

Case Analysis

Strøbye and Rosenlind v Denmark: A Surprising Departure from the European Court of Human Rights' Disability Voting Rights Jurisprudence

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Abstract

In Strøbye and Rosenlind v Denmark, the European Court of Human Rights decided that states may prevent persons with disabilities from voting based on legal capacity restrictions. The Court departed from three previous decisions, most notably Alajos Kiss v Hungary, where it decided similar legal capacity restriction-based voter disqualifications were impermissible under art.3 of Protocol No.1 to the ECHR. In contrast with Alajos Kiss, the Strøbye Court determined that Denmark warranted a wide margin of appreciation, gave greater weight to soft law instruments rather than the binding Convention on the Rights of Persons with Disabilities, considered voter disqualifications based on legal capacity restrictions nondiscriminatory because not many persons with disabilities are affected, and did not require individualised assessments of voters' capacity to justify their disqualification. Ultimately, the Strøbye Court's justifications for departing from its precedents underwhelm and the decision is ripe for reconsideration by the Grand Chamber.

1. Introduction

On 2 February 2021, the European Court of Human Rights decided in *Strøbye and Rosenlind v Denmark* that guardianship orders allow states to disenfranchise persons with disabilities, notwithstanding their right to vote under art.3 of Protocol No.1 to the ECHR.¹ The ruling departs from its prior decision in *Alajos Kiss v Hungary*,² twice affirmed in *Harmati v Hungary*³ and *Gajcsi v Hungary*⁴ wherein the Court ruled that states may not restrict persons with disabilities' right to vote solely on the basis of guardianship orders. To comply with these holdings, Hungary adopted reforms hinging on individualised assessments of voting

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¹ *Strøbye and Rosenlind v Denmark* (App. Nos 25802/18 and 27338/18), judgment of 2 February 2021.

² *Alajos Kiss* (2013) 56 E.H.R.R. 38.

³ *Harmati* (App. No.63012/10) judgment of 21 October 2014 at [8].

⁴ *Gajcsi* (App. No.62924/10) judgment of 23 September 2014 at [11].

capacity for persons with disabilities subject to guardianship orders. Following the *Alajos Kiss* trilogy, at least four European countries either reduced or eliminated guardianship-based voting restrictions—among them, Denmark.⁵

Strøbye departs from and undermines the Court’s disability voting rights precedents, particularly *Alajos Kiss*. Its stated reasoning further raises the ominous prospect of the Court charting a similar course in future cases, including *María del Mar Caamaño Valle v Spain*,⁶ currently pending adjudication. Accordingly, we assess *Strøbye* to discern the rationale for its departure.

2. Facts

Strøbye’s facts are relatively straightforward. The applicants were two men with intellectual disabilities declared “legally incompetent” by Danish courts pursuant to guardianship appointments.⁷ Article 29 of the Danish Constitution in turn prohibits legally incompetent persons from voting. Consequently, the applicants were unable to vote in the 2015 Danish parliamentary elections. They unsuccessfully challenged this exclusion in the Danish courts.

In 2016, Denmark granted legally incompetent persons the right to vote in European and local (but not Danish parliamentary) elections, notwithstanding the constitutional restriction.⁸ In 2019, an amendment to the Guardianship Act and the Parliamentary Elections Act entered into force, permitting Danish courts to appoint guardians for financial affairs while only partially restricting a person’s legal capacity.⁹ Such individuals were no longer considered “legally incompetent” for the purposes of the constitutional provision and could vote. Those who had been declared incompetent prior to the 2019 amendment could petition for their legal capacity restrictions to be made partial, which both applicants successfully did: the first applicant’s legal capacity was fully restored and the second’s was restored partially.¹⁰

