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La CEDU sulla condanna di un cittadino danese per violazione del divieto di ingresso in Siria (CEDU, sez. II, sent. 18 ottobre 2022, ric. n. 60785/19)

La Corte Edu si pronuncia sul caso riguardante la condanna di un cittadino danese per la violazione del divieto di ingresso e soggiorno, senza autorizzazione, in una zona della Siria (il distretto di al-Raqqa) interessata da un conflitto armato in cui era parte una organizzazione terroristica. Tale limitazione imposta dallo Stato danese per motivi di sicurezza e per garantire che i propri cittadini non prendessero parte al conflitto armato, era stata revocata al momento della decisione della causa a seguito del mutamento della situazione in tale zona.

La Corte ha convenuto con i giudici nazionali che le azioni del ricorrente dovessero essere giudicate sulla base del diritto penale vigente al momento del reato e che la sua condanna fosse conforme alla legge applicabile all'epoca dei fatti, legge che definisce chiaramente il reato *de quo*, soddisfacendo i requisiti di accessibilità e prevedibilità, non essendo invocabile il principio della retroattività della norma penale più favorevole, in quanto il successivo venire meno del divieto derivava unicamente da circostanze estrinseche irrilevanti ai fini della questione della colpevolezza.

I Giudici di Strasburgo hanno, peraltro, sottolineato che quel divieto non era assoluto, essendo data al ricorrente la libertà di lasciare la Danimarca ed entrare in Siria, ma non in quella ristretta zona riservata - salvo la rappresentazione di motivi idonei ad ottenere una autorizzazione speciale – in ragione del conflitto armato ivi in corso e che imponendo tale limitazione le autorità nazionali avevano opportunamente bilanciato i diritti del ricorrente con i bisogni della comunità nel suo insieme.

Nessuna violazione, pertanto, dell'art.7 (*nulla poena sine lege*) e dell'art.2 Protocollo n.4 (libertà di movimento).

***

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

SECOND SECTION

CASE OF XXXXX v. DENMARK

(Application no. 60785/19)

JUDGMENT
STRASBOURG
18 October 2022

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

In the case of XXXXX v. Denmark,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:
Carlo Ranzoni, *President*,
Jon Fridrik Kjølbro,
Egidijus Kūris,
Branko Lubarda,
Gilberto Felici,
Saadet Yüksel,
Diana Sârcu, *judges*,
and Hasan Bakırcı, *Section Registrar*,

Having regard to:

the application (no. 60785/19) 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 Tommy XXXXX ("the applicant"), on 15 November 2019;

the decision to give notice to the Danish Government ("the Government") of the complaints under Article 7 of the Convention and Article 2 of Protocol 4 to the Convention, and to declare the remainder of the application inadmissible;

the parties' observations;

Having deliberated in private on 27 September 2022,

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

INTRODUCTION

1. The application concerned the applicant's conviction under section 114j of the Penal Code, read with Executive Order no. 1200 of 28 September 2016 Prohibiting the Entry into or Stay in Certain Conflict Zones (hereinafter "the Executive Order" or "the 2016 Executive Order"), for having entered and taken up residence in the al-Raqqa district in the Raqqa province of Syria without permission from the police and without any legitimate purpose. The applicant was sentenced to imprisonment for six months.

2. While in Syria, he had engaged in armed combat against the terrorist organisation Islamic State ("IS") for the Kurdish People's Defence Units movement ("the YPG") on several occasions.

3. Before the Court the applicant complained that his conviction and sentence had been in breach of Article 7 of the Convention and of Article 2 of Protocol No. 4 to the Convention.

THE FACTS

4. The applicant was born in 1978 and lives in Aarhus. He had been granted legal aid. He was represented by Mr Bjørn Elmquist, a lawyer practising in Copenhagen.

5. The Government were represented by their Agent, Mr Michael Braad, from the Ministry of Foreign Affairs, and their co-Agent, Ms Nina Holst-Christensen, from the Ministry of Justice.

6. The facts of the case may be summarised as follows.

7. In March 2017 the applicant gave various interviews to an online newspaper and other media, stating amongst other things that he had been on the front line in the village of Tal Saman about 30 km north of Raqqa one morning in early January 2017. Believing that the village was the same as Tal Elsamen, which is located in the al-Raqqa District in the Raqqa Province of Syria, the police initiated an investigation in respect of the applicant.

8. On 1 February 2019 the applicant was charged with breaching section 114j(1), read with section 114j(3), of the Penal Code and section 1(1)(i) of Executive Order No. 1200 of 28 September 2016 Prohibiting the Entry into and Stay in Certain Conflict Zones (hereinafter "the Executive Order" or "the 2016 Executive Order"), in that during the period from about 3 November 2016 to about 17 March 2017 he had stayed in the town of Ayn Issa (also spelled Ein Issa) in Syria without permission from the police or a meritorious purpose. He was accused of travelling on up to twenty-five occasions from that location to the al-Raqqa District in the Raqqa Province and staying there, including around the village of Tal Elsamen, and of taking part in the armed conflict against IS on several occasions, on the side of the YPG.

