

Report from Denmark

presented by

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**Judicial Review of Public Administration
Enforcement of Executive Decisions**

I. INTRODUCTION

1. General/Concrete Executive Decisions

Today, the conduct of private individuals is extensively regulated by public authorities. A characteristic feature of this regulatory function is that it is often effected by a concrete legal instrument (executive decision) issued to private individuals or enterprises by an administration authority ordering them to do or refrain from doing a certain thing. With a view to enforcing compliance with such executive decisions, non-compliance is normally subject to penal sanctions laid down in statutes. Further, various means of seeking enforcement of executive decisions are by statute made available to the authorities.

Public administration activities are subject to a legality principle according to which decisions made by an administration authority must not be in breach of the Danish Constitution Act or for statutory provisions generally, and the administration must not without statutory power interfere with private citizens' activities. There is a general presumption that the deeper the interference is with the personal freedom of individuals and their enjoyment of property, the stricter are the requirements for clarity of the underlying statutory powers.

The legality principle applies equally to general and concrete executive decisions.

Under Danish law a concrete executive decision is characterized by being an order from an administration authority addressed to one or more specified persons or enterprises for the purpose of determining what is or shall be valid in law in the matter in question, and which under existing rules of law shall have legal effect according to its tenor.

A general executive decision is characterized by being addressed to an indefinite number of persons or enterprises and by finding application in a indefinite number of cases. Examples of general executive decisions are Royal Decrees, Executive Orders and Regulations.

The remedies available in Danish law for enforcement of concrete executive decisions are — apart from the threat of prosecution — the imposition of repetitive fines continuing until a mandatory action has been performed or until a prohibited activity has been discontinued (compulsory fines). In some cases the authorities are empowered to perform the act in question themselves (the remedy of self-help).

This present Report deals with the right of the courts of law to review

the enforcement by administration authorities of concrete executive decisions.

1.2. *Administration Enforcement of Executive Decisions Through Criminal Prosecution or Compulsory Fines*

1.2.1. Most administration statutes contain provisions on prosecution for infringement of statutory provisions and of concrete and general executive decisions made under statutory provisions. If a private individual does not comply with an executive decision, the authority concerned will thus normally be entitled to institute criminal proceedings by laying an information with the police. The public prosecutor will then independently assess if prosecution in the matter will lead to conviction. In a criminal case, before pronouncing in the actual matter, the court will normally have to consider the legality etc. of the executive decision itself.

In principle, it is exclusively the courts that can decide on application of sanctions in criminal matters. However, several statutes dealing with specific matters, such as taxes and excise duties, etc., allow the administration authority concerned to settle with private individuals by imposition of a fine. In each particular case this is however conditional upon the citizen pleading guilty to the offence, agreeing to the matter being settled out of court, and accepting the amount of the fine. Otherwise, the administration authority must leave it to the public prosecutor to bring the matter before the courts.

1.2.2. The administration authority may seek enforcement of its decisions in connection with criminal prosecution. The authority may ask the prosecution to claim compliance by the accused with a mandatory or prohibitory order. From the general provision of s.997(3) of the Danish Administration of Justice Act it then follows that in criminal sentences the person concerned can be ordered by the court to pay repetitive fines (compulsory fines) until he has complied with an executive decision, for instance ordering him to demolish an unlawfully erected building.

Execution of criminal sentences rests with the local Chief Constable of Police. He may — apart from executing the sentence of the court — apply the remedy of enforced collection of compulsory fines as ordered by the court. A criminal sentence in which an individual or enterprise is ordered to comply with an executive decision cannot be enforced by the Chief Constable or administration authority performing the actions ordered themselves, except where they are expressly empowered by statute to do so.

The application of such express provisions of the law is dealt with below in para. 1.3. et seq.

1.2.3. A few — mostly old — statutes provide powers for the administration authority itself to decide on use of compulsory fines where executive decisions are not complied with. Such fines can be collected with the help of the Sheriff's Court. This court may to some extent judicially try the claim made by the administration, including the administration's statutory power to impose compulsory fines. Since the limited access to judicial review may cause doubts about law and order, it is as far as possible sought to avoid that powers to impose compulsory fines be conferred on administration authorities.

