CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

**CASE OF JUSSI UOTI v. FINLAND**

*(Application no. 20388/02)*

JUDGMENT

STRASBOURG

23 October 2007

**FINAL**

*23/01/2008*

*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 Jussi Uoti v. Finland,**

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

Sir Nicolas BRATZA, *President*,
Mr G. BONELLO,
Mr K. TRAJA,
Mr L. GARLICKI,
Ms L. MIJOVIĆ,
Mr J. ŠIKUTA,
Mrs P. HIRVELÄ, *judges*,
and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 2 October 2007,

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

# PROCEDURE

1. The case originated in an application (no. 20388/02) against the Republic of Finland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Finnish national, Mr Jussi Uoti ("the applicant"), on 17 May 2002.

2. The applicant, who had been granted legal aid, was represented by Mr J. Hakanen, a lawyer practising in Turku. The Finnish Government ("the Government") were represented by their Agent, Mr Arto Kosonen of the Ministry for Foreign Affairs.

3. The applicant alleged a violation of the rights of the defence in respect of witnesses and the presumption of innocence.

4. By a decision of 7 November 2006, the Court declared the remainder of the application admissible.

5. The applicant and the Government each filed further written observations (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1964 and lives in Turku.

7. At the end of 1995 the applicant was questioned by the police about suspected dishonesty as a debtor. Subsequently, charges were brought

against him. The trial before the Helsinki District Court (*käräjäoikeus, tingsrätten*) involved 47 days of hearings. The court received testimony from the defendants, the complainants and over 40 witnesses. On 29 May and 10 June 1998 the prosecution presented documentary evidence, including some documents drawn up by a Mr G., who was working off-shore for a bank and who, in answer to a letter rogatory sent by the National Bureau of Investigation (*keskusrikospoliisi, centralkriminalpolisen*) to the Guernsey authorities, had produced documents (including "notes for archives" pertaining to meetings on 3 and 22 June 1993 and charts) related to a plan to transfer funds.

8. On 29 January 1999 the applicant was convicted of four counts of dishonesty as a debtor and four counts of aggravated tax fraud. He was sentenced to four years and two months' imprisonment. The District Court judgment ran to 163 pages. In short and in so far as relevant, the court found on the basis of, *inter alia*, the testimonies of J.S., S., the applicant and his brother and the documentary material, including the documents obtained from the Guernsey authorities, that the applicant and his brother had discussed the planned transfers of assets with G. It also found that the documentary evidence pertaining to the off-shore companies and the transfer of moneys proved that the assets acquired from the sale of the "bank group I." had been transferred via companies specified in G.'s charts to trusts, the beneficiaries of which the brothers had appointed. As both brothers had been present during the negotiations with G. on 3 June 1993 and the plan to transfer funds had been proved to have materialised, the court found that they had acted together in, *inter alia*, removing the funds from Finland.

9. The applicant appealed to the Helsinki Court of Appeal (*hovioikeus, hovrätten*). In his grounds of appeal he submitted, *inter alia*, that the documents drawn up by G., resident in Guernsey, who had not been questioned during the pre-trial investigations or heard as a witness before the District Court, should not have been taken into account as he had not had a possibility to respond to that important evidence.

10. In its decisions of 23 and 24 October 2000 the Court of Appeal refused, as being unnecessary, the request of the applicant's co-accused brother that G. be heard as a witness. It stated that it would provide further reasons in its judgment.

11. On 31 October 2000 the Court of Appeal held a preparatory hearing. The applicant's brother unsuccessfully renewed the request for G. to be heard as a witness.

12. The first hearing took place on 8 November 2000. The parties and altogether 22 witnesses gave oral evidence, of whom three were fresh witnesses. The hearing of 27 other proposed witnesses had been rejected.

13. On 30 March 2001 the Court of Appeal convicted the applicant of six counts of dishonesty as a debtor, four counts of aggravated tax fraud and

five counts of aiding and abetting accounting offences. It sentenced him to five years and eight months' imprisonment and ordered his immediate detention. He also lost his military rank.

