

## CASE OF JERSILD vs DENMARK

### Introduction <sup>1</sup>

**The applicant was a television journalist who interviewed some racist youth for a documentary programme. The transmitted programme contained racist and offensive words. The youths were convicted of making racist statements and the applicant was convicted of aiding and abetting their offences. The applicant claimed a violation of Article 10.**

**Held:** (ECtHR) Although the media must not overstep the boundaries which protected others when information and ideas were of public interest the press have a duty to impart them and the public a right to receive them. The documentary had an antiracist message. Criminal sanctions were not justified and Article 10 was violated. (1995) 19 E.H.R.R. 1

**Commentary:** Article 10(2) lists the protection of others as a legitimate basis for restricting freedom of expression. This is more specifically cited in Article 17 which reads: "Nothing in this convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

Application Number 15890/89 Importance Level 1 Represented by N/A  
Respondent State Denmark Referred by Commission;  
Date of Reference 09/09/1993 11/10/1993 Date of Judgment 23/09/1994

Conclusion Violation of Art. 10; Pecuniary damage - financial award ; Non-pecuniary damage - finding of violation sufficient ; Costs and expenses award - domestic proceedings ; Costs and expenses award - Convention proceedings

Keywords "FREEDOM OF EXPRESSION" "NECESSARY IN A DEMOCRATIC SOCIETY-{ART 10}" "PROTECTION OF THE RIGHTS OF OTHERS-{ART 10}"

### AS TO THE FACTS

#### I. The particular circumstances of the case

9. Mr Jens Olaf Jersild, a Danish national, is a journalist and lives in Copenhagen. He was at the time of the events giving rise to the present case, and still is, employed by Danmarks Radio (Danish Broadcasting Corporation, which broadcasts not only radio but also television programmes), assigned to its Sunday News Magazine (Søndagsavisen). The latter is known as a serious television programme intended for a well-informed audience, dealing with a wide range of social and political issues, including xenophobia, immigration and refugees.

##### A. The Greenjackets item

10. On 31 May 1985 the newspaper Information published an article describing the racist attitudes of members of a group of young people, calling themselves "the Greenjackets" ("grønjakkerne"), at Østerbro in Copenhagen. In the light of this article, the editors of the Sunday News Magazine decided to produce a documentary on the Greenjackets. Subsequently the applicant contacted representatives of the group, inviting three of them together with Mr Per Axholt, a social worker employed at the local youth centre, to take part in a television interview. During the interview, which was conducted by the

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<sup>1</sup> *Maureen and John Spencer*, Nutcases Human Rights, 1st edition, Sweet & Maxwell 2002, p 164f

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applicant, the three Greenjackets made abusive and derogatory remarks about immigrants and ethnic groups in Denmark. It lasted between five and six hours, of which between two and two and a half hours were video-recorded. Danmarks Radio paid the interviewees fees in accordance with its usual practice.

11. The applicant subsequently edited and cut the film of the interview down to a few minutes. On 21 July 1985 this was broadcast by Danmarks Radio as a part of the Sunday News Magazine. The programme consisted of a variety of items, for instance on the martial law in South Africa, on the debate on profit-sharing in Denmark and on the late German writer Heinrich Böll. The transcript of the Greenjackets item reads as follows [(I): TV presenter; (A): the applicant; (G): one or other of the Greenjackets]:

- (I) "In recent years, a great deal has been said about racism in Denmark. The papers are currently publishing stories about distrust and resentment directed against minorities. Who are the people who hate the minorities? Where do they come from? What is their mentality like? Mr Jens Olaf Jersild has visited a group of extremist youths at Østerbro in Copenhagen.
- (A) The flag on the wall is the flag of the Southern States from the American Civil War, but today it is also the symbol of racism, the symbol of the American movement, the Ku Klux Klan, and it shows what Lille Steen, Henrik and Nisse are. Are you a racist?
- (G) Yes, that's what I regard myself as.  
It's good being a racist.  
We believe Denmark is for the Danes.
- (A) Henrik, Lille Steen and all the others are members of a group of young people who live in Studsgårdsgade, called STUDSEN, in Østerbro in Copenhagen. It is public housing, a lot of the inhabitants are unemployed and on social security; the crime rate is high. Some of the young people in this neighbourhood have already been involved in criminal activities and have already been convicted.
- (G) It was an ordinary armed robbery at a petrol station.
- (A) What did you do?
- (G) Nothing. I just ran into a petrol station with a ... gun and made them give me some money. Then I ran out again. That's all.
- (A) What about you, what happened?
- (G) I don't wish to discuss that further.
- (A) But, was it violence?
- (G) Yes.
- (A) You have just come out of ... you have been arrested, what were you arrested for?
- (G) Street violence.
- (A) What happened?
- (G) I had a little fight with the police together with some friends.
- (A) Does that happen often?
- (G) Yes, out here it does.
- (A) All in all, there are 20-25 young people from STUDSEN in the same group.  
They meet not far away from the public housing area near some old houses which are to be torn down. They meet here to reaffirm among other things their racism, their hatred of immigrants and their support for the Ku Klux Klan.
- (G) The Ku Klux Klan, that's something that comes from the States in the old days during - you know - the civil war and things

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like that, because the Northern States wanted that the niggers should be free human beings, man, they are not human beings, they are animals, right, it's completely wrong, man, the things that happened. People should be allowed to keep slaves, I think so anyway.

