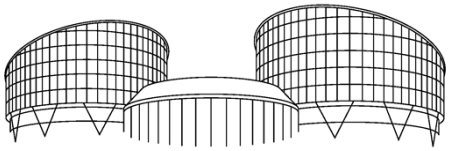

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF TELBIS AND VIZITEU v. ROMANIA

(Application no. 47911/15)

JUDGMENT

STRASBOURG

26 June 2018

FINAL

26/09/2018

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Telbis and Viziteu v. Romania,

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

Ganna Yudkivska, *President,*
Vincent A. De Gaetano,
Faris Vehabović,
Egidijus Kūris,
Iulia Motoc,
Georges Ravarani,
Péter Paczolay, *judges,*
and Marialena Tsirli, *Section Registrar,*

Having deliberated in private on 29 May 2018,

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

PROCEDURE

1. The case originated in an application (no. 47911/15) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Romanian nationals, Ms Luminița Telbis ("the first applicant"), Ms Laura Andreea Telbis ("the second applicant") and Ms Maria Agata Viziteu ("the third applicant"), on 2 November 2015.

2. The applicants were represented by Mr A. Fanu-Moca, a lawyer practising in Timişoara. The Romanian Government ("the Government") were represented by their Agent, Ms C. Brumar, of the Ministry of Foreign Affairs.

3. The applicants alleged, in particular, that the court proceedings that resulted in confiscation of their property had not been fair and that they had been unlawfully deprived of their property, in breach of Article 6 § 1 of the Convention and of Article 1 of Protocol No. 1.

4. On 6 November 2016 the above-mentioned complaints were communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1964, 1991 and 1982 respectively. The first and second applicants live in Timişoara, while the third applicant lives

in Lantosque (France). The applicants are the wife, the daughter and the niece of S.T. respectively.

A. Criminal investigation

6. On 13 March 2014 a criminal investigation was opened by the prosecutor's office attached to the High Court of Cassation and Justice ("the prosecutor") against S.T., a medical doctor and employee of a State pension office, on suspicion of bribe-taking. On the same day a search was conducted at the common residence of S.T. and the first applicant, in the first applicant's presence, accompanied by her lawyer. Documents and money found on that occasion were seized. The first applicant objected to that measure, claiming that some of the assets seized did not concern the ongoing investigation. The objection was included in the search record drawn up by the police on the spot and signed by the first applicant and her lawyer.

7. According to the prosecutor's decision of 17 March 2014 the movable assets taken away at the search of 13 March, as well as other movable and immovable assets belonging to S.T. and his wife (the first applicant), had been seized under Article 249 of the Criminal Procedure Code (see paragraph 36 below) for the purpose of subsequent special and extended confiscation provided for by Article 112^1 of the Criminal Code (see paragraph 35 below). The decision listed, among the assets found during the searches conducted in the case, the sum of 107,915 euros (EUR) found in cash. Cash in other currencies had also been seized as well as several items belonging to the second applicant. The prosecutor based the decision on the nature of the crimes under investigation and the need to recover the damages, as well as on the need to investigate possible money-laundering crimes.

8. On 19 March 2014 S.T. was handed a copy of the seizure decision of 17 March 2014 in the presence of his lawyer. On that occasion, after he had been informed of his rights and obligations, he stated that he had no observations or objections in connection with the seizure.

9. On 20 March 2014 the second applicant, represented by her lawyer, was informed of her rights and obligations in connection with the seizure of her property and received a copy of the decision of 17 March 2014.

10. On 25 March 2014 the second applicant, represented by two lawyers of her choice, lodged a complaint with the Caraş-Severin County Court against the prosecutor's decision of 17 March 2014. She claimed that the seizure of assets for the purpose of subsequent special or extended confiscation provided for by Article 249 of the Criminal Procedure Code, taken together with Articles 112 and 112^1 of the Criminal Code, could be ordered only with respect to assets belonging to a suspect or accused. She further explained that the assets listed in the prosecutor's seizure decision

included two flats, two garages and two cars, which had been lawfully acquired by her with money lent by members of her family and should not have been seized. She joined copies of sale contracts and a written statement given by a member of the family.

11. On 10 April 2014 the Caraş-Severin County Court decided with final effect that the seizure decision of 17 March 2014 had been in compliance with the provisions of Article 249 § 4 of the Criminal Procedure Code (see paragraph 36 below), which clearly stipulated that measures such as seizure may be ordered with respect to assets belonging not only to the suspect or accused, but also to any other person. Furthermore, the second applicant had not proved that she had an income or that she had purchased the assets in question with her own money. Therefore, taking into account also the fact that the prosecutor mentioned in the impugned decision that there were suspicions of money laundering, the court concluded that the seizure measure had been lawful and justified for all the assets concerned.

12. On 26 May 2014 S.T. was indicted on 291 counts of bribe-taking committed between 3 February and 13 March 2014 in his capacity as an employee in a public institution, more specifically the chief expert on matters regarding capacity to work and invalidity at the Caraş-Severin County State Pension Office (*Casa Judeţeană de Pensii Caraş-Severin*).

B. Proceedings before the courts

1. First-instance proceedings before the Arad County Court

13. On 23 October 2014 S.T. admitted his guilt in a statement before the Arad County Court. He chose to benefit from the special fast-track procedure provided for by the Criminal Procedure Code for such situations.

