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Europees Hof voor de Rechten van de Mens
17 december 2004, 33348/96.
(Wildhaber (President)
Rozakis
Costa
Bratza
Caflisch
Türmen
Strážnická
Bîrsan
Lorenzen
Casadevall
Zupancic
Hedigan
Pellonpää
Baka
Maruste
Ugrekhelidze
Hajiyev)
Noot Gerards

Pedersen en Baadsgaard
tegen
Denemarken

Vrijheid van meningsuiting; Kritiek op politieoptreden in televisiedocumentaire; Smaad; Feitelijke bewering of waardeoordeel; Journalistieke zorgvuldigheid; Redelijke termijn; Grand Chamber.

[EVRM art. 6 lid 1, art. 10]

Twee journalisten, Pedersen en Baadsgaard, maakten in 1991 een tweetal televisiedocumentaires over een strafzaak tegen X, die in 1982 wegens moord op zijn echtgenote tot twaalf jaar gevangenisstraf werd veroordeeld. In de documentaire werd onder meer een taxichauffeur aan het woord gelaten die vertelde dat zij ten tijde van het politieonderzoek naar de moord een verklaring had afgelegd. In deze verklaring had zij gesteld dat zij X samen met zijn zoontje op de dag van de verdwijning van zijn vrouw in een auto had zien rijden. Dit was een ontlastende verklaring, die X mogelijk een alibi verschafte. Haar was echter nooit de mogelijkheid geboden om de op schrift gestelde verklaring na te lezen of te ondertekenen. Ook was het relevante deel van de verklaring niet terug te vinden in een door de politie opgemaakt verslag van het verhoor. Na dit interview met de taxichauffeur stelde een commentaarstem onder andere de volgende vragen: “Now we are left with all the questions: why did the vital part of the taxi driver’s explanation disappear - and who in the police or public prosecutor’s office should carry the responsibility for this? Was it the two police officers who failed to write a report about it? Hardly, sources in the police tell us they would not dare. Was it [the Chief Superintendent] who decided that the report should not be included in the case? Or did he and the Chief Inspector of the Flying Squad conceal the witness’s statement from the defence, the judges and the jury?”
In de periode na de uitzending van de documentaires werd een aantal getuigen, waaronder de taxichauffeur, door de politie opnieuw verhoord. Naar aanleiding van het daardoor verkregen bewijsmateriaal werd besloten de zaak tegen X te heropenen. Bij beslissing in herziening werd X vrijgesproken van de moord.
De in de documentaire genoemde “Chief Superintendent”, de hoofdinspecteur van politie, diende een strafklacht in tegen de journalisten wegens smaad. Hij vond dat zijn goede naam was aangetast nu in de documentaire werd geïnsinueerd dat hij wezenlijk bewijsmateriaal zou hebben achtergehouden, hetgeen een ernstig strafbaar feit is. Klagers werden in de strafprocedure veroordeeld tot een geldboete en tot betaling van een schadevergoeding aan de hoofdinspecteur.
Het Hof stelt vast dat de stellingen in de documentaire, ook al waren zij in de vorm van vragen geformuleerd, een feitelijk oordeel inhielden over het optreden van de hoofdinspecteur. De journalisten beweerden met deze vragen dat deze een ernstig strafrechtelijk vergrijp had gepleegd. Een dergelijke feitelijke bewering moet met feiten gestaafd kunnen worden. Verzoekers dienen hun feitelijke stellingen te kunnen baseren op voldoende precieze en betrouwbare feiten, die in verhouding staan tot het vergaande karakter van hun beweringen. Het is in dit verband van belang dat de beweringen gedaan werden in een veelbekeken programma met een grote impact op het publiek. Ook acht het Hof het relevant dat een hoofdinspecteur weliswaar meer kritiek moet kunnen verdragen dan een privé-persoon, maar dat minder kritiek aanvaardbaar is dan het geval is bij politici. Daarnaast moet rekening worden gehouden met het feit dat de beschuldigingen inbreuk maakten op de presumptie van onschuld.