- (A) Because blacks are not human beings?
- (G) No, you can also see that from their body structure, man, big flat noses, with cauliflower ears etc., man. Broad heads and very broad bodies, man, hairy, you are looking at a gorilla and compare it with an ape, man, then it is the same [behaviour], man, it's the same movements, long arms, man, long fingers etc., long feet.
- (A) A lot of people are saying something different. There are a lot of people who say, but ...
- (G) Just take a picture of a gorilla, man, and then look at a nigger, it's the same body structure and everything, man, flat forehead and all kinds of things.
- (A) There are many blacks, for example in the USA, who have important jobs.
- (G) Of course, there is always someone who wants to show off, as if they are better than the white man, but in the long run, it's the white man who is better.
- (A) What does Ku Klux Klan mean to you?
- (G) It means a great deal, because I think what they do is right. A nigger is not a human being, it's an animal, that goes for all the other foreign workers as well, Turks, Yugoslavs and whatever they are called.
- (A) Henrik is 19 years old and on welfare. He lives in a rented room in Studsgårdsgade. Henrik is one of the strongest supporters of the Klan, and he hates the foreign workers, 'Perkere' [a very derogatory word in Danish for immigrant workers].
- (G) They come up here, man, and sponge on our society. But we, we have enough problems in getting our social benefits, man, they just get it. Fuck, we can argue with those idiots up there at the social benefit office to get our money, man, they just get it, man, they are the first on the housing list, they get better flats than us, man, and some of our friends who have children, man, they are living in the worst slum, man, they can't even get a shower in their flat, man, then those 'Perkere'-families, man, go up there with seven kids, man, and they just get an expensive flat, right there and then. They get everything paid, and things like that, that can't be right, man, Denmark is for the Danes, right?  
It is the fact that they are 'Perkere', that's what we don't like, right, and we don't like their mentality - I mean they can damn well, I mean ... what's it called ... I mean if they feel like speaking Russian in their homes, right, then it's okay, but what we don't like is when they walk around in those Zimbabwe-clothes and then speak this hula-hula language in the street, and if you ask them something or if you get into one of their taxis then they say: I don't know where it is, you give directions right.
- (A) Is it not so that perhaps you are a bit envious that some of the 'Perkere' as you call them have their own shops, and cars, they can make ends ...
- (G) It's drugs they are selling, man, half of the prison population in 'Vestre' are in there because of drugs, man,

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half of those in Vestre prison anyway, they are the people who are serving time for dealing drugs or something similar. They are in there, all the 'Perkere', because of drugs, right. [That] must be enough, what's it called, there should not be drugs here in this country, but if it really has to be smuggled in, I think we should do it ourselves, I mean, I think it's unfair that those foreigners come up here to ... what's it called ... make Denmark more drug dependent and things like that.

We have painted their doors and hoped that they would get fed up with it, so that they would soon leave, and jumped on their cars and thrown paint in their faces when they were lying in bed sleeping.

- (A) What was it you did with that paint - why paint?  
(G) Because it was white paint, I think that suited them well, that was the intended effect.  
(A) You threw paint through the windows of an immigrant family?  
(G) Yes.  
(A) What happened?  
(G) He just got it in his face, that's all. Well, I think he woke up, and then he came out and shouted something in his hula-hula language.  
(A) Did he report it to the police?  
(G) I don't know if he did, I mean, he won't get anywhere by doing that.  
(A) Why not?  
(G) I don't know, it's just kid's stuff, like other people throwing water in people's faces, he got paint in his. They can't make anything out of that.

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- (A) Per Axholt, known as 'Pax' [(P)], is employed in the youth centre in Studsgårdsgade. He has worked there for several years, but many give up a lot sooner because of the tough environment. Per Axholt feels that the reasons why the young people are persecuting the immigrants is that they are themselves powerless and disappointed. What do you think they would say that they want, if you asked them?  
(P) Just what you and I want. Some control over their lives, work which may be considered decent and which they like, a reasonable economic situation, a reasonably functioning family, a wife or a husband and some children, a reasonable middle-class life such as you and I have.  
(A) They do many things which are sure to prevent them from getting it.  
(P) That is correct.  
(A) Why do you think they do this?  
(P) Because they have nothing better to do. They have been told over a long period that the means by which to achieve success is money. They won't be able to get money legitimately, so often they try to obtain it through criminal activity. Sometimes they succeed, sometimes not, and that's why we see a lot of young people in that situation go to prison, because it doesn't work.

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- (A) How old were you when you started your criminal activities?  
(G) I don't know, about 14 I guess.  
(A) What did you do?

