



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

FOURTH SECTION

CASE OF VEEBER v. ESTONIA (No. 2)

(Application no. 45771/99)

JUDGMENT

STRASBOURG

21 January 2003

FINAL

21/04/2003

In the case of Veeber v. Estonia (no. 2),

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

Sir Nicolas BRATZA, *President*,

Mr M. PELLONPÄÄ,

Mrs E. PALM,

Mrs V. STRÁŽNICKÁ,

Mr J. CASADEVALL,

Mr R. MARUSTE,

Mr L. GARLICKI, *judges*,

and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 3 and 17 December 2002,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 45771/99) against the Republic of Estonia lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Estonian national, Mr Tiit Veeber ("the applicant"), on 28 September 1998.

2. The applicant was represented by Mr C. Wegelius, a lawyer practising in Lappers, Finland. The Estonian Government ("the Government") were represented by their Agents, Ms M. Hion, First Secretary of the Human Rights Division of the Legal Department of the Ministry of Foreign Affairs, and Mr E. Harremoes, Special Adviser to the Mission of the Republic of Estonia to the Council of Europe.

3. The applicant alleged, in particular, that his conviction under criminal legislation that had come into force on 13 January 1995 of offences committed in 1993 and 1994 amounted to the retrospective application of criminal law in breach of Article 7 § 1 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 3 May 2001, the Chamber declared the application partly admissible.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section.

8. The Government, but not the applicant, filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1948 and lives in Tartu (Estonia). He is the owner of a company called AS Giga and chairman of the board of directors. He is also the chairman of another company called AS Tartu Jõujaam.

10. On 4 December 1995 the Tartu police initiated criminal proceedings against the applicant for abusing his position as company chairman.

11. On 26 February 1996, on discovering that AS Giga had failed to pay certain mandatory taxes, the city tax authorities issued an order directing it to pay the taxes due.

12. On 22 March 1996 the applicant was formally charged with abuse of office, tax evasion and falsification of documents. However, on 28 June 1996 the charge of abuse of office was dropped.

13. On 1 July 1996 a further charge of fraud was added to the indictment.

14. On 7 October 1996 the investigating officers furnished the applicant with the final version of the charges. They concerned his actions as chairman of AS Giga and AS Tartu Jõujaam and as owner of the former. Under Article 148-1 § 7 of the Criminal Code (see “Relevant domestic law and practice” below) he was accused of the intentional, continuous and large-scale concealment of taxable amounts and of submitting false information on the companies' expenditure. The charges under that Article were divided into three different counts: one relating to five instances in 1993 and 1994 of the forgery and fabrication of documents intended to show commercial dealings with a fictitious company; the second to the use at the end of 1994 and in 1995 of false documents purporting to relate to the payment of salaries to employees of AS Giga; and the third to the entry into a sham contract on 12 May 1995 in order to circumvent tax laws.

15. On 31 October 1996, after the completion of the preliminary investigation, the applicant and his lawyer were given access to the case file.

16. On 11 November 1996 the bill of indictment was approved by the competent prosecutor and the case referred to the Tartu City Court (*Tartu Linnakohus*).

17. On 4 March 1997 the City Court committed the applicant for trial on the above charges. On 24 April 1997 he was served with a copy of the indictment as approved by the City Court.

18. By a judgment of 13 October 1997, the City Court found the applicant guilty as charged and sentenced him to three years and six months' imprisonment, suspended for two years.

In convicting the applicant of the charges of tax evasion under Article 148-1 § 7 of the Criminal Code, the City Court observed that the criminal acts had started in the third quarter of 1993, with the last act beginning on 12 May 1995. It considered that they constituted a continuing offence. They all contained the elements of the same offence – they were directed against the State taxation system, had the same criminal consequences, were all committed intentionally and in a similar fashion, namely by falsifying documents and presenting them to the tax authorities. The City Court held that the applicant's acts came within Article 148-1 §§ 1 to 4 of the Criminal Code. As they had caused considerable damage, they fell to be considered under paragraph 7 of that Article. The City Court pointed out that paragraph 7 was applicable irrespective of whether prior administrative penalties had been imposed on the accused and it referred to the practice of the Supreme Court in support for that view.

