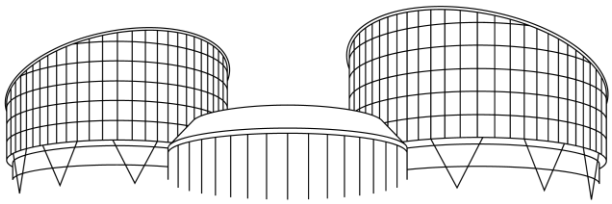

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF DENISOVA AND MOISEYEVA v. RUSSIA

(Application no. 16903/03)

JUDGMENT

STRASBOURG

1 April 2010

FINAL

04/10/2010

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

In the case of Denisova and Moiseyeva v. Russia,

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

Christos Rozakis, *President,*
Nina Vajić,
Anatoly Kovler,
Khanlar Hajiyev,
Dean Spielmann,
Giorgio Malinverni,
George Nicolaou, *judges,*

and André Wampach, *Deputy Section Registrar,*

Having deliberated in private on 11 March 2010,

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

PROCEDURE

1. The case originated in an application (no. 16903/03) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Russian nationals, Ms Nataliya Mikhaylovna Denisova and Ms Nadezhda Valentinovna Moiseyeva ("the applicants"), on 8 July 2002.

2. The applicants were represented by Ms K. Kostromina, a lawyer with International Protection Centre in Moscow. The Russian Government ("the Government") were represented by Mr P. Laptev, former Representative of the Russian Federation at the European Court of Human Rights.

3. The applicants alleged, in particular, a violation of their right to peaceful enjoyment of possessions.

4. On 9 September 2005 the Court decided to communicate the complaint concerning the alleged violation of the applicants' property rights to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1949 and 1978 respectively and live in Moscow. They are wife and daughter of Mr Valentin Moiseyev, who was also an applicant before the Court (see *Moiseyev v. Russia*, no. 62936/00, 9 October 2008).

A. Criminal proceedings against Mr Moiseyev

6. On 3 July 1998 the Investigations Department of the Federal Security Service of the Russian Federation (the FSB) opened criminal proceedings against Mr Moiseyev. At 11.30 p.m. a search was conducted at the applicants' flat. Foreign currency, the keys and registration papers for a VAZ car, and the second applicant's personal computer were seized. Simultaneously a search was carried out at Mr Moiseyev's office. In total, the investigators seized 5,747 US dollars.

7. On 10 July 1998 the investigator seized from the first applicant the keys to garage no. 178.

8. On 13 July 1998 Mr Moiseyev was formally charged with high treason, an offence under Article 275 of the Criminal Code.

9. On 22 July 1998 the investigator ordered a charge to be placed on the VAZ car with a view to "securing possible forfeiture of the defendant's property in accordance with Article 175 of the RSFSR Code of Criminal Procedure".

10. On 1 September 1998 the investigator informed the director of the SBS-Agro bank of the freezing of Mr Moiseyev's foreign currency and Russian rouble accounts.

11. On 16 September and 12 November 1998 the investigator issued charging orders in respect of the garage and the computer. On 16 November 1998 the computer was physically removed from the applicants' flat and placed in the material evidence room of the Federal Security Service.

12. On 29 March 1999 the second applicant asked the investigator to return the computer, which was her personal property. On 12 April 1999 the investigator replied that the computer had been seized with a view to securing possible forfeiture of Mr Moiseyev's property and that certain files edited by Mr Moiseyev had been discovered on the hard disc. The second applicant was informed that, if necessary, her text files would be copied and handed over to her.

13. On 8 June 1999 the investigator ordered attachment of the seized 5,747 US dollars as a material exhibit. On 15 June 1999 the Finance and Planning Department of the "USSR State Security Committee"[1] issued a receipt for the money.

14. On 14 August 2001 the Moscow City Court convicted Mr Moiseyev of high treason committed between 1992 and 1998, sentenced him to four years and six months' imprisonment and issued a confiscation order in respect of his property. The parts of the judgments relevant to the determination of the property matters read as follows:

> "Mr Moiseyev's pre-trial deposition that he had received remuneration for information transmitted to a representative of a foreign state has been confirmed by the search records, noting the discovery of US dollars both in his office and at his

1. According to the heading of the document. The State Security Committee ("KGB") is the predecessor of the Federal Security Service.