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- (G) The first time, I can't remember, I don't know, burglary.
- (A) Do you have what one might call a criminal career?
- (G) I don't know if you can call it that.
- (A) You committed your first crime when you were 14.
- (G) Well, you can put it that way, I mean, if that is a criminal career. If you have been involved in crime since the age of 15 onwards, then I guess you can say I've had a criminal career.
- (A) Will you tell me about some of the things you have done?
- (G) No, not really. It's been the same over and over again. There has been pinching of videos, where the 'Perkere' have been our customers, so they have money. If people want to be out here and have a nice time and be racists and drink beer, and have fun, then it's quite obvious you don't want to sit in the slammer.
- (A) But is the threat of imprisonment something that really deters people from doing something illegal?
- (G) No, it's not prison, that doesn't frighten people.
- (A) Is that why you hear stories about people from out here fighting with knives etc., night after night. Is the reason for this the fact that they are not afraid of the police getting hold of them?
- (G) Yes, nothing really comes of it, I mean, there are no bad consequences, so probably that's why. For instance fights and stabbings and smashing up things ... If you really get into the joint it would be such a ridiculously small sentence, so it would be, I mean ... usually we are released the next day. Last time we caused some trouble over at the pub, they let us out the next morning. Nothing really comes of it. It doesn't discourage us, but there were five of us, who just came out and then we had a celebration for the last guy, who came out yesterday, they probably don't want to go in again for some time so they probably won't commit big crimes again.
- (A) You would like to move back to Studsgårdsgade where you grew up, but we know for sure that it's an environment with a high crime rate. Would you like your child to grow up like you?
- (G) No, and I don't think she will. Firstly, because she is a girl, statistics show that the risk is not that high, I mean they probably don't do it, but you don't have to be a criminal because you live in an environment with a high crime rate. I just wouldn't accept it, if she was mugging old women and stealing their handbags.
- (A) What if she was among those beating up the immigrants etc. What then?
- (G) That would be okay. I wouldn't have anything against that.
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- (I) We will have to see if the mentality of this family changes in the next generation. Finally, we would like to say that groups of young people like this one in STUDSEN at Østerbro, have been formed elsewhere in Copenhagen."

B. Proceedings in the City Court of Copenhagen

12. Following the programme no complaints were made to the Radio Council, which had competence in such matters, or to Danmarks Radio but the Bishop of Ålborg complained to the Minister of Justice. After undertaking investigations the Public Prosecutor instituted criminal proceedings in the City Court of Copenhagen (Københavns Byret) against the three youths interviewed by the applicant, charging them with a

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violation of Article 266 (b) of the Penal Code (straffeloven) (see paragraph 19 below) for having made the statements cited below:

"... the Northern States wanted that the niggers should be free human beings, man, they are not human beings, they are animals."

"Just take a picture of a gorilla, man, and then look at a nigger, it's the same body structure and everything, man, flat forehead and all kinds of things."

"A nigger is not a human being, it's an animal, that goes for all the other foreign workers as well, Turks, Yugoslavs and whatever they are called."

"It is the fact that they are 'Perkere', that's what we don't like, right, and we don't like their mentality ... what we don't like is when they walk around in those Zimbabwe-clothes and then speak this hula-hula language in the street ..."

"It's drugs they are selling, man, half of the prison population in 'Vestre' are in there because of drugs ... they are the people who are serving time for dealing drugs ..."

"They are in there, all the 'Perkere', because of drugs ..."

The applicant was charged, under Article 266 (b) in conjunction with Article 23 (see paragraph 19 below), with aiding and abetting the three youths; the same charge was brought against the head of the news section of Danmarks Radio, Mr Lasse Jensen.

13. In the City Court counsel for the applicant and Mr Jensen called for their acquittal. He argued that the conduct of the applicant and Mr Jensen could in no way be compared to that of the other three defendants, with whose views they did not sympathise. They sought merely to provide a realistic picture of a social problem; in fact the programme only provoked resentment and aroused pity in respect of the three other defendants, who had exposed themselves to ridicule on their own terms. Accordingly, it was by no means the intention of Danmarks Radio to persuade others to subscribe to the same views as the Greenjackets, rather the contrary. Under the relevant law a distinction had to be drawn between the persons who made the statements and the programme editors, the latter enjoying a special freedom of expression. Having at that time a broadcasting monopoly, Danmarks Radio was under a duty to impart all opinions of public interest in a manner that reflected the speaker's way of expressing himself. The public also had an interest in being informed of notoriously bad social attitudes, even those which were unpleasant. The programme was broadcast in the context of a public debate which had resulted in press comments, for instance in Information, and was simply an honest report on the realities of the youths in question. Counsel, referring inter alia to the above-mentioned article in Information, also pointed to the fact that no consistent prosecution policy had been followed in cases of this nature.

14. On 24 April 1987 the City Court convicted the three youths, one of them for having stated that "niggers" and "foreign workers" were "animals", and two of them for their assertions in relation to drugs and "Perkere". The applicant was convicted of aiding and abetting them, as was Mr Jensen, in his capacity as programme controller; they were sentenced to pay day-fines (dagsbøder) totalling 1,000 and 2,000 Danish kroner, respectively, or alternatively to five days' imprisonment (hæfte).

