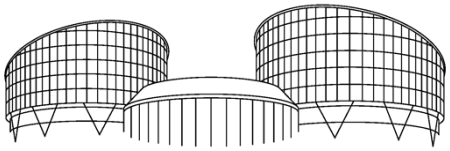

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF KALYAKINY v. ARMENIA

(Application no. 66654/12)

JUDGMENT

STRASBOURG

4 July 2023

This judgment is final but it may be subject to editorial revision.

In the case of Kalyakiny v. Armenia,

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

Anja Seibert-Fohr*, President*,
Armen Harutyunyan,
Ana Maria Guerra Martins*, judges*,
and Valentin Nicolescu, *Acting Deputy Section Registrar,*

Having regard to:

the application (no. 66654/12) against the Republic of Armenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 30 September 2012 by two Russian nationals, Ms Elena Kalyakina ("the first applicant") and Ms Vera Kalyakina ("the second applicant"), born in 1962 and 1983 respectively (together "the applicants"), who were represented by Mr T. Khurshudyan, a lawyer practising in Yerevan;

the decision to give notice of the complaints concerning the confiscation of the applicants' property to the Armenian Government ("the Government"), represented by their Agent, Mr G. Kostanyan, and subsequently by Mr Y. Kirakosyan, Representative of the Republic of Armenia on International Legal Matters, and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 13 June 2023,

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

SUBJECT MATTER OF THE CASE

1. On 22 July 2008 the police instituted criminal proceedings against the applicants, mother and daughter originally from Russia, on account of human trafficking. They were suspected of having had brought to Armenia a number of young women from Russia who were then exploited as strippers in various nightclubs in Armenia.

2. The following property was seized from them: two computers, a semi-basement in Yerevan purchased by the first applicant, her deposit of 12,500,000 Armenian Drams (AMD) in an Armenian bank, AMD 1,150,000 in cash, 3 US Dollar banknotes, 5 Iranian Rial banknotes of 10,000, two gold necklaces, gold earrings, AMD 15,530 and 129 Russian Rubles in cash. The second applicant's deposit of AMD 6,500,000 in an Armenian bank and 110 pieces of jewellery kept in a safe deposit box at another bank in Armenia were also seized. All this property was admitted as material evidence.

3. During the trial before the Kentron and Nork-Marash District Court of Yerevan (the District Court), the prosecution charged the applicants with aggravated human trafficking and money laundering in line with the amended Criminal Code ("the CC").

4. The first applicant testified that she had received income from her business in Russia and while working as a manager in a club in Armenia, and the second applicant testified, *inter alia*, that she had worked in nightclubs with the same conditions as the other girls and that she had earned more than the others. As with other girls, clients had given her jewellery as gifts; she had bought some of the jewellery with the money that she had earned, and some of the jewellery had been left from her grandmother.

5. On 3 October 2011 the District Court convicted the first and second applicants of aggravated human trafficking (see paragraph 14 below), sentencing them to 9 and 7 years' imprisonment respectively, and acquitted them of money laundering. It found it established that 24 young women had been trafficked from Russia to Armenia and exploited in nightclubs and the money they earned had been taken away. As concerns the charges of money laundering, the prosecution had failed to substantiate that the applicants had had the intention of concealing the proceeds of their criminal activity - they had acquired property and made bank deposits in their own name meaning that they had engaged in criminal activity in order to obtain those profits and use them. However, the prosecution had failed to find out and clarify which sums and assets referred to in the indictment had been obtained through criminal activity and which ones had been acquired legally.

6. The District Court left the civil claim for damages filed by 7 victims unexamined on the grounds that it had been impossible to determine the actual damage suffered by them, stating that they had the possibility of claiming damages in separate civil proceedings after the trial. It decided that the two computers, the money and jewellery seized from the first applicant should be returned to her and that the seizure of her bank deposit and her immovable property should be lifted. The seizure of the second applicant's bank deposit and jewellery should also be lifted.

7. The applicants lodged appeals seeking full acquittal.

8. The prosecution appealed as well seeking the applicants' conviction also on account of money laundering with confiscation of their property. They also requested for the material evidence to be treated in accordance with the requirements of Article 119 of the Code of Criminal Procedure (the CCP) (see paragraph 16 below), arguing that the applicants had failed to explain the origin of the property admitted into material evidence. Therefore, that property had been obtained by the income received from the exploitation of the victims (their earnings) and should be returned to them pursuant to Article 119 of the CCP (ibid.).