14. In his written plea submitted to the court, S.T. explained that some of the assets seized by the prosecutor belonged to his wife and daughter (the first and second applicants), who had not committed any criminal acts. In addition, he alleged that his family's assets had been acquired with funds obtained from real-estate transactions in 2007 and 2013, and that the prosecutor had failed to prove that the seized assets had been unlawfully acquired. He also mentioned that out of the money seized in cash, the sum of EUR 40,400 had come from the sale of a flat in 2013. A copy of a contract had been submitted in support of that allegation, showing that a flat owned jointly by S.T. together with the first and third applicants had been sold for EUR 40,400. In conclusion, he asked the court to exclude the assets belonging to his family from the confiscation order.

15. On 6 November 2014 the Arad County Court found S.T. guilty on all counts of bribe-taking and sentenced him to three years' imprisonment, the minimum sentence applicable in the light of his admission of guilt.

16. On the basis of the provisions of Article 289 § 3 of the Criminal Code (see paragraph 35 below), the court also ordered the confiscation of various amounts of money and goods received by S.T. as bribes during the above-mentioned period and which had been seized during the investigation.

17. In addition, the court decided to apply the provisions of Article 112[1] §§ 1 (m), 2 and 3 of the Criminal Code (see paragraph 35 below) and to confiscate, on the grounds that they had been acquired as a result of S.T.'s criminal activity, additional money and property belonging jointly to S.T. and the first applicant (the equivalent of EUR 124,000 in cash in various currencies, a dental practice, a flat and a vehicle), as well as property belonging to the second applicant (a flat and two vehicles). All confiscated property had been previously seized by virtue of the prosecutor's decision of 17 March 2014.

18. In reply to S.T.'s arguments concerning the assets belonging to his family, the court held that the total value of the seized property could not be justified by the lawful income earned by S.T. together with the first applicant in the five years before the commission of the crimes in question. In addition, the second applicant was a student and did not have any income. An analysis of the documents and expert reports included in the file showed that the annual income of S.T. and his wife, the first applicant, amounted to EUR 35,000, whereas the value of the assets acquired by the family in the preceding five years – the equivalent of EUR 300,000 in bank accounts or in cash, fifteen flats and plots of land, five garages and four vehicles – grossly exceeded their lawful income. However, referring to Decision no. 356 of 25 June 2014 of the Constitutional Court (see paragraph 37 below), the District Court explained that the confiscation measure would apply only to the assets acquired after April 2012. The court therefore decided to lift the seizure order in respect of the assets belonging to the family which did not fall within the scope of the case, having been acquired before April 2012.

2. Appeal proceedings before the Timişoara Court of Appeal

19. S.T. and all the applicants lodged appeals against the judgment of 6 November 2014.

20. In her reasons for appeal, the third applicant explained that she had asked her uncle, S.T., to keep for her the EUR 40,400 she had obtained from the sale of her flat in 2013. She claimed that that amount had been found in S.T.'s residence during the search of 13 March 2014 and had been wrongfully confiscated by the Arad County Court.

21. The first two hearings were scheduled for 19 January and 16 February. The applicants' lawyer requested the postponement of the trial because she could not be present. The next hearing was scheduled for 16 March 2015.

22. On 10 March 2015 the prosecutor submitted to the file a report prepared by the National Integrity Agency (*Agenţia Naţionala de Integritate*), verifying the assets statements submitted by the first applicant, on the basis of Law no. 176/2010 on integrity in the exercise of functions in public office. The report concluded that there were serious discrepancies between the first applicant's lawful income and her assets, and said that the information would be sent to the commission for the verification of assets of the Timişoara Court of Appeal for a decision on the further steps to be taken.

23. The applicants submitted to the file an accountant's report which provided a calculation of the net income earned by S.T. and the first applicant from their salaries between 1991 and 2014. The total amount determined by the accountant was EUR 281,071. They also submitted numerous copies of sale contracts for various properties, as well as a written statement from C.T., a family member who declared that he had lent money to the second applicant.

24. At the hearing of 16 March 2015 the applicants' lawyer requested that another person be invited to testify as a witness before the court that he had also lent money to the second applicant. With respect to the first applicant, the lawyer applied to the court for an accountant's report in order to establish the exact difference between her lawful income and the value of the property confiscated from her, taking into account the family's expenses.

25. The requests were discussed during the hearing, in the presence of all parties. The prosecutor argued that the request to hear a witness should be rejected, since the family's income could not be established with witness statements.

26. The court of appeal decided to refuse the requests, holding that there were enough elements in the file allowing for the exact calculation of both the family's income and the value of their assets. In any case, the court held that several hearings had taken place in the appeal proceedings and the applicants had had enough time at their disposal to prepare their defence and submit written evidence.

27. On the merits of their appeal, the applicants' lawyer argued that all property confiscated had been acquired from the legal income earned jointly by S.T. and the first applicant. In this connection, he referred to the accountant's report included in the file. As regards the sum of EUR 40,400, the lawyer explained that it had been confiscated by mistake, since it belonged in fact to the third applicant, who had asked her uncle, S.T., to keep it for her. The money had come from the sale of a flat belonging to the third applicant. The lawyer concluded that the confiscation of property belonging to the applicants had been an unlawful and excessive measure.