3. The Court’s judgment

The Court ruled unanimously that the applicants’ disqualification from voting in the 2015 Danish parliamentary elections due to legal incompetence declarations violated neither their right to vote under art.3 of Protocol No.1, nor their right to be free from discrimination under art.14 of the Convention taken in conjunction with art.3 of Protocol No.1. In doing so, the Court distinguished *Strøbye* from the *Alajos Kiss* trilogy and departed from its own decisions in at least four important ways: (a) the margin of appreciation due to states when restricting the voting rights of persons with mental disabilities, (b) its use of pertinent international law, (c) its consideration of the scope of the restriction’s effects in terms of the nature of the restriction and the size of the population affected, and (d) whether individualised assessments of voters’ capacity are required to justify restrictions. The following sections discuss these in turn before briefly concluding.

(a) Margin of appreciation

Strøbye broke with the *Alajos Kiss* trilogy’s threshold determination that states have a narrow margin of appreciation when restricting the voting rights of persons with mental disabilities. Instead, it granted

⁵ European Union Agency for Fundamental Rights, *Who will (not) get to vote in the 2019 European Parliament elections? Developments in the right to vote of people deprived of legal capacity in EU Member States* (2019), p.4.

⁶ *María del Mar Caamaño Valle v Spain* (App. No.43564/17) communicated on 13 February 2018.

⁷ *Strøbye* was appointed a guardian to manage his financial and personal affairs in 1984 under ss.2(1)(i) and 46 of the erstwhile Act on Legal Competence, while Rosenlind was appointed a guardian to manage his financial affairs in 2009 under s.5(1) of the 1996 Guardianship Act. *Strøbye* (App. Nos 25802/18 and 27338/18) judgment of 2 February 2021 at [6] and [8].

⁸ *Strøbye* (App. Nos 25802/18 and 27338/18) judgment of 2 February 2021 at [11].

⁹ *Strøbye* (App. Nos 25802/18 and 27338/18) judgment of 2 February 2021 at [20].

¹⁰ *Strøbye* (App. Nos 25802/18 and 27338/18) judgment of 2 February 2021 at [23] and [24].

Denmark's Guardianship Act a wide margin of appreciation based on the non-discriminatory nature of its restriction, the quality of parliamentary and judicial review, and the lack of uniformity among Contracting States regarding the voting rights of persons with mental disabilities deprived of legal capacity.

When determining the margin of appreciation, the Court generally weighs several competing interests, including the nature of the protected right, which in the case of voting warrants a wide margin of appreciation.¹¹ However, the margin narrows when the affected group is considered vulnerable, such as persons with mental disabilities.¹² In *Alajos Kiss*, the Court determined that Hungary's historical prejudice against this group resulted in questionable legislative classifications and voting restrictions, and thus applied a narrow margin.¹³

Although persons with mental disabilities' right to vote was at stake, the *Strøbye* Court determined Denmark's margin was wide. In doing so, it first discounted the discriminatory nature of the restriction, asserting that "the mentally disabled were not in general subject to disenfranchisement", nor were persons under guardianship in Denmark.¹⁴ Yet that appears also true about Hungary, where not all persons with mental disabilities under guardianship lose their right to vote.¹⁵ *Alajos Kiss* nonetheless classified the restriction as discriminatory because Hungarian law barred persons from voting based on guardianship orders restricting legal capacity that were in turn predicated on mental disability.¹⁶ The same seemingly obtains in Denmark where the 1996 Guardianship Act expressly names "mental disability" as a threshold criterion for legal incapacitation.¹⁷ Thus, the *Strøbye* Court's determination that voting exclusions falling short of "an automatic, blanket restriction" do not narrow the state's margin rested on false premises.¹⁸

Strøbye next bolstered the wide margin determination due to the "quality" of the Danish Parliament's deliberations on legislative measures and the Danish Supreme Court's review of same.¹⁹ The Court correctly contrasted these subnational bodies' considerations with those in *Alajos Kiss*, where neither the Hungarian parliament nor the courts spent much time considering this issue,²⁰ but neglected to analyse what exactly Denmark's bodies debated. A closer look reveals that the Supreme Court dealt with the applicants' request to be able to vote only summarily, concluding quickly that it lacked power to overrule the constitutional limitation.²¹ Indeed, the portions of the Danish Supreme Court's ruling cited by *Strøbye* are inapposite: they relate to the question of compensation for disenfranchisement, which even if granted would not affect the right to vote or eliminate the applicants' victim status and hence not comprise an adequate remedy under the ECHR.²² Put another way, the domestic courts' analysis was irrelevant for the purposes of granting the right to vote and overcoming the violation complained about by the applicants.