14. As regarded the reasons for not hearing G. as a witness, the court held, *inter alia*, that:

> "The Court of Appeal notes that no request to hear G. as a witness was made in the District Court although the documents relating to the plan to transfer moneys from the "bank group I.", had been presented at the hearings of 29 May and 10 June 1998 ... Also [the applicant's brother, who was a co-defendant] relied, as written evidence, on [some] documents drawn up by G. without requesting that G. be heard as a witness ...
>
> The documents allegedly drawn up by G. have not been drawn up for the purposes of the pending proceedings. The import of the documents can be assessed without hearing him as a witness. The question whether it is necessary to hear him as a witness depends solely on whether such a hearing could produce relevant new information. In assessing this question the Court of Appeal takes into account the fact that in the District Court G. was not proposed as a witness and the fact that the parties have been provided with an opportunity to put forward all their opinions concerning the content and reliability of the documents during the trial.
>
> The Court of Appeal notes that the documents in question have been requested by the public prosecutor and the National Bureau of Investigation by sending letters rogatory to the Guernsey authorities. The Court of Appeal does not have any reason to suspect that the documents were drawn up by someone other than G. ...
>
> The documents clearly indicate that there has been a deliberate conspiracy to transfer the assets acquired from the sale of the "bank group I." to companies established abroad and to invest the moneys. The transfer of assets has been conducted, as later explained in detail in chapter 6.2.2, by order of ... [the applicant and his co-accused brother]. The question whether G. himself thought that he was involved only in legal investment activities is therefore not relevant.
>
> The documents drawn up by G. are however relevant in assessing ... [the applicant's and his co-accused brother's] possible guilt of the offence of dishonesty as a debtor ... As becomes manifest in the reasons given in considering the charges, the Court of Appeal has not however decided the matter basing itself entirely on the documents in question. The court has instead assessed the value of the documents in an overall context, [in Finnish *kokonaisyhteydessä*] in which G. cannot have anything relevant to say.
>
> The Court of Appeal has heard witness S., as requested ... about the events relating to the documents. The testimony of S., which in [the applicant's brother's] opinion proves the content of the discussions with G., has thus been taken into account ... The Court of Appeal holds that the requirements of a fair trial do not require that G. be heard as a witness either."

15. The Court of Appeal judgment ran to 325 pages. In so far as relevant, the court principally endorsed the District Court's evaluation of the evidence.

16. The applicant sought leave to appeal. On 5 December 2001 the Supreme Court (*korkein oikeus, högsta domstolen*) refused leave to appeal.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

17. If an item of evidence that a party wishes to present pertains to a fact that is not material to the case or has already been proved, or if the fact can be proved in another manner with considerably less inconvenience or cost, the court may refuse to admit it (Chapter 17, Article 7 (as amended by Act no. 571/1948) of the Code of Judicial Procedure).

18. Chapter 17, Article 11 of the Code of Judicial Procedure, as in force at the relevant time, provided that a written statement drawn up for a pending or imminent trial, could not be used as evidence, unless specifically provided for by law or unless the court so decided for particular reasons.

19. Chapter 26, Article 7 of the Code of Judicial Procedure (as amended by Act no. 661/1978), as in force at the relevant time, provided that the Court of Appeal was to hold an oral hearing when necessary. Chapter 26, Article 8 (as amended by Act no. 661/1978), as in force at the relevant time, provided that the Court of Appeal could not change a lower court's conviction based on the evaluation of evidence without holding an oral hearing, unless the case concerned an offence punishable by fines only or unless an oral hearing was manifestly unnecessary, in particular taking into account the defendant's need for legal protection.

20. The provisions concerning the Court of Appeal's duty to hold an oral hearing were amended (Act no. 165/1998) with effect from 1 May 1998. The new provisions did not apply to criminal proceedings which had commenced prior to the entry into force of the new Code on Criminal Procedure (*laki oikeudenkäynnistä rikosasioissa, lagen om rättegång i brottmål*; Act no. 689/1997; in force from 1 October 1997). The aforementioned former provisions applied therefore to the instant case. The new Chapter 26, Article 15 (Act no. 165/1998) provides that the Court of Appeal is to hold a hearing, regardless of whether one has been requested, if the decision in the matter turns on the credibility of the testimony received in the District Court or on new testimony to be received in the Court of Appeal. In this event, the evidence admitted in the District Court proceedings is to be readmitted in the principal hearing, unless there is an impediment to this.

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3(d) OF THE CONVENTION

21. The applicant complained about a violation of the rights of the defence in respect of witnesses. Article 6 §§ 1 and 3(d) read in relevant part:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> ..."