> place of residence. The witness B. confirmed that the search had uncovered 4,647 US dollars sorted into non-standard envelopes.
>
> Both Mr Moiseyev and his wife Ms Denisova who was interviewed as an additional witness at trial, had been present during the search but raised no objections. Accordingly, the court considers that the decision attaching the 1,100 US dollars seized in Mr Moiseyev's office, the 4,647 US dollars, and seven envelopes as material exhibits was justified...
>
> Having regard to the public dangerousness of the committed crime, the court orders confiscation of Mr Moiseyev's property. The court decides on the destiny of the material exhibits in accordance with Article 86 of the RSFSR Code of Criminal Procedure...
>
> A confiscation order is issued in respect of the property that has been seized: [the VAZ car, foreign currency and Russian rouble bank accounts, garage no. 178, and the computer], as well as the cash funds of 5,747 US dollars which have been criminally acquired."

15. On 3 January 2002 the first applicant asked the Supreme Court to order the return of her spousal property and to remove the garage from the list because it was rented rather than owned. She did not receive a response to her request.

16. On 9 January 2002 the Supreme Court upheld the conviction.

B. Enforcement of the confiscation order

17. On 4 March 2002 the Moscow City Court sent an excerpt from the judgment of 14 August 2001 to the FSB's Finance and Economic Department for enforcement of the confiscation order in respect of the cash funds. The covering letter read as follows:

> "Confiscation order to be executed in respect of Mr Moiseyev's cash funds in the amount of [unreadable] US dollars as having been criminally acquired and stored at the Department [according to] receipt no. 1013 of 15 June 1999."

18. On 18 March 2002 the Moscow City Court issued five writs of execution for enforcement of the confiscation order in respect of Mr Moiseyev's property at his place of residence, the VAZ car, the garage, the bank accounts and the computer.

19. On 27 March 2002 the cash funds in the amount of 5,747 US dollars were received by the Vneshtorgbank from the FSB's Finance and Economic Department and credited to the State.

20. On 25 May 2002 a bailiff discontinued enforcement in respect of Mr Moiseyev's property located in his flat because no chargeable items had been found.

21. By a decision of 20 June 2002, a bailiff ordered the removal and sale of the computer and declared enforcement completed. On 31 July 2002 the computer was evaluated at 2,500 Russian roubles (RUB) and subsequently sold for RUB 1,609.05.

22. On 17 September 2002 a bailiff discontinued enforcement in respect of Mr Moiseyev's foreign currency and Russian rouble bank accounts. He determined that no accounts in his name were listed in the bank's database.

23. On 27 November 2003 a bailiff determined that the garage was in fact a collapsible metal structure located on a rented plot, in respect of which the rent agreement had expired. Accordingly, he held that its removal or sale were impossible.

24. Following the amendments of the Criminal Code (see paragraph 34 below), Mr Moiseyev asked the Moscow City Court to relieve him from the auxiliary penal sanction in the form of the confiscation order. On 14 February 2005 the Moscow City Court found that the enforcement of the confiscation order had been discontinued or terminated in respect of everything but the VAZ car. Since the auxiliary penal sanction of confiscation had been removed from the Criminal Code, the City Court decided to return the car to Mr Moiseyev. On 6 July 2005 the Supreme Court of the Russian Federation upheld that judgment on appeal.

C. Civil proceedings for return of family property

25. On 13 May 2002 the first applicant sued the court bailiffs and the Federal Security Service before the Khoroshevskiy District Court of Moscow, seeking to have the charging orders lifted and to have her right to one half of the marital property, excluding the bank deposits, recognised. She submitted that she had been married to Mr Moiseyev since 1978 and that the Civil and Family Codes provided for equality of spouses' portions of the marital property. Relying on Mr Moiseyev's pay statements, she argued that from 1992 to 1998 he had earned more than five thousand dollars and thus the amount of 5,747 US dollars could not be considered to have been unlawfully acquired. She indicated that the garage had been rented in 1988, and that the computer had been the second applicant's property.

26. On 11 October 2002, 14 and 27 February 2003 the court heard the parties. As the first applicant withheld consent to the substitution of the Federal Property Fund for the FSB and to Mr Moiseyev as co-defendant, Mr Moiseyev joined the proceedings as a third party.

