



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

**CASE OF SØRENSEN AND
RASMUSSEN v. DENMARK**

(Applications nos. 52562/99 and 52620/99)

JUDGMENT

STRASBOURG

11 January 2006

In the case of Sørensen and Rasmussen v. Denmark,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Luzius Wildhaber, *President*,
Christos Rozakis,
Jean-Paul Costa,
Nicolas Bratza,
Boštjan M. Zupančič,
Giovanni Bonello,
Loukis Loucaides,
Françoise Tulkens,
Peer Lorenzen,
Volodymyr Butkevych,
Josep Casadevall,
Nina Vajić,
John Hedigan,
Kristaq Traja,
Snejana Botoucharova,
Vladimiro Zagrebelsky,
Khanlar Hajiyeu, *judges*,

and Lawrence Early, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 22 June and 30 November 2005,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in two applications (nos. 52562/99 and 52620/99) against the Kingdom of Denmark lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Danish nationals, Mr Morten Sørensen (“the first applicant”) and Mr Ove Rasmussen (“the second applicant”), on 7 October 1999 and 22 September 1999 respectively.

2. The first applicant, who had been granted legal aid, was represented by Mr J. Paulsen, a lawyer practising in Herning. The second applicant was represented by Mr J.P. Buhl, a lawyer practising in Copenhagen. The Danish Government (“the Government”) were represented by their Agent, Mr P. Taksøe-Jensen, of the Ministry of Foreign Affairs.

3. The applicants complained that the existence of closed-shop agreements in Denmark in their respective areas of employment had violated their right to freedom of association, secured by Article 11 of the Convention.

4. The applications were allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). By decisions of 20 March 2003, the applications were declared partly admissible. The applicants and the Government each filed observations on the merits (Rule 59 § 1). In a decision of 25 November 2004, a Chamber constituted within the First Section, composed of Christos Rozakis, President, Peer Lorenzen, Giovanni Bonello, Françoise Tulkens, Nina Vajić, Vladimiro Zagrebelsky and Elisabeth Steiner, judges, and Søren Nielsen, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was fixed in accordance with Article 27 §§ 2 and 3 of the Convention and Rule 24. The President of the Grand Chamber decided to join the applications (Rule 42 § 1). Elisabeth Steiner, who was unable to take part in the deliberations following the hearing, was replaced by Loukis Loucaides, first substitute judge.

6. The Government, but not the applicants, filed supplementary observations on the merits (Rule 59 § 1).

7. Third-party comments were received from the Danish Confederation of Trade Unions (*Landsorganisationen – LO*), which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2). The applicants replied to those comments (Rule 44 § 5).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 22 June 2005 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr P. TAKSØE-JENSEN,	<i>Agent,</i>
Ms N. HOLST-CHRISTENSEN,	<i>Co-Agent,</i>
Mr E. OEST EDELSBERG,	
Ms D. BORGAARD,	
Mr D. KENDAL,	
Ms K. WEBER OLSEN,	
Mr J. RASMUSSEN,	<i>Advisers;</i>

(b) *for the applicants*

Mr E. LEGO ANDERSEN,	
Mr J. PAULSEN,	
Mr S. JUUL,	<i>Counsel,</i>
Mr J. MIKKELSEN,	
Mr S. FIBIGER OLESEN,	
Mr E. BERTELSEN,	
Mr A. BAGGE JØRGENSEN,	<i>Advisers.</i>

The Court heard addresses by Mr Lego Andersen and Mr Taksøe-Jensen, as well as their replies to questions from judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The first applicant

9. The first applicant was born in 1975 and lives in Århus, Denmark. In the spring of 1996 he did his national service. Since a few months remained before he could commence studying mathematics and physics at the University of Århus, on 10 May 1996 he applied for a job as a holiday relief worker in a company, FDB Distributionen (“FDB”). For this purpose, he filled in an application form, which contained a pre-printed paragraph stating, among other things:

“To obtain the job it is mandatory to be a member of one of the trade unions affiliated to the Danish Confederation of Trade Unions (LO). You will be informed on request of the name of the union.”

10. In a letter of 20 May 1996, the applicant was offered the job from 3 June until 10 August 1996 and informed that his terms of employment would be regulated by an agreement concluded between FDB and a trade union called SID, which was affiliated to LO, and of which the applicant was obliged to become a member.

11. From his first payslip on 20 June 1996 the applicant became aware that he was paying a subscription to SID, although he had not applied for membership. Instead, at the time of his appointment he had applied for membership of a trade union called Denmark's Free Trade Union (*Danmarks Frie Fagforening*). In a letter of 23 June 1996, the applicant informed his employer and the shop steward that he did not want to pay the subscription to SID because he had been told that, as a holiday relief employee, he would not be given full membership of SID.

12. Consequently, on 24 June 1996, the applicant was dismissed for not satisfying the requirements for obtaining the job as he was not a member of a trade union affiliated to LO.

13. The applicant, represented by Denmark's Free Trade Union, instituted proceedings before the High Court of Western Denmark (*Vestre Landsret*) against FDB, requesting that FDB be ordered to acknowledge that

his dismissal was unlawful and to pay him compensation. He alleged that section 2(2) of the Protection against Dismissal due to Association Membership Act of 9 June 1982 (*Lov om beskyttelse mod afskedigelse på grund af foreningsforhold*), as amended on 13 June 1990, violated Article 11 of the Convention as it allowed an employer to require an employee to be a member of a specific association in order to obtain employment. The applicant stated, among other things, that he did not share SID's political views.

14. On 18 November 1998 the High Court found for FDB, stating as follows:

“The High Court finds it established that the applicant was aware that membership of SID was a condition for his employment in the company. Thus, since the applicant did not comply with this requirement the conditions for dismissing him are fulfilled in accordance with section 2, subsection (2), in conjunction with subsection (1), of the Protection against Dismissal due to Association Membership Act.

Therefore, the pertinent question is whether the Act in issue, and with it the applicant's dismissal, is at variance with Article 11 of the European Convention on Human Rights, in the light of the interpretation this Article has been given by the European Court of Human Rights in its recent case-law.

The Protection against Dismissal due to Association Membership Act was passed by Parliament in 1982 as a result, *inter alia*, of the British Rail judgment (*Young, James and Webster v. the United Kingdom*, Series A no. 44) delivered by the European Court of Human Rights in 1981. In this judgment it was established that in certain circumstances Article 11 also secured the negative right to freedom of association. In the assessment of whether, subsequent to the Court's recent case-law, the domestic courts should disregard section 2(2) of the Protection against Dismissal due to Association Membership Act, the starting-point must be taken from the Act of 1992 incorporating the European Convention on Human Rights. According to the preparatory notes, incorporation of the Convention was not intended to change the existing balance between the Danish parliament and the Danish courts. Thus, in the view of the High Court, while taking into account the rights and obligations that may be inferred from the European Convention on Human Rights, Parliament still has considerable discretion when laying down Danish law. In this connection, it is also of importance to note that a decision abolishing or limiting the existing possibility of entering into closed-shop agreements will have far-reaching consequences for the Danish labour market.

In support of the applicant's understanding of the scope of Article 11, reference has been made to the *Sigurður A. Sigurjónsson v. Iceland* judgment of 1993 and the *Gustafsson v. Sweden* judgment of 1996. However, in the view of the High Court, an interpretation of these judgments does not establish with the necessary certainty that section 2(2) of the Protection against Dismissal due to Association Membership Act is at variance with Article 11 of the Convention.”

15. On appeal, the Supreme Court (*Højesteret*) upheld the High Court's judgment on 8 June 1999. In its reasoning the Supreme Court stated as follows:

“The Protection against Dismissal due to Association Membership Act (Law no. 285 of 9 June 1982) was passed notably in order to comply with the negative right to freedom of association to the extent that such an obligation could be established according to the interpretation of Article 11 of the Convention given by the European Court of Human Rights in the *Young, James and Webster v. the United Kingdom* judgment, Series A no. 44 (British Rail).

As stated in the Supreme Court's judgment of 6 May 1999 [see paragraph 21 below], the latest judgments of the European Court of Human Rights provide no grounds for a different assessment of the lawfulness of closed-shop agreements and their consequences from that appearing in the British Rail judgment. In addition, section 2(2), of the Protection against Dismissal due to Association Membership Act of 9 June 1982 raises no doubts as to its compatibility with this judgment.”

B. The second applicant

16. The second applicant was born in 1959 and lives in Haderslev, Denmark. He is a gardener by profession. He became a member of SID in the mid-1980s, but resigned his membership after a few years as he felt unable to support its political affiliations. Instead, he became a member of the Christian Trade Union (*Kristelig Fagforening*).

17. Having been unemployed for a while, he was offered a job at a nursery (Gartneriet i Regnmark I/S) on condition that he became a member of SID as the employer had entered into a closed-shop agreement with that trade union. The applicant commenced the job on 17 May 1999 and rejoined SID, although he still did not agree with its political views.

II. RELEVANT DOMESTIC LAW AND PRACTICE

18. Article 78 of the Danish Constitution (*Danmarks Riges Grundlov*) provides:

“1. Citizens shall, without prior permission, be free to form associations for any lawful purpose.

2. Associations employing violence, or aiming to attain their object by violence, by instigation to violence, or by similar punishable influence on persons holding other views, shall be dissolved by a court judgment.

3. No association shall be dissolved by any government measure; however, an association may be temporarily prohibited, provided that proceedings are instituted immediately for its dissolution.

4. Cases relating to the dissolution of political associations may, without special permission, be brought before the Supreme Court [*Rigets øverste domstol*].

5. The legal effects of such dissolution shall be determined by statute.”

19. The relevant parts of the Protection against Dismissal due to Association Membership Act of 9 June 1982 (which was passed as a direct result of the Court's ruling in *Young, James and Webster v. the United Kingdom*, 13 August 1981, Series A no. 44), as amended by Law no. 347 of 29 May 1990, read as follows:

Section 1

“An employer may not dismiss an employee on the ground that he or she is a member of an association or of a specific association.”

Section 2

“(1) An employer may not dismiss an employee on the ground that he or she is not a member of an association or of a specific association.

(2) Subsection (1) shall not apply if the employee, prior to recruitment, knew that the employer made membership of an association or of a specific association a condition for being employed with the enterprise.

(3) Subsection (1) shall furthermore not be applicable where an employee who is a member of an association is informed subsequent to recruitment that membership is a condition for continued employment with the enterprise.”

Section 3

“Sections 1 and 2 of the Act shall not apply in respect of employers whose business is specifically aimed at furthering political, ideological, religious or cultural ends, where the membership of the person concerned must be considered of importance for the business.”

Section 4

“Where an employee is dismissed contrary to the provisions of this Act, the dismissal must be overruled and the employment continued or restored, if a claim to this end is made. However, this shall not apply to employees in the private sector if, in special cases and following the balancing of the interests of the parties, it is found manifestly unreasonable to claim continuation of the employment or reinstatement.”

Section 4a

“(1) Where an employee is dismissed contrary to the provisions of this Act without the dismissal being overruled, the employer shall pay compensation.