Similarly, the parliamentary debates were not concerned with justifying why the applicants or other similarly situated persons should be disenfranchised. Indeed, Denmark's proffered evidence substantiates that no domestic body considered disenfranchisement a necessary, justified, or adequate measure.²³ Rather, the debates concerned the inability to overcome the constitutional limitation, and the underlying reasons for disenfranchisement were never debated. The records show that when the constitutional restrictions were introduced in 1849, the inability of persons with mental disabilities to vote was taken for granted²⁴;

¹¹ *Mathieu Mohin and Clerfayt v Belgium* (1988), 10 E.H.R.R. 1 at [51].

¹² *Alajos Kiss* (2013) 56 E.H.R.R. 38 at [42].

¹³ *Alajos Kiss* (2013) 56 E.H.R.R. 38 at [42].

¹⁴ *Strøbye* (App. Nos 25802/18 and 27338/18) judgment of 2 February 2021 at [113].

¹⁵ 18/A. § (1) of Act No.IV of 1959 on the Civil Code of the Hungarian Republic was in force at the time of *Alajos Kiss*.

¹⁶ *Alajos Kiss* (2013) 56 E.H.R.R. 38 at [44].

¹⁷ *Strøbye* (App. Nos 25802/18 and 27338/18) judgment of 2 February 2021 at [51].

¹⁸ *Strøbye* (App. Nos 25802/18 and 27338/18) judgment of 2 February 2021 at [114].

¹⁹ *Strøbye* (App. Nos 25802/18 and 27338/18) judgment of 2 February 2021 at [92].

²⁰ *Alajos Kiss* (2013) 56 E.H.R.R. 38, at [28].

²¹ *Strøbye* (App. Nos 25802/18 and 27338/18) judgment of 2 February 2021 at [17].

²² *Eckle v Germany* (1984) 6 E.H.R.R. CD52.

²³ *Strøbye* (App. Nos 25802/18 and 27338/18) judgment of 2 February 2021 at [20].

²⁴ *Strøbye* (App. Nos 25802/18 and 27338/18) judgment of 2 February 2021 at [31].

when the Constitution was amended in 1915 and 1953, the issue was not considered.²⁵ Likewise, when guardianship laws were amended, the need to disenfranchise persons came up only in the context of implementing the constitutional limitation²⁶ and in modern times, by circumventing the limitation to extend the franchise to as many persons as possible without amending the Constitution.²⁷ In that respect, Denmark's authorities were working under similar constraints to those in Hungary, wrestling with an extant Constitution that they could not change,²⁸ and each expressed similar historical prejudice by adopting restrictive measures without much consideration. By according approbation to the Danish authorities spending more time debating the issue than their Hungarian peers without examining the content of discussion, the *Strøbye* Court sets a dangerously low bar for substantive discussion by national level authorities.

Last, the Court cemented its wide margin determination based on the lack of uniformity among Contracting States' approaches to regulating the voting rights of persons with mental disabilities.²⁹ It endorsed the Danish Supreme Court's observations that the European Union Agency for Fundamental Rights' (FRA) 2014 survey showed only seven of 28 EU Member States guaranteed the right to vote to persons with mental disabilities notwithstanding legal capacity deprivations,³⁰ but did not seek to survey the Council of Europe's 47 Member States it has jurisdiction over. Nor did it factor the rate and directionality of change in this area. For example, the FRA reported in 2019 that three additional states had disbanded their disability-based voting restrictions.³¹ This is consistent with the third-party intervention by the European Network of National Human Rights Institutions that a consensus has emerged around decoupling voting and legal capacity restrictions.³² Moreover, in assessing common ground solely on the basis of national laws, the Court did not have to contend with plentiful regional directives, frameworks and similar instruments urging states to abolish disability-based voting restrictions.