27. On 27 February 2003 the Khoroshevskiy District Court delivered a judgment. The entire reasoning read as follows:

> "Having assessed the collected evidence, the court dismisses [the first applicant's] claim because the judgment of the Moscow City Court established that the contested property had been criminally acquired, which makes it impossible to recognise the plaintiff's right to one half of the seized property, and also [because] the FSB is not a proper defendant in this case. Neither [the first applicant] nor Mr Moiseyev have been deprived of an opportunity to appeal against the conviction in the part concerning the contested property."

28. On 18 June 2003 the Moscow City Court upheld the judgment on appeal, noting that the claimed property had been found to have been criminally acquired by the Moscow City Court's judgment of 14 August 2001.

29. On 20 November 2003 the applicants sued the Federal Property Fund of the Russian Federation, seeking the lifting of the charging orders and recognition of the first applicant's right to one half of the spousal property and the second applicant's ownership of the computer.

30. On 9 August 2005 the Khoroshevskiy District Court of Moscow dismissed their claim, finding as follows:

> "It follows from the judgment of 14 August 2001 that the cash funds in the amount of 5,747 US dollars had been criminally acquired... On 19 March 2002 they were deposited with the Vneshtorgbank bank with a view to confiscation and credit to the State... Accordingly, the court cannot agree with Ms Denisova's claim to one half of the spousal part of the said cash funds. No other judicial documents relating to the origin of the contested cash funds have been produced before the court, whereas, pursuant to Article 61 § 2 of the Code of Civil Procedure, the facts established by a final judicial decision in an earlier case bind the court.
>
> As to Ms Moiseyeva's claims for recognition of her ownership of the computer and peripherals, it cannot likewise be satisfied because they have not been corroborated during the examination of the merits of the case. At present the said property has been confiscated and sold, which is confirmed by the bailiffs' information about the enforcement of the confiscation order in that respect."

31. On 13 October 2005 the Moscow City Court upheld, in a summary fashion, the City Court's judgment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Spousal and donated property

32. Property acquired by spouses in marriage is presumed to be jointly owned (Article 256 § 1 of the Civil Code, Article 34 § 1 of the Family Code). A child owns property which he or she has received as a gift (Article 60 § 1 of the Family Code). Giving does not require a written agreement, handover of the gift being sufficient (Article 574 § 1 of the Civil Code).

B. Criminal law and procedure

33. The Criminal Code provides that "penalty shall be imposed on a person found guilty of commission of a crime" (Article 44). Confiscation of property is a form of penal sanction which is auxiliary to the main sanction and defined as "compulsory withdrawal, in whole or in part, without compensation, of the property owned by the convicted person" (Article 52). On 8 December 2003, Article 52 was removed from the Criminal Code.

34. As worded at the time of Mr Moiseyev's conviction, Article 275 of the Criminal Code provided that high treason carried a punishment of up to twenty years' imprisonment that may or may not be accompanied by a confiscation order in respect of the convict's property. On 8 December 2003 the reference to the possibility of issuing a confiscation order was deleted.

35. The RSFSR Code of Criminal Procedure, as worded at the time of Mr Moiseyev's conviction, provided as follows:

Article 86. Measures taken in respect of the exhibits in criminal proceedings

"The judgment... must decide on the destiny of the exhibits, and:

(1) instruments of crime which belong to the accused shall be confiscated and passed on to a competent agency or destroyed;

...

(4) criminally acquired money and other assets shall be confiscated to the profit of the State; other items shall be returned to their lawful owners, or, if the owners cannot be established, shall become the State's property. In case of a dispute over the ownership of such items, the dispute shall be resolved in civil proceedings..."

Article 175. Charging of property

"With a view to securing a civil claim or a possible confiscation order, the investigator must charge the property of the suspect, defendant... or of the other persons who keep criminally acquired property... If necessary, the charged property may be impounded..."

C. Rules of civil procedure

36. Article 442 § 2 of the Code of Civil Procedure provides:

"A dispute over the ownership of the charged property initiated by persons who were not parties to the case shall be examined as a civil claim.