As regards the applicant, the City Court found that, following the article in Information of 31 May 1985, he had visited the Greenjackets and after a conversation with Mr Axholt,

amongst others, agreed that the three youths should participate in a television programme. The object of the programme had been to demonstrate the attitude of the Greenjackets to the racism at Østerbro, previously mentioned in the article in Information, and to show their social background. Accordingly, so the City Court held, the applicant had himself taken the initiative of making the television programme and, further, he had been well aware in advance that discriminatory statements of a racist nature were likely to be made during the interview. The interview had lasted several hours, during which beer, partly paid for by Danmarks Radio, was consumed. In this connection the applicant had encouraged the Greenjackets to express their racist views, which, in so far as they were broadcast on television, in itself constituted a breach of Article 266 (b) of the Penal Code. The statements were broadcast without any counterbalancing comments, after the recordings had been edited by the applicant. He was accordingly guilty of aiding and abetting the violation of Article 266 (b).

#### C. Proceedings in the High Court of Eastern Denmark

15. The applicant and Mr Jensen, but not the three Greenjackets, appealed against the City Court's judgment to the High Court of Eastern Denmark (Østre Landsret). They essentially reiterated the submissions made before the City Court and, in addition, the applicant explained that, although he had suspected that the Greenjackets' statements were punishable, he had refrained from omitting these from the programme, considering it crucial to show their actual attitude. He assumed that they were aware that they might incur criminal liability by making the statements and had therefore not warned them of this fact.

16. By judgment of 16 June 1988 the High Court, by five votes to one, dismissed the appeal.

The dissenting member was of the view that, although the statements by the Greenjackets constituted offences under Article 266 (b) of the Penal Code, the applicant and Mr Jensen had not transgressed the bounds of the freedom of speech to be enjoyed by television and other media, since the object of the programme was to inform about and animate public discussion on the particular racist attitudes and social background of the youth group in question.

#### D. Proceedings in the Supreme Court

17. With leave the applicant and Mr Jensen appealed from the High Court judgment to the Supreme Court (Højesteret), which by four votes to one dismissed the appeal in a judgment of 13 February 1989. The majority held:

"The defendants have caused the publication of the racist statements made by a narrow circle of persons and thereby made those persons liable to punishment and have thus, as held by the City Court and the High Court, violated Article 266 (b) in conjunction with Article 23 of the Penal Code. [We] do not find that an acquittal of the defendants could be justified on the ground of freedom of expression in matters of public interest as opposed to the interest in the protection against racial discrimination. [We] therefore vote in favour of confirming the judgment [appealed from]."

Justice Pontoppidan stated in his dissent:

"The object of the programme was to contribute to information on an issue - the attitude towards foreigners - which was the subject of extensive and sometimes emotional public debate. The programme must be presumed to have given a clear picture of the Greenjackets' views, of which the public was thus given an opportunity to be informed and form its own opinion. In view of the nature of these views, any counterbalancing during or immediately before or after would not have served a useful purpose. Although it concerned a relatively small group of people holding extreme views, the programme

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had a fair degree of news and information value. The fact that the defendants took the initiative to disseminate such views is not of paramount importance for the assessment of their conduct. In these circumstances and irrespective of the fact that the statements rightly have been found to be in violation of Article 266 (b), I question the advisability of finding the defendants guilty of aiding and abetting the violation of this provision. I therefore vote in favour of the defendants' acquittal."

18. When the Supreme Court has rendered judgment in a case raising important issues of principle it is customary that a member of the majority publishes a detailed and authoritative statement of the reasons for the judgment. In keeping with this custom, Justice Hermann on 20 January 1990 published such a statement in the Weekly Law Journal (*Ugeskrift for Retsvæsen*, 1989, p. 399).

As regards the conviction of the applicant and Mr Jensen, the majority had attached importance to the fact that they had caused the racist statements to be made public. The applicant's item had not been a direct report on a meeting. He had himself contacted the three youths and caused them to make assertions such as those previously made in *Information*, which he knew of and probably expected them to repeat. He had himself cut the recording of the interview, lasting several hours, down to a few minutes containing the crude comments. The statements, which would hardly have been punishable under Article 266 (b) of the Penal Code had they not been made to a wide circle ("*videre kreds*") of people, became clearly punishable as they were broadcast on television on the applicant's initiative and with Mr Jensen's approval. It was therefore beyond doubt that they had aided and abetted the dissemination of the statements.

Acquitting the applicant and Mr Jensen could only be justified by reasons clearly outweighing the wrongfulness of their actions. In this connection, the interest in protecting those grossly insulted by the statements had to be weighed up against that of informing the public of the statements. Whilst it is desirable to allow the press the best possible conditions for reporting on society, press freedom cannot be unlimited since freedom of expression is coupled with responsibilities.