It ordered the applicant to pay the city tax authorities 853,550 Estonian kroons in outstanding taxes. No fine or tax surcharge was imposed.

19. On 18 October 1997 the applicant lodged an appeal against that judgment with the Tartu Court of Appeal. He argued that in convicting him under Article 148-1 § 7 of the Criminal Code of offences committed in 1993 and 1994, the City Court had applied the criminal law retrospectively, as paragraph 7 had not entered into force until 13 January 1995. Prior to that date conviction under Article 148-1 could follow only if an administrative penalty had been imposed on the accused for the same act or he or she had a previous criminal conviction for a similar offence.

20. By a judgment of 12 January 1998, the Tartu Court of Appeal upheld the applicant's conviction. It considered that after his first criminal act in 1993 he had embarked on a criminal enterprise which had lasted until 1996, when the tax authorities discovered the offences. The fact that no administrative penalty had been imposed on the applicant was not relevant for the purposes of determining the applicability of Article 148-1 § 7 of the Criminal Code, as the offending acts had been committed intentionally. A criminal intent was proved by his conscious and calculated concealment of matters giving rise to a tax liability and his failure to pay the taxes.

21. On 17 February 1998 the applicant lodged an appeal on points of law with the Supreme Court (*Riigikohus*) raising the question of the retrospective application of the relevant provision of criminal law. He also argued that the concealment of matters giving rise to a tax liability was not a continuing offence, but a series of individual acts.

22. By a judgment of 8 April 1998, the Supreme Court, agreeing with the reasoning of the Court of Appeal, upheld the applicant's conviction. In response to the applicant's above argument, it said that a constant and continuous violation of the obligation to declare one's sources of income and to pay the taxes due created a persisting criminal state.

II. RELEVANT DOMESTIC LAW AND PRACTICE

23. The text of Article 148-1 of the Criminal Code, as worded until 27 June 1993, was as follows:

“Concealment of income or other taxable amounts and failures to submit income tax returns:

1. The concealment of income or other taxable amounts, the submission of knowingly false data in financial statements, tax calculations, income tax returns or other documents relating to the calculation of taxes or payments and their transfer to the Treasury, or a failure to submit an income tax return or to do so on time shall, *provided an administrative penalty has been imposed on the offender for a similar offence* [emphasis added], be punishable by a fine or up to three years' imprisonment;

2. The same acts, if committed by a person who has a previous conviction for an offence referred to in paragraph 1 of this Article, shall be punishable by between one and five years' imprisonment.”

24. The text of Article 148-1 of the Criminal Code, as worded between 27 June 1993 and 13 January 1995, was as follows:

“Failure to file income tax returns or other tax calculations, the concealment of income or other taxable amounts, and tax evasion:

1. Any person required to file an income tax return who fails to do so or does so out of time, or who supplies false information in such return shall, *if an administrative penalty has been imposed on him or her for a similar offence* [emphasis added], be liable on conviction to a fine or up to one year's imprisonment;

2. Any person with responsibility for such matters who conceals or understates income or other taxable amounts or overstates deductible expenditure, who fails to file or files out of time any income tax return, tax calculation, financial statement or other document relating to the calculation of taxes or payments and their transfer to the Treasury, accounting document, contract or other document necessary for the assessment and verification of the tax liability, or who fails to comply with an order of the Tax Board shall, *if an administrative penalty has been imposed on him or her for a similar offence* [emphasis added], be liable on conviction to a fine or up to three years' imprisonment;

3. Any person with responsibility for such matters who fails to pay taxes or to pay them on time, or who fails to comply or to comply satisfactorily with an order issued by the Tax Board for the compulsory collection of taxes by a bank shall, *if an administrative penalty has been imposed on him or her for a similar offence* [emphasis added], be liable on conviction to a fine or up to three years' imprisonment;

4. Any person with responsibility for such matters who fails to deduct or to deduct correctly personal income tax from the wages (income) of employees, or to transfer payments so deducted to the Treasury in full and on time, shall, *if an administrative penalty has been imposed on him or her for a similar offence* [emphasis added], be punishable by a fine or up to three years' imprisonment;

5. The same acts, if committed by a person who has a previous conviction for any of the offences referred to in paragraphs 1, 2, 3 or 4 of this Article shall be liable to between one and five years' imprisonment;

6. A person who has committed any of the acts referred to in paragraphs 1, 2, 3 or 4 of this Article on a large scale shall be punishable by up to seven years' imprisonment.”