1.2.4. It has been disputed whether instead of seeking enforcement of its decision by a charge brought by the prosecution, the administration authority might elect to bring a civil action for specific performance, which, if successful, is enforceable under the general rules on execution of civil court judgments as laid down in the provisions of the Administration of Justice Act. Some experts on administrative law have maintained that administration authorities cannot seek enforcement of their decisions under the procedural rules applicable to civil actions. Such procedure was however applied in a matter heard by the Danish Supreme Court on 8 October 1975, and it must in several cases be deemed to be consonant with the interests of both administration and opposing party.

1.2.5. Literature on administrative law assumes that an administration authority can seek enforcement of a claim by issuing an injunction through the courts. This applies to instances where disregard of the claim is not subject to penal sanctions and to a few instances where penal sanctions apply. A case in point is where a private individual challenges the legality of an executive prohibition; here the administration authority may have an injunction issued through the Sheriff's Court.

Where an injunction has been granted by the courts, the police will under the provisions of the Administration of Justice Act have to assist in its execution, for example by preventing the party concerned from carrying out the infringing action. A party who does not comply with an injunction granted by the Sheriff's Court may be prosecuted.

It follows from the provisions of the Administration of Justice Act that a judicial injunction ought not to be granted where under the general

statutory rules punishment for violation of the law provides sufficient protection. Presumably, the penal sanctions contained in the various Public Administration Acts must often be held to provide sufficient protection.

An injunction issued by the Sheriff's Court has to be followed up by an action to confirm the interim injunction. Regardless of the injunction being issued against an activity that is subject to penal sanctions, the action for confirmation of the interim injunction must be brought before the civil courts.

1.3. *Administration's Own Enforcement of Executive Decisions (the Remedy of Self-Help)*

1.3.1. Under Danish law, administration authorities have no general power to enforce their own concrete decisions. Therefore, express statutory power is required for an authority itself be entitled to enforce a decision made.

Neither do the police have power to do the things required for performance of the executive decision.

However, several statutory provisions expressly empower administration authorities themselves to do such things (at the expense of the party concerned) as are required for performance of the executive decision, always provided the decision is not acted upon by the addressee. Some statutes provide that the authority itself may enforce its decisions; others provide that the police may act or give its assistance.

A number of Public Administration Acts thus contain powers for an authority to perform its own mandatory order at the expense of the person liable, provided he has not voluntarily complied with the decision. There is no specific statutory rule on the procedure to be followed in case of such self-help. However, in practice it is required — as a manifestation of good administrative custom — that the person liable be in advance notified of the intended self-help action should his obligation to perform not be fulfilled within a specified time limit.

1.3.2. In Denmark, it is a principle of legal policy to insert in the relevant statutes a proviso to the effect that an executive mandatory order must be based on or approved by *court judgment* and that compulsory fines must have proved of no avail before the administration authority will be entitled to implement the required measures for performance of the executive decision. However, this principle does not apply where typically postponement of the measures in question will endanger the safety of human

beings. In such cases the Special Statutes in question confer powers on the administration to interfere without waiting for court judgment. These rules apply for example where under an executive mandatory decision a derelict building about to collapse is ordered to be demolished or made physically inaccessible as it presents a risk that people may be injured.

1.3.3. The provisions on self-help measures do not in themselves empower the administration to use physical force against the persons in question. If obstacles are put in an authority's way, it will therefore not itself be allowed to implement the measures in question but will have to call in the police.

In several administrative fields there are statutory provisions on the right of the police to use physical force in connection with enforcement of executive decisions.

Under s. 108(1) of the Administration of Justice Act it is, among other things, the duty of the police to see that statutory provisions and bye-laws are observed and that criminal offences are prevented. If, in connection with administration of a Special Statute, the police is desired to undertake special duties exceeding those authorised under s. 108(1), such special duties may under s. 108(2) of the Administration of Justice Act be ordered by the administration subject to consent given by the Minister for Justice.

Further, a number of Special Statutes set out provisions empowering administration authorities, if necessary, to request the assistance of the police in enforcement of an executive decision. However, such Special Statute provisions are mostly otiose as they duplicate the general provision of s.108 of the Administration of Justice Act.