In striking a balance between the various interests involved, the majority had regard to the fact that the statements, which were brought to a wide circle of people, consisted of series of inarticulate, defamatory remarks and insults spoken by members of an insignificant group whose opinions could hardly be of interest to many people. Their news or information value was not such as to justify their dissemination and therefore did not warrant acquitting the defendants. This did not mean that extremist views could not be reported in the press, but such reports must be carried out in a more balanced and comprehensive manner than was the case in the television programme in question. Direct reports from meetings which were a matter of public interest should also be permitted.

The minority, on the other hand, considered that the right to information overrode the interests protected by Article 266 (b) of the Penal Code.

Finally, Justice Hermann noted that the compatibility of the impugned measures with Article 10 (art. 10) of the Convention was not raised during the trial.

## II. Relevant domestic law

### A. The Penal Code

19. At the relevant time Article 266 (b) of the Penal Code provided:

"Any person who, publicly or with the intention of disseminating it to a wide circle ("videre kreds") of people, makes a statement, or other communication, threatening, insulting or degrading a group of persons on account of their race, colour, national or ethnic origin or belief shall be liable to a fine or to simple detention or to imprisonment for a term not exceeding two years."

Article 23, paragraph 1, reads:

"A provision establishing a criminal offence shall apply to any person who has assisted the commission of the offence by instigation, advice or action. The punishment may be reduced if the person in question only intended to give assistance of minor importance or to strengthen an intent already resolved or if the offence has not been completed or an intended assistance failed."

### B. The 1991 Media Liability Act

20. The 1991 Media Liability Act (Medieansvarsloven, 1991:348), which entered into force on 1 January 1992, that is after the events giving rise to the present case, lays down rules inter alia on criminal liability in respect of television broadcasts. Section 18 provides:

"A person making a statement during a non-direct broadcast (forskudt udsendelse) shall be responsible for the statement under general statutory provisions, unless:  
(1) the identity of the person concerned does not appear from the broadcast; or  
(2) [that person] has not consented to the statement being broadcast; or  
(3) [he or she] has been promised that [he or she] may take part [in the broadcast] without [his or her] identity being disclosed and reasonable precautions have been taken to this effect.

In the situations described in paragraph 1, sub-paragraphs (1) to (3) above, the editor is responsible for the contents of the statements even where a violation of the law has occurred without intent or negligence on his part ..."

Pursuant to section 22:

"A person who reads out or in any other manner conveys a text or statement, is not responsible for the contents of that text or statement."

## III. Instruments of the United Nations

21. Provisions relating to the prohibition of racial discrimination and the prevention of propaganda of racist views and ideas are to be found in a number of international instruments, for example the 1945 United Nations Charter (paragraph 2 of the Preamble, Articles 1 para. 3, 13 para. 1 (b), 55 (c) and 76 (c)), the 1948 Universal Declaration of Human Rights (Articles 1, 2 and 7) and the 1966 International Covenant on Civil and Political Rights (Articles 2 para. 1, 20 para. 2 and 26). The most directly relevant treaty is the 1965 International Convention on the Elimination of All Forms of Racial Discrimination ("the UN Convention"), which has been ratified by a large majority of the Contracting States to the European Convention, including Denmark (9 December 1971). Articles 4 and 5 of that Convention provide:

#### Article 4

"States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, inter alia:

(a) shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

..."

#### Article 5

"In compliance with the fundamental obligation laid down in ... this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

...

(d) ...

viii. the right to freedom of opinion and expression;

..."

The effects of the "due regard" clause in Article 4 has given rise to differing interpretations and the UN Committee on the Elimination of Racial Discrimination ("the UN Committee" - set up to supervise the implementation of the UN Convention) was divided in its comments on the applicant's conviction. The present case had been presented by the Danish Government in a report to the UN Committee. Whilst some members welcomed it as "the clearest statement yet, in any country, that the right to protection against racial discrimination took precedence over the right to freedom of expression", other members considered that "in such cases the facts needed to be considered in relation to both rights" (Report of the Committee to the General Assembly, Official Records, Forty-Fifth Session, Supplement No. 18 (A/45/18), p. 21, para. 56).

#### PROCEEDINGS BEFORE THE COMMISSION

22. In his application (no. 15890/89) of 25 July 1989 to the Commission the applicant complained that his conviction violated his right to freedom of expression under Article 10 (art. 10) of the Convention.

23. On 8 September 1992 the Commission declared the application admissible. In its report of 8 July 1993 (Article 31) (art. 31), the Commission expressed the opinion that there had been a violation of Article 10 (art. 10) (by twelve votes to four). The full text of the Commission's opinion and of the two dissenting opinions contained in the report is reproduced as an annex to this judgment\*.

\* Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 298 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS MADE BY THE GOVERNMENT TO THE COURT

24. At the hearing on 20 April 1994 the Government invited the Court to hold that, as submitted in their memorial, there had been no violation of Article 10 (art. 10) of the Convention.

**AS TO THE LAW**

I. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

25. The applicant maintained that his conviction and sentence for having aided and abetted the dissemination of racist remarks violated his right to freedom of expression within the meaning of Article 10 (art. 10) of the Convention, which reads:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

26. The Government contested this contention whereas the Commission upheld it.

27. It is common ground that the measures giving rise to the applicant's case constituted an interference with his right to freedom of expression.

