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EGMR Nr. 55103/00 - Urteil vom 10. Februar 2004 (Puhk v. Estland)

Anwendung des Rückwirkungsverbotes auf Dauerdelikte (Gesetzlichkeitsprinzip; nulla poena sine lege; nullum crimen sine lege; rule of law bzw. Rechtsstaatsprinzip; Fortsetzungstaten; Steuerhinterziehung).

Präambel der EMRK; Art. 7 EMRK; Art. 103 Abs. 2 GG; Art. 20 Abs. 3 GG

Leitsätze des Bearbeiters

1. Der Schutz des Art. 7 EMRK beschränkt sich nicht darauf, die rückwirkende Anwendung des Strafrechts zum Nachteil des Angeklagten zu untersagen. Art. 7 EMRK umfasst auch das Prinzip, dass nur das Gesetz eine Straftat definieren und eine Strafe vorsehen darf (nullum crimen, nulla poena sine lege). Ebenso umfasst der Schutz des Art. 7 EMRK das Prinzip, dass das Strafrecht nicht zu lasten des Angeklagten extensiv ausgelegt werden darf.

2. Eine Straftat muss durch das Gesetz klar definiert werden. Dem ist genügt, wenn der Einzelne auf Grund der Formulierung der relevanten Vorschriften und gegebenenfalls mit Hilfe der Auslegung der Rechtsprechung vorhersehen kann, welche Handlungen und Unterlassungen zu einer strafrechtlichen Verantwortlichkeit führen.

3. Das Gesetzlichkeitsprinzip des Art. 7 EMRK ist ein grundlegendes Element der rule of law. Es ist so auszulegen und anzuwenden, dass ein effektiver Schutz gegen willkürliche Strafverfolgungen, Verurteilungen und Strafzumessungen besteht.

4. Art. 7 EMRK gilt auch bei Dauerdelikten. Wird die Strafbarkeit eines Dauerdelikts eingeführt, darf infolge Art. 7 EMRK keine Bestrafung des dem Einführungszeitpunkt vorangegangenen Verhaltens erfolgen, selbst wenn dieses dem jeweiligen Dauerdelikt begrifflich unterfällt. Die vergleichsweise kurze Dauer einer rückwirkenden Anwendung des Strafrechts schließt eine Verletzung nicht aus. Die Dauer der rückwirkenden Anwendung ist kein für die Entscheidung gemäß Art. 7 EMRK relevantes Kriterium.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE 1

8. The applicant was born in 1970 and lives in Tartu. At the material time he was the owner and manager of the company *AS Maarja*. 2

9. On 10 August 1995 the Tartu police instituted criminal proceedings against the applicant on charges of tax offences under Article 148-1 § 7 of the Criminal Code. In the course of the preliminary investigation the applicant was further charged with the offence of inadequate accounting under Article 148-4 of the Criminal Code as well as with falsification of documents. 3

10. On 6 October 1997 the Tartu prosecutor approved the bill of indictment, and the case was sent to the Tartu City Court (*Tartu Linnakohus*) for trial. The charges set out in the indictment related to acts and omissions of the applicant in the period from April 1993 to October 1995. 4

In particular, under Article 148-1 § 7 of the Criminal Code the acts which were the subject of the charges against the applicant concerned his failures to pay the required taxes, to file by the set deadline revenue statements for the year 1993, to inform the Tax Board of the change of his company's location, and to comply with the order of the Tax Board of 26 October 1995 to pay the required taxes. Under Article 148-4 of the Criminal Code the applicant was accused of having unsatisfactorily arranged his company's bookkeeping, in breach of the legal requirements. The existing records were incomplete and a number of documents had not been preserved, which made it impossible to determine the 5

company's performance.

11. By a judgment of 17 February 1999 the Tartu City Court convicted the applicant of the offences under Article 148-1 § 7 of the Criminal Code and sentenced him to 4 years' imprisonment. It also found the applicant guilty of the offence under Article 148-4 of the Code and sentenced him to 4 months' imprisonment. As the latter sentence was absorbed by the former, the aggregate sentence imposed on the applicant was 4 years' imprisonment, which was suspended for 3 years. 6

The City Court found that the application of Article 148-1 § 7 of the Criminal Code, which had been in force as from 13 January 1995, was justified in the case on the grounds that the applicant's failure to pay the required taxes had been intentional and continuous and his criminal activity had lasted until October 1995. It ordered the applicant to pay the city tax authorities 1,596,618.42 Estonian kroons in outstanding taxes. No fine or tax surcharge was imposed apart from the requirement to pay the taxes which were due under the relevant tax laws. 7

As regards the offence of inadequate accounting under Article 148-4 of the Criminal Code, which was in force as from 20 July 1993, the City Court noted that the applicant's company had operated from 5 May 1993 until 1 October 1993. During that period there had been no recording of its economic activity and it was impossible correctly to determine the company's performance, income, expenditure, profit, loss, debts, solvency or amount of its assets. The applicant had failed to comply with the obligations imposed on him by the Law on personal responsibility for the organisation of accounting. The law came into effect on 20 July 1993, i.e. at the time of the operation of the company, and the applicant, being its owner and manager, had to comply with the provisions of the law. The applicant also failed to adopt rules and procedures for bookkeeping and to secure the preservation of the relevant documents, as required under the Government decree of 6 July 1990 concerning the organisation of accounting. 8

