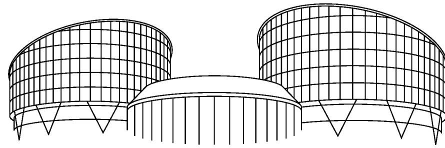

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF JENSEN v. DENMARK

(Application no. 8693/11)

JUDGMENT

STRASBOURG

13 December 2016

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Jensen v. Denmark,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Işıl Karakaş, *President,*
Nebojša Vučinić,
Paul Lemmens,
Valeriu Griţco,
Jon Fridrik Kjølbro,
Stéphanie Mourou-Vikström,
Georges Ravarani, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 22 November 2016,

Delivers the following judgment, which was adopted on that date.

PROCEDURE

1. The case originated in an application (no. 8693/11) against the Kingdom of Denmark lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Danish national, Mr Henrik Mønsted Jensen (“the applicant”), on 22 October 2010.

2. The applicant was represented by Mr Peter Trudsø, a lawyer practising in Copenhagen. The Danish Government (“the Government”) were represented by their former Agent, Mr Jonas Bering Liisberg, from the Ministry of Foreign Affairs, and their Co-agent, Mrs Nina Holst-Christensen, from the Ministry of Justice.

3. The applicant alleged that the dismissal of his appeal to the High Court breached his right to a fair trial as guaranteed by Article 6 of the Convention.

4. On 3 July 2013 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1957 and lives in Skørping.

6. By an indictment of 25 October 2007 the applicant, jointly with three co-accused, was charged with violation of intellectual property rights under section 299 b of the Penal Code of a particularly aggravated nature,

comprising professionally organised production, importation and sales, in which the defendants had cooperated on marketing substantial quantities of counterfeit goods in the form of designer knives, lamps and similar products.

7. From the beginning of 2006 the applicant was represented by lawyer A, and as from 21 August 2009, the applicant was represented by lawyer B.

8. By letters of 1 and 9 September 2009 A submitted his claim for legal costs to the City Court for work performed from 2006 until 2009. By decision of 24 September 2009 the City Court granted A fees in the amount of DKK 183,862.50 (approximately EUR 24,700) plus VAT and reimbursement of costs in the amount of DKK 2,060 which was provisionally to be paid by the Treasury. It appears that the transcript of the court records was sent to counsel A and the prosecutor in accordance with usual practice. Neither the applicant nor B was informed of this decision.

9. The case was heard before the City Court (*Retten i Viborg*) over 15 days between 24 September and 4 December 2009.

10. By a judgment of 4 December 2009, the City Court convicted the applicant and the three co-accused. The applicant was convicted on two out of fifteen counts and given a six months' suspended sentence, and 120 hours of community service due to his good personal circumstances and the fact that his role had been a minor one. In addition the proceeds, estimated at 40,000 Danish Kroner (DKK), were confiscated, as were various copies of designer goods, such as lamps and cutlery. The applicant and B were present when the judgment was passed. The operative part of the judgment, including the matter of payment of legal costs, was read aloud when the judgment was passed.

11. A few days later lawyer B received a transcript of the judgment, which in the operative part relating to legal fees stated:

"Each of the accused is to pay the legal costs relating to them, including the fee to counsel appointed to them."

12. The applicant did not appeal against the judgment to the High Court, nor did the public prosecution.

13. According to a court record of 5 January 2010, the City Court approved the costs to be paid to B in the amount of DKK 247,200 (approximately EUR 33,200) plus VAT and reimbursement of other costs amounting to DKK 32,423. It was stated that the amount was to be paid by the applicant.

14. On 17 January 2010, on behalf of the applicant, B appealed against the decision. He did not contest the amount granted, but claimed that it should be paid entirely or partly by the Treasury. In support thereof, and with reference to section 1008, section 2, of the Administration of Justice Act, he submitted that the applicant had only played a minor role in the criminal case; that an extensive part of the production of evidence did not

relate to him; that he had been acquitted of one count; and that the total fee was of a significant amount.