28. The court postponed the pronouncement of the judgment to 24 March 2015.

29. In the meantime, the first and second applicants submitted written pleadings complaining that the second applicant had never been summoned to appear before the Arad District Court and had never been asked by the courts to submit evidence on how she had acquired the confiscated property. They also claimed that all their assets had been acquired through the efficient management of the family's lawful income.

30. On 24 March 2015 the Timişoara Court of Appeal dismissed the applicants' appeal. The court held that from the high number of criminal acts committed by S.T. it could be inferred that he had established a habit in taking bribes which could have started long before the period that had been investigated. At the same time, S.T. and his family, the first and second applicants, had accumulated a considerable fortune in the past five years. The Court of Appeal further observed that it was clear from the evidence in the file that part of the confiscated goods were the direct proceeds of S.T.'s crimes, whereas other assets belonged to the first and second applicants. The court concluded that it could be inferred from an analysis of the lawful income of the first applicant and the lack of income of the second applicant that the assets found in their names had also been acquired through S.T.'s criminal activity.

31. The Court of Appeal observed that there was a considerable discrepancy between the family's lawful income and its assets, and that S.T. and the applicants had not supplied proof that the confiscated assets had been lawfully acquired. The court reasoned as follows:

> "Between 03.02.2014 and 13.03.2014 while the defendant was under surveillance he received various sums of money and other goods from 291 people who had come to his office for a medical examination in order to obtain a decision on retirement due to loss of capacity to work or to obtain an official certification of their degree of disability in order to benefit from social security benefits. As the lower court also held, the defendant has confessed to all the charges against him and he has been convicted to three years' imprisonment.
>
> As a result of this criminal conviction, the first-instance court considered that the requirements of Article 112^1 of the Criminal Code had been fulfilled and ordered the extended confiscation of money, flats and vehicles, items which had a value exceeding the income of the defendant and his family in the last five years ....
>
> As regards the income of the defendant and his family, the court observes that he submitted an accountant's report showing the family's income starting with January 1991, but without mentioning their expenses for the same period.
>
> In order to establish whether there was a discrepancy between the family's income and their properties and other goods acquired, the court must compare the amounts of money spent during the period of the acquisition of the properties in question with the income. Based on the documents submitted to the file, including an evaluation report submitted by the National Integrity Agency on 10 March 2015, the court concludes that there is a significant difference between the income and the assets accumulated. The above-mentioned report evaluated especially the assets acquired by the defendant's wife [the first applicant] mostly from her salary. Even if this salary had been higher than the defendant's and even assuming that they also had earnings from

real-estate transactions, they could not have accumulated enough money to acquire such a large number of properties and vehicles."

32. As regards the second applicant, the court held that she was currently a student and there was no proof in the file to show that she had ever had an income. Her allegations that the property found in her name had been acquired from donations from other members of the family had not been proved. Therefore, the conclusion of the first-instance court that the property she owned had been purchased with money from her parents was considered correct.

33. As regards the appeal submitted by the third applicant, the court held that no evidence had been submitted to the file to show that EUR 40,400 belonged to her and had been given to S.T. for safekeeping.

34. The Timişoara Court of Appeal concluded with final effect that the first-instance court had correctly applied the legal provisions in the case and had even decided to lift the seizure order in respect of certain items.

II. RELEVANT DOMESTIC LAW AND PRACTICE AND INTERNATIONAL DOCUMENTS

A. Relevant domestic law and practice

35. The provisions of the Criminal Code in force at the relevant time are as follows:

Article 289 – Bribe taking

"(1) A public servant who, directly or indirectly, for himself or for another person, requests or receives money or other services to which he/she is not entitled or accepts the promise of such services in connection with the fulfilment, non-fulfilment, giving priority or delaying the fulfilment of an act which falls within his/her duties or in connection with the commission of an act in contravention of those duties, is liable to a term of imprisonment from three to ten years ...

(3) The money, valuables or other goods received shall be confiscated, and if they cannot be found the equivalent shall be confiscated."

Article 108 – Security measures (*măsurile de siguranţă*)

"The security measures are:

...

d) special confiscation;

e) extended confiscation."

Article 112 – Special confiscation

"(1) The following are subject to special confiscation:

a) goods procured through the commission of crime; ...

(6) Other goods and income obtained by using the goods subject to confiscation, as well as the goods derived from them, shall also be confiscated...”

Article 112[1] – Extended confiscation

“(1) Items other than those listed under Article 112 shall be confiscated when a person is convicted for one of the following crimes, if the crime is capable of generating a financial gain and the sanction is four years’ imprisonment or more: ...

m) crimes of corruption and related offences ...

(2) Extended confiscation shall be ordered where the following conditions are fulfilled jointly:

a) the value of the goods acquired by the convicted person, within the previous five years, and in some circumstances, after the commission of the crime and until the date of indictment, clearly exceeds the person’s lawful income;

b) the court is convinced that the goods in question are the proceeds of the crimes mentioned in paragraph (1).

(3) In the enforcement of paragraph (2) the value of the goods transferred by the convicted person, or a third person, to a member of the family, or to a legal entity controlled by the convicted person, shall also be taken into account.

