AS TO THE ADMISSIBILITY OF

Application No. 30486/96
by Jens Thuesen LAURIDSEN et al
against Denmark

The European Commission of Human Rights (Second Chamber) sitting in private on 21 October 1998, the following members being present:

MM J.-C. GEUS, President
M.A. NOWICKI
G. JÖRUNDSSON
A. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
Mrs G.H. THUNE
MM F. MARTINEZ
I. CABRAL BARRETO
D. ŠVÁBY
E. BIELIŪNAS
E.A. ALKEMA
A. ARABADJIEV

Ms M.-T. SCHOEPFER, 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 28 July 1995 by Jens Thuesen LAURIDSEN et al against Denmark and registered on 18 March 1996 under file No. 30486/96;

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 first applicant is a Danish citizen, born in 1959. He resides in Hvide Sande, Denmark. The second applicant is an association domiciled in Denmark which promotes

the commercial and professional interests of Danish fishermen. Before the Commission the applicants are represented by Mr Anders Torbøl, a lawyer practising in Copenhagen.

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

A. Particular circumstances of the case

The first applicant is the owner of a fishing vessel located in Hvide Sande harbour in the western part of Denmark.

In August 1989 the first applicant and C.L. were fishing in the North Sea. They exceeded the quota limits concerning maximum catch which were laid down in the applicable fisheries legislation thus incurring criminal liability for the excess catch.

On 12 February 1992 they were convicted by the City Court of Ringkøbing (retten i Ringkøbing) and sentenced to a fine of 9,100 Danish Crowns (DKK) each. In addition, the estimated value of the excess catch was confiscated. The confiscation amounts were fixed as follows: the sales value, solely with deduction of costs connected with landing and sale, was estimated at 182,835 DKK. Of this amount, 116,500 DKK was confiscated from C.L. and 66,200 DKK from the first applicant.

On 24 November 1992 the High Court of Western Denmark (Vestre Landsret) upheld the City Court's judgment.

On 11 July 1994 the Ministry of Justice granted the applicant Lauridsen and C.L. leave to appeal subsequent to which they appealed to the Supreme Court (Højesteret).

On 2 February 1995 the Supreme Court upheld the High Court's judgment. The Supreme Court's judgment reads, in so far as relevant, as follows:

(Translation)

"...
The Supreme Court's reasoning.

Three judges express the following opinion:

The amounts confiscated from the accused pursuant to Section 75 subsection 1 of the Penal Code are fixed as the sales value of the illegal catch, solely with deduction of costs connected with landing and sale (landing costs). This conforms to previous case-law, cf. inter alia the Supreme Court's judgment of 7 October 1982 ... .

In evaluating as to whether there are grounds for changing this practice, account should be taken of the fact that in cases of illegal fishery, a substantial consideration is to be given to the preventive function of the confiscation.

In this connection, it is worthy of note that it is presupposed in the fisheries legislation ... that confiscation is a normal reaction in case of illegal fishery.

The accused's assistants on the fishing expeditions in question were remunerated with a share of the value of the catch and [they] have contributed to the offences objectively speaking. It depends on the particular legal position of the parties whether the accused, in case of an order of confiscation, are entitled to have the wages paid refunded. In view of this, we find that no deduction of the costs relating to wages should be calculated when fixing the amounts that are to be confiscated. Apart from the costs relating to fuel and ice - which to some extent can be assigned to the illegal catch - the remaining costs, as referred to by the accused, may be characterised as general costs which also should not be taken into consideration when fixing the amounts to be confiscated.

Thus, we find that there are not sufficient grounds for changing previous practice according to which amounts of confiscation in cases like the present - unless there are particular circumstances in the case - are fixed as the sales value of the illegal catch with the deduction solely of landing costs. We therefore vote that the High Court's judgment be upheld.

[Two judges] ... express the following opinion:

It follows from the travaux préparatoires to Section 75 subsection 1 of the Penal Code ... that the concept of confiscation of profit

'should be defined such that confiscation eliminates the enrichment obtained through the violation thereby making it clear that the violation "was not worth the effort". Based on this point of view, it may as a main rule be established that only the profit with the deduction of the costs paid in connection with the obtaining of the profit should be confiscated. But this main rule needs to be qualified.

As regards violations in connection with the conduct of business, the profit should generally be calculated without deduction of overhead expenses. The defendant should not, by way of his violation, benefit from the fact that part of the company's overheads were borne by the illegal part of his business. ...

Also, certain specific costs should not be deducted when calculating the profit. It is hardly possible to form a clear and exhaustive rule in relation hereto. However, one may tentatively conclude that confiscation may take place without deduction of a specific cost if such cost is closely related to an independent criminal offence. An example hereof might be remuneration for assistance to the violation.

The above statements are in accordance with the main viewpoints stated in the report by the Nordic Penal Code Committee, cf. below p. 95.'