15. On 25 January 2010, the applicant received an invoice from the police, dated 19 January 2010, requesting him to pay legal costs in the amount of DKK 573,311 (approximately EUR 77,000) including A's and B's fees. This was the moment when the applicant became aware for the first time of the fees that had been granted to A.

16. On 26 January 2010, on behalf of the applicant, B extended his appeal of 17 January 2010 also to include the payment of costs to A, which in the applicant's view should be paid entirely or partly by the Treasury. He also requested that the City Court send him the court records of the decision to grant fees to A.

17. On 8 February 2010 the City Court submitted a letter to B, with which was enclosed a copy of the judgment of 4 December 2009, which on 5 February 2010 had been rectified on page 90 in the operative part as follows:

"The accused are to pay the legal costs, so that each of them pays the legal costs relating to them, including the fees for their appointed counsel."

18. The court records of 24 September 2009 and A's letters of 1 and 9 September 2009 were also enclosed with the letter.

19. By letter of 11 February 2010, B informed the High Court of Western Denmark that the applicant withdrew his appeal as regards the fees to be paid to B. Moreover, he requested permission to submit further observations as regards the fee that the applicant had been ordered to pay to A.

20. In a supplementary pleading of 4 March 2010, B maintained that A's fees should be paid by the Treasury. He pointed out that the fees payable to A and B totalled DKK 573,311 and that therefore the payment duty would be manifestly disproportionate to the applicant's responsibility and circumstances. Referring to section 1008, subsection 4, of the Administration of Justice Act, he thus requested that the payment duty be reduced. In his view, the time-limit for appealing against the decisions on the fees to be paid to A should, at the earliest, run from 25 January 2010, the date on which the applicant received the invoice from the police and thus became aware for the first time of the fees that had been granted to A.

21. By decision of 10 March 2010 the High Court dismissed the appeal as being lodged out of time. More specifically, it stated:

"The interlocutory appeal does not concern the amount of the fee granted to the applicant's two defence lawyers; it only concerns the City Court's decision that the applicant must pay the legal costs relating to him, including the fee to his appointed counsel. This decision was integrated in the judgment of 4 December 2009 and the applicant, who was present when the judgment was passed, was informed of the decision during that hearing. Accordingly, the time-limit must be calculated from 4 December 2009,

pursuant to section 969 of the Administration Act, even if the applicant only later learned how much the legal costs, including the fees for the defence counsel, amounted to. Thus, the time-limit had expired when the interlocutory appeal was lodged on 17 January 2010."

22. Leave to appeal to the Supreme Court was refused by the Appeals Permission Board on 18 June 2010.

II. RELEVANT DOMESTIC LAW AND PRACTICE

23. The relevant provisions of the Administration of Justice Act (*retsplejeloven*), read as follows:

Section 910

"1. The High Court shall dismiss an appeal lodged after the expiry of the time-limit for appeal, see section 904.

2. The High Court may permit the appeal to proceed if the appealing party proves on a balance of probabilities that he only became aware of the circumstances on which the appeal is based after the time-limit expired, or that the time-limit was otherwise exceeded for reasons not attributable to him. The notice of appeal must be lodged no later than 14 days after the appealing party became aware of the reason for the appeal or after the circumstances resulting in non-compliance with the time-limit for appeal are no longer present. The notice of appeal must provide the information on the reasons for non-compliance with the time-limit.

3. ...

Section 968

1. Unless otherwise fixed by law, any person may lodge an interlocutory appeal (*kære*) with the High Court against orders (*kendelser*) and other decisions made by the District Court ... where [such] contain a ruling against him,

2. ...

3. Interlocutory appeal against judgments only lies in the cases referred to in section 1013.

4. Interlocutory appeal against orders and other decisions made during the trial or during its preparation only lies, unless otherwise provided for by law, where the order or decision: ...

(v) imposes a sentence or legal costs; or

...

