

unofficial translation

ORIGINAL

**TRANSCRIPT
OF
THE RECORD OF JUDGMENTS
FOR
THE DANISH SUPREME COURT**

**THE DANISH SUPREME COURT'S JUDGMENT
of 6th April 1998**

I 361/1997

J U D G M E N T

delivered by the Danish Supreme Court on Monday, 6th April 1998, in case
No. I 361/1997

- 1) Hanne Norup Carlsen
- 2) Ingeborg Fangel
- 3) Nicolas Fischer
- 4) Jørgen Erik Hansen
- 5) Marianne Henriksen
- 6) Ole Donbæk Jensen
- 7) Yvonne Petersen
- 8) Iver Reedtz-Thott
- 9) Lars Ringholm
- 10) Arne Würgler
(represented by Attorneys-at-Law Ms. Karen Dyekjær-Hansen and Mr.
Christian Harlang)

v e r s u s

Prime Minister Poul Nyrup Rasmussen

(Attorney to the Danish Government, Mr. Gregers Lar-sen, attorney-at-law, and Mr.
Karsten Hagel-Sørensen, attorney-at-law).

Interveners:

- 1) Professor Ole Krarup, Doctor of Laws (in person)
- 2) The Association Constitution Commit-tee 93 (For-eningen Grundlovskomi-té 93)
acting for Allan S. Aabech et al.
(Mr. Christian Harlang, attorney-at-law)

In the lower instance, judgment was delivered by the 3rd Court of the Eastern Division
of the Danish High Court on 27th June 1997.

Eleven Supreme Court Judges have participated in the adjudication: Hornslet,
Hermann, Marie-Louise Andreasen, Wendler Pedersen, Poul Sørensen, Melchior,
Blok, Jørgen Nørgaard, Lorenzen, Børge Dahl, and Lene Pagter Kristensen.

The Appellants, Hanne Norup Carlsen et al., have made a claim that the Respondent
Prime Minister Poul Nyrup Rasmusen be ordered to recognise that the transfer of the
powers of Danish author-ities which is a consequence of Section 2, cf. Section 4, of
Danish Act no. 447 of 11th October 1972 on Den-mark's Accession to the European

Communities, with the overall contents of the Act after the entry into force of Act no. 281 of 28th April 1993, is in contravention of the Danish Constitutional Act of 5th June 1953. The Appellants have withdrawn claims 2 and 3 made before the High Court.

The Prime Minister has moved for dismissal of the Appellants' claim.

The interveners Professor Ole Krarup, Doctor of Laws, and the Association Constitution Committee 93 (For-eningen Grundlovskomité 93) acting for Allan S. Aabech et al., have made statements in support of the Appellants' claim.

For the purpose of the Supreme Court additional information has been provided, i.a. as a consequence of an Order of 3rd November 1997 made by the Supreme Court according to which the Respondent was ordered to produce a substantial number of documents. Furthermore, in accordance with the Supreme Court's Order of 13th January 1998, evidence has been given by the Minister for Foreign Affairs, Mr. Niels Helveg Petersen, former Minister Mr. Ivar Nørgaard and former Ambassador and Secretary General Mr. Niels Ersbøll.

The full text of the Supreme Court's *ratio decidendi* is:

“9.1. What the Supreme Court is considering in this case is whether the implementation in Denmark of the Treaty Establishing the European Community (“the EC Treaty”) as framed in the Treaty Establishing the European Union (“the Union Treaty”) was lawfully made in pursuance of sect. 20 of the Danish Constitution or, alternatively, such implementation required an amendment of the Constitution pursuant to sect. 88 thereof.

Primarily, the appellants have pleaded that sect. 20 (1) of the Danish Constitution grants authority for the transfer of sovereignty only “to an extent specified by statute”, and that this condition has not been met. In this connection they have referred, in particular, to the powers vested in the Council under Article 235 of the EC Treaty, and to the law-making activities of the EC Court of Justice. Secondly, the appellants have pleaded that the delegation of sovereignty is on such a scale and of such a nature that it is inconsistent with the Constitution’s premise of a democratic form of government.

