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

THIRD SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application nos. 40766/06 and 40831/06
by Afram BARSOM and Levent VARLI
against Sweden

The European Court of Human Rights (Third Section), sitting on 4 January 2008 as a Chamber composed of:
Boštjan M. Zupančič, *President*,
Corneliu Bîrsan,
Elisabet Fura-Sandström,
Egbert Myjer,
David Thór Björgvinsson,
Ineta Ziemele,
Isabelle Berro-Lefèvre, *judges*,
and Stanley Naismith, *Deputy Section Registrar*,
Having regard to the above applications lodged on 4 October 2006,
Having deliberated, decides as follows:

THE FACTS

The applicants, Mr Afram Barsom and Mr Levent Varli, are Swedish nationals, who were born in 1962 and 1974 respectively and live in Södertälje. They were represented before the Court by Mr R. Armholt, a lawyer practising in Stockholm.

A. The circumstances of the case

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

Mr Barsom owns 31.25% and Mr Varli owns 43.75% of the active shares of a limited company, *Restaurang Välfunnet Holding AB*, which in turn owns a restaurant, *Restaurang Välfunnet*. Both applicants are involved in the daily running of the restaurant which is open for lunch, dinner and, during weekends, a discotheque.

During 2004 the Tax Authority (*Skatteverket*) in Stockholm carried out a tax audit of the restaurant covering the period from June 2001 to July 2002. It found that the bookkeeping of the restaurant was severely deficient and that it had not kept the necessary evidence of the business's expenses and sales. Based on certain calculations and statistics, the Tax Authority estimated that the restaurant had omitted to account for and declare all its sales in its bookkeeping and tax returns. Consequently, it found it necessary to make a discretionary assessment of the restaurant's unrecorded sales, which it calculated at SEK 2,700,000 (approximately EUR 292,300) and to adjust its tax returns accordingly.

On 8 December 2004, on the basis of the results from the tax audit, the Tax Authority decided to increase the applicants' income from business for the tax assessment years 2002 and 2003 and to impose tax surcharges on them amounting, in total, for Mr Barsom to SEK 106,084 (approximately EUR 11,460) and for Mr Varli to SEK 144,512 (approximately EUR 15,610). As the applicants, together with a third person, were the main owners of the company which owned the restaurant, and as they were in charge of its daily running, the Tax Authority found that most of the unrecorded sales from the restaurant were to be considered as taxable income, in the form of salary, for the applicants and the third person. Moreover, since the applicants had failed to provide correct and complete information concerning their income, the Tax Authority considered it justified to impose tax surcharges on them and found no grounds on which to remit the surcharges.

In January 2005 the applicants and the company appealed against the decisions to the County Administrative Court (*länsrätten*) of the County of Stockholm, disputing the Tax Authority's findings and claiming that there were no grounds for changing their tax returns or imposing tax surcharges on them. In both their appeals and their supplementary submissions, the applicants stated that they wished to rely on the same grounds as the company had in its appeal and supplementary submissions to the court. The applicants and the company were represented by the same lawyer.

On 14 March 2005 the Tax Authority made the obligatory reassessment of its decisions of 8 December 2004 but decided not to change them.

Following this, it forwarded the appeals to the County Administrative Court.

On 31 August 2005 the applicants requested the County Administrative Court to grant them legal aid to engage a lawyer to represent them. They referred to Article 6 § 3(c) of the Convention, claiming that since their cases concerned tax surcharges they had a right to free legal aid. The applicants stated that they lacked the means to pay for a lawyer since they had been obliged to pay the additional taxes and tax surcharges, as they had not been granted respite from the payment. Furthermore, they alleged that, as immigrants in Sweden, they did not have a complete command of Swedish or knowledge of the Swedish legal system and that their cases were complicated and involved significant amounts of money for them.

On 8 September 2005 the County Administrative Court rejected the applicants' request. It first noted that, according to the Legal Aid Act (*Rättshjälpslagen*, 1996:1619), the possibilities for a businessman to be granted legal aid in tax matters were very limited and it could only be granted if there were special reasons. It further observed that Article 6 § 3(c) of the Convention laid down that a person was entitled to free legal assistance only if he could not afford it himself and the interests of justice so required. It also noted that the domestic case-law indicated that there was no absolute right to legal aid in cases involving tax surcharges but that regard must be had to the amount at stake (the tax surcharges) and the complexity and nature of the case. Turning to the particular circumstances of the applicants' cases, the court considered that the material invoked by the parties was relatively voluminous but that the legal questions at issue and, in relation to these, the ancillary questions concerning tax surcharges were not of such a character as to warrant a grant of legal aid, under either Swedish law or the Convention.

The applicants appealed against the decisions to the Administrative Court of Appeal (*kammarrätten*) in Stockholm, repeating their claims and adding that, having regard to their financial situation, the tax surcharges amounted to substantial amounts for them. They added that they needed professional help to show that the Tax Authority's audit report and decisions were flawed.

On 18 October 2005 the Administrative Court of Appeal upheld the lower court's decisions in full.

The applicants lodged a further appeal to the Supreme Administrative Court (*Regeringsrätten*), which, on 5 April 2006, refused them leave to appeal.

The tax proceedings are still pending before the national courts.

B. Relevant domestic law and practice

The relevant rules concerning legal aid in Sweden are to be found in the Legal Aid Act (*Rättshjälpslagen*, 1996:1619 – hereinafter “the Act”). Section 7, paragraph 1, of the Act provides that legal aid may be granted if the person applying for it is in need of legal assistance and cannot obtain it by other means. Moreover, pursuant to section 8 of the Act, legal aid may only be granted if it is reasonable for the State to contribute to the costs, having regard to the nature and importance of the matter, the value of the contentious issue and other relevant circumstances. In any event, in matters concerning taxes and various fees for taxes, legal aid may be granted only when there are special reasons (section 11, paragraph 1, point 3).

