Case No. 53 29 September 2021

Pleading 2
on dismissal

To the Eastern High Court

In case BS-27824-OLR:

1. Applicant 1
2. Applicant 2
3. Applicant 3
4. Applicant 4
5. Applicant 5
6. Applicant 6
7. Applicant 7
8. Applicant 8
9. Applicant 9
10. Applicant 10
11. Applicant 11

(*all represented by attorney Eddie Omar Rosenberg Khawaja*)

versus

The Ministry of Interior and Housing
(*represented by attorney Peter Biering and attorney Emil Wetendorff Nørgaard*)

The rejoinder of 4 January 2021 and pleading A of 15 February 2021 by the Ministry of Interior and Housing give cause to the following remarks about the claim for dismissal:

As reported in the court's record of 25 May 2021, the Eastern High Court has decided that the claim for dismissal submitted by the Ministry of Interior and Housing is to be separated from the main proceedings, cf. Sections 253(1) and 253(2) of the Administration of Justice Act.

As part of this, the Ministry of Interior and Housing has in support of the claim for dismissal submitted that the applicants' claim is 1) unclear and unsuited for a ruling, and 2) that the applicants lack legal standing.

1. The clarity of the claims

In the applicants' reply of 30 November 2020, the submitted claim in the case has been clarified.

The question of whether the submitted claim for declaratory relief is suitable for a ruling, does not essentially depend on whether a specific action to be imposed on the defendant may be derived from the claim.

The assessment of whether a claim is unsuited for a ruling does in this context rather depend on whether the claim would entail a legal effect, which, if the claim is upheld, cannot be achieved anyway, cf. inter alia U2016.3929Ø and U2006.910Ø.

In addition, the assessment depends on the clarity of the claim in question in relation to what the party who submitted the claim wishes to achieve, cf. inter alia U2017.630H, U2009.2752H, and U2005.2134H.

The applicants have submitted the claim that the ministry must acknowledge that the approval of the Development Plan for Mjølnerparken violates the applicants' rights under Danish law as well as under the mentioned instruments of EU law and international law.

Thus, the applicants find that the claim, which has been submitted, is tied to the unlawfulness of the ministry's approval. A legal dispute that directly concerns the applicants.

The fact that the applicants' claim does not state what the operative consequence of the ruling ought to be does not imply that the claim is of no consequence to the legal position of the applicants, and that it thereby becomes unclear in such a way that it is unsuited for a ruling.

In the case U2010.1942H, the plaintiff inter alia submitted the claim that

> "1. The defendant, the Ministry of Science, Technology, and Development, must acknowledge that Act No. 598 of 24 June 2005 on internet domains that are specifically allocated to Denmark (the Internet Domain Act) is in violation of Section 3 of the Basic Law, because Sections 2, 6, 11, and 28 have introduced measures affecting a pending court case between the plaintiffs and a third party, and that the law, for that reason, is null and void.
>
> 2. The Ministry of Science, Technology, and Development must acknowledge that the provisions in Sections 2, 6, 11, and 28 of the Internet Domain Act, which regulates the relationship between the plaintiffs and a third party in a pending court case, is in violation of Article 6(1) of the European Convention of Human Rights, and that the law, for that reason, is null and void."

In response to these two claims, the Ministry of Science submitted a claim for dismissal before the high court and stated that both claims contained an element of an argument, and that the claims, for that reason, were not suitable for a ruling in the form, in which they had been submitted.

The high court did not dismiss the claims. Before the Supreme Court, there was submitted no claim for dismissal in relation to the claims in question.

Thus, the claims in question do not, in reality, contain an operational effect directed at the legal relation between the parties.

Moreover, the court did not find that the part of the claims concerning nullity should result in the other parts being in the nature of arguments in support of this.

In the case U2002.1789H, which concerned a requirement of citizenship as a condition for a licence for passenger transport, the plaintiff had submitted the claim that the Ministry of Transport had to acknowledge that the application of the citizenship requirement in the Taxi Act in relation to him was in violation of Article 14 of the ECHR in conjunction with Article 1 of Protocol No. 1 to the ECHR.

Before the Supreme Court, it was clarified that the claim for declaratory relief referred to the fact that the plaintiff had not been given a new taxi licence after the new Taxi Act had taken effect, because he did not fulfil the citizenship requirement.

The Supreme Court stated that the claim for declaratory relief had been formulated sufficiently clear to be adjudicated. The Supreme Court found that although a decision on the claim for declaratory relief did not have any significance for the plaintiff in other regards than concerning the demand for damages (which had been submitted as a claim for payment), the claim had been formulated sufficiently clear to be adjudicated.

