

Varia

The Finish Supreme Court on “ne bis in idem“

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On 16th June, 2009, the European Court of Human Rights (ECtHR) delivered its judgment in the case of *Ruotsalainen v. Finland*.¹ The case concerned a Finnish national (Mr. Ruotsalainen) who in accordance with the Finnish Penal Code was fined by the police for petty tax fraud through a summary penal order. The reason for this was that Mr. Ruotsalainen had used a more leniently taxed fuel than diesel oil in his vehicle without having paid due additional tax. After the imposition of the fine had become final, the Vehicle Administration issued Mr. Ruotsalainen with an administrative fuel fee debit (similar to a tax) on the ground that his vehicle had been run on more leniently taxed fuel than diesel oil. The fuel fee was intended to correspond to the fuel tax which would have accrued if diesel oil had been used as fuel in the vehicle. However, according to the provisions in the Fuel Fee Act in force at the time, the fee was treble the normal amount because no prior notification on the use of more leniently taxed fuel had been given to the Vehicle Administration or Customs. The reason for this provision was to prevent the use of fuel other than fuel intended for traffic and to ensure the accrual of tax revenue. Mr. Ruotsalainen complained under Article 4 of Protocol No. 7 (*ne bis in idem*) to the European Convention of Human Rights (Article 4P7 ECHR) that he had been punished twice for the same offence.

The ECtHR noted that the aim of Article 4P7 ECHR is to prohibit the repetition of criminal proceedings that have concluded in a final decision. In the case under consideration, two measures were imposed on Mr. Ruotsalainen in two separate and consecutive sets of proceedings. To assess whether the measures were both criminal in nature, the ECtHR stated that the notion of “penal procedure” in the wording of Article 4P7 ECHR must be interpreted in the light of the general principles concerning the corresponding words “criminal charge” and “penalty” in Articles 6 and 7 of the ECHR respectively. When determining the criminal nature of the measures, consideration is to be given to the three so-called “Engel criteria”,² namely the legal classification of the offence under national law, the very nature of the offence and the degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative and not necessarily cumulative. As the fine and the summary penal order were “criminal” according to the

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¹ *Ruotsalainen v. Finland* 16 June, 2001 (Appl. No. 13079/03).

² See *Engel and others v. The Netherlands* 8 June, 1976 (Appl. Nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72)

Finnish legal system, they were also clearly “criminal” for the purposes of Article 4P7 ECHR. The fuel fee debit was, however, not classified as criminal but as part of the fiscal regime. The ECtHR firstly observed that it had already previously found³ that administrative tax surcharges in failing to comply with the Finnish Value-Added Tax Act, because of their criminal nature, were seen to fall within the scope of application of Article 6 ECHR. Similarly to general legal provisions applying to taxpayers, the Fuel Fee Act was (potentially) directed towards all citizens rather than towards a group possessing a special status. The ECtHR further stated that the fuel fee imposed may very well have corresponded to the damage caused, namely loss of revenue. The fuel fee collected was, however, trebled. In the ECtHR’s view, this must be seen as a punishment to deter re-offending, recognized as a characteristic feature of criminal penalties. The ECtHR therefore concluded that the fuel fee debit was imposed by a rule whose purpose was not only compensatory but also deterrent and punitive, which established the criminal nature of the offence.

As to the question of whether or not the measures concerned the same offence, the ECtHR stated that the fine for petty tax fraud was primarily issued on the ground that Mr. Ruotsalainen had used a more leniently taxed fuel than diesel oil in the tank of his vehicle without having paid due additional tax. The definition of the offences of “tax fraud” and “petty tax fraud” under the Finnish Penal Code referred to various types of prohibited conduct. Each of these elements was in itself sufficient for a finding of guilt. Admittedly, the sanction provided for in the Penal Code always necessitated intent or at least negligence, and petty tax fraud was always intentional and thus essentially involved a subjective element. The police must be considered to have based the summary penal order on the fact that the applicant had “otherwise acted fraudulently” and thereby caused or attempted to cause a tax not to be assessed. It was also considered essential that the applicant had carried out the refueling himself. In the ensuing administrative proceedings, the applicant was issued with a fuel fee debit on the ground that his vehicle had been run on more leniently taxed fuel than diesel oil. The fuel fee debit was trebled on the ground that the applicant had not given prior notice of this fact. The fuel fee could be imposed irrespective of the degree of intent on the basis of the mere objective fact that the fuel system of a vehicle contained the wrong fuel. Although Mr. Ruotsalainen had admitted to having used the wrong fuel, the imposition of the fuel fee debit did not require intent on the part of the user of the wrong fuel.