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Ten aanzien van de litigieuze beweringen geldt volgens het Hof dat de journalisten zich uitsluitend baseerden op het interview met de taxichauffeur, terwijl hen bekend kon zijn dat haar verklaringen niet helemaal betrouwbaar waren. Voor het waarheidsgehalte van de stellingen is niet relevant dat verzoekster in 1982 niet in staat is gesteld om haar verklaring te lezen en te ondertekenen, omdat dit destijds het beleid van het betreffende politiecorps was - in ieder geval kan hieruit niet worden afgeleid dat de politie erop uit was een deel van de verklaring achter te houden. Ook de andere aangevoerde feiten vormen onvoldoende basis voor de ernstige aantijgingen tegen de hoofdinspecteur. Nu de opgelegde sancties niet disproportioneel hoog zijn, is geen sprake van een schending van art. 10 EVRM.

The law

I. Alleged violation of Article 6 of the Convention

41. Complaining of the length of the criminal proceedings, the applicants relied on Article 6 par. 1 of the Convention which, in so far as relevant, reads as follows: “In the determination of (...) any criminal charge against him, everyone is entitled to a (...) hearing within a reasonable time by [a] (...) tribunal (...)”

A. Period to be taken into consideration

42. The applicants submitted that the period from May 1991, when the Chief Superintendent reported the applicants to the police, until January 1993, when the applicants were formally charged, should be included in the Court’s assessment of the overall length of the proceedings.
43. The Government contended that the period relevant for the assessment of the issue under Article 6 par. 1 began on 19 January 1993, when the Chief Constable in Gladsaxe informed the applicants that they were charged with defaming the Chief Superintendent.
44. The Court reiterates that, according to its case-law, the period to be taken into consideration under Article 6 par. 1 of the Convention must be determined autonomously. It begins at the time when formal charges are brought against a person or when that person has otherwise been substantially affected by actions taken by the prosecuting authorities as a result of a suspicion against him (see, for example the *Hozee v. the Netherlands* judgment of 22 May 1998, *Reports of Judgments and Decisions* 1998-III, p. 1100, par. 43).
The applicants became aware on 10 July 1992 that they had been reported to the police; however, on their request they were informed that no decision had yet been taken as to possible charges against them. Further, no criminal procedure enforcement measures were taken against the applicants before 19 January 1993, when the applicants were notified that they were charged with defaming the Chief Superintendent.
In these circumstances the Court considers that the applicants were charged, for the purpose of Article 6 par. 1 of the Convention, on 19 January 1993 and that the “time” referred to in this provision began to run from that date.
It is common ground between the parties that the proceedings ended on 28 October 1998, when the Supreme Court gave its judgment.
Thus, the total length of the proceedings, which the Court must assess under Article 6 par. 1 of the Convention, was 5 years, 9 months and 9 days.

B. Reasonableness of the length of the proceedings

45. The reasonableness of the length of the proceedings is to be assessed in the light of the particular circumstances of the case, regard being had to the criteria laid down in the Court’s case-law, in particular the complexity of the case, the conduct of the applicant and that of the authorities before which the case was brought (see *Pélissier and Sassi v. France* [GC], no. 25444/94, ECHR 1999-II, par. 67).

1. Submissions of those appearing before the Court

a) The applicants

46. The applicants maintained that the case did not involve complex factual or legal issues that could justify the excessive length of the proceedings.
As regards their conduct, the applicants submitted that it could not be held against them that they had used the remedies available under Danish law.
With regard to the conduct of the authorities, the applicants found that the case had lain dormant from the City Court’s judgment on 15 September 1995 until the case was heard by the High Court in March 1997. They pointed out that the prosecution had sent a notice of appeal to the High Court on 15 April 1996, seven months after they had appealed against the judgment. Thus, they maintained, the duration of the trial had been unreasonable and the responsibility for this lay with the Government, who were responsible for the conduct of the prosecuting authorities and the functioning of the court system as such.

