AS TO THE ADMISSIBILITY OF

Application No. 24989/94
by Flemming PETERSEN
against Denmark

The European Commission of Human Rights sitting in private on 14 September 1998, the following members being present:

MM S. TRECHSEL, President
J.-C. GEUS
M.P. PELLONPÄÄ
E. BUSUTTIL
G. JÖRUNDSSON
A. WEITZEL
J.-C. SOYER
H. DANELIUS
Mrs G.H. THUNE
MM F. MARTINEZ
C.L. ROZAKIS
Mrs J. LIDDY
MM L. LOUCAIDES
B. MARXER
M.A. NOWICKI
B. CONFORTI
I. BÉKÉS
D. ŠVÁBY
G. RESS
A. PERENIČ
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIŪNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs M. HION
MM R. NICOLINI
A. ARABADJIEV

Mr M. de SALVIA, Secretary to the Commission

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

Having regard to the application introduced on 7 June 1994 by Flemming PETERSEN against Denmark and registered on 24 August 1994 under file No. 24989/94;

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

Having regard to the observations submitted by the respondent Government on 14 November 1996 and the observations in reply submitted by the applicant on 20 January 1997 and 5 March 1997;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Danish citizen, born in 1945. He is a lawyer and resides in Dragør. Before the Commission he is represented by Mr Lars Adam Rehof, Associate Professor at the University of Copenhagen.

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

A. Particular circumstances of the case.

On 15 February 1993 the applicant was ordered by the Chief of Police of Tårnby to pay a parking fee (parkeringsafgift) in the amount of 400 Danish Crowns (DKK) as he, allegedly, had parked a trailer belonging to him in violation of section 1 of the Parking Ordinance for Tårnby Police District (Bekendtgørelse om Parkering i Tårnby Politikreds). The amount of 400 DKK was fixed in accordance with section 121 of the Road Traffic Act (færdselsloven).

By letter of 1 March 1993 to the Chief of Police of Tårnby, the applicant maintained that no parking offence had been committed. Nevertheless, he received, on 19 March 1993, a standard order from the Central Register for Parking Fees (Centralregisteret for Parkerings-afgifter) - which is an administrative body under the National Chief of Police (Rigspolitichefen) - that since he had not yet paid the parking fee imposed the case would be sent to the Bailiff's Court (fogedretten) for enforcement. In such circumstances he would be liable to pay the costs involved. A reminder was sent on 23 April 1993 indicating that the parking fee, plus costs, would be recovered by levying execution on his property.

The applicant informed the Central Register on 3 May 1993 that, in his opinion, no parking offence had been committed. The Central Register forwarded the letter to the Chief of Police of Tårnby who informed the applicant, on 1 June 1993, that the parking fee would be recovered through the Bailiff's Court in case he did not pay it.

On 13 October 1993 the applicant was summoned to the Bailiff's Court as the Central Register for Parking Fees had requested assistance in order to recover a total of 700 DKK for the parking fee and the costs involved.

The case was heard on 1 November 1993 but was adjourned pending production of evidence and legal argument until 11 November 1993. At the hearings the Bailiff's Court heard the applicant and two witnesses. Furthermore, certain documentary evidence was submitted, including a statement from a motor vehicle inspector given at the request of the Chief of Police. After the production of evidence and legal argument, judgment in the case was reserved and finally pronounced on 14 December 1993. On the basis of the available evidence the Court decided to provide the Central Register with the necessary assistance to recover the fee and the costs involved. At all these stages the Bailiff's Court was presided over by a deputy judge (dommerfuldmægtig).

On 28 December 1993 the applicant appealed against the decision to the High Court of Eastern Denmark (Østre Landsret). He maintained in particular that the Bailiff Court's decision was based on an incorrect interpretation of the law and that the inspector's statement, which he had not been given an opportunity to comment on, was biased. He also complained that he had not had the possibility to put questions to the inspector who was not present during the examination of the case.

On 24 January 1994 the High Court dismissed the appeal as leave to appeal had not been granted by the Ministry of Justice as required under section 584 subsection 2 of the Administration of Justice Act (retsplejeloven).