Earlier the same year, the ECtHR had delivered its judgment in the case of *Zolotukhin v. Russia*.⁴ The judgment was groundbreaking in that the ECtHR expressly denounced its earlier case law on “the same offence” contained in Article 4P7 ECHR and opted for a broad, objective approach to the interpretation of the element of *idem* in line with the case law of the European Court of Justice on Article 54 of the Convention on the Implementation of the Schengen Agreement. It held that Article 4P7 ECHR must be understood as prohibiting the prosecution

³ See *Jussila v. Finland* 23 November, 2006 (Appl. No. 73053/01).

⁴ *Zolotukhin v. Russia* 10 February, 2009 (Appl. No. 1493/03).

or trial of a second “offence” insofar as it arises from “identical facts or facts which are substantially the same”. Following this approach, the ECtHR held that the facts that gave rise to the summary penal order against the Mr. Ruotsalainen related to the fact that he had used more leniently taxed fuel than diesel oil in his vehicle without having paid additional tax for the use. The fuel fee debit was imposed because Mr. Ruotsalainen’s vehicle had been run on more leniently taxed fuel than diesel oil and it was then trebled because he had not given prior notice of this fact. This latter factor was above all considered to have amounted to a punishment to deter re-offending. Thus, the facts in the two sets of proceedings hardly differed albeit there was the requirement of intent in the first set of proceedings. The facts of the two offences were therefore to be regarded as substantially the same for the purposes of Article 4P7 ECHR.⁵

The judgments in, above all, *Zolotukhin v. Russia* and *Ruotsalainen v. Finland* raised notable questions as to whether or not the Finnish sanctioning system, in regard to breaches of Finnish tax legislation, is in compliance with Article 4P7 ECHR. The Finnish – similarly to the Swedish and Norwegian – legislation has traditionally operated with a double-tracked sanctioning system in which administrative tax surcharges as well as criminal sanctions can be prescribed for the same act of failing to make the required declarations or giving false information to the tax authorities, for example. It was only a matter of time when these questions would reach the Finnish Supreme Court.

On 29th June, 2010, the Finnish Supreme Court delivered two judgments (KKO 2010:45 and KKO 2010:46) which both concerned the submission of income tax declarations containing false information to the tax authorities. On 11th November, 2010, the Supreme Court delivered a third judgment (KKO 2010:82) which concerned the submission of income tax declarations concealing facts that influenced the assessment of tax. The facts and legal issues at hand were more or less similar in all cases. The public prosecutor had prosecuted the defendants for, *inter alia*, aggravated tax fraud on the ground that they had given the taxation authority false information or concealed facts that influenced the assessment of tax for a period of four, two and three taxation years respectively. Moreover, considerable financial benefit had been sought, the offences were committed in a particularly methodical manner and the tax frauds were also considered aggravated when assessed as a whole. The defendants demanded with reference to Article 4P7 ECHR that the charges should be dismissed because they had already been issued with administrative tax surcharges for the same acts of willfully or by gross negligence