A claim for having the charging order lifted shall be made against the debtor and creditor. If the property has been charged or seized in connection with a confiscation order, the person whose property is to be confiscated, and the competent State authority shall be co-defendants..."

37. Resolution no. 7 of the Plenary Supreme Court of the USSR "On the case-law concerning confiscation of property" (of 29 September 1953, as amended on 29 August 1980) provided:

"4. ...The court should bear in mind that in case of confiscation of the convict's property in its entirety, the confiscation order should only apply to his or her personal property and to his or her part of the jointly owned property, it may not extend to the part of other persons who own that property jointly with the convict. Rights and lawful interests of the convict's family members living with him, must be respected...

> 9. The courts should bear in mind that even if the criminal judgment contained a list of specific property items liable to confiscation, third parties still may claim their title to that property in civil proceedings... The courts must consider such claims and the criminal judgment does not bind the civil court in its determination of the dispute over the contested property.
>
> However, if the criminal judgment established that the listed property items had been criminally acquired or paid for with criminally acquired assets, but registered in other persons' names with a view to concealing them from confiscation... then the claim for lifting of the charging order shall be dismissed."

38. Resolution no. 4 of the Plenary Supreme Court of the USSR "On legal requirements for examination of claims for lifting of charging orders" (of 31 March 1978, as amended on 30 November 1990) provided:

> "9. When considering a spouse's claim for lifting the charging order in respect of his or her part in the joint marital property, the court must bear in mind that... the property acquired in marriage is jointly owned by the spouses and in case of division their parts are presumed equal...
>
> The court must determine the actual size of the spouse's portion of the marital property and the specific items allocated to him or her, having regard to the entirety of the jointly acquired property, including the property that is not – by operation of law or otherwise – liable to confiscation. Each spouse's portion shall include both the property liable to confiscation and that not liable to confiscation..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

39. The applicants complained under Article 1 of Protocol No. 1 that their property rights had been violated as regards the domestic courts' refusal to lift the charging order in respect of the spousal portion of the first applicant and of the computer owned by the second applicant. Article 1 of Protocol No. 1 provides 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

40. The parties did not comment on the admissibility of the complaint.

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

B. Merits

1. Submissions by the parties

(a) The applicants

42. The applicants submitted that the finding of the criminal origin in the judgment of 14 August 2001 had related solely to the cash funds rather than to all the other property objects mentioned in the text. This was evident from the use of the plural form in the text ("cash funds... which *have* been criminally acquired"); otherwise, the sentence should have been in the singular ("property... which *has* been criminally acquired") (see paragraph 14 above). Furthermore, the writs of execution issued by the Moscow City Court had not mentioned that the property items – as opposed to the cash funds – had been criminally acquired. Finally, the applicants pointed out that the garage had been rented in 1988, that is before the beginning of Mr Moiseyev's alleged criminal activities, and that his accounts at the Sbs-Agro bank had only been used to withdraw the salary paid by the Ministry of Foreign Affairs.

43. The applicants pointed out that the Khoroshevskiy District Court had not given them an effective opportunity to vindicate their property rights because it had merely referred back to the criminal judgment, without carrying out an independent assessment of the facts. The District Court had failed to indicate which authority – the Federal Security Service or the Federal Property Fund – had been the proper defendant.

44. The applicants disputed the legal basis for the domestic courts' decisions and emphasised that Resolution no. 7 of the Plenary Supreme Court of the USSR required the courts to confine the scope of confiscation measures to the convict's personal property and to take into account the lawful interests of the convict's family members. However, the Russian courts had refused to exempt the first applicant's spousal portion and the second applicant's personal property from confiscation.

(b) The Government

45. The Government claimed that, according to the operative part of judgment of 14 August 2001, all of Mr Moiseyev's property, including the

cash funds, car, garage, and computer had been criminally acquired. In support of their claim they referred to the last paragraph of the judgment cited in paragraph 14 above. The Government maintained that the value of the cash funds and computer as the items which had actually been confiscated had not exceeded the amount of 14,000 US dollars, which Mr Moiseyev had received in remuneration for his spying activities.

