CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 45830/99
by Juha NUUTINEN
against Finland

The European Court of Human Rights (Fourth Section), sitting on 17 January 2006 as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr G. BONELLO,
Mr M. PELLONPÄÄ,
Mr K. TRAJA,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO,
Ms L. MIJOVIĆ, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 2 October 1998,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Juha Nuutinen, is a Finnish national who was born in 1950 and lives in Turku. He is represented before the Court by Mr Leo Lagerstam, a lawyer practising in Turku. The respondent Government are represented by their Agent, Mr Arto Kosonen, Director in the Ministry for Foreign Affairs.

A. The circumstances of the case

The facts of the case, as submitted by the parties and as they appear from the documents, may be summarised as follows.

District Court

On 7 September 1995 the public prosecutor charged the applicant and the managing director of company X before the District Court (*käräjäoikeus*, *tingsrätten*) of Turku with two counts of aggravated tax fraud, two counts of tax fraud and an accounting offence as they had allegedly produced false invoices to the County Tax Office (*lääninverovirasto*, *länsskatteverket*) of Turku. Furthermore they were accused of having entered false data into 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 it.

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"

The applicant pleaded not guilty, arguing that he did not have such a status in company X that he could 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.

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 into 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.

Court of Appeal

The applicant appealed to the Turku Court of Appeal (*hovioikeus*, *hovrätten*), requesting dismissal of the charges 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 into the accounts. Furthermore, the invoices were not 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, found guilty of some offence in the first place. ..."

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 touch upon a reclassification of the offences as aiding and abetting.

On 13 March 1997 the Court of Appeal held a hearing in 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.

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.] on what details were to be indicated 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 to entering false data into the accounts. Thus he intentionally furthered the criminal acts of which [the managing director] has been found guilty."

Supreme Court

The applicant sought leave to appeal from the Supreme Court (*korkein oikeus*, *hägsta 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 thus not given any opportunity to defend himself against them. Furthermore, the assessment of the evidence was unfair since

the Court of Appeal found the evidence sufficient even though the oral statements were contradictory.

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

B. Relevant domestic law and practice

Aiding and abetting

Chapter 5, section 3(1) of the Penal Code, as 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.

Procedure

The present case was commenced and therefore also brought to an end under the then provisions on criminal procedure in the Code of Judicial Procedure (*oikeudenkäymiskaari, rättegångsbalken*). The rule according to which an accused may not be convicted of an offence other than the one with which he has 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*; 689/1997). The rule was however established through case-law and it was codified upon the enactment of the new Act.

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.

According to the Government, the court may *e.g.* convict an accused for 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.

Leave to appeal to the Supreme Court

Chapter 30, section 3 (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."

COMPLAINTS

1. The applicant complained, under Article 6 §§ 1 and 3 (a - b) of the Convention, that he did not receive a fair trial since he was convicted of offences different from those he had been charged with in that the Court of Appeal found him guilty of aiding and abetting the offences he had been charged with as an 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 was not informed of the material facts on which the accusations were based or their legal classification, and he did not have an opportunity to defend himself against those accusations.

2. He also complained, under Article 6 § 2, that he was not presumed innocent by the Court of Appeal as it took into account the contradictory statements of his co-accused and found the evidence sufficient to convict him.

THE LAW

Article 6 §§ 1 and 3 (a)-(b) of the Convention

The applicant alleged a breach of Article 6 §§ 1 and 3 (a)-(b) of the Convention. Article 6 reads in relevant part:

"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;

..."

The parties' submissions

The Government considered 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 offences as those described in the indictment. 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.

The Government pointed out that in his writ of appeal the applicant himself considered that his conduct could be described as aiding and abetting and he addressed extensively his *de facto* position in the company. He 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. In the light of the above, the Government argued that the applicant 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 in the Court of Appeal hearing.

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 reduced his sentence. Lastly, it was the Supreme Court that bore the responsibility for the final definition of the limits within which the court must stay when classifying an offence. Had the Court of Appeal exceeded those limits or failed to hear the applicant, the Supreme Court would have granted him leave to appeal.

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. He had been charged with the principal offences.

While admitting the existence of the above statement in his writ of appeal to the Court of Appeal, 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 in the offences.

The applicant contested as irrelevant the Government's view that he had been convicted of only 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.

The Court's assessment

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

Article 6 § 2 of the Convention

The applicant also alleged a violation of Article 6 § 2 of the Convention, which reads:

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

The Court considers that the applicant's complaint is, essentially, that he was wrongfully convicted.

The Court reiterates that, in accordance with Article 19 of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention (see *Schenk v. Switzerland*, judgment of 12 July 1988, Series A no. 140, p. 25, § 45). As a general rule, it is for the domestic courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings in their entirety were fair (see *Edwards v. the United Kingdom*, judgment of 16 December 1992, Series A no. 247-B, pp. 34-35, § 34). In the present case, the examination of the application does not disclose any indication that the proceedings in the applicant's case were unfair in this respect.

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

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaint concerning the rights of the defence in respect of information about the charge and preparation of the defence;

Declares the remainder of the application inadmissible.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President