⁵ As regards similar fiscal matters, the ECtHR stated *inter alia* in its admissibility decision in *Rosenquist v. Sweden* 14 September, 2004 (Appl. No. 60619/00) that “that the two offences in question were entirely separate and differed in their essential elements” because “culpable intent or gross neglect, which was not a condition for a tax surcharge, was an essential condition for criminal conviction for (aggravated) tax fraud”. See also *Ponsetti and Chesnel v. Sweden* 30 July, (Appl. Nos. 36855/97 and 41731/98). This approach as to the notion of “the same offence” must without doubt be seen to have been overruled by the judgment in *Zolotukhin v. Russia* and subsequent case law. The notion of “the same offence” must, therefore, rather be understood as “the same act”, see e.g. *Bas van Bockel*, *The Ne bis in idem Principle in EU Law* 2010 pp. 190–201 and 230–233.

having given the taxation authority false information. The surcharges amounted to between 5 and 30 percent of the added taxable income.

The Supreme Court started out by assessing the “criminal nature” of the tax surcharges. The Supreme Court noted that no amendments had been made to the Finnish tax surcharge system after the ECtHR’s judgments in *Jussila v. Finland* and *Ruotsalainen v. Finland*. Therefore, there was no reason to deviate from the findings in these judgments when assessing the “criminal nature” of the tax surcharges in hand. Accordingly, these were seen to fall within the scope of application *ratione materie* of Article 4P7 ECHR.

The Supreme Court continued by assessing whether or not the charges of aggravated tax fraud concerned the same acts that the tax surcharges had been issued for. By reference to the case of *Zolotukhin v. Russia* and subsequent case law of the ECtHR, the Supreme Court noted that the decisive criteria when assessing the element of *idem* are whether or not a former judgment and a latter prosecution arise from “identical facts or facts which are substantially the same”, irrespective of the legal characterization of the two offences. The fact that different forms of tax offences involve a subjective element of intent or negligence, while tax surcharges can be issued on merely objective grounds, is therefore not decisive.⁶ This approach is also, more or less, in line with the traditional interpretation of the scope of application of *res judicata* in Finnish legal doctrine and case law, according to which the notion of the same act is to be assessed in reference to the same historical course of events, irrespective of subjective elements involved.⁷ Consequently, the Supreme Court concluded that the charges of aggravated tax fraud were indisputably based on the same submissions of income tax declarations containing false information for which the tax surcharges had also been issued. The charges of aggravated tax fraud and the tax surcharges did, therefore, arise from the same acts.

The final, and decisive, issue that the Supreme Court had to assess was the requirement of finality. It follows from the wording of Article 4P7 ECHR that the outcome of the first proceedings must have become final, in order to bar a second prosecution. According to the ECtHR’s case law, a decision is final when it is irrevocable, “that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them”. Decisions against which an ordinary appeal can be brought do not have *ne bis in idem* effect; the possibility of bringing extraordinary remedies under national law however does not affect the final nature of the previous decision. The question whether a judicial decision can be classified as an acquittal or conviction under the applicable rules of national procedure is

⁶ It can be noted that the tax surcharge in question presupposed that the tax authorities had willfully or by gross negligence been given false information. The Finnish tax legislation does, however, also include several forms of, more lenient, tax surcharges that do not necessitate this kind of subjective element.

⁷ Naturally, the legal issue at stake here did not, prior to, *inter alia*, the case of *Jussila v. Finland*, arise because administrative sanctions such as tax surcharges were not seen to fall within the scope of application *ratione materie* of *res judicata*, even though they could have been seen to arise from the same historical course of events as a prior or subsequent criminal charge.

therefore irrelevant. The only relevant question in this connection is whether the decision has become final.⁸

