

commission of offences by ordering the payment of a sum of money, which was penal in nature. The measures were qualified as criminal ones also under Liechtenstein law.

The applicants further argued, having regard to the procedure involved in the implementation of the measures in question, that it was irrelevant that an order to render assets which had been declared forfeited could not be enforced by an order of imprisonment in default. The prohibition to order imprisonment for debt was already laid down in the Convention provisions themselves. The seizure of the applicants' assets clearly had a punitive character as forfeiture constituted a severe interference with their property.

The Court recalls that section 20b of the Criminal Code, which authorises the forfeiture of assets originating from an act liable to punishment according to the laws of a foreign State, entered into force in December 2000, that is, after the third applicant purportedly committed the offences in question, namely the bribing of judges in Italy, before 1996. The seizure of such assets in order to safeguard their later forfeiture was therefore not yet permitted at the time when the third applicant had assumedly committed the said offences.

The Court notes that in the proceedings here at issue only a seizure of the applicant foundations' assets, that is, an interim – albeit long-lasting – safeguarding measure, has been ordered, but the decision on the actual forfeiture of the assets has not yet been taken. In view of this, it is questionable whether a penalty could already be considered as having been "imposed" within the meaning of Article 7 § 1, second sentence, of the Convention. It is not, however, necessary for the Court to rule on this issue if it shares the view of the Liechtenstein courts that the seizure orders and any subsequent forfeiture did not constitute a "penalty".

Article 7 § 1, second sentence, of the Convention, is only applicable to measures with retrospective effect if they constitute a "penalty" within the meaning of that Article.

The Court reiterates that the concept of "penalty" in Article 7 § 1 is an autonomous one. To render the protection afforded by that 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 (see *Welch v. the United Kingdom*, judgment of 9 February 1995, Series A no. 307-A, p. 13, § 27; *Jamil v. France*, judgment of 8 June 1995, Series A no. 317-B, p. 27, § 30).

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 was imposed following conviction for a "criminal offence". Further relevant factors to be examined are the characterisation of the measure under domestic law, its nature and purpose, the procedures involved in its making and implementation, and its severity (see *Welch*, cited above, p. 13, § 28; *Adamson v. the United Kingdom* (dec.),

no. 42293/98, 26 January 1999; *Van der Velden v. the Netherlands* (dec.), no. 29514/05, ECHR 2006-...).

As regards the connection of the orders of seizure of the applicants' assets with a criminal offence, the Court notes that a seizure under section 97a of the Code of Criminal Procedure may only be made if there is a suspicion that assets originate from an act liable to punishment and will therefore be declared forfeited pursuant to section 20b § 2 of the Criminal Code once it is proved that they are the proceeds of crimes. The seizure orders are therefore linked to and dependent on the commission of a criminal offence.

This link is not diminished by the fact that the order of seizure (and forfeiture) may affect property belonging to third parties other than the offender himself. Indeed, in the present case, it was only the third applicant who was suspected of having received the money later transferred to the first and second applicants as commissions for having bribed Italian judges. The fact that the seizure order may also be made against the legal successors of a perpetrator does not, however, alter the fact that the order is dependent on there having been a criminal offence. Likewise, the fact that it is not a precondition for the order that the perpetrator, when committing his offence, acted with criminal responsibility, does not call into question the fact that the order is linked to the objective elements of a criminal offence.

Next, as to the characterisation of the impugned measure under domestic law, the Court notes that the Liechtenstein courts were unanimous in their conclusion that seizure (and subsequent forfeiture) did not constitute a penalty within the meaning of Article 33 § 2 of the Constitution and Article 7 § 1 of the Convention. Having regard to the criteria developed in this Court's case-law, they found that the forfeiture of assets was not an additional punishment, but a civil law consequence of the fact that a perpetrator or other beneficiaries had obtained assets originating from an unlawful act. The Court notes in this connection that penalties and forfeiture are considered to be distinct measures according to the Liechtenstein Criminal Code itself. This is illustrated in the heading to and the wording of sections 18 to 31a of the Criminal Code, which lay down different rules for penalties (prison sentences and fines) as opposed to preventive measures, absorption of profits and forfeiture (see 'Relevant domestic and international law' above).