25. The text of Article 148-1 of the Criminal Code, as worded since 13 January 1995, reads as follows:

“Failure to file income tax returns or other tax calculations, the concealment of income or other taxable amounts, and tax evasion:

1. Any person required to file an income tax return who fails to do so or does so out of time, or who supplies false information in such return shall, *if he or she acted with intent, or is a person on whom an administrative penalty has been imposed for a similar offence* [emphasis added], be liable on conviction to a fine or up to one year's imprisonment;

2. Any person with responsibility for such matters who conceals or understates income or other taxable amounts or overstates expenditure for that purpose, who fails to file or files out of time any income tax return, tax calculation, financial statement or other document relating to the calculation of taxes or payments and their transfer to the Treasury, accounting document, contract or other document necessary for the assessment and verification of the tax liability, or who fails to comply with an order of the Tax Board shall, *if he or she acted with intent, or is a person on whom an administrative penalty has been imposed for a similar offence* [emphasis added], be liable on conviction to a fine or up to three years' imprisonment;

3. Any person with responsibility for such matters who fails to pay taxes or to pay them on time, or who fails to comply or to comply satisfactorily with an order issued by the Tax Board for the compulsory collection of taxes by a bank shall, *if he or she acted with intent, or is a person on whom an administrative penalty has been imposed for a similar offence* [emphasis added], be liable on conviction to a fine or up to three years' imprisonment;

4. Any person with responsibility for such matters who fails to deduct or to deduct correctly personal income tax from the wages (income) of employees, or to transfer payments so deducted to the Treasury in full and on time, shall, *if he or she acted with intent, or is a person on whom an administrative penalty has been imposed for a similar offence* [emphasis added], be liable on conviction to a fine or up to three years' imprisonment;

5. Any person with responsibility for such matters who supplies incorrect data or documents on compulsory registration under tax legislation, fails to disclose his or her residence, place of employment or place of business to a tax authority, or by any other

means evades the payment of the taxes provided for in the Taxation Act shall, *if he or she acted with intent, or is a person on whom an administrative penalty has been imposed for a similar offence* [emphasis added], be liable on conviction to a fine or up to three years' imprisonment;

6. The same acts, if committed by a person who has a previous conviction for any of the offences referred to in paragraphs 1, 2, 3, 4 or 5 of this Article shall be punishable by between one and five years' imprisonment;

7. A person who has committed any of the acts referred to in paragraphs 1, 2, 3, 4 or 5 of this Article on a large scale shall be liable to up to seven years' imprisonment."

26. Under the practice of the Supreme Court, referred to by the Government, if a failure to pay taxes is intentional and continuing, it is the most recent version of Article 148-1 that is applicable to acts which occurred prior to its amendment, provided that part of the criminal activity took place after the amendment came into force. Criminal liability arises on two alternative, not cumulative, grounds: (1) if the offender has committed the offence intentionally or (2) if administrative penalties have previously been imposed on the offender for a similar offence. Article 148-1 § 7 does not create a separate offence, but merely qualifies the elements listed in paragraphs 1 to 5. Thus, a person may only be convicted under Article 148-1 § 7 if his or her acts encompass the elements of one or more of the offences set out in paragraphs 1 to 5 (decision of the Criminal Division of the Supreme Court of 8 April 1997, *Riigi Teataja* III 1997, 14, 147, and decision of 27 January 1998, *Riigi Teataja* III 1998, 10, 104).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

27. The applicant complained that his conviction of offences committed in 1993 and 1994 under criminal legislation which had come into force on 13 January 1995 infringed the guarantee against the retrospective application of criminal law set forth in Article 7 § 1 of the Convention, which provides:

"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

A. Arguments of the parties

28. The applicant submitted that his acts prior to 13 January 1995 did not qualify as criminal under the law in force at that time. He pointed out that, as worded prior to that date, Article 148-1 of the Criminal Code made the existence of a previous administrative penalty for a similar offence a precondition for a criminal conviction for the acts defined therein. However, no such penalty had been imposed on him. Therefore, his conviction of those acts under the law of 13 January 1995 violated the *nullum crimen sine lege* principle.