9. Before the District Court (*Retten i Aarhus*) the applicant pleaded not guilty. He stated that he had left Denmark on 22 August 2016 and had entered Syria on 30 September 2016. He had left Iraq on 7 April 2017 and had entered Denmark again on 8 April 2017. The purpose of his journey was to support the revolution as he had considered the Kurdish area to be an autonomous zone. He had established contact with the YPG, which had helped him reach Syria, where he had wanted to take part in battles fought by the YPG. On his arrival in Syria, he had been taken to a training camp, where he had been given classes and training in matters such as handling weapons. At his own request, he had become part of a unit with heavy weapons. The unit had been stationed in the town of Ayn Issa, the front line being one or two kilometres outside the town. Two days after his arrival, an operation had been launched against Raqqa, and the front line had moved towards Raqqa. The applicant had followed the front line and had taken a few detours back to Ayn Issa. The applicant stated that he could easily have passed through the district border twenty-five times. He had been shot at seven or eight times during his stay, and on one single occasion he had returned fire. The applicant also stated that he had not been aware of the existence of section 114j of the Penal Code. The thought that his actions might be criminal had occurred to him, but he had not examined it any further, and moreover it had not had any impact on his decision.

10. On 4 June 2018 the District Court found the applicant guilty as charged and sentenced him to six months' imprisonment.

11. On appeal to the High Court (*Vestre Landsret*), the applicant testified in addition that he had taken a photograph of a map drawn on a wall by the leader of the applicant's combat unit as an attempt to explain where they were in Tal Elsamen, in comparison to where IS was.

12. On 12 November 2018 the High Court upheld the District Court judgment. The High Court found it established that the applicant had intentionally entered and remained in the prohibited

zone of the al-Raqqa District in the Raqqa Province of Syria without permission from the police and without any legitimate purpose. The Executive Order included a map, and since it was apparent from both the name of the area and the map which areas were off limits in terms of entry and stay, the High Court found that the prohibition was sufficiently clearly described. The High Court also found that the restriction on the applicant's freedom of movement did not constitute a violation of his rights under Article 2 of Protocol No. 4 to the Convention.

13. Having obtained leave to appeal, the applicant brought the case before the Supreme Court (*Højesteret*), where the issues to be determined were whether the acts were punishable under section 114j of the Penal Code; whether the prohibition in section 114j was described in a manner that was sufficiently clear for him to be sentenced and was in compliance with Article 7 of the Convention; whether his conviction was contrary to Article 2 of Protocol No. 4 to the Convention; and whether he should be acquitted because permission was no longer required to enter or stay in the area in question. It was not disputed that the applicant's acts were subject to Danish criminal jurisdiction.

14. By a judgment of 27 August 2019, the Supreme Court found against the applicant. It was satisfied that the applicant's entry into and stay in the al-Raqqa District fell within the scope of the wording of section 114j(1), read with section 114j(3), of the Penal Code, read with section 1(1)(i) of the Executive Order. Situations like the one at hand, where the relevant person had fought against a terrorist organisation, also fell within the scope of the provisions in question. That finding followed from the wording of and the preparatory notes on section 114j of the Penal Code, including the meritorious purposes set out under section 114j(4).

15. The Supreme Court considered that the applicant's conviction did not contravene Article 7 of the Convention since the provisions were accessible and foreseeable and section 1(1)(i) of the Executive Order set out clearly that it was unlawful to enter and stay in the al-Raqqa District without permission.

16. Moreover, in respect of Article 2 of Protocol No. 4 to the Convention, the Supreme Court found that the scheme set out in section 114j of the Penal Code was justified by significant considerations of general importance, that is, national security, public safety and the prevention of crime, and that the prohibition on entry into and stay in the al-Raqqa District did not go beyond what was necessary to achieve the intended aim. The Supreme Court emphasised the area was of limited size, and that it would have been possible for the applicant to obtain permission to travel to and stay in the area if his visit had served a meritorious purpose under section 114j(4) of the Penal Code.

17. The Supreme Court considered whether the applicant could be acquitted by virtue of section 3(1) of the Penal Code because the requirement for permission to enter or stay in the al-Raqqa District had subsequently been repealed by Executive Order no. 708 of 6 July 2019 ("the 2019 Executive Order"). The Supreme Court observed in this context that the new statutory regulation had not revised the scope of the sanctions set out in section 114j of the Penal Code, and that the 2019 Executive Order did not redefine the culpability of persons who breached the prohibition on entry into and stay in the prohibited zones listed in the 2016 Executive Order without permission. On that basis, and with reference to an information letter of 8 July 2019 from the Minister of Justice to the Danish Parliament (*Folketinget*) and to a press release issued on

26 April 2019, the Supreme Court found that the repeal of the 2016 Executive Order was attributable to extrinsic circumstances resulting from specific changes in the situation in Syria. Those changes had occurred after the time of the offence and were therefore irrelevant to the issue of guilt, and the applicant's actions had to be adjudicated on the basis of the criminal law applicable at the time of the offence, in accordance with the second sentence of section 3(1) of the Penal Code.

18. The Supreme Court had regard to the case-law of the Court and observed in that connection that neither Article 7 of the Convention nor the third sentence of Article 49 § 1 of the Charter of Fundamental Rights of the European Union, were the Charter to apply to the case (see Article 51 § 1), could be deemed to prevent the punishment of the applicant for breaching section 114j of the Penal Code.

