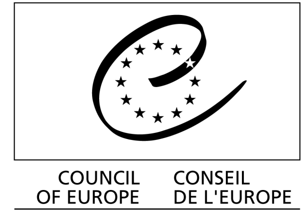

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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

Supreme Court of Denmark

Working document for the Circle of Presidents of the Conference of European Constitutional Courts

(Vilnius, 7 September 2006)

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A. Description

There is no special constitutional court in Denmark. The examination of the constitutionality of acts or administrative regulations is left therefore to the ordinary courts of law.

In 1660 an absolute monarchy was introduced in Denmark, and it was made statutory by The Kings Acts of 14 November 1665. Already in 1661 the King had issued a decree about the highest court of the Kingdom, the Supreme Court. Regardless of the fact that the Supreme Court was formally under the authority of the King, quite soon it acquired a status in practice which was essentially independent of the King, who intervened in very few cases. However, it was only with the transition to a constitutional monarchy, introduced after a revolutionary wave by the Constitution of June 1849, that the courts of law were formally separated from the legislative and the executive powers.

I. Basic texts

- Constitution (Sections 59-65)
- Administration of Justice Act.

II. Composition and organisation

1. Structure of the Judiciary

The Danish judiciary, which is regulated by the Administration of Justice Act, consists of courts of law at three levels: the District Courts, the High Courts, and the Supreme Court. As a general rule, however, a case can only be tried in two instances.

Most cases – both civil cases and criminal cases – start in the District Court with a right of appeal to the High Court. However, if the case concerns a matter of principle, an independent board, (*Procesbevillingsnaevnet*), chaired by a Supreme Court judge and composed of 2 judges from the lower courts, a practising lawyer and a professor of law, may grant leave for the case to be tried before the Supreme Court in the third instance. For certain minor cases, an appeal to the High Court also depends on leave being granted by an independent board.

Cases concerning trial of administrative decisions are as a general rule tried before the High Court at first instance with the possibility of an appeal to the Supreme Court. Further, the

District Courts have the possibility, when requested by one of the parties, of referring civil cases on a matter of principle to the High Court, from whose decisions a right to appeal to the Supreme Court is automatic.

Criminal cases where the offence is punishable by imprisonment for four years or more, and criminal cases concerning political crimes, are tried before the High Court at first instance with lay judges assisting. When sentences are appealed to the Supreme Court, this Court may evaluate only the legal basis: it cannot change the assessment of evidence.

However, the Administration of Justice Act has been amended in 2006 ; As from 1 January 2007 all cases – civil as well as criminal – shall start before the district court. An appeal may, as a matter of right, be brought to one of the two High Courts. A further appeal to the Supreme Court requires leave from the above-mentioned board. When requested by a party, the district court may refer a civil case involving questions of principle to the High Court, which will then be the court of first instance. In such a case, an appeal to the Supreme Court needs no leave. The reform will enable the Supreme court to concentrate on cases involving questions of principle or raising a point of general interest.

As a consequence of the distribution of competence between District Courts, High Courts, and the Supreme Court, and of the possibility of granting leave to try cases on matters of principle before the Supreme Court, cases concerning the compliance of acts or administrative provisions with the Constitution, EC law and the European Convention on Human Rights will normally be tried in the last instance by the Supreme Court. However, there is nothing to prevent such a case from being decided finally at a lower level.

2. Composition of the Supreme Court

The Supreme Court is composed of its President and 18 other judges. Like the judges of the lower instances, Supreme Court judges are formally appointed by the Queen on the recommendation of the Minister of Justice. The latter is advised by an independent Council for the Appointment of Judges (Dommerudnaevnelsesraadet). The Council is chaired by a Supreme Court judge and composed of two of the judges, one a practising lawyer and two members representing the general public. The Council will submit the name of only one candidate to the Minister, who is supposed to follow the recommendation of the Council. The appointments are unlimited in time, but subject to the normal age of retirement (70 years) and it follows directly from the Constitution that judges can only be removed by a court decision.

3. Procedure and organisation of the Supreme Court

The Supreme Court functions in two chambers usually composed of five judges. The Supreme Court may decide, however, that a larger number of judges or all of them shall participate in a case. This is particularly the case in decisions on the constitutionality of an Act.

The procedure of the Supreme Court is more formal than in the lower instances, but in principle it is regulated by the same provisions of the Administration of Justice Act. Cases are usually tried verbally, but the initial preparation will be written. Certain types of decisions, including especially procedural decisions, are dealt with on a written basis. In such cases the Supreme Court makes its decision in a committee comprising three judges.

It is common practice that a party is represented by a lawyer before the Supreme Court. It is a condition for being entitled to plead before the High Courts that the lawyer in question has passed a special test in procedure and, before the Supreme Court, that the lawyer in question shall have at least five years regular practice in procedure before the High Courts.

Court decisions of broader interest, i.e. decisions made by the Supreme Court and selected decisions of the High Courts, are published in a weekly periodical, Ugeskrift for Retsvaesen.

III. Powers

By the Constitution, whose most recent amendment was by Act No. 169 of 5 June 1953, the courts of justice were given explicit powers to decide on questions concerning the limits of the administration (Section 63 of the Constitution). At the same time a provision was introduced in the Constitution establishing special constitutional courts, but this provision has never been used, nor are there any plans for using it. If such courts of justice should be established, their decisions must be subject to appeal to the highest court of the Kingdom, the Supreme Court.

The Constitution does not explicitly state that the courts of justice have authority to test the constitutionality of enactments. This has been invariably assumed in theory as well as in practice, so that such a power of review is regarded as established by constitutional practice.

The testing of the constitutionality of an Act can assume the following forms:

- Testing of whether the legislative procedure has been adhered to;
- Testing of whether the separation of powers has been adhered to;
- Testing of whether an Act is materially constitutional, having regard for example to civil and political rights.

Legal action can be taken only by a party with a particular and individual interest in having a decision on a question. Thus, the concept of "popular complaint" is unknown in the Danish administration of justice. Nor has the *Folketing* (the Danish Parliament) any possibility of having opinions from the courts on the constitutionality of a Bill. Such questions are usually settled by the *Folketing* asking the Minister of Justice for opinions.

In practice the courts of law have been cautious in considering the constitutionality of Acts, thereby according the legislative power a margin of appreciation in difficult questions of evaluation or construction.

IV. Nature and effects of judgments

Review of the constitutionality of an Act takes place in tandem with the consideration of all other legal and factual circumstances of a case. If a court of law should find an Act unconstitutional, it cannot repeal it, but is limited to deciding whether the Act shall be applied in the concrete case put before the court for adjudication. If an Act has been considered to be invalid in a concrete case, the decision nonetheless has a general and normative valve, because as a precedent it means that the application of the Act will be paralysed in all similar future cases.

B. The Constitutional Act of Denmark (extracts)

Part VI

§59.

(1) The High Court of the Realm shall consist of up to fifteen of the senior ordinary members of the highest court of justice in the Realm (according to length of office) and an equal number of members elected for six years by the Folketing according to proportional representation. One or more substitutes shall be elected for each elected member. No member of the Folketing shall be elected a member of the High Court of the Realm, nor shall a member of the Folketing act as a member of the High Court of the Realm. Where, in a particular instance, some of the members of the highest court of justice in the Realm are prevented from taking part in the trial of a case, an equal number of the members of the High Court of the Realm last elected by the Folketing shall retire from their seats.

(2) The High Court of the Realm shall elect a president from among its members.

(3) Where a case has been brought before the High Court of the Realm, the members elected by the Folketing shall retain their seats in the High Court of the Realm for the duration of such case, even if the period for which they were elected has expired.

(4) Rules for the High Court of the Realm shall be provided by statute.

§60.

(1). The High Court of the Realm shall try such actions as may be brought by the King or the Folketing against Ministers.

(2) With the consent of the Folketing, the King may also cause other persons to be tried before the High Court of the Realm for crimes which he may deem to be particularly dangerous to the State.

§61.

The exercise of judicial authority shall be governed only by statute. Extraordinary courts of justice with judicial authority shall not be established.

§62.

The administration of justice shall always remain independent of executive authority. Rules to this effect shall be laid down by statute.

§63.

(1) The courts of justice shall be empowered to decide any question relating to the scope of the executive's authority; though any person wishing to question such authority shall not, by taking the case to the courts of justice, avoid temporary compliance with orders given by the executive authority.

(2) Questions relating to the scope of the executive's authority may by statute be referred for decision to one or more administrative courts, except that an appeal against the decision of the administrative courts shall be referred to the highest court of the Realm. Rules governing this procedure shall be laid down by statute.

§64.

In the performance of their duties the judges shall be governed solely by the law. Judges shall not be dismissed except by judgement, nor shall they be transferred against their will, except in such cases where a rearrangement of the courts of justice is made. A judge who has completed his sixty-fifth year may, however, be retired, but without loss of income up to the time when he is due for retirement on account of age.

§65.

(1) In the administration of justice all proceedings shall to the widest possible extent be public and oral.

(2) Laymen shall participate in criminal proceedings. The cases and the form in which such participation shall take place, including which cases shall be tried by jury, shall be provided for by statute.

C. Case-law (from the CODICES database)

DEN-2005-1-001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 21-01-2005 / **e)** 22/2004 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen* 2005, 1265; CODICES (Danish).

Keywords of the Systematic Thesaurus:

3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
5.1.1.2 **Fundamental Rights** – General questions – Entitlement to rights – Citizens of the European Union and non-citizens with similar status.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2.1.2.1 **Fundamental Rights** – Equality – Scope of application – Employment – In private law.
5.2.2.6 **Fundamental Rights** – Equality – Criteria of distinction – Religion.
5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of worship.

Keywords of the alphabetical index:

Discrimination, indirect / Discrimination, justification / Headscarf, refusal to remove, dismissal / Employment, dress code.

Headnotes:

Dismissal of a Muslim woman for wearing a headscarf contrary to the dress code of the employer neither implies unlawful indirect discrimination nor contravenes Article 9 ECHR.

Summary:

In 1996 the plaintiff was employed by the defendant, the supermarket Føtex, for the purpose of serving customers. According to the dress code of Føtex, the employees should be partially uniformed, and in certain cases must wear caps or other specific headgear. In the employer's official rules concerning the dress code, which was handed out to the employees, it was added that in all areas where there was no requirement of specific headgear, it was a part of the uniform requirement that the employees not wear headgear. This, however, only applied to employees with direct costumer contact. Thus, employees without customer contact were not bound to follow the rules in the dress code. The purpose of these rules in the dress code was for employees to present a neutral, uniform appearance vis-à-vis the customers. In 2001 the plaintiff

informed her employer that in the future she would wear a headscarf for religious reasons. After a meeting where the parties failed to reach an agreement, the plaintiff was dismissed.

Relying on Article 2 in the Danish Act on Prohibition of Discrimination on the Labour Market (the Discrimination Act), the plaintiff alleged that the defendant's prohibition of headgear implied indirect discrimination because the prohibition only affected the employees who for religious reasons needed to cover their hair and neck with headscarves. Furthermore, the discrimination was contrary to the principle of equal treatment because the rules in the dress code were not objectively justified, and because the rules – which made it impossible for certain employees to observe religious precepts – were not proportionate to the employer's aim of the neutral, uniform appearance of employees vis-à-vis the customers. The dismissal was therefore unlawful pursuant to the Discrimination Act.

Furthermore the plaintiff noted that the Discrimination Act had to be interpreted in the light of Denmark's convention obligations. Thus, a prohibition on headgear contravened Article 9 ECHR on freedom of religion. The case-law of the European Court of Human Rights showed that in each case a concrete assessment of evidence with regard to objectivity and proportionality must be made.

The defendant alleged that the rules in the dress code had been adopted for commercial and operational reasons. The rules were objectively justified and proportionate, and they pursued a legitimate aim. The defendant wanted to appear as a politically, religiously and culturally neutral company and wished to meet the customers on their own terms. Furthermore the employees had to be easily recognisable for the customers. The dress code was the same for all employees in the same position and was enforced consistently. Accordingly, there was no indirect discrimination. If the court would find that there was an indirect discrimination, it was justified for the reasons mentioned above.

Even though the form of the rules of the dress code was neutral, the Supreme Court was convinced that the prohibition of headgear particularly affected the Muslim women who for religious reasons wore headscarves.

However, according to the legislative history of the Discrimination Act, there is no unlawful indirect discrimination if the rules which imply discrimination are objectively justified by the interest in the performance of the work. As an example of lawful indirect discrimination, it is mentioned that it will still be permitted to require employees to wear uniforms or specific clothing if this is a part of the company's appearance vis-à-vis the customers, and if it is a consistent requirement which applies to all employees in the same position. The legislator has thus weighed the interests of an employer who requires use of uniforms or specific clothing against the interests of an employee who for religious reasons cannot conform to the dress code. The Supreme Court found that – where the conditions mentioned in the example are fulfilled – it cannot be decisive for the lawfulness of the dress code whether the company prescribes use of specific headgear or prescribes that the employees cannot wear headgear.