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b) The Government

47. The Government maintained that the criminal proceedings had been very comprehensive and thus time-consuming, involving the two TV-programmes produced by the applicants, the proceedings before the Special Court of Revision and the proceedings before the High Court, which eventually led to X's acquittal. Moreover, the case had presented several procedural problems, which required clarification before the case could be sent to the City Court for trial.

The Government submitted that to a very great extent the applicants' conduct had been the cause of the length of the proceedings, notably prior to the proceedings before the City Court and the High Court.

Furthermore, the Government contended that the case had contained no periods of inactivity for which the Government could be blamed. Accordingly, in the Government's opinion, the duration of the proceedings amounting to just over five years and nine months in a complicated criminal case heard at three levels of jurisdiction and by the Leave-to-Appeal Board had been in full compliance with the "reasonable time" requirement of the Convention.

2. The Court's assessment

a) Complexity of the case

48. The Court considers that certain features of the case were complex and time-consuming.

b) Conduct of the applicant

49. Only delays attributable to the State may justify a finding of failure to comply with the "reasonable time" requirement (see, for example, *Humen v. Poland*, no. 26614/95, par. 66, 15 October 1999). The applicants do not appear to have been much involved in the procedural disputes during the proceedings concerned. However, it follows from the Court's case-law that they are nevertheless to be held responsible for any delays caused by their representatives (see, for example, the *Capuano v. Italy* judgment of 25 June 1987, Series A no. 119, p. 12, par. 28). In the present case the Court finds that although the applicants' use of available remedies could not be regarded as hindering the progress of the proceedings, it did prolong them. Moreover, the applicants never objected to any adjournment. On the contrary, it appears that in general the preparation of the proceedings, including the scheduling of the final hearing before the High Court and the Supreme Court, was done in agreement with counsel for the applicants (see paragraphs 30, 32 and 36 above).

In these circumstances, the Court finds that the applicants' conduct contributed to some extent to the length of the proceedings.

c) Conduct of the national authorities

50. The period of investigation by the police and the legal preparation by the prosecution came to an end on 5 July 1994 when the case was sent to the City Court for adjudication (see paragraphs 29 and 30 above). During this period, lasting one year, five months and sixteen days, numerous preliminary court hearings were held and decisions taken. The Court finds that this period cannot be criticised.

The trial before the City Court was terminated by a judgment of 15 September 1995 (see paragraph 31 above), thus one year, two months and ten days after its commencement. Noting especially that the scheduling of the hearing was determined in agreement with the applicants' counsel, the Court finds this period reasonable.

The proceedings before the High Court lasted from 15 September 1995 until 6 March 1997 (see paragraphs 32 and 33 above), that is, one year, five months and eighteen days. At the meeting on 25 June 1996 counsel for one of the applicants expressed his wish not to commence the hearings before the High Court until the beginning of 1997 (see paragraph 32 above). It is true that it took seven months for the prosecuting authorities to prepare the case before a notice of appeal was sent to the High Court on 15 April 1996. However, in the light of the complexity of the case, the Court finds it unsubstantiated that this period constitutes a failure to make progress in the proceedings and it is not in itself sufficiently long to justify finding a violation.

On 6 March 1997 the applicants requested leave to appeal to the Supreme Court, which was granted by the Leave-to-Appeal Board on 29 September 1997 (see paragraph 34 above). The length of these proceedings, which therefore lasted six months and twenty-three days, cannot be criticised.

Finally, the proceedings before the Supreme Court, which commenced on 3 October 1997 and ended on 28 October 1998 (see paragraphs 35-37 above), thus lasting one year and twenty-five days, did not disclose any periods of unacceptable inactivity.

d) Conclusion

51. Making an overall assessment of the complexity of the case, the conduct of all concerned as well as the total length of the proceedings, the Court considers that the latter did not go beyond what may be considered reasonable in this particular case. Accordingly, there has been no violation of Article 6 par. 1 of

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the Convention in respect of the length of the proceedings.

