EUROPEAN COURT OF HUMAN RIGHTS

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GRAND CHAMBER JUDGMENT
SØRENSEN & RASMUSSEN v. DENMARK

The European Court of Human Rights has today delivered at a public hearing its Grand Chamber judgment[1] in the case of ***Sørensen & Rasmussen v. Denmark*** (applications nos. 52562/99 and 52620/99).

The Court held that there had been a **violation of Article 11** (freedom of association) of the European Convention on Human Rights concerning Mr Sørensen (by 12 votes to five) and Mr Rasmussen (by 15 votes to two).

Under Article 41 (just satisfaction) of the Convention, the Court awarded Mr Sørensen (by 12 votes to five) 2,000 euros (EUR) for pecuniary damage and EUR 33,689 for costs and expenses and Mr Rasmussen (by 15 votes to two) EUR 37,678 for costs and expenses. (The judgment is available in English and French.)

1. Principal facts

The applicants, both Danish nationals living in Denmark, are Morten Sørensen, who was born in 1975 and lives in Aarhus, and Ove Rasmussen, who was born in 1959 and lives in Haderslev.

Sørensen – On 10 May 1996 Mr Sørensen, who was a student about to start at university, applied for a job as a holiday-relief worker for the company FDB Distributionen (FDB). He was offered the job from 3 June until 10 August 1996 and informed that his terms of employment included mandatory membership of a trade union called SID, which was affiliated to the Danish Confederation of Trade Unions, *Landsorganisationen* (LO). Mr Sørensen joined the Danish Free Trade Union, which is not affiliated to the LO.

On 23 June 1996 he informed his employer 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. He was dismissed the next day for not satisfying the requirements of his job as he was not a member of a trade union affiliated to the LO.

Mr Sørensen brought proceedings in the High Court of Western Denmark against FDB on the ground that Danish law i.e. the Act on Protection against Dismissal due to Association Membership (*Lov om beskyttelse mod afskedigelse på grund af foreningsforhold*) did not comply with Article 11 of the Convention as it allowed an employer to require an employee to be member of a specific association in order to obtain employment. On 18 November 1998

[1] Grand Chamber judgments are final (Article 44 of the Convention).

the High Court did not find it established that there had been a violation of Article 11 and the judgment was upheld on appeal by the Supreme Court on 8 June 1999.

Rasmussen – Mr Rasmussen is a gardener. 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, joining instead the Christian Trade Union (*Kristelig Fagforening*). Following a period of unemployment, 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 started the job on 17 May 1999 and rejoined SID, although he still did not agree with its political views.

Draft legislation to amend the Act on Protection against Dismissal due to Association Membership was presented to the Danish Parliament in 2003 and 2005 aiming 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, people who were members of an association or a specific association. The Bill failed to secure the necessary majority to become law. The Danish Government has undertaken to resubmit the Bill once the parliamentary situation is more favourable.

2. Procedure and composition of the Court

The applications were lodged with the Court on 7 October 1999 and 22 September 1999 respectively and declared partly admissible on 20 March 2003. On 25 November 2004 the Chamber dealing with the cases relinquished jurisdiction in favour of the Grand Chamber and the applications were joined in January 2005. Third-party comments were received from the Danish Confederation of Trade Unions, which had been given leave by the President to intervene in the written procedure. A hearing took place in public in the Human Rights Building, Strasbourg on 22 June 2005.

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

Luzius **Wildhaber** (Swiss), ***President***,
Christos **Rozakis** (Greek),
Jean-Paul **Costa** (French),
Nicolas **Bratza** (British),
Boštjan M. **Zupančič** (Slovenian),
Giovanni **Bonello** (Maltese),
Loukis **Loucaides** (Cypriot)
Françoise **Tulkens** (Belgian),
Peer **Lorenzen** (Danish),
Volodymyr **Butkevych** (Ukrainian),
Josep **Casadevall** (Andorran),
Nina **Vajić** (Croatian),
John **Hedigan** (Irish),
Kristaq **Traja** (Albanian),
Snejana **Botoucharova** (Bulgarian),
Vladimiro **Zagrebelsky** (Italian),
Khanlar **Hajiyev** (Azerbaijani), ***judges***,

and also Lawrence **Early**, ***Deputy Grand Chamber Registrar***.

3. Summary of the judgment[1]

Complaint

The applicants complained that the existence of closed-shop agreements in Denmark in their respective areas of employment violated their right to freedom of association. They relied on Article 11.

