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

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The *ne bis in idem* principle (right not to be tried or punished twice) was not infringed by the conduct of administrative and criminal proceedings resulting in a combination of penalties

In today's **Grand Chamber** judgment[1] in the case of **A and B v. Norway** (applications nos. 24130/11 and 29758/11) the European Court of Human Rights held, by sixteen votes to one, that there had been:

no violation of Article 4 of Protocol No. 7 (right not to be tried or punished twice) to the European Convention on Human Rights.

The case concerned two taxpayers who submitted that they had been prosecuted and punished twice – in administrative and criminal proceedings – for the same offence.

The Court concluded that it had no cause to cast doubt on the reasons why the Norwegian legislature had opted to regulate the socially harmful conduct of non-payment of taxes by means of an integrated dual (administrative/criminal) process. Nor did it call into question the reasons why the Norwegian authorities had chosen to deal separately with the more serious and socially reprehensible aspect of fraud in the context of criminal proceedings rather than an ordinary administrative procedure.

The Court found that the conduct of dual proceedings, with the possibility of a combination of different penalties, had been foreseeable for the applicants, who must have known from the outset that criminal prosecution as well as the imposition of tax penalties was possible, or even likely, on the facts of their cases. The Court observed that the administrative and criminal proceedings had been conducted in parallel and were interconnected. The facts established in one of the sets of proceedings had been relied on in the other set and, as regards the proportionality of the overall punishment, the sentence imposed in the criminal trial had taken account of the tax penalty.

The Court was satisfied that, while different penalties had been imposed by two different authorities in the context of different procedures, there had nevertheless been a sufficiently close connection between them, both in substance and in time, for them to be regarded as forming part of an overall scheme of sanctions under Norwegian law.

Principal facts

The applicants, A and B, are Norwegian nationals who were born in 1960 and 1965 and live in Langhus (Norway) and Florida (United States of America) respectively.

The applicants and Mr E.K. owned a Gibraltar-registered company, Estora Investment Ltd. ("Estora"). Mr T.F. and Mr G.A. owned a Samoa/Luxembourg-registered company, Strategic Investment AS ("Strategic"). In June 2001 Estora acquired 24% and Strategic acquired 46% of the shares in another company, Wnet AS. In August 2001 all the shares were sold to Software Innovation AS, at a substantially higher price. Applicant A transferred his share of the proceeds of the sale to a Gibraltar-registered company, Banista Holding Ltd., of which he was the sole shareholder.

1. Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

The revenue from these and other similar transactions was not declared to the Norwegian tax authorities, resulting in unpaid taxes totalling some 32.5 million Norwegian kroner (NOK – approximately EUR 3.6 million). In 2005 the tax authorities initiated a tax audit. On 25 October 2007 they filed a criminal complaint against T.F. in relation to matters that later led to the indictment of several individuals, including the applicants A and B, for aggravated tax fraud. The individuals concerned were subsequently prosecuted, convicted and sentenced to terms of imprisonment in criminal proceedings for tax fraud.

Applicant A was initially interviewed as a witness. On 14 December 2007 he was arrested and admitted the factual circumstances but denied criminal liability. He was released four days later. On 14 October 2008 he was indicted for breaches of section 12-1(1)(a), cf. section 12-2, of the Tax Assessment Act 1980. On 24 November 2008 the Tax Administration amended A's tax assessment for the years 2002 to 2007. For the year 2002 the amendment was made on the ground that he had omitted to declare general income of NOK 3,259,341 (approximately EUR 360,000). Moreover, with reference to sections 10-2(1) and 10-4(1) of the Tax Assessment Act, the Tax Administration ordered him to pay a tax penalty of 30%, to be calculated on the basis of the tax that he owed in respect of the undeclared amount. A did not appeal against that decision and paid the outstanding tax due, together with the penalty, before the expiry of the three-week time-limit for lodging an appeal.