II. Alleged violation of Article 10 of the Convention

52. The applicants submitted further that the judgment of the Danish Supreme Court amounted to a disproportionate interference with their right to freedom of expression guaranteed by Article 10 of the Convention, which reads as follows:

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."

A. Submissions of those appearing before the Court

1. The applicants

53. The applicants maintained that their questions in the programme "The Blind Eye of the Police" could not be seen as factual statements whose truthfulness they could be required to prove. Read as a whole and in their context, in the applicants' view, it was apparent that the questions merely implied a range of possibilities in the criticised handling of the investigation of the murder case from 1981-82, especially as regards the taxi driver's observations. The questions left it to the viewers to decide, between various logical explanations, who was responsible for the failures in the handling of the murder case. The questions did not assert that the Chief Superintendent had committed a violation of the Penal Code. However, he had been the head of the police unit that performed the much-criticised investigation that led to the wrongful conviction of X. Accordingly, raising the hypothetical question whether he in his official capacity could be responsible for the misplacing or concealment of parts of the taxi driver's original statement was neither unreasonable nor excessive.

54. The applicants contended that the programmes were serious, well-researched documentaries and that there could be no serious doubts about their good faith, including when relying on the taxi driver's account of the events. In their request for the case to be referred to the Grand Chamber and later at the hearing, the applicants submitted that the majority of the Chamber had seemed to question whether the taxi driver in 1981 had actually given the explanation to the police that she claimed to have done. The applicants regretted the Chamber's assessment and the method used in this respect with regard to review of facts in a case under the European Convention. In addition, although regretting that they had failed to verify the time of the funeral, the applicants contended that the taxi driver's explanation had appeared highly plausible and credible and she had had no reason not to tell the truth about what she had observed on 12 December 1981. In addition, her testimony had been a crucial element in the reopening of the case by the Special Court of Revision and the later acquittal of X. Moreover, the applicants had reason to believe that a significant statement, such as the one the taxi driver had allegedly given to the police, would be the subject of a police report. Accordingly, and taking into consideration the fact that the Frederikshavn police had failed to comply with section 751 of the Administration of Justice Act at the material time, it seemed likely that someone within that police district had either misplaced or concealed part of the taxi driver's statement.

55. The applicants found that the majority of the Chamber had disregarded the Court's case law of according to which police officials must accept scrutiny by the public including the media on account of their sensitive functions. The applicants emphasised that, like politicians, civil servants were subject to wider limits of acceptable criticism than private individuals, and that members of the police force, including high-ranking police officers, could not be considered to have the same protection of their honour and reputation as afforded to judges. The applicants pointed out that the criticism was limited to the Chief Superintendent's performance as head of the investigation in the specific case and did not concern his general professional qualities or performance or his private activities. Furthermore, the applicants alleged that, during a telephone conversation between the first applicant and the Chief Superintendent, which had taken place at some unknown time before the broadcast of the second programme, the Chief Superintendent

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had declined to participate in the programme. Thus, he had not been precluded from participating in the programme.

2. The Government

56. The Government emphasised that the applicants had not been convicted for expressing strong criticism of the police, but exclusively for having, on their own behalf, made the very specific, unsubstantiated and extremely serious accusation against the named Chief Superintendent that he had intentionally suppressed evidence in the murder case. The Danish Supreme Court had fully recognised that the present case involved a conflict between the right to impart ideas and the right to freedom of expression and the protection of the reputation of others, and it had properly balanced the various interests involved in the case in conformity with the principles embodied in Article 10 of the Convention.

57. Moreover, the Government pointed out, the applicants had not been convicted for disseminating statements made by the taxi driver. In particular, she had made no allegation of suppression of evidence against the police in Frederikshavn, much less against the Chief Superintendent personally. In other words, the applicants had made an independent allegation to the extent that a vital piece of evidence had been suppressed and that such suppression had been decided upon either by the Chief Superintendent alone or by him and the Chief Inspector of the Flying Squad jointly. Leaving the viewers with these two options did not amount, as claimed by the applicants, to a range of possibilities. On the contrary, this was an allegation that the Chief Superintendent had in either event taken part in the suppression and thus committed a serious criminal offence, as also found by all three levels of jurisdiction, including the Supreme Court unanimously.