By letters of 30 January and 1 March 1994, the applicant applied for leave to appeal. He referred to his submissions to the High Court and furthermore maintained that the Bailiff's Court was not an independent and impartial tribunal established by law as required by Article 6 of the Convention. In this respect the applicant in particular pointed out that the deputy judge was an "ordinary" lawyer employed in the Ministry of Justice and thus not irremovable as required by section 64 of the Danish Constitution.

By letters of 10 March and 8 April 1994, the Ministry of Justice refused leave to appeal.

B. Relevant domestic law and practice.

Danish legislation on imposition of parking charges.

The relevant parts of section 121 subsection 1 of the Road Traffic Act (færdselsloven) reads as follows:

(Translation)

"The police may impose a charge for violation of:
...

(7) a stopping or parking prohibition fixed under section 92 although the prohibition is not indicated by signposting,

(8) other provisions on stopping or parking fixed under sections 92 and 93.

... ."

Section 92 subsection 1 of the Road Traffic Act reads as follows:

(Translation)

"With the consent of the Road Council or, in case of private roads, the local authority in question, the police may lay down traffic provisions affecting the use or design of the road. Provisions may be laid down concerning:

(1) parking and stopping.

... ."

The Parking Ordinance for Tårnby Police District (Bekendtgørelse om Parkering i Tårnby Politikreds) was issued pursuant to section 92 subsection 1 of the Road Traffic Act. The Ordinance was in force at the time of the applicant's parking. Sections 1 and 2 of the Ordinance read as follows:

(Translation)

Section 1:

"Parking of vehicles of a maximum gross weight exceeding 3,500 kg (lorries, buses and the like), trailers (including caravans), engine implements and tractors is not allowed between 7.00 pm and 7.00 am, unless such parking is permitted by special signposting at certain road sections or sites.

However, trailers (including caravans) of a maximum gross weight not exceeding 2,000 kg may be parked at the places mentioned for up to 24 hours."

Section 2:

"A charge will be imposed pursuant to section 121 of the Road Traffic Act for violation of these police regulations."

It appears from the concluding part of section 121 subsection 4 of the Road Traffic Act that the charge is subject to statutory debt collection. Furthermore, it appears from section 121 subsection 5 of the Road Traffic Act that the charge amounts to 400 DKK.

The background of the present rules on parking charges.

The present rules on parking charges derive mainly from an amendment of the Road Traffic Act implemented in 1971 which had the effect inter alia of decriminalising parking offences.

The Road Traffic Act was amended by Act No. 162 of 28 April 1971 to the effect that violations of certain provisions on stopping and parking were no longer sanctionable by a fine (bøde). Instead the police could impose a charge (afgift). Violations of provisions on stopping and parking were thus not to be punished by a fine save in the event that the stopping or parking had endangered others or caused unnecessary inconvenience to the traffic. In the latter instance the case was to be tried as an ordinary criminal case and the offender could be subjected to a fine.

The size of the charge is independent of the nature and severity of the violation and of the violator's ability to pay and there is no repetitive effect associated with the number of violations. Likewise, violations of stopping and parking regulations, where a parking charge is imposed, are not recorded as criminal offences. No alternative sentence (forvandlingsstraf) is fixed to a charge as it is, normally, to fines. Thus, in no case can failure to pay a parking charge result in a term of imprisonment. Finally, it followed from the amendment that other officials than the police could be empowered to control observance of certain regulations concerning stopping and parking, subject to the detailed authority of the Ministry of Justice and pursuant to rules laid down by it.

It appears from the travaux préparatoires to Act No. 162 of 28 April 1971 that the reason for the amendment was a proposal to the effect that the sanction for violation of parking restrictions, motivated solely by a rationing of the road area, was merely to be a charge for using the parking area in excess of the permitted use. The provisions then in force in the Road Traffic Act on criminal liability for violation of parking provisions were restricted correspondingly. In addition, the system of charges would render possible a far simpler legal procedure. Finally, the travaux préparatoires stress the view that the importance of punishment by fine should not be devalued, but that it should be reserved for offences more worthy of punishment than the use of road area for parking in excess of the permitted use.