In the light of the foregoing, the Supreme Court held that the enforcement against the plaintiff of the prohibition of wearing headgear was not an infringement of Article 2 in the Discrimination Act. Furthermore, the Supreme Court held that, according to the case-law of the European Court of Human Rights, there was no basis for regarding the enforcement of the prohibition as contrary to Article 9 ECHR.

For these reasons the Supreme Court ruled in favour of the defendant.

Languages:

Danish.

DEN-2004-3-003

a) Denmark / **b)** Supreme Court / **c)** / **d)** 15-04-2004 / **e)** / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen* 2004, 1773..

Keywords of the Systematic Thesaurus:

3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Rules of evidence.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.23 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

Keywords of the alphabetical index:

Defamation, through press / Witness, testimony outside trial / Child, protection / Child, sexual abuse.

Headnotes:

A chief editor was not responsible for defamation for the reports made by his newspaper concerning an acquittal in a case concerning sexual abuse of children.

The coverage both of the judgment of the High Court and of one of the parents' reaction to the acquittal were justifiable as a part of an ongoing debate regarding the subject on how to secure and use evidence in cases concerning sexual abuse against children.

Summary:

On 18 June 1999, the City Court of Gladsaxe sentenced B. to one year's imprisonment for violation of the Danish Criminal Code because he, on nine separate occasions, had engaged in sexual intercourse and other sexual conduct with minors. The City Court placed great emphasis on the testimony from the nine alleged victims, which had been video-taped in order to spare the minors the psychological stress associated with appearing in person in court. In addition to thprison sentence, B. was held liable for damages to the minors and was furthermore declared unfit to work or associate with minors.

B. appealed the judgment of the City Court to the High Court of Eastern Denmark arguing, *inter alia,* that the video-taped testimonies from the alleged victims should be excluded as evidence, since he had not had a chance to contradict the evidence in that testimony.

The Supreme Court had – in the time between the judgment against B. in the City Court and the proceedings before the High Court in another case – ruled that video-taped testimony should be excluded in instances where the defendant has not had a chance to submit his own line of questioning to the police officers interviewing the alleged victims. The Supreme Court had

based its decisions on the argument that children's testimonies can sometimes be unreliable and influenced by other testimonies, such as their parents or investigating police officers. It was the view of the Supreme Court that the defendant's right to a fair trial would be prejudiced if the witnesses could not be cross-examined and/or defence counsel was unable to submit questions to the alleged victims.

The High Court based its ruling in B.'s case on the above-mentioned Supreme Court precedent and excluded the evidence by a ruling of 11 August 2000. Consequently, the only evidence available in the proceedings against B. was the testimony given by the parents of the alleged victims.

In the final judgment on appeal, the High Court acquitted B. of all charges, holding that the parents' testimony could not be corroborated with other evidence; thus, the evidence presented by the prosecution was not beyond all reasonable doubt and could not be used as a basis for a conviction.

The acquittal in the High Court of B. was followed by a substantial public outcry, especially from the parents of the children. On 1 September 2000, a tabloid newspaper, C., published an Article relating to the case. In bold print covering almost the entire front page, C. had printed, "Distressed mother after sex-acquittal: I WILL EXPOSE HIM AS A PAEDOPHILE." The front page referred to a more detailed coverage within the newspaper. There it was, *inter alia,* mentioned that the parents were considering exposing B. as a paedophile on the Internet, as had happened previously in certain instances in the UK. The Article and the front page cover were mostly based, *verbatim*, on quotations from one of the concerned mothers, D.

The following day, counsel representing B. sent letters to C., D., and A., the chief editor of C. and appellant in the present case, stating that he intended to hold them liable for defamation of B.

On 5 September 2000, the newspaper C. printed a reply to B.'s claims, elaborating further on the statements made in particular by D. The Article quoted D., saying, *inter alia,* "In the High Court [B.] was acquitted because the judges were prevented from seeing the video tapes where the children themselves told about the sexual assaults [...] Now it is only adults that can testify [...] and the court ruled the other day that their opinions are prejudiced... The kindergarten teacher who should have gone to prison left the court exonerated and as a free man."

On 1 October 2001, Copenhagen City Court acquitted A. for defamation. The City Court emphasised that the series of newspaper Articles run by the newspaper C. were an important contribution to an ongoing debate. Pursuant to Article 10 ECHR, the court had to balance the opposing considerations: The protection of B.'s name and the right not to be falsely accused of a crime for which he had been acquitted, and the role of the media as a "public watchdog" reporting on events of acute public interest on the other. The City Court then noted that this evaluation required the Court to look at the expression as a whole and that the form of the Articles were important in that respect. In the view of the City Court the Articles appeared as verbatim quotations from D. and other parents. The Articles merely stated what the parents had to say after the acquittal and did not express C.'s own opinion on the matter. Therefore the Articles were not defamatory.

B. appealed the decision of the City Court to the High Court of Eastern Denmark, which on 24 June 2002 reversed the judgment of the City Court and held A. responsible for defamation of B.'s character.

The High Court focused on a part of C.'s first Article printed on 1 September 2000, which stated, *inter alia,* "When [B.] was acquitted it was especially because the video-taped testimonies given by the children to the police were inadmissible." The High Court agreed that this was a quotation of a statement made by D., one of the parents involved in the original criminal case. However, when examining the choice of words and the broader context in which this quote appeared in C.'s article, the Court concluded that C. expressed its own opinion that B. was indeed guilty, despite his acquittal of all charges. In that respect, the quotation and the context it had been placed in had the same exact meaning as if C. in its own words had written that B. was guilty.

The High Court recognised the argument that C.'s Articles were part of the ongoing debate and that C.'s role as a "public watchdog" was an important consideration when applying Article 10 ECHR. The Court, however, emphasised in particular that C. could have contributed to the debate regarding the use of children's video-taped testimony in sexual abuse cases without defaming B. Consequently, A. as chief editor could not invoke Article 10 ECHR as defence for defamation.

A. appealed the judgment of the High Court to the Supreme Court, and on 15 April 2004, the Supreme Court reversed the judgment of the High Court. The Supreme Court noted that the criticism of the outcome of a court case does not necessarily, and in itself, amount to a defamatory accusation. Whether a statement amounts to an accusation of defamatory character is subject to a concrete evaluation.

C.'s series of articles, in particular the Article of 1 September 2000, gave rise to serious doubt as to C.'s own point of view with regard to B.'s guilt. This doubt could be criticised, but it was not in itself enough to consider the Articles as an expression of C.'s belief that B. was indeed guilty.

The Supreme Court emphasised that the coverage both of the judgment of the High Court and D.'s reaction to the acquittal were justifiable as a part of an ongoing debate regarding the subject as to how to secure and use evidence in cases concerning sexual abuse against children.

After due consideration, the Supreme Court found it questionable to hold that A. was guilty of defamation, as the national rules are interpreted in the light of Article 10 ECHR. Accordingly, the Supreme Court quashed the judgment of the High Court and affirmed the judgment of the City Court of Copenhagen.

Languages:

Danish.

DEN-2004-2-002

a) Denmark / **b)** Supreme Court / **c)** / **d)** 20-08-2003 / **e)** 158/2003 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen* 2003, 2438; CODICES (Danish).

Keywords of the Systematic Thesaurus:

3.16 **General Principles** – Proportionality.

3.17 **General Principles** – Weighing of interests.
5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship or nationality.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Restaurant, service, refusal, political expression.

Headnotes:

The refusal by a restaurant owner to serve French and German customers cannot be regarded as an exercise of freedom of expression, conveying a disagreement with the political views of France and Germany on the war in Iraq.

Summary:

The appellant used to own and run a pizzeria by the name of "Aages Pizza" on the Danish island of Fanø. On 10 February 2003 the appellant started what he called a "boycott," where he refused to serve pizzas to French and German citizens visiting Fanø. In the beginning, the appellant informed his customers orally about the boycott. About a week after starting the boycott, the appellant installed signs on the door communicating the boycott. Whenever customers would enter the pizzeria, the appellant would ask them if they spoke German, and whether they were from France or Germany.

The appellant's reason for the boycott was to express his strong disagreement with the political views of the French and German governments on the US-led war in Iraq. According to the appellant, the two countries had caused dissention in NATO and the UN, by acting disloyally towards the United States. The applicant stated that he would continue his boycott, as long as the two countries refused to support the United States in the war on terror.

On 2 May 2003 a Danish-German couple visited the appellant's pizzeria; the Danish husband ordered pizzas in fluent Danish, but the appellant still suspected that the couple might be German. When he overheard the couple speaking together in German, while they were still eating, he took their pizzas from them, threw the pizzas away, and gave the couple their money back.

The appellant was indicted on two separate counts of violation of Section 1.1 of the Danish Racial Discrimination Act: firstly, a general violation of the law caused by the boycott of French and German customers; and secondly, a specific violation of the law caused when he removed the two pizzas ordered by the Danish-German couple on 2 May 2003.

In a judgment delivered on 10 June 2003, the City Court of Esbjerg found the appellant guilty on both counts. The appellant presented two arguments. Firstly, that the anti-racial discrimination law only applied in instances of discrimination against minorities, and thus did not apply to the situation in question, since French and German nationals were not racial minorities in Denmark. Secondly, in case the anti-racial discrimination law did apply, the applicant's actions constituted a symbolic gesture, conveying a political opinion, which was consequently protected by his freedom of expression pursuant to Section 77 of the Constitution and Article 10 ECHR.

The City Court rejected the appellant's first argument and held that according to the Racial Discrimination Act, the law not only applied to cases of discrimination against minorities, but also to all cases of discrimination based on race or nationality.

With respect to the appellant's second argument, the Court acknowledged that his actions were indeed symbolic and thus a manifestation of an expression falling under the sphere of application of Section 77 of the Constitution and Article 10 ECHR. The Court found, however, that the protection of freedom expression did not prohibit a State from enacting anti-discrimination laws; and, despite the fact that the appellant might have succeeded in bringing even international attention to his views, the appellant's discriminative actions were not exempted from legal consequences.

On 10 June 2003 the High Court of Western Denmark upheld the judgment of the City Court. The High Court agreed with the City Court that the Racial Discrimination Act did not limit its sphere of application to racial minorities. As regards the question of freedom of expression, the High Court noted that freedom of expression could be restricted where the restriction is prescribed by law and necessary in a democratic society to protect the rights of others. The Danish Racial Discrimination Act had been enacted to implement the 1965 UN International Convention on the Elimination of All Forms of Racial Discrimination. After weighing the appellant's right to freedom of expression against the general protection in the Racial Discrimination Act, the Court concluded that the infringement of the applicant's freedom of expression was justified. Furthermore, the size of the fine imposed was proportional, when the number of French and German nationals that had been discriminated against was taken into account.

Languages:

Danish.

DEN-2004-1-001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 03-12-2004 / **e)** 158/2003 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen* 2004.734 H..

Keywords of the Systematic Thesaurus:

4.5.10 **Institutions** – Legislative bodies – Political parties.
4.9.8 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.23 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

Keywords of the alphabetical index:

Racist statement / Internet, racist statements, dissemination.

Headnotes:

Publishing degrading and insulting statements towards Muslims via Internet, with the intent to disseminate them to a broad circle of persons constitutes propaganda and is not covered by the

broader freedom of speech enjoyed by politicians. Punishing such behaviour does not violate Articles 10 and ECHR.

Summary:

The defendant was the front-runner for "*Fremskridtspartiet*" (The Progress Party) in the elections for the Copenhagen City Council. As a part of his election campaign, he had established an Internet homepage with the address www.muhamedanerfrit.dk, in which he published an Article called "Mohammedan rape on Denmark". In this article, the defendant claimed that the only way to preserve the lives and security of the Danes would be to intern all unwanted aliens in concentration camps. While the aliens were living in such camps, the standard of living would have to be gradually lowered in order to make aliens want to leave Denmark.

In this case the defendant was sentenced to 20 days of imprisonment for making racist statements. Considering that the defendant had no previous convictions, the sentence was suspended subject to his not committing any crime during the course of a two-year probation period.

The District Court found that the defendant publicly and with the intent to disseminate his statements to a broad circle, had initiated degrading comments towards Muslims. Even though such remarks had been made in a political context, they were made on the Internet and not as a part of a political debate. The statements were therefore not covered by the broader freedom of speech enjoyed by politicians. The Court however did not find that comments of this nature amounted to propaganda, which is considered an aggravating circumstance, in the fixing of the sentence. The sentence was fixed at alternatively 6 fines of 500 DKK each or prison for 6 days imprisonment.

On the same grounds as the District Court the High Court, also found the defendant guilty. Unlike the District Court, however, the High Court concluded that the statements constituted propaganda. Indeed, they had been made via an electronic medium where everybody who sought information on the defendant's political views would find them. On account of this aggravating factor, the sentence was fixed at 20 fines of 500 DKK or 20 days imprisonment.