12. On 26 February 1999 the applicant filed an appeal against the judgment to the Tartu Court of Appeal (*Tartu Ringkonnakohus*). He argued that in convicting him under Article 148-1 § 7 of the Criminal Code of acts committed prior to its entry into force on 13 January 1995, the City Court had applied the criminal law retrospectively. Before that date a conviction of the offences defined in Article 148-1 could follow only if the person concerned had been previously subjected to an administrative sanction for a similar offence. 9

The applicant further submitted that, in making him responsible for the inadequate bookkeeping in his company during the whole period from 5 May 1993 until 1 October 1993, the City Court had also applied retroactively Article 148-4 of the Criminal Code which had only been in force as from 20 July 1993. 10

13. On 3 May 1999 the Court of Appeal upheld the judgment of the City Court. It found that the acts with which the applicant was charged under Article 148-1 § 7 of the Criminal Code amounted to ongoing crimes. After his first criminal act on 16 April 1993 the applicant had embarked upon a criminal enterprise which had lasted until 26 October 1995, the day on which the Tax Board discovered the abuses and issued its order. Therefore, the City Court had correctly qualified his acts as falling under that law. 11

It also considered that the ongoing nature of the applicant's acts relating to inadequate accounting justified his conviction under Article 148-4 of the Criminal Code. 12

14. On 1 June 1999 the applicant lodged an appeal on points of law to the Supreme Court (*Riigikohus*) raising the same arguments as in his appeal to the Court of Appeal. 13

15. By a judgment of 7 September 1999 the Supreme Court dismissed his appeal. It held that, according to the principles of Estonian criminal law, the law to be applied to a criminal act was the law which had entered into force before the end of a criminal activity. As the applicant's criminal activity ended on 26 October 1995, his actions fell under the law in force at that time, i.e. Article 148-1 § 7 of the Criminal Code. The same reasons applied to the applicant's conviction of inadequate accounting under Article 148-4 of the Criminal Code. 14

II. RELEVANT DOMESTIC LAW AND PRACTICE 15

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THE LAW

I. ALLEGED VIOLATION OF ARTICLE 7 § 1 OF THE CONVENTION 17

1.1. The applicant's conviction under the law of 13 January 1995 18

21. The applicant complained that his conviction under the criminal law in force as of 13 January 1995 of acts committed prior to that date infringed the guarantee against retrospective application of criminal law set forth in Article 7 § 1 of the Convention, which provides: 19

"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 20

22. The applicant submitted that before 13 January 1995 a criminal conviction could be imposed only if a person had been previously subjected to an administrative punishment for a similar offence. However, he had no such previous punishment. The application of the concept of a continuing offence could not override the prohibition of the retroactive application of criminal law. 21

23. The Government maintained that the bill of indictment set clearly out the acts with which the applicant was charged as well as their legal characterisation. That applicant's conviction under Article 148-1 § 7 of the Criminal Code was in accordance with the provisions of the criminal law in effect at the time of the commission of the offence and the criminal law was not applied retroactively. The acts which were the subject of the charges amounted to continuing offences, which ended on 26 October 1995, that is after the entry into force of the criminal law on 13 January 1995 which did not necessarily require a previous administrative punishment for its application. The courts gave detailed reasons for bringing the incriminated acts under that law. There was a constant case-law of the Supreme Court on the interpretation of Article 148-1 § 7 of the Criminal Code and on the concept of an ongoing offence in tax cases. The case-law was published and accessible to everyone. It was thus foreseeable to the applicant that his acts entailed criminal responsibility. The notion of an ongoing crime has been widely known in the Estonian criminal law and used for years. Therefore the conviction of the applicant and the application of the concept of an ongoing crime by the domestic court was neither arbitrary nor contrary to Article 7. 22

B. The Court's assessment 23

24. The Court recalls 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, pp. 41-42, § 35, and pp. 68 and 69, §§ 33, respectively. 24

25. 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 crime 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 (*ibidem*, see also *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, p. 22, § 52). 25

26. The Court observes at the outset that the present case is similar to that of *Veeber v. Estonia (no. 2)* (no. 45771/99, ECHR 2003-I) in which it found a violation of Article 7 § 1 of the Convention. It will examine the particular circumstances of the present case in the light of the application of the foregoing principles in that case (see paragraphs 31-37 of the afore-mentioned judgment). 26

27. In the instant case, the Court notes that the applicant was convicted under Article 148-1 § 7 of the Criminal Code, in force as from 13 January 1995, of tax offences which were committed in the period from April 1993 to October 1995. 27

It observes that the application of the criminal law of 13 January 1995 to subsequent acts is not at issue in the presence 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. 28

