AS TO THE ADMISSIBILITY OF

Application No. 22015/93
by Brian Paw JAKOBSEN
against Denmark

The European Commission of Human Rights (Second Chamber) sitting in private on 30 November 1994, the following members being present:

MM. S. TRECHSEL, President
C.A. NØRGAARD
H. DANELIUS
G. JÖRUNDSSON
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
MM. F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY

Mr. K. ROGGE, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 16 February 1993 by Brian Paw JAKOBSEN against Denmark and registered on 9 June 1993 under file No. 22015/93;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

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

The applicant is a Danish citizen, born in 1967. He is at present serving a prison sentence of 12 years at Nyborg prison, Denmark. Before the Commission he is represented by Mr. Jørgen Jacobsen, a lawyer practising at Frederiksberg, Denmark.

A. The particular facts of the case.

By indictment of 21 August 1992 the applicant was charged with murder and aggravated assault. His case was therefore, in accordance with Danish law, brought before the High Court of Eastern Denmark (Østre Landsret) sitting with a jury. Hearings were held on 28 and 29 September 1992 as well as on 1 and 2 October 1992. By judgment of 2 October 1992 the applicant was found guilty of the charges brought against him and sentenced to 11 years' imprisonment.

The applicant as well as the prosecution appealed against the judgment to the Supreme Court (Højesteret). The applicant requested that the judgment be quashed and the case referred back for a retrial in the High Court due to an alleged procedural error (rettergangsfejl) or, in the alternative, a reduction of the sentence. The prosecution

requested that the sentence be increased.

By judgment of 11 February 1993 the Supreme Court, while rejecting the request for a retrial as it did not find that a procedural error had occurred, increased the sentence to 12 years' imprisonment.

B. Relevant domestic law.

Chapter 82 (sections 940-961) of the Administration of Justice Act (retsplejeloven) concerns the possibilities of appeal to the Supreme Court against judgments pronounced by the High Court as a first instance court. Whereas the evaluation of evidence in respect of the question of guilt or innocence in jury trials in Denmark is finally determined by the jury and the professional judges of the High Court, section 943 provides that an appeal may be based on the allegation that procedural rules have been disregarded or applied wrongly, the latter, however, provided objections were lodged timely before the lower instance. Section 945 furthermore provides that in addition to the above, an appeal may be based on the allegation that the court has wrongly decided a matter which falls outside the jury's competence to decide upon, that the jury's finding, upon which the judgment is based, is wrong due to an incorrect instruction from the presiding judge as to the legal aspects of the case (urigtig vejledning i loven), that the questions put to the jury suffer from errors or are based on an incorrect interpretation of the Penal Code and, finally, that the sentence goes beyond the limits of the law or is obviously disproportionate to the offence.

COMPLAINTS

The applicant complains that his conviction by the High Court of Eastern Denmark cannot be reviewed by a higher tribunal. He refers in this respect to the fact that under Danish law an appeal to the Supreme Court against a judgment of a High Court sitting with a jury cannot be based on an alleged wrongful determination of the question of guilt but only on allegations of procedural errors committed in the court proceedings, or on the allegation that the sentence is excessive. He invokes Article 2 of Protocol No. 7 to the Convention and also considers that, for this reason, he did not have a fair trial as guaranteed by Article 6 of the Convention.

THE LAW

Relying on Article 2 of Protocol No. 7 (P7-2) to the Convention as well as Article 6 of the Convention the applicant complains of the fact that his conviction by the High Court of Eastern Denmark sitting with a jury cannot be reviewed by a higher tribunal. Article 2 of Protocol No. 7 (P7-2) reads as follows:

> "1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
>
> 2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against the acquittal."

The Commission recalls first of all that at the time of deposit of the instrument of ratification of Protocol No. 7 (P7) to the Convention, Denmark made the following reservation:

> "... Article 2, paragraph 1 (Art. 2-1) does not bar the use

of rules of the Administration of Justice Act according to which the possibility of review by a higher court - in cases subject to prosecution by the lower instance of the prosecution ('politisager') - is denied

a. when the prosecuted, having been duly notified, fails to appear in court;

b. when the court has repealed the punishment; or

c. in cases where only sentences of fines or confiscations of objects below the amount or values established by law are imposed."

The present case, however, does not concern a case "subject to prosecution by the lower instance of the prosecution" but was of such a nature that it was tried in the High Court sitting with a jury. It follows that the Danish reservation does not prevent the Commission from examining the issues raised by the applicant. Whereas Article 14 para. 5 of the International Covenant on Civil and Political Rights guarantees that "everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law," Article 2 of Protocol No. 7 (P7-2) to the Convention states that everyone has the right to have his conviction or sentence reviewed by a higher tribunal. This could be understood to imply that under this provision the States have a choice and may limit the review guaranteed for everyone either to concern the sentence alone or the conviction and sentence. However, the use of the word "or" could also be interpreted as referring to the possible choice by the individual concerned, taking into account that some national systems permit an application for review to be limited to the sentence.

The Commission notes that the explanatory report on Protocol No. 7 to the Convention refers to proceedings where the accused has pleaded guilty to explain the use of the word "or" in Article 2 para. 1 (Art. 2-1). This would support the view that the provision does not give a choice to the State. Whereas the second sentence of Article 2 para. 1 of Protocol No. 7 (P7-2-1) requires that the exercise of the right to a review by a higher tribunal shall be governed by law, the Article does not specify its scope or actual implementation. As the reference to the grounds for the review to be governed by national law clearly shows the States have a discretion as to the modalities for the exercise of the right of review. It is this part of the Article which gives States the possibility to limit the review in several ways.

Indeed different rules govern review by a higher tribunal in the member States of the Council of Europe. In some countries such review is in certain cases limited to questions of law, such as the "recours en cassation" (in French law) or "Revision" (in German law). In others there is a right to appeal against findings of fact as well as on questions of law; and in some States a person wishing to appeal to a higher tribunal must in certain cases apply for leave to appeal.

Having regard to this the Commission does not find it necessary to determine the scope of Article 2 of Protocol No. 7 (P7-2) in general. Assuming that a review within the meaning of this provision guarantees to everyone the right to bring before a higher tribunal his conviction or sentence or both such examination by this tribunal may be a limited review, provided the limitations under the law would not make such a review meaningless.

In the present case the Commission recalls that the applicant could under Danish law appeal against the judgment of the High Court of Eastern Denmark to the Supreme Court. Such an appeal could be based, and was in fact based, on the allegation that procedural rules were disregarded or applied wrongly. The applicant could also have based his appeal on allegations that the High Court had wrongly decided matters

which fell outside the jury's competence, that the jury had received wrong instructions as to the legal aspects of the case, or that the questions put to the jury suffered from errors or were based on an incorrect interpretation of the Penal Code. Finally, the applicant could, and did, base his appeal on the allegation that the sentence was disproportionate to the offence committed.

This shows that the limitation of the review was in line with the typical rules governing the procedures before the Supreme Courts which sit only to control the legality of the judgment of the trial court. The Commission, therefore, considers that the exercise of the applicant's right to review as provided for under Danish law satisfied the requirements of Article 2 of Protocol No. 7 (P7-2) to the Convention (cf. No. 19028/91, Dec. 9.9.92, D.R. 73, p. 239). Furthermore, the Commission finds that the character of the review cannot lead to the conclusion that the right to a fair trial within the meaning of Article 6 (Art. 6) of the Convention was not respected.

It follows that the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Second Chamber — President of the Second Chamber

(K. ROGGE) — (S. TRECHSEL)