46. The Government submitted that there had been no violation of the applicants' property rights. The confiscation order had been issued in strict compliance with the domestic law provisions. In case of mercenary crimes there existed the presumption of the criminal origin of the defendant's property and a confiscation order could be issued without examination of further evidence of its criminal origin. As the property had been criminally acquired, the Khoroshevskiy District Court had correctly refused the first applicant's claim for recognition of her spousal portion.

2. The Court's assessment

(a) Whether the applicants had a legitimate claim to property

47. The Court reiterates that the concept of "possessions" in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: the concept of "possessions" is not limited to "existing possessions" but may also cover assets, including claims, in respect of which the applicant can argue that he has at least a reasonable and "legitimate expectation" of obtaining effective enjoyment of a property right or a proprietary interest (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 124, ECHR 2004-XII, and *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 83, ECHR 2001-VIII). 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 it (see *Kopecký v. Slovakia* [GC], no. 44912/98, §§ 52, ECHR 2004-IX; *Draon v. France* [GC], no. 1513/03, § 68, 6 October 2005; *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 65, 11 January 2007).

48. On the facts, it is noted that in the course of criminal proceedings against Mr Moiseyev a large number of household items, including cash currency, keys and registration papers of a passenger car, keys to the garage and a computer, were seized by the investigation and subsequently confiscated pursuant to the confiscation order issued by the Moscow City Court on 14 August 2001 (see paragraph 14 above). Enforcement of the order proved to be impossible in respect of the garage (see paragraph 23 above) or was discontinued, owing to legislative changes, in respect of the car (see paragraph 24 above). The confiscation measure was eventually carried out in respect to the cash funds and the computer which had been sold by the bailiffs.

49. As regards the cash funds, it transpires from the Moscow City Court's judgment that the amount of 1,100 US dollars was seized in Mr Moiseyev's office and the remaining amount of 4,467 US dollars in the Moiseyevs family's home. The computer had been removed from the second applicant's room and the parties did not dispute that she had been its primary user.

50. The first applicant argued that she had been entitled to the spousal portion of the confiscated money and the second applicant asserted her ownership of the computer. The crux of the applicants' complaint was that the domestic courts had not provided them with an effective opportunity to claim their ownership to that property. Accordingly, in determining the existence of an interference with the right guaranteed by Article 1 of Protocol No. 1, the Court is called upon to verify in the light of the above-cited case-law whether the applicants had at least a reasonable and legitimate expectation to regain possession of the confiscated property.

51. The Court observes, firstly, that the Russian Civil and Family Codes stipulated joint ownership of property acquired by spouses in marriage. In the absence of evidence of any other arrangement between the first applicant and her husband in relation to the marital property, this default legal regulation was applicable in their case. Furthermore, by virtue of the relevant provisions of the Family and Civil Codes, children were legitimate owners of the objects which they had received from their parents as gifts. The change of ownership occurred at the moment of handing over the gift and there was no requirement of a written form (see paragraph 32 above). Thus, the first applicant could legitimately assert her entitlement to a portion of the family property equal to that of her husband and the second applicant to the computer which had been given to her by her parents.

52. The domestic case-law, as codified in the binding resolutions of the Supreme Court, indicated that confiscation orders could not "extend to the part of other persons who own [the] property jointly with the convict" and required the courts of general jurisdiction to respect the "rights and lawful interests of the convict's family members living with him". Only if it was found in subsequent civil proceedings – irrespective of the findings made in the criminal proceedings – that the property was criminally acquired but registered in other persons' names with a view to concealing it from confiscation, the claim was to be rejected (see paragraph 37 above). In the instant case the intention to mislead the courts as to the actual ownership of the property for the purpose of avoiding its confiscation was not established in any proceedings.

53. A further resolution by the Supreme Court required the civil courts to have regard to the entirety of the marital property and, taking account of the presumption of equality of spouses' portion, determine the actual size of each spouse's portion which was to include both items liable to confiscation and those not liable to confiscation (see paragraph 38 above). It therefore

appears that the first applicant could legitimately rely on those provisions to claim an equal share of the marital property.

54. In the light of the above considerations, the Court finds that the first applicant's claim to the spousal portion and the second applicant's claim to the computer had a basis in the statutory law, such as provisions of the Russian Civil and Family Codes, and the case-law codified by the Supreme Court. They could reasonably and legitimately argue that the confiscation order of 14 August 2001 amounted to an interference with their right to peaceful enjoyment of possessions and the Court is called upon to determine whether their claim was examined by the domestic courts in compliance with the requirements of Article 1 of Protocol No. 1.