### A. The parties' submissions

22. The applicant argued that the refusal of the Court of Appeal to hear G. as a witness had deprived him of his right to obtain the attendance and examination of witnesses on his behalf. G. had been of crucial importance to his case as the documents allegedly drawn up by him had been decisive in leading the Court of Appeal to conclude that there had been an intentional plan or conspiracy to commit the offences. G. had managed all the companies which had allegedly transferred assets abroad illegally and could have provided crucial information. G. had not even been heard in the pre-trial investigations, which had made it impossible to verify the content of the documents allegedly drawn up by him.

23. The applicant pointed out that the court had based itself on the documents allegedly drawn up by G. although he had not been heard as a witness at any stage of the proceedings and despite the explicit request of the applicant's co-defendants that G. be heard as a witness in the Court of Appeal. What was at issue was not only the rights of the defence to obtain the attendance of witnesses against him in order to put questions to and examine the reliability of that person, but also the fact that the prosecution had presented and the court had admitted as evidence against the applicant documents allegedly drawn up by a person who had not been heard at any stage of the proceedings, even though the origin of the documents and their

contents were disputed. It had been for the prosecution to call G. as a witness since it had relied on the documents in question. It had certainly not been the responsibility of the defendant to call a witness against himself. No attempt had been made by the prosecution to call G. as a witness. The documentary evidence in question should therefore have been declared inadmissible by the courts.

24. The applicant maintained that the Court of Appeal's refusal to hear G. as a witness prior to the principal hearing had also violated the presumption of innocence and had shown that the court had prejudged his guilt. He had been given to understand that the court was not going to admit the documents in question to the case file. However, the Court of Appeal's judgment had taken him by surprise in that the court had based its judgment on those very documents.

25. Lastly, the applicant maintained that the documentary evidence in question had *per se* been decisive for the outcome of the case.

26. The Government contested the allegations. The applicant had never requested that G. be heard as a witness whereas two other defendants had done so. They had not however requested that G. be heard during the pre-trial investigation or in the District Court. The fact that the applicant and his brother had controlled some companies had been unknown to the prosecution until documents had been obtained from the Guernsey authorities by a letter rogatory. The District Court found that G. had a business relationship with the applicant and his brother, and that it was in this framework that the documents in question had been drawn up containing a plan of transferring the brothers' assets to a number of destinations. In his appeal against the lower court's judgment the applicant had criticised the court for not having heard G. as a witness, but he had not however identified him as his witness. He had not denied the documents in question having been drawn up by G., but he had requested that S. be heard as a witness regarding the contents of the negotiations with G., a request which was granted by the appellate court. In his appeal the applicant stated, *inter alia*, the following:

> "The District Court has, therefore, considered proven that [the applicant] and [his brother] had made a plan together of 'emptying' their companies and that they had also carried it out by common agreement. The conclusion drawn that they had done this by common agreement has been based on documentary evidence obtained from abroad by means of a letter rogatory, in particular a memorandum drawn up by G. 'New business - [the applicant and his brother]'. What does, then, the assessment of the documents in the judgment of the District Court actually prove? It proves that a company represented by [the applicant] and [his brother] had received considerable profits from selling the stock ... and that [the applicant] and [his brother] were considering investing the assets in countries with more lenient taxation than in Finland. For carrying this out, G.'s memorandum and the correspondence between him and [the applicant's brother] contains plans for the practical measures for carrying out the transaction. Some of these plans have actually been carried out in practice, in some respects along the same lines as had been planned in the documents mentioned.

> ... What was really discussed with G., namely the investing of net assets, was testified by S., but the District Court apparently did not consider his testimony credible, whereas it did consider the memorandum G. had drawn up for his own purposes fully credible in all of its aspects. The evidence has been assessed erroneously. On this count, [the applicant] identifies S. and himself as his witnesses in the Court of Appeal."

27. The Court of Appeal extensively reasoned its decision not to hear G. as a witness, finding that the documents were normal written evidence, which could be assessed on their own without obtaining oral evidence from their author. The court thus assessed, within its discretionary power, the importance of the documents for the case and whether it was necessary or advisable to hear G. as a witness. The parties were able to comment on the documents in question both with regard to their contents and their credibility. G.'s testimony would not have produced any new decisive evidence since the question whether he believed that he was involved in legal investment activities did not have any particular bearing on the outcome of the case.