According to Finnish tax legislation, a taxpayer has the possibility of making a “demand for rectification” within 60 days of having been notified of a decision on tax surcharges by the tax authorities. This demand is directed to the board of tax rectification. The subsequent decision by the board can be appealed to the competent administrative court. A decision by the administrative court will become final if it is not successfully appealed to the Supreme Administrative Court. In addition to this, a taxpayer always has the possibility of making a demand for rectification within five years from the beginning of the year following the year during which the income taxation has been concluded.⁹ This time limit for making a demand for rectification is separate for each taxation year. Owing to the fact that a demand for rectification always constitutes a form of ordinary appeal in tax matters, the Supreme Court concluded that a decision on tax surcharges will become final at the expiration of this time limit. In the case of KKO 2010:45, the time limits for making a demand for rectification were seen to have expired in relation to all taxation years in question. The tax surcharges had, therefore, become final before the charges of aggravated tax fraud were brought. Consequently, the charges were dismissed. On the contrary, in the cases of KKO 2010:46 and KKO 2010:82, the time limits for making a demand for rectification had not expired for any of the taxation years in question. The tax surcharges had, therefore, not become final when the charges of aggravated tax fraud were brought. Consequently, there was no violation of Article 4P7 ECHR.

The Supreme Court further noted that it follows from Finnish national case law that, in addition to final judgments, prosecutions that are also pending bar new prosecutions for the same act (*lis pendens*). This *lis pendens* effect, however, only applies between parallel criminal prosecutions but not between parallel criminal prosecutions and administrative proceedings. According to the Supreme Court, it follows from the wording of Article 4P7 ECHR that it only prohibits consecutive prosecutions, and not, as such, parallel proceedings. Even though it follows from the case law of the ECtHR that the scope of application *ratione materie* of Article 4P7 ECHR also encompasses certain administrative measures, such as tax surcharges, it does not follow that all related national procedural principles, such as *lis pendens*, should be extended to proceedings concerning these types of measures. According to the Supreme Court, this also means that Article 4P7 ECHR does not prohibit the continuation of an ongoing (parallel) criminal prosecution when a former tax surcharge becomes final after a subsequent criminal prosecution has been initiated but before it has come to a final end.¹⁰ The Supreme Court acknowledged that, as

⁸ See *Zolotukhin v. Russia* paras. 107–111 and *van Bockel* 2010 pp. 225–226.

⁹ This time limit depends of the type of tax in question. For instance, concerning value added tax, the time limit is three years.

¹⁰ Even though I otherwise largely agree with the Supreme Court’s findings, I feel compelled to disagree with this conclusion. In my view, it seems clear that the handing down of a criminal conviction after a former tax surcharge, of a likewise “criminal nature”, has become final during a subsequent ongoing prosecution signifies that the person

regards legal certainty and the consistency of the penal system, it is not unproblematic that the possibility of bringing a criminal charge depends on whether or not a former tax surcharge has become final. The finality of the tax surcharge may in large depend on the timing of the tax authorities' measures and whether a person who has been issued a tax surcharge makes a demand for rectification that leads to a final decision, or whether he or she abides by the tax surcharge, in which case it will not become final until the expiration of the aforementioned time limit.¹¹ A person who has been issued with a tax surcharge can, consequently, feel compelled to make a demand for rectification simply in order to faster acquire a final decision, even though he or she may be content with the tax surcharge as such. In the Supreme Court's view, this is, however, something that should be rectified through legislative measures and not by the judiciary.

concerned has been "punished again". This implies that a former tax surcharge should at least be taken into account when imposing a subsequent criminal sentence in order to avoid double punishment. One could also further argue that if the outcome of one of the two proceedings becomes final before the other proceedings have come to an end, the further continuation of those proceedings would automatically infringe the *ne bis in idem* principle because this could be seen as a (continued) "prosecution", which takes place after an earlier prosecution has come to a final end. The situation that two parallel prosecutions are conducted will therefore inevitably lead to an infringement of the *ne bis in idem* principle, but only at a later point in time. This would mean that the ongoing proceedings would have to be discontinued, as soon as the outcome of the first set of proceedings becomes final, see *van Bockel* 2010 pp. 154 and 230.

¹¹ One could also question whether this undoubtedly long time limit is in conformity with the rationale of Article 4P7 ECHR, assessed in conjunction with e. g. Article 6 ECHR. The current situation is that a person who has been issued a tax surcharge may at worst be forced to live five years in unawareness of whether or not he or she will (also) be prosecuted for the same act that led to the tax surcharge.