

THE FACTS

The facts of the case presented by the parties and apparently not in dispute between them may be summarised as follows:

The applicants, who are husband and wife, are Danish citizens living in Varde. Mr. Kjeldsen was born in 1913 and is a galvaniser. Mrs. Kjeldsen was born in 1921 and is a school teacher. They have a daughter born in December 1962. The applicants are represented by Mr. Jorgen Jacobsen, a lawyer practising in Copenhagen.

On 10 March 1970 the Danish Minister of Education tabled a Bill to amend the Act relating to Public Schools (Lov om ændring af lov om folkeskolen). This Bill, which received the Royal Assent on 27 May 1970, contained, inter alia, a provision whereby sex education was to become a compulsory and integrated part of the curriculum in Danish public schools. Before the passing of this Act, it had been obligatory for pupils in the public schools to learn about the "reproduction of man". This had formed part of the biology syllabus. But detailed sex education had been an optional subject and parents had been free to decide whether or not their children were to attend the relevant classes. Teachers had also been free not to give sex instruction if they did not wish to do so.

After the Act had been passed, the Minister of Education requested the Curriculum Committee to prepare a new guide to sex education in public schools. This Committee had been constituted in 1958 and had, in 1960, provided a general guide to teaching in public schools. It produced, in April 1971, a new guide to sex education in public schools (Vejledning om seksualoplysning i folkeskolen) and this was sent out to the school authorities together with an Execution Order (bekendtgørelse) and Circular (cirkulaere) from the Ministry of Education both of which were dated 8 June 1971. The Execution Order provided that sex education should be integrated with the instruction given in other subjects, preferably Danish, religious knowledge, biology (hygiene), history (civics) and domestic relations. Section 2 of the Execution Order provided that the organisation and scope of sexual guidance should be laid down in, or in accordance with, the school curriculum. This left the choice about the organisation and content of sexual guidance to the local school authorities. This guide also set out general restrictions as to terminology and also as to the teaching aids which were not to be employed. Local school authorities could decide to ignore these restrictions, but could not oblige an individual teacher to ignore them if he preferred to follow them.

On 15 June 1972, the Ministry of Education published a new Executive Order and Circular. The Executive Order of 8 June 1971 was revoked. The new Circular explained that the object of the new Order was to give parents greater influence over the organisation of teaching. The new Order did not contain any reference to the guide but the guide remained unaltered.

On 25 April 1971 the applicants wrote to the Minister of Education requesting that their daughter, who was then attending a public schools in Varde, should be exempted from sex education. They stated that they wished to give her this instruction themselves. The Minister of Education replied on 6 May 1971 explaining that new regulations concerning obligatory sex education were in the course of preparation. In a further letter dated 14 July 1971, the Ministry explained that the regulations had been issued on 8 June, and that under the regulations sex education was integrated with the teaching of other subjects, except for a separate course laid down in the sixth and ninth school years. For practical reasons it was not possible to exempt children from integrated sex instruction.

On 5 August 1971 the applicants again wrote to the Ministry, this time

enquiring about sex education in private schools. The Ministry replied on 20 September to the effect that the freedom of parents to influence the form of instruction in private schools was not interfered with and that private schools were not obliged to provide instruction beyond that which, since 1960, they had been obliged to give in the biology syllabus.

On 31 August 1971 the Local School Commission (Skolekommissionen) of Varde refused a request by the applicants that their daughter should be given private education in Varde. The Commission stated that under the law a child could be educated only in a public school, in a recognised private school or at home (hjemmeundervisning). On 13 October 1971 the Ministry replied to a further letter from the applicants in which they had requested new legislation to provide for free education without sex instruction. The Ministry stated that they did not intend to introduce the legislation requested and they further refused to arrange for the separate education of the applicants' daughter. The Ministry also referred to a reply given to another person who had alleged that compulsory sex education violated Article 2 of Protocol No. 1. In the Ministry's view the provision of private schools of exempting children from instruction which contained a particular religious or moral foundation, meant that the Danish authorities had complied with the terms of Article 2.

In May 1971 the applicants wrote a letter of complaint to the Danish Parliament. They received no reply. They then wrote to the Parliamentary Commissioner (Folketingets ombudsmand) but were informed on 2 June 1971 that he had no competence to deal with the matter.

