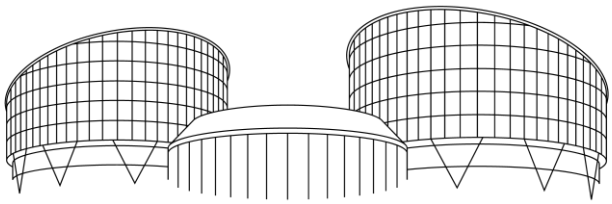

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

FOURTH SECTION

CASE OF RUOTSALAINEN v. FINLAND

(Application no. 13079/03)

JUDGMENT

STRASBOURG

16 June 2009

FINAL

16/09/2009

This judgment may be subject to editorial revision.

In the case of Ruotsalainen v. Finland**,**

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

Nicolas Bratza, *President,*
Lech Garlicki,
Giovanni Bonello,
Ljiljana Mijović,
Ján Šikuta,
Päivi Hirvelä,
Mihai Poalelungi, *judges,*

and Lawrence Early, *Section Registrar,*

Having deliberated in private on 26 May 2009,

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

PROCEDURE

1. The case originated in an application (no. 13079/03) 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 Jukka Ruotsalainen ("the applicant"), on 16 April 2003.

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

3. The applicant alleged, in particular, that the imposition of a fuel fee debit after he had been fined for petty tax fraud constituted double jeopardy in breach of Article 4 of Protocol No. 7.

4. On 23 August 2005 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1969 and lives in Lapinlahti.

6. While driving his pickup van on 17 January 2001, the applicant was stopped by the police during a road check. The police discovered a more leniently taxed fuel than diesel oil in the tank of the van.

7. On 26 February 2001 the applicant was fined for petty tax fraud through a summary penal order. The form stated, *inter alia*:

> "Misdemeanour, modus operandi:
>
> Petty tax fraud (motor vehicle tax misdemeanour). [The applicant] used as fuel in his car fuel more leniently taxed than diesel oil without having paid due additional tax (*lisävero, tilläggsskatt*).
>
> Footnote: he had filled the tank himself."

The fine amounted to 720 Finnish marks (FIM, or 121 euros (EUR)). The summary penal order indicated that Chapter 29, Article 3, of the Penal Code (*rikoslaki, strafflagen*; Act no. 769/1990) and sections 20 and 33 of the Motor Vehicle Tax Act (*laki moottoriajoneuvoverosta, lagen om skatt på motorfordon*; Act no. 722/1966, now repealed) had been applied. As the applicant did not contest the imposition of the fine, it became final on 6 March 2001.

8. In separate proceedings, and having received the applicant's submission in writing on an unspecified date, on 17 September 2001 the Vehicle Administration (*ajoneuvohallintokeskus, fordonsförvaltningscentralen*) issued the applicant with a fuel fee debit amounting to FIM 90,000 (equivalent to EUR 15,137) on the ground that his pickup van had been run on more leniently taxed fuel than diesel oil without prior notification to the Vehicle Administration or Customs. The decision indicated that sections 2-7 of the Fuel Fee Act (*laki polttoainemaksusta; lagen om bränsleavgift*; Act no. 337/1993, now repealed) had been applied. The decision also included instructions on how to appeal against it and how to apply for a reduction of the imposed amount.

9. The applicant lodged both an application for a reduction of the fee and an appeal with a view to having the decision overturned, arguing, *inter alia*, that the fuel fee should have been claimed at the same time as the summary penal order was issued. As it had not been claimed at that time, it was no longer possible to debit the fuel fee in the light of Article 7 of the Convention.

10. On 10 October 2001 the National Board of Taxes (*verohallitus, skattestyrelsen*) rejected the application for a reduction of the fee. It reasoned:

> "No special reasons provided for by law to grant a reduction have been put forward."

11. The decision indicated that section 15 of the Fuel Fee Act had been applied. No appeal lay.

12. On 28 August 2002 the Helsinki Administrative Court (*hallinto-oikeus, förvaltningsdomstolen*), having received the observations of the Tax Ombudsman (*veroasiamies, skatteombudet*) and the Vehicle Administration and the applicant's observations in reply, rejected the appeal. It reasoned:

