

THE INTRICATE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS ON NON-CONVICTION BASED CONFISCATION

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1. INTRODUCTION

The purpose of this article is to present the differentiated approach of the European Court of Human Rights (hereinafter the “Court”, the “ECtHR”) for non-conviction based confiscation, presented in selected judgments examining the rules of English, Italian, Dutch and Georgian law. Having examined the case law of the ECtHR concerning non-conviction based confiscation, the most representative rulings were selected for in-depth analysis. The mosaic of European procedures to adjudicate confiscation without prior conviction has influenced the jurisprudence of the Court so that such jurisprudence lacks a multi-faceted approach to the problem of protecting human rights, which may be violated by this type of confiscation. The indirect effect of these diverse regulations is that the Court has not developed common minimum procedural standards to protect human rights to serve as a litmus test for checking the conformity of the procedure allowing confiscation without conviction with the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the “Convention”, the “ECHR”).

2. THE SIMPLICITY OF REASONING IN *VARVARA*: CONFISCATION AS A PENALTY

Upon first inspection, the judgment in *Varvara v. Italy*¹ seems simple and correct. The applicant alleged that confiscation without prior conviction violated Articles 6(2) and 7 of the ECHR and Article 1 of Protocol No. 1 of the Convention. Criminal proceedings in

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¹ Application 17475/09, 29 October 2013. All rulings cited in the text are available online in the HUDOC database, at: <http://hudoc.echr.coe.int/eng#%7B%22documentcollectionid%22:%7B%22GRANDCHAMBER%22,%22CHAMBER%22%7D%7D> [accessed: 30.01.2016].

the applicant's case were discontinued because the offence was barred. Nevertheless, the confiscation was ordered based on Article 19 of Law no. 47 of 28 February 1985, regarding rules on the control of planning and building activities, sanctions, recovery and regularisation of building works. A key aspect was the position of the Italian courts on the confiscation, who qualified it as an administrative measure and allowed the imposition regardless of the outcome of the criminal proceedings. The condition to impose confiscation is a 'final decision' of a criminal court, which does not have to be a conviction. The justification of the judgment in *Varvara* leads to the conclusion that confiscation, regardless of the location of the branch of law, is an instrument of penal repression; hence, Article 7 of the ECHR is applicable. The problem is that due to the casuistic approach to non-conviction based confiscation in the Court's case law, this conclusion cannot be easily generalised and thus applies only to this particular case. The ECtHR found a violation of Article 7, which covers the issue of guilt and involves the presumption of innocence referred to in Article 6(2). In the context of confiscation, the Court noted the fundamental principle of the legality of criminal law and stated that imposing sanctions without a conviction would be contrary to this principle. In the Court's view, as expressed in *Paraponiaris v. Greece*², innocence cannot be challenged in accordance with Article 6(2) after a final acquittal of the accused, even if there was an acquittal for lack of evidence. Criminal proceedings in this case concerned the smuggling of petroleum products and did not result in a conviction because of prescription, as in the case of *Varvara*. However, a financial penalty was imposed on the applicant in exchange for avoiding the possibility of confiscation (Article 160(2) of the National Customs Code, Law no. 2960/2001). The Court found a violation of Article 6(2) of the Convention, *inter alia*.

In the case of *Varvara*, the Court also found a violation of Article 1 of Protocol No. 1 as a result of the disproportionate infringement of the applicant's property rights caused by the confiscation. According to the Italian government, proportionality was maintained because the deterrent purpose of confiscation justifies its dimension. However, the Court took a different approach, concluding that the action taken against the applicant's property in the form of confiscation was unlawful and arbitrary, thus avoiding the question of fair balance. In the case of *Sud Fondi Srl and Others v. Italy*³, confiscation was imposed despite an acquittal in criminal proceedings on the same legal basis as *Varvara* (Article 19 of Law no. 47 of 1985). In *Sud Fondi*, the ECtHR found a violation of Article 7 and Article 1 of Protocol No. 1. The Court expressed the view that the second paragraph of Article 1 of Protocol No. 1 is applicable regardless of whether the confiscation is ordered independently or following a conviction. Justifying this decision, the Court noted that confiscation ordered following the outcome of criminal proceedings should be considered a penalty, as referred to in the second paragraph of Article 1 of Protocol No. 1. Confiscation that occurs independent of the criminal proceedings should be recognised as a form of regulation of the use of property. However, in the opinion of the Court, Article 1 of Protocol No. 1 is applicable in both groups of cases.