From August 1971 onwards, the applicants educated their daughter at home. It appears that they were unable to continue this arrangement and she returned to school in the autumn of 1972.

Complaints

The applicants alleged that the respondent Government had, by making sex education compulsory in the Danish public schools, failed to respect their right to ensure that the education of their daughter should be in conformity with their religious and philosophical convictions. In this connection, the applicants also referred to the manner in which this education was carried out by the various authorities concerned. Furthermore, as there was no private school in Varde, the introduction of compulsory sex education in the only school available might oblige them to keep their daughter away from school and amount to a denial of her right to education.

In both respects they alleged a violation of Article 2 of Protocol No. 1.

SUBMISSIONS OF THE PARTIES

1. As to the Danish school system in general and the rules governing sex education

The respondent Government first pointed out that Danish parents were, under Article 76 of the Danish Constitution, under no compulsion to send their children to public schools, although all children were entitled to free education in public schools. They were entitled to send them to private schools or to educate them at home. Their only obligation was to ensure that their children received an elementary education. Furthermore, parents had a decisive voice in the administration of public schools. Parents of children at a public school constituted a majority on the school board and, if they objected to a particular book or to a particular teaching aid, it would not be used. Although sex education had been compulsory in the whole country since 1970, it was for the Minister of Education to decide from which school year and in connection with which subjects it should be given.

The administration of public schools was decentralised. They were run by local government councils, school commissions and school boards. Each school board supervised the schools and organised co-operation between schools and parents. School Committees drew up the curriculum for their schools. These had to be approved by the local government councils who were in turn assisted by "guidelines" issued by the Minister of Education and prepared by the Curriculum Committee of the public schools.

Private schools in Denmark received large subsidies from the State. As a result, a pupil at a private school in Denmark did not generally pay an annual fee in excess of 1,200 kroner.

The question of sex education in schools had been considered by various Committees during the past 35 years. The Curriculum Committee, which was set up by the Minister of Education in 1958 and which published a "Guide to Teaching in Public Schools" (1960), distinguished between teaching "the reproduction of man", which was part of the biology syllabus, and sex education proper. The reproduction of man had been an obligatory part of the syllabus (outside Copenhagen) since 1960, but until the 1970 amendment of the Act in the Public Schools, sex education was optional both for children and for teachers.

In 1961 the Government set up a Committee on Sex Guidance which was composed of prominent doctors, lawyers, teachers, clergy and civil servants. The chief object was to prevent unwanted pregnancies. Denmark suffered at this time from a high abortion rate and a high illegitimacy rate. Many couples, often very young, were married because the bride was pregnant. Such a situation was unfortunate both for the young parents and for their children.

The Committee submitted a report in 1968. The report was entitled "Sex Education in Public Schools" (Report No. 484) and recommended that sex education should henceforth be both an integral and an obligatory part of the school curriculum. It was necessary that once the teaching of sex was integrated into the curriculum it was also made obligatory. This was because it was not practical to exempt a child from 5 minutes' teaching in one class and 10 minutes' teaching in another. In making sex an obligatory subject Denmark was following the model taken by Sweden some years previously.

The Act of 27 May 1970 was a direct result of the Committee's recommendation. As soon as the Act had provided for obligatory sex education, the Minister of Education requested the Curriculum Committee to prepare a new guide to sex education in public schools. This was sent out to the school authorities concerned together with an Executive Order and a Circular issued by the Ministry on 8 June 1971. The Executive Order provided that the objectives of sex education at school should be "to impart to the pupils knowledge which could:

- (a) help the pupils to avoid such insecurity and apprehension as would otherwise cause them problems;
- (b) promote understanding of a connection between sex life, love life, and general human relationship;
- (c) enable the individual pupil independently to arrive at standpoints which harmonise best with his or her personality;
- (d) stress the importance of responsibility and consideration in matters of sex."

The guide set out the same objectives. It also stressed the necessity of strict objectivity in ethical and moral questions.

The Executive Order further provided that sex education at all levels should form part of the instruction given in general school subjects. The organisation and scope of sexual guidance should be laid down in, or in accordance with, the curriculum. Thus the local school authorities were secured direct influence on sex education.

