

**Utrikesdepartementet**

Enheten för folkrätt, mänskliga rättigheter
och traktat rätt (FMR)

Rättschefen Per Hall

JUSTITIEDEPARTEMENTET

Finansrådet Anita Saldén Enérus

FINANSDEPARTEMENTET

Güney mot Sverige inför Europadomstolen

1 bilaga

Europadomstolen för mänskliga rättigheter i Strasbourg beslutade den 17 juni 2008 att inte ta upp rubricerade mål till prövning i sak. Beslutet, som är offentligt, bifogas.

Bakgrunden till målet var i korthet följande. Efter en genomförd skatterevison av klagandens restaurangföretag påförde Skatteverket honom ett skattetillägg om sammanlagt ca 56 000 kr för taxeringsåren 2002 och 2003. Klaganden överklagade beslutet till länsrätten och ansökte om rättshjälp med hänvisning till artikel 6 § 3 (c) i Europakonventionen. Länsrätten avslög ansökan med hänvisning till ett avgörande från Regeringsrätten (RÅ 2003 ref. 56). Länsrätten fann att även om dokumentationen i ärendet var omfattande var de rättsliga frågorna inte av sådan art att det fanns rätt till rättshjälp enligt svensk lag. Kammarrätten avslög ansökan på samma grunder som länsrätten. Regeringsrätten meddelade inte prövningstillstånd.

Klaganden gjorde inför Europadomstolen gällande att hans rätt till försvar enligt artikel 6 § 3 (c) i Europakonventionen kränkts pga. att han nekats rättshjälp, trots att påföljden i målet om skattetillägg varit betungande och materialet som åberopats varit omfattande.

Europadomstolen avvisade ansökan såsom uppenbart ogrundad. Som skäl angavs att ådömda skattetillägg inte kunde omvandlas till fängelsestraff vid utebliven betalning och att målet inte innefattade några svåra eller omfattande juridiska frågor. När det gäller klagandens personliga situation noterades att han var svensk medborgare och att han – även om han inte var direkt inblandad i den dagliga restaurangverksamheten – var en av fyra delagare i det bolag som ägde restaurangrörelsen. Vidare konstaterades att de administrativa domstolarna har en skyldighet att utreda och klarlägga omständigheterna i de mål de handlägger. Slutligen noterades att länsrätten uttryckligen hade beaktat artikel 6 § 3 (c) i sitt beslut samt att klaganden företräts av ombud i länsrätten och även erhållit viss kompensation för rättegångskostnader genom länsrättens dom. Mot den bakgrunden fann domstolen att avsaknaden av rättshjälp inte hade någon negativ inverkan på klagandens möjligheter att lägga fram och driva målet om skattetillägg och, således, att rättvisans intresse inte krävde att rättshjälp beviljades.

Målet är nu slutbehandlat av Europadomstolen och kommer att läggas ad acta i Utrikesdepartementet.

Med vänlig hälsning



Anna Erman

Rättssakkunnig

Kopia till:

Regeringsrätten (mål nr 6624-05, 6625-05)

Samtliga kammarrätter (Kammarrätten i Stockholms mål nr 6026-05, 6028-05)

Länsrätten i Stockholms län (mål nr 5998-05, 6000-05)

Skatteverket (dnr 101 556530-04/5472, 101 556532-04/5472)

Justitiekanslern

Riksdagens ombudsmän (JO)

Sveriges Advokatsamfund

Amnr R Petersson, Ju/L6

Depr M Sörbom, Ju-DOM

Kr J Wieslander, Ju-DOM

Depr Lena Gustafson, Fi/S3

Rättssakk L Reinikainen, Fi/S3

Rättschefen, UD

Chefen, FMR

Bitr chefen, FMR

Processgruppen, FMR

Repr Strasbourg (onr)

MR/ER 18/2007
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COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 40768/06
by Musa GÜNEY
against Sweden

The European Court of Human Rights (Third Section), sitting on 17 June 2008 as a Chamber composed of:

Josep Casadevall, *President*,
Elisabet Fura-Sandström,
Corneliu Bîrsan,
Boštjan M. Zupančič,
Alvina Gyulumyan,
Egbert Myjer,
Ineta Ziemele, *judges*,

and Santiago Quesada, *Section Registrar*,

Having regard to the above application lodged on 5 October 2006,

Having regard to the Court's decision to examine jointly the admissibility and merits of the case (Article 29 § 3 of the Convention),

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 Musa Güney, is a Swedish citizen who was born in 1960. He was represented before the Court by Mr R. Armholt, a lawyer practising in Stockholm. The Swedish Government ("the Government") were represented by their Agent, Mr C.-H. Ehrenkrona, Ministry for Foreign Affairs.