In assessing the nature and purpose of the seizure orders the Court observes that according to the domestic courts, measures pursuant to section 97a of the Code of Criminal Procedure were aimed at preventing persons suspected of a criminal offence from frustrating the forfeiture of the assets obtained as a result thereof. The measures should comply with the obligations under the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime by depriving the

beneficiaries of crime from the proceeds thereof. Thus, the seizure (and forfeiture) orders were aimed at guaranteeing that crime did not pay.

The Court observes that, with forfeiture being excluded pursuant to section 20c of the Criminal Code in so far as third parties have legal claims in relation to the assets in question, the seizure orders are aimed, in the first place, at depriving the person concerned of the profits of his crime. They may, however, as is illustrated in the decision of the Supreme Court of 4 September 2003 (*in fine*), also serve to safeguard the enforcement of civil law claims of third persons. There are in fact several elements which make seizure and forfeiture, in the manner in which these measures are regulated under Liechtenstein law, more comparable to a restitution of unjustified enrichment under civil law than to a fine under criminal law. In particular, seizure and forfeiture under Liechtenstein law are limited to assets which originate from a punishable act (see section 20b § 2 of the Criminal Code). If the suspicion that the seized assets stem from a punishable act proves to be true, forfeiture is thus restricted to the actual enrichment of the beneficiary of an offence – a factor which distinguishes the present case from the case of *Welch* (cited above, at pp. 12, 14, §§ 12, 33) in which such a limitation did not exist. Moreover, other than in the *Welch* case (*ibid.*), there are no statutory assumptions under Liechtenstein law to the effect that property passing through the offender's hand prior to the offence was the fruit of crime unless he could prove otherwise. Likewise, other than in the *Welch* case (*ibid.*) and other than in the case of criminal-law fines, the degree of culpability of the offender is irrelevant for fixing the amount of assets declared forfeited. Furthermore, unlike the confiscation orders at issue in the case of *Welch* (*ibid.*), the forfeiture orders under Liechtenstein law cannot be enforced by imprisonment in default of payment.

Having regard to the procedures involved in the making and implementation of the measure, the Court observes that the seizure orders were made by the criminal courts in the course of investigations relating to objective forfeiture proceedings pursuant to section 356 of the Code of Criminal Procedure on the motion of the Public Prosecutor's Office. As set out above, the orders could not be enforced by imprisonment in default, but only by the ordinary instruments of execution of payment orders.

As to the gravity of the impugned orders, the Court recalls that the severity of the measure at issue is not in itself decisive, since many non-penal measures may have a substantial impact on the person concerned (compare *Welch*, cited above, p. 14, § 32). The Court notes that an order of seizure may affect assets of a considerable value, without there being an upper limit for the amount of assets of which the person concerned can no longer dispose. However, the seized assets may again be disposed of if the suspicion that they originated from an offence proved to be unfounded. Moreover, given that the seizure order, as set out above, is limited to the

actual enrichment of the beneficiary of an offence, this does not provide an indication that it forms part of a regime of punishment.

Having regard to all relevant factors for the assessment of the existence of a penalty, the Court concludes that, given in particular the nature of forfeiture under Liechtenstein law which makes it comparable to a civil law restitution of unjustified enrichment, the orders of seizure made against the applicant foundations in view of a subsequent forfeiture of their assets did not amount to a "penalty" within the meaning of Article 7 § 1, second sentence, of the Convention.

It follows that Article 7 is not applicable in the present case. This part of the application must therefore likewise be rejected as incompatible *ratione materiae* with the provisions of the Convention in accordance with Article 35 §§ 3 and 4 of the Convention.

D. Complaint under Article 1 of Protocol No. 1 to the Convention

In the applicants' view, the protracted unlawful seizure of all their assets was also in breach of their right to property as protected by Article 1 of Protocol No. 1 to the Convention, which provides:

> "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 applicants claimed that the prolonged unlawful seizure of their assets had violated their right to property protected by Article 1 of Protocol No. 1 to the Convention. By the prohibition to use their assets, they had suffered considerable financial losses. The courts had failed to strike a fair balance between the public interest in seizing their property and their own interest in using it.

The Court notes that the applicants did not raise this complaint about a breach of their property rights in either of the two sets of proceedings before the domestic courts. In particular, they did not invoke this right before the Constitutional Court of the Principality of Liechtenstein despite the fact that Article 34 § 1 of the Constitution guarantees the inviolability of private property (see 'Relevant domestic and international law' above).

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

For these reasons, the Court unanimously

Declares the application inadmissible.

Stephen PHILLIPS
Deputy Registrar

Peer LORENZEN
President