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## KKO:2023:35 – Petty state border offence

**Diary number R2018/618**

**Issued on 25 May 2023**

**ECLI:FI:KKO:2023:35**

### Background of the case and issues at hand

A, a Finnish citizen, had on 25 August 2015 travelled from Finland to the Republic of Estonia and back again aboard a pleasure boat. En route, A had traversed the international waters between Finland and Estonia. A had a valid Finnish passport, but he did not carry it with him on the trip. On the return trip, A underwent a border inspection in Helsinki and could not produce a passport or other travel document. However, A's identity could be established on the basis of a driver's license that A was carrying.

The border guard issued A a penal order for a petty state border offence, as referred to in chapter 17, section 7a, of the Criminal Code of Finland. The number of day-fines assessed in the penal order was 15 and the monetary amount of one day-fine EUR 6 350, which meant that the total fine would have been EUR 95 250.

When A objected to the penal order, the public prosecutor brought a charge against A before the District Court. The District Court held that A had committed a petty state border offence, having crossed the border of Finland without an appropriate travel document, but waived punishment.

On appeal, the Court of Appeal held that A's conduct had not met the constituent elements of a state border offence, and dismissed the charge.

On appeal to the Supreme Court, the issues at hand were whether A had committed a petty state border offence and, if so, what was the appropriate penalty. As regards the latter issue, the case was decided by an enhanced composition of the Supreme Court.

### The law

According to chapter 17, section 7(1)(1), of the Criminal Code, a person who crosses or attempts to cross the border of Finland without a valid travel document, visa, residence permit or other document equated with a travel document is to be convicted of a state border offence. The penalty for a state border offence is a fine or imprisonment for at most one year. An attempted act is considered equivalent to a completed act.

According to chapter 17, section 7a(1), of the Criminal Code, if, in view of the short duration of the unauthorised stay or movement, the nature of the prohibited act or the other circumstances connected with the offence, the state border offence is of minor significance when assessed as a

whole, the perpetrator is to be convicted of a petty state border offence and sentenced to a fine.

The fundamental principle of the Finnish system of day-fines is that a penalty directed at the assets of the person convicted of an offence is just and proportional for persons of different income and wealth groups. The total amount of a fine is the product of the number of day-fines multiplied by the monetary amount of one day-fine, the latter amount to be determined on the basis of the income of the person in question. According to chapter 2a, section 2(2), of the Criminal Code, the reasonable amount of one day-fine equals one sixtieth of the average monthly income of the person fined, after deduction of taxes and fees defined by government decree and a fixed amount for basic consumption. If the person fined is liable for the maintenance of another person, this may also reduce the amount of one day-fine.

## Reference for a preliminary ruling by the Court of Justice of the European Union

The Supreme Court made a reference to the Court of Justice of the European Union for a preliminary ruling on whether it is contrary to the freedom of movement under EU law to punish an EU citizen for travelling from one EU member state to another without carrying a valid travel document. The Supreme Court also asked for a preliminary ruling on whether the sanction typically imposed for the offence in Finland, a fine, was appropriate in view of the principle of proportionality under EU law.

The Court of Justice of the European Union issued its preliminary ruling on 6 October 2021, Case A (Crossing the maritime border of a Member State on board a pleasure boat), C-35/20, EU:C:2021:813.

## Assessment by the Supreme Court

### A's conduct and its punishability

The Supreme Court held that even though the wording of the provision on a state border offence also covered the entry of a Finnish citizen into Finland without carrying an appropriate travel document, the objective of the legislation indicated that the scope of application of the provision was not so broad. Accordingly, a Finnish citizen was not to be convicted of an offence referred to in chapter 17, section 7 or 7a, of the Criminal Code merely on the basis that he or she cannot produce an appropriate travel document when arriving in Finland.

That having been said, the Supreme Court held that A's conduct, when travelling by motorboat from Finland into Estonia and crossing the border of Finland without carrying an appropriate travel document, met the constituent elements of a petty state border offence under the domestic law of Finland. As noted by the Court of Justice of the European Union, EU law did not preclude the criminalisation of such conduct.

A was found to have committed a petty state border offence upon travelling from Finland to the Republic of Estonia aboard a motorboat and thereby crossing the Finnish border without carrying an appropriate travel document.

## Sentencing

The Supreme Court held that the day-fine system and the grounds for setting the monetary amount of one day-fine formed a part of the fundamental principles of the Finnish penal system.

In its preliminary ruling, the Court of Justice of the European Union had deemed the typical fine imposed for a petty state border offence to be too severe, in view of the principle of proportionality, as regarded the net income of the person fined and the minor character of the offence. In its assessment, the Court of Justice of the European Union had looked at the typical number of day-fines, fifteen, imposed for such an offence and at the monetary amount of one day-fine under chapter, 2a, section 2, of the Criminal Code, that is, one sixtieth of the net income of the person fined, less certain subtractions. Accordingly, the assessment of the Court of Justice of the European Union had been directed at a total fine that was typically some 20 per cent of the net monthly income of the person fined.

The imposition of a fine for a petty state border offence in this manner was to be deemed contrary to the principle of proportionality under EU law regardless of the income level of the person fined. This conclusion held notwithstanding the fact that the Court of Justice of the European Union also had looked at the total fine imposed for this particular minor offence and the fact that there was no statutory upper limit to the fine. The Supreme Court noted that the number of day-fines, fifteen, was not markedly different from the number of day-fines typically imposed for other minor offences, and it was therefore not overly severe per se. Hence, the number of day-fines was less relevant to the proportionality of the total sanction than the basis for the calculation of the monetary amount of one day-fine.

In the case at hand, the interpretation of domestic law did not allow for an adjudicative decision that would mean that the monetary amount of one day-fine is calculated in a way that would lead to a significantly lower amount. The Criminal Code was clear as to this point. It was also not possible to decline to apply certain parts of the provisions governing the calculation of the monetary amount of one day-fine so as to come to a conclusion that would be in line with the principle of proportionality. The monetary amount of one day-fine and the manner of its calculation were matters within the competence of the legislature. In contrast, the courts have discretion in the assessment of the number of day-fines for an offence. In order to ensure an outcome that is compatible with EU law, the court can use its discretion and impose a number of day-fines fewer than fifteen.

The Supreme Court held that an outcome compatible with EU law was achievable in this case by applying the Criminal Code according to its contents and wording so that the sentence imposed on A for a petty state border offence was a fine of fewer than fifteen day-fines. A had failed to observe a formality whose purpose was to simplify the exercise of the freedom of movement; the offence was not very harmful nor the culpability of the offender serious. The Supreme Court held that the just sanction for the offence was five day-fines.

The Supreme Court assessed A's average net monthly income at EUR 700 000. Therefore, the monetary amount of one day-fine was EUR 11 662 and the total fine imposed on A, EUR 58 310.

## Referendary draft and dissenting opinions

In the draft, the referendary proposed that punishment be waived for A owing to the delay in the proceedings. The president and two justices would have adopted the draft.

Two justices held that EU law and domestic criminal law would have been best in concord in the present case by declining to apply the provisions on the calculation of the monetary amount of one day-fine and by setting the day-fine at the statutory minimum. As a result, the monetary amount of one day-fine would in all cases be EUR 6 and the sanction of 15 day-fines for a petty state border offence would yield a total fine of EUR 90 to be imposed on A.

Published 28.6.2023