LISBOA, 3 DE NOVIEMBRE DE 2018

# LA INFLUENCIA DE LA JURISPRUDENCIA DEL TEDH EN EL DERECHO INTERNO

"COMISO DE GANANCIAS DE ORIGEN DELICTIVO VS. DERECHOS HUMANOS Y LIBERTADES FUNDAMENTALES"


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Casi todo en la vida tiene un lado brillante y un lado oscuro. El decomiso de las ganancias, efectos e instrumentos del delito no es una excepción…

Les propongo que dirijan su mirada hacia el lado oscuro en lo tocante a los derechos humanos a través de un caso

**CASE OF PAULET v. THE UNITED KINGDOM**
*(Application no. 6219/08)*
*STRASBOURG 13 MAY 2014*

**Recurso de apelación**: resulta opresivo y por lo tanto constituye un abuso de proceso (o desviación de poder) por parte de la UK imponer una orden de decomiso de la totalidad de los ahorros del reo conseguidos trabajando durante casi cuatro años.

**Argumento:** el Parlamento aprobó la Proceeds of Crime Act 2002 con la intención de que su aplicación se realizase de un modo que resultase compatible on los requisitos de la CEDH. Por lo tanto, a la luz del artículo 1 del Protocolo nº 1, para que la orden de decomiso fuese proporcionada debía estar conectada racionalmente a los objetivos de interés público perseguidos y no ir más allá de lo necesario para lograrlos.

**Rechazada el 28 de julio de 2009**

*"His earnings, of course, reflected the fact that he had done the necessary work, as we shall assume, to the satisfaction of his various employers. But the opportunity for him to do so, that is the pecuniary advantage, was unlawfully obtained. If the employee worked to his employer's satisfaction, and he paid his tax and National Insurance contributions on his earnings, and his deception either lacked any significant wider public interest, or, perhaps because of the passage of time, but for whatever reason, had ceased to have any meaningful effect on his employers' decision to continue his employment, the resolution of the issue might well be different. As it is there was here a wider public interest.* ***The appellant was deliberately circumventing the prohibition against him seeking remunerative employment in this country in any capacity. No basis for interfering with the order made in the Crown Court has been shown. In our judgment the appropriate link between the appellant's earnings and his criminal offences, in the context of the wider public interest, was plainly established.*** *"*

**RECURSO ANTE TEDH**

La orden de decomiso constituyó una injerencia desproporcionada en su derecho al pacífico disfrute de sus bienes en el sentido del art. 1 del Protocolo nº 1 CEDH:

"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."

El TEDH concluyó:

*in assessing whether or not the confiscation order in the present case was "oppressive" and thus an "abuse of process", the Court of Appeal did ask whether or not the order was in the public interest. However, having decided that it was, they did not go further by exercising their power of review so as to determine "whether the requisite balance was maintained in a manner consonant with the applicant's right to 'the peaceful enjoyment of his possessions', within the meaning of the first sentence of Article 1"*

*The foregoing considerations are sufficient to enable the Court to conclude that in the circumstances of the applicant's case there has been a violation of Article 1 of Protocol No. 1 to the Convention.*

*The Court recalls that the violation found in the present case was* ***procedural in character, based as it was upon the lack of a review of the confiscation order capable of satisfying the requirements of Article 1 of Protocol No. 1 to the Convention. It cannot be excluded that, had a sufficiently wide review been conducted by the domestic courts, this Court would have found an outcome involving confiscation of the applicant's remaining assets, as occurred in the present case, to be consistent with the Convention.*** *The sum claimed by the applicant in respect of pecuniary damage as just satisfaction under Article 41 is in the region of the amount of the confiscation order made against him ((…). However, in the absence of a proximate causal link between the procedural violation found and financial loss sustained by the applicant by reason of the confiscation order, the Court cannot make an award to the applicant under this head. Nevertheless, the Court recognises that the applicant must have suffered some anguish and frustration as a result of the failure of the domestic courts to conduct a Convention-compliant review of the confiscation order. It would therefore award him EUR 2,000 in respect of such non-pecuniary prejudice.*

*TheECHR*

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

*Held,* by five votes to two,

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into pounds sterling at the rate applicable at the date of settlement:

(i) EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

*Dismisses*d unanimously, the remainder of the applicant's claim for just satisfaction.

SEPARATE OPINION OF JUDGE KALAYDJIEVA JOINED BY JUDGE BIANKU AS REGARDS ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

*Unlike in Phillips, however, it has not been submitted that such employment constituted itself a crime on the part of the applicant, or that the regulation of the domestic labour market went so far as to make any irregularly obtained employment criminal or punishable in any manner. Likewise, it has not been contended that the applicant's work caused any public or private harm rather than contributing to the public welfare. Notwithstanding this situation, the applicant's genuinely earned savings were defined and confiscated as the "proceeds of the crime" of using a false passport – an act for which the applicant was punished in separate proceedings. The difference between the reasonable assumption as to the criminal origin of the confiscated property in the case of Phillips and the remote or indeed non-existent link between the use of a false passport and the genuine earning of the confiscated amounts in the present case appears quite obvious.*

*(…)Limiting the scope of the present case to only some of its "procedural aspects", the majority failed to express any views on whether the applicable legislation was sufficiently precise as to the conditions for forfeiture, whether the domestic courts were required to analyse the link between the assets proposed for forfeiture and the specific crime, and whether they did so in the present case.*

(…) *For these reasons I also disagree with the majority's view as to the "absence of a proximate causal link between the procedural violation found and financial loss sustained by the applicant by reason of the confiscation order" (see paragraph 73). In the absence of any subsequent examination of this causal link and/or the proportionality of the uncontested interference, the applicant should have been awarded compensation in pecuniary damage, and not merely for moral damage*.

ALGUNAS REFLEXIONES

-¿Qué es la relación de causalidad para el TEDH?

-¿No hay relación de causalidad entre la falta de ponderación del tribunal británico y el perjuicio económico irrogado por el decomiso del dinero y sí la hay en cambio entre la utilización del pasaporte falso y la obtención de ese dinero trabajando???

-¿Por qué se admiten como pago de tributos por rentas del trabajo el dinero ”procedente del delito “ ? ¿Blanqueo de capitales “lícito” para la Hacienda Publica?

-Efecto perverso: si no se realiza la ponderación, el decomiso es desproporcionado sólo en el plano procesal, no material, y no se devuelve lo decomisado.

Contraste con GYRLYAN v. RUSSIA (9-10-218); ISMAYILOV v. RUSSIA (6-11-2008):

-Violación material del art. 1 del protocolo nº 1. desproporcionado decomiso acumulado a pena de prisión suspendida. Decomiso es también sanción.

-TEDH entra a valorar críticamente , sin que ello sea necesario, el delito tipificado en el ordenamiento ruso del que el dinero decomisado es objeto material.

- Dinero decomisado debe ser “devuelto” al reo.

-La falta de racionalidad y el carácter coyuntural de las decisiones del TEDH redunda en detrimento de su propia misión y “auctoritas”