

JERSILD v. DENMARK

AS TO THE ADMISSIBILITY OF

Application No. 15890/89
by Jens Olaf JERSILD
against Denmark

The European Commission of Human Rights sitting in private on 8 September 1992, the following members being present:

MM. J. A. FROWEIN, Acting President
C. A. NØRGAARD
S. TRECHSEL
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
A. S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. G. SCHERMERS
H. DANELIUS
Mrs. G. H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C. L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M. P. PELLONPÄÄ
B. MARXER

Mr. K. ROGGE, Deputy to the Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 25 July 1989 by Jens Olaf JERSILD against Denmark and registered on 11 December 1989 under file No. 15890/89;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having regard to the observations submitted by the respondent Government on 20 December 1991 and the observations in reply submitted by the applicant on 17 February 1992;

Having deliberated;

Decides as follows:

THE FACTS

The facts of the case, as submitted by the parties, may be summarised as follows.

The applicant is a Danish citizen, born in 1959 and residing in Copenhagen, Denmark. He is a journalist by profession. Before the Commission the applicant is represented by Mr. Kevin Boyle of Colchester, United Kingdom.

A. The particular facts of the case

Inspired by an article which appeared in the newspaper Information on 31 May 1985 the applicant decided to make a television programme which would describe the attitudes of a group of young people, who called themselves the "greenjackets" (grønjakker), in respect of racism at Østerbro in Copenhagen, and give a general

JERSILD v. DENMARK

description of the social standing of these young people. The applicant contacted representatives of the "greenjackets", three of whom he invited to participate in a tape recording of their viewpoints. The interview and its recording lasted between 5 and 6 hours and in the course of the interview, which was conducted by the applicant, the greenjackets spoke in abusive and derogatory terms about immigrants and ethnic groups in Denmark.

The applicant subsequently edited and cut the interview to a filmed feature of a few minutes which was broadcast in Danmarks Radio's news magazine "Søndagsavisen" on 21 July 1985.

On 19 February 1986 the Public Prosecutor instituted criminal proceedings against the three youths interviewed (here referred to as A., B. and C.), charging them with a violation of Section 266 (b) of the Danish Penal Code by expressing in the filmed feature the following statements:

A. stated inter alia:

(translation)

"... Niggers, they're supposed to be free people - man, they aren't even people, they're animals. You can just, what's it called - take a picture of a gorilla, man - and then look at a negro, it's the same body-build and everything, man - flat forehead and everything, man, a nigger isn't a person - it's an animal - and so are other alien workers - Turks and Yugoslavs - and whatever they're called."

B. stated inter alia:

(translation)

"Well, we don't like that they're 'perkere' (1) - see - and then we don't like their mentality ... What we don't like is when they run around in Zimbabwe clothes and talk that hula-hula language out on the street ... All the 'perkere' are in the lockup for pushing drugs."

(1) "perkere" is a derogatory slang in Denmark for immigrant workers, such as Turks, Yugoslavs and Pakistanis.

C. stated inter alia in reply to the question of whether they are not somewhat envious of the 'perkere':

(translation)

"All those drugs they're selling - man - half the people in Vestre (prison) - man - they're the ones in the lockup for drugs ..."

The applicant was charged with aiding and abetting the three youths as was also the head of the news section of Danmarks Radio.

On 24 April 1987 the City Court of Copenhagen (Københavns Byret) found A., B. and C. guilty of the charge brought against them. In its judgment the City Court stated inter alia:

(translation)

"The statements made by the defendant A. in the television programme that 'niggers, alien workers' are animals and the statements made by the defendants B. and C. on drugs in relation to 'perkere' are found to insult and degrade a class of persons on account of their race, colour, national or ethnic origins. Consequently, they are found to have

JERSILD v. DENMARK

violated Section 266 (b) of the Penal Code. However, the other statements made by the defendant B. under the indictment are not found to be of such a serious nature that they are punishable under Section 266 (b)."