9. On 26 January 2012 the Criminal Court of Appeal (the Court of Appeal) rejected both appeals as regards the applicants' conviction and sentences and granted the prosecution's appeal in its part concerning the treatment of material evidence deciding that the seized material evidence in its entirety should be transferred into State ownership, reasoning as follows:

> "The Court of Appeal, having examined the [prosecution's] reasoning with regard to the treatment of material evidence, came to the conclusion that the appeal should be granted in that part on the basis of Articles 115 and 119 of [the CCP, see paragraphs 15 and 16 below]."

10. The applicants lodged an appeal on points of law. They argued, *inter alia*, that the Court of Appeal had provided no reasons for amending the District Court's decision concerning the treatment of material evidence. The prosecution had never requested the transfer of the property to the State's possession. They had thus been arbitrarily deprived of everything they had owned.

11. The prosecution also appealed.

12. On 30 March 2012 the Court of Cassation declared both appeals on points of law inadmissible for lack of merit.

13. The applicants complained that the confiscation of their property was in breach of the requirements of Article 1 of Protocol No. 1 to the Convention.

RELEVANT LEGAL FRAMEWORK

I. CRIMINAL CODE (IN FORCE UNTIL 1 JULY 2022)

14. At the relevant time Article 132 § 2 (1) and (2) provided that human trafficking or exploitation of two or more persons committed by prior agreement by a group of persons was punishable by 7 to 12 years' imprisonment with or without confiscation of property, and with or without deprivation of the right to hold certain positions or conduct certain activities for a maximum period of 3 years.

II. CODE OF CRIMINAL PROCEDURE (IN FORCE UNTIL 1 JULY 2022)

15. Article 115 provided at the relevant time that material evidence included*, inter alia*, objects of criminal activity as well as illegally obtained money.

16. Article 119 set out the rules concerning the treatment of material evidence upon completion of the criminal proceedings.

According to Article 119 § 1(1) and (2) instruments of a crime were seized and transferred to relevant State agencies or destroyed if they did not have any value. Items of no value were destroyed or given to those interested upon their request.

Article 119 § 1(3) stated that money, other valuables and other items, which had gone out of legal possession as a result of a crime, were given to the owners or their successors.

Article 119 § 1(4) stated that illegally obtained money, other valuables and other items were, by a court judgment, directed towards compensation of

judicial costs, damages suffered as a result of a crime and, if the person who had suffered damage was not known, were transferred to the State as income.

THE COURT'S ASSESSMENT

ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

17. The Government argued that the applicants had failed to exhaust the domestic remedies available to them in that they had not availed themselves of the possibility to submit a response to the prosecution's appeal against the District Court's judgment.

18. The applicants submitted that they had submitted their arguments during the hearings before the Court of Appeal and had raised their Convention complaints in their further appeal on points of law.

19. The Court notes that filing a response to an appeal lodged by the prosecution is a right and not an obligation for the defence. Furthermore, the decision of the Court of Appeal of 26 January 2012 (see paragraph 9 above) was amenable to further appeal of which possibility the applicants availed themselves raising their Convention complaints in relation to that decision before the Court of Cassation (see paragraph 10 above). The Court therefore dismisses the Government's non-exhaustion objection.

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

21. The general principles concerning confiscation of property have been summarised in *G.I.E.M. S.R.L. and Others v. Italy* ([GC], nos. 1828/06 and 2 others, §§ 289 and 292-93, 28 June 2018; see also *Todorov and Others v Bulgaria*, nos. 50705/11 and 6 others, §§ 179-99, 13 July 2021, for a recapitulation of the general principles concerning confiscation of proceeds of crime).

22. It is not in dispute that the confiscation of the applicants' property constituted an interference with their rights under Article 1 of Protocol No. 1.

23. While Article 132 § 2 (1) and (2) of the CC (see paragraph 14 above) provides for an alternative penalty of confiscation of property, the applicants were imposed only custodial sentences (see paragraphs 5 and 9 above) and their property was confiscated with reference to Article 119 of the CCP (see paragraphs 2 and 16 above). The Court of Appeal did not indicate which provision of Article 119 of the CCP was applied in the applicants' case (see paragraph 9 above). However, from the prosecution's arguments (see paragraph 8 above), which were referred to in its decision, it appears that the confiscation measure was intended at the forfeiture of the proceeds of a criminal offence.

24. The Court does not have to determine with finality which the applicable rule of Article 1 of Protocol No. 1 is given that the principles governing the question of justification are substantially the same (see *Todorov and Others*, cited above, § 182, with further references).