(2) The compensation, which may not be less than one month's salary or wages and may not exceed twenty-four months' salary or wages, must be fixed in view of the period of employment and the circumstances of the case in general. If the employment has lasted for at least two years, such compensation may not be less than three months' salary or wages.”

Section 4b

“(1) Cases under this Act must be processed as quickly as possible.

(2) During the hearing of a case concerning dismissal, the court may order that the dismissal should not become effective until the case has been finally decided by means of a judgment. The judgment may specify that the dismissal will not be stayed in case of an appeal.”

20. The question of the lawfulness of closed-shop agreements in relation to the 1982 Act and the European Convention on Human Rights was examined by the Supreme Court in a judgment of 6 May 1999 (concerning Mr Jensen, applicant in the original case of *Jensen and Rasmussen v. Denmark* (dec.), no. 52620/99, 20 March 2003). The Supreme Court found for the defendant and awarded him damages in the amount of 200,000 Danish kroner (DKK). As regards Article 11 of the Convention, the Supreme Court stated:

“According to the *Young, James and Webster v. the United Kingdom* judgment of 13 August 1981, Series A no. 44 (the British Rail judgment) it is in breach of Article 11 of the European Convention on Human Rights concerning freedom of association to dismiss an employee who refuses to join a trade union with whom the employer has entered into a closed-shop agreement at a time after the employment of the employee, in so far as membership was not a condition for the employment. The Court emphasised that it did not decide on closed-shop agreements as such, but only on its effect on the three applicants.

In the *Sigurður A. Sigurjónsson v. Iceland* judgment of 30 June 1993, the European Court of Human Rights found a violation of Article 11 in a situation where a holder of a taxi licence had his licence revoked because he resigned from a specific association of taxicab owners. The Court found it of importance that obligatory membership of the association was imposed on him by law and that there was no duty to join the association when *Sigurður A. Sigurjónsson* obtained his taxi licence as the original requirement to do so lacked a legal basis. As in the British Rail judgment, the Court emphasised that it did not decide on the scope of Article 11 of the Convention in relation to the negative freedom of association.

Against this background, the Supreme Court finds no reasons in the *Sigurður A. Sigurjónsson* judgment to assess the lawfulness of closed-shop agreements and their consequences any differently than what appears from the British Rail judgment. The same goes for the remainder of the judgments that the parties have referred to (*Sibson v. the United Kingdom*, judgment of 20 April 1993, Series A no. 258, and *Gustafsson v. Sweden*, judgment of 25 April 1996, *Reports of Judgments and Decisions* 1996-II).”

Also, in another judgment of 12 May 2000, the Supreme Court found that closed-shop agreements as such were not contrary to Article 11 of the Convention as that provision had been interpreted by the Strasbourg Court.

21. The relevant parts of the Act on Private Contributions to Political Parties and Disclosure of the Accounts of Political Parties (Law no. 404 of 13 June 1990 – *Lov om private bidrag til politiske partier og*

offentliggørelse af politiske partiers regnskaber), as amended by Law no. 394 of 14 June 1995, provide:

Section 1

“Employers' federations, trade unions and other trade associations whose main objectives are to attend to the economic interests of the trade group to which their members belong shall ensure that any financial contribution to political parties or for party-political purposes in general collected as part of membership fees are collected on a voluntary basis for each individual member.”

Section 2

“(1) A member who wishes to be exempt from payment of contributions to political parties or for political purposes in general as part of the membership fees shall submit a written declaration to this effect.

(2) Once a year the association shall forward to its members a form containing the wording of such a declaration. Publishing the form in a members' journal or a similar publication may fulfil this obligation. The declaration must have the following wording: 'I wish to be exempt from payment of contributions to political parties or for party-political purposes in general as part of my membership fees.'

(3) The declaration must be forwarded to the auditor of the association. This must be apparent from the form referred to in subsection (2) above. Declarations sent to association offices by members must be forwarded to the auditor immediately. The Minister of Justice may lay down further provisions on the layout of the form and on the auditors' treatment of declarations received.

(4) Information on persons who are exempt from payment of contributions or who have made a request to this effect may not be subject to any unauthorised disclosure.”

22. A general description of the background of closed-shop agreements in the Danish labour market is given below.

The struggle at the end of the nineteenth century between, on the one side, employees and their unions (notably what is today called the Danish Confederation of Trade Unions (LO)) and, on the other side, the employers and their federations (mainly the Confederation of Danish Employers (*Dansk Arbejdsgiverforening* – DA)) resulted in the so-called September Agreement of 1899 between LO and DA.

The Agreement laid down five major principles:

- (1) the right of employees to organise within trade unions;
- (2) the right of employers to manage and control work;
- (3) the right to industrial action (strikes, boycotts and lockouts) in order to obtain, for example, a collective agreement;
- (4) the embargo on industrial action, which means that no strikes are lawful during the term of a collective agreement; and
- (5) the establishment of a special arbitration tribunal to deal with all violations of the September Agreement.

The September Agreement is unique in that it has formed the basis of all subsequent general agreements between management and labour. Traditionally, the Danish legislature plays a minor role as regards the conditions governing wages, salaries and employment. Therefore, only to a certain extent does the Danish labour market have legislation which does not emanate from European Union directives, examples being the Salaried Employees' Act (*Funktionærloven*) and the Holiday Act (*Ferieloven*). Accordingly, rights imposed by statute in other countries have in Denmark been obtained by means of agreements between the labour-market partners. It is thus a characteristic feature of Danish law that the relationship between employers and employees is basically governed by a combination of agreements (collective and individual), labour-law principles, general statutes and rules laid down in pursuance of statutes. More than 80% of all employees in Denmark are trade union members.

From figures provided by Statistics Denmark (*Danmarks Statistikbank*) and the Ministry of Employment (*Beskæftigelsesministeriet*), in 2001 the Danish workforce consisted of 2,799,958 persons (inclusive of the unemployed). Of these, 1,611,715 were employed within the private sector and 937,826 within the public sector.

The Government estimate that nearly 80% of all employees are covered by collective agreements. It appears that the applicants disagree with this estimation.

The institution of closed-shop agreements is a long-standing practice in Denmark. Typically, a closed-shop agreement states that an employer has undertaken to hire and employ only members of the trade union that is party to the collective agreement concluded by the employer. Closed-shop agreements are unlawful in the public-sector labour market as they would be in conflict with the principle of equality under Danish administrative law. Also, they are not concluded in the part of the private-sector labour market covered by the general agreement between DA and LO, because DA considers the use of closed-shop provisions to be an interference with employers' managerial rights. Thus, closed-shop agreements are mainly of importance in collective agreements concluded with employers not affiliated to an employers' organisation.

The precise number of employees covered by closed-shop agreements is unknown. However, from figures provided by DA and the Christian Trade Union, the Government estimate that approximately 220,000 wage earners are affected in some way by closed-shop agreements – that is, less than 10% of all Danish employees on the labour market. The applicants submit that this estimation is probably somewhat below the actual figure.

Closed-shop clauses are primarily found in certain sectors such as building and construction and horticulture.

23. After the general election in Denmark on 20 November 2001, the new government decided to set up a committee to look into closed-shop

agreements. The mandate of the committee was to examine the scope of such clauses and other circumstances which required membership of specific associations as a precondition for access to certain professions, and also to assess the compliance of such clauses with Denmark's international commitments. The committee was also asked to draw up recommendations and proposals for initiatives which afforded greater protection of the negative right to freedom of association. The committee submitted a report in June 2002 (*Betænkning nr. 1419, Udvalget om eksklusivbestemmelser*) which proposed changes to the law concerning closed-shop agreements between employees' organisations and employers. The committee pointed out that general developments in society and the labour market could no longer justify, to the same extent as before, the need for closed-shop agreements, since strong and representative trade unions and organisations had now been established on the labour market. The committee further stated that the advantages relating to membership of a trade union should in themselves be strong enough reasons to be a member of a trade union. The committee considered that as closed-shop agreements only existed for a small part of the labour market, a change in the law would have only a marginal impact upon union density rates. The committee further stated that closed-shop agreements could have the effect of reducing the supply of labour, that freedom of contract on the labour market was not an immutable concept, and that restrictions existed in several fields as to the agreements that management and labour could lawfully conclude.

24. Beforehand, the committee had consulted numerous institutions, organisations and associations, among those DA, which classified closed-shop agreements into the following categories:

- I. Agreements concluded by an employers' association which is a (direct or indirect) member of DA.
- II. Agreements concluded by an employers' association which is not affiliated to DA.
- III. Agreements concluded directly between an employer and a trade union.

The classification was explained in Report no. 1419 as follows:

“Some years ago the Confederation of Danish Employers (DA) made a conservative estimate that at least 230,000 employees were covered by closed-shop provisions. This figure was calculated as follows:

In businesses organised in member organisations of DA, it was estimated that at least 60,000 employees were covered by closed-shop provisions. (However, this figure has diminished since the original estimate was made, so the present estimate is that about 45,000 employees within the scope of DA are covered by closed-shop provisions).

In organised businesses outside the scope of DA, at least 50,000 employees were estimated to be covered by closed-shop provisions.

In non-organised businesses, it was estimated that approximately 120,000 employees were covered by closed-shop provisions in agreements adhering to collective-bargaining agreements.”

25. The distinction between I and II is related to the fact that DA, as stated above, has a policy of not entering into (or allowing its member organisations to enter into) closed-shop agreements. Therefore, within the scope of DA, closed-shop provisions only apply when a member organisation of DA entered into a closed-shop agreement prior to becoming a member of DA. This was explained in the report as follows:

“In principle, closed-shop provisions are not entered into by the part of the private labour market which is covered by the main agreement between DA and LO. Under the Articles of Association of DA, the use of exclusivity clauses is not recognised, because such clauses are deemed to interfere with employers' managerial rights. However, this does not mean that no business within the scope of DA has any collective-bargaining agreement containing closed-shop provisions. Thus, it is estimated by DA that at least 45,000 employees working in businesses organised in member organisations of DA are covered by closed-shop provisions.

When a member organisation enters into a collective-bargaining agreement, this must be subject to the approval of DA. The same principle applies when members of the member organisations enter into collective-bargaining agreements themselves. If a member organisation or the members of a member organisation intend to enter into negotiations for collective-bargaining agreements which include closed-shop provisions, this requires the prior consent of the board of DA. DA does not approve of collective-bargaining agreements which contain exclusivity clauses.

However, if, at the time of applying for admission to one of DA's member organisations, a business is party to a collective-bargaining agreement which includes closed-shop provisions, this does not debar the business from membership of the organisation. In such cases the organisation will subsequently try to release the business from the exclusivity clause. The same applies if an organisation seeks admission to DA.”