19. The Supreme Court upheld the applicant's sentence of six months' imprisonment and refused to consider it a mitigating circumstance that the applicant had taken part in the armed conflict against IS during his stays in the al-Raqqa District. Moreover, it found that punishment of the applicant would not be contrary to Article 7 of Convention

20. A minority of two judges found that the applicant should be given a suspended sentence of imprisonment for a term of three months. They found that it could be inferred from the preparatory notes that the insertion of section 114j in the Penal Code did not serve the independent purpose of introducing sanctions for participating in armed conflicts in zones subject to a prohibition on entry and stay when such participation involved activities against a terrorist organisation, but that the provision was necessary for evidential reasons for the purpose of combating terrorism. The minority referred to the fact that the applicant had only been sentenced for breaching the prohibition on entry into and stay in the al-Raqqa District, where he had taken part in the YPG's armed conflict against IS, and that according to the information available, the YPG, which was not a terrorist organisation, played a crucial role in the military efforts to combat IS.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. THE PENAL CODE

21. The relevant provisions of the Penal Code, as applicable at the time of the offence, read as follows:

Section 3

"(1) If the criminal legislation in force at the time of the adjudication of a criminal act differs from the legislation in force when the act was committed, the issues of criminality and penalty must be decided under the most recent statute, provided always that the decision may not result in a more severe sentence than the sentence imposable under the former statute. If the statute no longer applies on account of extrinsic circumstances irrelevant to the issue of guilt, the criminal act must be adjudicated under the former statute."

Section 114e

"Imprisonment for a term not exceeding six years shall be imposed on any person who otherwise facilitates the activities of a person, a group or an association committing or intending to commit an act falling within section 114, 114a, 114b, 114c or 114d [those provisions criminalise terrorism (section 114), offences considered terrorist acts under the Council of Europe Convention on the Prevention of Terrorism which do not already fall within section 114 (section 114a), the financing of terrorism (section 114b), recruitment for terrorism (section 114c) and instruction in terrorism (section 114d)]. If the relevant person is a member of the armed forces, the sentence may be increased to imprisonment for a term not exceeding ten years, or in particularly aggravating circumstances to imprisonment for a term not exceeding sixteen years. Situations in which the relevant person has participated in combat shall be considered particularly aggravating circumstances."

Section 114j

"(1) Any person who is a Danish national or habitually resident within the Danish State and who enters or stays in an area as referred to in subsection (3) without permission shall be liable to imprisonment for a term not exceeding six years, but see subsection (2).

(2) Subsection (1) shall not apply to any entry and stay for the purpose of exercising a public function or office with a Danish, foreign or international organisation.

(3) Following negotiation with the Minister for Foreign Affairs and the Minister of Defence, the Minister of Justice may lay down rules determining that an area in which a group or an association as referred to in section 114e is a party to an armed conflict will fall within subsection (1). By a parliamentary resolution, Parliament may repeal rules laid down by the Minister of Justice under the first sentence of this subsection.

(4) The Minister of Justice or the person so authorised by the Minister may permit a person, upon application, to enter or stay in an area as referred to in subsection (1) if the entry or stay serves a meritorious purpose. A permission can comprise a group of persons involved in a particular activity or organisation, etc.

(5) The Minister of Justice may lay down detailed rules on the submission of applications under subsection (4), including the time-limit for applications. The Minister of Justice may specify in that connection that decisions made pursuant to subsection (4) cannot be brought before a higher administrative authority."

22. Section 114j was inserted into the Penal Code by Act no. 642 of 8 June 2016. The following appears from the general notes on the Bill (see Bill no. L 187 of 4 May 2016 as promulgated on page 2 of Supplement A to the Official Report on Parliamentary Proceedings (*Folketingstidende*) for 2015-16 on Bill no. 187 as introduced):

"1. Introduction

The purpose of the Bill is mainly to strengthen the safeguards of the criminal law for preventing participation in armed conflicts abroad for terrorist groups by the introduction of more severe sentences and a new power to prohibit the entry into and stay in certain conflict zones without prior permission. Moreover, it is proposed to insert a new criminal law provision on the receipt of financial support from a terrorist organisation.

It is the assessment of the Danish Security and Intelligence Service (*Politiets Efterretningstjeneste*) that persons returning to Denmark after having participated in combat operations in Syria and Iraq constitute a particular terrorist threat to Denmark. The Government therefore wants to tighten its control of foreign fighters who consider leaving Denmark to join armed conflicts like those in Syria and Iraq. The general purpose of the Bill is to increase the consequences for those going abroad and to strengthen the powers of the authorities to prosecute returning foreign fighters.

The Bill contains the following three main elements:

...

Secondly, it is proposed to introduce a power to impose, by an administrative decision, a ban prohibiting Danish nationals and foreigners resident in Denmark from entering and staying in an area in which a terrorist organisation is a party to an armed conflict unless they have permission from the Danish authorities. However, it is proposed that a person exercising a public function or office with a Danish, foreign or international organisation will be able to enter and stay in such area without prior permission. Any entry and stay for other purposes will require prior permission, which can be given upon application if the entry or stay serves a meritorious purpose. There will be a power to grant individual permission to particular persons and collective permission to a group of persons defined by their affiliation with a particular enterprise, organisation or the like. It is proposed that breaches of such prohibitions on entry and stay will be punishable by a fine or imprisonment for a term not exceeding six years.

The purpose of this proposal is to make it easier to punish individuals who enter or stay in a conflict zone to take part in an armed conflict, siding with a terrorist organisation or a similar party. As is the case today, it will not be necessary to prove that the relevant persons have violated the Penal Code provisions on terrorism or the provision on treason by enrolling with hostile armed forces. It will be sufficient that it can be proved that the relevant person entered or stayed in the designated zone without permission."