29. The Government submitted that the applicant had been given a clear indication in the bill of indictment, which had been approved on 11 November 1996, of the acts of which he was accused as well as their legal qualification. The indictment contained the dates of the incriminated acts and the reasons for qualifying those acts as a continuing offence.

The Government further referred to the application and interpretation of Article 148-1 § 7 of the Criminal Code by the domestic courts in the applicant's case and the practice of the Supreme Court, according to which Article 148-1 was applicable to acts of intentional and continuing tax evasion even before the amendment if the criminal activity had continued after it came into force. The domestic courts had given sufficiently detailed reasons for their decision to qualify the acts committed by the applicant as a continuing offence and to rely on all of them as the basis for convicting him.

The courts had applied the criminal law in the same way in a number of criminal cases. All the relevant judgments were published and accessible to the public. Therefore, the application and interpretation of Article 148-1 did not go beyond what could be reasonably foreseen by the applicant.

It was further argued that the qualification by the domestic courts of the applicant's tax evasion during the period from 1993 to 1995 as an ongoing crime had no effect on the nature and gravity of the sanction – a suspended sentence – and entailed no tangible negative consequences for him.

The Government pointed out that tax evasion had also been defined as a crime in the earlier versions of Article 148-1 of the Criminal Code.

B. The Court's assessment

30. The Court reiterates that the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *S.W. v. the United*

Kingdom and *C.R. v. the United Kingdom*, judgments of 22 November 1995 (Series A nos. 335-B and 335-C, p. 41, § 34, and p. 68, § 32, respectively).

31. According to the Court's case-law, Article 7 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment. From these principles it follows that an offence must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable (see *S.W.* and *C.R.*, cited above, pp. 41-42, § 35, and pp. 68-69, § 33, respectively; see also *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, p. 22, § 52).

32. Turning to the facts of the present case, the Court notes that the applicant was convicted under Article 148-1 § 7 of the Criminal Code, as worded since 13 January 1995, of tax offences which were committed in the period from 1993 to 1996.

It observes that the application of the criminal law of 13 January 1995 to subsequent acts is not at issue in the instance case. The question to be determined is whether the extension of the law to acts committed prior to that date infringed the guarantee set forth in Article 7 of the Convention.

33. In this connection the Court reiterates that it is not its task to rule on the applicant's criminal responsibility, that being primarily a matter for the assessment of the domestic courts, but to consider, from the standpoint of Article 7 § 1 of the Convention, whether the applicant's acts, at the time when they were committed, constituted offences defined with sufficient accessibility and foreseeability by the national law (see *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 51, ECHR 2001-II).

34. It notes that under Article 148-1 of the Criminal Code tax evasion was also an offence prior to 13 January 1995, in particular in 1993 and 1994, when the applicant committed some of the acts of which he was accused. However, a prerequisite for a criminal conviction under the law in force at that time was that the person concerned had previously been found liable for a similar offence and subjected to an administrative penalty.

The version of Article 148-1 of the Criminal Code which came into effect on 13 January 1995 maintained the requirement for a previous administrative penalty, but added a condition concerning intent. The two conditions were alternative, not cumulative, thus making a person criminally liable if one of the conditions was satisfied. Thus, in finding the applicant guilty under that Article, the domestic courts held that the fact that

no administrative penalty had previously been imposed on him was not a bar to his conviction.

However, the courts included in their findings under the 1995 legislation acts that had been committed during the preceding two years, holding that they were part of continuing criminal activity which had lasted until 1996.