26. The committee's consultation with SALA (the Danish Confederation of Employers' Associations in Agriculture) was described as follows in Report no. 1419:

“SALA stated that, in general, it would like to see exclusivity agreements abolished, and that such agreements are felt to be constrictive even though it acknowledges the value of having large organisations to negotiate with. SALA said that, while the industrial part of the organisation is more or less exempt from exclusivity agreements, these agreements are a large problem for the areas of agriculture, forestry, market gardening and horticulture. The Employers' Association of Agriculture and Forestry said that the whole market garden area is covered by closed-shop provisions, and argued for changes in all negotiations for collective-bargaining agreements. SID consistently states that there is no price at which the clauses could be eliminated from collective-bargaining agreements, so the question is not open to negotiation. In the market garden area the exclusivity agreements result in a decrease in the number of applicants for apprenticeships, recruitment problems and problems in hiring seasonal workers. In other areas within agriculture and forestry it is also the case that exclusivity agreements are not 'for sale'.

The Employers' Association of Danish Landscape Gardeners said that it has four collective-bargaining agreements which include exclusivity clauses; however, the agreement covering golf courses only includes a preference clause. Despite the fact that the employers recognise the interest in having properly regulated labour relations, exclusivity agreements cause recruitment problems and have a side effect of leading to other forms of provision of services, for example, by sub-contractor arrangements and the like ...

In reply to a question of the committee, it was stated that the number of employees covered by exclusivity agreements in SALA's area is around 25,000."

27. Subsequently, on 9 January 2003, a bill (no. 2002-03-L120) to amend the Protection against Dismissal due to Association Membership Act was tabled in Parliament by the Minister for Employment. The bill was aimed at ensuring, among other things, that in the future no agreements could be lawfully concluded which imposed a duty on an employer to employ exclusively or, preferably, persons who were members of an association or a specific association.

28. The explanatory memorandum on the bill stated, *inter alia*:

"Closed-shop agreements are obsolete and out of step with the wishes of many employees. The government consider that there should be freedom for an employee to decide whether to become a member of an association – just as there should be freedom to choose not to become a member of an association – without this leading to a risk of not being recruited or of being dismissed. The government do not consider it reasonable that an employer may lay down requirements as to the candidate's membership or non-membership of an association as a condition for obtaining or keeping a job. Furthermore, the government find it unreasonable that a clause in a collective agreement may prevent an employee who does not wish to be a member of an association or a specific association from obtaining or keeping employment with an employer or may prevent an employer from considering the candidate's qualifications alone. ...

The bill does not entail any economic or administrative consequences for public authorities ... the bill does not lead to any financial and administrative consequences of any major significance for enterprises. The proposal could even lead to an easing of procedures for the recruitment of labour as employers will no longer have to take candidates' union affiliation into account after the commencement of the Act ... the bill has no consequences for gender equality on the labour market ... the bill does not contain any Community law aspects ..."

29. In accordance with the Danish Constitution, a bill is read three times before it is adopted. At the first reading, the bill is discussed in general and thereafter, normally, the bill is referred to a committee, which examines the proposal and is free to put questions to the relevant minister. With regard to the bill in question, on 6 February 2003 the Parliamentary Committee on Employment (*Arbejdsmarkedsudvalget*) submitted various questions to the Minister for Employment. As regards two questions (nos. 7 and 8) the latter replied as follows:

Question no. 7

“The Minister is requested to explain the impact of the proposed bill in relation to the scope for trade unions to enforce collective-bargaining agreements, especially in relation to non-organised employers. It appears from the annual reports of the Labour Court for the years 1999 and 2000 that during the years in question, 600 and 646 cases respectively were conducted against non-organised employers, which correspond to 77% and 82% respectively of the cases in the Labour Court instigated by employees in those years. All these cases were instigated by LO ... It is the opinion of LO that the removal of closed-shop provisions will to a large extent make the efficient enforcement of collective-bargaining agreements against such employers more difficult.”

Reply

“I find it difficult to see how the annulment of closed-shop provisions in collective-bargaining agreements with non-organised employers, which is estimated to cover around 120,000 employees, should make it more difficult for the organisations to secure the efficient enforcement of collective-bargaining agreements. First and foremost the annulment of a closed-shop provision in a collective-bargaining agreement with a non-organised employer would not change the fact that the collective-bargaining agreement is still valid and must be complied with. That means that the employees or their representatives would still have the possibility of bringing to the attention of the union in question any problems in getting the agreement complied with. The possibilities for the trade union to take action in such a case would therefore be unaffected. If there is a problem in having the terms in a collective-bargaining agreement complied with in a business, due to the fact that the trade union does not have any members in that business, that should be reason enough for the employees to join the trade union and get the trade union to complain of the lack of compliance.

I do not believe that a trade union will get much help in enforcing a collective-bargaining agreement from employees whose membership is not voluntary.

I do believe that if a trade union makes an effort and spreads the message to all the employees in a business covered by a collective-bargaining agreement that it is due to its efforts that there are orderly conditions in the business, some of those employees that are involuntary members today could become voluntary members, and all employees could then stand together to secure compliance with the collective-bargaining agreement.”

Question no. 8

“Under Danish collective-labour law, an employer must comply with the terms of a collective agreement in respect of all employees doing work within the field of the collective-bargaining agreement. Does the Minister believe that it is fair that non-organised employees should, in this way, enjoy benefits to which they have not contributed, and which have been obtained for them by the trade unions?”

Reply

“The principle that a collective-bargaining agreement also applies in relation to the work performed by non-organised employees in a business covered by a collective-bargaining agreement, is a principle which also applies to areas without closed-shop provisions. It is a principle which follows from collective-bargaining agreements themselves, and it is only the organisation which is a party to the collective-bargaining agreement which may raise a claim, not the individual (non-organised) employee.

Furthermore, there is nothing to prevent a collective-bargaining agreement only covering the members of the organisation which is a party to the agreement. I must therefore note that it is the trade unions themselves that have elected to follow this principle both in fields with and without closed-shop provisions. Whether this is fair or not, I will leave to the trade unions in question and to their members to consider.”

30. Before the Parliamentary Committee on Employment on 12 March 2003, the Association of Employers in Gardening (that is to say, the employers' association which has a closed-shop agreement with SID affecting the applicant Rasmussen) and the Danish Landscape Gardeners Employers' Association made the following joint submission:

“Both the Association of Employers in Gardening and Danish Landscape Gardeners are parties to collective agreements with SID, pursuant to which the employers agree only to employ members of SID.

This provision was agreed more than forty years ago and it is not clear why this was done. Thus, it is not apparent whether it was a mutual deal or whether it was the result of a strong trade union imposing the provision on a group of small employers.

Briefly, the provision entails a number of drawbacks for Danish gardening of which the following may be mentioned:

- It is difficult to get an inflow of apprentices to the trade. We need around 500 apprentices per year, but can only attract around 200. The closed-shop provision scares away young people. At the same time we have difficulty in securing qualified labour, since many capable employees do not want to work under an exclusivity agreement. Some of these may then try to circumvent the provision by establishing a relationship as a sub-contractor instead of as an actual employee.
- The business of market gardening is characterised by seasonal work. Every year we need summer holiday casual workers, workers to pick vegetables, workers for Christmas production and the like. Typically, we are speaking of young students who would like to work for a few months – until the closed-shop provision is mentioned.
- Danish market gardens are in a very tough competitive situation in the European Union. No other country in the Union has closed-shop provisions similar to those for Danish gardeners. Therefore, there is unequal competition at European Union level.
- Closed-shop provisions may be an instrument for securing wages and employment terms in small, non-organised businesses. Danish market gardens are very large businesses (20-250 employees per business) and more than 90% are organised. The closed-shop provision has therefore been overtaken by the structural

development of the business. In relation to businesses under the DA, the trade union movement accepts that the closed-shop provisions are unnecessary; see the article in SID's periodical.

- Danish market gardens are organised, from a business point of view, in the same way as Danish agriculture. The businesses in agriculture are not covered by closed-shop provisions, and Danish market gardens should not be either.

- The closed-shop agreement with SID causes daily problems with employees who are members of other trade unions or who wish to join other unions. For example, it frustrates the desire of employees to be transferred to the Danish Association for Managers and Executives, to an organisation of artisans or to another unemployment fund.

- As a labour-intensive export and home market business we need to attract the most competent workforce to Danish market gardens to maintain and expand our markets. The maintenance of the closed-shop provision will inhibit our development, and the most competent employees elect for other professions.

- The collective-bargaining agreements between the Association of Employers in Gardening and Danish Landscape Gardeners respectively and SID will continue to apply for our employees (and be complied with), even if the closed-shop provision is removed by law. The removal of the closed-shop provision would therefore not cause wage-dumping.

- The introduction of closed-shop provisions was not put in place as an equal deal, where both parties gained something. It does not appear anywhere that Danish market gardeners have received any compensation from SID for agreeing in the past to the closed-shop provision. On the contrary, it is our opinion that the employers were forced to enter into the exclusivity agreement under strong pressure and the threat of industrial action.

- In the last many negotiations for collective-bargaining agreements we have tried to persuade SID to drop the exclusivity agreements. In these negotiations it has not been possible to buy ourselves out of the exclusivity agreement. SID has not even wanted to discuss the problem seriously.

Closed-shop agreements do not belong in a modern society. The individual citizen wants to make his own decisions about his relationship to the trade union movement, and must be expected to be able to do so rationally.

Closed-shop provisions arose at the end of the nineteenth century in a period when industrial action was the order of the day.

Circumstances are now quite different, so closed-shop provisions should be removed by law. This would not be State interference with the right of free negotiation on the labour market, but the necessary safeguarding of freedom of association.

We therefore strongly recommend that the closed-shop provisions be removed by law.”

31. At the beginning of May 2003 it became clear that the bill had failed to secure the necessary majority in Parliament and it was withdrawn. It was tabled anew (no. 2004-05-L48) in December 2004 and dealt with by Parliament in January 2005 (before the general election on 8 February 2005), again with the result that the majority was not in favour of changing the law.

32. During the proceedings before the Court, the parties have submitted further information about the extension of closed-shop agreements in the gardening and horticultural sector.

The Government noted by way of introduction that no single source of statistical information was able to provide a complete picture and the various statistical sources were not immediately comparable. On the basis of the material available, however, the Government estimated that the total number of employed in the gardening and horticultural sector amounted to at least 20,800 persons. The relevant employers' organisations in the private sector had reported that around 11,000 persons were covered by closed-shop agreements, whereas the relevant trade unions had reported that 8,100 persons were covered. Thus, the Government estimated that less than 53% but more than 39% of persons were covered by closed-shop agreements.

The applicant Rasmussen submitted that the Government's calculation was misleading and irrelevant to an assessment of the possibility of him finding a job which was not covered by a closed-shop agreement. He stressed that there were three different kinds of gardeners: landscape gardeners; greenhouse gardeners; and production gardeners. It was crucial to distinguish among the three kinds of gardening because job opportunities in the public sector almost exclusively related to landscape gardeners. Moreover, although the applicant Rasmussen possessed the qualifications to obtain a job at a nursery, this did not imply that he would be qualified to work in landscape gardening – be it in the public or private sector. A calculation should be made in respect of each of the three kinds of gardening. The percentages for greenhouse gardening and production gardening would then be seen to be higher, probably 80% (11,000 employees covered by closed-shop provisions out of 13,700 in the three kinds of gardening in the private sector). Consequently, the percentage would be lower in respect of landscape gardeners. Accordingly, even if the Government were correct in stating that approximately every second job was not covered by closed-shop agreements, it would be more pertinent to say that in the case of the applicant Rasmussen, only one out of five relevant jobs was not covered by a closed-shop agreement.

