

SUPREME COURT RULING

delivered on Tuesday 17 September:

Case 135/2013

(1st department)

A,

B,

C,

D,

E

and

F

(all represented by attorney Christian Harlang)

vs.

The Ministry of Defence of Denmark

(Legal Adviser to the Danish Government represented by Peter Biering)

Case 136/2013

G

and

H

(both represented by attorney Christian Harlang)

vs.

The Ministry of Defence of Denmark

(Legal Adviser to the Danish Government represented by Peter Biering)

Case 137/2013

I

J

and

K

(all represented by attorney Christian Harlang)

vs.

The Ministry of Defence of Denmark

(Legal Adviser to the Danish Government
represented by Peter Biering)

Intervener in support of the appellants: Dignity, Danish Institute Against Torture
(represented by legal senior adviser Dorrit Kjær Christiansen)

In the former instance, orders have been delivered by the Danish Eastern High Court 7th department on 8 June 2012, 10 August 2012 and 7 January 2013:

The following five judges have participated in the adjudication: Børge Dahl, Jytte Scharling, Jens Peter Christensen, Lars Hjortnæs and Kurt Rasmussen.

Claims

The appellants, A etc. contend that the Eastern High Court's decision of 8 June 2012, 10 August 2012 and 7 January 2013 should be amended such that the appellants shall not to provide security for legal costs.

The appellee, the Ministry of Defence of Denmark, has asked for confirmation.

Additional facts

The appellants, nine of whom reside in Iraq, one in Bahrain and one in Kuwait, have taken filed a suit against the Ministry of Defence of Denmark claiming compensation as a result of them in 2004 allegedly being subjected to an abusive and unlawful treatment in detention by the Danish forces in Iraq and the surrender to the Iraqi police by which they were allegedly subjected to torture and inhuman and degrading treatment.

By orders of 8 June 2012, 10 August 2012 and 7 January 2013, the Danish High Court determined that the appellants - pursuant to section 321 of Danish Administration of Justice Act - shall each pay DKK 40,000 as security for legal costs.

Iraq's ambassador to Denmark has, in an email dated 4 September 2013, at the request of attorney

Christian Harlang provided the following information:

”In your letter of 2 August 2013 you have asked some information about the law in Iraq on the following issue: “Can a plaintiff in a civil lawsuit in Iraq be obliged to pay or deposit an amount as security for costs to the defendant?”

I have examined that question in Iraq and on that basis I can confirm to you that no such rule exists in Iraq and consequently someone with residence in Denmark wanting to initiate a civil law suit in Iraq will not have to pay or deposit security for costs to the defendant.”

It is also stated that neither Iraq, Bahrain nor Kuwait have acceded the Hague Convention, and none of these countries have concluded a bilateral agreement with Denmark on legal aid, including the exemption to pay security for legal costs.

Allegations:

Firstly, the appellants contend the fact that it is not possible to require payment of security for the nine plaintiffs residing in Iraq. As shown in the Iraqi ambassador’s email of 4 September 2013, a Danish plaintiff does not have to provide security for legal costs in Iraq, and it thus follows of section 321(2) of the Danish Administration of Justice Act that the nine plaintiffs residing in Iraq cannot be required to pay or deposit security for litigation in Denmark.

Secondly, the appellants contend that there are special reasons for giving exemption to the requirement of payment of pursuant to section 321(1) article 3, of the Danish Administration of Justice Act. The cases are recognised by the courts as leading cases and they have great importance for the appellants. It is also of central importance in a democratic society to have courts deliver an order in such cases in order to allow efficient enforcement of the prohibition of torture and complicity in torture. The demanded amount of DKK 40,000 is the average annual salary for an Iraqi, and this in itself is an actual obstacle for the cases to be tried by the Danish courts.

A requirement for payment of security is also contrary to Article 6 of the European Convention on Human Rights. The Norwegian Supreme Court has in a ruling delivered on 29 June 1999 (NRT 1999, p. 961) on a person residing or domiciled in Kosovo having to pay security in a suit filed against the Norwegian government for compensation for unlawful detention specified that the government's requirement for payment of security must be compatible with Article 6 and that it relies on a concrete assessment on whether or not this is the case.

With reference to, *inter alia*, the fact that the case concerned claims for compensation for coercive detention and that it was a case filed by a socioeconomically disadvantaged person against the government, it was ruled that Article 6 was violated. The Norwegian case is comparable to the present cases. The High Court's orders are also delivered without regard to whether or not the appellants stand to succeed in their cases, which they do. The appellants have been denied free legal aid and with the requirement of payment of security, they have been deprived of effective access to have their case tried in court which is in violation of Article 6. The appellants' right is also supported by Articles 3 and 13 of the European Convention on Human Rights, and it is also possible to refer to the UN Convention against Torture.