Decision of the Court

Article 11

The Court reiterated that Article 11 had to be viewed as encompassing a right not to be forced to join an association as well as the right to join an association. It did not in principle exclude that the positive and the negative aspects of Article 11 should be afforded the same level of protection in the area under consideration, but found that it was a matter that could only be properly addressed in the circumstances of a given case.

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 the field, the Contracting States (States which have ratified the European Convention on Human Rights) enjoyed a wide margin of appreciation as to how the freedom of trade unions to protect the occupational interests of their members might be secured.

However, where a State's domestic law permitted closed-shop agreements between unions and employers which ran counter to the freedom of choice of the individual, the margin of appreciation was reduced. Particular weight had to be attached to the justifications advanced by the authorities and, in any given case, the extent to which they impinged on the rights and interests protected by Article 11. Account had also to be taken of changing perceptions of the relevance of closed-shop agreements for securing the effective enjoyment of trade-union freedom.

Were the applicants compelled to join a union?
In the Court's view, the fact that the 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. Had they refused, they would not have been recruited. Individuals applying for employment often found themselves in a vulnerable situation and were only too eager to comply with the terms of employment offered.

The Court accepted the Danish Government's argument that the applicants could have chosen to seek employment with an employer who had not entered a closed-shop agreement and that this option was open to them since in general less than 10 per cent of the labour market was affected by closed-shop agreements. However, it remained to be determined whether the

[1] This summary by the Registry does not bind the Court.

applicants were nonetheless individually and substantially affected as a result of the application of the closed-shop agreements to them.

It was not in dispute that Mr Sørensen could have found holiday-relief employment elsewhere with an employer who had not entered a closed-shop agreement, and it appeared to be common ground that, since at the relevant time he was 21 years old 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 have lasted only 10 weeks. However, he 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. Such a consequence could 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.

It was impossible to know whether Mr Rasmussen would have remained unemployed had he not accepted his current job or, if he were to leave the SID, whether he would be able to find employment elsewhere with an employer who had not entered into a closed-shop agreement. It was certain however that, should he resign from SID, he would be dismissed without the possibility of reinstatement or compensation. Moreover, closed-shop agreements were very common within the horticultural sector. In those circumstances, the Court was satisfied that Mr Rasmussen could be considered to be individually and substantially affected by the application of the closed-shop agreement to him.

As to whether the applicants' personal views and opinions were compromised, both objected to membership of SID because they could not subscribe to the political views of that trade union (and those of the other trade unions affiliated to the Danish Confederation of Trade Unions). Even if they had subscribed to a form of "non-political membership" of SID, such membership did not entail any reduction in the payment of the membership fee to the specific trade union. In any event, there was no guarantee that "non-political membership" would not give rise to some form of indirect support for the political parties to which the specific trade union contributed financially.

In those circumstances the Court concluded that both applicants were compelled to join SID, which struck at the very substance of the freedom of association guaranteed by Article 11.

Whether a fair balance had been struck between the competing interests

The Court then considered whether a fair balance had been struck between the applicants' interests and the need to enable trade unions to protect their members' interests.

The Court observed that legislative attempts to eliminate entirely the use of closed-shop agreements in Denmark appeared to reflect the trend in the Contracting States, namely that such agreements were not an essential means for securing the interests of trade unions and their members and that due weight had to be given to the right of individuals to join a union of their own choosing without fear of prejudice to their livelihood. Only a very limited number of Contracting States, including Denmark and Iceland, continued to permit the conclusion of closed-shop agreements. In addition, the Court had not been informed that concerns expressed by the Danish Confederation of Trade Unions had materialised in any of the very many Contracting Parties which have abolished closed-shop agreements entirely. There appeared to be little support in the Contracting States for the maintenance of closed-

shop agreements and various European instruments clearly indicated that the use of such agreements in the labour market was not an indispensable tool for the effective enjoyment of trade-union freedoms.

The Court concluded that Denmark had failed to protect the applicants' negative right to trade union freedom and that there had, therefore, been a violation of Article 11 in respect of both applicants.

Judges Rozakis, Bratza and Vajić expressed a partly dissenting opinion and Judge Zupančič and Judge Lorenzen each expressed a dissenting opinion, the texts of which are annexed to the judgment.

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The Court's judgments are accessible on its Internet site (http://www.echr.coe.int).

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