There is no specific statutory limitation to the use of physical force by the police when under the provisions of Special Statutes or by virtue of its general powers the police act to ensure compliance with executive decisions. It is, however, a general principle of Danish law that physical force may be used only where other means of enforcement do not suffice, and that the force applied must be reasonably graded in proportion to the interest sought to be enforced (the proportionality requirement). Consequently, the administration will often be restrained to laying an information with the police with a view to criminal prosecution and imposition of compulsory fines, rather than itself having the necessary measures taken with the assistance of the police.

2. Power of the Courts to Review Enforcement by the Public Administration

2.1. Judicial Review of Administration Activities

2.1.1. The courts of law are centrally placed in Danish public law. Under the Danish Constitution, express and direct powers to review administration activities are vested in the courts. Within specified fields, Parliament may however by statute bar the general power of jurisdiction of the courts. Such statutory provisions are only few and far between.

No special court system has been set up in Denmark for the hearing of disputes between private citizens and public authorities concerning the administration's performance of its duties. These matters are therefore dealt with by the ordinary courts of law under the procedural rules applying to either civil or criminal law, depending on the issue being connected with a civil action or a criminal matter.

There is no general time limit within which a citizen must bring before the courts a complaint against an executive decision. Neither is it a general requirement that the courts may try the matter at issue only when the citizen has exhausted all means of recourse through administration channels. However, there are sporadic statutory rules, for instance in the field of revenue law, that lay down time limits and requirements for exhaustive administrative recourse.

A person who brings an executive decision before the courts is not thereby released from complying with the decision made by the administration. Neither can the courts without express statutory power decide that the executive decision complained against shall not be complied with while the matter is pending before the courts.

2.1.2. Judicial review is in practice mainly concerned with determining whether an executive decision may be declared null and void. A decision is null and void when it is legally defective in some important respect and no extenuating circumstance is present.

If the courts find that an executive decision is null and void, enforcement is thereby debarred.

2.1.3. Judicial review may also deal with the very enforcement of an executive decision. Thus, in criminal matters where a charge is preferred for an offence against public law, the courts may decide the underlying question of the legality of the executive decision. Also in a civil action brought by a

citizen against an administration authority, the courts may review the enforcement of an executive decision. The citizen may raise questions on the enforcement by the administration authority of its executive decision in connection with an action brought against the administration authority concerning the executive decision itself. And where the citizen does not contest the executive decision itself but objects solely to its enforcement by the administration authority, he may bring a separate action objecting to its enforcement. For instance, the citizen may claim that the administration's mode of enforcing the decision has set aside a proportionality principle. Such actions may be brought not only where the courts have previously reviewed the legality of the decision but also where they have not adjudicated on the executive decision itself.

2.1.4. In Danish law there is no general rule to the effect that where a person objects to an executive decision addressed to himself, the decision or its enforcement must be brought before the courts for review at the instance of the administration. Such a rule is however found in connection with the implementation of administrative detention and in certain cases of administrative cancellation of the right to carry on specific professional activities, such as the right to work as a doctor, an advocate, and the like.

2.2. *Sanction Against the Administration After Enforcement Has Been Carried Out*

A special problem arises when the courts quash an executive decision that has already been enforced by the administration.

Frequently, after execution of a decision, the grievance suffered by the party concerned will be only temporary. A case in point is where a person suspected to be infectious is removed to hospital. He must be discharged if the decision for removal is judicially overruled. The courts will be able to hold the administration liable in damages for any financial loss or injury to his reputation etc. that the person concerned has suffered during the period of hospitalisation.

On the other hand, damage sustained by the person concerned by enforcement of the executive decision may be irreparable, for instance where the administration through an act of self-help has enforced a mandatory order for the demolition of a house. In such cases, the courts cannot restore the house to its previous state by quashing the decision. Normally, under Danish law, the courts cannot compel the administration to restore the

status quo. But in such cases the courts can order the administration to recompense the party aggrieved for the loss he has sustained.

In the cases here referred to, the administration will incur liability under the general principles applying to liability in damages. In matters where an administration authority through mandatory or prohibitive order interferes in the business or life of a private individual, and the courts quash the executive decision, the authority must be deemed to have acted in a manner causing liability in damages.

