European Court of Human Rights

Application no. 52562/99

Sørensen v. Denmark

and

Application no. 52620/99,

Rasmussen v. Denmark

Hearing on 22 June 2005

Initial submissions of the Government of Denmark

Mr President, distinguished Members of the Court. It is an honour to appear before you on behalf of the Danish Government.

The two cases before you today are of central and principled importance for the interpretation of Article 11. Never before has the Court considered cases of this kind. Cases where the applicants – prior to their employment – were fully aware that membership of a particular trade union was a clear requirement for getting the job. And, significantly, cases where this requirement was established by means of an agreement between private organisations. Not by law. These distinctive features of the two cases are central for understanding the scope and significance of the judgment to be delivered.

The applicants today are asking the Court to go beyond its earlier case law on negative freedom of association on the labour market. They are asking the Court to expand the interpretation of member states' obligations under the Convention. And – indirectly – they are asking the Court to interfere in an ongoing, highly sensitive and divisive political debate in Denmark on the existence of closed shop agreements.

In the following, I will set out why the Court should abstain from breaking such new ground in its case law.

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My submission will fall in five parts.

Firstly, I will briefly touch on the importance of the founding fathers' intentions for today's interpretation of Article 11.

Secondly, I will set out in more detail that the judgment in Young, James and Webster versus England– the British Rail judgment – is the leading case in relation to the negative freedom of association on the labour market, and that subsequent case law has not changed this.

Thirdly, I will explain how Denmark loyally and in good faith has done its utmost to ensure that Danish legislation is in compliance with the Convention as interpreted by the Court.

Fourthly, I will turn to the specific circumstances of the two cases before the Court today. I will analyse the Danish labour market. And, through this analysis, I will show that everybody seeking employment within the applicants' fields of employment could find work without having to be a member of a particular trade union. In other words, I will, refute the applicants' assertion that the Danish system of closed shop agreements subjected them to an intensive interference in the right to negative freedom of association on the labour market.

Finally, I will explain why Denmark – when it comes to labour market issues – should enjoy a wide margin of appreciation.

Mr. President. Before turning to the five parts of my submission, allow me briefly to touch on certain aspects of the facts of the cases before the Court today. It is necessary to correct the impression just given of a labour market closed to the applicants if they did not join a particular trade union.

In fact, the two applicants in the cases before us applied for a job as respectively a store man and a gardener. At the time when the applicants applied for their jobs, both of the applicants were informed that membership of a trade union was a requirement for their engagement. And yet they chose to accept the job.

As I will explain in more detail later, the applicants could – without particular problems – have sought another job within their fields of employment at a workplace where membership of a trade union would not be required of them. But still they chose employment at a workplace that had concluded a closed shop agreement.

Mr. President, allow me now to address the first part of my submission: The wording of Article 11 and the intended scope of that Article. As is clear from the travaux préparatoires of the Convention, there was no consensus between the founding fathers to protect the negative freedom of association. After careful deliberation it was decided not to copy the protection of negative freedom of association found in the UN human rights declaration of 1948. Instead Article 11 only mentions the positive aspect of this freedom. The founding fathers never intended to protect also the negative freedom of association.

I am well aware of the fact that the Court in its previous case law has found that Article 11 also includes the negative freedom of association. So, let me emphasize that the Government is not contesting that in certain situations it is necessary to protect the negative freedom of association. This is the case where the degree of compulsion –

the intensity of the interference – strikes at the very substance of the freedom guaranteed by Article 11. This could for example be the case where an employee is dismissed because the employer – subsequent to the employment – concludes a closed shop agreement. But not, the Government would submit, where the employee deliberately has chosen to be employed at a working place that has already concluded a closed shop agreement. And, in a situation where the employee could find work within his field of work without having to join a trade union.

In the light of the travaux préparatoires, the negative aspect of the freedom of association should not be protected on the same footing as the positive aspect, at least not on labour market related questions. Therefore, the travaux préparatoires are still significant and have to be kept in mind. In the view of the Government they set a firm starting point for the interpretation of Article 11 in the present case.