28. The Government pointed out that the reasons provided in the Court of Appeal's judgment described, *inter alia*, the oral evidence concerning the contacts between the applicant, his co-accused brother and G. It also set out how the court assessed the applicant's activity when it deemed him guilty of the offences. It closely scrutinised the transactions between the different companies controlled by the applicant and his brother. The documents drawn up by G. had clarified certain matters as they portrayed the transactions between different companies controlled by the brothers but they had not been decisive. The court had compared the documents with the transactions and had found them to be coherent. It had found it significant that it had been proved that the transfer of the assets had been conducted according to the plan in the documents and that the assets had ended up under the control of the brothers, so that these activities had constituted the crimes they had been charged with. The outcome of the case would not have been any different if G., too, had been called to testify on the same matters (i.e. on the contents of the negotiations with G.) on which S. had been heard as a witness.

### B. The Court's assessment

29. The basis of the applicant's complaint was the use as evidence of documents drawn up by a business partner without hearing his testimony. They had been requested by the public prosecutor and the National Bureau of Investigation by sending letters rogatory to the Guernsey authorities. On the request of the prosecution they were admitted to the case file. G. was not heard himself before the courts, although the applicant's co-accused brother requested that he be heard before the Court of Appeal.

30. As the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set forth in paragraph 1, the Court will consider the complaint under the two provisions taken together (see, among other authorities, *Asch v. Austria*, judgment of 26 April 1991, Series A no. 203, § 25). Even though G. had not testified at a hearing he should, for the purposes of Article 6 § 3 (d), be regarded as a witness – a term to be given an autonomous interpretation – because documents drawn up by him, as referred to by the prosecution, were in fact before the court, which took account of them.

31. The Court recalls that the admissibility of evidence is primarily a matter for regulation by national law and, as a rule, it is for the national courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair.

32. It is a fundamental aspect of the right to a fair trial that criminal proceedings should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and evidence adduced by the other party (see *Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, § 60, ECHR 2000-II).

33. All the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. As a rule, a conviction should not be based on the testimony of a witness whom the accused has not had an opportunity to challenge and question. However, Article 6 § 3 (d) does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the national courts to decide whether it is necessary or advisable to hear a particular witness.

34. Applying these principles to the present case, the Court first notes that the defence did not propose that G., who had produced written evidence relied on by the prosecution, be heard in the District Court. Nor was he heard before the Court of Appeal.

35. The possible disadvantages thereby caused to the applicant were, however, alleviated by the fact that he had the opportunity to comment on and challenge, both in writing and in a hearing at two court levels, the documentary evidence in question with a view to influencing the courts' decisions. The request of the applicant's co-accused brother to hear G.'s testimony was rejected for the reasons set out in paragraph 14 above. The courts based the applicant's conviction not only on the documents drawn up by G. but also on other evidence presented in the case, such as the documentary evidence concerning the money transactions and S.'s testimony as regards the content of the discussions with G. (see paragraphs 8 and 15 above).

36. In these circumstances the Court cannot conclude that the adversarial nature of the proceedings was not respected or that the national courts exceeded the margin of appreciation they have in the admission and assessment of evidence.

37. In sum, any limitations which may have been imposed on the rights of the defence were not such as to deprive the applicant of a fair trial. It follows that there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention, examined together.

## II. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

38. The applicant also complained that the refusal to hear G. as a witness had violated the presumption of innocence.

Article 6 § 2 reads:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

39. The Government contested the allegation, arguing that prior to the main hearing the Court of Appeal had, on the occasion of assessing the necessity of evidence offered, to establish which matters were material to the outcome of the case. This naturally did not imply that the Court of Appeal would have violated the presumption of innocence by deciding not to hear G.'s testimony.

40. The Court agrees with the Government. The fact that the Court of Appeal refused to hear G. as a witness cannot be construed as indicating that the court had at that stage prejudged the question of the applicant's guilt. The Court of Appeal's decision was taken in the exercise of its discretionary power to admit or disallow evidence including witness testimony in accordance with its own perception of relevancy. This conclusion is not affected by the fact that the Court of Appeal only provided detailed reasons for its refusal in its final judgment (see paragraph 10 above).

41. It follows that there has been no violation of Article 6 § 2 of the Convention.

## FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention taken together;

2. *Holds* that there has been no violation of Article 6 § 2 of the Convention.

Done in English, and notified in writing on 23 October 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Nicolas BRATZA
President