² Application 42132/06, 25 September 2008.

³ Application 75909/01, 20 January 2009.

Despite the clarity of reasoning in *Varvara*, Judge Pinto de Albuquerque reproached the Court for a number of omissions regarding the in-depth examination of the problem of confiscation without prior conviction in an opinion partly concurring and partly dissenting. The opinion notes that the weaknesses of the judgment resulted from the casuistic approach to confiscation and the failure to consider the problem in all its complexity. According to the judge, fulfilling the expectations of the modern approach requires considering the numerous international obligations and recommendations concerning non-conviction based confiscation in addition to a thorough analysis of confiscation as a punishment and its proportionality. Non-conviction based confiscation is still a subject of scientific controversy regarding the adequate protection of human rights⁴. Questions arise as to the possibility of circumventing the procedural guarantees of the criminal process, particularly those relating to the presumption of innocence. For obvious reasons, respecting these guarantees excludes the application of criminal penalties without a conviction. The different approaches to confiscation reflect the diversity of the case law of the ECtHR. The opinion of Judge Pinto de Albuquerque in *Varvara* concludes: 'Under the *nomen juris* of confiscation, the States have introduced *ante delictum* criminal prevention measures, criminal sanctions (accessory or even principal criminal penalties), security measures in the broad sense, administrative measures adopted within or outside criminal proceedings, and civil measures *in rem*. Confronted with this enormous range of responses available to the State, the Court has not yet developed any consistent case-law based on principled reasoning.'⁵

3. NON-CONVICTION BASED CONFISCATION UNDER THE 'ENGEL CRITERIA'

To properly determine whether confiscation without prior conviction is a legal instrument of criminal nature, two criteria set forth by the ECtHR in *Engel and Others v. the Netherlands*⁶ should be considered. Regarding the issue of confiscation,

⁴ See also B. Vettori, *Tough on Criminal Wealth. Exploring the Practice of Proceeds from Crime Confiscation in the EU* (Springer, Dordrecht 2006), p. 10; C. King, C. Walker, 'Emerging Issues in the Regulation of Criminal and Terrorist Assets' in C. King and C. Walker (eds.), *Dirty Assets. Emerging Issues in the Regulation of Criminal and Terrorist Assets*, Ashgate, Farnham 2014, p. 4–23; S. Dayman, *Is the patient expected to live? UK civil forfeiture in operation*, [in:] S.N.M. Young, *Civil Forfeiture of Criminal Property. Legal Measures for Targeting the Proceeds of Crime*, Edward Elgar, Cheltenham 2009, p. 228–249; Ch. Doyle, *Crime and Forfeiture*, Congressional Research Service, Report for Congress, 13 May 2013, p. 27–37; P. Alldridge, *Money Laundering Law. Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime*, Hart, Oxford 2003, p. 14–15; M.M. Gallant, *Money Laundering and the Proceeds of Crime. Economic Crime and Civil Remedies*, Edward Elgar, Cheltenham 2005, p. 19; M. Amos, *Human Rights Law*, Hart, Oxford 2014, p. 639–671; R. Ivory, *Corruption, Asset Recovery, and Protection of Property in Public International Law. The Human Rights of Bad Guys*, Cambridge University Press, Cambridge 2014, p. 1–11; G. Stressens, *Money Laundering. A New International Law Enforcement Model*, Cambridge University Press, Cambridge 2004, p. 60–76.

⁵ The partly concurring and partly dissenting opinion of Judge Pinto de Albuquerque in *Varvara v. Italy* (application 17475/09, 29 October 2013), p. 14.