28. In this connection the Court recalls 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). 29

29. It notes that under Article 148-I of the Criminal Code tax evasion was an offence also prior to 13 January 1995, in particular in 1993-1994 when the applicant committed part of the incriminated acts. However, a prerequisite for criminal conviction under the law in force at that time was that the person concerned had been previously found liable and subjected to an administrative punishment for a similar offence. 30

The version of Article 148-1 of the Criminal Code which came into effect on 13 January 1995 maintained the element of a previous administrative sanction, but added the condition of intent in its text. The two conditions were alternative, not cumulative, making a person criminally liable if one of the conditions was satisfied. Thus, the fact that an administrative punishment had not previously been imposed on an accused did not bar his criminal conviction under that law. 31

However, the domestic courts brought under the 1995 law also the applicant's behaviour during the preceding two years, finding that it was part of a continuing criminal activity which lasted until October 1995. 32

30. The Court recalls 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 for having intentionally and continuously failed to pay the required taxes over a period of time. While the starting point of the applicant's conduct pre-dated the entry into effect of the law under which he was convicted, the conduct lasted beyond the critical date. 33

31. 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 punishment ha[d] been imposed on the offender for a similar offence." The condition was thus an element of the offence of tax evasion without which a criminal conviction could not follow. 34

It further observes that the conduct of which the applicant was convicted concerned for the most part the period prior to 13 January 1995 and that the sentence imposed on him - four years suspended imprisonment - took into consideration his behaviour both before and after that date. In these circumstances, the approach of the domestic courts could not but affect also the severity of the sanction. 35

32. As regards the Government's submission that the established case-law on the interpretation and application of Article 148-1 § 7 of the Criminal Code made the risk of conviction foreseeable to the applicant, the Court notes that the Supreme Court decisions referred to by the Government were taken on 8 April 1997, 27 January 1998 and 8 April 1998. The applicant's complaint concerns however his conduct in 1993 and 1994. During that period the applicant could not expect that at the first discovery of his behaviour he would risk a criminal conviction, considering the terms of criminal law in force at that time. 36

33. In the light of the above, the Court finds that the domestic authorities applied retrospectively the 1995 law to behaviour which did not previously constitute a criminal offence. 37

34. Consequently, there has been a violation of Article 7 § 1 of the Convention. 38

1.2. The applicant's conviction under the law of 20 July 1993 39

35. The applicant complained that in finding him guilty of the offence under Article 148-4 of the Criminal Code, which had entered into force on 20 July 1993, the national courts applied retrospectively the law to acts committed prior to that date. 40

A. Arguments of the parties 41

36. The applicant submitted that he could not be held responsible under Article 148-4 of the Criminal Code for the period prior to its entry into force on 20 July 1993. The application by the courts of the concept of a continuing offence allowed them to evade the prohibition of retrospective application of criminal law in Article 7 of the Convention. 42

37. The Government argued that Article 7 of the Convention had not been breached. Although the applicant's company lacked any bookkeeping as from 5 May 1993, this state of affairs continued after the entry into force of Article 148-4 of the Criminal Code on 20 July 1993. Moreover, the applicant had the obligation to keep proper accounting records also prior to that date, according to the Government decree of 6 July 1990. 43

It was further maintained that the present case was distinguishable from the *Veeber (no. 2*) case, cited above, in that most of the applicant's acts fell within the period after 20 July 1993, from which date onwards the risk of criminal punishment was clearly foreseeable for the applicant. 44

The Government also referred to the jurisprudence of the Supreme Court concerning the application and interpretation of the law and the concept of an ongoing crime. 45

B. The Court's assessment 46

38. The Court notes that the applicant was convicted under Article 148-4 of the Criminal Code for having failed adequately to organise bookkeeping in his company during the period of its activity from 5 May 1993 until 1 October 1993. 47

It observes that under the Government decree of 6 July 1990 the applicant was required to ensure proper bookkeeping in his company during the whole period of its operation (see paragraph 11 above). However, criminal liability for an infringement of the relevant rules was established only on 20 July 1993, when Article 148-4 of the Criminal Code took effect. 48

In applying the criminal law to the applicant's behaviour before the material date, the domestic courts found that it was part of a continuing offence which lasted beyond that date. 49

39. While it is true that the applicant's conduct concerned mostly the period after 20 July 1993, the length of the period to which the law was applied retrospectively is not decisive in considering whether or not the guarantees of Article 7 of the Convention have been respected. 50

40. Finally, the Court notes that the jurisprudence referred to by the Government relates to the years 1997-1998, whereas the applicant's complaint concerns a situation before 20 July 1993. In the absence of a law on criminal liability for inadequate organisation of accounting, the applicant could not foresee the risk of criminal punishment for his conduct during that period. 51

41. In these circumstances, the Court finds that the domestic courts applied retrospectively the 1993 law to behaviour which previously did not constitute a criminal offence. 52

42. Accordingly, there has been a violation of Article 7 § 1 of the Convention. 53

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION 54

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FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 7 § 1 of the Convention on account of the retrospective application of the criminal law of 13 January 1995; 56

2. *Holds* that there has been a violation of Article 7 § 1 of the Convention on account of the retrospective application of the criminal law of 20 July 1993; 57

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