23. The following appears in the specific notes on section 114j of the Penal Code (see pages 23 et seq. of Supplement A to the Official Report on Parliamentary Proceedings for 2015-16 on Bill no. 187 as introduced):

"... It is proposed that the minimum and maximum penalties for breaching the prohibition on entry and stay will be a fine or imprisonment for a term not exceeding six years.

It will be a breach of the prohibition whenever a person enters or stays without permission for a main purpose other than that specified in the permission or after expiry of the permission.

Only intentional violations of the prohibition are punishable offences: see section 19 of the Penal Code. However, ignorance of the criminal law provision does not preclude intent. For this reason, no intent is required to be found guilty of entering and staying in a zone subject to the requirement of prior permission. On the other hand, intent is required to be found guilty of entering or staying in a zone that has been so designated. No one can therefore be sentenced for unintentionally entering or staying in the zone. ...

The sanction for breaching the prohibition on entry and stay would normally be a short prison sentence measured in months where it was a first offence. If there were mitigating

circumstances, including when a person presented proof of a meritorious purpose for his or her entry or stay, it would normally be possible to impose a sanction in the form of a fine.

Sentences are still to be determined by the courts based on a specific assessment in the individual case taking into account all circumstances of the case, and the level of the individual sanction can therefore be increased or decreased if there are aggravating or mitigating circumstances: see in this respect the general rules in Part 10 of the Penal Code on sentencing.

It is proposed by subsection (2) that no prohibition on entry and stay as mentioned in subsection (1) will apply to entry or stay for the purpose of exercising a public function or office with a Danish, foreign or international organisation. This exemption also extends to any entry and stay while serving in Danish or foreign governmental armed forces or in international armed forces.

The situations mentioned in subsection (2) fall entirely outside the scope of the prohibition on entry and stay mentioned in subsection (1). Accordingly, no permission is required in order to enter and stay for the purpose of exercising a public function or office.

A prohibition on entry and stay under subsection (1) applies to the zones listed in subsection (3).

According to the proposed wording of subsection (3), the Minister of Justice has the authority, following negotiation with the Minister of Foreign Affairs and the Minister of Defence, to lay down by executive order the zones that will be subject to a prohibition on entry and stay under subsection (1). The provision is to be understood in the sense that it is only possible to prohibit entry into and stay in zones outside the territory of the Danish State.

An area can be included in the list of zones subject to the prohibition on entry and stay if a group or an association committing or intending to commit acts falling within section 114, 114a, 114b, 114c or 114d is a party to an armed conflict in the designated zone. The references to an armed conflict and a party to an armed conflict must be understood in accordance with international humanitarian law.

Where this condition has been met, the Government has wide discretionary powers to determine which zones are to be subject to a prohibition on entry and stay under the proposed subsection (1). When such a decision is made, regard must be had to security and to foreign and security policy, including relations with foreign powers and international institutions.

The Government is not obliged to determine that an area in which the relevant condition has been met must be subject to a prohibition on entry and stay.

...

It is proposed by the first sentence of subsection (4) that the Minister of Justice or the person so authorised by the Minister must permit a person, upon application, to enter and stay in an area subject to a prohibition under subsection (1) if the entry or stay serves a meritorious purpose.

...

Meritorious purposes are generally to be taken to mean purposes which are not related to the armed conflict and which are deemed to be reasonable activities despite the ongoing armed conflict. Any entry and stay to perform journalistic activities, offer humanitarian aid, visit close

family members or pursue existing business activities would normally serve meritorious purposes.

Any entry and stay to perform journalistic activities or offer humanitarian aid would normally also serve a meritorious purpose even when the journalistic activities or humanitarian aid are related to the armed conflict. The same applies to any entry and stay for the purposes of studies or research related to the armed conflict.

No entry and stay to undertake business activities relating to supplies to the warring parties or to visit a family member currently participating in the armed conflict would serve a meritorious purpose. However, entry and stay to visit a family member who has previously taken part or is expected subsequently to take in the armed conflict, but is not currently participating in the armed conflict, would serve a meritorious purpose, regardless of whether the family member is on leave or the like or has been hospitalised due to injuries.

No entry and stay to take part in the armed conflict or to support either party to the armed conflict would serve a meritorious purpose under subsection (4)."

24. As regards compatibility with human rights, the following appears in the Bill (see pages 16 et seq. of Supplement A to the Official Report on Parliamentary Proceedings for 2015-16 on Bill No. 187 as introduced):

"6. Compatibility with human rights

Depending on the circumstances, the scheme proposed in section 114j, under which any Danish national or person habitually resident in Denmark who enters or stays without permission in certain zones defined by the Minister of Justice can be punished with imprisonment for a term not exceeding six years, may interfere with rights guaranteed by the Convention.

The main rights at stake are those granted by Article 2 of Protocol No. 4 to the Convention on the liberty of movement and freedom to choose one's residence, Article 8 of the Convention on the right to respect for private and family life and Article 10 of the Convention on the freedom of expression.

If discretionary powers have been granted to the authorities by the legislation of a State party, whether in full or in part, the European Court of Human Rights would normally not perform an abstract review of whether the legislation complies with the Convention. The decisive factor is how the legislation is applied in practice.