On p. 95 of the report it is stated inter alia:

'... it is agreed that as an overriding main rule, importance should be attached to the net profit obtained such that deductions are allowed for costs paid in connection with the obtaining of the profit. However, there may be costs - in particular illegal costs or calculated shares of overhead costs - in relation to which it would be objectionable or extremely impractical to authorise deductions upon the calculation of profits to be confiscated. This goes against categorically establishing a net profit principle ...'

We agree with the majority that the accused's expenses relating to tools, maintenance, returns of investment and provisions for depreciation are general costs that should not be deducted.

The payment of wages to the crew was based solely on a proportion of the value of the catch (30%) and a proportionate share of the wage costs may therefore be assigned to the illegal catch. Costs in relation to fuel and ice constituted approximately 10% of the net value of the catch and a proportionate share of these costs may also generally be assigned to the illegal catch. Costs in relation to wages, fuel and ice may thus not be regarded as general costs.

The costs mentioned have been legally incurred and have reduced the profit obtained by the defendants through the illegal fishery with approximately 40% of the net value of the catch and there are no grounds pursuant to Section 75 subsection 1 of the Penal code for confiscating an amount in excess of the profit thus calculated.

...

We vote for the amount of confiscation to be fixed at 70,000 DKK with regard to [C.L.] and at 40,000 DKK with regard to [the first applicant].

The judgment is to be decided on the basis of the opinion of the majority.

Thus, it is decided:

The High Court's judgment is upheld.

..."

B. Relevant domestic law

The relevant parts of Section 75 of the Penal Code (straffeloven) read as follows:

(Translation)

"(1) Profit deriving from a criminal activity or an equivalent amount can be confiscated in whole or in part. Should the necessary basis for the establishment of the size of the amount not be available, an amount which can be estimated to correspond to the profit obtained can be confiscated.

(2) Where it is deemed necessary in order to prevent further violation, or where special circumstances otherwise call herefor, confiscation may be effected of:

1. objects which have been used or intended to be used for a criminal action,
2. objects which have been brought about as the result of a criminal action, and
3. objects in relation to which a criminal action has been committed.

(3) Instead of confiscation of the objects mentioned in subsection (2), confiscation may be made of an amount corresponding to the value of the objects or part thereof.

..."

COMPLAINTS

1. The applicants complain that the Supreme Court's judgment of 2 February 1995 was not made in accordance with national law and that Section 75 of the Danish Penal Code as interpreted in this judgment does not fulfil the requirements of foreseeability and accessibility which follows from the Convention case-law. The applicants allege that this constitutes a violation of the principle of a fair trial as enshrined in Article 6 para. 1 of the Convention.

2. The applicants further complain, under Article 7 para. 1 of the Convention, that the Supreme Court judgment violated the principle of the legality of criminal offences and penalties ("nullum crimen, nulla poena sine lege") in that the first applicant was penalised according to norms which were neither enacted nor foreseeable at the time when the acts in question were committed.

3. The applicants also allege that the confiscation order deprived the first applicant of his possessions in an arbitrary and disproportionate manner. The applicants consider this to be a violation of Article 1 of Protocol No. 1 to the Convention.

4. Finally, the applicants maintain that the way in which the Supreme Court interpreted Section 75 of the Penal Code means that the first applicant and others in cases of illegal fishery are subjected to unjustified differential treatment in comparison with offenders in cases concerning inter alia drug-trafficking and brothel activities. They invoke in this respect Article 14 of the Convention.

THE LAW

.1. The first applicant complains of a violation of Articles 6, 7 and 14 of the Convention and of Article 1 of Protocol No. 1 to the Convention.

The Commission finds that it cannot, on the basis of the file, determine the admissibility of these complaints and that it is therefore necessary, in accordance with Rule 48 para. 2 (b) of the Rules of Procedure, to give notice of these complaints to the Government to submit written observations on the admissibility and the merits thereof.

2. The second applicant complains of a violation of Articles 6, 7 and 14 of the Convention and of Article 1 of Protocol No. 1 to the Convention on behalf of the first applicant and the entire fishing industry.

In so far as the second applicant claims itself to be a victim of a violation of the above-mentioned Articles, the Commission recalls its case-law under Article 25 of the Convention according to which there must be a sufficiently direct connection between the applicant and the injury he maintains he suffered as a result of the alleged breach (see No. 24581/94, Dec. 6.4.95, D.R. 81 p. 123). Accordingly, a person who is unable to demonstrate that he is personally affected by the application of the law which he criticises cannot claim to be a victim of the Convention (ibid.).

In the present case it has not been submitted that the association itself or other members of the association than the first applicant have been directly affected by the legislation in question.

Thus, the Commission considers that the second applicant cannot claim that it is itself a victim of a violation of the Convention.

It follows that the application, in so far as it concerns the second applicant, must be rejected in accordance with Article 27 para. 2 of the Convention as being incompatible ratione personae with the provisions of the Convention.

For these reasons, the Commission,

DECIDES TO ADJOURN the examination of the first applicant's complaints;

unanimously,
DECLARES INADMISSIBLE the remainder of the application.

M.-T. SCHOEPFER Secretary to the Second Chamber	J.-C. GEUS President of the Second Chamber