Finally, the Supreme Court did not find that the claim for declaratory relief could be seen (solely) as an argument in support of the submitted claim for payment.

In case U2021.1073Ø (pending appeal), which concerned blood transfusion performed on an unconscious patient who was a Jehovah's Witness, the plaintiff (who was the spouse to the patient) submitted several claims.

Among other claims, two claims for declaratory relief (claims 4.a and 4.b of the case) had been submitted to the effect that the Danish Agency for Patient Complaints should acknowledge that the specific hospital had performed an unauthorised blood transfusion, which constituted an intervention in violation of Article 8 and Article 9 of the ECHR. The high court found that the claims had been formulated sufficiently clear to be adjudicated.

Thus, the high court stated that:

> "Following the caselaw of the European Court of Human Rights (ECtHR), a violation of the ECHR may, depending on the circumstances, be redressed ("just satisfaction") without awarding damages or compensation by a juridical statement of the fact that the violation has taken place. Since the case has been acquitted concerning the demand for compensation for emotional distress, because the agency is not the correct defendant, it is assumed that such a statement must be found in the ruling. Furthermore, it should be noted that claim 4.a and 4.b are formulated sufficiently clear to have been adjudicated."

Thus, the conclusion would have been the same, had there not been submitted a claim for compensation for emotional distress.

Moreover, the Ministry of Interior and Housing appears to submit that, in light of how the claims have been formulated, it is unclear what the subject matter of the present case is, and that the case must be dismissed for that reason.

Among other things, the Ministry of Interior and Housing states that there is no basis for concluding that the ministry proactively must ensure that the housing associations comply with the rules on equal treatment.

The applicants disagree with this.

It is the provisions of the Common Housing Act that prescribe that the housing associations and municipalities must draw up development plans, and it is the Ministry of Interior and Housing that is responsible not only for the law, but also for the final approval of the development plans stemming from the rules, and which are submitted to the ministry.

The housing associations and municipalities draw up a development plan, because the Ministry of Interior and Housing through the Common Housing Act instructs them to do so, and the ministry's approval is decisive for whether a development plan can take effect and be implemented. If the housing association and the municipal council had not drawn up a development plan, which the Ministry of Interior and Housing could approve, this would have resulted in an order to dismantle Mjølnerparken. This is stated in the provisions in Sections 168a and 168b of the Common Housing Act. A submitted development plan contains full details of the proposals for the area, including in this case the sale of two blocks of homes within which the plaintiffs reside.

Like all other public authorities, the Ministry of Interior and Housing is obliged to comply with the ECHR and EU law, including as the latter has been expressed in the Ethnic Equal Treatment Act. This is mandatory for all exercise of the ministry's administrative authority.

Thus, this also applies to the approval of development plans.

Regardless of whether it is stated in the ministerial order on the physical transformation of tough ghettos, the Ministry of Interior and Housing is thus obliged to ensure that its approval of a development plan does not entail rights violations stemming from other rules, EU law, or international obligations.

Accordingly, and in light of the above-stated, the applicants once again find cause to clarify the claims submitted in the case so that the following claims are submitted:

> *"1. The Ministry of Transport and Housing must acknowledge that the ministry's approval on 10 September 2019 of the Development Plan for Mjølnerparken is in violation of the applicants' right to not be directly or indirectly discriminated against, cf. Section 3 of the Ethnic Equal Treatment Act, and Denmark's obligations under international law as expressed in Article 14 of the European Convention on Human Rights, in conjunction with Article 8 of the ECHR on the right to respect for their private and family life, Article 1 of Protocol No. 1 on the right to protection of property, and Article 2 of Protocol No. 4 on the freedom to choose one's residence, and that the decision, as a result thereof, is null and void.*
> *2. The Ministry of Transport and Housing must acknowledge that the ministry's approval on 10 September 2019 of the Development Plan for Mjølnerparken is in violation of the applicants' rights according to Denmark's obligations under international law as expressed in Article 8 of the European Convention on Human Rights on the right to respect for their private and family life, Article 1 of Protocol No. 1 on the right to protection of*

property, and Article 2 of Protocol No. 4 on the freedom to choose one's residence, and that the decision, as a result thereof, is null and void."

The claims rank equal.

Claims for declaratory relief and the ECHR

It is stated in Article 1 of the ECHR that the high contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in the convention.

If a person claims that the state has violated their rights under the ECHR, it is possible to bring an application to the European Court of Human Rights (ECtHR). This is stated in Article 34 of the ECHR.

However, the ECtHR may only deal with the matter after all domestic remedies have been exhausted. This is stated in Article 35 of the ECHR.