It follows from Article 2 of Protocol No. 4 to the Convention that everyone lawfully resident within the territory of a State has, within that territory, the right to liberty of movement and freedom to choose his residence and that everyone is free to leave any country, including his own. It follows from the case-law of the European Court of Human Rights that the provision also creates a right to go to a country of one's own choice provided that one is allowed entry, see, *inter alia*, judgment of 20 February 1995, *Peltonen v. Finland*.

...

However, the protection afforded by those provisions is not absolute. It is possible to interfere with the above-mentioned rights if the interference is prescribed by law and is necessary in a democratic society (that is, the interference meets the requirement of proportionality) and serves

a specific meritorious purpose, including national security, public safety and the prevention of crime: see Article 2 § 3 of Protocol No. 4 to the Convention and Article 8 § 2 and Article 10 § 2 of the Convention.

The proposed scheme prohibiting such entry and stay is inserted into the Penal Code, and, as mentioned in clause 1 above, the purpose of the scheme is to strengthen the safeguards of the criminal law for preventing individuals from taking part in armed conflicts abroad, by increasing the consequences for those going abroad and strengthening the powers of the authorities to prosecute returning foreign fighters. The proposed prohibition on entry and stay is thus intended to make it easier to punish individuals who enter or stay in a conflict zone in order to take part in an armed conflict, siding with a terrorist organisation or a similar party, as it will be sufficient to prove that the relevant person entered or stayed in a designated zone without permission.

As to the background to the scheme, it appears from clause 1 above that it is the assessment of the Danish Security and Intelligence Service that persons returning to Denmark after having participated in combat operations in Syria or Iraq constitute a particular terrorist threat to Denmark. The Government therefore wants to tighten its control of foreign fighters who consider leaving Denmark to join armed conflicts like the ones in Syria and Iraq.

The Minister of Justice has the authority, following negotiation with the Minister of Foreign Affairs and the Minister of Defence, to lay down rules determining which zones will be subject to such prohibitions on entry and stay.

An area can be designated as a conflict zone subject to the prohibition of entry and stay if a group or association committing or intending to commit acts falling within section 114, 114a, 114b, 114c or 114d of the Penal Code is a party to an armed conflict in the designated zone. The proposed provision thus restricts what areas can be designated as zones subject to the prohibition of entry and stay.

When the above condition has been met, the Government has wide discretionary powers to determine the zones subject to such prohibition. In this connection, security issues, relations with foreign powers and international institutions and similar factors may be taken into account.

Prohibited zones will be listed in an executive order, which makes information on the geographical scope of the prohibition on entry and stay available to each individual citizen.

Any decision allowing a person to enter and stay in a zone subject to the prohibition of entry and stay is made based on an individual and specific assessment.

...

Permission must be granted if the entry or stay serves a meritorious purpose. According to the explanatory notes to the Bill, meritorious purposes are generally to be taken to mean purposes which are not related to the armed conflict and which are deemed to be reasonable activities despite the ongoing armed conflict. Any entry and stay to perform journalistic activities, offer humanitarian aid, visit close family members or pursue existing business activities would normally constitute meritorious purposes. It also appears that journalistic or humanitarian activities and studies or research related to the armed conflict would constitute meritorious purposes.

It should be pointed out that the proposed provision explicitly states that the prohibition on entry and stay does not apply to entry and stay for the purpose of exercising a public function or office with a Danish, foreign or international organisation. Therefore, it is not necessary to apply for prior permission to enter or stay for such purposes.

...

The proposed scheme is thus justified by significant considerations of general importance, that is, national security, public safety and the prevention of crime, and does not go beyond what is necessary to achieve the intended aim according to the Ministry of Justice.

Against this background, the Ministry of Justice finds that the proposed scheme is not contrary to the European Convention on Human Rights."

II. EXECUTIVE ORDER No. 1200 OF 28 SEPTEMBER 2016 PROHIBITING THE ENTRY INTO OR STAY IN CERTAIN CONFLICT ZONES

25. The relevant provisions of the 2016 Executive Order read as follows:

Section 1

"(1) Permission is required under the rules of this Executive Order (see section 114j(3) of the Penal Code) to enter or stay in the following areas (see also attachment 1 [map of the area]):-

(i) the al-Bab District in the Aleppo Province, the al-Thawrah District and the al-Raqqa District in the Raqqa Province and the Deir al-Zour Province of Syria;

(ii) the Mosul District in the Nineveh Province of Iraq.

(2) Danish nationals and persons habitually resident within the Danish State must obtain permission unless the purpose of their entry or stay is to exercise a public function or office with a Danish, foreign or international organisation."

III. EXECUTIVE ORDER No. 708 OF 6 JULY 2019 PROHIBITING THE ENTRY INTO AND STAY IN CERTAIN CONFLICT ZONES

26. The relevant provisions of the 2019 Executive Order read as follows:

Section 1

"(1) Permission is required under the rules of this Executive Order (see section 114j(3) of the Penal Code) to enter or stay in the following areas (see also Attachment 1):-

the Dayr al-Zawr Province of Syria (see also item 2 of Attachment 1);

the Idlib Province of Syria (see also item 3 of Attachment 1).

(2) Danish nationals and persons habitually resident within the Danish State must obtain permission unless the purpose of their entry or stay is to exercise a public function or office with a Danish, foreign or international organisation."

27. The press release of 26 April 2019 from the Minister of Justice stated as follows:

"The situation in Syria and Iraq has changed since the previous Government introduced a prohibition on entry into and stay in certain parts of the countries. The terrorist organisation

ISIL no longer controls any territory in Syria and Iraq. The number of western foreign fighters in those territories has also changed. For those reasons, the Government now wants to repeal the prohibition on entry into and stay in Iraq and update the list of areas designated as prohibited zones in Syria.