Mr. President, turning to the second part of my submission, allow me to comment on certain aspects of the Court's case law on negative freedom of association. The rather selective presentation of jurisprudence, which we have heard from the applicants, makes it necessary to consider this issue in some detail.

The first time the Court dealt with the negative freedom of association was in the British Rail case. In this case the three applicants were all employees of British Rail. They were dismissed because they did not want to join one of the trade unions with which British Rail had concluded a closed shop agreement. It is important to note that

membership of a trade union was not a condition for the employment, when the applicants were engaged. It was only when British Rail later concluded a closed shop agreement that the membership requirement was imposed on the applicants.

It is also important to note that two of the applicants had held their jobs for several years before British Rail concluded the closed shop agreement. And that British Rail de facto had monopoly on railway-services, why all of the applicants would have great difficulties in finding another work within their field of work.

In the British Rail case, the applicants were faced with only one alternative. They could choose between either joining the trade unions or loosing their livelihood.

In that precise situation, the Court found that the detriment suffered by the applicants amounted to a violation of Article 11.

My colleague has made a big effort in his intervention today to emphasize the difference between paragraph 55 and 57 in the British Rail case.

However, according to the Government of Denmark, there is no difference between paragraph 55 and 57. Also the paragraph 57-situation must – of course – be seen in the context of the facts of the case. That is to say, that Young and Webster were forced to join the unions after engagement at British Rail, though it was against their political convictions.

Therefore, Young and Webster´s rights according to Article 11 read in conjunction with Articles 9 and 10 were interfered with.

Mr. President. The British Rail case is not the only case in which the Court has interpreted the negative freedom of association on the labour market. But, in the eyes of the Government, the British Rail case remains the leading case in this area.

The subsequent case law of the Court in relation to the negative freedom of association on the labour market is building on the British Rail judgment. Therefore this case law also attaches central importance to whether or not the applicant – when applying for the job – was aware of the requirement of membership of a trade union, in other words, the protection of the principle of legitimate expectations.

The Court has only found violations of the negative freedom of association in two cases concerning the labour market. These cases were the British Rail case and the subsequent case Sigurjonsson v. Iceland. Another case on the negative freedom of association was Chassagnou v. France. However, the Chassagnou case did not deal with the labour market. It dealt with private landowners who – under a French law – were compelled to join hunting associations and obliged to transfer their hunting rights over the land they owned – although they were opposed to hunting on ethical grounds. Further the French law did not permit them to leave the hunting associations. And, importantly, this law for no clear reason, discriminated between owners of large and small land plots. Therefore, the facts of the Chassagnou case can hardly be compared to a closed shop agreement on the labour market. Due to the particular features of the Chassagnou case it is – in the eyes of the Government – not a relevant precedent for the cases before the Court today.

In the Sigurjonsson case, the requirement to join a trade union was imposed by law. And, this requirement was first imposed on the applicant after he had obtained his taxi license. And after he had started working as a Taxi-driver. In paragraph 36 of the Sigurjonsson judgment, the Court emphasised this significant aspect and stated that –

and I quote –"only when the 1989 law entered into force did it become clear that membership was a requirement. The applicant has since been compelled to be a member of Frami". In other words, Sigurjonsson's legitimate expectations were not respected, as was also the case in the British Rail judgment.

Not only the temporal aspect of Sigurjonsson distinguishes it from the cases before the Court today. In the Sigurjonsson case, the requirement to become a member of a specific organisation was not a result of an agreement between the two sides of the labour market, but instead a requirement imposed by the Icelandic Parliament. However, the cases before the Court today are fundamentally different in this respect. It is a longstanding tradition that the Danish parliament only reluctantly interferes in the conditions of the labour market. The Danish system of closed shop agreements is no exception. Closed shop agreements are solely based on negotiations between private parties on the labour market and reflect what they see as a necessary regulation in this respect.