Relevant legislation on collection of debts.

According to section 478 subsection 2 of the Administration of Justice Act (retsplejeloven) execution may be levied for claims to which legislation confers a right of debt collection.

If an imposed parking charge is not paid within the fixed period, the Central Register of Parking Charges will forward the case to the Bailiff's Court with a claim for statutory debt collection. Such enforcement proceedings belong to the activities of the city courts (byretter) (Section 14 subsection 1 of the Administration of Justice Act) to which the bailiff's courts are attached. The city courts are classified as ordinary courts of law (Section 1 subsection 1 of the Act).

The Bailiff's Court is competent to try the debtor's objections, whether they concern issues of fact or of law and evidence may also be produced before the Bailiff's Court concerning both the existence of the claim and its amount. However, the Bailiff's

Court may refuse the production of evidence which should be given during ordinary legal proceedings owing to its volume or nature or for other reasons (Section 501 subsection 4 of the Administration of Justice Act). The legal effect of such decision is that the execution or enforcement will be refused and the plaintiff will have to have the existence and amount of the claim established in ordinary court proceedings.

Collection is effected by levying execution under the rules of the Administration of Justice Act concerning enforcement. A decision to this effect by the Bailiff's Court is legally binding upon the parties, and can only be altered on appeal to the High Court.

The composition of the Bailiff's Court.

The Bailiff's Court is presided over by a judge or, more often, by a deputy judge (dommerfuldmægtig) or a senior deputy judge (retsassessor). Thus, it follows from section 17a subsection 1 of the Administration of Justice Act that deputy judges and senior deputy judges of city courts are authorised to perform enforcement proceedings to the extent that the judge or the president of the court confers such authority on them.

Judges are appointed by the Queen on the recommendation of the Minister of Justice, who is advised by the courts. By contrast, the deputy judges and senior deputy judges - although working full time in the courts - are employed directly by the Ministry of Justice on the same conditions as other groups of staff from the executive, including the police and prosecution. Thus, formally deputy judges and senior deputy judges are not judges but civil servants. Although subject to a rotation system, due to which senior deputy judges and deputy judges are obliged to serve in different courts during their career, these officials do in principle enjoy their terms of office for an unlimited period. It is a requirement for employment as a senior deputy judge or a deputy judge with the courts that the candidate has a master's law degree (cf. Section 52 of the Administration of Justice Act).

In addition to judicial functions exercised by senior deputy judges and deputy judges, civil servants presently working in the central administration of the Ministry of Justice can, for educational purposes, be authorised by the Minister to act as judges on a part time basis beside their usual functions in the Ministry. It is a requirement for such authorisation that the civil servant has a master's law degree (cf. Section 17a subsection 1 and Section 52 of the Administration of Justice Act).

The protection of appointed judges against interference from the executive and others is secured by Section 64 of the Constitution (Grundloven), which states that the judges shall be directed solely by the law. On the personal level the judges are protected against arbitrary removal. Removal or transfer against the will of a judge may take place only by decision of the Special Board of Revision (Den Særlige Klageret) and only in cases of gross misconduct, lasting illness or inability to cope with cases within a reasonable time. Deputy judges, senior deputy judges and other civil servants which are authorised on a part time basis to act as judges, are afforded independence by Section 64 of the Constitution in the same manner as the appointed judges, in so far as they must

only obey the law. However, the constitutional safeguards concerning irremovability of judges do not apply to these officials. They can be removed or transferred according to the same rules that apply to other civil servants and Government officials. However, in practice removal or transfer of such non-appointed judges is very rarely effected by the Ministry.

In two recent cases, the Danish Supreme Court (Højesteret) has had opportunity to decide whether a civil servant presently working in the central administration of the Ministry but authorised on a part time basis to act as a judge, while hearing a criminal case, satisfied the requirements of Article 6 of the Convention.