The facts of the case, as submitted by the parties, may be summarised as follows.

The Tax Authority made a tax audit of a restaurant business, owned by a holding company owned, in its turn, by the applicant and three other persons. Following the audit the Tax Authority, by decisions of 8 December 2004, raised the company's turnover by 2.7 million Swedish kronor (SEK) and considered that SEK 1.9 million of that amount had been paid to the company owners during the tax assessment years 2002 and 2003. Consequently, by the same decisions, the applicant's taxable income for both years was raised by SEK 236,581. Moreover, as the revised taxation involved a discretionary assessment due to allegedly undisclosed salary payments in the applicant's tax returns, tax surcharges (*skattetillägg*) were imposed on him, amounting to SEK 30,078 and 25,886, respectively, for the two assessment years (in total approximately 6,000 euros (EUR)).

The applicant appealed to the County Administrative Court (*länsrätten*) of the County of Stockholm through his legal counsel. On 14 March 2005 the Tax Authority reconsidered its decisions but did not change them.

On 31 August 2005 the applicant applied to the County Administrative Court for legal aid. Referring to Article 6 § 3 (c) of the Convention, he maintained that he had no financial means to pay for legal representation as he had not been granted a respite to pay the tax amounts, that the legal issues were not uncomplicated as statistical information concerning the Swedish restaurant business had been used in determining the revised taxes and that the tax surcharges imposed on him were considerable. He further stated that, being of foreign origin, he did not fully master the Swedish language.

On 8 September 2005 the court refused the applicant legal aid. It noted that, under the terms of the Legal Aid Act (*Rättshjälpslagen*, 1996:1619), the scope for granting legal aid to a businessman in a taxation case was very limited. According to a leading decision by the Supreme Administrative Court (*Regeringsrätten*), the application of Article 6 § 3 (c) in a case concerning tax surcharges would depend on the size of the surcharges and the nature of the case; only if the penalties were particularly heavy and the legal issues complicated could legal aid be granted by virtue of the Convention (RÅ 2003 ref. 56). The instant case concerned mainly the question whether the documentation obtained by the Tax Authority constituted a sufficient ground for increasing the first applicant's liability to income tax. The court found that, although the documentation was relatively extensive, the legal issues, including those related to the subordinate questions concerning the tax surcharges, were not of such a character that the applicant had a right to legal aid under Swedish law or the Convention.

On 18 October 2005 the Administrative Court of Appeal (*kammarrätten*) in Stockholm rejected the applicant's appeal, subscribing to the reasons

given by the County Administrative Court. On 5 April 2006 the Supreme Administrative Court refused leave to appeal.

By a judgment of 3 January 2007, the County Administrative Court reduced the company's unrecorded revenues and salary payments. Accordingly, in a further judgment of 16 March 2007 the court lowered the applicant's taxable income to SEK 125,008 for each of the assessment years. In consequence of this finding, the tax surcharges were also reduced, to SEK 14,495 and 12,614, respectively, for the two assessment years (in total approximately EUR 3,000). The court also decided that the applicant be compensated for litigation costs under the Act on Compensation for Costs and Expenses in Cases Concerning Taxes, etc. (*Lagen om ersättning för kostnader i ärenden och mål om skatt, m.m.*, 1989:479). The applicant was awarded SEK 825 concerning the court proceedings and SEK 1,000 concerning the proceedings before the Tax Authority (in total about EUR 200). He had claimed SEK 825 and 3,500, respectively.

The applicant appealed against the taxation and the tax surcharges to the Administrative Court of Appeal, where the case was still pending at the time of the present decision.

COMPLAINT

The applicant complained, under Article 6 § 3 (c) of the Convention, that he was not granted legal aid.

THE LAW

The applicant claimed that the decision not to grant him legal aid in the taxation proceedings breached Article 6 § 3 (c) of the Convention. This provision reads as follows:

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

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”

The Government referred, *inter alia*, to the reasons given by the County Administrative Court in its decision of 8 September 2005 and submitted that the interests of justice had not required that the first applicant be afforded free legal assistance within the meaning of Article 6 § 3 (c).

The applicant maintained his complaint. He alleged that the amount of tax surcharges was not insignificant to him, as he was unemployed and had a monthly income of only SEK 6,000. He had not been involved in the

running of the restaurant, but had only been employed for short periods as a cleaner and dishwasher. Moreover, he was of foreign origin, for which reason he did not have the necessary knowledge of Swedish law and language to defend himself effectively. He further stated that the tax cases concerned whether the restaurant had failed to account for all proceeds and, if so, in what amounts. In his view, this raised complex evidentiary questions.