III. RELEVANT INTERNATIONAL LAW AND PRACTICE

33. The preparatory notes on Article 11 of the Convention (Report of 19 June 1950 of the Conference of Senior Officials, Collected edition of the “*travaux préparatoires*”, vol. IV, p. 262) state, *inter alia*:

“On account of the difficulties raised by the 'closed shop system' in certain countries, the Conference in this connection considered it undesirable to introduce into the Convention a rule under which 'no one may be compelled to belong to an association' which features in [Article 20 § 2] of the United Nations Universal Declaration.”

34. It appears that among the member States of the Council of Europe, only a very limited number of States, including Denmark and Iceland, permit by law pre-entry closed-shop agreements in general or in certain sectors. Such agreements refer to the obligation to join a trade union at the time of taking up a contract of employment as opposed to the situation in which a similar obligation is imposed after recruitment (post-entry closed-shop agreements).

35. Article 5 of the European Social Charter provides for the following “right to organise”:

“With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Contracting Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this Article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.”

In its Conclusions XIV-1 and XV-1, the European Committee of Social Rights found that the Protection against Dismissal due to Association Membership Act infringed Article 5 of the European Social Charter in that an employee could be dismissed if, prior to recruitment, he or she knew that membership of a certain union was a condition for being employed with the enterprise (section 2, subsections (2) and (3), of the Act). On this basis, the Governmental Committee of the Social Charter in its 14th (1999) and 15th (2000) reports proposed that the Committee of Ministers adopt a recommendation to that end with regard to Denmark. On 7 February 2001, at the 740th meeting of the Ministers' Deputies, the proposal for the recommendation was not adopted as the requisite majority was not obtained.

In its Conclusions XVI-1, the European Committee of Social Rights stated, *inter alia*:

“The situation in Denmark is not in conformity with Article 5 of the Charter for the following reasons:

Closed-shop clauses are permitted in national law as illustrated by the decisions of the Danish Supreme Court summarised in the report. Clauses or practices of this kind violate the right to freedom of association; ...”

Subsequently, in September 2002 the Danish government informed the Governmental Committee of the European Social Charter of their intention to introduce a bill prohibiting closed-shop agreements (see paragraph 23 above). The Governmental Committee therefore decided to await the next assessment by the European Committee of Social Rights.

In its Conclusions XVII-1 of March 2004, the European Committee of Social Rights again maintained that the aforementioned Act infringed Article 5 of the European Social Charter. In this connection, the following views were expressed within the Governmental Committee, according to the report of its 106th meeting (11-14 May 2004):

“1. The Danish delegate said that once the parliamentary situation was more favourable the Government would resubmit the draft legislation. A case was also pending before the European Court of Human Rights.

2. The Portuguese delegate, supported by the Icelandic delegate, thought that under these circumstances Denmark should be given time to remedy the violation.

3. However, the Maltese delegate thought that the Governmental Committee should express its concern that nothing had been done to rectify the situation.

4. The Committee noted that it was firmly opposed to closed-shop clauses in any form and insisted that the violation of the Charter be remedied.”

The Conclusions of the next assessment by the European Committee of Social Rights on Article 5 in respect of Denmark are expected to be published in the first half of 2006.

36. Recently, in *Confederation of Swedish Enterprise against Sweden* (Collective Complaint no. 12/2002), the European Committee of Social Rights found that the situation in Sweden as regards pre-entry closed-shop clauses infringed Article 5 of the Revised European Social Charter. On the basis of the report by the European Committee of Social Rights, the Committee of Ministers, at the 853rd meeting of the Ministers' Deputies on 24 September 2003, adopted a resolution (ResChS(2003)1) taking note of the Swedish government's undertaking to bring the situation into conformity with the Revised Social Charter.

37. The Community Charter of the Fundamental Social Rights of Workers, adopted by the heads of State or government of eleven member States of the European Communities on 9 December 1989, provides that every employer and every worker has the freedom to join or not to join professional organisations or trade unions without any personal or occupational damage being thereby suffered by them.

The relevant parts of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 (2000/C 364/01), read:

Article 12 – Freedom of assembly and of association

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.”

Article 53 – Level of protection

“Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.”

38. Conventions nos. 87 and 98 of the International Labour Organisation (ILO) protect, *inter alia*, the positive aspects of freedom of association. As regards the issue of closed-shop agreements, the ILO considers this to be a matter for regulation at national level.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

39. The applicants complained that the existence of pre-entry closed-shop agreements in Denmark and their application to them violated their right to freedom of association guaranteed by Article 11 of the Convention, the relevant part of which provides:

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. ...”

A. Submissions of those appearing before the Court

1. The applicants

40. The applicants maintained that Article 11 of the Convention encompassed a negative right to freedom of association on an equal footing with the positive right and that consequently the Danish Protection against Dismissal due to Association Membership Act of 9 June 1982, as amended on 13 June 1990, violated that Article. In effect, it allowed an employer to require an employee to be a member of a trade union or a specific trade union in order to obtain employment.

41. Even if the negative right to freedom of association could not be considered on an equal footing with the positive right, there had been an interference with the applicants' negative right since they were compelled under threat of loss of their livelihood to be members of a specific trade union and were denied in consequence protection of their right to hold opinions, as guaranteed by Articles 9 and 10 of the Convention. The prejudice suffered struck at the very substance of the right guaranteed by Article 11. The applicant Sørensen stressed that he was dismissed without notice as a direct result of his refusal to become a member of SID, whose political views were alien to him, and that he had wished to become a member of a trade union with whose policies he sympathised, namely Denmark's Free Trade Union. The applicant Rasmussen for his part stated that he wished to rejoin the Christian Trade Union because it had a different ethos, taking care of its members without resorting to strikes and other forms of direct action. However, if he were to resign from SID he would inevitably be dismissed without the possibility of reinstatement or compensation since his dismissal would be in accordance with the Danish Freedom of Association Act. Moreover, working in the horticultural sector, one of the sectors of the labour market in which closed-shop agreements were predominant (see paragraph 32 above), he would be faced with a substantial and significant restriction of his employment opportunities.

42. The applicants further contended that, in spite of the Private Contributions to Political Parties and Disclosure of the Accounts of Political Parties Act, employees do not *de facto* have a possibility of subscribing to “non-political membership” of a trade union. This was partly because the exercise of that option did not entail any reduction in the payment of the membership fee to the specific trade union, and partly because a trade

union's financial contributions to one or more political parties were not limited to a fixed percentage of membership fees, but were usually derived from funds raised by the trade union.

43. The applicants stressed in addition that the interference was neither prescribed by law nor pursued a legitimate aim within the meaning of Article 11 § 2 of the Convention.

44. Finally, they submitted that the existence of closed-shop agreements could not or could no longer be justified in a democratic society. They referred, among other things, to the position in the vast majority of other Contracting States, to the fact that closed-shop provisions are not found in the public sector, nor as a general rule within businesses organised under the auspices of the DA, and to the explanatory memorandum to the bill to amend the Protection against Dismissal due to Association Membership Act tabled in Parliament in January 2003 and January 2005.

2. *The Government*

45. The Government maintained that, although Article 11 encompassed a negative right to freedom of association to some extent, it could not be considered on an equal footing with the positive right. They referred in this connection to the wording of and the *travaux préparatoires* to the said provision.

46. The Court's case-law on this point had not altered since the case of *Young, James and Webster v. the United Kingdom* (13 August 1981, Series A no. 44). Accordingly, the negative right to freedom of association guaranteed by Article 11 afforded protection against dismissal or deprivation of a licence to work only in those situations where the requirement to join a trade union was imposed *after* the recruitment of the individual or *following* the issue of a licence to him. A decisive consideration was therefore the individual's knowledge at the relevant time. Turning to the present case, the applicant Sørensen was fully aware at the time of his recruitment as a holiday relief worker that his employment was conditional on membership of a trade union affiliated to LO. Thus, he could not have had any legitimate expectation that he would be able to continue his employment with FDB without becoming a member of SID.

47. The applicant Rasmussen's situation had to be distinguished from the situations dealt with in the Court's previous case-law on the issue in that he was not continuously and directly at risk of dismissal as a consequence of the state of the law in Denmark. On the contrary, since less than 53% of the labour market was affected by closed-shop agreements (see paragraph 32 above), he could simply apply for a job with an employer who had not concluded a closed-shop agreement.

48. Finally, the Government submitted that closed-shop agreements were in accordance with the law, pursued a legitimate aim, namely the "protection of the rights and freedoms of others", and were justified within

the meaning of Article 11 § 2 of the Convention. They added in this connection that closed-shop agreements did not prevent the persons affected by them from pursuing their occupation. Moreover, as regards labour-market policies there was no common political understanding among the member States and in Denmark even Parliament was divided on the question of closed-shop agreements. Taking these considerations into account, and bearing in mind the sensitive character of the social and political issues involved, a wide margin of appreciation should be afforded to the Contracting States. In short, the question of closed-shop agreements was more appropriately dealt with on the national level.

B. Submissions by the Danish Confederation of Trade Unions (LO)

49. The Danish Confederation of Trade Unions (LO) (see paragraph 7 above), with nineteen affiliated unions and 1.4 million members, submitted that closed-shop clauses were concluded primarily: in collective agreements between LO-affiliated unions and small, non-affiliated employers; in collective agreements concluded by a number of major employers outside the employers' association; and in a few affiliated areas where special problems existed. Closed-shop agreements were of crucial importance for enforcing collective agreements, securing fair competition and combating undeclared and illegal work. It would be detrimental to the Danish collective-agreement system to prohibit them.

50. In the very short term, the only effect of a complete prohibition on closed-shop clauses would be that the trade union movement would lose some of its members, although in modest numbers. That would not have a particularly negative effect on the trade union movement or on others.

51. In the slightly longer term, a prohibition on closed-shop clauses would have more severe consequences. First and foremost, it would become difficult – and in many cases impossible – to enforce collective agreements *vis-à-vis* small, non-affiliated employers. To begin with, this would affect the relatively large number of employees who would lose the rights they had earned under the collective agreements with the consequence that they would risk being underpaid. Similarly, large enterprises could not be sure of peace in the workplace in the same way as when there was only one trade union movement. This might lead to unproductive battles between competing trade unions. Enterprises and employees would both stand to lose from such a situation. Furthermore, trades with special problems could not protect themselves against circumvention of their collective agreements. This was particularly the case for the hairdressing industry in which major problems were predicted. Overall, in the slightly longer term, an unavoidable practical consequence of a complete prohibition on closed-shop clauses would be the impossibility of combating underpayment of employees in a number of areas and peace in the workplace.