Section 969, subsection 1

1. Unless otherwise provided by this act, the time-limit for interlocutory appeal is fourteen days, calculated from the passing of the decision, the provisions set out in section 910 apply correspondingly.

...

Section 1007

1. In criminal cases prosecuted by a public authority, the legal costs of processing the case and enforcing the sentence are defrayed by the Treasury subject to the right to have them repaid under the rules below.

2. ...

Section 1008

1. If the accused is found guilty ... he shall repay to the Treasury the necessary expenses incurred in the processing of the case. The Minister of Justice may fix rates to be used when calculating the amount that the accused must pay to cover expenses to expect advice during the proceedings.

2. If the investigation was related to another crime, or crimes other than the one of which the applicant was convicted, he is not liable to compensate the supplementary costs connected thereto ... If it is not possible to distinguish those costs, the court decides if, and how big a part, [the convicted person] must compensate.

3. ...

4. Incurred costs which are caused by mistake or negligence by others should not be a burden on the convicted person. The court may also, in its judgment, limit the liability to pay legal costs when it finds that it would otherwise be manifestly disproportionate to the responsibility and circumstances of the convicted person.

5. ...

Section 1009

Where several defendants are convicted as accomplices of the same act, each of them shall repay the expenses deriving from counts solely concerning him. As regards other legal costs, the court shall order the individual accomplices to defray a share determined proportionately to the degree of their complicity and may also decide that all individual accomplices are to be liable jointly and severally.

Section 1013

1. Where a judgment has been appealed against, the superior court shall try the matter of legal costs if the determination thereof depends on the outcome of the appeal or it has been specifically included in the appeal. A corresponding rule applies where an interlocutory appeal is lodged against an order for legal costs imposed in connection with a sentence or similar consequence. Otherwise, an interlocutory appeal may be lodged against the court's decision on legal costs where the decision is independent of the outcome of the case and the amount of the legal costs imposed will presumably exceed DKK 40."

...

24. On 10 March 2009, in another case, the Supreme Court passed a decision about legal costs (see U.2009.1421H). Originally, the District Court had passed a judgment on 26 October 2007 in a criminal case against five defendants, of whom counsel A had defended three. When passing the judgment, the District Court had ordered the three defendants to pay legal costs (without specifying the amount). On the same day the District Court had awarded A DKK 73,500, of which each of the three defendants was to pay one third. Information about that decision had been sent to A by letters

of 31 October and 2 November 2007. The three defendants had only become aware of this decision when the police collected the fee from one of them on 31 January 2008. On 12 February 2008 A had lodged an interlocutory appeal claiming that the defendants should pay a smaller share. The appeal had been dismissed by the High Court as being submitted out of time. On appeal, the Supreme Court stated that the decision on payment of legal costs was integrated in the judgment, which had been passed in the presence of the defendants. Accordingly, since the interlocutory appeal concerned the order to pay the legal costs, and not the actual amount of the legal fee, the time-limit should be calculated from 26 October 2007.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

25. The applicant complained that the dismissal of his appeal by the High Court had breached his right to a fair trial as guaranteed by Article 6 of the Convention, which in so far as relevant reads as follows:

"1. "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

26. The Government contested that argument.

A. Admissibility

27. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

28. The applicant submitted that when the City Court passed its judgment on 4 December 2009 and its decision included therein that he was liable to pay the legal costs pertaining to him, he had not been aware of the specific amount. He could therefore not effectively apprise himself of the decision that he should pay the legal costs in their entirety. It was not until 25 January 2010, after the expiry of the time-limit for appealing against the judgment, that he became aware of the exact amount, which totalled DKK 573,311, which was very burdensome.

29. The City Court should have advised either him or his counsel B, at the latest on 4 December 2009, that it had already on 24 September 2009 granted A fees in the amount of DKK 183,862.50 plus VAT and reimbursement of costs in the amount of DKK 2,060 which provisionally had to be paid by the Treasury.

30. The system of imposing a duty to pay legal costs in a judgment without specifying the amount will have the consequence that a convicted person is forced to appeal unnecessarily against a judgment, solely in order not to miss the time-limit when the exact amount becomes known.