The guide set out certain general restrictions (which according to the above Executive Order, bound the teacher regardless of the curriculum):

- (a) the teacher should not use expressions taken from vulgar sex terminology;
- (b) the teacher should in no way give the individual pupil any sex guidance which could have the character of personal advice;
- (c) the teacher should not give information about the technique of coitus;
- (d) the teacher should not use photographs depicting certain erotic situations.

As parents formed a majority on school boards and were also well represented on school commissions, they had ample opportunity to make sure that teaching aids of which they did not approve were not used. It was not possible to guarantee that every parent approved of every book used in a particular school, but the system as a whole ensured that the wishes of parents were taken into account as much as possible.

In addition to integrated sex education which was obligatory for both pupils and teachers, a survey of the main topics covered by sex education might be given in the sixth and ninth school years. This special instruction was voluntary for pupils as well as for teachers.

On 15 June 1972 a new Executive Order was published. This revoked the Order of 8 June 1971. The Ministry of Education also issued a Circular on the same day. The Circular explained that the object of the new Order was to give parents greater influence over the organisation of teaching. The objective of sex education had also become more confined; placing greater emphasis on imparting factual information. At the same time, however, minimum requirements were established for the scope of the instruction. Section 3 (2) of the new Order stated that teachers should not be under any obligation to give the additional instruction which was voluntary for the pupils, nor should the teachers be obliged to "impart information about coital techniques or to use photographs representing erotic situations", if they did not wish to. Unlike the 1971 Order the new Order contained no reference to the guide but the guide remained unaltered. It was intended by the Ministry to emphasise that the guide was an aid to local school authorities in drawing up curricula.

In Varde itself, the sex education provisions of the 1970 Act had, in December 1972, still not come into effect. The schools were still using curricula which were adopted in 1969 and, although the Varde School Commission had forwarded a new draft curriculum to the school boards, this had not been approved but was expected to be adopted early in 1973. None of the teaching aids which the applicants had submitted as evidence to the Commission had yet been approved for use in Varde and the Act of 1970 had, as yet, no effect in the town.

At the hearing it was conceded by the applicants' counsel that Article 76 of the Danish Constitution did, indeed, grant all parents the right to free public education for their children and also the right to opt out of the state system and have their children educated privately. But it was not relevant to the second sentence of Article 2 to say that parents could opt out of the state system. The second sentence of Article 2 protected parents when their children were within the state system. The applicants did not attack the motivation of the Government in introducing sex education. But they attacked the compulsory and integrated nature of that education. Again, they did not dispute that the majority opinion of parents could make itself felt in the running of the schools and in the choice of teaching aids. This case, however, raised the question not of majority opinion but of minority opinion. Furthermore, the applicants were complaining about the use of certain books and films which they considered to be offensive. It might be true that these were not yet in the use in Varde but they could come into use there at any time or, alternatively, the applicants might move to

a part of Denmark where they were already in use.

The applicants felt that it was their right to choose in what way their daughter learned about sex. They believed that a child should be taught about sex in such a way as to explain to her its connection with love and to explain that love life is more important than sex life.

The Government had stated that the Executive Order and guide prevented the teaching of sex from taking a form which could offend the parents. But it was apparent that the theoretical restrictions were not intended to be, or were not being, applied. Although the guide "dissuaded" teachers from using vulgar terminology and "recommended" them to use conventional terms, it could be seen that a book by Bent H. Claësson "Dreng og Pige, Mand og Kvinde" which had been produced to the Commission and which was intended for use by 10 to 14 years old contained a large amount of vulgar terminology. This book was used in many schools and 55,000 copies which was a very large sale by Danish standards, had been issued. The book also gave information about the technique of coitus and contained erotic photographs. All this was contrary to the policy officially laid down in the guide. It should also be noted that, while the Act of 27 May 1970 had made integrated sex education compulsory both for pupils and for teachers, there had been vigorous protests from many teachers and, on 15 June 1972, the Ministry had been obliged to issue an order permitting teachers to free themselves from the duty to give instruction in sex. There was thus now a distinction between teachers and pupils. The former were now under no duty to give sexual instruction but the latter remained under a duty to receive it.