⁶ Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, 8 June 1976.

there first needs to be an examination of the affiliated regulations of the criminal, administrative or civil law in the domestic legal system of the State concerned. Nonetheless, according to the Court, this is a relative and formal criterion that must be examined in light of the 'common denominator of the respective legislation of the various Contracting States'⁷. The second step is an examination of the degree of severity of the sanction in the form of confiscation. According to the ECtHR, this criterion must be examined in light of 'the traditions of the Contracting States and the importance attached by the Convention (...)'.⁸ Regarding confiscation, the appropriate reference plane seems to be the principles of criminal responsibility and the final deprivation of property. In *Varvara*, the confiscation was treated by Italian law as an administrative sanction independent of the criminal proceedings. Despite another classification of confiscation in domestic law, the ECtHR arrived at the opposite conclusion. The reasoning of the Court in *Varvara* did not share the view of Judge Pinto de Albuquerque, who noted the features of confiscation that characterize it as an administrative sanction for unlawful land development (the possibility of revocation of sanction, the preventive purpose of the sanction, the procedure being independent of the issue of guilt, the severity of the sanction consisting of interference with property rights in accordance with the Convention).

4. INTERNATIONAL INITIATIVES ON NON-CONVICTION BASED CONFISCATION

When the judgment in *Varvara* was issued, non-conviction based confiscation had not yet been required by European Union law. Currently, EU Member States are required to implement confiscation procedures without prior conviction, at least in the case of the illness or flight of the suspected or accused person from criminal proceedings. The grounds for the decision to confiscate were indicated in Article 4(2) of the Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014, on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ L 127, 29 April 2014, p. 39). Non-conviction based confiscation is also subject to regulation under international agreements. Article 11(1) of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990) refers indirectly to non-criminal proceedings for the confiscation. Although the definition of the term 'confiscation' set out in Article 1 does not speak directly about confiscation not based on conviction, Article 11(1) of the Convention states the following: 'At the request of another Party which has instituted criminal proceedings or proceedings for the purpose of confiscation, a Party shall take the necessary provisional measures, such as freezing or seizing, to prevent any dealing in, transfer or disposal of property which, at a later stage, may be the subject of a request for confiscation or which might be such as to satisfy the request.'

⁷ *Ibid.*, footnote 6, p. 31.

⁸ *Ibid.*

A direct reference to non-conviction based confiscation has been made in the United Nations Convention Against Corruption (2003) in Article 54(1)(c), which recommends that the States consider introducing confiscation without prior conviction in cases of the death, flight or absence of an offender and in other appropriate cases – that is, in a wide range of cases. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005) refers directly to confiscation as a non-penal sanction. Article 23(5) of the Convention states: ‘The Parties shall co-operate to the widest extent possible under their domestic law with those Parties which request the execution of measures equivalent to confiscation leading to the deprivation of property, which are not criminal sanctions, in so far as such measures are ordered by a judicial authority of the requesting Party in relation to a criminal offence, provided that it has been established that the property constitutes proceeds or other property in the meaning of Article 5 of this Convention.’

The Financial Action Task Force (FATF) in Recommendation No. 4 recommends that the States adopt measures allowing for the confiscation of the proceeds or instrumentalities of crime without the requirement of a prior conviction or measures requiring the demonstration by an offender of the lawful origin of the property alleged to be liable to confiscation (FATF Recommendations, February 2012).

5. CONFISCATION AS A PREVENTIVE MEASURE OR PART OF THE SENTENCING PROCESS

The Court found a violation of Article 6(2) of the ECHR in *Geerings v. Netherlands*⁹. In the applicant’s case, an order to pay a sum of money as deprivation of an illegally achieved advantage was issued on the basis of Article 36e of the Penal Code of the Netherlands, despite an acquittal in the criminal proceedings. The domestic law permits its imposition in a separate judicial decision against a person who benefited from a similar offence to that at issue in the case. Adjudication was based on specific provisions of the Code of Criminal Procedure of the Netherlands (Articles 511b–511i), which do not require a high standard of proof as in a criminal trial. According to the Court, the evidentiary requirements are based on a comparison of probabilities typical of civil procedure. It should be noted, however, that in another case, *Van Offeren v. Netherlands*¹⁰, despite the acquittal of one of the charges connected with illegally obtained advantage and despite the same legal basis for a confiscation order as in the case of *Geerings v. Netherlands*, the Court found no violation of Article 6(2). In *Van Offeren*, the Court cited the case of *Phillips v. United Kingdom*¹¹ and *Engel and Others v. Netherlands* and stated: ‘Once an accused has properly been proved guilty of a particular criminal offence, Article 6 § 2 has no application in relation to

⁹ Application 30810/03, 1 March 2007. Compare *Sud Fondi srl and Others v. Italy*, application 75909/01, 30 August 2007.

¹⁰ Application 19581/04, 5 July 2005.