(4) Amounts of money are also considered goods.

(5) In order to establish the difference between the lawful income and the goods acquired, the purchasing value of the goods and the expenditure made by the convicted person together with his/her family members shall be taken into consideration. ...

(7) Other goods and income obtained using the proceeds subject to confiscation, as well as the goods derived from them, shall also be confiscated.”

36. The relevant provisions of the Criminal Procedure Code as amended by Law no. 255/2013, which entered into force on 1 February 2014, read as follows:

Article 249

General conditions for preventive measures (*măsurile asigurătorii*)

“(1) During the criminal investigation the prosecutor ... may issue a decision (*ordonanţă*) to carry out preventive measures in order to avoid the hiding, destruction, selling or exclusion from the investigation of goods which may be subject to special or extended confiscation ...

(4) Preventive measures in the form of special or extended confiscation may be taken in respect of goods belonging to the suspect, the accused or to any other person in whose possession they are found.”

Article 250

Complaints against preventive measures

“(1) The suspect, the accused and any other interested person may lodge a complaint with the court competent to decide on the merits of the case against the

prosecutor's decision to carry out a preventive measure within three days of its notification or the date of its enforcement."

Article 253

Seizure record and list of goods seized

"(1) The person who applies the seizure order shall draw up a record of the enforcement of the seizure, listing the seized goods and their value. In addition, the record shall mention any objections raised by the suspect ... or by any other interested person."

Article 366

Participation of the injured party and of other parties to the trial and their rights

"(3) Those whose goods are subject to confiscation in the criminal proceedings may be represented by a lawyer, lodge applications, raise objections and submit arguments in connection with the confiscation measure."

37. In its decision no. 356 of 25 June 2014, published in the Official Journal on 22 September 2014, the Constitutional Court held that the provisions of Article 112^1 of the Criminal Code concerning extended confiscation (see paragraph 35 above) were fully compatible with the Constitution and more specifically with the principle that property must be presumed to have been acquired lawfully. However, in order to comply with the principle that the criminal law may not be applied retroactively, paragraph 2 (a) of the Article did not apply to goods acquired before 22 April 2012, the date on which the provision entered into force.

The Constitutional Court concluded:

"... the provisions concerning extended confiscation ... include the guarantees mentioned in the case-law of the European Court of Human Rights. Accordingly, extended confiscation is ordered by a court on the basis of its verdict that the assets subject to confiscation derive from illicit activities. This verdict is formed following public judicial proceedings which allow access to the file and to the arguments of the prosecution to all interested persons, who then have the possibility to submit evidence as they deem necessary."

B. Relevant international documents

1. The United Nations

38. The United Nations Convention Against Corruption was ratified by Romania on 2 November 2004 and entered into force in respect of Romania on 14 December 2005. The relevant parts of the Convention provide as follows:

Article 31. Freezing, seizure and confiscation

"1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:

(a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;

(b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.

2. Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation. ...

4. If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

5. If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.

6. Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime. ...

8. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings."

2. The Council of Europe

39. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990) entered into force in respect of Romania on 1 December 2002. The Convention aims to facilitate international co-operation and mutual assistance in investigating crime and tracking down, seizing and confiscating the proceeds thereof. Parties undertake in particular to criminalise the laundering of the proceeds of crime and to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds.

40. In 2005 the Council of Europe adopted another, more comprehensive, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. It entered into force in respect of Romania on 1 May 2008. Articles 3 and 5 of the 2005 Convention, in so far as relevant, state as follows:

Article 3 – Confiscation measures

"4. Each Party shall adopt such legislative or other measures as may be necessary to require that, in respect of a serious offence or offences as defined by national law, an offender demonstrates the origin of alleged proceeds or other property liable to

confiscation to the extent that such a requirement is consistent with the principles of its domestic law."

Article 5 – Freezing, seizure and confiscation

"Each Party shall adopt such legislative and other measures as may be necessary to ensure that the measures to freeze, seize and confiscate also encompass:

(a) the property into which the proceeds have been transformed or converted;

(b) property acquired from legitimate sources, if proceeds have been intermingled, in whole or in part, with such property, up to the assessed value of the intermingled proceeds;

(c) income or other benefits derived from proceeds, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled, up to the assessed value of the intermingled proceeds, in the same manner and to the same extent as proceeds."

41. The Explanatory Report to the Convention of 2005 stated:

"71. Paragraph 4 of Article 3 requires Parties to provide the possibility for the burden of proof to be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation in serious offences. ...

76. This provision underlines in particular the need to apply such measures also to proceeds which have been intermingled with property acquired from legitimate sources or which has been otherwise transformed or converted."

42. At its 44th plenary meeting held from 31 March to 4 April 2014 in Strasbourg, the Council of Europe Group of States Against Corruption (GRECO) adopted the report of its Fourth Assessment Visit to Romania. It made the following observations and recommendations on the practice and legal framework in force in Romania at the relevant time:

"230. Although confiscation and provisional measures are applied in Romania, the evaluators noted an important imbalance between assets frozen – which have moderately increased in comparison with the third round evaluation figures, and those finally confiscated. There is also a clear gap between the value of damages observed, the value of interim measures and the value of confiscation orders achieved. ...