This difference between closed shop provisions imposed by law versus closed shop provisions springing from agreement between private parties on the labour market is significant. It is significant because under the Court's practice a state's positive obligation to interfere and act against violations committed by private parties is of a different nature and scope compared to a state's negative obligation to correct violations, which it has committed itself, through legislation.

Mr. President. I will now turn to the third part of my submission. I will explain how Denmark loyally and in good faith has done its utmost to ensure that it is in compliance with Article 11 of the Convention as interpreted by the Court.

Following the British Rail judgment in 1981, the Danish Parliament – in 1982 – passed an act on freedom of association. This law was enacted to ensure that Denmark would continue to fully comply with Article 11. Also after the British Rail judgment.

The law is based on the principle that no employer is allowed to dismiss an employee on the grounds that he or she is – or is not – a member of an association. The employer is still allowed to make membership of a trade union a requirement for the employment. But, it must be made perfectly clear for the employee – before he or she is engaged – that membership is a requirement for getting the job. The law is – in other words – based on the protection of the principle of legitimate expectations and fully in line with the case law set out by the British Rail case.

The Danish Freedom of Association Act does not prevent the use of closed shop agreements. But it does contain the necessary limitations on the employer's possibilities to dismiss an employee who does not want to be member of a trade union.

The law demonstrates how Denmark has loyally implemented the Court's jurisprudence. Denmark has done what was necessary to comply with the Convention.

Let me also stress that, in the applicant Sørensen's case, the Danish Supreme Court applied and interpreted the Freedom of Association Act in accordance with the Convention and the case law of the Court. This includes the judgment in the Sigurjonsson case.

I will make a final point in this context. The applicants have devoted some time this morning to the fact that the Government has put forward legislation that would completely abolish closed shop agreements. But let me make it quite clear. The Government's attempts to pass legislation that would prohibit the use of closed shop agreements have solely been based on political considerations. Not on a sense of legal obligation. This is also explicitly stated in the explanatory notes to the amending act, put forward by the Government in January 2003. Therefore, it would be incorrect to submit that the Government's previous attempt to change the legislation is evidence that the Government considers the Danish state of law to be contrary to the Convention.

Now, I will turn to the fourth part of my submission. By analysing the Danish labour market, I will show that everybody seeking employment within the applicants' fields of work could find employment without having to be a member of a particular trade union.

In assessing closed shop provisions, it is relevant to know the historic background to – and the reason why – closed shop agreements exist in the Danish labour market in the first place. And why such agreements are still being concluded. The Danish labour market has a 100-year-old tradition for basing pay and working conditions on agreements only. More than 80 pct. of Danish employees are covered by collective agreements. The collective agreements are concluded between employee organisations and employer associations. Collective agreements can also be concluded between an employee organisation and an individual employer, who is not a member of an employer association. Pay and working conditions are agreed upon without any interference from the State.

An important prerequisite for the Danish labour market system is that the trade unions have sufficient support and are representative of the employees on whose behalf they make collective agreements. The unions are of the opinion that closed shop agreements are still a useful tool – especially vis-à-vis non-organised employers.

Another significant prerequisite for the Danish labour market system is the freedom of contract prevailing between the parties. Employers and employees agree on the terms of employment. Throughout the years, the freedom of contract in the labour market has included the element that parties to a collective agreement can agree on a closed shop provision, whereby the employer undertakes to exclusively or mainly employ persons who are members of a specific union.

Closed shop agreements are thus only concluded between private parties. And closed shop agreements on the Danish labour market are actually quite rare.

Closed shop agreements are not allowed in the public sector. The unlawfulness of closed shop agreements within the public sector is based on a fundamental principle. Namely, that the public sector cannot give a preferential position to a specific trade union by having closed shop agreements. In other words, a principle of equality before the law. This principle is a fundamental part of public administrative law and therefore binding on the public sector.

There are around 2.4 million people employed in Denmark. More than one third of those are employed in the public sector. This implies that for more than one third of every job in Denmark it would be directly illegal to conclude a closed shop agreement.

It should also be mentioned that many different professions are represented in the public sector. For example, many gardeners are employed by the state and municipalities to take care of public parks or gardens.