The Supreme Court found the statements insulting and degrading towards the ethnic group in question. The broader freedom of speech that politicians enjoy regarding statements on public matters did not apply under these circumstances, and the Supreme Court therefore concurred in the conviction of the defendant by the High Court and further regarded such conviction to be in accordance with Articles 10 and 7 ECHR.

As the defendant was a candidate for political office and the name of his homepage was designed to attract the public's attention, the Supreme Court furthermore concurred in the High Court's finding that the statements constituted propaganda.

The defendant was sentenced to 20 days of imprisonment, which were suspended on account of the defendant's lack of previous convictions.

Languages:

Danish.

DEN-2003-3-002

a) Denmark / **b)** Supreme Court / **c)** / **d)** 12-06-2003 / **e)** 550/2002 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen* 2003.2031H; CODICES (Danish).

Keywords of the Systematic Thesaurus:

5.3.13.13**Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Trial/decision within reasonable time.

Keywords of the alphabetical index:

Sentence, mitigation / Company, asset stripping / Tax, fraud / Good, stolen, handling.

Headnotes:

In prosecution of a defendant who was accused of handling stolen goods in a particularly aggravated way, the length of the proceedings was deemed to be a violation of Article 6.1 ECHR, which states that everyone is entitled to a fair trial within a reasonable time. The Supreme Court mitigated the sentence to repair the violation.

Summary:

Together with two other persons the defendant had bought ten companies. In each of the deals the liquid assets in the companies – intended for payment of due corporation tax – were transferred either to the seller, the first acquirer or the defendants. Hereby the government either suffered a capital loss or the government's possibility of satisfaction was severely diminished, because the companies' liquid assets were stripped.

In this case the defendant was sentenced to 1 year and 6 months imprisonment for 10 counts of handling stolen goods in a particularly aggravated way.

The District Court found that the defendant had taken part in an arrangement where 10 companies werebought and the assets where stripped, and the defendant had personally received some of the money that had been removed from the companies. However the court found that because of the statute of limitations, the court could only convict the defendant if his actions constituted handling stolen goods in a particularly aggravated way. The Court did not find that the defendant had received sufficient amounts of money to justify this claim. The actions were hereby statute-barred and the defendant was therefore acquitted.

The High Court found that the defendant was aware of the nature of the acquisition deals and the way the liquid assets in the companies – intended for payment of due corporation tax – were divided between the defendants. The court found that the defendant had transferred the money to an attorney, who divided the money between the involved parties, and the defendant had personally received a share of the money. The defendant was hereby guilty of handling stolen goods.

As to whether or not the actions constituted handling of stolen goods in a particularly aggravated way, the High Court found that an overall assessment of the events, including the defendants knowledge of the asset stripping, indicated that his actions constituted handling of stolen goods in a particularly aggravated way. The actions were hereby not statute-barred.

A majority (4 judges) voted to fix the sentence at 1 year and 6 months imprisonment. A minority of 2 judges voted to fix the sentence at 1 year and 9 months imprisonment. All judges had taken into account the length of the proceedings when fixing the sentence.

The Supreme Court found for the reasons that the High Court stated that the defendant was guilty of handling stolen goods in a particularly aggravated way. Furthermore the Supreme Court found that the sentence given by the High Court was adequate.

The Supreme Court noted that this punishment was substantially lower than the normal punishment for a crime of this magnitude. However given the length of the proceedings and the fact that the case was not proceeded for two years from September 1996, the Supreme Court considered this a violation of Article 6.1 ECHR. To repair this violation the Supreme Court mitigated the sentence.

Languages:

Danish.

DEN-2003-1-001

a) Denmark / **b)** High Court / **c)** / **d)** 27-03-2002 / **e)** / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen* 2002, 1393; CODICES (Danish).

Keywords of the Systematic Thesaurus:

3.16 **General Principles** – Proportionality.
5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.
5.3.33 **Fundamental Rights** – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Criminal law / Expulsion, foreigner, under criminal procedure / Burglary.

Headnotes:

Having regard to the extensive and serious crimes committed and the strong relations maintained with the country of origin, the permanent expulsion of a 40-year-old Yugoslav national, who had been living in Denmark since he was 12 years old, does not contravene the principle of proportionality in Article 8 ECHR.

Summary:

The appellant, a 40-year-old Yugoslav national, had been living in Denmark since he was 12 years old. He had finished his education in Denmark, and during the last couple of years he had had a permanent cleaning job. His parents, his sister and his sister's family were also living in Denmark. The appellant was not married and had no children. He had a Yugoslav girlfriend, who also lived in Denmark. The appellant spoke Serbian, and in 1985 and 1986 he had visited Yugoslavia for 4 and 3 months respectively. His family owned real property in Yugoslavia and frequently stayed there. It appeared from the telephone conversations, to which the police had listened in, that the appellant was planning to send considerable amounts of money to

Yugoslavia and to invest in real property. It also appeared that he owned a large amount of goods in Yugoslavia.

In this case, the appellant was sentenced to 4 years of imprisonment for 52 cases of burglary and 7 cases of handling of stolen goods for a total amount of approximately 10,2 million Danish kroner.

The appellant had previously been convicted 4 times for, *inter alia*, serious offences against property. Consequently, from 1990 to 1999 he had received convictions sentencing him to imprisonment for a total of approximately 5 years.

The District Court found that he should not be expelled from Denmark. The majority (2 judges) noted that he had lived in Denmark for many years. Therefore, the expulsion contravened the principle of proportionality in Article 8 ECHR.

The High Court found that the appellant should be permanently expelled from Denmark. The majority (5 judges) noted that the appellant's primary attachment to Denmark consisted in the facts that he came to Denmark at the age of 12 years and that he had lived in Denmark for approximately 23 years. Nevertheless, he had maintained his attachment to Yugoslavia. For those reasons and considering his extensive and serious crimes, the majority found that expulsion did not contravene the principle of proportionality in Article 8 ECHR.

A minority of 1 judge took into account that the appellant had lived in Demark for approximately 23 years, that he had finished his education in Denmark and that his closest family and his girlfriend lived in Denmark. The minority considered that, taken as a whole, the appellant's attachment to Denmark was so strong that expulsion – irrespective of his former and past crimes – contravened Article 8 ECHR. The minority took into special account that the appellant was not convicted for cases of drug offences or offences dangerous to persons.

Cross-references:

The Danish Supreme Court has delivered five judgements concerning expulsion, which have been reported as precis in the *Bulletin* 1999/1 [DEN-1999-1-002] and [DEN-1999-1-003]; *Bulletin* 1999/3 [DEN-1999-3-007] and [DEN-1999-3-009] and *Bulletin* 2000/1 [DEN-2000-1-001].

Languages:

Danish.

DEN-2002-3-001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 21-05-2002 / **e)** II 222/2001 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen* 2002, 1789; CODICES (Danish).

Keywords of the Systematic Thesaurus:

2.1.1.4.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
3.19 **General Principles** – Margin of appreciation.
5.2.2.3 **Fundamental Rights** – Equality – Criteria of distinction – National or ethnic origin.
5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship or nationality.

5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Licence, granting, requirements / Transport, commercial.

Headnotes:

A requirement of citizenship as a condition for receiving a licence for the commercial transportation of persons (taxi driving) was not contrary to the European Convention on Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination or the International Covenant on Civil and Political Rights.

Summary:

In 1997 an amendment of the act regulating taxi driving was passed, which included a citizenship requirement as a condition for receiving a licence for the commercial transporting of passengers. This requirement was revoked in 1999. In June 1998 the Copenhagen Taxi Board advertised some vacant taxi licences. The plaintiff, who was a Pakistani citizen, and who at that time already held six taxi licences, was among the persons who were not granted a new licence. The plaintiff did not receive his seventh licence until June 1999. The plaintiff instituted legal proceedings against the Ministry of Transportation claiming that the application of the citizenship requirement in the act regulating taxi driving in relation to him was contrary to Article 14 ECHR read in conjunction with Article 1 Protocol 1 ECHR, as well as the International Convention on the Elimination of All Forms of Racial Discrimination, Article 26 of the International Covenant on Civil and Political Rights andArticle 2.2 of the International Covenant on Economic, Social and Cultural Rights read in conjunction with Article 6 of that Covenant. Furthermore the plaintiff claimed before the High Court for Western Denmark that the provision on citizenship was contrary to Section 74 of the Constitution governing the free choice of occupation.

The High Court found that the requirement of citizenship as a condition for undertaking the commercial transportation of passengers gave rise to different treatment of persons legally residing in Denmark without having Danish citizenship. The grounds given by the legislator were not sufficient to justify such different treatment. Furthermore, the High Court found that the applicant's six taxi licences were covered by the concept of property in Article 1 Protocol 1 ECHR. It was apparent from the act regulating taxi driving that the plaintiff would no longer be able to exercise his commercial activity after 1 January 2005 if he was not able to obtain Danish citizenship. The High Court found that the application of the citizenship requirement in relation to the plaintiff was contrary to Article 1 Protocol 1 ECHR as well as Article 14 ECHR read in conjunction withArticle 1 Protocol 1 ECHR. Furthermore the High Court concluded that the plaintiff would have obtained one more taxi licence in 1998 and that it was only due to the requirement of citizenship that he had not obtained this licence until 22 June 1999. In this respect the High Court found that the plaintiff had suffered an economic loss for which the defendant was liable for damages.

Before the Supreme Court the applicant only claimed that the application of the provision on citizenship was contrary to Article 14 ECHR read in conjunction with Article 1 Protocol 1 ECHR.

The Supreme Court stated that the application of Article 14 ECHR is contingent on the disputed discrimination concerning the enjoyment of the rights and freedoms recognised in the European Convention on Human Rights. The Supreme Court found that the plaintiff had no legal claim for being awarded another licence. According to the case law of the European Court of Human Rights the possibility of being granted a public licence to carry out commercial activities is not a right protected under Article 1 Protocol 1 ECHR. Therefore the Supreme Court found that the plaintiff's possibility of being awarded an additional licence in 1998 was not protected by Article 1 Protocol 1 ECHR. Accordingly the Supreme Court found that the application of the citizenship requirement in relation to the plaintiff was not contrary to Article 14 ECHR read in conjunction with Article 1 Protocol 1 ECHR.

Furthermore the Supreme Court found that differential treatment on the grounds of citizenship was not in itself a violation of Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination and that Article 26 of the International Covenant on Civil and Political Rights had to be interpreted in the same manner. The Supreme Court held that the insertion of the requirement for citizenship was motivated by a wish to consider stated legitimate aims and that differential treatment on the ground of national origin was unintentional. Furthermore the Supreme Court found that the Parliament *(Folketinget)* enjoyed a certain margin of appreciation in deciding whether a requirement for citizenship was appropriate and was reasonable in relation to the aims pursued. Thus the application of the citizenship requirement was not contrary to Article 5 or Article 26.

Languages:

Danish.

DEN-2001-1-001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 16-02-2001 / **e)** I 67/2000 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 2001, 1057; CODICES (Danish).

Keywords of the Systematic Thesaurus:

5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.39.1 **Fundamental Rights** – Civil and political rights – Right to property – Expropriation.
5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Property, enjoyment / Housing, temporary residence ban.

Headnotes:

It was not expropriation to temporarily ban a person from residing in his own property.

Summary:

A. was banned from residing on a property he owned. A. was a member of *"Bandidos"* and his property was made into a so-called biker fortress. The ban was issued in accordance with the

"Biker Law". The purpose of the law was to prevent clashes between the two rivalling biker gangs, *"Bandidos"* and *"Hells Angels"*, by banning the gang members from residing in biker fortresses.

In the proceedings before the Danish Supreme Court A. did not claim that the conditions for issuing the ban were not fulfilled, but in accordance with the Constitution he claimed compensation because he alleged the ban had to be regarded as expropriation.

The Supreme Court found that the ban would presumably be lifted after a while, and that the ban did not involve any other limitations on A's rights as owner of the property. He was free, for example, to sell the property or rent it out.

Moreover the purpose of the law was to protect the life and health of the general public in connection with the extremely violent internal clashes between biker gangs, and A. had indeed arranged and used his property as a typical biker fortress. The property was therefore a likely focus for a clash between biker gangs. On these grounds the Supreme Court decided that the ban issued against A. was not a measure that justified compensation. Neither Article 73 of the Constitution concerning expropriation measures, nor Article 8 ECHR or Article 1 Protocol 1 ECHR were violated.

Cross-references:

- Case 248/1998, Judgment of 16.08.1999, *Bulletin* 1999/3 [DEN-1999-3-010].

Languages:

Danish.

DEN-2000-1-001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 13-12-1999 / **e)** I 377/1999 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 2000, 546; CODICES (Danish).

Keywords of the Systematic Thesaurus:

3.16 **General Principles** – Proportionality.
5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.
5.3.33 **Fundamental Rights** – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Criminal law / Deportation / Drug, offences.

