CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

CASE OF JUHA NUUTINEN v. FINLAND

(Application no. 45830/99)

JUDGMENT

STRASBOURG

24 April 2007

FINAL

24/07/2007

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Juha Nuutinen v. Finland,

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

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL,
Mr G. BONELLO,
Mr M. PELLONPÄÄ,
Mr K. TRAJA,
Mr L. GARLICKI,
Ms L. MIJOVIĆ, *judges*,
and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 27 March 2007,

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

PROCEDURE

1. The case originated in an application (no. 45830/99) against the Republic of Finland 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 a Finnish national, Mr Juha Nuutinen ("the applicant"), on 2 October 1998.

2. The applicant was represented by Mr A. Setälä, a lawyer practising in Turku. The Finnish Government ("the Government") were represented by their Agent, Mr A. Kosonen of the Ministry for Foreign Affairs.

3. The applicant alleged a breach of Article 6 §§ 1 and 3 (a) and (b) 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. By a decision of 17 January 2006, the Court declared the application partly admissible. Judge Pellonpää, who at the time of the decision sat in respect of Finland, continued to participate in the examination of the case (Article 23 § 7 of the Convention).

6. The applicant and the Government each filed further written observations (Rule 59 § 1). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1950 and lives in Turku.

A. The Turku District Court

8. On 7 September 1995 the public prosecutor charged the applicant and the managing director of company X before the District Court (*käräjäoikeus*, *tingsrätten*) with two counts of aggravated tax fraud and two counts of tax fraud, as they had allegedly produced false invoices to the Turku County Tax Office (*lääninverovirasto*, *länsskatteverket*). They were also charged with an accounting offence (count 9), as they had allegedly entered false data in the accounts of X. The prosecutor claimed that the applicant was responsible for the offences together with the managing director as, even though he did not have an official status in the management of the company, he had in fact participated in its management.

In the indictment dated 12 June 1995, count 1, for example, read as follows:

> *"Aggravated tax fraud.*
>
> On 23 November 1993 [the managing director] and [the applicant] together, [the former] as the managing director of [company X] and chairman of the board of directors and [the latter] as a person who was *de facto* responsible for the management of the company, submitted the company's application for a VAT refund in the amount of FIM 342,760 [some EUR 57,000] as regards November 1993 to the County Tax Office of Turku. The application stated that [company Y] had sold electrical relays to [company X] for FIM 1,900,000 [some EUR 319,000] and the latter company had sold the said products further to an Estonian company for FIM 1,680,000 [EUR 282,000]. The invoice relating to the sales transaction between [company X] and [company Y] was fabricated. By submitting such false information which affected the amount of taxes to the authorities for the purposes of taxation, [the managing director] and [the applicant] have attempted to evade taxes.
>
> Applicable law: Chapter 29, section 2 of the Penal Code"

As a further example, count 2, which concerned the co-defendant H.A., read as follows:

> *"Aiding and abetting an aggravated tax fraud.*
>
> By preparing the invoice in the amount of FIM 1,900,000 referred to in count 1, and by handing it over to [the managing director] and [the applicant] to be attached to the application for a tax refund, [H.A.], on 23 November 1993, intentionally furthered the criminal act committed by [the managing director] and [the applicant].

Applicable law: Chapter 29, section 2 and Chapter 5, section 3 (1) of the Penal Code"

9. The applicant pleaded not guilty, arguing that he did not have such a status in company X and therefore could not be held responsible for the alleged offences. Furthermore, he argued that he had not been involved in compiling the documents and that the transactions concerned had not been forged.

10. On 8 February 1996 the District Court found that the business transactions referred to in the relevant invoices were not genuine, that the invoices were false and that the applicant had, together with the managing director, produced false information to the County Tax Office and entered false data in the accounts of X. The District Court referred to the evidence given by the co-accused and the witnesses, finding it proved, *inter alia*, that the applicant had actually acted in the company in such a position that he was to be held responsible for the offences together with the managing director. Thus, the District Court convicted them both as charged and sentenced them to a suspended term of one year's imprisonment. The co-defendant, H.A., was also convicted as charged.

B. The Turku Court of Appeal

11. The applicant appealed to the Court of Appeal (*hovioikeus*, *hovrätten*) against his conviction. He maintained that since he had not had any legal or *de facto* status in X, he had not produced any documents to the County Tax Office and he had not entered false data in X's accounts. Furthermore, the invoices had not been fabricated. He also claimed that the witness evidence was contradictory and that the District Court's assessment of it was erroneous. At the end of his writ of appeal, he stated:

"... [C]onsidering that the conduct of [the applicant], on the whole, cannot be considered aggravated, he could not be found guilty of more than aiding and abetting a tax fraud if he were, against all reason, to be found guilty of any offence ..."