Not only is it illegal to conclude closed shop agreements in the public sector. The application of closed shop agreements is also very limited in the private sector. The explanation for this is that the largest employer organisation does not accept the conclusion of closed shop agreements. Although certain old closed shop agreements still survive, today new closed shop agreements are only concluded between trade unions and unorganised employers.

The Government does not know the precise number of employees, which are actually covered by closed shop agreements. The estimate is, however, that less than 10 percent of all Danish employees are covered by closed shop agreements. This implies that only 16 percent of the private sector is covered. And no one in the public sector.

And – just as important – the applicants' fields of work are not totally covered by closed shop agreements. Within the applicants' fields of work it is possible to get a job at a workplace that has not concluded a closed shop agreement.

It is therefore not correct when Mr. Sørensen and Mr. Rasmussen state that it was impossible to get a job without having to join a trade union. Mr. Sørensen could easily have found a job as a store man in another store – since the great majority of stores in Denmark have not concluded a closed shop agreement.

With regard to Mr. Rasmussen it is true that closed shop agreements are quite common in the private sector within his field of work. But, it is far from every workplace in the area of gardening, which have concluded such an agreement. This is

why Mr. Rasmussen could find work in the private sector. Or, he could find work as a gardener in the public sector. Here closed shop agreements are illegal as I have explained, and there are a considerable number of jobs within his field of work.

As I have just explained, less than 10 percent of the Danish labour market is covered by closed shop agreements. And that within the applicants' field of work it is possible to get a job at a work place that has not concluded a closed shop agreement. Mr. Sørensen could have chosen another workplace and Mr. Rasmussen is not bound to continue working for his employer.

Mr. President, distinguished Members of the Court. The question put before you is the following: Are Mr. Sørensen and Mr. Rasmussen in such a situation of compulsion, that it strikes at the very substance of the freedom guaranteed by Article 11? The Government would submit that the response to that question must clearly be "no".

A final, but crucial point. Closed shop agreements cannot force an employee – against his or her political conviction – to support a certain political party. According to the Danish Act on Private Contributions to Political Parties every member of an organisation has the right to be exempt from paying contributions to political parties or to political purposes in general. No employee – regardless of his or her place of work – will therefore be forced to contribute financially to political purposes through their subscription fee to a trade union.

It should moreover be mentioned that the Danish law against discrimination on the labour market forbids any discrimination of an employee on the basis of his or her political convictions.

Mr. President. I have now explained that none of the applicants had legitimate expectations to get the job they applied for without having to join a particular trade union. Neither were any of the applicants in real danger of losing their livelihood if they declined to join the specific trade union. In fact, nothing indicates that the applicants are continuously and directly running a risk of being prevented from working within their field of work as a consequence of the Danish system of closed shop agreements.

In summary, legislative acts have been taken to ensure that closed shop agreements in no way promote political or otherwise ideological purposes against the will of the individual employee. In other words, the right to freedom of association according to Article 11 is real and certainly of a practical value in Denmark.

Now, I will turn to the last part of my submission. I will set out why Denmark, in the view of the Government, should enjoy a wide margin of appreciation in relation to the cases before the Court today.

As the Court recalled in the case of Gustafsson versus Sweden, paragraph 45, the Member States enjoy a wide margin of appreciation in the labour market. Let me quote –

"In view of the sensitive character of the social and political issues involved in achieving a proper balance between the competing interests and, in particular, in assessing the appropriateness of State intervention to restrict union action aimed at extending a system of collective bargaining, and the wide degree of divergence between the domestic systems in the particular area under consideration, the contracting states should enjoy a wide margin of appreciation in their choice of the means to be employed".

There are three distinct elements to support that Denmark should enjoy a wide margin of appreciation in the cases before the Court today. Firstly, the labour markets in the European countries are founded on different legal traditions. Secondly, in Europe there is no common political understanding concerning closed shop agreements. And thirdly, in Denmark the question of closed shop agreements is of such political sensitivity that it is best dealt with on the national democratic level. Allow me to elaborate on these three elements:

To a large extent, labour markets are an expression of the culture and tradition of each country. Labour market systems differ and the Danish labour market is not similar to the systems in other European countries. As I have already stated, Denmark has a long standing tradition for basing pay and working conditions on agreements only – first of all on collective agreements – without the intervention of the State. The organisations play the main role in securing acceptable pay and working conditions.