(b) Whether the applicants' claim was examined in accordance with the requirements of Article 1 of Protocol No. 1

55. Article 1 of Protocol No. 1 comprises three distinct rules: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, *inter alia*, to control the use of property in accordance with the general interest (see, as a recent authority, *Broniowski v. Poland* [GC], no. 31443/96, § 134, ECHR 2004-V). The parties did not take a clear stance on the question of the rule of Article 1 of Protocol No. 1 under which the case should be examined. The Court considers that there is no need to resolve this issue because the principles governing the question of justification are substantially the same, involving as they do the legitimacy of the aim of any interference, as well as its proportionality and the preservation of a fair balance.

56. The Court emphasises that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be "lawful": the second paragraph recognises that the States have the right to control the use of property by enforcing "laws". Moreover, the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention. The issue of whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights only becomes relevant once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary (see, among other authorities, *Baklanov v. Russia*, no. 68443/01, § 39, 9 June 2005, and *Frizen v. Russia*, no. 58254/00, § 33, 24 March 2005).

57. The Court notes that the specific legal provisions for the confiscation measure were not mentioned in the Moscow City Court's judgment of 14 January 2001 or in any other domestic decisions. This

omission requires it to conjecture as to the legal basis for the interference. However, even though the decision itself did not refer explicitly to the provisions that formed its basis, it may be understood that the confiscation order was imposed as an auxiliary penal sanction on the basis of Articles 52 and 275 of the Criminal Code, read in conjunction with Article 86 § 4 of the RSFSR Code of Criminal Procedure (see paragraphs 33, 34 and 35 above). The interference at issue may therefore be regarded as "lawful".

58. The Court considers that the confiscation measures in criminal proceedings pursue a general interest of the community because the forfeiture of money or assets obtained through illegal activities or paid for with the proceeds from crime is a necessary and effective means of combating criminal activities (see *Raimondo v. Italy*, judgment of 22 February 1994, Series A no. 281-A, p. 17, § 30). Such confiscation measures are in keeping with the goals of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, which requires State Parties to introduce confiscation of instrumentalities and proceeds from crime in respect of serious offences (Article 3 § 3). Thus, the making of a confiscation order in respect of criminally acquired property operates in the general interest as a deterrent to those considering engaging in criminal activities and also guarantees that crime does not pay (compare *Phillips v. the United Kingdom*, no. 41087/98, § 52, ECHR 2001-VII, and *Dassa Foundation and Others v. Liechtenstein* (dec.), no. 696/05, 10 July 2007).

59. The Court further reiterates that, although the second paragraph of Article 1 of Protocol No. 1 contains no explicit procedural requirements, it has been its constant requirement that the domestic proceedings afford the aggrieved individual a reasonable opportunity of putting his or her case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision. In ascertaining whether this condition has been satisfied, a comprehensive view must be taken of the applicable procedures (see *Jokela v. Finland*, no. 28856/95, § 45, ECHR 2002-IV, and *AGOSI v. the United Kingdom*, judgment of 24 October 1986, Series A no. 108, § 55).

60. In the instant case the seizure and subsequent confiscation were ordered and carried out in the framework of criminal proceedings against Mr Moiseyev. The applicants were not party to those proceedings and had no standing to lodge requests or make any submissions in them. When issuing the confiscation order, the sentencing court did not examine whether any property objects affected by the seizure order could have belonged to the first and/or second applicant. The first applicant made representation to the appeal court for removal of her spousal portion and the garage from the confiscation order but she did not receive any reply or an opportunity to take part in the appeal proceedings (see paragraph 15 above). The Khoroshevskiy District Court's judgment of 27 February 2003 indicated that the first applicant had had an opportunity to appeal against the criminal

judgment in the part concerning the contested property, but it did not refer to any legal provisions which would have allowed a person who had no standing in criminal proceedings to lodge such an appeal. The Government, for their part, did not indicate any provisions of the Russian law that would have enabled the spouse or daughter of the convicted person to make submissions to the trial or appeal court.