31. The Government contended that the principle of legal certainty had been observed, that the applicant had had an effective judicial remedy, and that throughout the entire proceedings the applicant had been represented by counsel, who could have advised him about the pertinent time-limits.

32. They pointed out that, according to domestic law and established case-law, it is decisive for the calculation of the time-limit which decision the interlocutory appeal concerns. If the decision concerns the actual payment duty (without a specific amount), and the convicted person finds that this should be taken on by the Treasury in full or in part, for example because the duty would otherwise be manifestly disproportionate to his responsibility and circumstances (see section 1008, subsection 4, of the Administration Act), the time-limit is 14 days from the passing of the judgment or the date the convicted person was informed of the contents of the judgment. If the decision concerns the actual amount, and the convicted person finds that this is too high or incorrectly assessed, the time-limit is 14 days from the date on which the convicted person or his counsel became aware of the amount granted.

33. In the present case, the interlocutory appeal concerned the duty to pay legal costs, not the amount of the legal fees. The Government noted that on 17 January 2010 the applicant and his counsel, B, claimed that the fees should be paid by the Treasury in full or in part. Likewise, on 26 January 2010, they claimed that this should also apply to the costs granted to A, and this was repeated on 4 March 2010. Accordingly, as stated by the High Court in its decision of 10 March 2010, the interlocutory appeal did not concern the amount of the fees awarded to the applicant's two representatives, but solely the decision integrated in the judgment of 4 December 2009 that the applicant was liable to pay the legal costs pertaining to him. Therefore, by virtue of section 969 of the Administration Act, the time-limit ran from the date of the judgment and expired on 18 December 2009.

34. The principles relating to the right of access to a court secured by Article 6 § 1 of the Convention were recently set out in *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, §§ 126-129, 21 June 2016. Notably, the right of access to a court is not absolute, but may be subject to limitations; these are permitted by implication, since the right of access by its very nature calls for regulation by the State.

35. In respect of time-limits governing the lodging of appeals, it is not the Court's task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts of appeal and of first instance, to resolve problems of interpretation of domestic legislation. The role of the

Court is limited to verifying whether the effects of such interpretation are compatible with the Convention. This applies in particular to the interpretation by courts of rules of a procedural nature such as time-limits governing the filing of documents or the lodging of appeals. Rules governing the formal steps to be taken and the time-limits to be complied with in lodging an appeal are aimed at ensuring a proper administration of justice and compliance, in particular, with the principle of legal certainty. Litigants should expect those rules to be applied. (see, for example, *Zvolský and Zvolská v. the Czech Republic*, no. 46129/99, § 46, ECHR 2002-IX and *Miragall Escolano and Others v. Spain*, nos. 38366/97, 38688/97, 40777/98, 40843/98, 41015/98, 41400/98, 41446/98, 41484/98, 41487/98 and 41509/98, § 33, ECHR 2000-I).

36. However, an issue concerning the principle of legal certainty may arise, not merely as a problem of interpretation of a legal provision in the usual way, but also in the form of an allegation of an unreasonable construction of a procedural requirement which prevents a claim from being examined on the merits and thereby entails a breach of the right to the effective protection of the courts. Thus, while time-limits are in principle legitimate limitations on the right to a court, the manner in which they are applied in a particular case may give rise to a breach of Article 6 § 1 of the Convention, for example, if the time-limit for lodging an appeal starts to run at a moment when the party did not and could not effectively know the content of the contested court decision *(see, inter alia, Viard v. France*, no. 71658/10, § 36, 9 January 2014; *Tsironis v. Greece* (no. 44584/98, 6 December 2001; and *Miragall Escolano and Others v. Spain,* quoted above, §§ 33 and 37), or if the time-limit is so short and inflexible that the party in practice does not have sufficient time to lodge an appeal (see, *inter alia, Pérez de Rada Cavanilles v. Spain* judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, §§ 46-50, and *Gruais and Bousquet v. France*, no. 67881/01, §§ 29-30, 10 January 2006), or if the dismissal of an appeal for failure to comply with a time-limit is not a foreseeable reaction (see, *inter alia*, *Olsby v. Sweden*, no. 36124/06, §§ 51-52, 21 June 2012).