> "Section 4 of the Fuel Fee Act provides that a fuel fee (*polttoainemaksu, bränsleavgift*) is collected for the number of days the vehicle has been continuously located in Finland prior to the noted use, but not for more than 20 days at a time. Section 5 provides that the fuel fee for a pickup van is FIM 1,500 [some EUR 252] *per diem*. Section 6 provides that if the use of more leniently taxed fuel than diesel oil is discovered in a vehicle in respect of which no prior notice has been given, the fuel fee collected is treble the [normal] amount.
>
> The pickup van owned by Pertti Jukka Tapio Ruotsalainen, [registration no.] KJM-327, has been noted to have been used during the year 2001 using fuel more leniently taxed than diesel oil. Ruotsalainen had not informed the Vehicle Administration or the Customs thereof [in advance]. In the pre-trial investigation and in his writ of appeal he has conceded that he has used incorrect fuel in his vehicle.
>
> The imposition of a fuel fee in an administrative procedure concerns the imposition of a fee comparable to a tax. What is in issue is not the imposition of a criminal punishment or a sanction *in lieu*.
>
> The imposition of a fuel fee ... is not in breach of the Constitution of Finland or the Convention.
>
> Despite the reasons for the use submitted by Ruotsalainen and despite his financial status, the Vehicle Administration was entitled to impose a fuel fee. The fuel fee amounts to FIM 1,500 *per diem*, it was to be imposed in respect of 20 days and it was to be trebled. The fuel fee FIM 90,000 has been imposed in accordance with the law. There is no reason to amend the debiting decision."

13. The decision indicated that sections 1, 3, 7 and 15 of the Fuel Fee Act and Article 7 of the Convention and Article 1 of Protocol No. 1 to the Convention had been applied.

14. The applicant requested leave to appeal, alleging a breach of Article 4 of Protocol No. 7.

15. On 26 February 2003 the Supreme Administrative Court (*korkein hallinto-oikeus, högsta förvaltningsdomstolen*) refused leave to appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

16. The Finnish system relating to the use as motor fuel of more leniently taxed oil than diesel oil is based on two main elements. First, the owners or users of motor vehicles are obliged to give prior notice to the authorities of their intention to use such fuel as motor fuel, and to pay additional tax (section 20 of the Motor Vehicle Tax Act, which has since been repealed) and/or a fuel fee (section 1 of the Fuel Fee Act as amended by Act no. 234/1998). Second, the authorities ensure compliance with those

conditions by means of road checks. Tax evasion or attempted tax evasion was punishable under the Penal Code and failure to comply with the notification obligation was punishable as a motor vehicle tax offence (section 33 of the Motor Vehicle Tax Act).

17. The Fuel Fee Act's provisions of interest for the present case read:

> **"Section 2 - Fuel fee**
>
> A vehicle referred to in section 1 shall be subject to a fuel fee as a tax corresponding to fuel tax if a more leniently taxed fuel than diesel oil is used in the vehicle. A fuel fee shall not be collected on the fuel contained in the tank of a vehicle when the vehicle is imported. A fuel fee shall, however, be collected if the fuel contained in the tank of the imported vehicle has been made identifiable as provided by virtue of the Excise Duty on Fuels Act (Act no. 948/82). A vehicle in respect of which a notification within the meaning of section 20 of the Motor Vehicle Tax Act has been given for collecting additional tax shall not be subject to a fuel fee during the tax period of the additional tax.
>
> **Section 3 - Notification obligation**
>
> If a more leniently taxed fuel than diesel oil is used in a vehicle referred to in section 1, the owner or holder of the vehicle shall be obliged to notify the Vehicle Administration of such use before using it. In respect of a vehicle imported to Finland, the notification may also be given to the customs authorities.
>
> **Section 4 - Imposition of a fuel fee**
>
> A fuel fee shall be collected for the number of days on which, according to a notification, a more leniently taxed fuel than diesel oil is used in a motor vehicle.
>
> If the use of a more leniently taxed fuel than diesel oil is discovered in a vehicle during a time in respect of which no prior notification has been given, a fuel fee shall be collected for the number of days on which the vehicle has been continuously located in Finland prior to the use, but not for more than 20 days at a time. If a fuel fee has been imposed on the vehicle, the time shall be counted from the first day following the previous tax period at the earliest. If the date of importing the vehicle to Finland cannot be established, the fuel fee shall be collected for a minimum of 10 days.
>
> **Section 5 – The amount of the fuel fee**
>
> The fuel fee for a pickup van is FIM 1,500 [equivalent to EUR 252.28] *per diem*. ...
>
> **Section 6 - Increase of the fuel fee**
>
> If the use of a more leniently taxed fuel than diesel oil is discovered in a vehicle in respect of which no prior notification under section 3 has been given, the fuel fee collected shall be three times the normal amount.

Section 7 - Party liable for payment

The fuel fee shall be collected from the person who was the owner of the vehicle at the time when a more leniently taxed fuel than diesel oil was used in the vehicle. If another person holds the vehicle permanently in his or her possession, the fuel fee shall be collected from this holder. ...

...

Section 9 - Establishing the use of fuel

The use of a fuel other than diesel oil shall be presumed if a tank belonging to the fuel system of a vehicle contains a fuel which has been made identifiable pursuant to the legal provisions on light fuel oil. A fuel fee shall be collected irrespective of the amount of such fuel in the vehicle.

...

Section 15 - Tax relief and respite of payment

For particularly weighty reasons the Ministry of Finance may, on application and on conditions set by the Ministry, grant exemption from the payment of a fuel fee, penal interest or arrears, and interest due because of deferral of payment.