The appellants’ representations concern the EC Treaty and, in other words, neither involve pillar 2 of the Union Treaty on the common foreign & security policy, nor pillar 3 concerning cooperation regarding legal and internal affairs. The representations about the EC Treaty have no bearing on the third phase of the Economic and Monetary Union, in that Denmark is not participating therein, cf. sect. 4, 12., item a., of the Act of Accession.

9.2. Sect. 20 of the Danish Constitution is framed as follows:

“20. (1) Powers vested in the authorities of the Realm under this Constitutional Act may, to an extent specified by statute, be delegated to international authorities set up by mutual agreement with other states for the promotion of international rules of law and co-operation.

(2) For the enactment of a Bill dealing with the above, a majority of five-sixths of the members of the Folketing shall be required. If this majority is not obtained, whereas the majority required for the passing of ordinary Bills is obtained, and if the Government maintains it, the Bill shall be submitted to the electorate for approval or rejection in accordance with the rules for referenda laid down in sect. 42.”

Sect. 20 was included in the 1953 Constitutional Act to enable Denmark to participate - without amending the Constitution by virtue of its sect. 88 - in international co-operation implying that the exercise of legislative, administrative or judicial authority is entrusted to an international organisation with direct effect in this Kingdom. Because it was impossible to predict with any degree of certainty what forms the international cooperation would assume in the future, no detailed specification was made as to what powers the provision covers. Thus, the aim was to grant wide limits for the access to transfer sovereignty. However, it was emphasised in the provision that the delegation of powers can occur only “to an extent specified by

statute". Furthermore, it was considered important that the more stringent demands for the adoption of bills under the provision offer a far-reaching guarantee.

The application of the qualified procedure in sect. 20 of the Constitution is required to the extent that an inter-national organisation is entrusted with the exercise of legislative, administrative or judicial authority with direct effect in this Kingdom, or the exercise of other powers which, according to the Constitution, are vested in the authorities of the Realm, including the power to enter into treaties with other states.

Sect. 20 does not permit that an international organisation is entrusted with the issuance of acts of law or the making of decisions that are contrary to provisions in the Constitution, including its rights of freedom. Indeed, the authorities of the Realm have themselves no such power.

The term "to an extent specified by statute" must be interpreted to the effect that a positive delimitation must be made of the powers delegated, *partly* as regards the fields of responsibility and *partly* as regards the nature of the powers. The delimitation must enable an assessment to be made of the extent of the delegation of sovereignty. The fields of responsibility may be described in broad categories, and there is no requirement for the extent of the delegation of sovereignty to be stated so precisely that there is no room left for discretion or interpretation. The powers delegated may be indicated by means of reference to a treaty.

The demand for specification in sect. 20 (1) precludes that it can be left to the international organisation to make its own specification of its powers.

The term "to an extent specified by statute" cannot be interpreted to the effect that powers which are vested in the authorities of the Realm can be entrusted to an international organisation only to a limited - i.e., minor - extent.

- 9.3. The Act of Accession delegates powers to the EC to the extent laid down in the EC Treaty. The compatibility of the Act of Accession with sect. 20 of the Constitution therefore presupposes that the Treaty meets the requirement that powers have been delegated only "to an extent specified by statute".

The EC Treaty is based on a principle of conferred powers, cf. Article 3b (1) and Article 4 (1) of the Treaty. The institutions of the Community may act only within such limits for the operation of the Community as appear from the provisions of the Treaty, and within these limits the institutions may only exercise such powers as have been conferred upon them by or pursuant to the Treaty.

The principle of conferred powers thus implies a restriction on the powers of the institutions which is in keeping with the demand for specification in sect. 20 of the Constitution. The Supreme Court finds that the specific rules of authority in the EC Treaty meet this demand.

9.4. However, as stated above, the appellants specifically claimed that the general provision of authority in Article 235 of the EC Treaty enables the incorporation of new areas of responsibility under the powers of the EC to an extent which implies that the demand for specification in sect. 20 of the Danish Constitution has not been observed. They have stated that this appears from the way in which Article 235 has been applied prior to the implementation of the Union Treaty. In this connection they have referred, *inter alia*, to the material which was produced in accordance with the order by the Supreme Court of 3rd November 1997 (excerpts of which are included in paragraph 5 above). Furthermore, they have stated that the amendments to the EC Treaty which were made by the Union Treaty imply an expansion of the scope of Article 235.