¹¹ Application 41087/98, 5 July 2001.

allegations made about an accused's personality as part of the sentencing process, unless they are of such a nature and degree as to amount to the bringing of a new charge within the autonomous meaning of the Convention (...).¹²

The Court noted that the confiscation procedure should be seen in the context of the national law as part of the sentencing process for other drug offences. Furthermore, the Court considered it significant that the applicant had not effectively challenged the illicit origin of the property. Consequently, the Court did not see a connection between the confiscation procedure and any new criminal charges. For this reason, the ECtHR found no violation of Article 6(2) of the Convention.

The cases of *Van Offeren* and *Phillips* are similar because the confiscation was imposed in relation to sentencing for drug offences. In addition, what connects them is the context of assets of an unproven legitimate source. The confiscation in *Phillips* was imposed on the basis of the Drug Trafficking Act (1994) using the assumption of the illegal origin of the property (sections 3 and 4 of the above Act). The Court did not find any new criminal charge in the confiscation procedure, which meant there was no violation of Article 6(2) of the EHCR¹³. According to the ECtHR, the confiscation procedure and the presumption about the origin of the property were consequences of committing drug offences. An analysis of these cases leads to the conclusion that the recognition of confiscation as part of the sentencing process excludes the application of Article 6(2). Nonetheless, against the background of the same Drug Trafficking Act (1994), in the case of *Butler v. United Kingdom*¹⁴, the Court issued a ruling based on a different context. The applicant had not been convicted of drug offences, although in the past, he had been convicted of an ordinary crime against property. However, this had no connection to the confiscation procedure. In the ECtHR's view, Article 6(2) did not apply to the present procedure. Moreover, this did not involve the determination of a criminal charge against the applicant. In the grounds for the decision, the ECtHR noted: '(...) the forfeiture order was a preventive measure and cannot be compared to a criminal sanction since it was designed to take out of circulation money which was presumed to be bound up with the international trade in illicit drugs.'¹⁵

In *Butler*, the Court found no violation of Article 1 of Protocol No. 1 (the complaint was manifestly ill-founded and was rejected) and expressed the opinion that the forfeiture conformed to the general interest in combating international drug trafficking. One gets the impression that the Court did not avoid references to the effectiveness of the measure in its justification of the decision. The ECtHR disagreed with the arguments of the applicant regarding the similarity of his case to the case

¹² *Ibid.*, footnote 10, p. 10.

¹³ Compare *Walsh v. United Kingdom* (application 43384/05, 21 November 2006). In the opinion of the ECtHR, the proceedings for the recovery of assets pursuant to the Proceeds of Crime Act (2002) did not involve the determination of a criminal charge. The ECtHR held that Article 7 is not applicable and that the proceedings at issue in this case did not fall under the criminal head of Article 6. In *Paulet v. United Kingdom* (application 6219/08, 13 May 2014), the ECtHR reviewed the same Proceeds of Crime Act (2002) and found a violation of Article 1 of Protocol 1 to the Convention.

¹⁴ Application 41661/98, 27 June 2002.

¹⁵ *Ibid.*, footnote 14, p. 9.

of *Phillips*. According to the applicant, the similarity would justify the application of Article 6 under its criminal head and, as a consequence, the application of procedural guarantees of the presumption of innocence. The Court stressed that *Phillips* and *Butler* are two different cases. The confiscation in *Phillips* followed a prosecution, trial and ultimate conviction. Moreover, it was part of the sentencing procedure and thus was not associated with a separate or new charge.

The procedure for confiscation under the Drug Trafficking Act (1994) was also considered by the ECtHR in *Webb v. United Kingdom*¹⁶. The Court held that the forfeiture order is a preventive measure, not a criminal sanction, and it shared the government's view that Article 6 under its criminal head is not applicable to the forfeiture proceedings. With regard to the new charge in the confiscation procedure, the ECtHR's judgment in *Agosi v. United Kingdom*¹⁷ should also be mentioned. Considering the violation of the rights of a third party as a result of confiscation, the Court in that case held that Article 6 does not apply and decided that it was not necessary to consider this Article in the field of the applicant's civil rights and obligations. The ECtHR stated: 'The fact that measures consequential upon an act for which third parties were prosecuted affected in an adverse manner the property rights of AGOSI cannot of itself lead to the conclusion that, during the course of the procedures complained of, any "criminal charge", for the purposes of Article 6 (...), could be considered as having been brought against the applicant company.'¹⁸