On 2 March 2009 the Follo District Court found A guilty of aggravated tax fraud and sentenced him to one year's imprisonment on account of his failure to declare the sum of NOK 3,259,341 in income earned abroad in his tax return for 2002. In determining the sentence the District Court had regard to the fact that A had already received a significant sanction in the form of the tax penalty. A appealed, complaining that he had been tried and punished twice, in breach of Article 4 of Protocol No. 7 to the European Convention on Human Rights. The High Court found against him, as did the Supreme Court.

Applicant B was notified on 16 October 2008 by the Tax Administration that it was considering amending his tax assessment and imposing a tax penalty on him. On 5 December 2008 the Tax Administration amended his tax assessment to the effect that B owed NOK 1,302,526 (approximately EUR 143,400) in tax in respect of undeclared income. On the basis of sections 10-2(1) and 10-4(1) of the Tax Assessment Act, the Tax Administration decided to impose a tax penalty of 30% on him. B paid the tax due, together with the penalty, and did not appeal against the decision, which became final on 26 December 2008.

In the meantime, on 11 November 2008 the public prosecutor had indicted B for a breach of section 12-1(1)(a), cf. section 12-2, of the Tax Assessment Act on the ground that for the tax years 2001 and/or 2002 he had omitted to declare income of NOK 4,651,881 (approximately 500 000 EUR) in his tax return. The public prosecutor requested the Oslo City Court to give a judgment based on his confession. On 10 February 2009 B withdrew his confession. On 30 September 2009 the Oslo City Court, after holding an adversarial hearing, found B guilty of aggravated tax fraud and sentenced him to one year's imprisonment, taking into account the fact that he had already had a tax penalty imposed on him. B appealed to the High Court against the procedure followed in the City Court, arguing that by reason of the prohibition of double jeopardy in Article 4 of Protocol No. 7 to the European Convention, the fact that he had had a tax penalty imposed on him constituted a bar against criminal conviction. The High Court dismissed his appeal. On 29 October 2010 the Appeals Leave Committee of the Supreme Court refused him leave to appeal to that court.

Complaints, procedure and composition of the Court

Relying on Article 4 of Protocol No. 7 (right not to be tried or punished twice), the applicants submitted that they had both been prosecuted and punished twice in respect of the same offence. They alleged that they had been interviewed by the public prosecutor as persons charged and had

then been indicted, had had tax penalties imposed on them by the tax authorities, which they had paid, and had thereafter been convicted and sentenced in criminal proceedings.

Their applications were lodged with the European Court of Human Rights on 28 March 2011 and 26 April 2011 respectively. On 7 July 2015 the Chamber relinquished jurisdiction in favour of the Grand Chamber. The Governments of Bulgaria, the Czech Republic, Greece, France, the Republic of Moldova and Switzerland, all of whom had been granted leave to intervene in the written procedure, produced observations. A hearing was held on 13 January 2016.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Guido **Raimondi** (Italy), *President*,
Işıl **Karakaş** (Turkey),
Luis **López Guerra** (Spain),
Mirjana **Lazarova Trajkovska** ("the former Yugoslav Republic of Macedonia"),
Angelika **Nußberger** (Germany),
Boštjan M. **Zupančič** (Slovenia),
Khanlar **Hajiyev** (Azerbaijan),
Kristina **Pardalos** (San Marino),
Julia **Laffranque** (Estonia),
Paulo **Pinto de Albuquerque** (Portugal),
Linos-Alexandre **Sicilianos** (Greece),
Paul **Lemmens** (Belgium),
Paul **Mahoney** (United Kingdom),
Yonko **Grozev** (Bulgaria),
Armen **Harutyunyan** (Armenia),
Gabriele **Kucsko-Stadlmayer** (Austria), *judges*,
Dag Bugge **Nordén** (Norway), ad hoc *judge*,

and also Lawrence **Early**, *Jurisconsult.*

Decision of the Court

Article 4 of Protocol No. 7

Applicant A

The Court saw no cause to call into question the Supreme Court's finding that the proceedings in which a 30% tax penalty had been imposed on A concerned a "criminal" matter within the meaning of Article 4 of Protocol No. 7.