Dignity, the Danish Institute Against Torture, has in particular contended that Denmark is strongly committed to the fight against torture. Specific reasons speak in favour of exempting the appellants for having to pay security cf. section 321(1) article 3 of the Danish Administration of Justice Act. The cases have been filed against the Danish government by socioeconomically disadvantaged individuals and concerns compensation for torture. These individuals are entitled to make their case without having to pay security for the legal costs incurred by the Ministry of Defence of Denmark. This is a matter of a disproportionate national demand for security, which is also contrary to Article 6 of the European Convention on Human Rights, just as it is contrary to the UN Convention against Torture and the UN Covenant on Civil and Political Rights.

The Ministry of Defence has firstly contended that there is no basis for invoking the provisions of section 321(2) of the Administration of Justice Act. It can be used only by plaintiffs who reside in countries which are signatories to the Hague Convention, or where similar agreements exist.

Secondly, there are no special reasons to grant exemption for payment of security, cf. section 321(1) Article 3 of the Administration of Justice Act. The fact that the case concerns torture or aiding and abetting thereto does not in itself entail that special reasons are present, and the provision shall not be interpreted such way that exemption can be granted for entire categories of cases from the general rule on payment of security.

A requirement of payment of security is not contrary to Article 6 of the European Convention on Human Rights. The requirement of payment of security serves a legitimate interest recognised by several rulings from the European Court of Human Rights. The requirement of paying a security of DKK 40,000 is proportionate, and the national courts have been attributed an estimate in this regard. Even today, the Ministry of Defence's expenses are much higher than the required security totaling DKK 440,000. Moreover, the appellants have no prospect of succeeding in their claim for compensation for injury, as the claim is already statute-barred. The ruling delivered by the Norwegian Supreme Court in 1999 relates to a completely different situation. Finally, the High Court's orders do not conflict with neither the UN Convention against Torture nor the UN Covenant on Civil and Political Rights.

Legal basis

Section 321 of the Danish Administration of Justice Act reads as follows:

”Section 321. A plaintiff who is not resident or domiciled in the European Economic Area shall, upon the defendant's request, provide collateral for the legal costs which the plaintiff may be required to pay to the defendant. The defendant's request shall be made in its defence or during the court session referred to in section 352(3). The nature and amount of the collateral shall be determined by the court, which can also grant exemption for payment of security if there are special reasons to do so. If security is not paid, the case will be dismissed.

Ss. 2. Ss. 1 shall not apply if the plaintiff resides or is domiciled in a country where a plaintiff, who is domiciled in Denmark, is exempt from paying security for legal costs.”

Concerning section 321(2)

A provision similar to section 321 of the Administration of Justice Act was found in section 323 of the Administration of Justice Act of 11 April 1916. The provision had the following wording:

"Section 323. A foreigner shall, when he acts in a capacity as plaintiff, and if so required by the defendant on the first day in court, be obliged to pay adequate security, within a deadline specified by the court for legal costs which the plaintiff could be ordered to pay to the defendant unless Danes in the applicable foreign state are exempt of paying such security cf. The Danish Ministry of Justice's Executive Order No. 119 of 19 May 1909, Art. 17. If the required security is not paid, the case will be dismissed."

Executive Order No. 119 of 19 May 1909 concerned the Convention of 17 July 1905 on an international regime for certain civil procedures (the Hague Convention).

Articles 17 and 18 stipulate inter alia that:

"Article 17

Guarantee or deposit shall not, under any designation be imposed on subjects of any of the Contracting States who are domiciled in one of these when they act as plaintiffs and interveners in courts in another of these States...

Article 18.

Judgments ordering any of the States contract a Plaintiff or Intervener who by virtue of Article 17, ss. 1 and 2, or subject to the laws in the applicable State, where the case has been filed, are not required to pay security or deposit or payment, ordered to pay legal costs, shall, through diplomatic channels submit an application in any of the other Contracting States to the appropriate competent authority is made freely executable... "

An amendment adopted in 1932 (Act No. 209 of 23 July 1932) deleted the reference to the Department of Justice's notice in section 323. It appears from the notes to the bill in question that the reason for this was that "it was intended to replace the Hague Convention of 1905 by a new Convention" (Reichstag Journal 1930-31, sp. 4892).

The Hague Convention of 1905 was replaced by the Convention of 1 March 1954 on Civil Procedure (Hague Civil Procedure Convention) which was ratified by Denmark in 1958 pursuant to Executive Order No. 33 of 7 June 1960. Articles 17 and 18 of the 1954 Convention largely corresponds to the above-quoted provisions of the Convention of 1905.