The applicants were not opposed to sex education but believed that it was their duty, not the duty of the State, to explain sex to their daughter. In this respect the applicants referred to and adopted the arguments of the Minister of Religion and author, Mr Søren Krarup (Den helige hensigt, 1969, pp. 40-47).

2. The respondent Government observed that the applicants had made no attempt to take their complaint before the Danish courts. Although the Convention had never been incorporated directly into Danish law by legislation, this was because special enactment was not considered necessary. Rules similar to the provisions of the Convention were in force in Denmark before 1953 when the Convention was ratified. But, when a treaty had been ratified and no special implementing legislation had been passed, it was the duty of the administrative authorities and of the law courts to interpret internal law in such a way as to ensure its compliance with such treaty. This principle which was referred to as the "rule of interpretation" ensured that a legal provision whose meaning was obscure should be interpreted so as to conform with treaty obligations. There was also a second principle which had been referred to by legal writers in Denmark as the "rule of presumption". This rule went further and was to the effect that a legal provision enacted after a treaty had come into force should be interpreted to comply with the treaty even if its prima facie meaning seemed to be at variance with the treaty. An express statutory provision which was clearly contrary to a treaty provision would, however, under Danish law, prevail over the treaty, if the legislator had intended to enact the statute so as to vary the international obligation. The Government further referred to Article 63 of the Danish Constitution which authorised the courts to "decide any question bearing upon the scope of the authority of the administration".

Following these rules, it would be open to the applicants to plead before the Danish courts that the provisions for compulsory integrated sex education were at variance with Article 2 of Protocol No. 1. Not only had academic writers maintained that it was possible to raise the Convention before the Danish courts but the Town Court of Copenhagen had specifically referred to Article 6 (3) (e) of the Convention in a case where it had ordered that the cost of interpretation should be

paid out of public funds and not by the defendant who was a foreigners. As a further example the Government referred to the discretionary powers given to the Ministry of Justice, under the act on Aliens' Entry and Residence in Denmark, to take decisions on the expulsion of aliens. In exercising these powers the Minister of Justice had taken into account the right to respect for family life as guaranteed under Article 8 of the Convention.

The rules of interpretation and presumption should be borne in mind when noting the way that compulsory integrated sex education was introduced in Denmark. When the competent Danish authorities introduced administrative measures under the Act of 1970 they would at all times attempt to ensure that these measures complied with Denmark's treaty obligations. It seemed that counsel for the applicants intended to cite a Supreme Court (Højesteret) decision of 16 September 1972 but this decision was irrelevant. It merely held that the Supreme Court could not decide whether or not a draft bill was compatible with the Danish Constitution. But the present case was not concerned with a draft bill. It was concerned with the compatibility of administrative regulations with the European Convention.

In the Government's submission the applicants were at liberty to bring an action against the Minister of Education claiming that the Minister be ordered to recognise the applicants' right to have their daughter exempted from obligatory sex education. In support of their claim they could plead that the administrative rules which precluded exemption were not binding on them because these rules were not adequately provided for in the 1970 amendment and this amendment should be read in the light of Denmark's international obligations, in particular Article 2 of Protocol No. 1. The Government considered that such a legal action could be based on Article 63 of the Convention and stated that in such proceedings the Minister, or the Solicitor General acting on his behalf, would not ask that the claim be declared inadmissible.

The respondent Government submitted that the application should, therefore, in the first place be rejected on the ground that the applicants had failed to exhaust the domestic remedies available to them.

In reply the applicants pointed out that they had written a letter to the Danish Parliament in May 1971. This letter had not been answered. It was not justifiable for the Government now to say that the applicants had failed to exhaust domestic remedies which the Government had failed to point out to them when it had had the opportunity. Alternatively, Article 63 of the Danish Constitution was completely irrelevant. It stated that the Danish courts were entitled to decide any question bearing upon the scope of the authority of the administration. But the present case was not about the authority of the administration. It was about an Act of Parliament which had itself laid down the basic rule, i.e. compulsory sex education and authorised the Minister of Education to issue regulations to implement this rule. The decision of the Danish Supreme Court of 26 September 1972 showed that Article 63 of the Convention could not be invoked against an Act of Parliament.