The National Board of Taxes shall make a decision on the application referred to in subsection 1 if the sum whose removal or return is requested does not exceed FIM 300,000 [equivalent to EUR 16,818.79]. The Ministry of Finance may, however, take the case up for decision if it is of particular significance.

The National Board of Taxes may, on application, defer the payment of a fuel fee. The provisions on the additional tax on the motor vehicle tax shall apply to the conditions of such deferral. The Ministry of Finance may take a case concerning deferral of payment up for decision. In such cases, the Ministry shall determine the conditions of deferral in its decision concerning the application.

A decision made by virtue of this section shall not be subject to appeal.

Section 16 - Penal provisions

Illegal evasion of a fuel fee, and attempted evasion thereof, are punishable under Chapter 29, Articles 1-3, of the Penal Code."

18. According to the Government Bill for the enactment of the Fuel Fee Act and amendment of section 6 of the Excise Duty on Fuels Act and section 16 of the Motor Vehicle Tax Act (no. HE 329/1992), the fuel fee is intended to correspond to the fuel tax which would have accrued if diesel oil had been used as fuel in the vehicle.

19. Government Bills nos. HE 329/1992 vp and HE 234/1998 vp note that section 4 of the Fuel Fee Act is based on the presumption that the same fuel is used in the vehicle continuously. Since it is usually impossible to

provide evidence of the type of fuel used in the vehicle before it is observed by the authorities, or to provide evidence of the extent to which the vehicle has been used, the imposition of the fuel fee has to be based on the time during which the vehicle has been used in Finland. For reasons of equity, however, the period is restricted to 20 days at a time.

20. With regard to section 15, the Government submitted that in most cases where a tax appeal is pending the National Board of Taxes refuses tax relief. This also concerns the application of section 15 of the Fuel Fee Act. If an application for tax modification has been rejected for this or another reason, the applicant may, notwithstanding the existing decision, file a new modification application with the same authority after the decision on taxation has become final. The Government did not refer to any such decision.

21. The Fuel Fee Act in force at the relevant time was replaced by a new Fuel Fee Act (Act no. 1280/2003, with effect from 1 January 2004, which was not therefore applicable to the present case). Section 3 provides that a fuel fee is imposed for the purpose of preventing the use of a fuel which gives rise to the imposition of a fuel fee, and that the use in vehicles of a fuel which gives rise to the imposition of a fuel fee is prohibited. Section 9 lays down the sums of the fuel fees imposed on different types of cars. Section 10 provides that if a notification has not been made to the competent authority, the fuel fee shall be increased by 30% at most. The fuel fee may also be increased by 50% at most if the use of the fuel which gives rise to imposing the fuel fee is repeated, or doubled at most if the use of the fuel which gives rise to imposing the fuel fee is particularly aggravated.

22. The Government Bill for the enactment of the new Fuel Fee Act (HE 112/2003, p. 7) noted that the use of more leniently taxed fuel led to the issuing of a fuel fee debit and an additional motor vehicle tax and that the aim of this was effectively to prevent the use of fuel other than fuel intended for traffic. Formally, the use of more leniently taxed fuel was not forbidden, but it was subject to fairly severe financial sanctions. The basic structure of the Fuel Fee Act and the Motor Vehicle Tax Act was identical to, for example, the Penal Code, which does not specifically forbid certain unwanted acts but only provides for the consequences of such acts. The only difference was that the sanction applicable to the use of fuels was an administrative sanction collected as a tax. The basic aim of the provisions on additional tax and fuel fee is well established in Finland. The provisions are well-known among motorists and the consequence is that, compared with other countries, more leniently taxed fuel is hardly ever used in road traffic in Finland. The Government Bill considered that the high level of the fuel fee was necessary with regard to the preventive effect of the sanctions system.

23. Chapter 29, Articles 1-3, of the Penal Code provide:

“Article 1 - Tax fraud (Act no. 1228/1997)

A person who

(1) gives a taxation authority false information on a fact that influences the assessment of tax,

(2) files a tax return concealing a fact that influences the assessment of tax,

(3) for the purpose of avoiding tax, fails to observe a duty pertaining to taxation, influencing the assessment of tax, or

(4) acts otherwise fraudulently,

and thereby causes or attempts to cause a tax not to be assessed, a tax to be assessed too low or a tax to be unduly refunded, shall be sentenced for tax fraud to a fine or to imprisonment for at most two years.

Article 2 - Aggravated tax fraud (Act no. 769/1990)

If in the tax fraud

(1) considerable financial benefit is sought or

(2) the offence is committed in a particularly methodical manner and the tax fraud is aggravated also when assessed as a whole, the offender shall be sentenced for aggravated tax fraud to imprisonment for at least four months and at most four years.

Article 3 - Petty tax fraud (Act no. 769/1990)

(1) If the tax fraud, when assessed as a whole, with due consideration to the amount of financial benefit sought and the other circumstances connected with the offence, is to be deemed petty, the offender shall be sentenced for petty tax fraud to a fine.