... Persons who have already stayed illegally in the areas previously designated as prohibited zones can still be punished. ...

Former prohibited zones that will no longer be subject to prohibition of entry and stay:

... the al-Raqqa District in the Raqqa Province of Syria. ..."

28. In the information letter of 8 July 2019, the Minister of Justice wrote the following to the Danish Parliament:

"The situation in Syria and Iraq has developed since the [2016] Executive Order was made, so it is expedient to update the geographical scope of its application. For this reason, the Ministry of Justice has drafted, in consultation with the Ministry of Defence and the Ministry of Foreign Affairs, the appended proposal for an [2019] executive order with an updated list of areas designated as zones subject to the prohibition of entry and stay; see section 1 of the proposed executive order.

As a consequence of the update:

... the al-Raqqa District in the Raqqa Province of Syria ... is removed from the list of zones subject to the prohibition.

I expect to issue the executive order within a few days, and it will come into force two days later. It is observed as a matter of form that persons staying illegally in an area designated as a zone falling within the scope of the current Executive Order, but not included in the scope of the new executive order, can still be punished for staying illegally in the zone that was previously subject to a prohibition."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

29. The applicant complained that his conviction and sentence had been in breach of Article 7 of the Convention, which reads as follows:

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

A. Admissibility

30. The Government submitted that the case should be declared inadmissible as manifestly ill-founded.

31. The applicant disagreed.

32. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

33. The applicant maintained, among other things, that the law lacked foreseeability. Section 114j of the Penal Code did not apply in a situation like the present one, where he had joined a foreign allied organisation, namely the YPG, and fought against a terrorist organisation. Moreover, the Executive Order and the map attached was too vague and lacking in detail so that it was impossible to ascertain which zones were subject to the prohibition on entry and stay.

34. Furthermore, the 2019 Executive Order, under which permission was no longer required to enter and stay in the al-Raqqa district in Syria, should have been applied in his case, leading to his acquittal.

35. The Government submitted that the applicant's conviction had had a sufficient legal basis in domestic law, which had been accessible and foreseeable as to its effects. They referred to the wording of section 114j(1) and (3) of the Penal Code and section 1(1)(i) of the 2016 Executive Order, its illustrative map, the preparatory notes, and the findings of the domestic courts.

36. Moreover, they emphasised that the al-Raqqa district had no longer been included in the 2019 Executive Order because IS no longer controlled any area in Syria. However, there had been no redefinition of the culpability of persons who had already violated the prohibition on entry into and stay in the prohibited zones listed. The repeal of the Executive Order was thus relevant only to extrinsic circumstances that had occurred after the time of the offence.

2. The Court's assessment

(a) Whether the applicant's conviction was in accordance with the law

37. The Court has pointed out that when speaking of "law" ("*droit*") Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability (see *Del Río Prada v. Spain* [GC], no. 42750/09, § 91, ECHR 2013, and *Vasiliauskas v. Lithuania* [GC], no. 35343/05, § 154, ECHR 2015). Those qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries (see *Del Río Prada*, cited above, § 91; *Jidic v. Romania*, no. 45776/16, § 79, 18 February 2020; and *Advisory opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture* [GC], request no. P16-2021-001, Armenian Court of Cassation, § 67, 26 April 2022 ("*Advisory opinion P16-2021-001*")).

38. It is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to

use general categorisations as opposed to exhaustive lists. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see *Kokkinakis v. Greece*, 25 May 1993, § 40, Series A no. 260-A; *Del Río Prada*, cited above, § 92; and *Advisory opinion* P16-2021-001, cited above, § 67). When the legislative technique of categorisation is used, there will often be grey areas at the fringes of the definition. This penumbra of doubt in relation to borderline facts does not in itself make a provision incompatible with Article 7, provided that it proves to be sufficiently clear in the large majority of cases (see *Cantoni v. France*, 15 November 1996, § 32, *Reports of Judgments and Decisions* 1996-V).

39. The Court reiterates its settled case-law to the effect that it is primarily for the national authorities to interpret and apply domestic law (see, *inter alia*, *Del Río Prada*, cited above, § 105 and *Jorgic v. Germany*, no. 74613/01, § 102, ECHR 2007-III.) However, when a Convention right itself, Article 7 in the present case, requires that there was a legal basis for a conviction and sentence, the Court's powers of review encompass an examination of whether the result reached by the domestic courts was compatible with Article 7 of the Convention, even if there were differences between the legal approach and reasoning of this Court and the relevant domestic decisions. To accord a lesser power of review to this Court would render Article 7 devoid of its purpose (see, for example, *Vasiliauskas v. Lithuania*, cited above, §§ 160-161).

40. The Court notes that all the judicial bodies, namely the District Court, the High Court and the Supreme Court, found that the law was sufficiently clearly set out in section 114j(1), read with section 114j(3), of the Penal Code and section 1(1)(i) of the 2016 Executive Order.

41. They examined the wording of section 114j and the preparatory notes, according to which the overall purpose of section 114j of the Penal Code was to make it a criminal offence to enter or stay in an area with an armed conflict to which a group or an association as mentioned in section 114e was a party. The purpose of the entry or stay was therefore irrelevant. It was therefore also the intention to make it a criminal offence where the relevant person had fought against a terrorist organisation. This was clearly expressed in the notes on the scheme of permissions set out in section 114j(4), which said that no entry and stay to take part in an armed conflict or to support **either party** (emphasis added) to the armed conflict would serve a meritorious purpose that could justify the grant of permission to enter and stay in a prohibited zone (see paragraph 23 above).