231. The Romanian authorities have adopted a strategy and an action plan which recognise the need to take further measures at a policy level to strengthen the confiscation regime. The recent introduction of the extended confiscation regime is undoubtedly to be commended in this context, and further legal and institutional measures shall be required to establish relevant mechanisms and norms for the adequate asset identification, tracing, recovery and management of seized property. ...

241. It is therefore recommended to Romania to: ...

Adopt comprehensive measures in the legal framework enabling to void legal actions when these have been made to transfer illicitly acquired assets to another person. ...

Consider the possibility of requiring that an offender demonstrates the lawful origin of alleged proceeds of crime or other property liable to confiscation envisaged in the Article 12 of the Palermo Convention (reversal of the burden of proof)."

3. The European Union

43. 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 (hereinafter, "the Directive 2014/42/EU") establishes minimum rules on the freezing of property with a view to possible subsequent confiscation and on the confiscation of property in criminal matters. The relevant parts of the directive provide:

Article 5

Extended confiscation

"1. Member States shall adopt the necessary measures to enable the confiscation, either in whole or in part, of property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct."

Article 6

Confiscation from a third party

"1. Member States shall take the necessary measures to enable the confiscation of proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value.

2. Paragraph 1 shall not prejudice the rights of *bona fide* third parties."

4. Other materials

44. The Financial Action Task Force (FATF) was established in July 1989 as an inter-governmental group by the Group of Seven (G-7) Summit in Paris. It has since been globally recognised as an authoritative body setting universal standards and developing policies for combating money laundering, amongst other things. In 2003 it issued a specific recommendation, which was endorsed by Romania, calling for confiscation even in the absence of a prior criminal conviction (Recommendation no. 3):

"Provisional measures and confiscation

3. Countries may consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction, or which require an offender to demonstrate the lawful origin of the property alleged to be

liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

45. The applicants complained that they had had no opportunity to defend their rights in the framework of the criminal proceedings against S.T. which had resulted in the confiscation of their property. They relied on Article 6 § 1 of the Convention, the relevant parts of which read as follows:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

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

B. Merits

1. The parties' arguments

47. The applicants submitted that they had not been summoned to take part in the proceedings before the Arad County Court, a fact which had prevented them from effectively exercising their right to defend their case. Moreover, when they intervened in the appeal proceedings, the domestic court wrongfully rejected their requests to submit evidence without giving any reasons.

48. The Government submitted that the first and second applicants had been aware of the seizure of their assets and had had ample opportunity to participate in the proceedings during both the investigation and the trial. As regards the third applicant, the prosecution had been unaware of her involvement in the case. In any event, all of the applicants' interests related to the confiscated property were duly represented and defended before a domestic court in accordance with the law. More specifically, Romanian legislation provided that all those interested could complain against a seizure decision as well as intervene in the proceedings at any stage. As soon as the applicants had made use of that right, the domestic court had examined their arguments thoroughly and delivered a reasoned judgment, in

full compliance with the fair-trial guarantees set forth in Article 6 § 1 of the Convention.

2. The Court's assessment

(a) General principles

49. The Court reiterates that in previous cases involving confiscation of property from applicants in the framework of criminal proceedings against third parties, it considered that the confiscation measure constituted an interference with the applicants' right to peaceful enjoyment of their possessions. Property rights being civil rights within the meaning of Article 6 § 1 of the Convention, that provision was applicable under its civil head (see *Silickienė v. Lithuania*, no. 20496/02, §§ 45-46, 10 April 2012, and *Yldirim v. Italy* (dec.), no. 38602/02, ECHR 2003-IV).

50. In considering the compatibility of this kind of confiscation measure with the civil-law aspect of Article 6, the Court has established that it must determine whether the way in which the confiscation was applied in respect of the applicants breached the basic principles of a fair procedure inherent in Article 6 § 1. Accordingly, it must be ascertained whether the procedure in the domestic legal system afforded the applicants, in the light of the severity of the measure to which they were liable, an adequate opportunity to put their case to the courts, pleading, as the case might be, that the measure was illegal or arbitrary and that the courts had acted unreasonably (see *Veits v. Estonia*, no. 12951/11, § 57, 15 January 2015).

51. The Court has consistently held that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation and assess the facts. It is not the Court's task to substitute its own assessment of the facts for that of the domestic courts or to give a ruling as to whether certain elements were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which the evidence was taken, were fair (see *Arcuri and Others v. Italy* (dec.), no. 52024/99, ECHR 2001-VII).

52. In the application of the above principles in *Silickienė* (cited above), a case where the widow of an accused person had her property confiscated, the Court held that "as a general principle, persons whose property is confiscated should be formally granted the status of parties to the proceedings in which the confiscation is ordered". However, even though the applicant in that case had never been a party to the proceedings in which the measure had been decided, the Court considered that "the Lithuanian authorities had de facto afforded her a reasonable and sufficient opportunity to protect her interests adequately" and found that there had been no violation of Article 6 § 1 (see Silickienė, cited above, § 50). In reaching this conclusion, the Court attached certain weight to the fact that the

confiscation of the applicant's property had originated in a measure taken by the investigative authorities, namely the seizure of her assets. The Court considered that it had been open to the applicant to institute judicial review proceedings to obtain the lifting of that seizure, challenging the reasons for it and presenting evidence that those items of property had been acquired lawfully. Whilst acknowledging that seizure was a temporary measure that had no conclusive influence over the subsequent confiscation, the Court was of the view that, at the time when the measure had been ordered, the applicant could have reasonably foreseen that the seizure could result in confiscation of the property at a later stage of the proceedings (ibid., § 48).