In its first decision of 18 April 1994 the Supreme Court, referring to Article 6 of the Convention, found that the fact that the authorised judge in question was actually assigned to the office in the central administration of the Ministry, which dealt with cases concerning the police and prosecution, could be said to violate the requirement of appearance of independence. Hence, the judgment pronounced by the authorised judge was quashed. In a similar case the Supreme Court on 8 March 1995 refused to quash the judgment in question where the civil servant authorised to sit as a judge in a city court was actually employed in the central administration of the Ministry and served in the legislative office.

On the basis of a report issued by a Government Committee the Parliament, on 19 June 1998, made an amendment to the Administration of Justice Act introducing inter alia safeguards against unsolicited dismissal and transfer for anybody exercising judicial authority without having been appointed judge. Thus, requests for dismissal of such officials must be referred to the Special Board of Revision. The official has a right to be heard by the Board. The Board's judgment may be appealed against to the Supreme Court by the parties. In addition, the amendment prescribes that the competence of employing deputy judges and senior deputy judges is to be vested with the courts. The amendment will enter into force on 1 July 1999.

Appeal against decisions of the Bailiff's Court.

Unless otherwise provided in the Administration of Justice Act, decisions made by a Bailiff's Court can be appealed against to the High Court (landsret) in the district of which the Bailiff's Court is located (Section 584 subsection 1 of the Administration of Justice Act). However, generally the decisions of the Bailiff's Court concerning execution levied for parking charges cannot be appealed directly owing to the insignificant amounts concerned. In such cases an appeal requires leave to appeal. At the time of the applicant's case, decisions concerning execution levied for claims of a financial value not exceeding 10,000 DKK could only be appealed to the High Court with the permission of the Minister of Justice (Section 584 subsection 2 of the Administration of Justice Act, cf. Consolidated Act No. 905 of 10 November 1992).

COMPLAINTS

The applicant claims that he has not received a fair hearing by an independent tribunal as required by Article 6 of the Convention. He maintains that the Bailiff's Court is not a "court" within the meaning of this provision, or within the meaning of the Danish Administration of Justice Act. He also maintains that a court must be composed of judges who are secured independence which - in the applicant's opinion - is not the case in respect of deputy judges. In addition, he argues that he has not had an opportunity to appeal against the Bailiff's Court's decision to a tribunal fulfilling the requirement of independence in Article 6 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The applicant's application was introduced on 7 June 1994 and registered on 24 August 1994. On 27 June 1996 the Commission decided that notice of the application should be given to the respondent Government and invited them to submit written observations on the admissibility and merits thereof.

Following an extension of the time-limit fixed for this purpose the Government submitted its observations on 14 November 1996.

On 3 December 1996 the Commission decided that legal aid should be granted to the applicant.

Following extensions of the time-limit, the applicant submitted observations in reply on 20 January and 27 February 1997.

THE LAW

The applicant complains that he has not received a fair hearing by an independent tribunal. He invokes Article 6 of the Convention which, in so far as relevant, reads as follows:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a ... hearing ... by an independent tribunal ... ."

As to the applicability of Article 6.

In the Government's opinion Article 6 has no application in the present case, as the application does not concern a criminal charge or a civil law dispute. The Government argue that the violation of regulations on stopping and parking in the Road Traffic Act or the rules issued under it has been completely decriminalised. Thus, in Danish law this regulation is not classified under criminal law. A charge is imposed, the size of which is independent of the nature or gravity of the violation and of the violator's ability to pay. Furthermore, no repetitive effect is associated with the number of

violations and the sanction is of limited financial scope. Failure to pay the parking charge merely results in a collection similar to the collection of other claims of a financial nature. No alternative sentence is fixed, and thus in no case can failure to pay result in a term of imprisonment, which would be the case if a fine was involved. In addition, violations of stopping and parking rules, where a parking charge is imposed, are not recorded as criminal offences.

Finally, the Government recall the background to the legislation in question which is that a parking charge is merely a sanction against violation of parking restrictions based on a rationing of the road area and that the charge has therefore no predominantly penal purpose.