In this connection it should be noted that, as already mentioned, the case concerns the question whether the adoption of the Act on Denmark's Accession to the EC Treaty with the content given to that Treaty through the Union Treaty was constitutional. The issue, therefore, is not whether any transgression of the limits to the powers conferred may have taken place during the time prior to the amendment of the Treaty through certain legislative acts, etc., adopted in pursuance of Article 235.

At the amendment of the Treaty the statement of fields of cooperation in Article 3 has been expanded and new articles have been added in Part Three of the Treaty on "Policy of the Community". A number of the fields where Article 235 was previously referred to as authority for drawing up legislative acts, etc., has now been adjusted or is even mentioned in the Treaty. Pillars 2 and 3 of the Union Treaty also comprise regulations on international cooperation in a number of other fields. The field of application of Article 235 must be evaluated on this background.

The wording of Article 235 of the EC Treaty is as follows:

"If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."

It appears from the wording of Article 235 that the fact that action by the Community is considered necessary in order to attain one of the objectives of the Community does not in itself constitute sufficient background for applying the provision. It is a further condition that the intended action is "in the course of the operation of the common market". This - compared with Article 2 under which the tasks of the Community shall be promoted "by establishing a common market and an economic and monetary union and through implementation of common policies or action as stated in articles 3 and 3a" - is to be understood so that the intended action shall lie within the scope of the operation of the common market that appears from the other provisions of the Treaty, including in particular Part Three on the policy of the Community and the listing in Articles 3 and 3a of the individual fields of operation. This interpretation is in accordance with the Government's note of 21st January

1997, to the Folketing's European Committee (mentioned above in paragraph 4) and is confirmed by opinion 2/94 of 28th March 1996 of the European Court of Justice in plenary session, (mentioned above in the same paragraph) where it is stated in grounds 29 and 30 (E.C.R. 1996-I, page 1788):-

- "29. Article 235 aims to remedy the lack of authority in those cases where powers are not expressly or by way of assumption through special provisions in the Treaty vested in the institutions of the Community to the extent that such powers nevertheless turn out to be necessary in order for the Community to exercise its functions with a view to attaining one of the objectives laid down in the Treaty.
30. Since this provision is part of an institutional system which is founded on the principle of conferred powers, it cannot be applied as authority for an expansion of the scope of jurisdiction of the Community in excess of the general scope which follows from the provisions of the Treaty as a whole, particularly the provisions whereby the tasks and operation of the Community are determined. Under no circumstances can the Article be applied as authority for the determination of provisions the actual consequence of which is that the Treaty is altered without the prescribed procedure being followed."

The stated interpretation of Article 235 must be taken as the basis even though, prior to the amendment of the Treaty, the provision may have been applied on the basis of a wider interpretation.

A legislative act which does not go any further than to confer powers to issue legislative acts or decide upon other measures in accordance with the interpretation of Article 235 stated above, does not constitute a violation of the demand for specification in sect. 20 of the Constitution.

Any adoption pursuant to Article 235 must be unanimous. Therefore the Government may prevent the provision from being applied to any adoption which is beyond the stated scope for Denmark's delegation of powers to the EC. The Government cannot assist in the adoption of bills which fall outside this scope and therefore presuppose additional transfer of sovereignty. On the background of the objective which Article 235 is intended to support it is unavoidable that the precise delimitation of the scope of application of the provision may give rise to doubts. In view thereof it is considered that the Act of Accession grants the Government a not insignificant margin.

9.5. In pursuance of Article 164 of the Treaty, the European Court of Justice shall ensure that in the interpretation and application of the Treaty the law is observed, and under Article 173 of the Treaty the Court of Justice shall review the legality of acts of the institutions of the Community. Under Article 177 the Court of Justice shall have jurisdiction to give preliminary rulings concerning the interpretation of the Treaty and on the validity and interpretation of acts of the institutions of the Community.

Any question on the validity of an act of law or another action passed in pursuance of Article 235 may therefore be brought before the EC Court of

Justice, and in that event the Court of Justice shall ensure that the scope of the operation of the Community is observed.