It is moreover undisputed that this interference was "prescribed by law", the applicant's conviction being based on Articles 266 (b) and 23 (1) of the Penal Code. In this context, the Government pointed out that the former provision had been enacted in order to comply with the UN Convention. The Government's argument, as the Court understands it, is that, whilst Article 10 (art. 10) of the Convention is applicable, the Court, in applying paragraph 2 (art. 10-2), should consider that the relevant provisions of the Penal Code are to be interpreted and applied in an extensive manner, in accordance with the rationale of the UN Convention (see paragraph 21 above). In other words, Article 10 (art. 10) should not be interpreted in such a way as to limit, derogate from or destroy the right to protection against racial discrimination under the UN Convention.

Finally it is uncontested that the interference pursued a legitimate aim, namely the "protection of the reputation or rights of others".

The only point in dispute is whether the measures were "necessary in a democratic society".

28. The applicant and the Commission were of the view that, notwithstanding Denmark's obligations as a Party to the UN Convention (see paragraph 21 above), a fair balance had to be struck between the "protection of the reputation or rights of others" and the applicant's right to impart information. According to the applicant, such a balance was envisaged in a clause contained in Article 4 of the UN Convention to the effect that "due regard" should be had to "the principles in the Universal Declaration of Human Rights and the rights ... in Article 5 of [the UN] Convention". The clause had been introduced at the drafting stage because of concern among a number of States that the requirement in Article 4 (a) that "[States Parties] shall declare an offence punishable by law all

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dissemination of ideas based on racial superiority or hatred" was too sweeping and could give rise to difficulties with regard to other human rights, in particular the right to freedom of opinion and expression. In the applicant's further submission, this explained why the Committee of Ministers of the Council of Europe, when urging member States to ratify the UN Convention, had proposed that they add an interpretative statement to their instrument of ratification, which would, inter alia, stress that respect was also due for the rights laid down in the European Convention (Resolution (68) 30 adopted by the Ministers' Deputies on 31 October 1968).

The applicant and the Commission emphasised that, taken in the context of the broadcast as a whole, the offending remarks had the effect of ridiculing their authors rather than promoting their racist views. The overall impression of the programme was that it sought to draw public attention to a matter of great public concern, namely racism and xenophobia. The applicant had deliberately included the offensive statements in the programme, not with the intention of disseminating racist opinions, but in order to counter them through exposure. The applicant pointed out that he tried to show, analyse and explain to his viewers a new phenomenon in Denmark at the time, that of violent racism practised by inarticulate and socially disadvantaged youths. Joined by the Commission, he considered that the broadcast could not have had any significant detrimental effects on the "reputation or rights of others". The interests in protecting the latter were therefore outweighed by those of protecting the applicant's freedom of expression.

In addition the applicant alleged that had the 1991 Media Liability Act been in force at the relevant time he would not have faced prosecution since under the Act it is in principle only the author of a punishable statement who may be liable. This undermined the Government's argument that his conviction was required by the UN Convention and "necessary" within the meaning of Article 10 (art. 10).

29. The Government contended that the applicant had edited the Greenjackets item in a sensationalist rather than informative manner and that its news or information value was minimal. Television was a powerful medium and a majority of Danes normally viewed the news programme in which the item was broadcast. Yet the applicant, knowing that they would incur criminal liability, had encouraged the Greenjackets to make racist statements and had failed to counter these statements in the programme. It was too subtle to assume that viewers would not take the remarks at their face value. No weight could be attached to the fact that the programme had given rise to only a few complaints, since, due to lack of information and insufficient knowledge of the Danish language and even fear of reprisals by violent racists, victims of the insulting comments were likely to be dissuaded from complaining. The applicant had thus failed to fulfil the "duties and responsibilities" incumbent on him as a television journalist. The fine imposed upon him was at the lower end of the scale of sanctions applicable to Article 266 (b) offences and was therefore not likely to deter any journalist from contributing to public discussion on racism and xenophobia; it only had the effect of a public reminder that racist expressions are to be taken seriously and cannot be tolerated.

The Government moreover disputed that the matter would have been dealt with differently had the 1991 Media Liability Act been in force at the material time. The rule that only the author of a punishable statement may incur liability was subject to exceptions (see paragraph 20 above); how the applicant's case would have been considered under the 1991 Act was purely a matter of speculation.

The Government stressed that at all three levels the Danish courts, which were in principle better placed than the European Court to evaluate the effects of the programme, had carried out a careful balancing exercise of all the interests involved. The review effected by those courts had been similar to that carried out under Article 10 (art. 10); their decisions fell within the margin of appreciation to be left to the national authorities and corresponded to a pressing social need.