The applicant submits that the term "criminal charge" must be interpreted autonomously within its Convention meaning. He recalls the Öztürk case (Eur. Court HR, Öztürk v. the Federal Republic of Germany judgment of 21 February 1984, Series A no. 73) in which a similar regulation in German law, whereby traffic offences were classified as "regulatory offences" and penalties were imposed, was covered by the notion of "criminal charge". The applicant contends that the Government's arguments do not give reason to distinguish the present case from the Öztürk case. He recalls that the Court in the Öztürk case stated that, in considering whether Article 6 was applicable, regard had to be had to the general character of the rule and the purpose of the penalty, being both deterrent and punitive and, in particular, that the small size of the penalty did not take it outside the ambit of Article 6. Thus, the applicant maintains that the procedure applied and the penalty incurred are covered by the notion of "criminal charge" within the meaning of Article 6 para. 1 of the Convention.

The Commission recalls that the notion of "criminal charge" in Article 6 para. 1 cannot be interpreted solely by reference to the domestic law of the respondent State. It is to be interpreted as having an autonomous meaning in the context of the Convention (cf. Eur. Court HR, Adolf v. Austria judgment of 26 March 1982, Series A no. 49, p. 15, para. 30).

In order to determine whether an offence qualifies as "criminal" for the purpose of the Convention, it is first necessary to ascertain whether or not the provision defining the offence belongs, according to the legal system of the respondent State, to criminal law; next, the nature of the offence and degree of severity of the penalty risked must be examined (see inter alia Eur. Court HR, Palaoro v. Austria judgment of 23 October 1995, Series A no. 329-B, p. 38, para. 34).

The Commission recalls that the regulations concerning stopping and parking in the Road Traffic Act and rules issued under it have been completely decriminalised in Danish law. Thus, it follows from the travaux préparatoires to the Act No. 162 of 28 April 1971 that the purpose of the amendment was to place these rules outside the ambit of criminal law. In addition, the sanctions for violation of the rules are referred to as charges, and not fines, and the ordinary law governing civil law procedure applies in full to proceedings involving parking charges.

However, the second criterion stated above - the very nature of the offence, considered also in relation to the nature of the corresponding penalty - represents a factor of appreciation of greater weight (Öztürk v. the Federal Republic of Germany, op. cit., p. 19, para. 52). It is of great significance in this respect whether the purpose of the sanction is to be punitive and deterrent (cf., inter alia, Öztürk v. the Federal Republic of Germany, op. cit., p. 20, para. 53).

The Commission notes in this respect that the regulation in question is based on a rationing of the road area. According to the travaux préparatoires to the amendment implementing the present rules, parking charges are considered as charges for using the parking area in excess of the permitted use. Thus, in the Government's opinion, the charges have no predominantly penal purpose.

However, the Commission is not convinced that the rules in question do not retain a punitive character and do not have the effect essentially to deter. The wording of section 121 subsection 1 (7) and (8) of the Road Traffic Act and of section 1 of the Parking Ordinance suggest that the charge is a sanction imposed for violation of a prohibited and unwanted behaviour. There is nothing in the wording of the provisions to indicate that the charge is intended to correspond to a service rendered or a parking place occupied. In addition, the provision is directed towards all citizens in their capacity as road users. Thus, the Commission is of the opinion that the general character of the rule and the purpose or the effect of the penalty, being both deterrent and punitive, suffice to show that the offence in question was, in terms of Article 6 of the Convention, criminal in nature (ibid.). The Commission considers that it is not decisive in this respect that the rules applied to parking offences lack certain hallmarks usually connected with criminal procedure.

As the contravention committed by the applicant was criminal for the purposes of Article 6 of the Convention, there is no need to examine it also in the light of the final criterion stated above. The relative lack of seriousness of the penalty at stake cannot divest an offence of its inherently criminal character (Öztürk v. the Federal Republic of Germany, op. cit., p. 21, para. 54 and Eur. Court H.R. Lutz v. the Federal Republic of Germany judgment of 25 August 1987, Series A no. 123-A, p. 23, para. 55).

Accordingly, the Commission considers that the proceedings at issue involved a determination of a "criminal charge" within the meaning of Article 6 of the Convention which is thus applicable in the present case.