Headnotes:

Deportation for a period of 5 years of a 35-year-old Chilean, who had been living in Denmark since he was 14 and who had been convicted of several serious offences, did not contravene the principle of proportionality in Article 8 ECHR.

Summary:

The appellant – a 35-year-old Chilean citizen – had been living in Denmark with his parents and two half brothers since he was 14. The appellant had been married but was now divorced and he currently lived with his mother. He had no children. He spoke and wrote Spanish and in the last ten years he had visited relatives in Chile several times.

In this case, the appellant was sentenced to 5 months imprisonment for 6 cases of drug offences.

The appellant had previously been convicted several times for, *inter alia*, drug offences and robberies. Since 1986, when he was sentenced to 3 and a half years imprisonment for drug offences, he had received convictions sentencing him to imprisonment for a total of approximately 6 years.

Both the District Court and the High Court found that he should be deported for a period of 5 years. Considering the repeated convictions for drug offences, both courts found that the deportation was essential for social reasons and that it did not contravene Article 8 ECHR.

The Supreme Court upheld the decisions of the District Court and the High Court. The majority (3 judges) noted that the appellant had come to Denmark at the age of 14 years and that he had lived in Denmark for approximately 20 years. Beyond this, the appellant's primary attachment to Denmark consisted in his mother and two half brothers living in Denmark. The appellant spoke Spanish and he had maintained contact with his relatives in Chile. On these grounds, and considering his extensive and serious crimes, the majority found that deportation did not contravene the principle of proportionality in Article 8 ECHR.

A minority of two judges took into account that the appellant had committed his most serious crime in 1986. Since then he had – apart from a sentence of one and a half years imprisonment in 1995 – only been sentenced to a number of shorter terms of imprisonment during the 1990s. The minority considered that, taken as a whole, the appellant's attachment to Denmark was so strong that deportation founded on his past crime contravened the principle of proportionality in Article 8 ECHR.

Cross-references:

The Supreme Court has delivered four other judgements concerning deportation, which have been reported as précis in *Bulletin* 1999/1, [DEN-1999-1-002] and [DEN-1999-1-003], and *Bulletin* 1999/3 [DEN-1999-3-007] and [DEN-1999-3-009].

Languages:

Danish.

DEN-1999-3-010

a) Denmark / **b)** Supreme Court / **c)** / **d)** 16-08-1999 / **e)** I 248/1998 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1999, 1798; CODICES (Danish).

Keywords of the Systematic Thesaurus:

2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
3.4 **General Principles** – Separation of powers.
3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
4.5.7 **Institutions** – Legislative bodies – Relations with the executive bodies.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.
5.3.28 **Fundamental Rights** – Civil and political rights – Freedom of assembly.

Keywords of the alphabetical index:

Biker group / Violence, risk.

Headnotes:

An Act enabling the police to bar individuals from premises used as a meeting place by a group to which the person in question belonged and which was involved in on-going armed confrontations with other groups did not contravene the principle of freedom of association nor the principle of the separation of powers.

Summary:

Following several violent encounters between two biker groups (Bandidos and Hells Angels), the Danish Parliament in October 1996 passed the Prohibition on Staying on Certain Premises Act in order to protect the people who live near biker group residences. Pursuant to § 1 of the Act, the police could bar individuals from certain premises which were used as a meeting place by a group to which the person in question belonged, when, because of on-going armed confrontations with other groups, the presence of that person on those premises posed a risk of violence with possible repercussions for persons in the vincity.

The plaintiff, who had been prohibited from staying in two buildings that served as residences for Hells Angels, brought an action against the Justice Department claiming that the prohibition was invalid.

The plaintiff submitted that § 1 of the Act is in conflict with § 79 of the Constitution, which reads:

“Citizens shall, without previous permission, be at liberty to assemble unarmed. The police shall be entitled to be present at public meetings. Open-air meetings may be prohibited when it is feared that they may constitute a danger to the public peace.”

The plaintiff mainly argued that the Act gave authority to issue a prohibition based on a merely abstract risk of an attack endangering other peoples lives.

The plaintiff further submitted that the Act contravened the principle of the separation of powers enshrined in § 3 of the Constitution since the Parliament, by adopting the Act, had made legislation concerning a specific police matter.

The Supreme Court dismissed the claim. The Supreme Court stated that according to its interpretation of the Act, a prohibition could only be issued when a genuine and actual risk of a dangerous attack was established. The presence of an abstract risk was not enough. Furthermore, the purpose of the Act was to protect neighbours and persons passing by. It was not the purpose of the Act to hinder the groups from meeting nor to restrict their right to express their opinion.

Preventing the groups in question from gathering in buildings used as residences by the groups made these buildings unsuitable targets. The Act was only of little consequence to these groups – which, due to their participation in violent confrontations, had become a possible target of attack – considering the desired protection of other citizens. Finally, it would have required extensive police measures to protect neighbours if the groups continued to stay in their well-known residences and this would have had far more substantial consequences.

The Supreme Court also stated that the Act's interference with the exercise of police authority was not in conflict with the principle of separation of powers.

Languages:

Danish.

DEN-1999-3-009

a) Denmark / **b)** Supreme Court / **c)** / **d)** 24-06-1999 / **e)** 14/1999 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1999, 1591; CODICES (Danish).

Keywords of the Systematic Thesaurus:

3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.
5.1.1.3.1 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.
5.3.33 **Fundamental Rights** – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Criminal law / Deportation / Persecution, risk.

Headnotes:

The decision to deport a Bosnian muslim, who had inflicted grievous bodily harm against fellow prisoners in a prison camp in Croatia, was not annulled. His wife and children had been granted residence permits in Denmark. The decision did not contravene Articles 3 or 8 ECHR.

Summary:

The appellant, a Bosnian muslim, had come to Denmark in January 1994 with his wife, who was a Bosnian Croat, and their two children of 3 and 5 years. In November 1994, he had been prosecuted for having inflicted grievous bodily harm against fellow prisoners in a Croatian prison camp, and he was sentenced to 8 years imprisonment and permanent deportation.

Pursuant to a provision in the Danish Aliens Act, the appellant had requested an annulment of the deportation decision mainly relying on the facts that his wife and children had been granted residence permits in 1996, and that he risked persecution if he returned to his native country.

The District Court as well as the High Court ruled in favour of upholding the deportation decision. Considering the nature of the criminal offences, strong interests in law enforcement still pointed towards deportation. The fact that his wife and children had been granted residence permits and that they had become more integrated in the Danish society was not considered to constitute sufficient grounds for an annulment of the deportation decision. Both courts recognised that the deportation of the appellant would interfere with his family life but the interference was not considered to contravene Article 8 ECHR since the deportation was rendered necessary by the serious crimes.

The Supreme Court stated that the deportation decision did not conflict with Article 3 ECHR or similar national rules. The Court referred here to the decisions of the Refugee Board and the Alien Board, both of which had established that the appellant in any case would be protected from being deported if this would imply a risk of persecution.

On these grounds and with reference to the grounds given in the District Court and the High Court, the Supreme Court unanimously ruled in favour of upholding the decision on deportation.

Cross-references:

Three other précis concerning Supreme Court judgments on deportation have been published in the *Bulletin* 1999/1 [DEN-1999-1-002] and [DEN-1999-1-003] and in the *Bulletin* 1999/3 [DEN-1999-3-007].

Languages:

Danish.

DEN-1999-3-008

a) Denmark / **b)** Supreme Court / **c)** / **d)** 15-06-1999 / **e)** 103/1999 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1999, 1536; CODICES (Danish).

Keywords of the Systematic Thesaurus:

3.17 **General Principles** – Weighing of interests.
5.1.1.4.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.
5.3.5.1.3 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Detention pending trial.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.22 **Fundamental Rights** – Civil and political rights – Freedom of the written press.

Keywords of the alphabetical index:

Police, investigation, continuing / Visitation right / Detainee, press interview.

Headnotes:

The freedom of expression did not imply that a person remanded in custody pending trial could be interviewed by the press.

Summary:

In January 1999, the appellant was remanded in custody charged with forgery. After the annulment of an isolation order, three journalists requested permission to visit the appellant in order to interview him about the case, which had been subject to extensive coverage by the press.

The police's rejection of the request was set aside by the District Court but was subsequently affirmed by the High Court.

The Supreme Court found that there was no basis for setting aside the assessment of the police, according to which a visit by the journalists could jeopardise the investigation of the case – a risk against which letting the criminal police control the visits would not be an adequate safeguard.

The rejection did not contravene the principle of freedom of expression as protected by § 77 of the Constitution and Article 10 ECHR. The extent to which the police informed the press about the case was without significance for the question of whether the appellant should have access to make statements to the press while remanded in custody.

On these grounds, the Supreme Court affirmed the decision of the High Court.

Languages:

Danish.

DEN-1999-3-007

a) Denmark / **b)** Supreme Court / **c)** / **d)** 09-06-1999 / **e)** II 66/1998 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1999, 1500; CODICES (Danish).

Keywords of the Systematic Thesaurus:

3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.3.33 **Fundamental Rights** – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Criminal law / Deportation / Drug.

Headnotes:

The deportation for 10 years of a 42-year-old foreigner who had been living in Denmark since 1972 did not contravene the principle of proportionality in Article 8 ECHR, since the person in question had committed serious drug offences.

Summary:

The appellant – a 42-year-old Turkish citizen – had been living in Denmark since 1972. In 1980, he married. The couple had a son who, at the time of the judgment, was 17 years old. The appellant and his wife had remained in contact with the wife's family living in Turkey. The appellant had previously been convicted for drug offences. In 1995 he had been released on probation after serving a sentence of 7 years imprisonment.

In this case, the appellant was sentenced to 8 months imprisonment for possession of cocaine and heroin with intent to resell. Both the District Court and the High Court had found that he should be deported for a period of 10 years. Both courts argued that the appellant had lived in Turkey until he was 15, that he (being a welfare claimant) did not have a job and that he did not support his family.

The Supreme Court upheld this decision. Irrespective of the appellant's strong attachment to Denmark, the Supreme Court found that considering the severity of the drug offence committed by the appellant, a 10 years deportation would not contravene the principle of proportionality in Article 8 ECHR.

Cross-references:

Three other précis concerning Supreme Court judgments on deportation have been published in the *Bulletin* 1999/1 [DEN-1999-1-002] and [DEN-1999-1-003] and in the *Bulletin* 1999/3 [DEN-1999-3-009].

Languages:

Danish.

DEN-1999-3-006

a) Denmark / **b)** Supreme Court / **c)** / **d)** 06-05-1999 / **e)** 66/1998 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1999, 1316; CODICES (Danish).

Keywords of the Systematic Thesaurus:

2.1.1.4.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.
5.4.11 **Fundamental Rights** – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Closed shop agreement / Trade union, membership, compulsory / Labour market.

Headnotes:

A company cannot dismiss an employee for not belonging to a particular trade union if a closed shop agreement is concluded after the appointment of the employee, and if the employee is not a member of the concerned trade union at the time of the agreement.

Summary:

The appellant had in September 1989 been hired by a company which in August 1990 concluded a closed shop agreement with a Danish trade union. The appellant joined the trade union in October 1990 but was expelled in January 1996. As a consequence, the appellant was dismissed from his job. The appellant, relying on the Freedom of Association Act taken together with the case law of the European Court of Human Rights concerning the interpretation of Article 11 ECHR, claimed that the dismissal was unlawful.

The Supreme Court first addressed the general question of the compatibility of closed shop agreements with Article 11 ECHR. The Court noted that the European Court of Human Rights had not taken a position on closed shop agreements as such in the *Young, James and Webster v. United Kingdom* [ECH-1981-S-002] and the *Sigudur A. Sigurjønsson v. Iceland* [ECH-1993-S-005] judgments (see below under Cross-references), nor in its subsequent case law.

The Supreme Court then noted that the Freedom of Association Act was enacted in 1982 in order to protect the freedom from compelled membership of certain associations following the interpretation of the European Court of Human Rights ofArticle 11 ECHR in the *Young, James and Webster v. United Kingdom* judgment [ECH-1981-S-002]. Pursuant to § 2.1 of the Act, an employee cannot be dismissed for not being a member of a particular trade union nor for not being a member of any trade union. The Act contains, however, certain exemptions from this rule; that is:

1. if an employee at the time of his appointment knew that membership of a particular trade union or membership of some trade union is a condition for employment (§ 2.2) or

2. if an employee who is a member of a trade union is informed after his appointment that the membership is a condition for his continuous employment (§ 2.3).

After making a contextual interpretation of the provision, the majority of the Supreme Court (5 judges) concluded that § 2.3 of the Freedom of Association Act does not allow the dismissal of an employee for not belonging to a particular trade union if a closed shop agreement is concluded after the appointment of the employee, and if the employee is not a member of the concerned trade union at the time of the agreement. The Court thereby set aside a mutual procedural declaration on a contrary interpretation of the provision made before the Court by both parties. The majority further noted that its understanding of § 2.3 of the Act was the understanding most in line with the *Young, James and Webster v. United Kingdom* judgment [ECH-1981-S-002].