By Act No. 554 of 24 June 2005, section 321(2) of the Danish Administration of Justice Act got the current wording. In the comments to the applicable bill it is inter alia stated that (Parliamentary gazette 2004-05, 2nd Session, annex A, Bill L 132, p 5556):

"For section 321

...

It is also proposed that plaintiffs who reside or are domiciled in a country where a plaintiff with registered residence or domicile in Denmark is exempt from pay security for legal costs, in general shall be exempt for providing collateral, cf. subsection 2. Compared to the existing rule in section 323, the exemption is amended for people from being based on nationality to be based on residence. Cf. also pp. 307-309 of the report."

In Report No. 1436/2004 on access to a court, which is referred to in the cited comments, the Danish Standing Committee on Procedural Law considered the question of possibly introducing a general rule determining that the plaintiff in all civil proceedings must pay security for legal costs to the counterparty. The report inter alia states that (p. 308)

"Rules on payment of security that are based on the plaintiff's poor financial situation (and not - as with the foreign plaintiffs - on the legal or factual obstacles to compulsory enforcement of a Danish order on legal costs abroad) might therefore easily risk appearing as an insurmountable barrier in the case of litigation or appeal."

Concerning section 321(1) 3rd paragraph of the Administration of Justice Act.

Section 321(1) 3rd paragraph of the Administration of Justice Act was inserted into the provision by Act No. 554 of 24 June

2005. The comments in the relevant bill provides, inter alia (Parliamentary gazette 2004 05, 2 collection, annex A, Bill L 132, p 5556):

"For section 321

The provision contains rules for payment of security for legal costs. The provision corresponds to the current section 323, but is changed in several places cf. below.

...

It is proposed as a new rule that the court must be able to grant exemption for the payment of security if there are special reasons to do so. This exemption option shall be intended to be used only in rare cases.

...

Cf. also pp. 307-309 of the report."

Report No. 1436/2004 from the Danish Standing Committee on Procedural Law on access to a court provides, inter alia that (p. 59-191)

"Chapter 2

Access to a court

...

3. The European Convention on Human Rights

Pursuant to Article 6 of the European Human Rights Convention everyone is entitled to a fair and public hearing) within a reasonable time by an independent and impartial tribunal established by law (within a reasonable time by an independent and impartial tribunal established by law) in the determination of his civil rights and obligations or of any criminal charge against him

Within its scope, Article 6 establishes certain minimum standards for access to a court and to the courts' organisation and handling of cases.

The requirement stating that everyone must have effective access to an independent and impartial tribunal, has consequences for rules on court fees (section 3.1), legal costs (including security for legal costs) (section 3.2) and free legal aid (Section 3.3).

...

3.2. Court fees

Payment of security for legal costs

As mentioned, the requirements of Article 6 on access to a court will be violated the, if a party is effectively cut off from pursuing legal action without the presence of compelling reasons which can justify restrictions on access to a court.

Demands for payment of security for counterparty costs, however, serve a legitimate judicial purpose and are therefore generally not in violation of Article 6. The demand for payment of security must be proportionate to the purpose. The Human Rights Court has in this respect been more inclined to accept demands for payment of security in appeals than in proceedings at first instance.

In *Tolstoy-Miloslavsky* (A 316 B) a demand to pay security of £125,000 for the counterparty's costs for an appeal was not considered a violation of Article 6. The Human Rights Court emphasised that the case had been subject to a comprehensive treatment in the first instance and that the amount was not excessive in relation to the counterparty's expected costs of the appeal. The Human Rights Court furthermore accepted

that the basis for the decision on payment of security included an assessment of the complainant's prospects of being successful in the appeal. The counterparty was in the first instance awarded damages of £1.5 million.

In Ait-Mouhoub (Rep. 1998.3227) a demand to pay a security of FRF 80,000 for the counterparty's costs was on the other hand considered a violation of Article 6. The matter concerned an adhesion claim in connection with criminal proceedings in the first instance, and the complainant was insolvent."

Page 307 of the report further states:

"The Danish Standing Committee on Procedural Law considers that the rules on foreign plaintiff's payment of security for costs should be drafted in a clearer and more orderly manner.

The Standing Committee on Procedural Law also finds that it should be possible to grant exemption for the payment of security when circumstances warrant it. This could be the case when the plaintiff has assets in this country."

The Danish Supreme Court's reasoning and result

Basis and construct

The 11 appellants are foreigners, nine of whom are living in Iraq, one in Bahrain and one in Kuwait. They have all filed cases against the Ministry of Defence of Denmark with claims for compensation for injury. They argue that they were detained in Iraq in 2004 by Danish military and handed over to Iraqi police and in this connection tortured, which the Danish government is liable for.