Thus, as a threshold matter, the *Strøbye* Court broke from the *Alajos Kiss* trilogy by granting Denmark a wide margin of appreciation with regard to voting restrictions affecting persons with mental disabilities.

(b) *International law*

The *Strøbye* Court deepened its break from the *Alajos Kiss* trilogy with regard to utilising international law as an interpretive aid when construing the European Convention's voting rights protections. The *Strøbye* Court did not engage substantively with the United Nations Convention on the Rights of Persons with Disabilities. CRPD art.29 explicitly requires universal franchise for persons with disability, including those under guardianship.³³ This was confirmed by the authoritative treaty body, the Committee on the Rights of Persons with Disabilities in *Bujdosó v Hungary*.³⁴ Both the CRPD and the Committee's views were relied on by the applicant, and were therefore difficult for it to ignore outright.³⁵

Strøbye nevertheless, and unconvincingly, downplayed such guidance. First, it established a false equivalence between the CRPD—a binding, disability-specific global treaty ratified by both Denmark (2009) and the EU (2010)—with earlier, non-binding guidelines from the Council of Europe's Venice

²⁵ *Strøbye* (App. Nos 25802/18 and 27338/18) judgment of 2 February 2021 at [32]–[34].

²⁶ *Strøbye* (App. Nos 25802/18 and 27338/18) judgment of 2 February 2021 at [46].

²⁷ *Strøbye* (App. Nos 25802/18 and 27338/18) judgment of 2 February 2021 at [57].

²⁸ *Alajos Kiss* (2013) 56 E.H.R.R. 38 at [28].

²⁹ *Strøbye* (App. Nos 25802/18 and 27338/18) judgment of 2 February 2021 at [111].

³⁰ The United Nations Special Rapporteur on the rights of persons with disabilities and the CRPD Committee similarly criticise the Court for mischaracterising the report's description of “*what is*” ... as an accurate summary of “*what ought to be*”. “UN experts urge European Court of Human Rights to rethink vote ban for those with cognitive disabilities” (1 March 2021), UN Office of the High Commissioner on Human Rights, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26821&LangID=E> [Accessed 22 March 2021].

³¹ European Union Agency for Fundamental Rights, *Who will (not) get to vote in the 2019 European Parliament elections? Developments in the right to vote of people deprived of legal capacity in EU Member States* (2019), p.4.

³² *Strøbye* (App. Nos 25802/18 and 27338/18) judgment of 2 February 2021 at [90].

³³ United Nations Convention on the Rights of Persons with Disabilities 2006 art.29(a) (“CRPD”).

³⁴ The CRPD Committee went even further than the *Alajos Kiss* trilogy, holding that voting restrictions, whether pursuant to guardianship orders or individualised assessments, are discriminatory. *Bujdosó v Hungary*, UN Doc.CRPD/C/10/D/4/2011, views adopted 20 September 2013 at para.9.6.

³⁵ *Strøbye* (App. Nos 25802/18 and 27338/18) judgment of 2 February 2021 at [60].