The purpose of this is that the state must be given the chance to redress a potential violation, before the state is held accountable internationally. Moreover, Article 35 of the ECHR is closely connected to Article 13 of the ECHR, which states that there must exist effective national remedies to enforce the rights in the convention.

Thus, the control mechanism of the ECHR is based on the assumption that alleged violations of rights in the ECHR can be handled on the national level.

This entails that national courts must be able to examine whether a person's rights under the ECHR have been violated.

This applies regardless of whether there may be an operative legal consequence as such, which for example could be expressed through a claim for compensation, cf. also U2021.1073Ø, since a juridical statement that a violation has taken place may constitute sufficient redress under the ECHR.

When no claim for compensation has been submitted, it must be assumed that this statement can be expressed in the court's ruling.

Moreover, reference is made to the overview of caselaw by the Danish Institute for Human Rights, cf. page 3 of the institute's intervention of 30 June 2021 as well as judgement of 6 July 2006, Nachova v Bulgaria, para. 145, judgement of 24 July 2012, B.S. v Spain, para 62 and 63 and judgement of 16 April 2019, Lingurar v Romania, para 79-81 in respect of State authorities' obligations to use all available means to combat racism.

A claim that the Ministry of Interior and Housing must acknowledge that the ministry by approving the Development Plan on 10 September 2019 violated the applicants' rights under the ECHR is thus a claim, which is suitable for a ruling.

Claims for declaratory relief and EU law

The Ethnic Equal Treatment Act implements Council Directive of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Directive 2000/43).

Therefore, the Danish law must be understood and interpreted in accordance with EU law, including the caselaw of the CJEU, which, in turn, must be viewed and interpreted in the light of the Charter of Fundamental Rights of the European Union (the Charter).

Article 47 of the Charter prescribes the rights to effective legal protection of the rights enshrined in EU law. It is based on Article 13 of the ECHR, but it gives a more comprehensive protection, since it is not limited to the rights in the Charter, but is applicable to all rights and freedoms that can be derived from EU law.

Article 7 of Directive 2000/43 likewise prescribes that the member states shall ensure that judicial and/or administrative procedures are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them.

In recital no. 19 to the Directive, it is likewise stated that persons who have been subject to discrimination based on racial and ethnic origin should have adequate means of legal protection.

Finally, it follows from article 19 of the Treaty of the European Union (Treaty of Lisbon) that all Member States shall provide remedies sufficient to ensure legal protection in the fields covered by Union Law.

In the decision *Braathens Regional Aviation AB* (case C-30/19), the CJEU has stated that the payment of a sum of money alone is not such as to ensure effective judicial protection for a person who requests a finding that there was a breach of his or her right to equal treatment derived from that directive, in particular where the primary interest of that person is not economic but rather to obtain a ruling on the reality of the facts alleged against the defendant and their legal classification, cf. para. 47 of the judgment.

In order to ensure an effective legal protection under Article 7 of Directive 2000/43 and Article 47 of the Charter, it cannot be required that the applicants must submit a claim for compensation that can be enforced or a claim with another operational legal consequence, since the applicants are entitled to have an examination of whether their rights under the Ethnic Equal Treatment Act have been violated, regardless of whether there is a specific legal consequence derived from such a ruling.

The applicants' claim that the Ministry of Interior and Housing must acknowledge that the ministry by approving the Development Plan on 10 September 2019 violated the applicants' rights under the Ethnic Equal Treatment Act, and thus cannot be dismissed with reference to the claim being unsuitable for a ruling.

Building on this, the applicants submit that they are entitled to a judicial examination of whether they have been directly or indirectly discriminated against in violation of the Ethnic Equal Treatment Act and Directive 2000/43 as well as whether their rights under the European Convention on Human Rights (ECHR) have been violated, and the claims to this effect are suitable for a ruling.

2. The applicants are individually and concretely affected by the ministry's approval

In extension of the claim by the Ministry of Interior and Housing that it is unclear what the subject matter of the case is, the ministry refers to the applicants not being individually and concretely affected by the ministry's approval of the development plan for Mjølnerparken.

Among other things, the ministry makes reference to the judgment reported in U2013.3295H where an interest group could neither for itself nor as an agent for a business, D, file a lawsuit against the Danish Veterinary and Food Administration concerning the Administration's decision on a competing business, A, regarding the latter's marketing.

The Supreme Court found that neither the business D nor the interest group was so concretely affected by the Danish Veterinary and Food Administration's decision concerning business A's marketing that they had a legitimate interest in having the validity of the decision tried by the courts. The Supreme Court noted that it is not the purpose of the food legislation to safeguard the interests of competing producers of the product in question. Finally, the Supreme Court noted that a recognition of the interest group's legal standing in the lawsuit about the Danish Veterinary and Food Administration's decision on business A's marketing would entail that the question of the legality of business A's marketing could be tried without the inclusion of business A.