Unlike a number of other European countries Denmark does not have a system where collective agreements concluded within a field is given general effect by means of legislation.

The Danish system of collective bargaining is built on strong and representative organisations. The organisation rate is extremely high compared to other European countries.

And – more important – there is no common political understanding concerning closed shop agreements in Europe. The Danish system of closed shop agreements has been assessed within the supervisory system of the European Social Charter. However, when a recommendation critical of the Danish system was presented to the

Committee of Minister's deputies, only 11 out of 28 countries supported the recommendation. Against this background, it seems fair to draw the conclusion that there is no common political understanding in Europe concerning closed shop agreements.

Mr. President. The Government recognizes that the convention is a living instrument. However, in the view of the Government the Court should abstain from harmonising areas such as the European labour markets in a situation where there is no common political understanding and which is politically very sensitive. The sensitivity is clearly illustrated by the fact that the Government could not get a majority in the Parliament to vote for a law that would have prohibited the use of closed shop agreements in Denmark. On this point the Government simply could not carry out its Government programme.

The cases before the Court today are paradoxical: If the Court finds in favour of the applicants this will establish a state of law in Denmark which the Government for political reasons would be sympathetic to. But, such a judgment would also establish a state of law, which the majority of the Danish parliament would oppose.

The Danish Parliamentary situation in relation to closed shop agreements illustrates exactly how sensitive a judgment in favour of the applicants will be. This is why the Government finds that the Court should leave it to the Danish parliament to decide to what extent closed shop agreements should be allowed on the Danish labour market.

Or, in line with the words of the Court in the Gustafsson case: Denmark should in these cases enjoy a wide margin of appreciation.

Allow me now, Mr. President, to summarize my submission.

Firstly, I considered the wording of Article 11 and the intended scope of that Article. I underlined that even though the Government agrees that Article 11 also encompasses a negative freedom of association, the travaux préparatoires of the Convention are still significant. They send a clear signal to the Court not to protect the negative aspect of the freedom of association on the same footing as the positive aspect, at least not on the labour market.

Secondly, I established that the British Rail case remains the leading case within the area of the negative freedom of association on the labour market. The subsequent Sigurjonsson judgment has attached significant importance to the principle of legitimate expectations; a principle which was established in the British Rail judgment.

Thirdly, I made it clear that the Danish Parliament, by enacting the freedom of association act, loyally and in good faith has done its utmost to comply with the Convention as interpreted by the Court. The law was enacted as a direct result of the Court's ruling in the British Rail case.

Fourthly, I analysed the Danish labour market. This analysis demonstrated that less than 10 percent of the Danish labour market is covered by closed shop agreements. And that no one in the public sector is covered at all. This implies that it will be possible for anyone – within his or her profession – to get a job where membership of a trade union is not required. The freedom of association on the labour market in Denmark is real and not illusive. This is true also in relation to the applicants in the cases before the Court today.

As I have explained this morning, both the applicants could find work within their field of labour without having to join a trade union. Mr. Sørensen could easily find work in another store since the majority of stores in Denmark do not conclude closed shop agreements. And Mr. Rasmussen could find work as a gardener with an employer who has not entered into a closed shop agreement. Or, he could choose to work in the public sector. Therefore, closed shop agreements have a limited intensity – if any – on the applicants' freedom of association.

Finally I explained why Denmark should enjoy a wide margin of appreciation in these cases. In relation to labour market policies there does not exist any common European political understanding. I also explained that the question of closed shop agreements is politically very sensitive in Denmark. And that such a question is best dealt with on a national, democratic level.

On this basis, the Government respectfully requests the Court to find that there has been no violation of Article 11 in either of the present cases.

Thank you, Mr. President.