Commission, the 2002 Code of Good Practice in Electoral Matters.³⁶ In doing so, the *Strøbye* Court gave the Venice Commission's Code greater weight than it had in *Alajos Kiss*.³⁷ Moreover, while the Court rightly recognised that the Code permits states to disenfranchise people due to "mental incapacity",³⁸ it ignored the Commission's post-CRPD interpretative declaration expressly disavowing that stance which, trenchantly, cited both the CRPD and *Alajos Kiss* for its reversal.³⁹ Finally, the Court approved the Danish Supreme Court's reliance on the European Union Agency for Fundamental Rights' (FRA) 2014 report to discern discord among Contracting States (see above). When doing so, the Court overlooked the same report's repeated statements that voting restrictions applied to persons with mental disabilities pose problems under the CRPD, its overt endorsement of Croatia's 2013 legislative reforms abolishing such restrictions,⁴⁰ and its manifest highlight of the Venice Commission's 2010 declaration. Read with scrutiny, the very counterweights relied on by the *Strøbye* Court to undermine the CRPD each affirm its primacy.

(c) *Scope of the restriction's effects*

The *Strøbye* Court further distinguished *Alajos Kiss* by contrasting the nature of the interference in the two cases. According to the Court, the measure in *Alajos Kiss* was an "automatic, blanket restriction in respect of suffrage", which applied to "all persons, whether under full or partial guardianship".⁴¹ According to the Court, this "significantly differed" from the relevant Danish legislation which disenfranchised only those persons under guardianship "who, after an individualised judicial evaluation, had also been found legally incompetent by a court under s.6 of the Guardianship Act".⁴²

In actuality, there was no relevant difference between the Danish and the Hungarian restrictions. The Hungarian regulations applicable in 2006, the year of the relevant parliamentary elections from which Mr Kiss was barred, permitted persons under guardianship to vote provided that their legal capacity was not restricted.⁴³ Thus certain Hungarians, much like certain Danes, with both mental disabilities and court-appointed guardians could lawfully vote. Also in alignment with Denmark, only Hungarians with mental disabilities and guardians whose legal capacity was restricted could not vote, regardless of whether the guardianship order was partial or plenary. Section 6 of Denmark's 1996 Guardianship Act similarly permitted courts to adjudicate a person with mental disability "legally incompetent" separately from appointing a guardian pursuant to s.5 of same.⁴⁴ The "individualised judicial evaluation" referred to by the Court refers to their legal incapacitation, not the assessment of their voting capacity, as was the case in Hungary.⁴⁵ Partial legal incapacitation not resulting in disenfranchisement only became possible in Denmark in 2019. Thus, contrary to the Court's assertion, Denmark's guardianship-based voting restrictions were just as "automatic" and "blanket" as those challenged in *Alajos Kiss*.

Strøbye discerned a distinction between the Hungarian and the Danish measures with regard to the size of the affected group, noting that in Denmark 0.046 per cent of the voting population was excluded,⁴⁶ in

³⁶ European Commission for Democracy through Law (Venice Commission), Code of Good Practice in Electoral Matters Opinion No.190/2002 CDL-AD(2002)023 (Strasbourg, 19 October 2002).

³⁷ *Alajos Kiss* (2013) 56 E.H.R.R. 38 at [27] (mentioning the Code perfunctorily in its recitation of Hungary's submissions but declining to incorporate in its analysis).

³⁸ *Strøbye* (App. Nos 25802/18 and 27338/18) judgment of 2 February 2021 at [112].

³⁹ European Commission for Democracy Through Law (Venice Commission), Revised Interpretative Declaration to the Code of Good Practice in Electoral Matters on the Participation of People with Disabilities in Elections, Study No.584/2010, CDL-AD(2011)045 (Strasbourg, 19 December 2011), para.II.2.

⁴⁰ Compare *Strøbye* (App. Nos 25802/18 and 27338/18) judgment of 2 February 2021 at [111] with European Union Agency for Fundamental Rights, *The right to political participation for persons with disabilities: human rights indicators* (2014), pp.39–41.

⁴¹ *Strøbye* (App. Nos 25802/18 and 27338/18) judgment of 2 February 2021 at [113].

⁴² *Strøbye* (App. Nos 25802/18 and 27338/18) judgment of 2 February 2021 at [113].

⁴³ See 18/A. § (1) of Act No.IV of 1959 on the Civil Code of the Hungarian Republic.