The reasoning that the rules of criminal law, especially with regard to the presumption of innocence, do not apply to confiscation related to an offence, even if nominally located outside the rules of criminal procedure, is still complicated. In addition, this type of argument often seeks support in referring to the insufficient effectiveness of traditional confiscation (in the sense of following the conviction) in the fight against serious crime. An example of this type of argument occurred in a group of cases examined by the ECtHR concerning an Italian law aimed at organised crime, which provides for confiscation in the form of preventive measures without the requirement of a prior conviction (Act No. 1423 of 27 December 1956 and Act No. 575 of 31 May 1965). In *Raimondo v. Italy*¹⁹, the Court referred to the needs associated with the fight against organised crime, but with a high degree of generality. References to efficiency in combating the economic power of organised crime were also made in *Arcuri and Others v. Italy*²⁰, *Riela v. Italy*²¹ and *Prisco v. Italy*²². In these cases, the ECtHR held that confiscation was a preventive measure, which may be recognised

¹⁶ Application 56054/00, 10 February 2004.

¹⁷ Application 9118/80, 24 October 1986. Compare *Air Canada v. the United Kingdom* (application 18465/91, 5 May 1995). The ECtHR found no violation of Article 6(1) and Article 1 of Protocol No. 1 in the forfeiture procedure. In the opinion of the Court, the case did not involve a criminal charge but concerned the civil rights of the company affected by forfeiture. In *Silickienė v. Lithuania* (application no. 20496/02, 10 April 2012), the ECtHR found no violation of Article 6 §§ 1 and 2 and Article 1 of Protocol No. 1, despite the fact that the confiscation was applied to the widow of the deceased in the course of criminal proceedings that had not been completed.

¹⁸ *Ibid.*, footnote 17, p. 18.

¹⁹ Application 12954/87, 22 February 1994.

²⁰ Application 52024/99, 5 July 2001.

²¹ Application 52439/99, 4 September 2001.

²² Application 38662/97, 15 June 1999.

only for compliance with Article 6(1) of the Convention under its civil head. From this perspective, confiscation can be viewed only as a form of control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1 (in accordance with the general interest). It should be remembered that in this area the State has a wide latitude in shaping policies aimed at preventing crime.

6. TOWARDS A COMPREHENSIVE APPROACH

The ECtHR presented a new, more comprehensive approach to the issue of confiscation without prior conviction in its judgment in *Gogitidze and Others v. Georgia*²³. The justification in this case suggests that the Court, to some extent, wanted to make up for the shortcomings of reasoning in *Varvara* that were noted by Judge Pinto de Albuquerque. The non-conviction based confiscation recognised in *Gogitidze* was imposed on the basis of Georgian law that permits its application as an administrative procedure aimed at illegal asset recovery from public officials, their relatives and persons connected to them (Article 37 § 1 of the Code of Criminal Procedure, Articles 21 §§ 4 to 11 of the Code of Administrative Procedure). The sufficient condition for initiating the confiscation proceedings is a criminal charge, not a conviction. The burden of proof of the legal origin of the property is shifted to the defendant. The anti-corruption legislation had been introduced into domestic law under the influence of recommendations of the Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL) and the OECD's Anti-Corruption Network for Transition Economies. The applicants alleged that the confiscation order violated Article 1 of Protocol No. 1. According to the applicants, deprivation of their property through confiscation due to its irreversibility 'amounted to' a criminal sanction and was certainly more than a preventive measure or a control of the use of property referred to by the second paragraph of Article 1 of Protocol No. 1 of the Convention. The ECtHR did not share the assessment of the applicants and found no violation of Article 1 of Protocol No. 1. In its reasoning, the Court referred to the problem of the effectiveness of confiscation: "(...) having regard to the Georgian authorities' wide margin of appreciation in their pursuit of the policy designed to combat corruption in the public service and to the fact that the domestic courts afforded the applicants a reasonable opportunity of putting their case through the adversarial proceedings, the Court concludes that the civil proceedings *in rem* for the forfeiture of the applicants' property, based on a procedure which was moreover in line with the relevant international standards, did not upset the requisite fair balance."²⁴

The Georgian government took the view that the confiscation applied to the applicants was not of a criminal nature but was civil and compensatory. The government also referred to the Georgian penal policy aimed at tackling corruption: 'The confiscation of the applicants' property had (...) been justified by socio-legal

²³ Application 36862/05, 12 May 2015.