As to the exhaustion of remedies.

The Government allege that the applicant did not avail himself of all domestic remedies as he did not raise the complaints, which he is now making before the Commission, during the hearings in the Bailiff's Court. Thus, the Government submit that it appears from the transcripts of the Bailiff's Court and from a statement of 29 July 1996

from the Court that the applicant did not object to the Court being presided over by a deputy judge. Furthermore, as the Convention, at the time in question, was incorporated into Danish law and, owing to the applicant being a solicitor's clerk, he should have asserted his point of view before the Bailiff's Court. In addition, the Government submit that the Bailiff's Court would have had a genuine opportunity to consider the question whether it was competent and whether the deputy judge was independent as the Supreme Court had previously decided on questions whether non appointed judges in criminal cases satisfied the requirements of Article 6 of the Convention.

The Government admit that the applicant raised the complaint as to the competence and independence of the Bailiff's Court in connection with his request to the Ministry of Justice for leave to appeal. However, the Government contend that this request was an extraordinary remedy.

The applicant submits that he did on several occasions, during the proceedings in the Bailiff's Court, explicitly invoke Article 6 of the Convention. Thus, he alleges, the Bailiff's Court was in fact invited to review its competence and powers in the light of the requirements of Article 6 para. 1 of the Convention.

The Commission considers that it need not be established whether the applicant raised the issues dealt with in his application during the proceedings in the Bailiff's Court. There is no dispute with regard to the fact that the applicant raised the issues before the Ministry of Justice while requesting leave to appeal to the High Court. According to the Commission's consistent case-law, a request for leave to appeal is regarded as an effective domestic remedy in the sense of Article 26 of the Convention (see inter alia No. 10789/84, Dec. 11.10.84, D.R. 40, p. 298). After the Ministry's rejection of his application, no other domestic remedy was available to the applicant. The Commission finds, therefore, that the applicant has exhausted domestic remedies within the meaning of Article 26 of the Convention in regard to the present complaint.

Alleged violation of Article 6 para. 1.

The Government submit that, according to Danish law, the Bailiff's Court was fully competent to try the applicant's case and, to the extent that the Bailiff's Court might not have been competent to try the case owing to voluminous evidence, the case would have been referred to civil proceedings where no limitation of the jurisdiction applies. In addition, the Government argue that enforcement proceedings - as conducted in the bailiff's courts - belong to the sphere of activities of the city courts which are, indeed, classified as ordinary courts in Denmark.

The Government contend, furthermore, that the fact that a person presiding over a court is not protected against dismissal does not automatically mean that the body cannot be considered independent within the meaning of Article 6 para. 1 of the Convention. Nor does the fact that a person presiding over a court has a limited term of office with a certain risk of dismissal, or the fact that he or she is employed by the executive, mean that the body automatically cannot be considered independent within the meaning of that

Article. The Government allege that the way in which this scheme is administered by the Ministry of Justice, its long-standing tradition in Danish law and the fact that similar schemes exist in other Contracting States, mean that an objective assessment would not provide a basis for doubting the independence of the Bailiff's Court. Furthermore, the applicant has not submitted any evidence to support that, on a subjective assessment, the deputy judge in question was not independent or impartial.

In the applicant's opinion the Bailiff's Court is not a real court which is emphasised by the fact that the Danish Administration of Justice Act does not expressly state that the Bailiff's Court belongs to the ordinary courts. Furthermore, the presiding judge in the Bailiff's Court is formally a civil servant and subject to discretionary removal by the executive. These features of the Bailiff's Court in conjunction with the fact that the applicant was not granted an appeal to a court which satisfied the requirements of Article 6 amounted, in the applicant's view, to a violation of that Article.

The Commission considers, in the light of the parties' submissions, that the case raises complex issues of law and of fact under the Convention, the determination of which should depend on an examination of the merits of the application as a whole. The Commission concludes, therefore, that the application is not manifestly ill-founded, within the meaning of Article 27 para. 2 of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

M. de SALVIA
Secretary
to the Commission

S. TRECHSEL
President
of the Commission