The applicant was convicted of aiding and abetting in the violation of this Section read in conjunction with Section 23 of the Penal Code. He was held to have aided and abetted in the dissemination of the statements. In the judgment the City Court stated inter alia:

(translation)

"... When considering the conduct of [the applicant] and [the head of the news section] the Court finds, having regard to the evidence given during the trial, that [the applicant] visited the 'grønjakker' in Studsgårdsgade following an article in [the newspaper] 'Information' of 31 May 1985 in which inter alia the racist viewpoints of the 'grønjakker' were described, and then, after a discussion with [P.], the club assistant, among others, agreed that the defendants A., B. and C. should participate in a television programme. Furthermore the Court finds that the object of the television programme was to describe the attitudes of the 'grønjakker' in respect of racism at Østerbro - as stated in the article in 'Information' - as well as to give a general description of the social standing of these young people. The Court thus finds that [the applicant] has taken the initiative for the television programme himself. Furthermore the Court finds that [the applicant] knew beforehand that discriminatory statements of a racist nature could be expected to be made during the interview. In connection with the interview, which took several hours and during which beer was consumed, partly paid for by [Danmarks Radio], [the applicant] is found to have encouraged the 'grønjakker' to express their racist viewpoints, which by being broadcast on television in itself implies a violation of Section 266 (b) of the Penal Code. Thus, by having aided and abetted the dissemination of the above-mentioned statements under the circumstances stated above - which in fact without any 'balancing' whatsoever were transmitted indiscriminately in the television programme on the basis of the cutting of the recordings made by the [applicant] - [he] is found guilty of aiding and abetting the violation of Section 266 (b) of the Penal Code."

The applicant was sentenced to pay five day fines of 200 Danish crowns each or in the alternative to serve five days of mitigated imprisonment.

A., B. and C. did not appeal against the Court's judgment. The applicant, on the other hand, appealed against the judgment to the High Court of Eastern Denmark (Østre Landsret).

On 16 June 1988 the High Court delivered its judgment. The majority, five judges, upheld the conviction on the same grounds as the City Court. One judge held that the applicant should be acquitted. He agreed that the statements of A., B. and C. were punishable but added that he

(translation)

"does not find that [the applicant], by broadcasting the statements on television, has transgressed the bounds of the freedom of expression to which the television and other media must be entitled considering the fact that the object of the programme was to create a social debate and to inform the public of the youth group's special attitude to

JERSILD v. DENMARK
racism and the group's social standing."

With leave the applicant appealed against this judgment to the Supreme Court (Højesteret).

On 13 February 1989 the Supreme Court delivered its judgment. The majority (four judges) confirmed the applicant's conviction, stating:

(translation)

"[The applicant] has caused the publication of the racist statements made by a narrow circle of persons which thereby rendered them punishable and [he] has thus, as held by the City Court and the High Court, violated Section 266 (b) in conjunction with Section 23 of the Penal Code. These judges do not find that the protection of freedom of expression in respect of issues and events of general public interest as opposed to the protection against racial discrimination in this case can justify an acquittal of [the applicant]. These judges therefore vote in favour of upholding the judgment."

One judge dissented with the following reasoning:

(translation)

"The object of the programme was to contribute to the information on an issue - the attitude towards strangers - which was the subject of an extensive and at times very emotional debate. The programme must be presumed to have given a clear picture of the viewpoints of the 'grønjakker' which the population thus had an opportunity to be acquainted with and make up their mind about. Considering the nature of the viewpoints, any countering during or immediately before or after the interview would not have served a reasonable purpose. Even though it concerned a relatively small group of people with extreme viewpoints, the programme had a fair news and information value. When assessing the conduct of [the applicant] it is found that the fact that these viewpoints were disseminated at [his] own initiative is not of the utmost importance. In these circumstances and irrespective of the fact that the statements are rightly considered to be covered by Section 266 (b) of the Penal Code, I doubt the advisability of finding [the applicant] guilty of aiding and abetting in the violation of the provision in question. I therefore vote in favour of acquittal."

B. Relevant domestic legislation

Section 266 (b) of the Penal Code provides:

(translation)

"Any person who, publicly or with the intention of wider dissemination, makes a statement or other communication by which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin or religion shall be liable to a fine or to simple detention or to imprisonment for any term not exceeding two years."

Section 23 (1) of the Penal Code provides:

(translation)

"The penalty in respect of an offence shall apply to any person who has contributed to the execution of the wrongful

JERSILD v. DENMARK

act by instigation, advice or action. The punishment may be reduced for any person who only intended to give assistance of minor importance, strengthen an intent already resolved, if the offence has not been completed or an intended assistance failed."

COMPLAINTS

The applicant complains that the Supreme Court judgment upholding his conviction and sentence constitutes a breach of Article 10 of the Convention in that his right as a television journalist to impart information and to impart his ideas was unjustifiably interfered with by a public authority.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 29 July 1989 and registered on 11 December 1989.