²⁴ *Ibid.*, footnote 23, p. 31.

and economic considerations, namely the need to eradicate corruption and to return the illicitly acquired property to the lawful owners or, in the absence of such, to the State budget.²⁵

Three applicants complained that there was a breach of the principle of equality of arms of Article 6, and one of the applicants alleged a breach of the presumption of innocence because of the imposition of confiscation without prior conviction. The Court held that the complaints under Article 6 §§ 1 and 2 were manifestly ill-founded and rejected them. However, the ECtHR referred to earlier case law (*Arcuri and Others v. Italy*, *Butler v. United Kingdom*, *Silickienė v. Lithuania*), which held that confiscation in civil proceedings *in rem* should be treated not as a penalty but as a measure of control of property, which can be considered only in terms of the civil head of Article 6(1). The Court distinguished between two aspects of Article 6(2). Its narrow aspect concerns the protection given by the presumption of innocence in the framework of pending criminal proceedings. In this context, the Court referred to the cases of *Arcuri and Others v. Italy*, *Butler v. United Kingdom*, *Agosi v. United Kingdom* and *Riela v. Italy*. In the grounds supporting its decision, the ECtHR noted: “(...) the forfeiture of property ordered as a result of civil proceedings *in rem*, without involving determination of a criminal charge, is not of a punitive but of a preventive and/or compensatory nature and thus cannot give rise to the application of the provision in question.”²⁶

The second, wider aspect of Article 6(2) concerns the protection against undermining the presumption of innocence after a verdict in criminal proceedings that did not result in a conviction (for example, acquittal, discontinuance of the proceedings due to prescription or death). In this regard, the Court made reference to the cases of *Allen v. United Kingdom*²⁷, *Geerings v. Netherlands*, *Phillips v. United Kingdom* and *Lagardère v. France*²⁸.

It is significant that in a less serious infringement of the law (as unlawful land development in *Varvara*), the Court found that confiscation without a prior conviction was a penalty and, as a result, supported the strict guarantees of a criminal trial, including the presumption of innocence. However, in cases involving serious drug offences or those connected with organised crime, the Court agreed to less demanding rules of evidence and civil procedure and opted against the punitive nature of the confiscation, viewing it as a preventive and/or compensatory measure. In other cases, the Court recognised the deprivation of an illegally achieved advantage without prior conviction as part of the sentencing process for other offences (*Van Offeren v. Netherlands*, *Phillips v. United Kingdom*). It is hard to agree with the opinion expressed by the ECtHR in *Gogitidze* that its previous case law was well established with regard to confiscation. It is true that the Court has referred to this issue only in cases that addressed civil proceedings *in rem*²⁹. However, the question is whether such separation of one of the

²⁵ *Ibid.*, footnote 23, p. 22.

²⁶ *Ibid.*, footnote 23, p. 34.

²⁷ Application 25424/09, 12 July 2003.

²⁸ Application 18851/07, 12 April 2012.

²⁹ Cited above: *Arcuri and Others v. Italy*, *Riela v. Italy*, *Butler v. United Kingdom*, *Agosi v. United Kingdom*, *Silickienė v. Lithuania*, and also *Veits v. Estonia* (application 12951/11, 15 January 2015).

various forms of confiscation proceedings is correct if each is in some way related to crime. It seems that through the connection of each non-conviction based confiscation to a criminal offence, the answer to the aforementioned question is in the negative. Looking at the jurisprudence on confiscation without prior conviction as a whole, it seems more legitimate to say that the case law was inconsistent and did not develop general principles on the protection of the rights of individuals in confiscation procedures. On the other hand, the casuistic approach to non-conviction based confiscation results from the different procedures applicable in the various jurisdictions against whom proceedings were brought before the ECtHR. With such a mosaic of confiscation systems, it is difficult to have a consistent body of case law and to develop general rules. However, the reasoning of the judgment issued in *Gogitidze* indicates that there has been a change in the approach of the Court to the problem of confiscation without prior conviction and that the approach is shifting towards a more comprehensive framework. The more complex vision of the Court in *Gogitidze* follows from references to international initiatives on non-conviction based confiscation, comparisons of the national system of confiscation to its various international legal concepts, as well as attempts to formulate general conclusions about prior case law being currently limited to cases involving civil proceedings *in rem*.