3. As to the question whether the application is incompatible The respondent Government submitted that the travaux préparatoires to Article 2 of Protocol No. 1 showed that one of the notions behind the efforts to include educational matters in the Convention or in a Protocol was the principle of freedom of private education. The aim of the provisions was to ensure that there would be no revival of the forced regimentation of children and young persons organised by totalitarian regimes before and during the second world war. Freedom of private education was not a privilege reserved for parents having religious convictions but also included philosophical convictions. The other notion was the idea that parents should be free to demand that their children should be exempted from religious instruction in the

public schools to the extent that such instruction would not be in conformity with the convictions of the parents.

The respondent Government argued that a State had fulfilled all its obligations under Article 2 when parents were free to provide education and teaching for their children in private schools. Hence, the obligation to give parents the right to have their children exempted from taking part in certain parts of the education provided in public schools would arise only where attendance of a public school was compulsory. In Denmark, however, parents had a right to have their children educated at private schools or to arrange for them to be taught privately at their homes. For these reasons the application should therefore be declared incompatible with the provisions of the Convention.

The applicants submitted that Article 2 of Protocol No. 1 gave parents the right to have their children exempted from certain parts of the syllabus in public schools. This right existed even when attendance at public schools was not compulsory.

It was not open to the Government to introduce sex education in a vulgar form in the public schools and then tell parents that, if they did not wish their children to be indoctrinated, they could send them to a private school 19 kilometres away.

4. As to the question whether the application is manifestly ill-founded

Alternatively, if the Commission were to hold that the complaint was not incompatible with Article 2 of Protocol No. 1, the respondent Government argued that any right to exemption contained in Article 2 must be construed very narrowly. On this new right to exemption was a right to exemption from religious education of a denominational character. It was impractical to extend the right further. It would not be possible, for example, to allow pacifist parents to have their children exempted from history lessons dealing with wars. The present complaint was, therefore, manifestly ill-founded.

As for the applicants' allegation that their daughter had been "denied the right to education" and there was thereby a violation of the first sentence of Article 2 of the Protocol, the Government pointed out that there was nothing to prevent her being sent to a private school in Esbjerg 19 kilometres from Varde.

The applicants submitted that the words "manifestly ill-founded" should be read as they stood. They were very strong words indeed. The Government had argued that any right to exemption contained in Article 2 must be construed very narrowly. It had based its argument on "practical considerations" and on the travaux préparatoires. But it would be wrong to declare the application inadmissible when the problems raised were of a complex and difficult nature. The applicants contested that the right to exemption under Article 2 should be narrowly defined. Article 2 of Protocol No. 1 governed a clearly defined sector of private life. The Government had quoted the Executive Order of 8 June 1971 which was full of nice-sounding words and phrases such as - "avoiding insecurity" - "promoting understanding" - "standpoints" - "stress". But who was to decide which "insecurity", which "understanding", which "standpoints", what "stress"? Was it to be the State? The applicants maintained that compulsory and integrated sex education might have a destructive influence on their daughter's sexual and religious life. They were of the opinion that the Darwinistic concept of life which prevailed in this education was contrary to their philosophical and religious convictions.

Lastly, the applicants wished to stress that they did not stand alone. Their counsel quoted newspaper articles to show that a body of responsible opinion in Denmark stood behind them.

THE LAW

1. The applicants have complained that the respondent Government, by making sex education compulsory in Danish public schools, have failed to respect the applicants' right to ensure that the education of their daughter conforms with their religious and philosophical convictions, and thereby violated Article 2 of Protocol No. 1 (P1-2).

They have further alleged that the Government are denying their daughter her right to education as provided for in the same Article, by making it impossible for her to attend any public school where such compulsory education is given.

The respondent Government have submitted that the application should be rejected on the ground that the applicants have failed to exhaust the domestic remedies available to them under Danish law; alternatively, that the application should be declared inadmissible as being incompatible with the provisions of the Convention; and in the further alternative, that it should be declared inadmissible as being manifestly ill-founded.

As regards the first ground, it is true that under Article 26 (Art. 26) of the Convention, the Commission may only deal with a matter after all domestic remedies have been exhausted according to the generally recognised rules of international law.