(b) Application of the above principles to the present case

53. The applicants' main argument lay in the fact that they had been unable to benefit from fair proceedings, given that they had not been summoned as parties to the criminal proceedings from the outset.

54. The Court notes that in accordance with Article 366 of the Criminal Procedure Code (see paragraph 36 above), the applicants had the opportunity, if they so wished, to fully participate in the proceedings in which the confiscation measure was decided. Therefore, the domestic authorities were not under a legal obligation to grant, of their own motion, the applicants the status of parties to the proceedings, since national law provided interested persons with the opportunity to intervene in the proceedings at any stage. Notwithstanding these considerations, the Court notes that, as in the above-mentioned case of *Silickienė*, the confiscation of the applicants' property originated in measures taken by the investigating authorities, namely the seizure of 17 March 2014 (see paragraph 7 above). At that time, the first and second applicants – whose ownership of some of the confiscated assets was substantiated by documents – had been represented by lawyers of their choice and had been informed of the seizure carried out with the purpose of subsequent confiscation, and of their rights as provided by law (see paragraphs 6 and 9 above). As regards the third applicant, the Court agrees with the Government that her involvement in the case was not made known to the investigative authorities and could not have been inferred from any of the documents found during the searches. Lastly, the Court observes that all of the applicants were accepted as parties to the proceedings as soon as they expressed an interest, before the Court of Appeal (see paragraph 19 above; and see, by contrast, *Silickienė,* cited above, § 48, where the applicant had not been a party to the criminal proceedings at all).

55. The Court notes from the judgment of the Timişoara Court of Appeal of 24 March 2015 (see paragraphs 30-34 above) that the applicants benefited from a full hearing on the merits in respect of the confiscation measure. Moreover, the applicants, who were represented by a lawyer of their choice, had ample opportunity to present their arguments on points of

law both in writing and in oral hearings before that court (see paragraphs 20, 23-27 and 29 above).

56. The domestic court duly examined the prosecutor's claim as well as the applicants' arguments in the light of the supporting documents available in the case file. That evidence led the domestic court to the finding that the considerable assets acquired by S.T. and his family in the years preceding his indictment could not have been financed by his and the first applicant's salaries alone, whilst the second applicant had had no source of income. The Timişoara Court of Appeal made a careful examination of the financial situation of the first and second applicants' family and, as required by the domestic law (see paragraph 35 below), confirmed the existence of a considerable discrepancy between their income and their wealth. That discrepancy, which was a well-documented factual finding, then became the basis for the confiscation measure (compare *Arcuri and Others*, decision cited above). The domestic court also thoroughly analysed the allegations put forward by the third applicant and found them to be unsupported. The Court observes that all arguments and requests raised by the applicants were analysed and responded to by the domestic court (see paragraphs 30-34 above).

57. As to the applicants' complaint about the domestic court's decision on their request for the submission of evidence, the Court observes that the domestic court took into consideration the fact that the applicants had had an opportunity at several hearings to propose evidence and yet they had chosen to do so at the end of the proceedings. At that point in the trial, the domestic court decided that additional witness statements or expert reports were not necessary to decide the case (see paragraph 26 above). In this connection, the Court reiterates that Article 6 of the Convention does not lay down any rules on the admissibility of evidence or the way in which evidence should be assessed, these being primarily matters for regulation by national law and the national courts. Normally, issues such as the weight attached by the national courts to given items of evidence or to findings or assessments before them for consideration are not for the Court to review. The Court should not act as a fourth instance and will not therefore question under Article 6 § 1 the judgment of the national courts, unless their findings can be regarded as arbitrary or manifestly unreasonable (see the case-law cited in paragraph 51 above and *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, § 61, ECHR 2015).

58. In the light of the above, the Court considers that the Romanian authorities afforded the applicants reasonable and sufficient opportunity to protect their interests adequately. Accordingly, it finds that there was no violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

59. The applicants argued that the confiscation of their property in the absence of their conviction for a criminal act and without sufficient procedural guarantees was in breach of Article 1 of Protocol No. 1 to the Convention, which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

60. The Court notes as regards the third applicant that she complained that the confiscation of EUR 40,400 which belonged to her, in the absence of her conviction for a criminal act and in violation of her right to a fair trial, was in breach of Article 1 of Protocol No. 1 to the Convention.

61. The Government argued that no proof had been brought before the authorities that the third applicant had been the owner of the impugned sum of money and that she had given it to S.T.

62. The Court reiterates that an applicant can allege a violation of Article 1 of Protocol No. 1 only in so far as the impugned decisions related to his/her "possessions", within the meaning of that provision. "Possessions" can be either "existing possessions" or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a property right. Where the proprietary interest is in the nature of a claim, it may be regarded as an "asset" only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming its existence (see, amongst many authorities, *Gratzinger and Gratzingerova v. the Czech Republic* (dec.) [GC], no. 39794/98, § 69, ECHR 2002-VII, and *Kopecký v. Slovakia* [GC], no. 44912/98, § 52, ECHR 2004-IX).