25. The Court of Appeal, when overturning the District Court's decision concerning the treatment of the assets seized from the applicants (see paragraphs 5 and 9 above), did not indicate on which specific provision of Article 119 of the CCP, to which a general reference was made, it had based its decision in a situation where none of the provisions of Article 119 of the CCP provide for an immediate transfer to the State's possession of confiscated material evidence. Therefore, it remains unclear on what legal basis the Court of Appeal decided that the applicants' entire property seized during the investigation was to be transferred to the State whereas the prosecution had not made such a request (see paragraph 8 above).

26. The Court therefore remains doubtful as to whether the impugned confiscation measure may be regarded as having been carried out "subject to the conditions provided for by law". It does not, however, find it necessary to settle that question, as the impugned confiscation breaches Article 1 of Protocol No. 1 for other reasons (see, *mutatis mutandis*, *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, § 105, 25 October 2012, and paragraphs 28-29 below).

27. The Court is satisfied that confiscation of property obtained through crime is in line with the general interest of the community, because the forfeiture of money or assets obtained through illegal activities or paid for with the proceeds of crime is a necessary and effective means of combating criminal activities (see *Raimondo v. Italy*, 22 February 1994, § 30, Series A no. 281-A). It therefore proceeds to examine whether a fair balance was struck between the legitimate aim and the applicants' rights, and whether sufficient procedural guarantees were in place.

28. Having regard to Article 119 of the CCP, particularly its § 1(4), which specifically concerned the treatment of proceeds of a criminal offence admitted into material evidence in criminal proceedings, the Court observes that the District Court had referred the victims' civil claim against the applicants to be settled in separate civil proceedings after the completion of the trial while the prosecution themselves had stated that the material evidence which, according to them, included solely proceeds of a crime, should have been transferred to the victims (see paragraphs 6 and 8 above). When deciding that the material evidence should be transferred to the State's possession, the Court of Appeal referred to the arguments contained in the prosecution's appeal, but provided no analysis of the evidence for its own part. This is especially striking in view of the fact that, as already noted, the prosecution had not requested the transfer of the property to the State's possession but had argued that the assets in question had been obtained by the income received from the exploitation of the victims and should be

returned to them pursuant to Article 119 of the CCP (presumably by virtue of Article 119 § 1(4) of the CCP). It is even more striking that, having upheld the District Court's findings in their entirety, including apparently the finding that the prosecution had failed to find out which assets admitted into material evidence had been obtained through criminal activity and which ones had not, the Court of Appeal made no individual assessment of which pieces of property to confiscate (see, by contrast, *Silickienė v. Lithuania*, no. 20496/02, § 68, 10 April 2012; see also *Rummi v. Estonia*, no. 63362/09, § 108, 15 January 2015, and *Todorov and Others*, cited above, § 213 *in fine*).

29. Lastly, although the Court of Appeal had failed to carry out any independent assessment of the matter, the Court of Cassation in its turn refused to examine the merits of the applicant's appeal against that decision (see paragraphs 10 and 12 above) thereby resulting in a situation where no judicial review was eventually conducted as regards both the legality and the justification for the confiscation (compare *Silickienė*, cited above, § 68).

30. Against this background, the Court finds that the respondent Government failed to show that a fair balance was struck between the protection of the right of property and the requirements of general interest.

31. There has accordingly been a violation of Article 1 of Protocol No.1 to the Convention.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

32. In respect of pecuniary damage, the applicants claimed 109,435 euros (EUR), comprising the value of their confiscated assets. The applicants further claimed jointly EUR 4,000 in respect of non-pecuniary damage. They did not submit any claims in respect of costs and expenses.

33. The Government contested those claims.

34. In finding a violation of Article 1 of Protocol No. 1, the Court noted that the domestic courts had failed to conduct proper judicial review of the legality and justification of the confiscation of the applicants' property (see paragraphs 28-29 above). The Court cannot speculate as to the possible outcome of the proceedings had the requirements of Article 1 of Protocol No. 1 been complied with. It therefore considers that a reopening of the domestic proceedings and a re-examination of the matter on the national level, of which the possibility exists under Article 403 § 1(5) of the Code of Criminal Procedure currently in force, would constitute, in principle, an appropriate means to remedy the violation (see *Todorov and Others*, cited above, § 321, with further references). The Court therefore rejects the claim for pecuniary damage. Furthermore, the Court considers that its finding in the present judgment constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants and accordingly makes no award under this head.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 4 July 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Valentin Nicolescu Acting Deputy Registrar	Anja Seibert-Fohr President