42. They also found that it was sufficiently clear from section 1(1)(i) of the 2016 Executive Order, including the attached map, that it was unlawful to enter and stay in the al-Raqqa District without permission (see paragraphs 12 and 15 above).

43. Having regard to the above, the Court cannot find any grounds on which to criticise the domestic courts' finding in this respect (see paragraph 40 above). It is satisfied, having regard to the wording of section 114j and the preparatory notes, that the offence was clearly defined in the law and fulfilled the requirements notably of accessibility and foreseeability (see, for example, *Jorgic v. Germany*, cited above, § 100). It follows that there has been no violation of Article 7 regarding this complaint.

(b) Whether the applicant should have been acquitted because the 2019 Executive Order no longer included the al-Raqqa District

44. The Court reiterates that Article 7 § 1 of the Convention guarantees not only the principle of the non-retroactivity of the harsher criminal law, but also, implicitly, the principle of the retroactivity of the more lenient criminal law. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant (see *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 109, 17 September 2009; *Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law,* [GC], request no. P16-2019-001, Armenian Constitutional Court, § 81, 29 May 2020 ("*Advisory opinion P16-2019-001*"); and *Jidic*, cited above, § 80). The principle of retrospective application of the more lenient criminal law also applies in the context of an amendment relating to the definition of the offence (see *Parmak and Bakır v. Turkey*, nos. 22429/07 and 25195/07, § 64, 3 December 2019, and *Advisory opinion P16-2019-001*, cited above, § 82).

45. It is not the Court's task to review *in abstracto* whether the alleged failure to retroactively apply the new criminal law is, *per se,* incompatible with Article 7 of the Convention. This matter must be assessed on a case-by-case basis, taking into consideration the specific circumstances of each case and, notably, whether the domestic courts have applied the law whose provisions are most favourable to the defendant (see *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, § 65, ECHR 2013, and *Jidic*, cited above, § 82). What is crucial is whether, following a concrete assessment of the specific acts, the application of one criminal law rather than the other has put the defendant at a disadvantage as concerns sentencing (see *Maktouf and Damjanović,* cited above, §§ 69-70, and *Jidic*, cited above, § 85).

46. Even though the principle of concretisation was developed in cases relating to an amendment of the relevant penalties, the Court considers that the same principle also applies to cases involving a comparison between the definition of the offence at the time of its commission and a subsequent amendment (see *Advisory opinion P16-2019-001*, cited above, § 90).

47. The Supreme Court examined whether, by virtue of section 3(1) of the Penal Code, the applicant should be acquitted, since under the 2019 Executive Order, which came into force on 11 July 2019, there was no longer any prohibition on entering or staying in the al-Raqqa District of Syria without permission. It followed from section 3(1) that where the criminal legislation in force at the time of the adjudication of a criminal act differed from the legislation in force when the act had been committed, the issue of criminality had to be decided under the most recent statute, provided that the decision did not result in a more severe sentence than the sentence imposable under the former statute. If the statute no longer applied as a result of extrinsic circumstances irrelevant to the issue of guilt, the criminal act had to be adjudicated under the former statute.

48. The Supreme Court noted that the Minister of Justice, in a press release and an information letter to the Danish Parliament, dated respectively April and July 2019 (see paragraphs 27 and 28 above), had stated that the situation in Syria had developed since the 2016 Executive Order had been made, so it had been expedient to update the geographical scope of application of the Order. The

terrorist organisation IS no longer controlled any territory in Syria, and the number of western foreign fighters there had also changed.

49. The Supreme Court also observed that the 2019 Executive Order did not revise the scope of the sanctions set out in section 114j of the Penal Code. Moreover, in the opinion of the Supreme Court the 2019 Executive Order did not redefine the culpability of persons who had violated the prohibition on entry into and stay in the prohibited zones listed in the 2016 Executive Order without permission. The repeal of the 2016 Executive Order was attributable only to extrinsic circumstances resulting from specific changes in the situation in Syria that had occurred after the time of the offence and were thus irrelevant to the issue of guilt.

50. In conclusion, the Supreme Court found that the applicant's actions had to be adjudicated on the basis of the criminal law applicable at the time of the offence (see the second sentence of section 3(1) of the Penal Code).

51. Moreover, having regard to the case-law of the Court, it found that punishment of the applicant would not be contrary to Article 7 of Convention.

52. The Court observes that the present case significantly differs from its previous case-law on the principle of the retroactivity of the more lenient criminal law. It recalls that it has found a violation in cases where the criminal law or the criminal procedure were amended (see, among others, *Scoppola* cited above and *Sinan Çetinkaya and Ağyar Çetinkaya v. Turkey*, no. 74536/10, 24 May 2022), or where the domestic courts subsequently exercised their judicial discretion in an expansive manner by adopting an interpretation that was inconsistent with both prevailing national jurisprudence and the essence of the offence as defined by the national law (see, for example, *Parmak and Bakır*, cited above). In the present case, however, the Penal Code and procedure remained unchanged. The amendment in the 2019 Executive Order only related to changed factual circumstances that had occurred after the time of the offence, resulting from specific changes in the situation in Syria. It was thus unrelated to the assessment of the criminal act committed in 2016/2017 (see paragraph 17 above).