63. In the current case the Court observes that in its judgment of 24 March 2015 the Timişoara Court of Appeal found that the third applicant had failed to prove that the sum of money claimed belonged to her and had been given to S.T. for safekeeping (see paragraph 33 above). In the light of the elements in the file, the Court sees no reason to depart from those findings. Therefore, in the circumstances of the present case, the Court finds

that the third applicant did not have an existing possession or a claim constituting an asset within the meaning of Article 1 of Protocol No. 1 to the Convention.

64. It follows that the complaint raised by the third applicant is incompatible ratione materiae with the provisions of the Convention and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

65. The Court further notes that the complaint raised by the first and second applicants is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' arguments

66. The first and second applicants alleged that the confiscation of their property had been in breach of the case-law of the Romanian Constitutional Court as well as contrary to the provisions of Directive 2014/42/EU (see paragraph 43 above), in that the unlawful provenance of the confiscated assets had not been proved by the authorities. Referring to the fact that they had not been summoned to appear before the domestic courts from the beginning of the proceedings against S.T., they also submitted that the authorities had failed to protect their rights as *bona fide* third parties.

67. The Government contended that the confiscation of the applicants' property had been in accordance with domestic law and had amounted to a justified control of use of property in the general interest. Referring to the Court's findings in the cases of *Gogitidze and Others* and *Silickienė* (both cited above) as well as in *Phillips v. the United Kingdom* (no. 41087/98, ECHR 2001-VII), they submitted that the Convention did not oppose the application of confiscation measures to family members of persons directly accused of offences or of extended confiscation, the measure carried out in the current case. They held that the applicants had benefited from qualified legal representation and had had reasonable opportunity to present their position before the authorities.

2. The Court's assessment

(a) General principles

68. The Court has found in numerous previous cases that it was legitimate for the relevant domestic authorities to issue confiscation orders on the basis of a preponderance of evidence suggesting that the respondents' lawful incomes could not have sufficed for them to acquire the property in question (see, for instance, *Gogitidze and Others*, cited above, § 107).

Indeed, whenever a confiscation order was the result of proceedings related to the proceeds of crime derived from serious offences, the Court has not required proof "beyond reasonable doubt" of the illicit origins of the property in such proceedings. Instead, proof on a balance of probabilities or a high probability of illicit origins, combined with the inability of the owner to prove the contrary, have been found to suffice for the purposes of the proportionality test under Article 1 of Protocol No. 1. The domestic authorities were given leeway under the Convention to apply confiscation measures not only to persons directly accused of offences, but also to their family members and other close relatives who had been presumed to possess and manage the "ill-gotten" property informally on behalf of the suspected offenders, or who otherwise lacked the necessary *bona fide* status (see, among many other authorities, *Arcuri and Others,* decision cited above; *Webb v. the United Kingdom* (dec.), no. 56054/00, 10 February 2004; *Morabito and Others v. Italy* (dec.), 58572/00, 7 June 2005; and *Saccoccia v. Austria*, no. 69917/01, §§ 87‑91, 18 December 2008; compare also with the more recent case of *Silickienė*, cited above, §§ 60-70).

69. The Court's constant approach in cases involving confiscation of assets deemed by the domestic courts to have been unlawfully acquired and when the confiscation was intended to prevent the use of these assets to the detriment of the community has been that, confiscation constitutes control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1 (see *S.C. Fiercolect Impex S.R.L. v. Romania*, no. 26429/07, § 57, 13 December 2016; and *Silickienė*, cited above, § 62). This provision gives the State the right to adopt "such laws as it deems necessary to control the use of property in accordance with the general interest" (see *Arcuri and Others*, decision cited above).

70. The Court has held on many occasions that an interference with property rights must be prescribed by law and pursue one or more legitimate aims. In addition, there must be a reasonable relationship of proportionality between the means employed and the aims sought to be achieved. In other words, the Court must determine whether a balance was struck between the demands of the general interest and the interests of the individuals concerned (see *Silickienė,* cited above, § 63).

71. In this connection, the Court reiterates that confiscation measures form part of a crime-prevention policy. In implementing such a policy, the legislature must have a wide margin of appreciation both with regard to identifying the existence of a problem affecting the public interest which requires measures of control and the appropriate way to apply such measures (see *Arcuri and Others*, decision cited above; see also *Silickienė*, cited above, § 63, and *Yildirim v. Italy* (dec.), no. 38602/02, ECHR 2003-IV).

(b) Application of the above principles to the present case

72. From the facts of the case the Court notes that the "possessions" at issue were movable and immovable assets confiscated by a judicial decision. Article 1 of Protocol No. 1 is therefore applicable. The above-mentioned measure constitutes control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1 to the Convention (see paragraph 69 above).

73. The Court further notes that the confiscation of the applicants' property was ordered pursuant to Article 112^1 of the Criminal Code (see paragraphs 7, 17 and 35 above). It was therefore an interference prescribed by law.