In certain cases where the aggrieved party has failed to apply an available remedy, e.g. lodging of a complaint with a superior administration authority, claiming alteration or cancellation of the executive decision, it is assumed that the courts will reduce or bar the claim for damages. Such court orders are however conditional upon the presumption that the complaint would have succeeded. As already said, lodging of a complaint with a superior administration authority does not generally have staying effect. Therefore, it must be assumed that failure to complain will be immaterial when the damage was done before the aggrieved party could have the decision altered or cancelled.

2.3. *Sanctions Against Administration Employees*

Apart from holding the administration liable in damages, it will be possible to apply various sanctions against administration employees.

2.3.1. In principle the courts of law can, upon a claim made, hold administration employees personally liable in damages to any aggrieved party for damage caused by the negligence, omissions, or errors of the employees. The employee's personal liability in damages to the aggrieved party is however in administrative practice of little importance. In administrative practice, matters of compensation are always brought against the authority concerned.

In principle the administration authority has recourse to its employees for the amount of compensation paid to the aggrieved party because of neglect, omission, or error on the part of employees. Such cases are almost nonexistent in administrative practice, and the courts have wide powers to reduce or cancel any claim made under recourse.

2.3.2. Where negligence is found in the official performance of an employee, it is further possible to hold him responsible under disciplinary and penal rules. In administrative practice, if disciplinary action is possible,

prosecution will normally not be resorted to. Where the issuance and enforcement of an executive decision is subsequently quashed by the courts of law, claims against employees for disciplinary or penal liability, or for liability in damages, play an insignificant role.

3. Judicial Review of Public Administration Enforcement of Decisions Relating to Environment and Refugees

3.1. Environmental Matters

3.1.1. Statutes on the legal aspects of environmental matters do not empower the administration to impose compulsory fines for the purpose of enforcing executive decisions. In this field, therefore, compulsory fines can be imposed only by court judgment, ordering the judgment debtor to comply, within a specified time limit, with the environment authority's decision.

In environmental matters, self-help will be particularly relevant where the citizen does not comply with a mandatory order requesting him to discontinue an unlawful activity, as for example the unlawful discharge of waste water.

3.1.2. A number of statutes dealing with the environment provide that the administration authority concerned can implement a remedial action at the expense of the party concerned, always provided that (i) a court judgment ordering the correction of an unlawful situation is not complied with in time, and (ii) it is deemed that imposition of compulsory fines does not lead to compliance with the court order. Thus, enforcement by the administration of its decision in these cases presupposes an initial trial by the courts of the executive decision. If the courts find the executive decision to be void, the authority concerned cannot enforce the decision.

Where the courts find the decision to be valid, it is a further condition for implementation of self-help that imposition of compulsory fines cannot be assumed to induce the party concerned to comply with the judgment. It is the administration authority that forms its own opinion on whether compulsory fines have the desired effect, and also that decides the point in time when its remedial self-help action may be implemented. However, the courts may réexamine whether the administration in its exercise of discretion has set aside essential doctrines of law, such as the doctrine of equality before the law, or has exceeded the normally wide scope within which its discretionary powers may be exercised.

3.1.3. A few statutes on environmental matters provide that an administration authority, without court proceedings, may implement a remedial action at the expense of the party concerned if a mandatory or prohibitory order is not complied with within the time fixed. This applies to mandatory orders requesting remedial action and to prohibitory orders requesting unlawful operation to be discontinued, including orders for removal of buildings etc., which under the general statutory provisions on protection of the environment are addressed to enterprises where pollution has been established. However, in these cases the general power to exercise self-help will apply only when the executive decision is final and conclusive, as in such matters lodging of a complaint with a superior administration authority has staying effect, save where the object of the decision would be frustrated, as for instance in cases of pollution injurious to health.

3.1.4. As mentioned in para. 1.3.3 above, the provisions on self-help referred to do not themselves authorise the use of physical force. If the administration is met with any obstruction, the use of physical force is not available to the administration. However, the police has a statutory power to assist in enforcing the already mentioned mandatory or prohibitory anti-pollution orders if the risk of pollution is severe. If this is not the case, the administration will be obliged to lay an information with the police asking for penal sanctions and imposition of compulsory fines, and possibly use of physical force, to put an end to the continued violation of the law by the party concerned.