61. In a situation where the ownership of property subject to a confiscation order was contested by persons who were not parties to the criminal proceedings, Article 442 of the Code of Civil Procedure allowed such persons to vindicate their property rights in civil proceedings. The applicants availed themselves of that remedy by introducing two civil claims, firstly against the bailiffs' service and the Federal Security Service, the latter having been the prosecuting authority in Mr Moiseyev's case, and subsequently against the Federal Property Fund. In examining their claims, the courts should have directed their attention to the possibility that the confiscated property items could have belonged to family members rather than to Mr Moiseyev himself and should have examined whether the applicants could have been their owners. However, the civil courts refused to take cognisance of the merits of the vindication claims or make any independent findings of fact, and they merely referred back to the judgment in Mr Moiseyev's criminal case. Thus, on 27 February 2003 the Khoroshevskiy District Court dismissed the first applicant's claim on the ground that the Moscow City Court had already established that "the contested property had been criminally acquired" (see paragraph 27 above). On 9 August 2005 the same District Court dismissed her renewed claim, by holding that the "facts established by a final judicial decision in an earlier case bind the court", and rejected the second applicant's claim because the computer had already been "confiscated and sold" (see paragraph 30 above).

62. The Khoroshevskiy District and the Moscow City Courts' persistent failure to take cognisance of the merits of the applicants' claim for vindication of their property was at variance with the requirements of the Russian law. In a series of binding rulings the Plenary Supreme Court consistently reminded the courts of general jurisdiction that a confiscation order may only apply to the convict's portion of the jointly owned property and may not affect the property rights of cohabiting family members, unless it has been established that the property was criminally acquired and registered in family members' names with a view to avoiding confiscation. To achieve the proper balance of interests, the courts examining claims for release of the spousal portion from confiscation were required to determine the portion of each spouse by reference to the family property in its entirety, so that each spouse's portion comprises both confiscated and non-confiscated property items (see paragraphs 37 and 38 above). The first applicant supported her claim to one half of the spousal property with evidence capable of showing the legitimate origin of at least a part of the

family property, such as Mr Moiseyev's pay statements from the Ministry of Foreign Affairs and the rental agreement in respect of the car garage. Although the domestic courts did not declare that evidence inadmissible, it was not mentioned in their judgments, which moreover did not contain any analysis of the composition of the family property. It follows that the domestic courts did not carry out a global assessment of the family property and the balancing exercise of the rights of family members, which were both required under the applicable domestic law provisions.

63. After Mr Moiseyev had regained possession of the car following a legislative amendment of Russian criminal law and after the bailiffs had determined that confiscation of bank assets, personal property and the garage was not physically possible, the first applicant reintroduced her claim for the spousal portion of the contested cash funds and the second applicant sought to vindicate her right to the computer. However, the second civil claim was likewise dealt with in a summary fashion. The domestic courts did not give heed to the evidence and submissions by the applicants or make a global assessment of the family property with a view to determining the spousal portions. As to the second applicant's claim to the computer, it was likewise dismissed without any explanation why her submission that the computer had been given to her by her parents as a gift appeared implausible. The Khoroshevskiy District and Moscow City Courts did not mention or refer in their judgments to any provisions of the Civil or Family Code.

64. In the light of the foregoing considerations, the Court finds that the applicants "bore an individual and excessive burden" which could have been rendered legitimate only if they had had the opportunity to challenge effectively the confiscation measure imposed in the criminal proceedings to which they were not parties; however, that opportunity was denied them in the subsequent civil proceedings and therefore the "fair balance which should be struck between the protection of the right of property and the requirements of the general interest" was upset (compare *Hentrich v. France*, judgment of 22 September 1994, Series A no. 296-A, § 49).

65. Accordingly, there has been a violation of Article 1 of Protocol No. 1.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

66. The first applicant further complained under Article 8 of the Convention about the night search of their flat on 3 July 1998. The applicants also complained under Article 6 § 1 of the Convention that the proceedings that lasted from 3 July 1998 to 18 June 2003 had exceeded a "reasonable time".