The dismissal of the appellant therefore contravened § 2.1 of the Freedom of Association Act. The company was thus ordered to pay compensation to the appellant.

In a dissenting opinion, the minority of the Supreme Court (4 judges) stated that as a result of the mutual procedural declaration, the parties had not further dealt with the question of the

interpretation of § 2.3 before the Court. The minority further noted that the majority's interpretation of § 2.3 did not correspond well with the wording of the provision and the *travaux préparatoires*. The minority, therefore, did not find sufficient grounds for ruling that the dismissal contravened § 2.3 of the Freedom of Association Act. Thus, the minority voted in favour of the High Court decision to dismiss the appellant's claim.

Cross-references:

In this judgment the Supreme Court referred to the judgments of the European Court of Human Rights in *Young, James and Webster v. United Kingdom* (Series A no. 44), presented in précis form in *Special Bulletin – ECHR* [ECH-1981-S-002], and in *Sigudur A. Sigurjønsson v. Iceland* (Series A no. 264), presented in précis form in *Special Bulletin – ECHR* [ECH-1993-S-005].

Languages:

Danish.

DEN-1999-2-005

a) Denmark / **b)** Supreme Court / **c)** / **d)** 19-02-1999 / **e)** I 295/1998 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1999, 841; CODICES (Danish).

Keywords of the Systematic Thesaurus:

1.5.4.3 **Constitutional Justice** – Decisions – Types – Finding of constitutionality or unconstitutionality.
1.5.4.4 **Constitutional Justice** – Decisions – Types – Annulment.
2.2.2.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources – The Constitution and other sources of domestic law.
3.4 **General Principles** – Separation of powers.
4.5.8 **Institutions** – Legislative bodies – Relations with judicial bodies.
4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.

Keywords of the alphabetical index:

Grant, state / School, private.

Headnotes:

An Amending Act depriving some specifically mentioned schools of a State grant that they had been entitled to receive previously was found to be contrary to the principle of the separation of powers laid down in § 3 of the Constitution.

Summary:

In March 1996 the Minister of Education and Science moved an amendment on, *inter alia*, the Private Independent Schools Act. The Minister's proposals were primarily aimed at clarifying in the Acts the extent to which the schools receiving State grants should be self-governing. The proposals included provisions on the impartiality of the members of the board of directors as

well as accountants, and provisions on the terms on which the schools could enter into, *inter alia*, tenancy agreements and real estate dealings. Additionally, rules on the administration of the school funds, and rules on the withholding, withdrawal, and reclaiming of State grants were laid down.

The Minister of Education and Science had serious doubts as to whether the schools connected to a union of private schools, Tvind, would use the State grant for purposes that the Danish Parliament and the Government wished to encourage. Consequently, the Minister moved an amendment (§ 7 of the Amendment Act) under which Tvind schools were specified as being deprived of the State grant as from 31 December 1996. The serious doubts of the Minister originated from investigations carried out by the Ministry of Education and Science and the Public Auditor which "now gave full insight into the schools' illegal practices and reprehensible conditions".A majority in the Danish Parliament joined the Minister of Education and Science in his general mistrust of the schools' willingness to administer State grants in accordance with the law and consequently passed the proposed provision in § 7.

A private school connected to Tvind and covered by the Private Independent Schools Act brought an action against the Ministry of Education and Science claiming that § 7 of the Amendment Act should be declared invalid. The High Court found in favour of the Ministry of Education and Science but the Supreme Court unanimously (agreeing with the private school) found § 7 invalid because it contravened § 3, third sentence, of the Danish Constitution: "Judicial authority shall be vested in the courts of justice." The Supreme Court held that such an interference by means of a legislative Act denying the schools access to judicial review of the right to receive State grants was in fact a final decision in a specific legal dispute. Such a decision does not lie within the jurisdiction of the legislature but falls under the jurisdiction of the judiciary in accordance with the principle of due process of law.

Supplementary information:

Apart from questions of compensation in relation to expropriation the Supreme Court in this judgment, for the first time since it was founded, found a Parliamentary Act unconstitutional.

Languages:

Danish.

DEN-1999-2-004

a) Denmark / **b)** Supreme Court / **c)** / **d)** 06-01-1999 / **e)** I 134/1997 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1999, 560; CODICES (Danish).

Keywords of the Systematic Thesaurus:

2.1.1.4.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
5.3.22 **Fundamental Rights** – Civil and political rights – Freedom of the written press.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Defamation / Identity revealed / Public watchdog / Rumour, unverified.

Headnotes:

A newspaper's dissemination of a charge against a person, who could easily be identified, was held to be based on unverified rumours and therefore not justified in the public interest.

Summary:

In February 1996 a Danish newspaper, Jyllands-Posten, published a series of Articles on various business transactions made by a Danish bank. The Articles were based upon summaries of board meetings and other confidential material. On 20 February 1996 another Danish newspaper, *Det Fri Aktuelt*, published an Article with the headline "Bank considers notifying the police" stating that the management of the bank had a presumption as to who had given the confidential material to Jyllands-Posten but that the management did not wish to reveal the identity of the person in question.

In the Article certain information was given that would identify A, the person who was supposed to have given the confidential information, to anyone with slightest knowledge of the state of affairs of the bank. The article, in which it was also hinted that revenge against the bank was the reason for A's behaviour, thereby contained a defamation against A under Section 261.1 of the Criminal Code. The Supreme Court took into account that the rumour passed on was unverified, a fact which reduced the importance of the public interest in being informed about the matter. On this basis the Supreme Court unanimously concluded that the comprehensive freedom of speech, which is generally afforded the press in order to enable them to fulfil their role as "public watchdog", when weighed against A's interests, would not render the defamation unpunishable in accordance with Section 269.1 of the Criminal Code and Article 10 ECHR. The chief editor of *Det Fri Aktuelt*, having known that one of the journalists of the newspaper had sought to reveal the source of the information published in Jyllands-Posten, was found to share the responsibility for the content of the Article under Section 13 of the Media Liability Act and therefore was required to pay a fine as well as compensation for damages.

Cross-references:

In decisions I 488/1995 (*Bulletin* 1997/1 [DEN-1997-1-001] and I 508/1997 (*Bulletin* 1999/1 [DEN-1999-1-001] the Supreme Court also considered to what extent the freedom of expression of the press is guaranteed under Article 10 ECHR.
Languages:

Danish.

DEN-1999-1-003

a) Denmark / **b)** Supreme Court / **c)** / **d)** 24-11-1998 / **e)** I 501/1998 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1999, 275; CODICES (Danish).

Keywords of the Systematic Thesaurus:

5.1.1.3.1 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.
5.3 **Fundamental Rights** – Civil and political rights.
5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.

Keywords of the alphabetical index:

Criminal law / Deportation / Drug, pushing.

Headnotes:

Deportation of a foreigner who came to Denmark in 1984 and who had been convicted of several criminal offences was found to be contrary to the Aliens Act taken together with Article 3 ECHR.

Summary:

The appellant, a 45 year old refugee from Iraq who had lived in Denmark since 1984, had a permanent Danish residence permit. He had become a drug addict during his stay in Denmark, and had several times been convicted for, *inter alia*, drug pushing. In the present case of drug pushing the court had to decide whether the appellant should be deported or not.

In contrast to the District Court and the High Court the Supreme Court unanimously found that the appellant should not be deported, under § 26 of the Aliens Act and Article 3 ECHR. The Court made reference to the fact that the appellant would have served all his sentences not later than seven months after the verdict and to the opinion of the Refugee Board about the existing risk for the appellant if he was returned to Iraq.

Cross-references:

On 24 November 1998 the Supreme Court also delivered a judgement concerning the same question – deportation due to drug pushing. This decision was reported in *Ugeskrift for Retsvæsen*, 1999, 271, and is also reported in this *Bulletin* [DEN-1999-1-002].

Languages:

Danish.

DEN-1999-1-002

a) Denmark / **b)** Supreme Court / **c)** / **d)** 24-11-1998 / **e)** I 334/1998 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1999, 271; CODICES (Danish).

Keywords of the Systematic Thesaurus:

5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.3.35 **Fundamental Rights** – Civil and political rights – Inviolability of the home.
5.3.36 **Fundamental Rights** – Civil and political rights – Inviolability of communications.

Keywords of the alphabetical index:

Criminal law / Deportation / Expulsion.

Headnotes:

The deportation of a 23-year-old foreigner, who came to Denmark at the age of 4-5 years, and who had been convicted of several criminal offences, was found to be contrary to Article 8 ECHR.

Summary:

The appellant – a Turkish citizen – was born in Turkey in 1974. He had lived in Denmark with his family since 1979. He was sentenced to 14 days of imprisonment on lenient terms for pushing heroin. The appellant had previously been convicted for drug pushing, violence and offences against property. The question in the present case was whether the defendant should be deported or not.

In contrast to the District Court and the High Court the Supreme Court unanimously found that the appellant should not be deported. Since the appellant had lived in Denmark nearly all his life, received his education and gained some working experience in Denmark, and since his family was still living here, he was found to be so closely connected with Denmark that a deportation would be an interference with his private and family life. He could therefore only be deported if the interference was necessary in a democratic society, according to Article 8 ECHR. The Supreme Court found that the criminal offences were not of such a character that this criteria was fulfilled.

Cross-references:

On 24 November 1998 the Supreme Court also delivered a judgement concerning the same question – deportation due to drug pushing. This decision was reported in *Ugeskrift for Retsvæsen*, 1999, 275, and is also reported in this *Bulletin* [DEN-1999-1-003].

Languages:

Danish.

DEN-1999-1-001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 28-10-1998 / **e)** I 508/1997 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1999, 123; CODICES (Danish).

Keywords of the Systematic Thesaurus:

2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
3.18 **General Principles** – General interest.
3.19 **General Principles** – Margin of appreciation.
4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.
5.3.23 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

5.3.25 **Fundamental Rights** – Civil and political rights – Right to administrative transparency.

Keywords of the alphabetical index:

Defamation / Media, press, role / Good faith / Police, report, suppression.

Headnotes:

Allegations made in a television programme against a police officer were not justified in the public interest.

Summary:

The appellants had produced a television programme about a criminal investigation which resulted in a conviction for murder. The television programme had been transmitted on the public television channel. The appellants were charged with an offence under § 267.1 of the Criminal Code, based on a defamation allegation made in the programme against a police officer concerning the investigation of the murder case.

The Supreme Court unanimously held that the appellants in the programme had made allegations against the police officer which were intended to discredit him. This constituted a criminal offence under § 267.1 of the Criminal Code. The question was hereafter whether or not the allegations were justified under § 269.1 of the Criminal Code, under which a person who in good faith justifiably makes an allegation which is clearly in the general public interest or in the interest of other parties is not indictable.

The majority of the Supreme Court (5 members) – after interpreting the provision in the light of rticle 10 ECHR – found the appellants guilty. The European Court of Human Rights had stated in their judgement of 25 June 1992, *Thorgeirson v. Iceland*, that there is a wide margin in respect of public criticism of the police. However, consideration shall be given to their good name and reputation. The appellants had made a concrete allegation against the police officer claiming that he had committed a very serious criminal offence by having suppressed a police report. According to the Supreme Court the appellants' purpose had been to perform the role of the press as a public watchdog. However, to fulfil this purpose it was not necessary to insinuate the guilt of the police officer without sufficient basis.

The minority of the Supreme Court (2 members) held that seen in the light of the narrow interpretation of the exception to rticle 10.1 ECHR contained in Article 10.2 ECHR the appellants were not guilty. Consideration had to be given to the basis on which the appellants had made their allegation, its formulation and the circumstances under which it was made. According to the minority the allegations should not be judged in isolation from the programme in general. The programme's purpose had been to criticise the investigation of the murder case and the appellants had not exceeded the limits of freedom of expression, which should be available to the media in a situation like this – covering a serious matter of public interest.
Cross-references:

In its decision of 9 December 1996, reported in *Ugeskrift for Retsvæsen,* 1997, 260 (*Bulletin* 1997/1 [DEN-1997-1-001])), the Supreme Court also considered to what extent the freedom of expression of the press is guaranteed under rticle 10 ECHR.

Languages:

Danish.

DEN-1998-2-001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 06-04-1998 / **e)** I 361/1997 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1998, 800; CODICES (Danish, English).

Keywords of the Systematic Thesaurus:

2.2.1.6.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Primary Community legislation and constitutions.
2.3.3 **Sources of Constitutional Law** – Techniques of review – Intention of the author of the enactment under review.
3.3 **General Principles** – Democracy.
4.16.1 **Institutions** – International relations – Transfer of powers to international institutions.
4.17.2 **Institutions** – European Union – Distribution of powers between Community and member states.

Keywords of the alphabetical index:

Intention, legislative body / Constitution, judicial review / Sovereignty, transfer, limit.

Headnotes:

Danish participation in the European Community does not infringe the Constitution.