12. The public prosecutor did not submit any written response to the applicant's appeal. In its response to the applicant's appeal the County Tax Office did not refer to a reclassification of the offences as aiding and abetting.

13. On 13 March 1997 the Court of Appeal held a hearing at which the parties and the witnesses were heard. It appears that there was no discussion as to whether the applicant's alleged conduct could be classified as aiding and abetting the above offences.

14. In its judgment of 28 August 1997 the Court of Appeal convicted the applicant of two counts of aiding and abetting an aggravated tax fraud and two counts of aiding and abetting a tax fraud and an accounting offence and

sentenced him to a term of nine months' suspended imprisonment. The Court of Appeal reasoned *inter alia*:

> *"[The applicant's] conduct*
>
> During the pre-trial investigation [the managing director] stated that [the applicant] had given instructions to [H.A.] as to the details to be included in the documents that were attached to the applications for a tax refund ... and had also otherwise taken care of matters and the business transactions of [company X].
>
> [H.A.] stated during the pre-trial investigation that he had prepared documents to be attached to applications for a tax refund ... in accordance with [the applicant's] and [the managing director's] instructions. According to [H.A.], [the applicant] was in practice responsible for the operation of [company X].
>
> Witness [V.M.] stated in the Court of Appeal that he had dealt with the invoice ... together with [the managing director] and [the applicant].
>
> In the light of the statements given by [the managing director] and [H.A.] during the pre-trial investigation, and of the witness statement of [V.M.], which supports those statements, it has been established that [the applicant] participated in the planning of the offences referred to in the indictment and in the preparation of the documents needed for the commission of the offences.
>
> *Assessment of [the applicant's] conduct under criminal law*
>
> ... [the applicant] did not have such a position in [company X] as would have made it possible for him to commit, as a principal offender, the offences with which he was charged. When participating in the planning of the offences and in the preparation of the documents needed for the commission of the offences, however, he contributed to producing false information to the County Tax Office and [on count 9] to entering false data in the accounts. Thus he intentionally furthered the criminal acts of which [the managing director] has been found guilty."

C. The Supreme Court

15. The applicant sought leave to appeal from the Supreme Court (*korkein oikeus*, *högsta domstolen*), arguing that he had been convicted of offences differing from those with which he had been charged. He submitted that the public prosecutor had not even claimed that he had been involved in the planning of the offences and compiling the documents. During the proceedings the applicant had not been informed of the nature and cause of these accusations and was thus not given any opportunity to defend himself against them. Furthermore, the assessment of the evidence was unfair since the Court of Appeal had found the evidence sufficient even though the oral statements were contradictory.

16. On 18 June 1998 the Supreme Court refused leave to appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Aiding and abetting

17. Chapter 5, section 3(1) of the Penal Code, in force at the relevant time, provided that a person who, during or before the commission of an offence by someone else, intentionally furthers the act through advice, action or exhortation, shall be convicted of aiding and abetting the principal offence. The sentence imposed on the person who aids and abets shall be reduced to three quarters of the maximum penalty prescribed for the principal offence.

B. Procedure

18. The present case was commenced and therefore also concluded under the then provisions on criminal procedure in the Code of Judicial Procedure (*oikeudenkäymiskaari, rättegångsbalken*). The rule according to which an accused might not be convicted of an offence other than the one with which he had been charged was not included in the legislation until the coming into force on 1 October 1997 of the Criminal Procedure Act (*laki oikeudenkäynnistä rikosasioissa, lag om rättegång i brottmål*; Act no. 689/1997). The rule was however established through case-law and it was codified upon the enactment of the new Act.

19. Chapter 11, section 3, of the Criminal Procedure Act provides that the court may only pass a sentence for an act for which a punishment has been requested. The court is not bound by the heading or the reference to the applicable provision in the indictment. The court is however bound by the conduct described in the indictment. The prosecutor is under an obligation to define the alleged offence and the accused must be provided with an opportunity to defend himself or herself within the limits of the indictment.

20. According to the Government, the court may *e.g.* convict an accused of aiding and abetting a tax fraud even if the prosecutor has charged him or her with the principal offence, as long as the conduct described in the indictment is not altered. This is based on the principle of *jura novit curia*, *i.e.* on the principle that the court itself is responsible for the legal assessment of the criminal act in question without being bound by the views of the prosecutor or of the accused. This was contested by the applicant.