(2) If a punitive tax increase is deemed a sufficient sanction, the report of, or prosecution or punishment for, petty tax fraud may be waived.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL No. 7 TO THE CONVENTION

24. The applicant complained under Article 4 of Protocol No. 7 to the Convention that he had been punished twice for the same offence.

Article 4 of Protocol No. 7 to the Convention reads as follows:

"1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention."

25. The Government contested that argument.

A. Admissibility

26. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

27. The applicant argued that what was in issue was one single offence or violation of a single object of legal protection. The principal purpose of the fuel fee was to ensure that more leniently taxed fuel than diesel oil was not used in diesel vehicles. The fuel fee alone had no fiscal purpose. He could have used a more leniently taxed fuel by notifying the authorities of such use and by paying a daily fee amounting to some EUR 252. However, it had not been possible to drive the pickup van during a single day such a distance as to make the use of such fuel financially viable. The result of the failure to give prior notice had been that the applicant had been considered to have used more leniently taxed fuel for a period of twenty days although his statement that the use involved one fill-up of the fuel tank had not been proved wrong. The consequences were out of all proportion and unreasonable taking into consideration even the absolute benefit sought through the offence, that is, the difference in price between fuel taxed as diesel oil and more leniently taxed fuel, the reprehensibility and unique nature of the act, the financial position and actions of the offender and other circumstances. The applicant's application for exemption from payment of the fuel fee or a decrease thereof had been unsuccessful. Although the increased fuel fee was characterised as an administrative sanction, it should be equated with a criminal sanction.

28. The applicant considered that the prohibition on the use of more leniently taxed fuel had technically been in existence even prior to the entry into force in 2004 of the new Fuel Fee Act. The legislation provided for a high fuel fee so as to render the actual use of such fuel impossible. In practice, few notifications were made of the use of more leniently taxed fuel oil in cars and vans. A prohibition on the use of light fuel oil had not even been proposed in the Government Bill for the enactment of the new Fuel Fee Act. It was only added to the Bill during consideration in the Finance Committee (report no. 37/2003 vp). This demonstrated that the State had long held that the notification procedure including sanctions was sufficient to prevent the use of more leniently taxed fuel in diesel vehicles. The applicant took the view that the essential elements of the punishable offence were identical in the provision on petty tax fraud and in the Fuel Fee Act. Likewise, the administrative fuel fee and the penal sanction resulting from petty tax fraud were imposed for one and the same act. Under the wording of sections 3-4 and 6 of the Fuel Fee Act, the fuel fee was imposed for failure to observe the notification obligation. According to the essential elements of tax evasion in the Penal Code, a person who for the purpose of avoiding tax fails to observe a duty pertaining to taxation or influencing the assessment of tax shall be sentenced for tax fraud. The use of the more leniently taxed fuel would have been permissible subject to payment of a daily fee. The increased fuel fee was imposed for failure to submit a prior notification. It was for precisely the same reason, that is failure to observe the notification obligation, that the fine had been imposed. The fuel fee had thus not been imposed because the use of more leniently taxed fuel was prohibited as such. The fact of the fuel fee being imposed irrespective of intent or negligence only served to underscore the citizens' need for judicial relief and it did not change the essentially criminal nature of the fuel fee. The Fuel Fee Act and the Penal Code had the same structure, a stand which was also taken in the Government Bill for the enactment of the new Fuel Fee Act.

29. The applicant submitted that he had been punished for petty tax fraud on the ground that he had failed to give notification in advance. In practice, the owner or holder of a vehicle cannot be unaware of the type of fuel used in that vehicle. In theory, the fuel tank of a vehicle could be filled with more leniently taxed fuel during unauthorised use. Any occurrence of such a scenario would again only underscore the need of citizens for judicial relief. In the case of *Västberga Taxi Aktiebolag and Vulic v. Sweden*, no. 36985/97, 23 July 2002) the Court held that the question of whether a tax or tax surcharge could be converted into a prison sentence was not decisive for the classification of an offence as "criminal". The characterisation in Finland of the current fuel fee as an administrative sanction and the fact that appeals against it were examined by an administrative court had no relevance to the case.

30. The applicant argued that his case was distinguishable from the case of *Ponsetti and Chesnel v. France* (dec.) (nos. 36855/97 and 41731/98, ECHR 1999-VI), which involved failure to file tax returns, whereas the present case involved failure to file prior notification. In the former case the tax consequence was based on accounts, that is, the amount of tax actually evaded. In the present case, the amount of tax actually evaded had not been established but it seemed indisputable that the fuel fee significantly exceeded the amount of tax actually evaded. In the case of *Ponsetti and Chesnel*, interest on arrears and tax surcharge amounted to 40-80%. In the present case, the tax was increased by 300%. The former case involved chronic and repeated failure whereas the present case involved a single instance of failure of short duration. In the former case, the essential elements of tax fraud differed from those of failure to file tax returns in a timely fashion, whereas in the present case the essential elements of tax fraud and failure to notify were the same. Moreover, the acts in the present case were congruous.