53. In the light of the above considerations the Court sees no reason to call into question the Supreme Courts' finding that the applicant's actions had to be adjudicated on the basis of the criminal law applicable at the time of the offence, in accordance with the second sentence of section 3(1) of the Penal Code.

54. It follows that there has been no violation of Article 7 regarding this complaint.

II. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL No. 4 TO THE CONVENTION

55. The applicant also complained that his conviction breached Article 2 of Protocol No. 4 to the Convention, which reads as follows:

"1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national

security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society."

A. Admissibility

56. The Government submitted that the application should be declared inadmissible as manifestly ill-founded.

57. The applicant disagreed.

58. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

59. The applicant maintained that the restriction on his entry into and stay in the al-Raqqa District had not been in accordance with the law, or necessary in a democratic society. He emphasised in that connection that he had not been siding with a terrorist organisation or a similar party. On the contrary, he had wanted to contribute actively to the protection of democracy, including against terrorist attacks. In his view, foreign fighters who were against terrorists were not covered by section 114j of the Penal Code, and there were no substantial arguments for including them either.

60. The Government maintained that the interference had been prescribed by law and had pursued the legitimate aims of national security, public safety and prevention of crime. It was clear from the preparatory notes to section 114j that the purpose had been to make it easier to punish individuals who entered or stayed in a conflict zone in order to take part in armed conflict, siding with for example a terrorist organisation, as it would be sufficient to prove that the relevant person had entered or stayed in a designated zone without permission. It was not decisive which party to the armed conflict the relevant person had joined. Moreover, the interference had been necessary in a democratic society and proportionate to the aim pursued. They referred notably to the reasons advanced by the Supreme Court.

61. The Court reiterates that Article 2 of Protocol No. 4 guarantees that everyone shall be free to leave any country, including his own. The provision does not directly address restrictions on going to certain areas in other countries. Nevertheless, it implies the right to travel to any country of the person's choice to which he or she may be admitted (see, *inter alia*, *Baumann v. France*, no. 33592/96, § 61, ECHR 2001-V, and *Khlyustov v. Russia*, no. 28975/05, § 64, 11 July 2013).

62. In the present case the applicant was free to leave Denmark. However, in the context of preventing participation in armed conflicts abroad, under section 114j (1) read with section 114j (3) of the Penal Code, and section 1 (1) of the 2016 Executive Order, he was, as a Danish national, prohibited from entering and staying in the al-Raqqa district in Syria without permission by the Danish State. Proceeding on the assumption that such a restriction falls under Article 2 of Protocol No. 4, it must therefore be examined whether the interference was "in accordance with law", pursued one or more of the legitimate aims set out in Article 2 § 3 of Protocol No. 4 and was "necessary in a democratic society" to achieve such an aim (see *Nalbantski v. Bulgaria*, no. 30943/04,

§ 61, 10 February 2011; *Stamose v. Bulgaria*, no. 29713/05, § 30, ECHR 2012; *Kerimli v. Azerbaijan*, no. 3967/09, § 45, 16 July 2015; and *De Tommaso v. Italy* [GC], no. 43395/09, § 105, 23 February 2017).

63. In respect of lawfulness, the Court refers to its findings under Article 7 of the Convention (see paragraphs 40 to 44 above; see also, for example, *Baldassi and Others v. France*, nos. 15271/16 and 6 others, §§ 41 and 59, 11 June 2020).

64. Having regard to the preparatory notes to section 114j (see paragraphs 22 to 24 above) and the findings of the domestic courts, the Court is also convinced that the interference pursued the legitimate aims of national security, public safety and prevention of crime.

65. The Supreme Court carefully examined the case under Article 2 of Protocol No. 4 and, after carrying out the requisite balancing exercise in the light of the Convention principles, found that the restriction on the applicant's freedom of movement had been proportionate, notably since the al-Raqqa district was of a limited size and the applicant could have obtained permission to enter and stay there if he had had a meritorious purpose (see paragraph 16 above).

66. The Court considers that the quality of the judicial review of the disputed general measure and its application in the present case militates in favour of a wide margin of appreciation (see, *mutatis mutandis*, *Lings v. Denmark*, no. 15136/20, § 58, 12 April 2022).

67. In addition, the Court notes that the restriction only concerned areas in which a terrorist organisation was a party to an ongoing armed conflict. Moreover, the prohibition on entry and stay without permission was not absolute as persons performing a public function or office with a Danish, foreign or international organisation were explicitly exempted from the provision. Furthermore, the relevant zones were revised carefully on an ongoing basis, and the al-Raqqa district was therefore not included in the subsequent 2019 Executive Order. Lastly, the restriction served the purpose of ensuring that persons who were Danish nationals or habitually resident within the Danish State did not independently join any of the parties to the ongoing armed conflict and posed a threat to the society upon their return to Denmark (see paragraph 22 above).

68. In these circumstances, the Court is satisfied that the interference with the applicant's right to freedom of movement struck a fair balance between the public interest and the rights of the individual, and that it was necessary in a democratic society.

69. Accordingly, there has been no violation of Article 2 of Protocol No. 4 to the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 7 of the Convention;
3. *Holds* that there has been no violation of Article 2 of Protocol No. 4 to the Convention.

Done in English, and notified in writing on 18 October 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı
Registrar

Carlo Ranzoni
President