⁴⁴ *Strøbye* (App. Nos 25802/18 and 27338/18) judgment of 2 February 2021 at [51].

⁴⁵ *Strøbye* (App. Nos 25802/18 and 27338/18) judgment of 2 February 2021 at [113].

⁴⁶ *Strøbye* (App. Nos 25802/18 and 27338/18) judgment of 2 February 2021 at [102].

contrast to the Hungarian figure of 0.75 per cent.⁴⁷ By relying on this difference of degree, which likely indicates guardianship’s relative overuse in Hungary, *Strøbye* implies that there is a subset of persons with mental disabilities in Denmark whose voting rights may be restricted under art.3 of Protocol No.1 once the right proxy has been employed to identify them. In this limited way, *Strøbye* appears consistent with *Alajos Kiss*, where the Court had similarly left open the possibility that states may restrict persons with mental disabilities’ voting rights based on their mental capacity so long as they did so in a more tailored manner. However, *Strøbye* provides no criteria to assess whether the proxy employed by a state is appropriate for identifying persons unable to vote.

(d) No individualised assessment required

The *Strøbye* Court agreed with the Danish Supreme Court that art.3 of Protocol No.1 as interpreted in *Alajos Kiss* does not require states to base a voting restriction on “a specific and individual assessment” of the person’s voting capacity.⁴⁸ Although it had held in *Alajos Kiss* that “an indiscriminate removal of voting rights, without an *individualised judicial evaluation* and solely based on a mental disability necessitating partial guardianship, cannot be considered compatible with the legitimate grounds for restricting the right to vote”,⁴⁹ the Court barely acknowledged its glaring reversal.⁵⁰ Without mentioning *Alajos Kiss*, the Court cited in support of this proposition *Hirst v United Kingdom*, which concerned the right to vote of convicted prisoners.⁵¹ Reaching even farther afield of its established disability-specific voting rights jurisprudence, the Court relied on two cases regarding criminal due process⁵² and freedom of speech⁵³ to postulate that a “general measure may, in some situations, be found to be a more feasible means of achieving a legitimate aim than a provision requiring a case by case examination”.⁵⁴

4. Conclusion

The *Strøbye* Court’s justification for departing from the *Alajos Kiss* trilogy underwhelms and the holding is ripe for reconsideration by the Grand Chamber. Should that obtain, the Grand Chamber will have occasion to clarify whether the European Court should follow the example of *Strøbye* or hew to its *Alajos Kiss* line of cases in future disability voting rights matters. Such direction is urgently needed, as a similar case is pending and others will inevitably follow absent clear guidance. More broadly, the Grand Chamber will have an opportunity both to affirm the CRPD’s primacy in elucidating the European Convention’s disability rights protections and also provide clear directives on *how* the European Court should apply the CRPD as an interpretive aid, with a view to smoothing its inconsistent applications of the CRPD to date.

⁴⁷ *Strøbye* (App. Nos 25802/18 and 27338/18) judgment of 2 February 2021 at [86].

⁴⁸ *Strøbye* (App. Nos 25802/18 and 27338/18) judgment of 2 February 2021 at [17], [107] and [114].

⁴⁹ *Alajos Kiss* (2013) 56 E.H.R.R. 38 at [44] (emphasis added).

⁵⁰ *Strøbye* (App. Nos 25802/18 and 27338/18), judgment of 2 February 2021 at [114].

⁵¹ *Hirst v United Kingdom (No.2)* [GC] (2004) 38 E.H.R.R. 40.

⁵² *Correia de Matos v Portugal* [GC] (App. No.56402/12) judgment of 4 April 2018.

⁵³ *Animal Defenders International v United Kingdom* [GC] (2013) 57 E.H.R.R. 21.

⁵⁴ *Strøbye* (App. Nos 25802/18 and 27338/18) judgment of 2 February 2021 at [114].