31. The Government submitted that the aim of the Fuel Fee Act in force at the relevant time was to ensure that the State would in all circumstances, in respect of diesel vehicles, obtain at least the same amount of tax that accrued from the use of diesel oil instead of the generally available and more leniently taxed light fuel oil. The primary purpose of the legislation was to ensure the use of diesel oil in diesel vehicles. At that time, the legislation did not contain any formal prohibition on the use of more leniently taxed fuel and therefore it was necessary to make the use of such fuel financially less advantageous than the use of diesel oil. This was ensured by providing for a high flat-rate tax (the fuel fee). Although the use of a more leniently taxed fuel was not prohibited, anyone who used such fuel was obliged to give prior notification. The fee was imposed irrespective of whether the person in question defaulted on the notification obligation intentionally or through carelessness since this guaranteed the State's tax income irrespective of how the conduct of the tax payer was assessed. The amount of the fuel fee depended solely on the vehicle type. Failure to comply with the notification obligation resulted in the fuel fee being collected threefold. Furthermore, a fuel fee could only be reduced in individual cases for particular reasons. Although the increased fuel fee had the nature of an administrative sanction, its main objective was to collect tax revenue and to safeguard the operation of the fuel taxation system. According to the new Fuel Fee Act, the fuel fee was, unlike before, a sanction for a violation of a prohibition laid down in the Act. However, the purpose of the fee remained unchanged, that is, to ensure the proper accrual of tax revenue.

32. The Government submitted that petty tax fraud was an offence under the Penal Code punishable in criminal proceedings by a fine (the amount of the day-fine being dependent on the income and assets of the person

concerned). Failure to pay a fine resulted in its being converted to a prison sentence. The increased fuel fee was not a penal sanction but an administrative one, imposed in an administrative procedure and could not, therefore, be equated to a determination of a criminal charge against the applicant. This was also reflected in the new Fuel Fee Act, which contained an express prohibition on the of use light fuel oil. This change to the legislation resulted from the judgment of the European Court of Justice of 27 November 2003 concerning Finland (Case C-185/00: *Commission of the European Communities v. Republic of Finland*) in which the European Court of Justice deemed that Community legislation obliged Finland to amend its legislation so as to ensure, more efficiently than before, that fuels were used in compliance with fuel directives (see *Council Directive 92/81/EEC on the harmonisation of the structures of excise duties on mineral oils* and *Council Directive 92/82/EEC on the approximation of the rates of excise duties on mineral oils*, both replaced by *Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity*). As to the applicant's view that the prohibition on the use of more leniently taxed fuel had technically been in existence also before the amendment, the Government submitted that it was indeed true that the rate of the fuel fee was so high that its payment was disadvantageous even if the person concerned only had to pay the basic amount. However, in the above-mentioned judgment it had been found that Finland had failed to fulfil its obligations under Community law. Thus, the prohibition on the use of more leniently taxed fuel and the fact that the sanction for using the wrong fuel was severe, have been found to constitute different legal issues. As to the applicant's submission that the State had long held that the notification procedure inclusive of sanctions was sufficient to prevent the use of more leniently taxed fuel in diesel vehicles, the Government submitted that this was true, and that this fact had also been relied on before the European Court of Justice. However, it did not render the fuel fee a criminal law sanction nor a sanction of a comparable nature, as its aim was specifically to ensure the accrual of tax revenue, primarily by ensuring the use of taxable diesel oil in vehicles and secondarily by corresponding at least to the tax difference between the different fuels.

33. The Government argued that although the increased fuel fee could be considered quite substantial, the essential elements of the acts leading to its imposition on the one hand and to punishment for petty tax fraud on the other differed significantly from each other and did not constitute one and the same act on the following grounds. Firstly, the administrative fuel fee was imposed for using a fuel that was taxed more leniently than diesel oil whereas the criminal sanction for petty tax fraud was imposed for illegal evasion of the fuel fee, the punishable act being failure to comply with the notification obligation laid down in the Fuel Fee Act. Thus, the

administrative fuel fee and the criminal sanction for petty tax fraud were imposed for different acts. Secondly, 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. By contrast, the fuel fee was 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. Thirdly, the purpose of the criminal sanction for tax fraud was to constitute a punishment and to express moral reproach for a certain act. The fuel fee did not have a similar purpose of punishment or reproach. It was only intended to ensure the accrual of tax revenue, primarily by ensuring the use of taxable diesel oil in vehicles and secondarily by corresponding at least to the tax difference between the different fuels. Moreover, the higher fuel fee was not intended to be a punishment, but only to ensure that vehicle users gave prior notification if they wanted to use a more leniently taxed fuel. Fourthly, the fuel fee system in force at the relevant time also differed from a punishment in that it made it legally possible for vehicle owners to choose to use a tax-free fuel, to notify the authorities of this and to pay the fuel fee, an option which was not open in respect of acts regulated by criminal law. Fifthly, only a perpetrator or an accomplice comparable with the perpetrator could be sentenced to a sanction under criminal law. Emphasis should be put on the fact that owners or holders of a vehicle had to pay the fuel fee irrespective of whether they used the fuel concerned. Sixthly, an unpaid fine could be converted to imprisonment whereas an unpaid fuel fee could not. Seventhly, criminal cases were examined by general courts whereas cases concerning fuel fees were examined in an administrative procedure, like tax cases, and finally through an appeal to an administrative court.