52. In the somewhat longer term, the consequences of a complete prohibition on closed-shop clauses would be more difficult to predict. This hinged on a number of factors. Potentially, the consequences could be very far-reaching. The lack of possibilities of enforcing collective agreements – as regards small enterprises and special areas – would not only have a negative effect on the employees. This would also be considered unfair competition in relation to enterprises that had and observed collective agreements in force. The harm caused by this would obviously vary from one industry to the next, but in the long term it was certain that some affiliated enterprises, which observed collective agreements, would be unable to resist this unfair competition. If widespread, the consequences would increase. First and foremost, this would create a wage push from within the agreement area. This might have two different outcomes. Firstly, it would become more difficult to negotiate pay increases in connection with collective bargaining. Secondly, pay would – within the scope of the collective agreement – be close to the minimum wage compared with today where many areas are at levels that are considerably above the minimum pay stipulated by the collective agreement. This meant that pay trends would in effect be influenced by the intervention of the legislator – which was in contravention of the fundamental elements of the Danish model under which pay and working conditions evolved through self-regulation among the social partners. In addition, if unfair competition became as widespread as feared, the motivation to be a member of an employers' association would be reduced. It should therefore be considered a reasonable possibility that fewer employers would be affiliated. This would mean lower coverage of collective agreements. Furthermore, this would reduce the employees' motivation to join a trade union since the trade union movement's main service – conditions provided for by collective agreements – could no longer be offered to the same extent. Summarising the consequences of the complete prohibition of closed-shop clauses in the longer term, it became obvious that a regrettable and highly realistic risk existed that: it would affect the enforcement of collective agreements; it would affect the high unionisation rate; it would affect the high coverage of collective agreements; and pay trends would be interfered with.

53. The sum of these possible consequences meant that the foundation of the Danish model – which had had broad political backing for more than one hundred years – might begin to crumble. If so, to maintain the overall welfare level, Denmark would, within the foreseeable future, have to give up the extensive use of self-regulation and let Parliament handle the regulation of pay and employment conditions to a greater extent. Consequently, a judgment in favour of the applicants might, besides the immediate consequences for a number of employees, result in political intervention in the Danish labour-market model, which would fail to benefit employees, employers and Danish society in general.

C. The Court's assessment

1. General principles

54. The right to form and to join trade unions is a special aspect of freedom of association, and the notion of a freedom implies some measure of freedom of choice as to its exercise (see *Young, James and Webster*, cited above, § 52). Accordingly, Article 11 of the Convention must also be viewed as encompassing a negative right of association or, put in other words, a right not to be forced to join an association (see *Sigurður A. Sigurjónsson v. Iceland*, 30 June 1993, § 35, Series A no. 264). Although compulsion to join a particular trade union may not always be contrary to the Convention, a form of such compulsion which, in the circumstances of the case, strikes at the very substance of the freedom of association guaranteed by Article 11, will constitute an interference with that freedom (see *Gustafsson v. Sweden*, 25 April 1996, § 45, *Reports of Judgments and Decisions* 1996-II; and *Young, James and Webster*, § 55, and *Sigurður A. Sigurjónsson*, § 36, both cited above).

Furthermore, regard must also be had in this context to the fact that the protection of personal opinions guaranteed by Articles 9 and 10 of the Convention is one of the purposes of the guarantee of freedom of association, and that such protection can only be effectively secured through the guarantee of both a positive and a negative right to freedom of association (see *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 103, ECHR 1999-III; and *Young, James and Webster*, § 57, and *Sigurður A. Sigurjónsson*, § 37, both cited above).

In this connection, the notion of personal autonomy is an important principle underlying the interpretation of the Convention guarantees. This notion must therefore be seen as an essential corollary of the individual's freedom of choice implicit in Article 11 and confirmation of the importance of the negative aspect of that provision.

55. The parties have discussed at length whether in the area of trade union membership the negative aspect of the freedom of association should be considered on an equal footing with the positive right. The Court notes that hitherto it has not taken any definite stand on that point (see *Young, James and Webster*, *Sigurður A. Sigurjónsson* and, in a different context, *Chassagnou and Others*, all cited above).

56. The Court does not in principle exclude that the negative and the positive aspects of the Article 11 right should be afforded the same level of protection in the area under consideration. However, it is difficult to decide this issue in the abstract since it is a matter that can only be properly addressed in the circumstances of a given case. At the same time, an individual cannot be considered to have renounced his negative right to freedom of association in situations where, in the knowledge that trade

union membership is a precondition of securing a job, he accepts an offer of employment notwithstanding his opposition to the condition imposed. Accordingly, the distinction made between pre-entry closed-shop agreements and post-entry closed-shop agreements in terms of the scope of the protection guaranteed by Article 11 is not tenable. At most, this distinction is to be seen as a consideration which will form part of the Court's assessment of the surrounding circumstances and the issue of their Convention compatibility.

57. It is further to be observed that, by virtue of Article 1 of the Convention, each Contracting Party "shall secure to everyone within [its] jurisdiction the rights and freedoms defined in ... [the] Convention". The discharge of this general duty may entail positive obligations inherent in ensuring the effective exercise of the rights guaranteed by the Convention. Thus, in the context of Article 11, although the essential object is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, the national authorities may in certain circumstances be obliged to intervene in the relationship between private individuals by taking reasonable and appropriate measures to secure the effective enjoyment of those rights (see, *mutatis mutandis*, *Young, James and Webster*, § 49, and *Gustafsson*, § 45, both cited above; and *Wilson, National Union of Journalists and Others v. the United Kingdom*, nos. 30668/96, 30671/96 and 30678/96, § 41, ECHR 2002-V).

In the present case, the matters about which the applicants complained did not involve direct intervention by the State. However, Denmark's responsibility would be engaged if these matters resulted from a failure on its part to secure to the applicants under domestic law their negative right to freedom of association.

58. The boundaries between the State's positive and negative obligations under Article 11 of the Convention do not lend themselves to precise definition. The applicable principles are nonetheless similar. Whether the case is analysed in terms of a positive duty on the State or in terms of interference by a public authority which needs to be justified, the criteria to be applied do not differ in substance. In both contexts regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole (see, *mutatis mutandis*, *Broniowski v. Poland* [GC], no. 31443/96, § 144, ECHR 2004-V, and *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, §§ 98 et seq., ECHR 2003-VIII).

In the area of trade union freedom and in view of the sensitive character of the social and political issues involved in achieving a proper balance between the respective interests of labour and management, and given the wide degree of divergence between the domestic systems in this field, the Contracting States enjoy a wide margin of appreciation as to how the freedom of trade unions to protect the occupational interests of their

members may be secured (see *Swedish Engine Drivers' Union v. Sweden*, 6 February 1976, § 39, Series A no. 20; *Gustafsson*, cited above, § 45; *Schettini and Others v. Italy* (dec.), no. 29529/95, 9 November 2000; and *Wilson, National Union of Journalists and Others*, cited above, § 44). Thus, the Court has so far not found fault with a Contracting State's failure to impose on an employer an obligation to recognise a trade union or to provide for a system of compulsory collective bargaining (see *Wilson, National Union of Journalists and Others*, § 44, and cases cited therein).

However, where the domestic law of a Contracting State permits the conclusion of closed-shop agreements between unions and employers which run counter to the freedom of choice of the individual inherent in Article 11, the margin of appreciation must be considered reduced. The Court reiterates in this connection that, although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position (see *Young, James and Webster*, cited above, § 63, and *Chassagnou and Others*, cited above, §§ 112-13). In assessing whether a Contracting State has remained within its margin of appreciation in tolerating the existence of closed-shop agreements, particular weight must be attached to the justifications advanced by the authorities for them and, in any given case, the extent to which they impinge on the rights and interests protected by Article 11. Account must also be taken of changing perceptions of the relevance of closed-shop agreements for securing the effective enjoyment of trade union freedom.

The Court sees no reason not to extend these considerations to both pre-entry and post-entry closed-shop agreements.

2. *Application of the above principles in the instant case*

59. The Court will examine whether the applicants were in fact compelled to join a particular trade union and, in the affirmative, whether such compulsion struck at the very substance of the negative right to freedom of association guaranteed by Article 11 of the Convention. It observes that the present case concerns the application of pre-entry closed-shop agreements to the applicants. They were both aware before taking up their respective jobs that an obligation existed to join SID, and that this was a condition for obtaining and retaining their employment. The Government have argued that the applicants' situation differs from those dealt with previously by the Court since the applicants could never have assumed the contrary. In the Court's view, however, the fact that the applicants accepted membership of SID as one of the terms of employment does not significantly alter the element of compulsion inherent in having to join a trade union against their will. Had they refused they would not have been recruited. In this connection, the Court can accept that individuals applying

for employment often find themselves in a vulnerable situation and are only too eager to comply with the terms of employment offered.

60. The Government have further submitted that the applicants could have chosen to seek employment with an employer who had not entered into a closed-shop agreement and that this option was open to them since in general less than 10% of the labour market was affected by closed-shop agreements. Closed-shop agreements are unlawful in the public-sector labour market and are no longer concluded in the part of the private-sector labour market covered by the general agreement between DA and LO (see paragraphs 22, 24 and 25 above). The Court for its part can accept this analysis. However, it remains to be determined whether the applicants were nonetheless individually and substantially affected as a result of the application of the closed-shop agreements to them.

61. It is not in dispute that the applicant Sørensen could have found holiday relief employment elsewhere with an employer who had not entered into a closed-shop agreement, and it appears to be common ground that, since at the relevant time he was 21 years old, had just finished his military service and was about to commence his university studies, he was not in the long term dependent on keeping his job with FDB, which in any event would only have lasted ten weeks. The Government have argued that his situation cannot be compared with the hardship and the serious consequences that arose for the applicants in, for example, the above-cited cases of *Young, James and Webster* and *Sigurður A. Sigurjónsson*. However, it must be observed that the applicant Sørensen was dismissed without notice as a direct result of his refusal to comply with the requirement to become a member of SID, a requirement which had no connection with his ability to perform the specific job or his capacity to adapt to the requirements of the workplace. In the Court's opinion, such a consequence can be considered serious and capable of striking at the very substance of the freedom of choice inherent in the negative right to freedom of association protected by Article 11 of the Convention.

62. The applicant Rasmussen was born in 1959 and had worked as a gardener for many years. He had been a member of SID in the mid-1980s but resigned his membership and joined the Christian Trade Union instead. Following a period of unemployment, on 17 May 1999 he commenced his current employment at a nursery after rejoining SID, this being one of the conditions for the job. It is impossible to know whether he would have remained unemployed had he not at the relevant time accepted his current job which included obligatory membership of SID. It is speculative whether, if he were to resign his membership of SID, he could find employment elsewhere with an employer who had not entered into a closed-shop agreement. It is certain, however, that should the applicant Rasmussen resign from SID, he would be dismissed without the possibility of reinstatement or compensation since the dismissal would be in accordance

with the Danish Freedom of Association Act. Moreover, although closed-shop agreements do not extend to the entire horticultural sector, they are nevertheless very common (see paragraphs 22, 26, 30 and 32 above). In these circumstances, the Court is satisfied that the applicant Rasmussen can be considered to be individually and substantially affected by the application of the closed-shop agreement to him.