Summary:

Ten citizens appealed to the Supreme Court in order to have the judgment of the Eastern Division of the High Court (*Østre Landsret*) of 27 June 1997 overruled. They reiterated their claim before the High Court that the Prime Minister should be ordered to recognise that the Act of Accession to the European Communities contravened the Constitution. The Prime Minister moved for dismissal of the claim.

The Supreme Court considered in this case whether the implementation in Denmark of the Treaty Establishing the European Community (EC) as framed in the Treaty Establishing the European Union was lawfully made in pursuance of § 20 of the Constitution or, alternatively, whether such implementation required an amendment of the Constitution pursuant to § 88 of the Constitution.
§ 20 of the Constitution is framed as follows:

> "20.1 Powers vested in the authorities of the Realm under this Constitutional Act may, to an extent specified by statute, be delegated to international authorities set up by mutual agreement with other states for the promotion of international rules of law and cooperation.
>
> 20.2 For the enactment of a Bill dealing with the above, a majority of five-sixths of the members of the Folketing shall be required. If this majority is not obtained, whereas the majority required for the passing of an ordinary Bill is obtained, and if the Government

maintains the Bill, it shall be submitted to the electorate for approval or rejection in accordance with the rules for referenda laid down in Section 42."

Primarily, the appellants pleaded that Section 20.1 of the Constitution grants authority for the transfer of sovereignty only "to an extent specified by statute", and that this condition had not been met. In this connection they referred, in particular, to the powers vested in the Council under Article 235 EC, and to the law-making activities of the European Court of Justice. Secondly, the appellants pleaded that the delegation of sovereignty is on such a scale and of such a nature that it is inconsistent with the Constitution's premise of a democratic form of government.

In a unanimous judgment the Supreme Court found that the Danish participation in the European Community did not infringe the Constitution.

Cross-references:

On 12 August 1996 the Supreme Court delivered a judgment on the admissibility of this case. This decision has been reported in *Bulletin* 1996/2 [DEN-1996-2-002].

See also the Supreme Court decision of 26 May 1997 reported in *Bulletin* 1997/3 [DEN-1997-3-002].

Languages:

Danish.

DEN-1997-3-003

a) Denmark / **b)** Supreme Court / **c)** / **d)** 16-06-1997 / **e)** 137/1997 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1997, 1157; CODICES (Danish).

Keywords of the Systematic Thesaurus:

2.3.3 **Sources of Constitutional Law** – Techniques of review – Intention of the author of the enactment under review.
4.5.2 **Institutions** – Legislative bodies – Powers.
4.5.8 **Institutions** – Legislative bodies – Relations with judicial bodies.
4.6.6 **Institutions** – Executive bodies – Relations with judicial bodies.
5.1.1.3.1 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.
5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.

Keywords of the alphabetical index:

Intention, legislative body / Judicial review, preclusion / Refugee Board, judicial character / Expulsion.

Headnotes:

In a split decision the Supreme Court found it established in the final wording as well as in the drafting history of the relevant provision of the Aliens Act that the Danish Parliament *(Folketinget)* intended to preclude judicial review of the decisions of the Danish National Refugee Board. Hence, according to Danish law, the normal limitations upon the courts' examination of executive decisions stemming from such provisions applied. The plaintiff, a foreign national, was thus precluded from challenging the decision in court on the grounds that it violated Article 3 ECHR.

Summary:

In September 1994 the Danish National Refugee Board refused an application for a residence permit lodged by a foreign national and, at the same time, decided that pursuant to § 32a of the Aliens Act the applicant could be compelled to leave the country, if necessary by force. Having failed to persuade the National Board to reconsider its decision, the applicant took legal action against the Board on the grounds that he risked persecution if he were to return to his native country. Thus, he argued, the carrying out of the Board's decision would constitute a violation of rticle 3 ECHR.

A majority of the Supreme Court (4 members) initially stated that § 63 of the Constitution (which provides that the courts shall have the power to decide any question bearing upon the scope of the authority of the executive power) does not preclude the *Folketing* from limiting this power to a certain extent. It subsequently found that the wording of § 56.7 of the Aliens Act as well as its drafting history indicated that the *Folketing* intended to preclude judicial review of the Board's decisions to the same extent as other provisions that preclude judicial review. In reaching this verdict the majority of the court attached importance *inter alia* to the fact that the Refugee Board is of a judicial character and that it is composed of specialist members. The majority also found that the Board's decision to require the plaintiff to leave the country, if necessary by force, had been taken with due regard to rticle 3 ECHR. Therefore the plaintiff's argument (that to force him to leave the country would constitute an infringement of the Convention) did not give the courts jurisdiction over the matter in spite of the provision in the Aliens Act precluding judicial review.

A minority of the Supreme Court (3 members) stated that a precondition for the preclusion of the courts' judicial review was that the Act in question be sufficiently clear as to warrant such an interpretation. In the case before them the minority were of the opinion that the above-mentioned provisions were not of such clarity as to preclude the courts from reviewing the decision of the Refugee Board.

In accordance with the view of the majority, the plaintiff's complaint was dismissed by the Supreme Court.

Languages:

Danish.

DEN-1997-3-002

a) Denmark / **b)** Supreme Court / **c)** / **d)** 26-05-1997 / **e)** I 171/1997 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1997, 1062; CODICES (Danish).

Keywords of the Systematic Thesaurus:

1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
3.19 **General Principles** – Margin of appreciation.
4.6.6 **Institutions** – Executive bodies – Relations with judicial bodies.
5.3.13.19 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Equality of arms.

Keywords of the alphabetical index:

Decision, descretionary, judicial review / Judgment, reasoned, obligation / Treaty, Maastricht.

Headnotes:

A decision of the Board of Appeal Permissions *(Procesbevillings-nævnet)* was exempted from judicial review as the decision was based on the exercise of the Board's discretion. The Board of Appeal Permissions' dismissal of an application for leave to appeal to the Supreme Court fell within the Board's margin of appreciation.

Summary:

A number of persons brought legal action against the Danish Prime Minister asserting that Denmark's accession to the Maastricht Treaty constituted a breach of § 20 of the Constitution. In this connection the plaintiffs requested that the High Court order the Prime Minister to produce a number of documents to cast light upon the position of the Government and of Parliament concerning the limits to the application of Article 235 EC. The High Court dismissed this request in a unanimous decision of 5 November 1996.

The plaintiffs applied to the Board of Appeal Permissions for leave to appeal the decision to the Supreme Court. The Board dismissed this application in a decision of 22 November 1996 as the Board did not consider the appeal to be a matter of a fundamental character as required. The plaintiffs then instituted legal proceedings against the Board asserting that the decision was invalid.

A majority of the Supreme Court (4 members) held that they could not disregard the fact that the fundamental character of the original case might influence the question whether or not the appeal was itself to be regarded as fundamental. The majority of the Supreme Court found, however, that the decision of the Board of Appeal Permissions was within the Board's margin of appreciation. The majority further held that it did not constitute a procedural fault that the Board's decision was given merely with reference to § 392.2 of the Administration of Justice Act without any further reasons in support of its decision having been given.

Finally, the majority held that there had been no violation of the principle of "equality of arms" of Aticle 6 ECHR in respect of the refusal to order the Prime Minister to produce the documents.

A minority of the Supreme Court (1 member) found that the case against the Prime Minister was of a fundamental character and that this fact should have been taken into consideration by the Board, cf. § 392.2 in the Administration of Justice Act. Therefore the minority found the decision void.

Languages:

Danish.

DEN-1997-1-001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 09-12-1996 / **e)** I 488/1995 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1997, 260; CODICES (Danish).

Keywords of the Systematic Thesaurus:

2.2.1.5 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and non-constitutional domestic legal instruments.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.22 **Fundamental Rights** – Civil and political rights – Freedom of the written press.

Keywords of the alphabetical index:

Conviction, criminal.

Headnotes:

Since the interference with their freedom of expressi on was not necessary in a democratic society for the protection of the reputation or rights of others, the Supreme Court acquitted a journalist and an editor responsible under the press from a criminal charge.

Summary:

The Danish High Court of Justice had sentenced a journalist and an editor responsible under the press for having referred in a number of Articles to defamatory statements originating in a complaint lodged by a citizen to the Disciplinary Board of the Danish Bar and Law Society *(Advokatnæv net)*.

The Supreme Court recalled that since the European Convention on Human Rights had been incorporated into Danish law in 1992, the defamation provisions in the Danish Criminal Code must be read in the light of Article 10 ECHR. This means that any restriction of the right to freedom of expression must be neces sary in a democratic society, *inter alia* in the interest of the protection of the reputation or rights of others.

In weighing respect for freedom of expression against protection against defamation, attention must be drawn to the media's role as "public-watchdog" and restrictions which in an unreasonable manner interfere with that role cannot be made.

In the light of these considerations the Supreme Court found the journalist and the editor responsible under the press not guilty.

Cross-references:

In the judgement reference is made to a Supreme Court judgement published in *Ugeskrift for Retsvæsen*, 1994, 988.

Languages:

Danish.

DEN-1996-2-002

a) Denmark / **b)** Supreme Court / **c)** / **d)** 12-08-1996 / **e)** I 272/1994 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1996, 1300; CODICES (Danish).

Keywords of the Systematic Thesaurus:

1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
3.1 **General Principles** – Sovereignty.
3.4 **General Principles** – Separation of powers.
4.16.1 **Institutions** – International relations – Transfer of powers to international institutions.
4.17.2 **Institutions** – European Union – Distribution of powers between Community and member states.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.

Keywords of the alphabetical index:

Treaty, Maastricht.

Headnotes:

The Treaty on European Union implies a transfer of legislative powers to the Union in respect of a number of general and important aspects of life. This is why the Act of Accession in itself is of vital importance to the Danish population in general. Ordinary citizens have thus a legal interest in having the constitutionality of the Act of Accession tried on the merits.

Summary:

In this case a judgment of the High Court *(landsret)* was quashed and the case remitted for trial before the High Court because the Supreme Court was of the opinion that the plaintiffs (the appellant) – a number of citizens of varying occupation – had the necessary legal interest in having the question of the constitutionality of the Act of Parliament regarding accession to the Treaty on European Union (Maastricht) tried. The citizens invoked especially the provision in the Constitution regarding the powers of the legislature in foreign affairs as well as the provision regarding amendment of the Constitution.

A number of citizens had instituted legal proceedings before the High Court against the Prime Minister, claiming that the Act of Parliament regarding accession to the Treaty on European Union (Maastricht) – the Act of Accession of 28 April 1993 – was not in accordance with the provisions of Article 20.1 of the Constitution regarding the legislature's powers in foreign affairs. The plaintiffs argued that the transfer of legislative powers to the European Union was not "to a more specified extent", as required by Article 20.1 of the Constitution. Thus, accession to the treaty – according to the plaintiffs – required an amendment of the Constitution in accordance with the procedure pursuant to Article 88 of the Constitution. The High Court dismissed the plaintiffs' claim on the grounds that the citizens in question had no specific and

present legal interest in having the claim admitted for the purpose of trying the question in substance. The plaintiffs appealed to the Supreme Court.

In the Supreme Court, the appellant plaintiffs argued in addition that it would constitute a violation of Article 6.1 ECHR if the Court dismissed the claim to have the constitutionality of the Act of Accession tried on the merits. This was disputed by the defendant, who moreover argued that it would be possible for citizens, in connection with legal challenges to acts of the EU institutions which affected them individually and directly, to challenge also the constitutionality of the Act of Accession.

The Supreme Court stated that the Treaty on European Union implied a transfer of legislative powers to the Union in respect of a number of general and important aspects of life. This was why the Act of Accession itself was of vital importance to the Danish population in general. The present case differed in this respect from previous cases concerning the constitutionality of Acts of Parliament. The Supreme Court therefore considered that under the circumstances there was not a sufficient basis – contrary to what was the case in the Supreme Court judgment reported in *Ugeskrift for Retsvæsen*, 1973, page 694 – to call for the demonstration of a direct and individual affect on their affairs arising from the Act in question. The Court moreover stated that such a demand was not appropriate in that it would not lead to a better clarification of the case.

The Supreme Court therefore ruled that the judgment by the High Court be quashed and that the case be remitted for trial in the High Court. The appellants were thus given an opportunity to have the case examined by a court on the merits. The judgment was given by nine judges and was unanimous.

Supplementary information:

The judgment resulted in a comprehensive public debate on the question of the relationship between the courts and the legislature, and on a possible amendment to the Constitution.

Cross-references:

Judgment of the 3rd division of the Eastern High Court of 30.06.1994.

Supreme Court judgment of 28.06.1973 in case 321/1972, reported in *Ugeskrift for Retsvæsen*, 1973, page 694.

Languages:

Danish, English (translation by the Court).

DEN-1996-1-001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 16-11-1995 / **e)** I 36/1995 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1996, 234; CODICES (Danish).

Keywords of the Systematic Thesaurus:

2.1.1.4.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.