37. Turning to the present case, the Court observes that before the domestic courts, in letters from counsel B to the High Court of 17 and 26 January and 4 March 2010, the applicant complained that he was liable to pay the legal costs pertaining to his case without any contribution from the Treasury. He did not maintain that the amount of legal costs for either counsel A or B was excessive or wrongly calculated. Accordingly, as stated by the High Court in its decision of 10 March 2010, since the interlocutory appeal did not concern the amount of the fees awarded to the applicant's two lawyers, but solely the decision integrated in the judgment of 4 December 2009, namely that the applicant was liable to pay the legal costs pertaining to him, section 969 of the Administration Act applied. Therefore,

the time-limit for lodging an interlocutory appeal was fourteen days, calculated from the passing of the decision integrated in the judgment of 4 December 2009, and it expired on 18 December 2009.

38. The applicant argued that since he was not aware on 4 December 2009, or a few days later, when B received the transcript of the judgment, that the legal costs to be paid by him amounted to almost DKK 573,311, he could not at that time effectively apprise himself of the court decision integrated in the judgment of 4 December 2009, which imposed a heavy burden on him in relation to the legal fees to be paid. It was not until 5 January 2010, when the City Court approved the fees to be granted to B and the supplementary costs to be paid, and until 25 January 2010, when the applicant received the invoice from the police, informing him about the fees that the City Court had granted A on 24 September 2009, that the applicant could effectively apprise himself of the court decision of 4 December 2009.

39. It is not in dispute between the parties that the applicant was not aware on 4 December 2009, or a few days later, that the legal costs would amount to DKK 573,311. He was present, though, and assisted by counsel B on 4 December 2009, when the judgment was passed. Thus, he was or could have been, aware from that day on that he - and he alone - was liable to pay the legal costs relating to him, including the fees to his two lawyers, despite their amount. It is also undisputed that B, a few days later, received a transcript of the judgment, which in the operative part relating to the legal fees stated: "Each of the accused is to pay the legal costs relating to them, including the fee to counsel appointed to them."

40. At that point in time, the applicant and counsel B had access to the Supreme Court decision of 10 March 2009 in another case (see paragraph 24 above) which specified the time-limit to apply when an interlocutory appeal concerned the order to pay legal costs, as opposed to an interlocutory appeal regarding the amount of the legal fees.

41. The legislation and the jurisprudence clearly indicated that the time-limit for lodging an interlocutory appeal was fourteen days, calculated from the passing of the decision integrated in the judgment of 4 December 2009, and the applicant thus had the possibility, and sufficient time, to appeal against the decision that he - and he alone - was liable to pay the legal costs relating to him. He could have argued, without knowing the exact amount of the legal costs, that the Treasury should contribute, in full or in part. However, the applicant did not lodge such an appeal until 17 January 2010, and the High Court's dismissal of his appeal on 10 March 2010 was therefore a foreseeable reaction.

42. In addition, had the applicant found that the amount of legal costs for either counsel A or B were excessive or wrongly calculated, he could have lodged such an appeal as well. The time-limit for such an appeal, which was also 14 days, would have started to run from the date on which the applicant

or his counsel became aware of the amount granted (see paragraph 23 above).

43. In these circumstances, the Court finds that it cannot be concluded that the applicant and counsel B could not, on 4 December 2009 or shortly thereafter, effectively apprise themselves of the court decision integrated in the judgment of 4 December 2009, ordering the applicant to pay the legal fees pertaining to him without any contribution by the Treasury.

44. There has accordingly been no violation of Article 6 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 6 of the Convention.

Done in English, and notified in writing on 13 December 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Işıl Karakaş
Registrar	President