These lawsuits for compensation for injury are pending before the Danish Eastern High Court, and the Danish High Court has in the cases, at the request of the Ministry of Defence of Denmark subject to section 321 of the Administration of Justice Act ordered that each of the 11 appellants shall pay a security of DKK 40,000 to the Ministry of Defence for legal costs, which they may be required to pay to the Ministry of Defence in each of the cases.

To the Supreme Court, the only issue to consider is whether or not the security for legal costs shall be paid as mentioned.

Pursuant to section 321(1) 1st paragraph, the basis is the fact that in the cases brought before the court by the 11 appellants, at the Ministry of Defence has as defendant requested that the appellants shall pay security for the legal costs which the appellants may be required to pay to the Ministry of Defence since they are not domiciled in the European Economic Area.

The provision of section 321(1) shall, however, not apply pursuant to subsection 2 "if the applicant resides or is domiciled in a country where a plaintiff, who resides or is domiciled in Denmark, is exempt from paying security for legal costs."

It also follows from section 321(1) 3rd paragraph that "the court ... may grant exemption to the payment of security if there are special reasons to do so."

The exemption rule of section 321(2) of the Danish Administration of Justice Act

According to page 308 in report No. 1436/2004 on access to a court, the general rule on payment of security in section 321(1) 1st paragraph is not designed to protect against actions brought by plaintiffs with poor finances, but is designed to overcome the difficulties of the legal and factual nature which may be associated with enforcement of a Danish order on legal costs abroad.

The provision of section 321(2) is a continuation of the corresponding provision in the Danish Administration of Justice Act from 1916, which based on its language and preparatory work must be understood such that it concerned cases where persons in this country on a legal basis such as the Hague Convention on Civil Procedure were exempted from paying security in another country. It is apparent from the preparatory work of the provision that with the amendment in 1932, in which the reference to the notice of the 1905 Hague Convention was removed from the legal text, there was no intention to change any of the links to international conventions. By linking the exemption for paying security to a convention which commits participating countries to enter into a litigation agreement with the possibility of seeking of forced recovery of foreign legal costs, the interest in the possibility of forced recovery is also taken into account; a purpose which the payment of security would otherwise serve.

On this basis, the Supreme Court finds that section 321(2) shall be construed as meaning that exemption should be granted based on treaty law.

Since Denmark has not concluded agreements on the exemption from paying security with Iraq, Bahrain or Kuwait, section 321(2) does not contain any legal basis to exempt any of the appellants for paying guarantees in the applicable cases.

Exemption pursuant to section 321(1) 3rd paragraph of the Danish Administration of Justice Act.

As mentioned, the basis is the fact that defendants in cases filed by plaintiffs residing or

domiciled abroad can demand payment of security for legal costs. The exemption rule in section 321(1) 3rd paragraph is an exemption rule, and it is indicated by the preparatory work that it will rarely apply. It shall thus be assumed that there may be cases where it - due to specific reasons - will be deemed unfair to order a foreign plaintiff to pay security for legal costs.

As mentioned, the rule of security is not intended to protect against lawsuits filed by foreign plaintiffs with a poor financial situation, but is designed to overcome the difficulties that may be associated with enforcement of a Danish order on legal costs abroad. When determining whether an exemption from the requirement of security should be made, it is not - as in the matter of granting legal aid - deemed important whether or not the plaintiff is likely to prevail in its case.

The present cases concern the Danish government's liability for the alleged torture in connection with the Danish military in Basra in Iraq allegedly having detained a number of local people and handed them over to the Iraqi police. Based on the evidence of the economic conditions in the locations where the appellants reside, there is reason to believe that a demand for payment of security for legal costs could effectively debar the filed cases. The special nature and circumstances of the cases - the Danish government's potential liability for the use of military force abroad and the allegedly socio economically disadvantaged victims of torture abroad in conjunction with the government's limited interest in the payment of security for the legal costs involves - in the opinion of the Supreme Court - that it would be unreasonable to comply with the Ministry of Defence's demand for payment of security. The Supreme Court thus grants exemption to the 11 appellants for having to pay security for legal costs.

Legal costs to the High Court and the Supreme Court for this part of the case shall be determined by the High Court in connection with the proceedings.

The Supreme Court finds no basis for imposing or awarding the intervener, Dignity, Danish Institute Against Torture, the legal costs of the Supreme Court.

**Therefore it is
adjudged that**

The Ministry of Defence's request that A, B, C, D, E, F, G, H, I, J and K shall pay security for the legal costs, which they can be required to pay to the Ministry of Defence, is dismissed.