35. The Court observes that, by definition, a “continuing offence” is a type of crime committed over a period of time (see *Ecer and Zeyrek v. Turkey*, nos. 29295/95 and 29363/95, § 33, ECHR 2001-II). It notes that the applicant was charged with and convicted of the intentional, continuous and large-scale concealment of taxable amounts and of submitting false information to the tax authorities on the companies' expenditure over a period of time. While the starting-point of the applicant's activity pre-dated the entry into effect of the provision under which he was convicted, the activity was considered as resulting in a persisting criminal state which continued after the critical date.

36. The Court observes that, according to the text of Article 148-1 of the Criminal Code before its amendment in 1995, a person could be held criminally liable for tax evasion only “if an administrative penalty ha[d] been imposed on him or her for a similar offence”. The condition was thus an element of the offence of tax evasion without which a criminal conviction could not follow.

It further observes that a considerable number of the acts of which the applicant was convicted took place exclusively within the period prior to January 1995 (see paragraphs 14 and 18 above). The sentence imposed on the applicant – a suspended term of three years and six months' imprisonment – took into account acts committed both before and after January 1995. Contrary to the Government's submission, it cannot be stated with any certainty that the domestic courts' approach had no effect on the severity of the punishment or did not entail tangible negative consequences for the applicant.

37. The Court notes the Government's argument that the jurisprudence of the Supreme Court on the application and interpretation of the 1995 version of Article 148-1 of the Criminal Code made the risk of criminal punishment foreseeable to the applicant. It observes, however, that the decisions of the Supreme Court referred to by the Government were handed down in April 1997 and January 1998, whereas the applicant's complaint concerns acts committed during the period from 1993 to 1994. At that time, considering the terms of the criminal law in force during that period, the applicant could not have foreseen that he would face criminal conviction at the first discovery of his activity.

38. In these circumstances, the Court finds that the domestic courts applied the 1995 amendment to the law retrospectively to behaviour which did not previously constitute a criminal offence.

39. It follows that there has been a violation of Article 7 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. 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.”

A. Pecuniary damage

41. The applicant claimed 853,550 Estonian kroons (EEK), a sum which he was required to pay in damages to the tax authorities upon his conviction. He submitted that he had paid to the authorities EEK 185,000 of that sum.

42. The Government maintained that the applicant should only be awarded an amount corresponding to the damage he actually suffered, that is to say EEK 185,000.

43. The Court reiterates that it will award pecuniary compensation under Article 41 only where it is satisfied that the loss or damage complained of was actually caused by the violation it has found. It notes that the applicant's claim relates to his obligation to pay outstanding taxes which were due under the relevant tax laws. Although the order to pay the required taxes was issued by the criminal court, it was separate from the suspended sentence imposed on the applicant and did not involve a tax surcharge or a fine (see paragraph 18 above).

As there is no causal link between the sums claimed for pecuniary damage and the violation of Article 7 § 1 of the Convention, the Court rejects the applicant's claim under this head.

B. Non-pecuniary damage

44. The applicant claimed EEK 50,000 for feelings of stress and helplessness caused by his wrongful conviction.

45. The Government submitted that the finding of a violation would constitute in itself sufficient just satisfaction. In the alternative, they invited the Court to determine the amount of an award on an equitable basis.

46. The Court considers that the applicant must have suffered distress which cannot be compensated solely by the finding of a violation. Ruling on an equitable basis, the Court awards the applicant 2,000 euros (EUR) for non-pecuniary damage.

C. Costs and expenses

47. The applicant sought reimbursement of 5,000 Finnish markkas (EUR 840.90) which he had paid for the services of his lawyer in the Strasbourg proceedings.

48. The Government did not dispute that sum.

49. The Court considers the applicant's claim reasonable and allows it in full.

D. Default interest

50. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 7 § 1 of the Convention;
2. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 2,000 (two thousand euros) in respect of non-pecuniary damage;
 - (ii) EUR 840.90 (eight hundred and forty euros ninety cents) in respect of costs and expenses;
 - (iii) any tax that may be chargeable;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 21 January 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President