2.2.1.5 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and non-constitutional domestic legal instruments.
5.3.5.1.3 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Detention pending trial.
5.3.13.15 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Impartiality.
5.3.13.22 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Presumption of innocence.

Keywords of the alphabetical index:

Judge, acting / Criminal proceedings / Justice, appearance.

Headnotes:

The judgments of the district court (*byret*) and of the High Court (*Landsret*) in a criminal case were quashed and the case remitted for retrial before the district court because in the circumstances of the case an order for detention in custody based on an especially confirmed suspicion – made during the trial before the district court – disqualified the court from trying the case.

Summary:

A person charged with rape had been detained pending trial of the case before the court, as in the circumstances of the case there were specific reasons to believe that the accused would render difficult the prosecution of the case. The judge found that the detention could not be based on an especially confirmed suspicion.

During the trial before the district court, an order was made to maintain the detention, but now based on the establishment of an especially confirmed suspicion. At the time of this order, the court had examined the accused and six witnesses in the trial. The witness examination was not concluded, and counsel for the defence had not yet made his closing speech.

The accused claimed that the court had disqualified itself through the order for detention, and that the continued trial was an infringement of Article 6.1 ECHR.

The presuppositions for the rules on disqualification as declared by the legislator in the Danish Administration of Justice Act (*retsplejeloven*), and the relationship of these rules to detention pending trial, were expressed in the preparatory works of an amendment to the Act in 1990. This amendment was caused by the decision of the European Court of Human rights in the *Hauschildt* case (*Special Bulletin ECHR [ECH-1989-S-001]*). The preparatory works presupposed that no disqualification would arise pursuant to Article 6.1 ECHR caused by detentions based on an especially confirmed suspicion (not prior to, but) during the trial.

The Supreme Court stated that the present practice from the Convention bodies does not provide a basis for establishing that in all cases it will be compatible with the Convention provision that a judge participates in the adjudication of a case if he has ordered detention of the accused based on an especially confirmed suspicion during the trial.

The majority (three judges) of the Supreme Court found that, in the circumstances, the use of the provision on detention was suited to give the accused the impression that the question of guilt now had in fact been decided without his having had an opportunity to exercise his right of defence, cf. Articles 6.3.c and 6.3.d ECHR. Accordingly, these judges found that the case had presented circumstances which were suited to call in question the absolute impartiality of the court during the continued trial.

The minority (two judges) found that, although the production of evidence was not completely concluded and counsel for the defence had not yet had an opportunity to make his closing speech, disqualification did not arise because by far the most important part of the production of evidence had been completed when the order was made.

The judgments of the district court and of the High Court were then quashed and the case was remitted for retrial.

Cross-references:

The judgments of the district court and of the High Court are reported in *Ugeskrift for Retsvæsen* (Danish Law Reports) 1994, 225 .

The decision refers to the Supreme Court order of 1 November 1989, reported in *Ugeskrift for Retsvæsen* 1990, 13, and to the judgment of the European Court of Human Rights of 24 May 1989 in the *Hauschildt* case (Series A no. 154), *Special Bulletin ECHR [ECH-1989-S-001].*

Languages:

Danish.

DEN-1995-R-001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 08-08-1995 / **e)** II 449/1994 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1995, 828; CODICES (Danish).

Keywords of the Systematic Thesaurus:

5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
5.3.26 **Fundamental Rights** – Civil and political rights – National service.

Keywords of the alphabetical index:

Sentence, suspension / Community service / Jehovah's witness.

Headnotes:

A suspended sentence combined with community service is a suitable sentence in situations where the objection to do military service is truly motivated by the conscience of the accused.

Summary:

The accused was called up to do six months' military service in the National Rescue Corps. However, he twice failed to present himself. He submitted that he wanted to be exempted from military service – including the National Rescue Corps – because of his religious persuasion. His family had been Jehovah's Witnesses for generations and he used all his spare time doing missionary work. He claimed that doing military service was not in accordance with one of the fundamental principles of Christianity: the sixth commandment, "Thou shalt not kill". The accused felt that if he participated in the National Rescue Corps he would indirectly have accepted doing military service.

The majority of the Supreme Court (3 members) held that a suspended sentence combined with community service is a suitable sentence in situations where the objection to doing military service is truly motivated by the conscience of the accused. The accused was therefore convicted and given a suspended sentence of six months' imprisonment on the condition that he did 240 hours of community service.

The minority of the Supreme Court (2 members) held that if objectors were given a suspended sentence combined with community service, the principle of equality before the law would be infringed since the community service was limited to one and a half months (240 hours) of service, whereas those who did their military service had to serve six, nine or twelve months in the military forces. The minority would therefore have sentenced the accused to six months' imprisonment.

Languages:

Danish.

DEN-1994-3-003

a) Denmark / **b)** Supreme Court / **c)** / **d)** 28-10-1994 / **e)** I 91/1994 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1994, 988; CODICES (Danish).

Keywords of the Systematic Thesaurus:

3.17 **General Principles** – Weighing of interests.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.23 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
5.3.24 **Fundamental Rights** – Civil and political rights – Right to information.
5.3.32 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Freedom of information.

Headnotes:

The media's right to news coverage (the right to freedom of information) was in a particular case given priority to the right to private life.

Summary:

A journalist working for a local television channel was charged with unlawfully entering the private garden of a well-known politician and member of parliament during a demonstration that took place in the garden. The demonstrators had previously been convicted of the same offence. The journalist had tried to contact the politician by knocking on the door. However, the door remained closed and the journalist remained in the garden where he spoke to the demonstrators and made an interview which was broadcast the same evening. The journalist was convicted by the District Court as well as by the High Court, but acquitted by the Supreme Court.

The Supreme Court held that by remaining in the garden the journalist had entered a private property that was not “freely accessible” as prohibited by Section 264.1 of the Danish Criminal Code. However, the right to private life must in such cases be balanced against the interest of news coverage (right to freedom of information). In the present case, priority was given to the media’s right to news coverage.

Supplementary information:

In this balancing of interests the Court made specific reference to Article 10 ECHR and to the judgment of 23.09.1994 of the European Court of Human Rights in the case “Jersild vs. Denmark”.

Languages:

Danish.

DEN-1994-3-002

a) Denmark / **b)** Supreme Court / **c)** / **d)** 12-10-1994 / **e)** II 50/1994 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen*, 1994, 953; CODICES (Danish).

Keywords of the Systematic Thesaurus:

5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.

Keywords of the alphabetical index:

Collective agreement / Labour law.

Headnotes:

A collective agreement cannot preclude an employee from bringing an action regarding his discharge before the ordinary courts in cases where the trade association does not take steps to deal with the case before a special court or arbitration.

Summary:

An employee in a building society – who had been discharged – wanted to bring an action against the building society before the ordinary court regarding his salary. A collective agreement provided right to take proceedings before a special court of arbitration for the trade union and not for the individual employee. The trade union, however, did not wish to take any legal action in connection with the case. The building society asserted that according to the

collective agreement the case should be dismissed by the ordinary courts. The Supreme Court stated that in the light of Article 6.1 ECHR the employee was not precluded from bringing an action regarding a civil claim relating to a discharge before the ordinary courts in cases where the trade union does not bring the claim before a special court of arbitration.

Languages:

Danish.

DEN-1994-1-001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 18-04-1994 / **e)** II 395/1993 / **f)** The Attorney General against Per-Henrik Nielsen / **g)** / **h)** *Ugeskrift for Retsvaesen*, 1994, 536; CODICES (Danish).

Keywords of the Systematic Thesaurus:

1.4.1 **Constitutional Justice** – Procedure – General characteristics.
2.2.1.5 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and non-constitutional domestic legal instruments.
4.7.8.2 **Institutions** – Judicial bodies – Ordinary courts – Criminal courts.
5.3.13.14 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Independence.

Keywords of the alphabetical index:

Judge, acting / Criminal proceedings.

Summary:

The Constitution was not found to preclude the exercise of judicial functions by acting judges who do not enjoy constitutional protection against dismissal and transfer, since this corresponds to a long-standing legal practice. The Supreme Court did not find a sufficient basis to state that the exercise of judicial functions by these acting judges in general would be incompatible with Article 6 ECHR, but urged the legislative power to seek a general clarification of the problem. However, the Supreme Court found that it was incompatible with Article 6 ECHR that the criminal proceedings in the case under consideration had been conducted by an acting judge who had at the same time served in the department of the Ministry of Justice dealing with the police, the prosecution and the granting of leave to appeal in criminal proceedings.

Languages:

Danish.

DEN-1989-S-001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 13-02-1989 / **e)** 279/1988 / **f)** / **g)** / **h)** *Ugeskrift for Retsvaesen*, 1989, 399.

Keywords of the Systematic Thesaurus:

2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
3.17 **General Principles** – Weighing of interests.
5.2.2.2 **Fundamental Rights** – Equality – Criteria of distinction – Race.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.23 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
5.3.45 **Fundamental Rights** – Civil and political rights – Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Defamation, racial / Media, broadcasting, racially derogatory statement / Racial discrimination, protection, principle / Racial hatred, incitation / Racial hatred, aiding and abetting.

Headnotes:

Two persons employed at the Danish Broadcasting Corporation had infringed the Danish Penal Code by broadcasting statements of a racially derogatory nature made by three youths. The majority of the Supreme Court found that the principle of freedom of expression did not outweigh the right to protection against such racially derogatory statements.

Summary:

In 1985 an interview with three members of a group of youths known as “the Greenjackets” by the Danish Broadcasting Corporation *(Danmarks Radio)* was broadcast nationwide. During the interview the three persons made abusive and derogatory remarks about immigrants and ethnic groups in Denmark, *inter alia*, comparing various ethnic groups to animals.

The three youths were subsequently convicted under Article 266.b of the Penal Code for having made racially derogatory statements. The City Court of Copenhagen and the Eastern Division of the High Court also convicted the journalist, who had initiated the interview, and the head of the news section of *Danmarks Radio*, who had consented to the broadcast, under Article 266.b in conjunction with Article 23 of the Penal Code for aiding and abetting the three youths. Both courts reasoned, *inter alia*, that the journalist had taken the initiative to make the programme while aware of the nature of the statements likely to be made during the interview and that he had encouraged “the Greenjackets” to express their racist views. The head of the news section was convicted because he had approved of the broadcasting of the programme though aware of the content.

A majority of the Supreme Court (4 members) voted in favour of confirming the High Court sentence. By broadcasting and thus making public the racially derogatory statements, the journalist and the head of the news section of *Danmarks Radio* had infringed Article 266.b in conjunction with Article 23 of the Penal Code. In this case, the principle of freedom of expression in matters of public interest did not outweigh the principle of protection against racial discrimination.

One dissenting judge voted in favour of the acquittal of the journalist and the head of the news section of *Danmarks Radio*. The judge noted that the object of the programme had been to make an informative contribution to an issue of sometimes emotional public debate and the

programme had offered an adequate coverage of the views of "the Greenjackets". Even though "the Greenjackets" only made up a small number of people, the programme still had a reasonable news and information value. The dissenting judge concluded that the fact that the journalist had taken the initiative with regard to the interview did not imply that the journalist and the leader of the news section should be found guilty.

In accordance with the view of the majority, the defendants' appeal was dismissed by the Supreme Court.

Cross-references:

Following the judgment by the Supreme Court, the journalist, Mr Jersild, lodged an application against Denmark with the European Commission of Human Rights on the grounds that his conviction violated his right of freedom of expression under Article 10 ECHR. On 23 September 1994 the European Court of Human Rights, by twelve votes to seven, decided that there had been a violation of Article 10 (*Publications of the European Court of Human Rights*, vol. 298, *Bulletin on Constitutional Case-Law*, 1994/3 [ECH-1994-3-014]).

Languages:

Danish.

DEN-1986-S-001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 24-10-1986 / **e)** II 193/1985, 194/1985, 195/1985 / **f)** / **g)** / **h)** *Ugeskrift for Retsvaesen*, 1986, 898.

Keywords of the Systematic Thesaurus:

1.3.4.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of fundamental rights and freedoms.
1.6.1 **Constitutional Justice** – Effects – Scope.
2.1.1.4.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.2.1.5 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and non-constitutional domestic legal instruments.
5.1.1.2 **Fundamental Rights** – General questions – Entitlement to rights – Citizens of the European Union and non-citizens with similar status.
5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.
5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.
5.4.11 **Fundamental Rights** – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Trade union, membership, change / Necessity, legal, justification.

Headnotes:

Eight bus drivers, who had terminated their membership of certain trade unions, were subsequently dismissed. Their constitutional rights did not render the dismissal invalid nor could Article 11 ECHR be applied directly. Under the Act granting Protection against Dismissal due to Trade Union Relations, however, the bus drivers were awarded compensation. However, the bus drivers were not entitled to be reinstated in their service.

Summary:

Eight bus drivers employed at the Greater Copenhagen Bus Service had terminated their membership of certain trade unions, which until then had represented all bus drivers employed at the bus company. The bus drivers had instead joined either Denmarks Free Trade Union or the Christian Unemployment Fund. This resulted in extensive strikes and blockades of the bus service by their colleagues and finally led to the dismissal of the eight bus drivers.