The Court reiterates that it has found in several judgments concerning Sweden that the imposition of tax surcharges involves the determination of a “criminal charge” within the meaning of Article 6 of the Convention, although they cannot be said to belong to criminal law under the Swedish legal system (see, for instance, *Janosevic v. Sweden*, no. 34619/97, §§ 64-71, ECHR 2002-VII). It follows that Article 6 is applicable under its criminal head and the question arises whether Article 6 § 3 (c) was complied with.

The Court first observes that, although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer assigned officially if need be, is one of the fundamental features of a fair trial (see, *Poitrimol v. France*, judgment of 23 November 1993, Series A no. 277-A, § 34). Still, the right to free legal assistance under Article 6 § 3 (c) of the Convention is subject to two conditions. Firstly, the applicant must lack sufficient means to pay for legal assistance. Secondly, the “interests of justice” must require that legal aid be granted.

As concerns the first condition, the Court notes that the applicant has stated that he did not have sufficient means to pay for legal assistance himself. However, the Court does not find it necessary to decide on this issue since, in any event, the second condition is not fulfilled for the reasons set out below.

The Court has to take into consideration several factors to determine whether the interests of justice required that legal aid be granted before the domestic courts. This is to be judged by reference to the facts of the case as a whole having regard, *inter alia*, to the seriousness of the offence, the severity of the possible sentence, the complexity of the case and the personal situation of the accused (see, *Quaranta v. Switzerland*, judgment of 24 May 1991, Series A no. 205, §§ 32-36).

As to the seriousness of the offence and the severity of the possible sentence, the Court observes that the cases before the national courts mainly concerned tax assessments for 2002 and 2003 and that the only question to fall within the criminal sphere of Article 6 of the Convention was whether or not to impose tax surcharges. Although the tax surcharges imposed by the Tax Authority amounted to approximately EUR 6,000 (later reduced to roughly half that amount by the County Administrative Court), it should be pointed out that, according to Swedish law, failure to pay the tax surcharges could not have been converted into a prison sentence. Consequently, the

applicant never faced a risk of being deprived of his liberty (cf. *Benham v. the United Kingdom*, judgment of 10 June 1996, *Reports of Judgments and Decisions* 1996-III, § 61, and *Padalov v. Bulgaria*, no. 54784/00, § 43, 10 August 2006).

In so far as the complexity of the case is concerned, the Court reiterates that it mainly concerned the applicant's tax assessments. Moreover, the contentious issues before the national courts related primarily to the assessment of evidence, i.e. whether or not the restaurant had failed to account for all its proceeds. The Court cannot find that any complex legal questions were to be argued in the cases. Furthermore, the assessment relating to the tax surcharges was relatively straightforward in that the issue to be determined was whether or not the applicant had submitted incorrect or incomplete information in his tax returns to the Tax Authority and, if so, whether there were any grounds for remission of the surcharges.

As to the personal situation of the applicant, it is not clear how long he has been living in Sweden. However, he is a Swedish citizen. Moreover, while not involved in the daily running of the restaurant, he was one of four owners of the holding company owning it. In these circumstances, the Court finds it unlikely that he would not be able to present his case and arguments adequately, without legal assistance, before the national courts. Even if he were to have certain difficulties, it should be stressed that the Swedish administrative courts have an obligation under the Administrative Court Procedure Act to ensure that the circumstances of each case are clarified to the extent that its character demands and that, if there is a need, they shall direct the parties how to supplement the case-file with the necessary information.

In this context, the Court takes note of the fact that the County Administrative Court, in rejecting the request for legal aid, specifically assessed the matter with reference both to domestic law and to Article 6 § 3 (c) the Convention. Moreover, the applicant was in fact assisted by legal counsel, at least before the Tax Authority and the County Administrative Court, and received compensation for litigation costs by virtue of the court's judgment of 16 March 2007.

In view of all of the above, the Court finds that there is no indication that the refusal of legal aid adversely affected the possibility for him to present his case properly and satisfactorily (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, §§ 24 and 26, *Gnahoré v. France*, no. 40031/98, §§ 39-41, ECHR 2000-IX, and *Barsom and Varli v. Sweden* (dec.), nos. 40766/06 and 40831/06, 4 January 2008). Consequently, in the present case, the interests of justice did not require that the applicant be granted free legal assistance. Thus, the decision to refuse legal aid did not involve a violation of Article 6 § 3 (c) of the Convention.

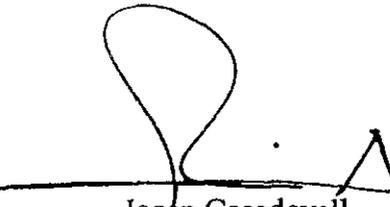
Consequently, this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.



Santiago Quesada
Registrar



Joscp Casadevall
President