The protection afforded by the *ne bis in idem* principle was not dependent on the order in which the respective proceedings were conducted; the only material factor was the relationship between the two offences. The Supreme Court had found that the factual circumstances forming the basis for the tax penalty and the criminal conviction – in both cases, the omission to provide certain information in the tax return – were sufficiently similar to be regarded as the same (*idem*) in accordance with the criteria established in the Grand Chamber's Sergey Zolotukhin v. Russia judgment of 10 February 2009. Despite the additional factual element of "fraud" present in the criminal offence, the Court saw no reason to conclude otherwise.

The national authorities had found that applicant A's reprehensible conduct called for two responses: an administrative penalty and a criminal one, each pursuing different purposes. In the Supreme Court's view, the purpose of tax penalties was first and foremost to encourage taxpayers to comply with their duty to provide complete and correct information and to strengthen the foundations of the national tax system, a precondition for a functioning State and thus a functioning

society. Criminal conviction, on the other hand, served not only as a deterrent but also had a punitive purpose in respect of the same anti-social omission, and involved the additional element of culpable fraud.

Firstly, the Court concluded that it had no cause to cast doubt on the reasons why the Norwegian legislature had opted to regulate the socially harmful conduct of non-payment of taxes by means of an integrated dual (administrative/criminal) process. Nor did it call into question the reasons why the Norwegian authorities had chosen to deal separately with the more serious and socially reprehensible aspect of fraud in the context of criminal proceedings rather than an ordinary administrative procedure.

Secondly, the Court found that the conduct of dual proceedings, with the possibility of a combination of different penalties, had been foreseeable for applicant A, who must have known from the outset that criminal prosecution as well as the imposition of tax penalties was possible, or even likely, on the facts of the case.

Thirdly, it appeared clear that the criminal and administrative proceedings had been conducted in parallel and were interconnected. The facts established in one of the sets of proceedings had been relied on in the other set and, as regards the proportionality of the overall punishment, the sentence imposed in the criminal trial had taken account of the tax penalty.

Applicant B

As in the case of applicant A, the Court had no cause to cast doubt on the reasons why the Norwegian authorities had opted to deal with applicant B's reprehensible conduct by means of an integrated dual (administrative/criminal) process. The possibility of a combination of different penalties must have been foreseeable in the circumstances. The administrative and criminal proceedings had been conducted largely in parallel and were interconnected. The facts established in one of the sets of proceedings had been relied on in the other set and, as regards the proportionality of the overall punishment, the sentence imposed in the criminal trial had taken account of the administrative penalty.

The Court concluded that there was no indication that applicants A and B had suffered any disproportionate prejudice or injustice as a result of the impugned integrated legal treatment of their failure to declare part of their income and pay part of their taxes. In the case of both applicants, there had been a sufficiently close connection, both in substance and in time, between the decision to impose the tax penalty and the subsequent criminal conviction for them to be regarded as forming part of an overall scheme of sanctions under Norwegian law in the event of failure to provide information in a tax return.

Neither of the applicants could therefore be said to have been tried or punished again in criminal proceedings for an offence for which they had already been finally acquitted or convicted, for the purposes of Article 4 of Protocol No. 7. The Court accordingly found no violation of that provision in respect of either of the two applicants.

Separate opinion

Judge Pinto de Albuquerque expressed a separate opinion, which is annexed to the judgment.

The judgment is available in English and French.

Press contacts
echrpress@echr.coe.int | tel.: +33 3 90 21 42 08

Denis Lambert (tel: + 33 3 90 21 41 09)
Tracey Turner-Tretz (tel: + 33 3 88 41 35 30)
Inci Ertekin (tel: + 33 3 90 21 55 30)
George Stafford (tel: + 33 3 90 21 41 71)

The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.