The fact that the detailed determination of the powers vested in the institutions of the Community may give rise to doubts, and that the jurisdiction to give rulings concerning the interpretation of such questions is transferred to the EC Court of Justice cannot in itself be regarded as incompatible with the requirement for specification in sect. 20 of the Constitution.

The fact that the EC Court of Justice in its interpretation of the Treaty also attaches importance to factors of interpretation other than the wording of the provisions, including the objectives of the Treaty, is not in violation of the assumptions on which the Act of Accession was based, nor is it in itself incompatible with the demand for specification in sect. 20 (1) of the Constitution. The same applies to the law-making activities of the EC Court of Justice within the scope of the Treaty.

9.6. The appellants have pleaded that the jurisdiction of the EC Court of Justice under the Treaty, held against the principle of precedence for EC law, implies that Danish courts of law are prevented from enforcing the limits for the surrender of sovereignty which has taken place by the Act of Accession and that this must be taken into consideration when assessing if the demand for specification in sect. 20 (1) of the Constitution has been observed.

By adopting the Act of Accession it has been recognised that the power to test the validity and legality of EC acts of law lies with the EC Court of Justice. This implies that Danish courts of law cannot hold that an EC act is inapplicable in Denmark without the question of its compatibility with the Treaty having been tried by the EC Court of Justice, and that Danish courts of law can generally base their decision on decisions by the Court of Justice on such questions being within the limits of the surrender of sovereignty. However, the Supreme Court finds that it follows from the demand for specification in sect. 20 (1) of the Constitution, held against the Danish courts' access to test the constitutionality of acts, that the courts of law cannot be deprived of their right to try questions as to whether an EC act of law exceeds the limits for the surrender of sovereignty made by the Act of Accession. Therefore, Danish courts must rule that an EC act is inapplicable in Denmark if the extraordinary situation should arise that with the required certainty it can be established that an EC act which has been upheld by the EC Court of Justice is based on an application of the Treaty which lies beyond the surrender of sovereignty according to the Act of Accession. Similar interpretations apply with regard to community-law rules and legal principles which are based on the practice of the EC Court of Justice.

9.7. On the background mentioned, the Supreme Court finds that neither the additional powers that have been delegated to the Council in pursuance of Article 235 of the EC Treaty, nor the law-making activities the Court of Justice can be regarded as incompatible with the demand for specification in sect. 20 (1) of the Constitution.

9.8. Under sect. 20 of the Constitution any delegation of powers can take place only to "international authorities" established by "mutual agreement"

with "other states" for the promotion of "international rules of law and cooperation". It must be considered to be assumed in the Constitution that no transfer of powers can take place to such an extent that Denmark can no longer be considered an independent state. The determination of the limits for this must rely almost exclusively on considerations of a political nature. The Supreme Court finds it beyond any doubt that by the Act of Accession no sovereignty has been transferred to the Community to such an extent that it is in violation of the said assumption in the Constitution.

9.9. With regard to the question whether surrender of sovereignty in accordance with the Act of Accession is of such a nature that it is in violation of the assumption of the Constitution of a democratic system of government, it is noted that any delegation of part of the Folketing's legislative powers to an international organisation will involve a certain encroachment on the Danish democratic system of government. This has been taken into consideration when drawing up the rigorous requirements for adoption under sect. 20 (2). In so far as concerns the EC Treaty, legislative powers have been transferred primarily to the Council, in which the Danish Government - answering to the Folketing - can exercise its influence. It is reasonable to assume that the Folketing has been entrusted to consider whether participation by the Government in the EC cooperation should be conditional upon any additional democratic control. Nor does the Supreme Court in this respect find any basis for holding the Act of Accession unconstitutional.

9.10. In view of the above and in view of the fact that the appellants have made no further statements that may lead to a different outcome the Supreme Court hereby affirms the judgment and dismisses the appeal."

H E L D:

The judgment of the High Court of Justice shall be affirmed.

Neither of the parties shall pay costs of the case before the Supreme Court to any other party or to the Treasury.

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IN WITNESS of the correctness of the Transcript,
In the Supreme Court of Justice,
this 6th day of April,

(signature)
Annika Niebling
Senior Clerk