63. As to whether the applicants' personal views and opinions were compromised (see paragraph 54 above), it is to be noted that both applicants objected to membership of SID because they were unable to subscribe to the political views of that trade union (and those of the other trade unions affiliated to LO). Instead, the applicant Sørensen joined Denmark's Free Trade Union, and the applicant Rasmussen wishes to rejoin the Christian Trade Union. The Government have pointed out that the applicants had the possibility of subscribing to a form of "non-political membership" of SID or of any other trade union pursuant to the Private Contributions to Political Parties and Disclosure of the Accounts of Political Parties Act (see paragraph 21 above). However, it is to be observed that such "non-political membership" does not entail any reduction in the payment of the membership fee to the specific trade union. In any event, there is no guarantee that "non-political membership" will not give rise to some form of indirect support for the political parties to which the specific trade union contributes financially.

64. In these circumstances, the Court concludes that both applicants were compelled to join SID and that this compulsion struck at the very substance of the freedom of association guaranteed by Article 11 of the Convention.

65. It remains to be determined whether the respondent Government, in authorising the use of the closed-shop agreements in issue, failed in the circumstances to secure the applicants' effective enjoyment of their negative right to freedom of association and thereby violated Article 11 of the Convention. The Court's assessment must be focused on whether a fair balance has been struck between the applicants' interests and the need to ensure that trade unions are able to strive for the protection of their members' interest (see paragraph 58 above).

66. The Court notes the special features of the Danish labour market, in particular the fact that the relationship between employers and employees is governed by a combination of agreements (collective and individual), labour-law principles, general statutes and statutory rules (see paragraph 22 above). Moreover, the institution of closed-shop agreements is a long-standing practice in Denmark, although they are unlawful in the public-sector labour market and are not concluded in the part of the private-sector labour market covered by the general agreement between DA and LO (see paragraphs 22, 24, 25 and 60 above). Closed-shop agreements thus

presently affect only approximately 220,000 wage earners, which is equivalent to less than 10% of all Danish employees on the labour market.

67. Furthermore, in their report, the committee set up to look into closed-shop agreements found, among other things, that the general developments in society and the labour market could no longer justify, to the same extent as before, the need for closed-shop agreements, since strong and representative trade unions and organisations had now been established on the labour market. Moreover, since closed-shop agreements merely covered a small part of the labour market, a change in the law would have only a marginal impact on union density rates (see paragraphs 23 and 24 above).

68. In January 2003 and again in January 2005 (see paragraphs 27 and 31 above), the Minister for Employment presented a bill to Parliament to amend the Protection against Dismissal due to Association Membership Act, which aimed at ensuring, among other things, that in the future no agreements could be lawfully concluded which imposed a duty on an employer to employ exclusively or to give preference to persons who were members of an association or a specific association. In the explanatory memorandum to the bill, the government stated among other things (see paragraph 28 above) that they “consider that there should be freedom for an employee to decide whether to become a member of an association – just as there should be freedom to choose not to become a member of an association – without this leading to a risk of not being recruited or of being dismissed” and that they “find it unreasonable that a clause in a collective agreement may prevent an employee who does not wish to be a member of an association or a specific association from obtaining or keeping employment with an employer or may prevent an employer from considering the candidate's qualifications alone”.

69. In the beginning of May 2003, it became clear that the bill had failed to secure the necessary majority in Parliament and was withdrawn. Nevertheless, it was tabled anew in December 2004 and discussed by Parliament in January 2005. However, once again a majority in favour of changing the law could not be secured (see paragraph 31 above).

70. It is to be observed that these legislative attempts to eliminate entirely the use of closed-shop agreements in Denmark would appear to reflect the trend which has emerged in the Contracting Parties, namely that such agreements are not an essential means for securing the interests of trade unions and their members and that due weight must be given to the right of individuals to join a union of their own choosing without fear of prejudice to their livelihood. In fact, only a very limited number of Contracting States, including Denmark and Iceland, continue to permit the conclusion of closed-shop agreements (see paragraph 34 above).

71. It is true that in the context of the Danish debate on this topic LO has voiced its opposition to the attempts to eliminate the remaining areas where

pre-entry closed-shop agreements continue to be applied. LO has pointed to the severe consequences which the prohibition of closed-shop clauses would entail, and in particular its view that it would become difficult or impossible to enforce collective agreements *vis-à-vis* small non-affiliated employers (see paragraph 51 above). However, the Court considers that these concerns have been adequately addressed by the Minister for Employment in his reply to question no. 7 put by the parliamentary committee, namely that an annulment of a closed-shop provision in a collective-bargaining agreement with a non-organised employer would not change the fact that the collective-bargaining agreement is still valid and must be complied with (see paragraph 29 above). Furthermore, the Court has not been informed that the concerns expressed by LO have materialised in any of the very many Contracting Parties which have abolished closed-shop agreements entirely.

72. The Court also observes that the desire of the Danish legislature to bring an end to the use of closed-shop agreements in the private sector is consistent with the manner in which the 1961 Social Charter has been applied to the issue of pre-entry closed-shop agreements. In its Conclusions XIV-1, XV-1 and XVI-1, the European Committee of Social Rights found that the Danish Protection against Dismissal due to Association Membership Act infringed Article 5 of the Social Charter (see paragraph 35 above) and accordingly the Governmental Committee proposed that a recommendation be addressed to Denmark. Admittedly, at the 740th meeting of the Ministers' Deputies in February 2001 the required majority was not obtained. However, shortly thereafter, in September 2002, the Danish government informed the Governmental Committee of the European Social Charter of their intention to introduce a bill prohibiting closed-shop agreements and the latter therefore decided to await the next assessment by the European Committee of Social Rights. Subsequently, when it had become clear that the bill had failed to secure the necessary majority in Parliament and was withdrawn, in its Conclusions XVII-1 of March 2004 the European Committee of Social Rights maintained that the Danish Protection against Dismissal due to Association Membership Act infringed Article 5 of the Social Charter, in response to which the government stated that once the parliamentary situation was more favourable they would resubmit the draft legislation (see paragraph 35 above).

73. Reference should also be made to the Community Charter of the Fundamental Social Rights of Workers, adopted by the heads of State or government of eleven member States of the European Communities on 9 December 1989. This text provides that every employer and every worker shall have the freedom to join or not to join professional organisations or trade unions without any personal or occupational damage being thereby suffered by them (see paragraph 37 above).

74. Article 12 of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 (2000/C 364/01) (see paragraph 37 above), is devoted to freedom of assembly and association. The above-mentioned provisions of the Community Charter of the Fundamental Social Rights of Workers are of obvious relevance for the interpretation of the scope of Article 12. It should be noted in this connection that Article 53 of the Nice Charter states that nothing therein shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by European Union law and international law and by international agreements to which the European Union, the Community, or all the member States are party, including the Convention for the Protection of Human Rights and Fundamental Freedoms, and by the member States' constitutions.

75. In view of the above, it appears that there is little support in the Contracting States for the maintenance of closed-shop agreements and that the European instruments referred to above clearly indicate that their use in the labour market is not an indispensable tool for the effective enjoyment of trade union freedoms.

76. In conclusion, taking all the circumstances of the case into account and balancing the competing interests in issue, the Court finds that the respondent State has failed to protect the applicants' negative right to trade union freedom.

77. Accordingly, there has been a violation of Article 11 of the Convention in respect of both applicants.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

78. Article 41 of the Convention provides:

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

A. Damage

79. The applicant Sørensen claimed 164,000 Danish kroner (DKK) (equal to 22,077 euros (EUR)¹) in compensation for his alleged wrongful dismissal. The amount claimed represented DKK 20,000 during the period of notice and DKK 144,000 amounting to nine months' pay in compensation under the Danish Freedom of Association Act.

1. According to the exchange rate on 3 July 2003, the date on which the claim was submitted.

80. The Government found this amount excessive.

81. The Court notes that the applicant Sørensen was offered a job as a holiday relief worker from 3 June until 10 August 1996. He received his first payslip on 20 June 1996 and was dismissed on 24 June 1996 as he had not fulfilled the requirement for obtaining the job, namely membership of a union affiliated to LO. The applicant has not produced a payslip or other documents which could support his claim. Accordingly, the Court does not consider the alleged financial loss to have been substantiated. However, the applicant may nevertheless be reasonably considered to have suffered some loss of income. In these circumstances the Court considers, deciding on an equitable basis, that the applicant Sørensen should be awarded the sum of EUR 2,000.

82. The Court notes that the applicants have not put forward any claim for non-pecuniary damage and makes no award in this respect.

B. Costs and expenses

83. The applicant Sørensen claimed a total amount of DKK 757,302 (equal to EUR 101,543¹) inclusive of tax for legal costs and expenses incurred in the Convention proceedings. He provided the following details:

- (i) DKK 231,250 inclusive of value-added tax (VAT) for work carried out by counsel Mr E. Lego Andersen in the proceedings before the Court;
- (ii) DKK 475,000 inclusive of VAT for work carried out by counsel Mr J. Paulsen in the proceedings before the Court;
- (iii) DKK 26,360 for translation expenses;
- (iv) DKK 6,164 for travel and accommodation expenses incurred by counsel Mr E. Lego Andersen in connection with the Court's hearing in Strasbourg on 22 June 2005;
- (v) DKK 18,528 for travel and accommodation expenses incurred by the applicant Sørensen, counsel Mr J. Paulsen and representatives of the Free Trade Union in connection with the Court's hearing in Strasbourg on 22 June 2005.

84. The applicant Rasmussen claimed EUR 145 and a total amount of DKK 592,544 inclusive of tax equal to a total amount of EUR 79,596 for legal costs and expenses incurred in the Convention proceedings. He provided the following details:

- (i) DKK 231,250 inclusive of VAT for work carried out by counsel Mr E. Lego Andersen in the proceedings before the Court;
- (ii) DKK 330,000 inclusive of VAT for work carried out by counsel Mr S. Juul in the proceedings before the Court;

1. According to the exchange rate on 8 August 2005, the date on which the claim was submitted.

(iii) DKK 6,164 for travel and accommodation expenses incurred by counsel Mr E. Lego Andersen in connection with the Court's hearing in Strasbourg on 22 June 2005;

(iv) DKK 8,144 for travel and accommodation expenses incurred by counsel Mr S. Juul in connection with the Court's hearing in Strasbourg on 22 June 2005;

(v) DKK 5,662 for a plane ticket for the applicant Rasmussen in connection with the Court's hearing in Strasbourg on 22 June 2005 (incurred in vain since he fell ill);

(vi) DKK 11,324 and EUR 145 for travel and accommodation expenses incurred by two representatives of the Christian Trade Union in connection with the Court's hearing in Strasbourg on 22 June 2005.