58. In the Government's view the applicants' allegation was of such a direct and specific nature that it clearly went beyond the scope of a value judgment. It had thus been fully legitimate to demand justification as a condition for non-punishment. The applicants had the possibility of giving such justification, but had not done so. In this respect the Government referred both to the unanimous finding of the Supreme Court that the applicants had had no basis for making the allegations, and to its consequent ruling that the allegations were null and void.

59. The Government disputed the applicants' allegation that it was a fact that the taxi driver when questioned by the police in 1981 had claimed to have seen X on 12 December 1981. They observed that there was no authoritative finding of any Danish authorities or courts on this point. Also, setting aside the fact that the Government could not accept that there was any basis for jumping from the taxi driver's statement to the serious allegation against the Chief Superintendent, the Government submitted that the applicants had in any event failed to examine the validity of the taxi driver's statement, which had emerged over nine years after the events had taken place. The applicants had failed to check simple facts such as whether the funeral of the taxi driver's grandmother had actually taken place at 1 p.m. The Government found it sadly ironic that the programme, which by its own account aimed at clearing someone unjustly convicted in a court of law, had ended up unjustly convicting someone else in the court of public opinion. They pointed out that the applicants' first programme had also resulted in a defamation case.

60. The Government maintained that the Chief Superintendent had been precluded from participating in the programme "The Blind Eye of the Police" at the time when X's request for a re-opening of the murder trial was pending before the Special Court of Revision.

61. Finally, the Government submitted that the programme "The Blind Eye of the Police" had had no decisive influence on either the order to re-open the murder trial or on the subsequent judgment acquitting X.

B. Submissions by the Danish Union of Journalists

62. In their comments submitted under Article 36 par. 2 of the Convention and Rule 61 par. 3 of the Rules of Court, the intervening party, the Danish Union of Journalists (see paragraph 3 above) maintained that it was essential to the functioning of the press that restrictions on their freedom of expression be construed as narrowly as possible, with self-censorship being the most appropriate form of limitation.

63. Moreover, when imparting information as to the functioning of the police and the judiciary, notably when deficiencies therein resulted in miscarriages of justice, the press should have the right both to investigate and to present their findings with limited restrictions.

64. With regard to the present case, the Danish Union of Journalists contended that the applicants had researched the case very thoroughly. In this respect they had in fact been so successful that they had not merely raised a debate on a matter of serious public concern, they had also ultimately been able to change the course of justice.

65. Accordingly, in the view of the Danish Union of Journalists the Supreme Court judgment of 28 October 1998 amounted to an

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unjustified interference with the applicants' freedom of expression.

C. The Court's assessment

1. Whether there was an interference

66. It was common ground between the parties that the judgment of the Danish Supreme Court constituted an interference with the applicant's right to freedom of expression, as guaranteed by Article 10 par. 1 of the Convention.

2. Whether the interference was justified

67. An interference will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 10. It should therefore be determined whether it was "prescribed by law", whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was necessary in a democratic society" in order to achieve those aims. It was not disputed that the interference was prescribed by law and pursued a legitimate aim, namely the protection of the reputation or rights of others, within the meaning of Article 10 par. 2. The Court endorses this assessment. What is in dispute between the parties is whether the interference was "necessary in a democratic society."

a) General principles

68. The test of "necessity in a democratic society" requires the Court to determine whether the interference complained of corresponded to a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see, among many other authorities, *Perna v. Italy* [GC],no. 48898/99, par. 39, ECHR 2003-V, and *Association Ekin v. France*, no. 39288/98, par. 56, ECHR 2001-VIII).

69. The Court's task in exercising its supervisory function is not to take the place of the competent domestic courts but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation (see *Fressoz and Roire v. France* [GC], no. 29183/95, par. 45, ECHR 1999-I). This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully or in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole, including the content of the comments held against the applicants and the context in which they made them (see *News Verlags GmbH & CoKG v. Austria*, no. 31457/96, par. 52, ECHR 2000-I).