On 7 October 1991 the Commission decided to bring the application to the notice of the respondent Government and to invite them to submit written observations on its admissibility and merits.

The Government's observations were submitted on 20 December 1991 and the applicant's observations in reply were submitted on 17 February 1992.

THE LAW

The applicant complains that his right as a television journalist to impart information and to impart his ideas was interfered with by the Danish courts and that the interference was not justified. He invokes 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."

The Commission finds that there has been an interference by a public authority with the exercise of the applicant's freedom of expression. This interference resulted from the sentence to pay a fine imposed on the applicant by the City Court of Copenhagen on 24 April 1987, upheld by the High Court of Eastern Denmark on 16 June 1988 and by the Supreme Court on 13 February 1989, for aiding and abetting the three youngsters to disseminate defamatory statements about immigrants in Denmark.

The Commission also finds that the interference was in accordance with law as it was based on Section 266 (b) in conjunction with Section

JERSILD v. DENMARK

23 (1) of the Danish Penal Code. The restriction pursued a legitimate aim covered by Article 10 para. 2 (Art. 10-2) of the Convention, namely the protection of the reputation and rights of others.

Accordingly, what remains to be examined is whether the restriction complained of was necessary in a democratic society as required by Article 10 para. 2 (Art. 10-2) of the Convention.

The applicant submits that in pursuit of the legitimate aim of protecting the reputation and rights of others it is not necessary in a democratic society to penalise a journalist where he seeks in good faith to investigate an issue of major public concern and to ensure public and governmental response. The applicant contends that the programme item condemned in court was in fact directed at protecting the rights of the immigrant community, through exposure of the attitudes of the greenjackets which in turn explained their violent behaviour towards immigrants. At the same time the feature sought to give information to the public about the social deprivation of the youngsters and to raise questions about the effectiveness of policies of the authorities, particularly the police.

The applicant also submits that the interpretation of Section 266 (b) in conjunction with Section 23 of the Danish Penal Code by the Danish courts did not give proper weight to the motivation of the broadcast, which was not aimed at insulting or degrading persons, but was designed to make a portrait of the greenjackets and to convey to the public an appreciation through images and words of this new phenomenon in Denmark, the espousal of violent racism. To achieve such a portrait of the group it was necessary for the medium in question, television, to broadcast the views of the group even if these were, outside the context of the broadcast, offensive. To have excluded such speech in the final editing would have made the portrait incomplete and ultimately of no value as a means of communicating to the public the group's attitudes however reprehensible they were, particularly as the "Søndagsavisen" feature in July 1985 was the first investigation by television of the phenomenon of violence and harassment against immigrants.

The applicant thus considers that his conviction was a disproportionate interference with his freedom of expression.

The Government submit that present-day actions against racist activities are based on the international community's bitter experience of the dire consequences of such acts which have led to great suffering. This phenomenon is not only something which belongs to the past but is a reality of today as recent trends in various European countries show. This had led to the adoption of declarations within the European Communities against racism as well as motions in the Danish Parliament, condemning all forms of discrimination. The Government agree that it is desirable to give the press as good conditions as possible in order to enable it to report on what is happening in society, but this is not tantamount to giving it a free rein.

With reference to the comments on the Supreme Court's judgment of 13 February 1989, published in the Danish Law Journal on 20 January 1990, the Government furthermore submit that the Danish Penal Code is not applied automatically in respect of press reports and articles. Consideration for freedom of expression and freedom of the press makes it natural to weigh the need for protection of the individual against the public's right to be informed. The result must depend on which consideration is found to carry most weight in the specific circumstances.

In the present case the Government maintain that the statements, which were intended to be made to a wider circle, were nothing but a number of inarticulate defamatory remarks and insults made by representatives of a quite insignificant group of young persons whose opinions could hardly be of interest to many people. Therefore, so the

JERSILD v. DENMARK

Government contend, the weighing of the opposing interests lead to the conclusion that the programme did not have such a news or information value that it could justify, in relation to the protection against racial discrimination, the dissemination of the racist statements.

The Commission has taken cognizance of both parties' submissions. After a preliminary examination of the case the Commission has reached the conclusion that it raises serious issues as to the interpretation of Article 10 (Art. 10) of the Convention and that these issues can only be determined after a full examination of their merits. It follows that the application cannot be regarded as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION ADMISSIBLE,
without prejudging the merits of the case.

Deputy to the Secretary
to the Commission

Acting President
of the Commission

(K. ROGGE)

(J. A. FROWEIN)