85. In the Government's view, the applicants' claims for costs and expenses were excessive, notably with regard to the fees claimed by counsel which, based on an average hourly wage, would correspond respectively to 231 hours of work carried out by counsel Mr Eigil Lego Andersen, 237 hours of work carried out by counsel Mr Jens Paulsen, and 165 hours of work carried out by counsel Mr Søren Juul. Moreover, the applicant Sørensen was granted free legal aid in an amount up to DKK 40,000 (equal to EUR 5,365) due to the existence in Denmark of a Legal Aid Act (*Lov 1999-12-20 nr. 940 om retshjælp til indgivelse og førelse af klagesager for international klageorganer i henhold til menneskerettigheds-konventioner*) under which applicants may be granted free legal aid for the lodging of their complaints and the procedure before international institutions set up under human rights conventions. The final amount of legal aid to be awarded to the applicant under the said Act has yet to be determined. The applicant Rasmussen did not apply for legal aid under the said scheme.

86. According to the Court's established case-law, costs and expenses will not be awarded under Article 41 unless it is established that they were actually incurred, were necessarily incurred and are also reasonable as to quantum (see *The Sunday Times v. the United Kingdom (no. 1)* (Article 50), 6 November 1980, § 23, Series A no. 38).

87. As regards the costs and expenses claimed by the applicant Sørensen, the Court considers that these conditions are met as regards the costs and expenses claimed under points (iii) and (iv) (EUR 3,535 and EUR 827, respectively). As to item (v), the conditions have not been met as regards the costs and expenses incurred by the representatives of the Free Trade Union. Nevertheless, bearing in mind the specific means of transport used, the Court accepts the full amount claimed (equal to EUR 2,484). The Court considers the costs and expenses listed under points (i) and (ii) claimed by the applicant Sørensen's lawyers in the present case to be excessive. Having regard to the information in its possession and the aforementioned criteria, it awards the applicant EUR 15,000 for the work carried out by Mr Eigil Lego Andersen and EUR 20,000 for the work

carried out by Mr Jens Paulsen. Thus, the Court awards the applicant Sørensen the sum of EUR 41,846 minus the amounts of EUR 5,365 received by way of legal aid under the Danish Legal Aid Act and of EUR 2,783 received by way of legal aid from the Council of Europe. It therefore awards the sum of EUR 33,698. It rejects the remainder of the claim for costs and expenses.

88. As regards the costs and expenses claimed by the applicant Rasmussen, the Court considers that the above conditions are met as regards the costs and expenses claimed under points (iii), (iv) and (v) (EUR 827, EUR 1,092 and EUR 759, respectively). The Court considers that the costs and expenses listed under points (i) and (ii) claimed by the applicant Rasmussen's lawyers are excessive. Having regard to the information in its possession and the aforementioned criteria, it awards the applicant EUR 15,000 for the work carried out by Mr Eigil Lego Andersen and EUR 20,000 for the work carried out by Mr Søren Juul. Thus, the Court awards the applicant Rasmussen the sum of EUR 37,678. It rejects the remainder of the claim for costs and expenses.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Holds* by twelve votes to five that there has been a violation of Article 11 of the Convention in respect of the applicant Sørensen;
2. *Holds* by fifteen votes to two that there has been a violation of Article 11 of the Convention in respect of the applicant Rasmussen;
3. *Holds* by twelve votes to five
 - (a) that the respondent State is to pay the applicant Sørensen, within three months, the following amounts to be converted into the national currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 2,000 (two thousand euros) in respect of pecuniary damage plus any tax that may be chargeable on this amount;

- (ii) EUR 33,698 (thirty-three thousand six hundred and ninety-eight euros) inclusive of value-added tax in respect of costs and expenses incurred in the proceedings before the Court;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
- 4. *Holds* by fifteen votes to two
 - (a) that the respondent State is to pay the applicant Rasmussen, within three months, EUR 37,678 (thirty-seven thousand six hundred and seventy-eight euros) inclusive of value-added tax in respect of costs and expenses incurred in the proceedings before the Court. The sum is to be converted into the national currency of the respondent State at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
- 5. *Dismisses* unanimously the remainder of both applicants' claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 11 January 2006.

Lawrence Early
Deputy Registrar

Luzius Wildhaber
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) joint partly dissenting opinion of Judges Rozakis, Bratza and Vajić;
- (b) dissenting opinion of Judge Zupančič;
- (c) dissenting opinion of Judge Lorenzen.

L.W.
T.L.E.

JOINT PARTLY DISSENTING OPINION OF JUDGES ROZAKIS, BRATZA AND VAJIĆ

1. Underlying the complaint of both applicants is the contention that trade union membership or “closed-shop” agreements, which have either never existed or which have ceased to exist in the vast majority of Contracting States, can no longer be justified in a democratic society and that their existence is incompatible with the right of freedom of association guaranteed by Article 11 of the Convention. However, as was emphasised by the Court in the case of *Young, James and Webster v. the United Kingdom* (13 August 1981, § 53, Series A no. 44), it is not the role of the Court to review a closed-shop system as such in relation to the Convention or to express an opinion on every consequence or form of compulsion which it may engender. Rather, it is necessary to examine the effect of the system and the impact of a trade union membership agreement on a particular applicant and in the particular circumstances of the case. While, in the circumstances of the present case, we agree with the majority of the Court that the rights of Mr Rasmussen under Article 11 were violated, we cannot share the majority's view that the Article was also violated in the case of Mr Sørensen.

2. The general principles derived from the Court's case-law governing the application of Article 11 in the context of trade union membership agreements are fully set out in the judgment. In common with the majority of the Court, we consider:

(i) that the matters of which complaint is made in the present case involve not a direct interference by the State with the applicants' freedom of association but rather the fulfilment by the State of its positive obligation to protect through its domestic legal system the effective enjoyment of their Article 11 rights, including the question whether a fair balance was struck by that system between the competing interests of the individual applicants and of the community as a whole;

(ii) that the question whether the right not to be compelled to join a trade union should be afforded the same level of protection under Article 11 as the right to join a trade union is not a question which can be decided in the abstract but is a matter to be addressed in the circumstances of a given case;

(iii) that, contrary to the submission of the Government, the protection afforded by Article 11 does not extend only to those situations where the requirement to join a trade union is imposed after the recruitment of the individual (as in *Young, James and Webster*) or following the issue of a licence (as in *Sigurður A. Sigurjónsson v. Iceland*, 30 June 1993, Series A no. 264). While the previous cases decided by the Court have all concerned what are referred to in the judgment as “post-entry” rather than “pre-entry” closed-shop agreements, there are no reasons of principle why the protection of Article 11 should be confined to the former to the exclusion of

the latter. However, as noted by the majority, the fact that membership of a particular trade union was expressly made a precondition of securing a job is a relevant factor in the Court's assessment of the surrounding circumstances and the issue of their Convention compatibility.

3. In arriving at its conclusion in *Young, James and Webster* that there had been a violation of Article 11, the Court held that, although compulsion to join a particular trade union might not always be contrary to the Convention, a form of compulsion which, in the circumstances of the case, struck at the very substance of the right to freedom of association guaranteed by Article 11 would constitute an interference with that freedom. In finding that in the case of the three applicants this level of severity had been achieved, the Court laid emphasis on the fact that the threat of dismissal not only involved a loss of livelihood but was directed against persons engaged before the introduction of any obligation to join a particular trade union. In addition, the Court noted that none of the applicants enjoyed an effective freedom of choice as to which, if any, trade union they wished to join and that two of the applicants had conscientious objections to the policies, activities or political affiliations of the union in question.

4. In contrast to the applicants in *Young, James and Webster*, both of the present applicants were aware before taking up their respective jobs that an obligation existed to join SID and that this was a condition for obtaining and retaining their employment. In the view of the majority of the Court, the fact that the two applicants accepted membership of SID as one of the terms of their employment did not significantly alter the element of compulsion inherent in having to join a trade union against their will, since, had they refused they would not have been recruited. It is on this point that we differ from the majority, in that we see a very clear distinction in the degree of compulsion to which the two applicants were subjected.

5. Mr Rasmussen, who had worked as a gardener for many years, commenced his current employment at a nursery in May 1999 after a period of unemployment. It is not in dispute that the gardening and horticulture sector in Denmark is one of the sectors in which closed-shop agreements not only exist but are common. The precise extent to which the sector is covered by such agreements is disputed between the parties. According to the Government estimates, between 39 and 53% of persons working within the sector were covered by such agreements. In the submission of the applicant, such percentages were misleading in failing to distinguish between different kinds of gardeners, namely landscape, greenhouse and production gardeners: according to his estimates, some 80% of persons employed in the latter two categories, to which he belonged, were covered by closed-shop agreements. It is true, as pointed out in the dissenting opinion of Judge Lorenzen, that the applicant has not provided information as to his personal difficulties, if any, in obtaining a job in his own field of work which was not

subject to a closed-shop agreement or as to the number of such available jobs within a reasonable distance of his home. However, like the majority of the Court, we do not regard the absence of this information as decisive. As pointed out in the judgment, what is certain is that, should Mr Rasmussen resign from SID in accordance with his personal convictions, he would be dismissed without the possibility of reinstatement or compensation and with no strong prospect, let alone certainty, of finding alternative employment as a greenhouse or production gardener without being obliged to rejoin the union. This threat of dismissal and the potential loss of livelihood which would result amounted in our view to a serious form of compulsion which struck at the very substance of the right guaranteed by Article 11. Moreover, for the reasons given in the judgment, we consider that the legal system failed to preserve a fair balance between the competing interests and to secure adequately Mr Rasmussen's negative right to freedom of association.

6. Mr Sørensen's case seems to us to be significantly different and here our view corresponds closely to those expressed in Judge Lorenzen's dissenting opinion. As noted in that opinion, Mr Sørensen did not apply for a permanent job but wished only to be employed as a holiday relief worker in the summer period until he commenced his university studies. He was not in the long term dependent on keeping his job with FDB, which in any event would only have lasted ten weeks. It is undisputed that he would have had no difficulties in finding a similar job without the requirement of trade union membership either before accepting the job with FDB or after his dismissal by the company. While it is true, as noted in the judgment, that Mr Sørensen's dismissal was not related to his ability to perform the specific job or his capacity to adapt to the requirements of the workplace, we are unable to find that the compulsion to join SID was in the particular circumstances of his case such as to be capable of striking at the very substance of the freedom of choice inherent in the negative freedom of association. Accordingly, there was in our view no failure on the part of the respondent State to secure the applicant's rights under Article 11 of the Convention.

DISSENTING OPINION OF JUDGE ZUPANČIČ

I should like to add the following to the dissenting opinion of Judge Lorenzen, with which I am in agreement.

In general, the right to disassociate, the negative right to the freedom of association – or whatever one chooses to call this freedom *not* to belong – derives from a symmetrical and undemanding logic, mirroring the freedom to belong to an association. However, there are many situations in which there is no freedom not to belong, for instance if one wishes to practise a profession (as a lawyer, a doctor, a psychotherapist, etc.) or to own a residence, and many other situations where there is a *necessitas contrahendi* but not necessarily a sincere *animus contrahendi*.

Thus, if we look beyond the superficial mirror symmetry we see that the analogy does not carry very far.