3.1.5. If an environmental authority has prohibited operation of an enterprise because of pollution and with the assistance of the police under requisite statutory powers has removed the buildings belonging to the enterprise, and in subsequent court proceedings the court has quashed the executive decision, the owner of the enterprise will generally be entitled to claim recovery from the authority of his financial loss. The owner may also claim damages if the court finds that the authority ought to have applied a less radical means of enforcement, such as laying an information with the police claiming penal sanction and compulsory fines.

3.2. *Refugee Matters*

Under Danish law a refugee seeking asylum is legally entitled to asylum either if he falls within the provisions of the Geneva Convention Relating to the Status of Refugees, 28 July 1951, or if for reasons similar to

those given in that Convention or for other material reasons he cannot be ordered to return to his country of origin.

On the other hand, if the applicant for asylum was denied entry at the international boundary, for example because of lack of passport or visa, or if he was expelled because of illegal entry, he cannot as of right stay on in Denmark while his matter is pending. However, the applicant for asylum must never be deported to a country where he will risk persecution for the reasons set out in Article 1A of the said Convention on Refugees or in cases where the applicant for asylum is not protected against further deportation to such country.

Where the Directorate for Aliens (Direktoratet for Udlændinge), being the First Instance in asylum matters, has decided that the applicant shall be denied entry or be expelled, the application for asylum will not be considered until the person concerned has left Denmark. If he does not leave Denmark of his own free will, the Directorate may request that the police assist in enforcing the decision.

Appeal from a decision that denies entry or orders expulsion lies to the Danish Ministry of Justice. Such appeal has no staying effect.

It is assumed that the decisions made by the Refugees Board cannot be brought before the courts. This is because the Refugees Board is a specialist body, independent of the administration, and with procedural rules much like those of the courts. Thus, Refugees Board hearings are always presided over by a legally qualified judge, and the hearings are subject to several procedural guarantees known from the ordinary administration of justice by the courts, such as availability of legal aid, access to public administration files, and application of the adversary system and of oral pleadings.

If the Refugees Board decides that a person applying for asylum cannot be granted permission to stay in Denmark, this decision may if necessary be enforced with the assistance of the police.

4. Conclusion

Danish statutes contain several provisions on the right of administration authorities to enforce their decisions by means of self-help, possibly with assistance of the police. However, this remedy is not often used in administrative practice. In fact, legal disputes between the administration and private individuals on the enforcement of executive decisions are rarely brought before the Danish courts of law.

Presumably, one weighty reason for this is that to a great extent the Danes comply with the decisions made by the administration authorities. Also, Danish administration traditionally feels that direct use of force is tantamount to substantial interference in the private spheres of individuals and enterprises, and therefore self-restraint is shown in the direct use of power. Further, it is probably not insignificant that compulsory enforcement is normally left to the public prosecutor and the courts and that therefore it is an atypical situation for an administration authority to have to join in the enforcement of a decision.

Moreover, you can hardly rule out the possibility that uncertainty in weighing reasonable and necessary measures of enforcement against the risk of subsequent judicial review of the legality of measures taken and of an award of damages against the public authorities, may at times be a causative factor when an authority decides to refrain from enforcing its decision without a court order.

In evaluating the practical significance of judicial review of enforcement by the public administration of its decisions, there may be good reason to note that instead of taking a matter to court many Danes elect to complain to the Folketing Ombudsman for Administration. Disputes under administrative law often arise in matters that cannot or can only with difficulty bear a costly and time-consuming court action but are well suited for the cost-free and less time-consuming consideration offered by the Ombudsman office. The Ombudsman may — like the courts — look into whether an executive decision and its enforcement are in accordance with statutory provisions and unwritten legal doctrines, as for example the doctrine of proportionality. Contrary to what applies in court procedure, the Ombudsman cannot make a binding decision but may solely give his opinion on the matter at issue and may possibly express his criticism. In Danish administrative practice the authorities are very attentive to any criticism made by the Ombudsman and to any suggestion made by him to re-consider a matter.

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