30. The Court would emphasise at the outset that it is particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations. It may be true, as has been suggested by the applicant, that as a result of recent events the awareness of the dangers of racial discrimination is sharper today than it was a decade ago, at the material time. Nevertheless, the issue was already then of general importance, as is illustrated for instance by the fact that the UN Convention dates from 1965. Consequently, the object and purpose pursued by the UN Convention are of great weight in determining whether the applicant's conviction, which - as the Government have stressed - was based on a provision enacted in order to ensure Denmark's compliance with the UN Convention, was "necessary" within the meaning of Article 10 para. 2 (art. 10-2).

In the second place, Denmark's obligations under Article 10 (art. 10) must be interpreted, to the extent possible, so as to be reconcilable with its obligations under the UN Convention. In this respect it is not for the Court to interpret the "due regard" clause in Article 4 of the UN Convention, which is open to various constructions. The Court is however of the opinion that its interpretation of Article 10 (art. 10) of the European Convention in the present case is compatible with Denmark's obligations under the UN Convention.

31. A significant feature of the present case is that the applicant did not make the objectionable statements himself but assisted in their dissemination in his capacity of television journalist responsible for a news programme of Danmarks Radio (see paragraphs 9 to 11 above). In assessing whether his conviction and sentence were "necessary", the Court will therefore have regard to the principles established in its case-law relating to the role of the press (as summarised in for instance the *Observer and Guardian v. the United Kingdom* judgment of 26 November 1991, Series A no. 216, pp. 29-30, para. 59).

The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance (*ibid.*). Whilst the press must not overstep the bounds set, *inter alia*, in the interest of "the protection of the reputation or rights of others", it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (*ibid.*). Although formulated primarily with regard to the print media, these principles doubtless apply also to the audiovisual media.

In considering the "duties and responsibilities" of a journalist, the potential impact of the medium concerned is an important factor and it is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media (see *Purcell and Others v. Ireland*, Commission's admissibility decision of 16 April 1991, application no. 15404/89, Decisions and Reports (DR) 70, p. 262). The audiovisual media have means of conveying through images meanings which the print media are not able to impart.

At the same time, the methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. It is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. In this context the Court recalls that Article 10 (art. 10) protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see the *Oberschlick v. Austria* judgment of 23 May 1991, Series A no. 204, p. 25, para. 57).

The Court will look at the interference complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are relevant and sufficient and whether the means employed were proportionate to the

legitimate aim pursued (see the above-mentioned Observer and Guardian judgment, pp. 29-30, para. 59). In doing so the Court has to satisfy itself that the national authorities did apply standards which were in conformity with the principles embodied in Article 10 (art. 10) and, moreover, that they based themselves on an acceptable assessment of the relevant facts (see, for instance, the Schwabe v. Austria judgment of 28 August 1992, Series A no. 242-B, pp. 32-33, para. 29).

The Court's assessment will have regard to the manner in which the Greenjackets feature was prepared, its contents, the context in which it was broadcast and the purpose of the programme. Bearing in mind the obligations on States under the UN Convention and other international instruments to take effective measures to eliminate all forms of racial discrimination and to prevent and combat racist doctrines and practices (see paragraph 21 above), an important factor in the Court's evaluation will be whether the item in question, when considered as a whole, appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas.

32. The national courts laid considerable emphasis on the fact that the applicant had himself taken the initiative of preparing the Greenjackets feature and that he not only knew in advance that racist statements were likely to be made during the interview but also had encouraged such statements. He had edited the programme in such a way as to include the offensive assertions. Without his involvement, the remarks would not have been disseminated to a wide circle of people and would thus not have been punishable (see paragraphs 14 and 18 above).

The Court is satisfied that these were relevant reasons for the purposes of paragraph 2 of Article 10 (art. 10-2).

33. On the other hand, as to the contents of the Greenjackets item, it should be noted that the TV presenter's introduction started by a reference to recent public discussion and press comments on racism in Denmark, thus inviting the viewer to see the programme in that context. He went on to announce that the object of the programme was to address aspects of the problem, by identifying certain racist individuals and by portraying their mentality and social background. There is no reason to doubt that the ensuing interviews fulfilled that aim. Taken as a whole, the feature could not objectively have appeared to have as its purpose the propagation of racist views and ideas. On the contrary, it clearly sought - by means of an interview - to expose, analyse and explain this particular group of youths, limited and frustrated by their social situation, with criminal records and violent attitudes, thus dealing with specific aspects of a matter that already then was of great public concern.

The Supreme Court held that the news or information value of the feature was not such as to justify the dissemination of the offensive remarks (see paragraph 18 above). However, in view of the principles stated in paragraph 31 above, the Court sees no cause to question the Sunday News Magazine staff members' own appreciation of the news or information value of the impugned item, which formed the basis for their decisions to produce and broadcast it.

34. Furthermore, it must be borne in mind that the item was broadcast as part of a serious Danish news programme and was intended for a well-informed audience (see paragraph 9 above).

The Court is not convinced by the argument, also stressed by the national courts (see paragraphs 14 and 18 above), that the Greenjackets item was presented without any attempt to counterbalance the extremist views expressed. Both the TV presenter's introduction and the applicant's conduct during the interviews clearly dissociated him from the persons interviewed, for example by describing them as members of "a group of extremist youths" who supported the Ku Klux Klan and by referring to the criminal records of some of them. The applicant also rebutted some of the racist statements for

instance by recalling that there were black people who had important jobs. It should finally not be forgotten that, taken as a whole, the filmed portrait surely conveyed the meaning that the racist statements were part of a generally anti-social attitude of the Greenjackets.