74. As regards the legitimacy of the aim pursued by the impugned confiscation, the Court observes that the measure was part of a legislative framework aimed at intensifying the fight against corruption (see paragraph 35 above). The confiscation involved assets which the domestic court had deemed to have been unlawfully acquired through corruption offences committed by S.T. while in public service. Therefore, it is evident that the rationale behind the confiscation of wrongfully acquired property and unexplained wealth owned by persons accused of committing serious offences while in public office and by their family members and close relatives was twofold, having both a compensatory and a preventive aim (see *Gogitidze and Others*, cited above, § 101). The Court accordingly finds that the confiscation measure in the instant case was effected in accordance with the general interest in ensuring that the use of the property in question did not procure advantage for the applicants to the detriment of the community for combatting corruption in the public office (see, *mutatis mutandis*, *Phillips*, cited above, § 52).

75. As regards the requisite balance to be struck between the means employed for the confiscation of the applicants' assets and the above-mentioned general interest in combatting corruption in the public service, the Court notes that the tenor of the applicants' submissions in this respect was twofold: they called into question the confiscation of their property in the absence of their criminal conviction and complained that the proceedings in which the confiscation had been decided had been unfair.

76. On the issue of confiscation in the absence of a criminal conviction, the Court has already observed in its case-law that common European and even universal legal standards can be said to exist which encourage the confiscation of property linked to serious criminal offences such as corruption, money laundering and drug offences, without the prior existence of a criminal conviction. Secondly, the onus of proving the lawful origin of property presumed to have been wrongfully acquired may legitimately be shifted onto the respondents in such non-criminal proceedings for confiscation, including civil proceedings *in rem*. Thirdly, confiscation measures may be applied not only to the direct proceeds of crime but also to

property, including any income and other indirect benefits, obtained by converting or transforming the direct proceeds of crime or intermingling them with other, possibly lawful, assets. Finally, confiscation measures may be applied not only to persons directly suspected of criminal offences but also to any third parties which hold ownership rights without the requisite *bona fide* with a view to disguising their wrongful role in amassing the wealth in question (see *Gogitidze and Others*, cited above, § 105, and paragraphs 38-43 and 68 above).

77. In the current case, too, it was only reasonable to expect the first and second applicants – who were presumed, as the accused's close family members, to have benefited unduly from the proceeds of his crimes – to discharge their part of the burden of proof by refuting the prosecutor's substantiated suspicions about the wrongful origins of their assets. Moreover, the proceedings in which the confiscation was decided clearly formed part of a policy aimed at prevention and eradication of corruption in the public service, for which the States enjoy a wide margin of appreciation (see *Gogitidze and Others*, cited above, § 108).

78. The Court considers that its findings in respect of Article 6 § 1 (see paragraphs 53-58 above) are also relevant in the context of Article 1 of Protocol No. 1 as regards the question whether the domestic proceedings afforded the applicants a reasonable opportunity of putting their case to the authorities in order to effectively challenge the confiscation measure (see, *mutatis mutandis*, *Veits*, cited above, § 74). In this connection, the Court also attaches importance to the conclusions of the Constitutional Court, which found that the provisions of the Criminal Code applied in the current case were in compliance both with the Constitution and with the case-law of the Court (see paragraph 37 above). Moreover, the domestic courts' decision not to confiscate part of the seized assets shows the authorities' caution in dealing with the case in the light of the national law and the guidance from the Constitutional Court (see paragraphs 18 and 34 above).

79. The Court thus finds that there is nothing in the conduct of the proceedings to suggest either that the applicants were denied a reasonable opportunity of putting forward their case or that the domestic courts' findings were tainted with manifest arbitrariness. The confiscation measure was applied by the domestic courts based on a high probability that the assets in question had illicit origins (see paragraph 30 above), combined with the applicants' inability to prove the contrary (see paragraph 31 above).

80. Lastly, the Court cannot overlook the specific circumstances which prompted the Romanian courts to take measures against the applicants. In particular, S.T.'s criminal activity conducted as a public servant consisted of 291 acts of bribe-taking over a period of only five weeks (see paragraphs 12 and 15 above) and involved damage to the State social security budget. In addition, the considerable estate acquired by S.T. and his family in a rather

short period of time was clearly disproportionate to their lawful income (see paragraphs 18 and 31 above).

81. Having regard to all the above considerations, and in particular to the way the domestic courts fairly assessed the case, the Court finds that the proceedings in the present case cannot be considered to have been arbitrary. Having regard to the wide margin of appreciation enjoyed by States in pursuit of a crime 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 adversarial proceedings, the Court concludes that the interference with the first and second applicants' right to the peaceful enjoyment of their possessions was not disproportionate to the legitimate aim pursued (compare *Arcuri and Others*, decision cited above, and *Bongiorno and Others v. Italy,* no. 4514/07, §§ 44-51, 5 January 2010).

82. Consequently, there has been no violation of Article 1 of Protocol No. 1 to the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning Article 6 § 1 of the Convention admissible;

2. *Declares* the complaint concerning Article 1 of Protocol No. 1 to the Convention admissible in so far as it has been raised by the first and second applicants and inadmissible in so far as it has been raised by the third applicant;

3. *Holds* that there has been no violation of Article 6 § 1 of the Convention;

4. *Holds* that there has been no violation of Article 1 of Protocol No. 1 to the Convention.

Done in English, and notified in writing on 26 June 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli Registrar	Ganna Yudkivska President