The respondent Government have here submitted that the applicants could, under Article 63 of the Danish Constitution, have brought a court action against the Minister of Education, claiming that the Minister be ordered to recognise their right to have their daughter exempted from obligatory sex education. In the Government's view, the applicants could have argued, in support of their claim, that the administrative rules which precluded exemption were not adequately provided for in the Act of 27 May 1970 amending the Act on the Public Schools as this amendment should be read in the light of Denmark's international obligations, in particular under Article 2 of Protocol No. 1 (P1-2).

The applicants have admitted that they did not bring any proceedings before the Danish courts in regard to the matters of which they now complain. They have, however, submitted that a legal action of the kind suggested by the respondent Government would not be an effective remedy for the purposes of Article 26 (Art. 26) of the Convention. They point out that the basic rule making sex education compulsory was laid down in the 1970 Act itself and could therefore not be challenged under Article 63 of the Constitution which only authorises the courts to decide questions bearing upon the scope of the authority of the executive power.

The Commission first recalls that it has frequently held that, in order to comply with the requirements of Article 26 (Art. 26) of the Convention, an applicant is obliged to exhaust every domestic remedy which cannot clearly be said to lack any prospect of success (see e.g., the decisions on admissibility of applications No. 712/60, *Retimag S.A. v. Federal Republic of Germany*, Yearbook, Vol. 4, pp. 384, 400, and No. 2257/64, *Soltikow v. Federal Republic of Germany*, Yearbook, Vol. 11, pp. 180, 224.)

It is true that in the present case the respondent Government have not been able to show that the Danish courts, in proceedings brought under Article 63 of the Constitution, have ever ruled on the question whether the Convention could be invoked in judging the legality of administrative regulations. On the other hand, the Government have explained that it is a widely accepted view in Danish legal theory that a valid treaty, such as the Convention, imposes on the domestic authorities an obligation to apply and interpret national law in a

manner to ensure that, wherever possible, Denmark's treaty obligations are fulfilled.

The Commission finds that, insofar as the present application relates to the directives issued by the Ministry of Education and other administrative measures taken by the Danish authorities regarding the manner in which the sex education referred to in the 1970 Act should be carried out, it cannot be said that the remedy indicated by the respondent Government would clearly have been without any prospect of success. Moreover, an examination of the case, as it has been submitted, does not disclose the existence of any special circumstances which might have absolved the applicants, according to the generally recognised rules of international law, from exhausting this remedy.

It follows that, in this respect, the applicants have not complied with the condition as to the exhaustion of domestic remedies and this part of the application must therefore be rejected under Article 27 (3) (Art. 27-3) of the Convention.

2. The Commission has next considered whether there was any remedy against the Act of 27 May 1970 which laid down the principle of compulsory sex education and authorised the Minister of Education to issue regulations as to how this instruction should be given.

The applicants have asserted that no proceedings could be taken under Article 63 of the Danish Constitution against an Act of Parliament. The respondent Government have not contested this assertion and have not suggested that any other specific remedy might be available to the applicants insofar as the provisions of the 1970 Act are concerned. The Commission therefore concludes that there was no effective domestic remedy available to the applicants with regard to the principle of compulsory sex education as embodied in the Act. It follows that, in this respect, the application cannot be rejected as inadmissible under Article 26 (Art. 26) of the Convention.

3. Without in any way prejudicing its final opinion as to the interpretation of Article 2 of Protocol No. 1 (P1-2), the Commission is nevertheless fully satisfied that the applicants' complaint cannot be considered as clearly falling outside the scope of this Article. The complaint cannot, therefore, as submitted by the respondent Government, be rejected as being incompatible *ratione materiae* with the provisions of the Convention. On the contrary, the Commission considers that the complaint raises important and complex issues under Article 2 of Protocol No. 1 (P1-2) whose determination should depend on an examination of the merits of the case.

For these reasons, the Commission

1. Declares admissible the application insofar as the applicants complain that the Act of 27 May 1970 providing for obligatory sex education in the public schools constitutes a violation of Article 2 of Protocol No. 1 (P1-2).

2. Declares inadmissible the application insofar as it relates to the directives issued and other administrative measures taken by the Danish authorities regarding the manner in which such sex education should be carried out.