70. In particular, the Court must determine whether the reasons adduced by the national authorities to justify the interference were "relevant and sufficient" and whether the measure taken was "proportionate to the legitimate aims pursued" (see *Chauvy and Others v. France*, no. 64915/01, par. 70, ECHR 2004-VI). In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10 (see, among many other authorities,, judgment of 25 November 1997, *Reports of Judgments and Decisions* 1997-VII, pp. 2547-48, par. 51).

b) Application of the above principles in the instant case

71. The programmes "Convicted of Murder" and "The Blind Eye of the Police" were produced by the applicants on the premises "that there was no legal basis for X's conviction and that by imposing its sentence, the High Court of Western Denmark [on 12 November 1982] set aside one of the fundamental tenets of the law in Denmark, namely that the accused should be given the benefit of the doubt" and "that a scandalously bad police investigation, in which the question of guilt had been prejudged right from the start, and which ignored significant witnesses and concentrated on dubious ones, led to X being sentenced to 12 years' imprisonment for the murder of his wife" (see paragraph 11 above). The latter premise is also implied by the title of the second programme. Evidently, those topics were of serious public interest.

Freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, among other authorities, *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, p. 23, par. 31; *Janowski v. Poland* [GC], no. 25716/94, par. 30, ECHR 1999-I; and *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, par. 43, ECHR 1999-VIII). Moreover, a constant thread running through the Court's case-law is the insistence on the essential role of a free press in ensuring the proper functioning of a democratic society. Although the press must not overstep certain bounds, regarding in particular protection of the reputation and rights of others and the need to prevent the disclosure of confidential

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information, its duty is nevertheless to impart - in a manner consistent with its obligations and responsibilities - information and ideas on all matters of public interest, including those relating to the administration of justice (see *De Haes and Gijsels v. Belgium*, judgment of 24 February 1997, *Reports* 1997-I, pp. 233-34, par. 37). 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" (see *Thorgeir Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239, p. 27, par. 63, and *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, par. 62, ECHR 1999-III). Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 19, par. 38; *Thoma v. Luxembourg*, no. 38432/97, paras. 45 and 46, ECHR 2001-III; and *Perna* (cited above, par. 39).
The Danish Supreme Court clearly acknowledged the weight to be attached to journalistic freedom in a democratic society when stating "that the applicants' intentions, in the programme, of undertaking a critical assessment of the police investigation were proper as part of the role of the media in acting as a public watchdog" (see paragraph 37 above).
72. However, the applicant journalists were not convicted for alerting the public to what they considered to be failings in the criminal investigation made by the police, or for criticising the conduct of the police or of named members of the police force including the Chief Superintendent, or for reporting the statements of the taxi driver, all of which were legitimate matters of public interest. Indeed, the Danish Supreme Court recognised that there is a very extensive right to public criticism of the police. The applicants were convicted on a much narrower ground, namely for making a specific allegation against a named individual contrary to Article 267 par. 1 of the Penal Code. This provision provides that "any person who violates the personal honour of another by offensive words or conduct or by making or spreading allegations of an act likely to disparage him in the esteem of his fellow citizens shall be liable to a fine or to mitigated detention" (see paragraph 39 above).
73. At all three levels of jurisdiction the Danish courts - the Gladsaxe City Court on 15 September 1995, the High Court of Eastern Denmark on 6 March 1997, and the Supreme Court unanimously on 28 October 1998 - found that the statements cited in the indictment, irrespective of their having been phrased as questions, had to be understood as containing factual allegations of the kind covered by Article 267 par. 1 of the Penal Code and that the applicants had the requisite intentions. The courts at all three levels of domestic jurisdiction found unanimously that the applicants, by formulating the questions as they did, had made the serious accusation that the named Chief Superintendent had committed a criminal offence during the investigation against X, by intentionally suppressing a vital piece of evidence in the murder case, namely the taxi driver's explanation that she, at the time of the murder on 12 December 1981 shortly after noon, had seen X, with the result that X had been wrongly convicted by the High Court sitting with a jury on 12 November 1982.
74. The Court agrees with the domestic courts that the applicants, by introducing their sequence of questions with the question: "Why did the vital part of the taxi driver's explanation disappear - and who in the police or public prosecutor's office should carry the responsibility for this?" (see paragraph 21 above), took a stand on the truth of the taxi driver's statement and presented the matters in such a way that viewers were given the impression that it was a fact that the taxi driver had given the explanation as she claimed to have done in 1981; that the police were therefore in possession of this explanation in 1981; and that this report had subsequently been suppressed. The Court notes in particular that the applicants did not leave it open, or at least include an appropriate question, as to whether the taxi driver in 1981 had in fact given the explanation to the police that, nine years later, she claimed she had.
75. Subsequently they asked: "Was it the two police officers who failed to write a report about it? Hardly, sources in the police tell us, they would not dare. Was it [the named Chief Superintendent] who decided that the report should not be included in the case? Or did he and the Chief Inspector of the Flying Squad conceal the witness's statement from the defence, the judges and the jury?" (see paragraph 21 above). The Court agrees with the Danish Supreme Court that the applicants thereby left the viewers with only two options, namely that the suppression of the vital part of the taxi driver's statement in 1981 had been decided upon either by the Chief Superintendent alone or by him and the Chief Inspector of the Flying Squad jointly. In either case it followed that the named Chief Superintendent had taken part in the suppression and thus committed a serious criminal offence. The applicants did not leave it open, or at least include the appropriate questions, as to whether a report had been made containing the alleged statement by the taxi