67. The Court reiterates that it has already dismissed the complaint about the search at Mr Moiseyev's flat on 3 July 1998 for non-exhaustion of domestic remedies (see *Moiseyev v. Russia* (dec.), no. 62936/00,

9 December 2004). It finds no reason to depart from that conclusion in the present case.

68. The Court further observes that there was no continuous set of proceedings that lasted from 3 July 1998 to 18 June 2003. The applicants were not parties to the criminal proceedings against Mr Moiseyev and the first applicant introduced her first civil claim only on 13 May 2002. That claim was finally dismissed on 18 June 2003, that is one year and one month later. That period was short and there was no appearance of a violation of the "reasonable time" requirement.

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

70. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

71. The first applicant claimed the following amounts in respect of pecuniary damage:

- 6,657.50 euros (EUR) for the loss of rental income from the car garage and the land tax she was liable to pay on it;
- EUR 2,712.60 for one half of the depreciation cost of the VAZ car and the transport tax she was liable to pay on it; and
- EUR 3,537.80 for one half of the cash funds plus interest at the statutory lending rate.

72. The second applicant claimed EUR 800, representing the approximate value of a computer similar to hers.

73. The applicants further claimed EUR 30,000 and EUR 20,000 respectively in respect of non-pecuniary damage. Finally, they claimed jointly EUR 374.60 for legal fees in the domestic proceedings, EUR 122.20 for court fees and EUR 3,000 for their representation before the Court.

74. The Government pointed out that the obligation to pay taxes, such as land and transport tax, was a corollary of the right of ownership. Neither Mr Moiseyev's nor the first applicant's right of ownership to the car garage and the car itself had ever been disputed and they had been therefore liable to tax imposition. The claim for rental income was speculative and the depreciation cost of the car was not supported with any documents. The second applicant's claim for the computer value was excessive, in view of the small amount which the sale of the computer fetched. Finally, the Government considered that the claim in respect of non-pecuniary damage was unreasonable as to quantum and that the applicants had not submitted appropriate documents in support of their claims for costs and expenses.

75. The Court considers that the question of the application of Article 41 is not ready for decision. Accordingly, it shall be reserved and the subsequent procedure fixed having regard to any agreement which might be reached between the Government and the applicants (Rule 75 § 1 of the Rules of Court).

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint concerning an alleged violation of the applicants' property rights admissible and the remainder of the application inadmissible;

2. *Holds*, by six votes to one, that there has been a violation of Article 1 of Protocol No. 1;

3. *Holds*, by six votes to one, that the question of the application of Article 41 is not ready for decision and accordingly:
   (a) *reserves* the said question;
   (b) *invites* the Government and the applicants to submit, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
   (c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

Done in English, and notified in writing on 1 April 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach	Christos Rozakis
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Ms N. Vajić is annexed to this judgment.

C.L.R.
A.M.W.

DISSENTING OPINION OF JUDGE VAJIĆ

I am unable to find that there has been a violation of the applicants' property rights under Article 1 of Protocol No. 1 to the Convention in the present case.

According to national law a criminal court in Russia has the power to confiscate criminally acquired property; the finding as to its criminal origin is of a factual nature. In the present case that question was examined in the criminal proceedings, which determined the matter (see paragraphs 14-16 of the judgment) and simply precluded any further claims. In this regard, Resolution no. 7 of the Plenary Supreme Court of the USSR states as follows: "**However, if the criminal judgment established that the listed property items had been criminally acquired or paid for with criminally acquired assets,** but registered in other persons' names with a view to concealing them from confiscation ... **then the claim for lifting of the charging order shall be dismissed**" (see paragraph 37 of the judgment). (emphasis added)

As in most countries, Russian civil law basically denies any legal protection to criminally acquired property.

It follows that in the given circumstances the applicants could not and had not become the owners of the property in question and thus could not claim their share of the property, as their claim had no basis in domestic law (contrary to the assertion in paragraph 52 of the judgment). This was also stated by the national courts (see paragraphs 27-28 and 30 of the judgment). Therefore, in view of the Court's case-law, the applicants – contrary to the majority's view (see paragraphs 51-54 of the judgment) – did not have a sufficiently established claim to qualify as an asset protected by Article 1 of Protocol No. 1.

For the above-mentioned reasons it is my opinion that the applicants did not have a right or a legitimate expectation that was protected by the Convention and I do not agree with the majority that there has been a violation of Article 1 of Protocol No. 1.