C. Leave to appeal to the Supreme Court

21. Chapter 30, section 3 (Act no. 104/1979), of the Code of Judicial Procedure reads in relevant part:

"Leave to appeal may be granted only if it is important to bring the case before the Supreme Court for a decision with regard to the application of the law in other, similar cases or because of the uniformity of legal practice; if there is a special reason for this because of a procedural or other error that has been made in the case on the basis of which the judgment is to be reversed or annulled; or if there is another important reason for granting leave to appeal."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

22. The applicant complained, under Article 6 §§ 1 and 3 (a) and (b) of the Convention, that he had not received a fair trial since he had been convicted of offences different from those with which he had been charged, in that the Court of Appeal found him guilty of aiding and abetting the offences he had been charged with as principal offender. Furthermore, the Court of Appeal found that he had been involved in planning the offences and compiling the relevant documents even though he had not been charged with that. Thus, he had not been informed of the material facts on which the accusations were based or their legal classification, and he had not had an opportunity to defend himself against those accusations.

The relevant provision reads:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ...

...

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

..."

A. The parties' submissions

23. The applicant argued that the Court of Appeal was bound by the description of the offences in the indictment which did not allege that he had committed any offences characterised as aiding and abetting. There was

no reference to any furtherance of any offences. He had been charged with the principal offences and aiding and abetting was a different offence.

24. While admitting the existence of the above statement in his writ of appeal to the Court of Appeal (paragraph 11 above), the applicant argued that it had been removed from its context and was to be seen as part of his defence. At no time had he been charged with aiding and abetting the offences.

25. The applicant contested as irrelevant the Government's view that he had been convicted only of aiding and abetting although he had been charged with more serious offences. The point was that he had never been afforded an opportunity to defend himself against that allegation or submit legal arguments. Indeed, the Supreme Court had refused leave to appeal.

26. The Government submitted that, although the conduct described in the judgment and in the indictment was not entirely identical, the criminal offences of which the applicant was found guilty were effectively the same as those described in the indictment. According to the indictment, the applicant had, together with the managing director, produced an application for a tax refund, based on a false invoice and had thus attempted to evade taxes. The Court of Appeal found that the applicant had participated in the planning of the offences and in the preparation of the documents needed for the commission of the offences and had thereby contributed to producing false information to the County Tax Office. The judgment concerned the same events as the charges insofar as the time and place and other circumstances relating to the commission of the offences were concerned. It was also relevant that the indictment alleged that the applicant had run the company although he lacked an official status in its management. In considering that the applicant's conduct only amounted to aiding and abetting the Court of Appeal made a different assessment of the legal relevance of his position.

27. The Government pointed out that in his writ of appeal the applicant himself had submitted that his conduct could be described as aiding and abetting and had addressed extensively his *de facto* position in the company. He had also defended himself against the allegation that he had given instructions to one of the co-accused in respect of the preparation of documents. Thus, the Court of Appeal's reclassification of the offences could not have come as a surprise to him. He had an opportunity to defend himself already in the District Court in respect of the possibility that his conduct as described in the indictment could be characterised as aiding and abetting. At the very least, he had reason to do so at the Court of Appeal hearing.

28. The Government pointed out that the offences of which the applicant had been convicted were less serious than the ones with which he had been charged and that the Court of Appeal had reduced his sentence. Had the Court of Appeal exceeded the limits within which the court must stay when

classifying an offence or failed to hear the applicant, the Supreme Court would have granted him leave to appeal.

B. The Court's assessment

29. The Court reiterates that when determining whether Article 6 of the Convention has been complied with, it must take into account the proceedings as a whole. Furthermore, the guarantees in Article 6 § 3 are specific aspects of the right to a fair trial set forth in general in Article 6 § 1 (see*, inter alia*, *Foucher v. France*, judgment of 18 March 1997, *Reports of Judgments and Decisions* 1997-II, p. 464, § 30). Therefore, the Court finds that the applicant's complaints should be examined under the two provisions taken together.

30. The Court observes that the provisions of paragraph 3 (a) of Article 6 point to the need for special attention to be paid to the notification of the "accusation" to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on notice of the factual and legal basis of the charges against him (see *Kamasinski v. Austria*, judgment of 19 December 1989, Series A no. 168, pp. 36-37, § 79). Article 6 § 3 (a) of the Convention affords the defendant the right to be informed not only of the cause of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts. In criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair. Furthermore, the Court has ruled that sub-paragraphs (a) and (b) of Article 6 § 3 are connected and that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence (see *Pélissier and Sassi v. France* [GC], no. 25444/94, §§ 51-52 and 54, ECHR 1999-II).