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driver, and if so, whether anyone had deliberately made it disappear.
76. In order to assess the justification of an impugned statement, a distinction needs to be made between statements of fact and value-judgments, in that while the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (see, for example, *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 28, par. 46 and *Oberschlick v. Austria*, *Oberschlick v. Austria (no. 1)* , judgment of 23 May 1991, Series A no. 204, p. 27, par. 63). The classification of a statement as a fact or as a value judgment is a matter which in the first place falls within the ambit of the margin of appreciation of the national authorities, in particular the domestic courts (see *Prager and Oberschlick*, cited above, par. 36). However, even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it, failing which it will be excessive (*Jerusalem v. Austria*, no. 26958/95, par. 43, ECHR 2001-II).
As regards the facts of the instant case, the Court notes, as did the Supreme Court, that the applicant journalists did not limit themselves to referring to the taxi driver's testimony and to making value judgments on this basis about the conduct of the police investigation and the Chief Superintendent's leadership of that investigation (see paragraph 37 above). The Court, like the Supreme Court, concludes that the accusation against the named Chief Superintendent, although made indirectly and by way of a series of questions, was an allegation of fact susceptible of proof. The applicants never endeavoured to provide any justification for their allegation, and its veracity has never been proven. It was for this reason that the courts at all three levels of jurisdiction in Denmark unanimously declared it null and void.
77. In news reporting based on interviews, a distinction also needs to be made as to whether the statement emanates from the journalist or is a quotation of others, since 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 (see *Jersild*, cited above, par. 35). Moreover, a general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas (see, for example, *Thoma v. Luxembourg*, cited above, par. 64).
In the present case the applicants were not convicted for reproducing or reporting the statements of others, as in *Jersild* (cited above). They were, as is undisputed, themselves the authors of the impugned questions and the allegations of facts found by the Supreme Court to be inherent in those questions. Indeed, in the programme "The Blind Eye of the Police" none of the persons appearing alleged that the named Chief Superintendent had intentionally suppressed a report which contained the taxi driver's statement that she had seen X on the day of the murder. The applicants drew their own conclusions from the statements of the witnesses, in particular the taxi driver, in the form of an accusation of deliberate interference with evidence, directed against the Chief Superintendent.
78. The Court observes in this respect that protection of the right of journalists to impart information on issues of general interest requires that they should act in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism (see e.g. the *Fressoz and Roire* judgment par. 54; the Bladet Tromsø *and Stensaas* judgment,par. 58, and the *Prager and Oberschlick* judgment, par. 37, all cited above). Under the terms of paragraph 2 of Article 10 of the Convention, freedom of expression carries with it "duties and responsibilities", which also apply to the media even with respect to matters of serious public concern. Moreover, these "duties and responsibilities" are liable to assume significance when there is a question of attacking the reputation of a named individual and infringing the "rights of others". Thus, special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist depends in particular on the nature and degree of defamation in question and the extent to which the media can reasonably regard their sources as reliable with respect to the allegations (see, among other authorities,, no. 46311/99, par. 84, ECHR 2002-III and Bladet Tromsøcited above, par. 66). Also of relevance for the balancing of competing interests which the Court must carry out is the fact that under Article 6 par. 2 of the Convention individuals have a right to be presumed innocent of any criminal offence until proven guilty (see, among other authorities, *Worm v. Austria,* judgment of 29 August 1997, *Reports*1997-V, par. 50, and