The case is – as it clearly appears – in no way comparable to the present case.

In U2013.2395H, the case concerned an interest group, which on behalf of a member, business D, wished to safeguard the business' economic interest vis-à-vis a competing business by making a public authority change a decision, which had been made in accordance with a law that has the purpose of protecting the consumers. At the same time, it is clear that if the lawsuit had been entertained, the business, whose marketing was the subject matter of the case, would not have had the opportunity to safeguard its own interests. Finally, the interest group and business D had the opportunity to safeguard their own (economic) interests by filing a civil lawsuit against business A concerning a violation of the Marketing Act.

The present case concerns an examination of whether the approval by the Ministry of Interior and Housing of the development plan for Mjølnerparken constitutes unlawful discrimination and rights violations against the applicants.

The development plan for Mjølnerparken, which the ministry according to the Common Housing Act and the ministerial order on the physical transformations of tough ghettos must approve before it can take effect, and according to which sale of flats can be carried out, directly affects all applicants who live in tenancies in the housing blocks in question.

Thus, the applicants live in block 2 and 3 in Mjølnerparken, which according to the Development Plan approved by the Ministry of Interior and Housing both are to be sold.

It is clearly stated in the Development Plan that this entails that the applicants will be terminated and evicted from their homes.

For all the applicants, this means that they face eviction from the flats that have been the homes of them and their families for decades.

Thus, the applicants are individually and concretely affected by the approval by the Ministry of Interior and Housing of the Development Plan, regardless of the fact that they have not yet had their tenancies terminated, since this will only be a matter of time.

It should be noted that the present case thus rather is identical to the circumstances in the judgment reported in U2012.2572H where a number of residents filed a lawsuit against the Ministry of Environment with the claim, inter alia, that the ministry should acknowledge that a new law about a test centre for large windmills at Østerild (the Test Centre Act) was null and void in relation to the plaintiffs.

The plaintiffs' claim was in particular based on the argument that the Test Centre Act had been passed in violation of the EU Habitats Directive.

The Test Centre Act made it possible to construct windmills 250 meter tall in order to construct pylons, road access etc.

The high court found that those applicants, who owned real estate (and thus had their homes) so close to the test centre that they would be affected by this visually, in terms of noise or so that their property could be expropriated in part or in total, had a legitimate interest in having the basis for the decision to place the test centre specifically at Østerild tried.

Likewise, the applicants in the present case are directly and individually affected by the development plan, which the Ministry of Interior and Housing by its decision of 10 September 2019 approved.

Moreover, it should be noted in this connection that the case in U2012.2572H differs from the present case in that it is not the provisions of the Common Housing Act as such that the applicants wish to have examined in the present case, but rather the specific approval by the Ministry of Interior and Housing of the development plan for Mjølnerparken.

This further underlines the fact that the applicants, who are residents in Mjølnerparken in the blocks, which according to the development plan are to be sold, are concretely and individually affected by the ministry's decision.

That the applicants are to be seen as sufficiently individually and concretely affected, regardless whether their homes have not yet been sold, is further supported by practice from the ECtHR regarding when a person are to be considered a victim of an alleged violation of the ECHR.

According to Article 34 and 35 of the ECHR on the right to lodge complaints with the ECtHR, the notion of victim is, according to practice from the ECtHR, to be interpreted autonomously and irrespective of domestic rules such as those concerning interest in or capacity to take action, cf. inter alia judgement of 27 April 2004, Gorraiz Lizarraga and others v Spain, para 35, judgement of 4 December 2015, Roman Zakharov v Russia, para 164.

Furthermore, it follows from practice of the ECtHR that a person or group of persons may also be regarded as a victim within the meaning of the ECHR if their rights may be affected in the future, cf. inter alia judgement of 10 March 1978, Marckx v Belgium, judgement of 6 September 1978, Klass and others v Germany, para 30-38, judgement of 29 October 1992, Open Door and Dublin Well Woman v Ireland, para 41-44, and judgement of 15 March 2012, Aksu v Turkey, para 50-54.

3. Conclusion

In conclusion, the applicants' claim is thus suitable for a ruling, because it is sufficiently clear and precise, and because the applicants under Danish law, the ECHR, and EU law are entitled to have an examination of whether the rights that they have been granted have been violated.

Furthermore, the applicants have a legitimate interest in having the approval by the Ministry of Interior and Housing of the development plan for Mjølnerparken examined, because they are individually and concretely affected by it.

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