34. The Government argued that the present case was similar to the case of *Ponsetti and Chesnel* (cited above) in that the constitutive elements of tax fraud and those of failure to file tax returns within the prescribed period ("the fiscal offence") were different. The cases were also similar in that tax fraud included the element of "wilfulness" whereas the "fiscal offence" was possible on solely objective grounds. On the other hand, when compared to the aforementioned case, it could be noted that in respect of the fuel fee in the present case, the acts underlying the sanctions were even more clearly composed of different elements than the acts giving rise to a tax penalty, as the fuel fee could, on the conditions mentioned in the foregoing, be imposed even if there had been no intention of tax evasion.

35. Should the Court find it necessary to examine whether any of the exceptions mentioned in Article 4 § 2 of Protocol No. 7 would have been applicable to the said procedures, the Government took the view that none of these exceptions was applicable to the present case.

36. As to the applicant's view that the structure of the Fuel Fee Act and the Penal Code was the same, it was true that at the relevant time, the Fuel

Fee Act did not contain a prohibition on the use of more leniently taxed fuel, in the same way as the Penal Code did not explicitly prohibit the commission of acts that were punishable under it. This common feature was also referred to in the Government Bill (112/2003) for the enactment of the new Fuel Fee Act. However, the purpose of the reference was only to indicate that the fuel fee must be considered an effective means of ensuring the collection of fuel tax or of a corresponding amount of taxes, irrespective of whether the fuel fee was based on a prohibition of use. A further reason for the inclusion of the aforementioned comparison of the Fuel Fee Act with the Penal Code was the case pending before the European Court of Justice. The purpose was only to indicate that the objectives of legislation may be achieved even if not based on a prohibition. Thus, the applicant's quotation was irrelevant in relation to the present case.

37. The Government argued that, had the applicant notified the use, the question of tax fraud could not have been raised since there would have been no tax evasion. Thus, the applicant's conduct would not have been reprehensible as required for the application of criminal law sanctions. At the relevant time, it was in accordance with the law to pay the fuel fee and then start using more leniently taxed fuel. Whether this was financially viable was an entirely different issue.

38. The Government reiterated that the administrative fuel fee and the criminal sanction for petty tax fraud were not imposed for similar acts. The fuel fee was imposed for using a fuel that was taxed more leniently than diesel oil. The criminal sanction, by contrast, was imposed for illegal evasion of the fuel fee, the punishable act being the failure to comply with the notification obligation laid down in the Fuel Fee Act. The fact that a criminal sanction could only be imposed on a person who had committed a criminal act, and that the fuel fee was imposed on the owner or holder of the vehicle, was an essential difference between administrative and criminal sanctions. The applicant's allegation to the effect that in practice the owner or holder of a vehicle cannot be unaware of the type of fuel used in that vehicle, was not true, for example in respect of vehicles owned by employer companies. Furthermore, whether the owner or holder of the vehicle was aware of the type of fuel had essentially different relevance in administrative and criminal proceedings.

39. As to the fact that in the case of *Ponsetti and Chesnel* the tax consequence imposed was based on tax actually evaded, which was not the case in the present application, the Government submitted that this difference was due to differences in the applicable forms of taxation. The fuel fee was not dependent on income and nor could the amounts of fuel used in individual vehicles be taken into account in the imposition of the fee, for practical reasons.

40. The Government further emphasised that the duration of the reprehensible conduct should not be of relevance considering, in particular,

that there could be no evidence of what type of fuel had been used in the vehicle at times other than the moment when the person concerned was caught using the wrong type of fuel.

2. The Court's assessment

A. Whether the sanctions were criminal in nature

41. The aim of Article 4 § 1 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a final decision. In the case under consideration two measures were imposed on the applicant in two separate and consecutive sets of proceedings. On 26 February 2001 the applicant was fined in summary penal order proceedings and on 17 September 2001 the applicant was issued with a fuel fee debit in administrative proceedings.