31. In the present case, the applicant was charged with a series of tax offences as a principal offender. The District Court convicted him as charged. The Court of Appeal, having found that his position in the company had not been such as would have made it possible for him to commit the offences in issue as a principal offender, convicted him of aiding and abetting those offences. It is not the Court's task to give a ruling as to whether Finnish law, at the time of the proceedings, allowed the Court of Appeal to convict the applicant of aiding and abetting although he had been charged as the principal offender without drawing his attention to that possibility. Given the practice at the relevant time, it is obvious that the impugned interpretation and procedure applied were possible. It could thus be regarded that, at the material time, it was for a defendant in general to

take into account the possibility that the court could return a verdict of aiding and abetting.

32. The Court reiterates that, as noted above, the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence. Regarding this question in the present case, there was no modification of the timing of the commission of the offences. However, the description of the factual situation set out in the indictment concerning the tax frauds changed during the proceedings in that the applicant had been charged with submitting VAT refund applications, relying on fabricated invoices (allegedly drawn up by H.A., a co-defendant), whereas he had been convicted also of preparation of the documents needed for the commission of the offences (compare and contrast paragraphs 8 and 14 above). This new element did not constitute an element intrinsic to the initial accusation (compare and contrast *De Salvador Torres v. Spain*, judgment of 24 October 1996, *Reports* 1996-V, p. 1587, § 33). The Court finds that the applicant's chances to defend himself in respect of the new element of the charges were impaired. As to the Government's argument that the applicant had himself anticipated the possibility that he could be convicted of aiding and abetting (see paragraphs 11 and 27 above), the Court notes that it still remains the case that he was denied the possibility to argue his defence in adversarial proceedings insofar as the element introduced by the Court of Appeal, *i.e.* the preparation of the documents, was concerned.

33. The Court also takes note of the Government's argument that had the Court of Appeal exceeded the limits within which the court must stay when classifying an offence or failed to hear the applicant, the Supreme Court would have granted him leave to appeal. It is true that in previous cases the Court, when assessing the fairness of criminal proceedings as a whole, accepted that a re-qualification of an offence did not impair the rights of the defence when the accused, in review proceedings, had sufficient opportunity to defend him or herself (see *Dallos v. Hungary*, no. 29082/95, § 47-53, ECHR 2001-II and *Sipavičius v. Lithuania*, no. 49093/99, § 30, 21 February 2002). However, this was only the case if in the review or appeal proceedings the accused was entitled to contest all relevant legal and factual aspects of the conviction before the appeal court (see *Dallos*, cited above, § 50; *Sipavičius*, cited above, § 31 and *Balette v. Belgium* (dec.), no. 48193/99, 24 June 2004). In the present case, the Supreme Court only considered whether or not to grant leave to appeal. In the event, it refused leave to appeal. In such circumstances, the applicant did not have sufficient opportunity to defend himself before the highest court.

34. In the light of the above, the Court concludes that the applicant's right to be informed in detail of the nature and cause of the accusations against him and his right to have adequate time and facilities for the preparation of his defence were infringed.

Accordingly, there has been a violation of Article 6 § 1 taken together with Article 6 § 3 (a) and (b) in the present case.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

35. 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. Damage

36. Under the head of non-pecuniary damage the applicant claimed 38,000 euros (EUR) for suffering and distress caused by the fact that he had been convicted of offences other than as charged.

37. The Government considered the claim excessive as to *quantum*. Any award should not exceed EUR 1,000.

38. The Court accepts that the lack of the guarantees of Article 6 has caused the applicant non-pecuniary damage, which cannot be made good by the mere finding of a violation. The Court, making its assessment on an equitable basis, awards the applicant EUR 1,000 in respect of non-pecuniary damage.

B. Costs and expenses

39. The applicant claimed a total of EUR 3,732.36 (inclusive of value added tax) for costs in the domestic proceedings and in the proceedings before the Court.

40. The Government contested the claim regarding the domestic proceedings. As to the proceedings before the Court, they considered that any award should not exceed EUR 2,200 (net of value added tax).

41. As regards the proceedings before the Supreme Court, the Court observes that the applicant, besides the complaint in respect of which a breach of the Convention has been found, had raised several other issues which related to complaints not submitted to the Court or which have been declared inadmissible. Therefore, these costs were only in part incurred in an attempt to prevent or redress the violation found and, accordingly, only a part thereof can be reimbursed. In respect of the costs incurred in the Strasbourg proceedings, the Court observes that the applicant was only partly successful with his application. It considers it reasonable to award him a total of EUR 2,500 (inclusive of value added tax) under this head.

C. Default interest

42. 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 6 § 1 taken together with Article 6 § 3 (a) and (b) 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:
      (i) EUR 1,000 (one thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 2,500 (two thousand five hundred euros) in respect of costs and expenses; and
      (iii) any tax that may be chargeable on the above amounts.
   (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 claims for just satisfaction.

Done in English, and notified in writing on 24 April 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Nicolas BRATZA
President