7. CONCLUSION

The ECtHR rulings in cases of non-conviction based confiscation are complicated by the casuistic approach, which is partly due to different systems of confiscation in national legal systems. Jurisprudence in this area has started to evolve towards a more comprehensive examination of the issue. Nevertheless, the question arises of whether the direction taken by the Court – that adjudication of confiscation for penal purposes under standards of evidence characteristic of civil procedure – is compatible with the Convention. Numerous references by the ECtHR regarding the well-known need for efficiency in combating crime can give the impression that the Court has engaged more in the rhetoric of supporting the fight against crime than the discussion of the individual rights that confiscation without prior conviction may violate, regardless of the type of procedure adopted in domestic law. The judgment in *Gogitidze* does not dispel doubts about the impact of the presumption of innocence on the non-penal procedure for confiscation, which essentially serves the objectives of crime control. Even considering that contemporary socio-political needs necessitate extraordinary measures, such as non-conviction based confiscation, the procedures governing its use should be based on the principles guaranteeing the protection of individual rights. The determination of such general principles (e.g. the use of non-conviction based confiscation only for the fight against serious crime) and certain minimum procedural standards should become a task for the ECtHR. This expectation is all the more justified because non-penal confiscation procedures are based on the reversal of the burden of proof and less strict requirements of evidence, which may provide a broad scope for abuse (when used as an ordinary repressive measure for purposes other than the fight against organized crime) depending on the political and economic

circumstances prevailing currently in the State. Any jurisprudential omissions in the field of the adequate protection of individual rights that are exposed to the risk of being violated in various confiscation procedures could result in a retreat to clear justifications, which is supported by the *Engel* criteria that confiscation is a penalty, as the Court held in *Varvara*.

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THE INTRICATE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS ON NON-CONVICTION BASED CONFISCATION

Summary

This article examines the jurisprudence of the European Court of Human Rights in cases involving non-conviction based confiscation. The author presents the casuistic approach of the Court towards the issue and discusses the reason for this approach, i.e. the diverse confiscation proceedings adopted in national legal systems. Critical remarks are formulated about the justification of judgements referring more extensively to the fight against crime than the adequate protection of individual rights. The author observes the evolution of case law towards a more comprehensive examination of non-conviction based confiscation while raising questions about the correctness of the chosen direction. The article expresses the expectation that the Court's future case law will determine the common minimum procedural standards for confiscation proceedings without prior conviction.

Key words: non-conviction based confiscation, procedural standards, jurisprudence of the European Court of Human Rights

SKOMPLIKOWANE ORZECZNICTWO EUROPEJSKIEGO TRYBUNAŁU PRAW CZŁOWIEKA W SPRAWACH DOTYCZĄCYCH KONFISKATY NIEBAZUJĄCEJ NA WYROKU SKAZUJĄCYM

Streszczenie

Artykuł analizuje orzecznictwo Europejskiego Trybunału Praw Człowieka w sprawach dotyczących konfiskaty niebazującej na wyroku skazującym (tzw. *non-conviction based confiscation*). Autor przedstawia kazuistyczne podejście Trybunału wobec zagadnienia i wskazuje tego przyczynę, tj. zróżnicowane procedury konfiskaty przyjęte w krajowych porządkach prawnych. Uwagi krytyczne zostały sformułowane odnośnie uzasadnień orzeczeń sądowych odwołujących się w większym stopniu do walki z przestępczością niż odpowiedniej ochrony praw jednostki. Autor zwraca uwagę na ewolucję orzecznictwa w stronę bardziej kompleksowego badania konfiskaty niezależnej od wyroku skazującego i wskazuje jednocześnie wątpliwości co do poprawności obranego kierunku. W artykule wyrażono oczekiwanie wobec przyszłego orzecznictwa Trybunału w zakresie określenia standardu procesowego wspólnego dla postępowań dotyczących konfiskaty niebazującej na wyroku skazującym.

Słowa kluczowe: konfiskata niebazująca na wyroku skazującym, standardy procesowe, orzecznictwo Europejskiego Trybunału Praw Człowieka