42. The Court reiterates that the legal characterisation of the procedure under national law cannot be the sole criterion of relevance for the applicability of the principle of *non bis in idem* under Article 4 § 1 of Protocol No. 7. Otherwise, the application of this provision would be left to the discretion of the Contracting States to a degree that might lead to results incompatible with the object and purpose of the Convention (see, most recently, *Storbråten v. Norway* (dec.), no. 12277/04, ECHR 2007-... (extracts), with further references). The notion of "penal procedure" in the text of Article 4 of Protocol No. 7 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 Convention respectively (see *Haarvig v. Norway* (dec.), no. 11187/05, 11 December 2007; *Rosenquist v. Sweden* (dec.), no. 60619/00, 14 September 2004; *Manasson v. Sweden* (dec.), no. 41265/98, 8 April 2003; *Göktan v. France*, no. 33402/96, § 48, ECHR 2002-V; *Malige v. France*, 23 September 1998, § 35, *Reports of Judgments and Decisions* 1998-VII; and *Nilsson v. Sweden* (dec.), no. 73661/01, ECHR 2005-...).

43. The Court's established case-law sets out three criteria, commonly known as the "*Engel* criteria" (see *Engel and Others v. the Netherlands*, 8 June 1976, Series A no. 22), to be considered in determining whether or not there was a "criminal charge". The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence and the third is the degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative and not necessarily cumulative. It is enough that the offence in question is by its nature to be regarded as criminal or that the offence renders the person liable to a penalty which by its nature and degree of severity belongs in the general criminal sphere (see *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, § 86, ECHR 2003-X). The relative lack of seriousness of the penalty cannot divest an offence of its

inherently criminal character (see *Öztürk v. Germany*, judgment of 21 February 1984, Series A no. 73, § 54, and *Lutz v. Germany*, judgment of 25 August 1987, Series A no. 123, § 55). This does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (see, as recent authorities, *Jussila v. Finland* [GC], no. 73053/01, §§ 30-31, ECHR 2006-..., and *Ezeh and Connors*, cited above, § 82-86).

44. As noted above, first, the applicant was fined in summary penal order proceedings because he had used more leniently taxed fuel than diesel oil in the tank of his vehicle, which constituted petty tax fraud. The proceedings were "criminal" according to the Finnish legal classification. Those proceedings were "criminal" also for the purposes of Article 4 of Protocol No. 7 and consequently the applicant was "finally acquitted or convicted in accordance with the law and penal procedure of [the] State". The guarantee of Article 4 of Protocol No. 7 comes into play where a new set of proceedings is instituted after the previous acquittal or conviction has acquired the force of *res judicata*. In this case, the applicant did not appeal against the summary penal order, which therefore became *res judicata*.

45. Subsequently, the applicant was issued with a fuel fee debit in administrative proceedings. Turning to the first of the Engel criteria, it is apparent that the fuel fee debit was not classified as criminal but as part of the fiscal regime (see paragraph 12 above). This is however not decisive. In this connection, the Court has previously found that the sphere defined in the Finnish legal system as "administrative" embraces certain offences that have a criminal connotation but are too trivial to be governed by criminal law and procedure (see *Jussila v. Finland* [GC], cited above, § 38).

46. The second criterion, the nature of the offence, is the more important. The Court observes that the relevant provision of the Fuel Fee Act was directed towards all citizens rather than towards a group possessing a special status. The applicant was liable in his capacity as owner or user of a diesel engine vehicle. As to the Government's argument that the fuel fee debit was intended as pecuniary compensation for damage, the Court is however not so convinced in the circumstances of the present case. It may well be that the fuel fee imposed corresponded to the damage caused, namely loss of revenue. It is however to be noted that the fuel fee collected was trebled. This must in the Court's view be seen as a punishment to deter re-offending, recognised as a characteristic feature of criminal penalties (see *Ezeh*, §§ 102 and 105). It may therefore be concluded that the fuel fee debit was imposed by a rule whose purpose was not only compensatory but also deterrent and punitive. The Court considers that this establishes the criminal nature of the offence.

47. In the light of the above considerations the Court concludes that the nature of the offence was such as to bring the issuing of the fuel fee debit on

17 September 2001 within the ambit of "penal procedure" for the purposes of Article 4 of Protocol No. 7.

B. Whether the latter sanction arose from the same facts as the former and whether there was a duplication of proceedings

48. In the case of *Sergey Zolotukhin v. Russia* [GC] (no. 14939/03, §§ 70-78, 10 February 2009) the Court observed that the body of case-law that had been accumulated throughout the history of application of Article 4 of Protocol No. 7 by the Court demonstrated the existence of several approaches to the question of whether the offences for which an applicant was prosecuted were the same. Seeking to put an end to this legal uncertainty the Court decided to provide a harmonised interpretation of the notion of the "same offences" – the *idem* element of the *non bis in idem* principle.

49. In the aforementioned case (§ 82) the Court took the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same.

50. Turning to the present case, the Court will examine whether the subsequent issuing of the fuel fee debit arose from the same facts as the fine (*idem*) and whether there was a duplication of proceedings (*bis*). The Court notes that the statement of the facts in the decisions by which the "penal procedures" were concluded are an appropriate starting point for its determination of the issue of whether the facts in both proceedings were identical or substantially the same. The Court's inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked in time and space.