For reasons expounded exhaustively by Judge Lorenzen, the specific and historically established situation under consideration in Denmark has implications beyond the wider margin of appreciation afforded to the Contracting State in question. Trade unions defend the economic interests of the individual worker, whose initial bargaining position and consequent contractual situation *vis-à-vis* his employer are a result of the association's collective impact. While an individual(ist) worker may not want to belong, the individual conditions of employment he currently enjoys have been achieved through decades of collective bargaining. Can he reap the economic and other advantages, take the job and then say he does not want to belong to the very trade union whose past efforts have made all of this possible for him?

This logical inconsistency must then be balanced against the legitimate interest of an individual worker in being free not to subscribe to the ideological and other non-economic implications of his membership in the trade union. Leaving aside the fact that in the majority's decision this balancing has remained implicit, I believe that the latter consideration has been lent too much weight (not sufficiently nuanced).

It may turn out that a substantial collective economic interest of the workers has been sacrificed to an insubstantial, individual preference. In view of that possibility, I would prefer the impact of the judgment to remain *inter partes*.

DISSENTING OPINION OF JUDGE LORENZEN

1. The majority have found that there has been a violation of Article 11 of the Convention in both cases. I am unable to share the majority's conclusions for the following reasons.

2. The scope of Article 11 in respect of the protection of the so-called “negative right” of freedom of association has not been clarified in the Court's case-law so far. It transpires from the *travaux préparatoires*, as mentioned in paragraph 33 of the judgment, that the member States were not prepared to accept the inclusion in the Convention of a provision modelled on Article 20 § 2 of the United Nations Universal Declaration which would have expressly granted the right not to belong to an association, the reason for their opposition being the existence of “closed-shop systems” in certain countries. In *Young, James and Webster v. the United Kingdom* (13 August 1981, § 52, Series A no. 44), the Court held that, even assuming that a general rule such as the one contained in Article 20 § 2 of the Universal Declaration could not be regarded as itself enshrined in the Convention, it did not follow that the negative aspect of a person's freedom of association fell completely outside the ambit of Article 11 of the Convention and that each and every compulsion to join a particular trade union was compatible with the intention of that provision. That a negative right of association is protected by Article 11, at least to some extent, has been confirmed in the Court's subsequent case-law, but as the majority rightly stressed, the Court has hitherto not taken any definite stand on whether the negative and positive aspects of the right to freedom of association should be afforded the same level of protection (see, in particular, *Sigurður A. Sigurjónsson v. Iceland*, 30 June 1993, §35, Series A no. 264). I agree with the majority that it is difficult to decide this issue in the abstract since it can only be properly addressed in the circumstances of a given case.

3. The present case concerns the use of closed-shop agreements between the trade union SID (now 3F) and, respectively, FDB (which is the Danish consumer cooperative COOP) and a private nursery. Both applicants were aware that membership of SID was a condition of employment before they accepted the jobs with their respective employers. The majority correctly stated that the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities and that there was no direct intervention by the respondent State in any of the matters complained of in the present case (see paragraph 57 of the judgment). Accordingly, a violation of that Article can only be found if it is established that the State failed to fulfil a positive obligation to secure the effective enjoyment of a right of the applicants to enter into a contract of employment with a private employer without their being confronted with a condition to join a specific trade union.

In its case-law to date, the Court has only ruled on the scope of Article 11 in different circumstances. Thus *Young, James and Webster* (cited above) concerned the enforcement of a closed-shop agreement which did not exist at the time the applicants were first recruited. In *Sibson v. the United Kingdom* (20 April 1993, Series A no. 258), a closed-shop agreement never came into effect although the applicant was forced to leave his job because of a demand to join a union which was not prescribed at the time of his recruitment. *Sigurður A. Sigurjónsson* is also to be distinguished, as in that case the obligation for the applicant to be a member of Frami was prescribed by law. In that case there was direct interference by the State with the freedom of association. Furthermore, the obligation was only lawfully imposed after the applicant had obtained his taxicab licence.

The Government argued with reference to the above case-law that Article 11 only affords protection against closed-shop agreements if the requirement to join a trade union was imposed after the recruitment of the individual, either because the requirement did not exist at the time of recruitment or because the individual was not informed about it until later. I agree with the majority that such a limitation of the scope of protection of the freedom not to be compelled to join a trade union cannot be deduced from the Court's case-law. It appears from the previous judgments that the Court's examination was limited to the circumstances of the individual cases and it cannot therefore justifiably be concluded that the Court intended to exclude protection of the negative right of association in other cases such as, for example, the present one. Furthermore, I agree with the majority that there are no reasons to make a distinction of principle in terms of the scope of protection guaranteed by Article 11 between pre-entry and post-entry closed-shop agreements. What matters is whether the criteria which, in the Court's case-law, have been decisive for finding a violation of the negative right of freedom of association apply equally to the circumstances of the present case. In the judgments mentioned above it was a condition for finding a violation that the applicant had been exposed to a form of treatment which "strikes at the very substance of the freedom of association".

4. When deciding whether a Contracting State has complied with a positive obligation under the Convention, the Court must examine whether a fair balance has been struck between the competing interests of the individual and the community as a whole, but it has always acknowledged that the Contracting States, in achieving such a balance, must be granted a certain margin of appreciation. The scope of this margin depends on the Convention issue at stake. The majority rightly stated that, in the field of labour market relations, the Court has consistently held that the Contracting States enjoy a wide margin of appreciation (see paragraph 58 of the judgment). However, the majority have modified this established case-law in so far as the margin of appreciation in the field of closed-shop

agreements is now considered to be “reduced”. As justification for this change, the majority referred to the need in a democracy to achieve “a balance ... which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position”. In *Young, James and Webster*, an identical argument was relied on, but only as a principle to be taken into account when assessing the necessity of interference with the right to freedom of association.

I fail to see how such a principle – however relevant it may be in other contexts – constitutes a convincing argument for increasing the Court's involvement in the assessment of delicate social and political matters such as those in issue in the instant case. In any event, such a principle is not the only one to be taken into account when determining the scope of the Court's scrutiny in this field. Others may point in the opposite direction. In this connection the majority seem to have overlooked an element which in my opinion should be given importance. Closed-shop agreements like those in the present case are made between private contracting parties, and obliging the Contracting States to prohibit such agreements in the interests of third persons interferes with the rights of others to freedom of contract. In my view, the Court should be careful not to go too far by imposing on Contracting States its own opinion on how such conflicting interests between private individuals should be resolved. This does not mean that I rule out the possibility that interference may, in certain circumstances, be necessary in order to protect an individual's negative right of association, for instance against abuse of a dominant position, but it should only be done where the interests of that person would otherwise be seriously harmed.

5. The majority found that both applicants were compelled to join a trade union against their will as they would otherwise not have been recruited, and that they were individually and substantially affected by the closed-shop agreements because they faced dismissal if they refused to comply with the requirement.

In my opinion, the circumstances of the present case cannot justify this conclusion. It is of course true that the requirement to join a specific trade union constituted a “compulsion” in the sense that the applicants would not have been recruited or would later have been dismissed had they refused to comply with it.

However, it is far from unusual that an individual seeking a job is “compelled” to accept requirements which are contrary to, for example, his personal views or which interfere with his private or family life (see, *mutatis mutandis*, *Dahlab v. Switzerland* (dec.), no. 42393/98, ECHR 2001-V (requirement for a teacher not to wear a headscarf), and *Madsen v. Denmark* (dec.) no. 58341/00, 7 November 2002 (requirement to undergo random urine tests for alcohol, drugs or other intoxicating substances)). It is also quite normal that non-compliance with such requirements may lead to dismissal. This does not in itself raise an issue under the Convention –

especially if the employment is in the private sector – as the Convention does not grant a right to find a job and the individual is free to seek employment elsewhere.

However, the situation may be different if an individual is compelled to accept interference with freedoms guaranteed by the Convention because he or she would otherwise be exposed to substantial hardship, for example if there are no reasonable prospects of finding a job in his or her line of work without such a requirement or where a change of job would cause considerable inconvenience. Thus in *Young, James and Webster* the Court found a violation of Article 11 because the requirement to join a trade union under threat of dismissal involved loss of livelihood for the applicants, some of whom had been employed for long periods before the requirement was introduced. The situation was similar in *Sigurður A. Sigurjónsson*, where the applicant risked losing his taxicab licence if he did not comply with the obligation to join Frami. On the other hand, in *Sibson* the applicant was not faced with a threat of dismissal involving loss of livelihood as he could have been transferred to work at another location for the same employer.

Whether a requirement to join a trade union under threat of dismissal substantially affects an individual must be determined on the basis of the circumstances of a given case. Even if I agree with the majority that the distinction between pre-entry and post-entry agreements is not as such decisive for the scope of protection of Article 11, it is in my opinion reasonable to assume that an individual may more easily be found to be substantially affected where he or she is forced to leave a job because of closed-shop agreements which are perhaps introduced several years after the recruitment, than where an individual is dismissed shortly after recruitment for refusal to join a trade union even though he or she knew that membership was a condition of recruitment.

6. The applicant Sørensen did not apply for a permanent job but only wanted to be employed as a holiday relief worker in the summer period until he commenced his university studies. Three weeks after his recruitment, he informed his employer that he did not want to become a member of SID and he was dismissed the following day. It is undisputed that he would have had no difficulties in finding another similar job either before accepting the job with FDB or after his dismissal. In these circumstances I fail to see that he suffered any real hardship or for that matter was put in a worse position than the applicant in *Sibson*. To find that this applicant was “substantially affected” would in my opinion strip that requirement of any reasonable content.

The applicant Rasmussen is a gardener by profession. Following a period of unemployment he commenced working in May 1999 at a nursery. He is still employed there. The gardening and horticultural sector is one of those sectors where closed-shop agreements exist. However, it is far from clear to what extent that sector is covered by closed-shop agreements. The

Government have submitted an estimate according to which between 39 and 53% of jobs in the sector are covered by such agreements. The applicant does not dispute the figures as such but submits that a distinction should be made between three different kinds of gardener, and that he is only qualified to obtain a job in one line of gardening in which, according to his estimate, the percentage of jobs with closed-shop agreements is higher – probably 80%. However, he has not provided any more precise information in support of this claim. Nor has he provided any information about his personal difficulties in finding a job, in particular as regards the length of time he was unemployed, how many jobs, if any, he applied for before being recruited by his present employer, whether he later tried to find a job not subject to a closed-shop agreement or how many jobs not covered by a closed-shop agreement were available within a reasonable distance of his home. In these circumstances, I am unable to accept that this applicant has substantiated that the closed-shop agreements limited his possibilities of finding a job to such an extent that he could be considered to have been substantially affected.

7. Finding that neither of the applicants was substantially affected by closed-shop agreements, it is not necessary for me to consider whether their personal views and opinions were compromised to such an extent that it struck at the very substance of the freedom of association. Nor do I find it necessary to express an opinion on whether the closed-shop agreements – had the applicants been substantially affected by them – were justified with reference to the fair balance which has to be struck between their interests and the need to ensure that trade unions are permitted to strive for the protection of their members' interests.