The plaintiffs – the eight bus drivers – were of the opinion that the dismissals conflicted with their constitutionally-protected rights of worship (Article 68 of the Constitution), choice of trade (Article 74 of the Constitution), and association (Article 75 of the Constitution) as well as the principle of access to employment in a suitable job, cf. Article 78 of the Constitution. They further referred to the principle of equal rights, the Act granting Protection against Dismissal due to Trade Union Relations, the Salaried Employee Act, and Article 11 ECHR.

The employer, the Greater Copenhagen Council, argued that the dismissal of the bus drivers was not due to the change in their trade union conditions but was solely a consequence of restrictions on the operation of the bus service in the metropolitan area. According to the Council, every other possible a verve had been explored to solve the conflict. The dismissal was in any case justified by legal necessity.

The Supreme Court stated that the Greater Copenhagen Council's decision could not be declared invalid pursuant to the paragraphs of the Constitution, referred to by the plaintiffs, or any other constitutional principles. The Supreme Court further stated that Article 11 ECHR could not be applied directly in this case. Instead, the dismissals had to be judged under the Act granting Protection against Dismissal due to Trade Union Relations, which had been adopted with the aim of fulfilling Denmark's obligations pursuant to Article 11 ECHR. The Supreme Court then went on to conclude that the dismissals were in contravention of the said Act as well as of the principle of equal rights. The bus drivers should therefore be granted compensation. The Act did not, however, contain any provisions pursuant to which the bus drivers could be reinstated in their jobs.

Supplementary information:

At the time of the judgment, Denmark was bound by the European Convention of Human Rights on the basis of international law. In 1992 the Convention was incorporated in Danish law.

Languages:

Danish.

DEN-1980-S-002

a) Denmark / **b)** Supreme Court / **c)** / **d)** 29-10-1980 / **e)** I 333/1979 / **f)** / **g)** / **h)** *Ugeskrift for Retsvaesen*, 1980, 1037.

Keywords of the Systematic Thesaurus:

3.17 **General Principles** – Weighing of interests.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Defamation / Trademark, close reproduction on poster / Poster, satiric manifestation / Public debate, contribution / Social matter, essential.

Headnotes:

A poster with a controversial text could not be prohibited nor should the text be modified.

Summary:

In 1978, the appellant had produced a poster with a drawing of a pig and the following text: "Danish pigs are healthy, they are bursting with antibiotics". The drawing was a close reproduction of the trademark used by two organisations representing the Danish meat industry.

The two organisations claimed that the content and the presentation of the poster constituted defamation towards the industry. They therefore wanted a prohibition against the use and distribution of the poster as well as a substantial modification of the expression: "They are bursting with antibiotics".

According to the appellant the poster was a satiric manifestation of the fact that antibiotics may be found in slaughtered pigs, and a contribution to the extensive public debate about the use of antibiotics for domestic animals and the effects of their use. The poster was not intended to be defamatory.

A majority of the Supreme Court (5 members) held that the poster was a satiric expression of the opinion that an unreasonable amount of antibiotics may be found in slaughtered pigs. This criticism was not addressed towards a particular group such as the slaughter-houses represented by the plaintiffs. It was meant rather as a contribution to the extensive public debate on the use of drugs for farm animals, a debate which had caused a legislative restriction on the drugs used for farm animals, and which had increased the number of samples taken from slaughtered animals tenfold. The majority stressed the importance of the principle of freedom of expression in essential social matters such as the one in question. Accordingly, the majority found that the poster did not contain an unlawful statement.

A minority of the Supreme Court (2 members) held that the poster should be interpreted as an accusation against the Danish slaughter-houses and producers, clearly stating that Danish pigs pose a health threat due to the use of antibiotics. The principle of freedom of expression could, according to the minority, not justify the harmful and unverified statement of the appellant.

Languages:

Danish.

DEN-1980-S-001

a) Denmark / **b)** High Court / **c)** Eastern Division / **d)** 19-06-1980 / **e)** 16-313/1978 / **f)** Greendane / **g)** / **h)** *Ugeskrift for Retsvaesen*, 1980, 955.

Keywords of the Systematic Thesaurus:

3.18 **General Principles** – General interest.
4.5.2 **Institutions** – Legislative bodies – Powers.
5.3.39.1 **Fundamental Rights** – Civil and political rights – Right to property – Expropriation.

Keywords of the alphabetical index:

Monopoly, state / Competition / Transport, sea, monopoly / Law, effect on individual / Compensation / Law, economic aim.

Headnotes:

An Act of Parliament re-establishing a state monopoly on the sea carriage of goods to Greenland, which solely affected one private company, was held to be an act of expropriation.

Summary:

Since 1776, carriage by sea to Greenland had been, by law, a Danish state monopoly. The Monopoly Act was repealed in 1951 but a new Act was passed re-establishing the state monopoly in 1973.

As a consequence, a shipping company, Greendane, which had been carrying goods to Greenland by sea since January 1972, was precluded from conducting its shipping business. Greendane therefore claimed that the Act constituted an act of expropriation and that Greendane was entitled to compensation according to Article 73 of the Constitution. Under this provision the right to property is protected and no person shall be ordered to surrender his property except where required in the public interest. It shall be done only as provided by statute and against full compensation.

The majority of the High Court (2 members) found that free enterprise such as the shipping business conducted by Greendane was protected under Article 73 as a property right. As to whether the Act in question constituted an act of expropriation, the majority then reflected upon the purpose of the Act. According to the *"travaux préparatoires"*, the principal aim was to maintain a system of equal carriage rates for all parts of Greenland. The majority, however, held that the Act also pursued an economical aim for the Danish state. The majority further noted that Greendane was the only company directly affected by the establishment of the state monopoly. On this basis the Act was found to constitute an act of expropriation and thus Greendane was entitled to compensation, including an estimated amount for loss of expected profit. It was without significance that Greendane had been warned against starting the shipping business and that the business had only been conducted for a short time.

The minority of the High Court (1 member) found that the Act did not constitute an act of expropriation. The Act introduced an ordinary prohibition against private companies offering sea carriage to Greenland with the main purpose of maintaining the single tariff system for all

parts of Greenland in accordance with public interests. The economic aim mentioned by the majority was secondary. The minority therefore held that the prohibition fell within the legislative powers of the parliament. The minority further noted that the shipping business exercised by the plaintiff was not protected by Article 73 of the Constitution, as the plaintiff had very recently started his business.

Languages:

Danish.

DEN-1974-S-001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 28-01-1976 / **e)** II 236/1974 / **f)** / **g)** / **h)** *Ugeskrift for Retsvaesen*, 1976, 184.

Keywords of the Systematic Thesaurus:

3.13 **General Principles** – Legality.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
5.3.35 **Fundamental Rights** – Civil and political rights – Inviolability of the home.

Keywords of the alphabetical index:

House search / Media, broadcasting, use of specific equipment, obligation / Media, broadcasting, equipment, inspection / Inspection, limited purpose.

Headnotes:

Pursuant to a statutory instrument, a person holding a radio transmission licence was fined for refusing an inspection at his home of his radio equipment. The statutory instrument was warranted by statute and did not infringe the constitutionally protected inviolability of the dwelling. The fact that a forced inspection was not warranted did not prevent the imposition of a fine.

Summary:

According to Article 72 of the Constitution, a house search shall not take place except under a judicial order, unless particular exception is warranted by statute.

According to an act on radio communication, radio transmission required a radio transmission licence. Licence holders were only allowed to transmit from specific types of radio equipment approved by the authorities. Pursuant to a statutory instrument under the Act, inspections of approved radio equipment could be carried out at any time. Refusal to give access to inspection of the equipment was punishable by a fine.

In this case, the defendant, who held a radio transmission licence, was fined for having refused access to his radio equipment in his home. The defendant argued that according to the Director of Public Prosecutions *(Rigsadvokaten)*, the statutory instrument did not warrant a forced inspection without a judicial order. The statutory instrument therefore did not contain a "particular exception" as required pursuant to Article 72 of the Constitution. The defendant

therefore was of the opinion that he could not lawfully be forced to accept an inspection by means of being imposed a fine. The defendant further claimed that the imposition of the fine lacked sufficient statutory basis.

A majority of the Supreme Court (5 judges) first noted that a licence to make radio transmissions could only be obtained by accepting certain conditions, *inter alia* that inspections of the equipment could be carried out at any time. The majority further concluded that the rules on inspection in the statutory instrument did not go beyond the powers conferred on the Minister under the Act on radio communication.

In accordance with the opinion of the Director of Public Prosecutions *(Rigsadvokaten)*, the majority further noted that the Act did not warrant a forced house search without a judicial order. However, under such conditions as in the present case, Article 72 of the Constitution did not prevent a statutory instrument from stating that inspectors should have access to the equipment. The majority also found that the statutory instrument contained provisions pursuant to which a person denying access to inspectors authorised to carry out such inspections could be fined.

Accordingly, and without prejudice to the scope of Article 72 of the Constitution in relation to legal issues outside the criminal procedure, the imposition of the fine was lawful.

In a concurring opinion, one judge found it questionable whether the authorisation of inspections as established in the statutory instrument had sufficient authority in the Act. He found, however, that Article 72 of the Constitution was inapplicable in this case because the inspections had a limited purpose and because it was a natural condition for obtaining a radio transmission licence to tolerate such inspections. Furthermore, the inspections could not be carried out with the use of force without observing the rules on searches laid down in the Danish Administration of Justice Act.

Accordingly and, without prejudice to the scope of Article 72 of the Constitution in relation to legal issues outside the criminal procedure, he voted for the same result as the majority.

In a dissenting opinion, one judge first reasoned that Article 72 of the Constitution is applicable also in relation to searches outside the criminal procedure such as the inspection in question. The Act on radio communication did not contain any provisions on inspections of radio equipment. The dissenting judge therefore seriously doubted whether the Act constituted a sufficient statutory basis for imposing a fine on a licence holder, who refused access to inspection of his radio equipment. Accordingly, this judge voted in favour of the acquittal of the defendant.

In accordance with the view of the majority, the imposition of the fine on the defendant was confirmed by the Supreme Court.

Languages:

Danish.

DEN-1966-S-001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 17-11-1966 / **e)** 107/1966 / **f)** Ancient Icelandic Manuscript Writings / **g)** / **h)** *Ugeskrift for Retsvaesen*, 1967, 22.

Keywords of the Systematic Thesaurus:

4.5.6 **Institutions** – Legislative bodies – Law-making procedure.
5.1.1.5.1 **Fundamental Rights** – General questions – Entitlement to rights – Legal persons – Private law.
5.3.39.1 **Fundamental Rights** – Civil and political rights – Right to property – Expropriation.

Keywords of the alphabetical index:

Foundation, property, expropriation / Public policy.

Headnotes:

An act providing for the return of a number of ancient writings and records to Iceland constituted an act of expropriation. The constitutionality of the Act was examined accordingly by the Supreme Court, which found that the procedure prescribed by the Constitution for passing bills concerning expropriation had been followed.

Summary:

The private Foundation of Arne Magnussen had since the death of Arne Magnussen and his wife in the 18th century been in possession of, *inter alia*, a great number of ancient Icelandic manuscript writings and legal documents. According to an act on amendment of the statute of the Foundation, a large proportion of the writings and legal documents were to be returned to Iceland where they were to be given to an independent foundation. The Foundation of Arne Magnussen contested the constitutionality of the Act with reference to the right to private property as protected under Article 73 of the Constitution.

The majority of the Supreme Court (8 members) found that the Foundation of Arne Magnussen was to be regarded as an independent institution as opposed to a publicly founded institution. The majority further stated that the disputed Act implied a forced renunciation of private property and thus constituted an Act of expropriation.

Article 73 of the Constitution provides for a special legislative procedure when the parliament *(Folketing)* is presented with a bill concerning expropriation. A third of the parliament can require that the bill be accepted first by the present parliament and second by the parliament as it is formed after the following general election, in accordance with Article 73.2 of the Constitution.

The majority of the Supreme Court found that the fact that the procedural prerequisites in Article 73.2 of the Constitution had been observed by the Parliament showed that the Parliament had given due consideration to the possibility that the bill possibly concerned expropriation. The majority further stated that the Act fulfilled the condition of Article 73 of the Constitution as regards expropriation on the grounds of public policy. The majority finally concluded that the lack of provisions with regard to damages did not deprive the Act of its validity.

A minority of the Supreme Court (5 members) agreed with the majority on the point that the rights of the Foundation were protected by Article 73 of the Constitution. The minority did not find, however, that the Act constituted a renunciation covered by Article 73 of the Constitution, since the documents and writings on Iceland would be part of a foundation with a similar charter and purpose to those of the Foundation of Arne Magnussen in Denmark.

The Supreme Court thereby jointly stated that the Act should not be considered invalid.

Languages:

Danish.