Admittedly, the item did not explicitly recall the immorality, dangers and unlawfulness of the promotion of racial hatred and of ideas of superiority of one race. However, in view of the above-mentioned counterbalancing elements and the natural limitations on spelling out such elements in a short item within a longer programme as well as the journalist's discretion as to the form of expression used, the Court does not consider the absence of such precautionary reminders to be relevant.

35. News reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of "public watchdog" (see, for instance, the above-mentioned Observer and Guardian judgment, pp. 29-30, para. 59). The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so. In this regard the Court does not accept the Government's argument that the limited nature of the fine is relevant; what matters is that the journalist was convicted.

There can be no doubt that the remarks in respect of which the Greenjackets were convicted (see paragraph 14 above) were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10 (art. 10) (see, for instance, the Commission's admissibility decisions in Glimmerveen and Hagenbeek v. the Netherlands, applications nos. 8348/78 and 8406/78, DR 18, p. 187; and Künen v. Germany, application no. 12194/86, DR 56, p. 205). However, even having regard to the manner in which the applicant prepared the Greenjackets item (see paragraph 32 above), it has not been shown that, considered as a whole, the feature was such as to justify also his conviction of, and punishment for, a criminal offence under the Penal Code.

36. It is moreover undisputed that the purpose of the applicant in compiling the broadcast in question was not racist. Although he relied on this in the domestic proceedings, it does not appear from the reasoning in the relevant judgments that they took such a factor into account (see paragraphs 14, 17 and 18 above).

37. Having regard to the foregoing, the reasons adduced in support of the applicant's conviction and sentence were not sufficient to establish convincingly that the interference thereby occasioned with the enjoyment of his right to freedom of expression was "necessary in a democratic society"; in particular the means employed were disproportionate to the aim of protecting "the reputation or rights of others". Accordingly the measures gave rise to a breach of Article 10 (art. 10) of the Convention.

## II. APPLICATION OF ARTICLE 50 (art. 50)

38. Mr Jersild sought just satisfaction under Article 50 (art. 50) of the Convention, according to which:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

39. The Government accepted parts of his claim. The Commission offered no comments.

A. Pecuniary damage

40. The applicant claimed 1,000 kroner in respect of the fine imposed upon him, to be reimbursed by him to Danmarks Radio which had provisionally paid the fine for him.

41. The Government did not object and the Court finds that the amount should be awarded.

B. Non-pecuniary damage

42. The applicant requested 20,000 kroner in compensation for non-pecuniary damage. He maintained that his professional reputation had been prejudiced and that he had felt distress as a result of his conviction.

43. The Court observes that the applicant still works with the Sunday News Magazine at Danmarks Radio and that his employer has supported him throughout the proceedings, inter alia by paying the fine (see paragraphs 9 and 40 above) and legal fees (see paragraph 44 below). It agrees with the Government that the finding of a violation of Article 10 (art. 10) constitutes in itself adequate just satisfaction in this respect.

C. Costs and expenses

44. The applicant claimed in respect of costs and expenses:

(a) 45,000 kroner for work done in the domestic proceedings by his lawyer, Mr J. Stockholm;

(b) by way of legal fees incurred in the Strasbourg proceedings, 13,126.80 kroner for Mrs Johannessen, 6,900 pounds sterling for Mr Boyle and 50,000 kroner (exclusive 25% value-added tax) for Mr Trier;

(c) 20,169.20 kroner to cover costs of translation, interpretation and an expert opinion;

(d) 25,080 kroner, 965.40 pounds and 4,075 French francs in travel and subsistence expenses incurred in connection with the hearings before the Commission and Court, as well as miscellaneous expenses.

Parts of the above costs and expenses had been provisionally disbursed by Danmarks Radio.

45. The Government did not object to the above claims. The Court considers that the applicant is entitled to recover the sums in their entirety. They should be increased by any value-added taxes that may be chargeable.

FOR THESE REASONS, THE COURT

1. Holds by twelve votes to seven that there has been **a violation of Article 10** (art. 10) of the Convention;

2. Holds by seventeen votes to two that Denmark is to pay the applicant, within three months, 1,000 (one thousand) Danish kroner in compensation for pecuniary damage; and, for costs and expenses, the sums resulting from the calculations to be made in accordance with paragraph 45 of the judgment;

3. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 September 1994.

Signed: Rolv RYSSDAL President Signed: Herbert PETZOLD Acting Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint dissenting opinion of Mr Ryssdal, Mr Bernhardt, Mr Spielmann and Mr Loizou;

(b) joint dissenting opinion of Mr Gölcüklü, Mr Russo and Mr Valticos;

(c) supplementary joint dissenting opinion of Mr Gölcüklü and Mr Valticos.

Initialled: R. R. Initialled: H. P.