Furthermore, section 13, paragraph 1, of the Act stipulates that legal aid may not be granted to a person who is, or has been, a businessman where the contentious issue has arisen in connection with the business, unless there are special reasons relating to the nature and limited scope of the business, his or her financial and personal situation and other relevant circumstances. The Act defines a businessman as a natural person who runs a business of an economic nature that can be described as professional, or who has a deciding influence over a legal entity which runs such a business (section 13, paragraph 2).

From the case-law of the national courts, it appears that when a case involves tax surcharges, Article 6 § 3(c) of the Convention is applicable, but that consideration must be given to the amount of the imposed tax surcharges as well as to the nature and character of the case. Moreover, only if there is a risk of particularly serious consequences or if complicated legal questions arise should free legal assistance be granted on the basis of the Convention in cases involving tax surcharges (*Regeringsrättens Årsbok* 2003 *ref* 56).

Section 8 of the Administrative Court Procedure Act (*Förvaltningsprocesslagen* 1971:291) requires the administrative courts to ensure that the circumstances of each case are clarified to the extent that its character demands. Where necessary, the courts must give directions for the case-file to be supplemented with the requisite information.

COMPLAINT

The applicants complained that their right to free legal assistance under Article 6 § 3(c) of the Convention had been violated since they had been refused legal aid despite needing it.

THE LAW

The applicants claimed that the national courts had violated their right to free legal assistance by refusing their request for legal aid. Article 6 § 3(c) of the Convention 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 applicants alleged that since their tax cases involved tax surcharges of rather significant amounts for them, Article 6 of the Convention was applicable under its criminal head. They noted that they did not have sufficient means to pay for legal assistance themselves and that this had not been questioned by the national courts. Moreover, they were both of foreign origin, Mr Barsom having arrived in Sweden in 1978 and Mr Varli in 1975, and so did not have the necessary knowledge of Swedish law and language to defend themselves effectively. They further stated that their tax cases concerned the issues of whether their restaurant had failed to record all its sales and, if so, the amounts involved. In their 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 such surcharges cannot be said to belong to criminal law under the Swedish legal system (see, in particular, *Janosevic v. Sweden*, no. 34619/97, §§ 64 -71, ECHR 2002-VII, and *Västberga Taxi Aktiebolag and Vulic v. Sweden*, no. 36985/97, §§ 75-82, 23 July 2002). 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, § 34, Series A no. 277-A). However, 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 applicants have stated that they did not have sufficient means to pay for a lawyer to represent them since they had been obliged to pay the additional taxes and tax surcharges imposed on them. However, the Court does not find it necessary to decide that issue since, in any event, the second condition is not fulfilled for the reasons set out below.

With respect to the second condition, the Court has to take into consideration several factors to determine whether the interests of justice required the applicants to be granted legal aid 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, §§ 32-36, Series A no. 205).

As to the seriousness of the offence and the severity of the possible sentence, the Court observes that the applicants' cases before the national courts mainly concerned their 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 on them. Although the tax surcharges amounted to around EUR 11,500 for Mr Barsom and around EUR 15,600 for Mr Varli, they were able to pay these sums to the Tax Authority. In this respect, the Court wishes to point out that, according to Swedish law, any failure by the applicants to pay the tax surcharges could not have been converted into a prison sentence. Consequently, they never faced a risk of being deprived of their 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).

As regards the complexity of the case, the Court reiterates that it mainly concerned the applicants' tax assessments. It further has regard to the fact that their cases were very closely connected to each other as well as to that of their restaurant and that all three appellants were represented by the same lawyer before the Tax Authority and in their appeals to the County Administrative Court. Moreover, the contentious issues before the national courts primarily concerned the assessment of the evidence, and, in particular, the question whether the restaurant had failed to record all its sales or not. 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 firstly whether or not the applicants had submitted incorrect or incomplete information in their tax returns to the Tax Authority and, if so, whether there were any grounds for remission.

Here, the Court has to take into account the personal situation of the applicants. It notes that both of them have been living in Sweden for almost 30 years and are businessmen who own and are in charge of the daily running of a restaurant. In these circumstances, the Court finds it highly unlikely that they would not be able to present their case and arguments adequately, without legal assistance, before the national court.

However, even if the applicants might have had certain difficulties, the Court stresses 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, where necessary, to give directions to the parties to supplement the case-file with the requisite information.

In this context, the Court also notes that the County Administrative Court, before rejecting the request for legal aid, specifically assessed the matter with reference both to domestic law and to Article 6 § 3(c) the Convention.

In view of all of the above, the Court finds that there is no indication that legal aid was indispensable to give the applicants effective access to court or that the refusal of legal aid adversely affected their ability to present their case properly and satisfactorily (see, *Airey v. Ireland*, 9 October 1979, §§ 24 and 26, Series A no. 32, and *Gnahoré v. France*, no. 40031/98, §§ 39-41, ECHR 2000-IX). Consequently, in the present case, the interests of justice did not require the applicants to be granted free legal assistance and the fact that legal aid was refused by the domestic courts was therefore not a violation of their rights under Article 6 § 3(c) of the Convention.

It follows that the applications are manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court unanimously

Decides to join the applications;

Declares the applications inadmissible.

Stanley Naismith
Deputy Registrar

Boštjan M. Zupančič
President