51. The Court will begin its analysis of the circumstances in the instant case by reviewing the events of 17 January 2001 and the fine imposed and the fuel fee levied on the applicant. On 26 February 2001 the applicant was fined under Chapter 29, Article 3, of the Penal Code and sections 20 and 33 of the Motor Vehicle Tax Act for petty tax fraud or, more precisely, a motor vehicle tax offence. Although the summary penal order contained only two sentences relevant to the establishment of the facts, it transpires that the fine was issued on the ground that he had used a more leniently taxed fuel than diesel oil in the tank of his van without having paid due additional tax and that he had filled the tank himself (see paragraph 7 above).

52. In the subsequent administrative proceedings the applicant was issued with a fuel fee debit on the ground that his pickup van had been noted to have been used during the year 2001 with fuel more leniently taxed than diesel oil. As he had failed to inform the Vehicle Administration or the Customs of the use in advance, the fuel fee collected was to be trebled. The decision also noted that the applicant had conceded that he had used the wrong fuel in his vehicle.

53. This recapitulation of the events and sanctions demonstrates that since the same conduct on the part of the same defendant and within the same time frame is in issue, the Court is required to verify whether the facts of the offence for which the applicant was fined and those of the offence by reason of which he was issued with a fuel fee debit were identical or substantially the same.

54. The definition of the offences of "tax fraud" and "petty tax fraud" under Chapter 29, Articles 1 and 3, of the Penal Code referred to various types of prohibited conduct (see paragraph 23 above). Each of these elements was in itself sufficient for a finding of guilt. 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 filled the tank himself.

55. In the ensuing administrative proceedings the applicant was issued with a fuel fee debit on the ground that his car 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. Although the Administrative Court's decision noted that the applicant had admitted 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.

56. To sum up, the facts that gave rise to the summary penal order against the applicant related to the fact that he had used more leniently taxed fuel than diesel oil in his pickup van without having paid additional tax for the use. The fuel fee debit was imposed because the applicant's pickup van 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 has above been considered to have amounted to a punishment to deter re-offending. Thus, the facts in the two sets of proceedings hardly differ albeit there was the requirement of intent in the first set of proceedings. The facts of the two offences must, the Court considers, therefore be regarded as substantially the same for the purposes of Article 4 of Protocol No. 7. As the Court has held, the facts of the two offences serve as its sole point of comparison (see *Sergey Zolotukhin v. Russia* [GC], cited above, § 97). Lastly, the Court notes that the latter proceedings did not fall within the exceptions envisaged by the second paragraph of the said provision.

57. The foregoing considerations are sufficient to enable the Court to conclude that there has accordingly been a violation of Article 4 of Protocol No. 7 to the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

58. The applicant complained that the failure to comply with the *non bis in idem* rule also amounted to a violation of Article 6 of the Convention.

59. The Court notes that that principle is embodied solely in Article 4 of Protocol No. 7; the other provisions of the Convention do not guarantee compliance with it either expressly or implicitly (see *Ponsetti and Chesnel v. France* (dec.), cited above). It follows that this part of the application is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

60. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

61. Under the head of pecuniary damage the applicant requested that the fuel fee, inclusive of increases and consequences for default, be voided in full and that he be reimbursed for any payments made inclusive of interest and arrears. He did not specify any amounts. Under the head of non-pecuniary damage the applicant claimed EUR 15,000 for suffering and distress. This amount represented EUR 3,000 for each year subsequent to the imposition of the fuel fee.

62. The Government considered that the costs relating to the fine amounting to FIM 729 (EUR 121) could be reimbursed and that the applicant should be awarded reasonable compensation for non-pecuniary damage not exceeding EUR 1,000.

63. The Court notes that the applicant has not claimed reimbursement of the fine amounting to EUR 121. Nor has he shown that he has paid the trebled fuel fee and it therefore rejects this claim. On the other hand, the Court awards the applicant EUR 1,500 in respect of non-pecuniary damage.

B. Costs and expenses

64. The applicant claimed EUR 13,733.60 for the costs and expenses incurred before the Court.

65. The Government considered the total of 46.6 hours' work (at a rate of EUR 200 plus VAT per hour) excessive. Also, the applicant had not submitted any invoice concerning the costs of translations. The award under this head should not exceed EUR 4,500 (inclusive of VAT).

66. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession, the above criteria and the legal aid granted by the Council of Europe, the Court considers it reasonable to award the sum of EUR 8,000 (inclusive of VAT) for the proceedings before the Court.

C. Default interest

67. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning Article 4 of Protocol No. 7 to the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 4 of Protocol No. 7 to the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,500 (one thousand five hundred euros) in respect of non-pecuniary damage, plus any tax that may be chargeable, and EUR 8,000 (eight thousand euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 16 June 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early Registrar	Nicolas Bratza President