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Du Roy and Malaurie v. France, no. 34000/96, par. 34, ECHR 2000-X).
During the domestic proceedings the applicants never endeavoured to prove their allegation, which was declared null and void. However, invoking Article 10 of the Convention and Article 269 par. 1 of the Penal Code, the applicants claimed that, even if their questions amounted to an allegation, the latter could not be punishable because it had been disseminated in view of an obvious general public interest and in view of the interests of other parties. The Court must therefore examine whether the applicants acted in good faith and complied with the ordinary journalistic obligation to verify a factual allegation. This obligation required that they should have relied on a sufficiently accurate and reliable factual basis which could be considered proportionate to the nature and degree of their allegation, given that the more serious the allegation, the more solid the factual basis has to be.
79. It is relevant to this assessment that the allegation was made at peak viewing time on a national TV station in a programme devoted to objectivity and pluralism; that it was therefore seen by a wide audience; and that the audio-visual media often have a much more immediate and powerful effect than the print media.
80. The Court must also take into consideration the fact that the accusation was very serious for the named Chief Superintendent and would have entailed criminal prosecution had it been true. The offence alleged was punishable with up to nine years' imprisonment under Articles 154 and 164 of the Penal Code (see paragraph 39 above). It is true that civil servants acting in an official capacity are, like politicians, subject to wider limits of acceptable criticism than private individuals. However, it cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent politicians do (see *Oberschlick v. Austria (no. 2)* , judgment of 1 July 1997, *Reports* 1997-IV, p. 1275, par. 29; *Janowski*, cited above, par. 33; and *Thoma*, cited above, par. 47). Thus, although the Chief Superintendent was subject to wider limits of acceptable criticism than private individuals, being a public official, a senior police officer and leader of the police team which had carried out an admittedly controversial criminal investigation, he could not be treated on an equal footing with politicians when it came to public discussion of his actions. Even less so, as the allegation exceeded the notion of "criticism of the Chief Superintendent's performance as head of the investigation in the specific case" (see paragraph 56 above) and amounted to an accusation that he had committed a serious criminal act. Thus, it inevitably not only prejudiced public confidence in him, but also disregarded his right to be presumed innocent until proven guilty according to law.
81. The police enquiries in the original criminal trial against X involved about 900 people and more than 4,000 pages of reports, and thirty witnesses gave statements before the High Court in 1982 (see paragraph 12 above). When preparing their programmes, the applicant journalists had established contact with various witnesses through advertising in the local paper and via police reports.
82. Yet, with regard to the accusation for which they were convicted, the applicants relied on one witness in particular, namely the taxi driver. The Court observes that during the programme "The Blind Eye of the Police" the taxi driver claimed that in 1981 she had told the two police officers who interviewed her about two observations she had made on the day of the murder: she had seen a Peugeot taxi and she had seen X and his son shortly after 12 o'clock on 12 December 1981. The reason why she could remember the exact date and time so well as to the latter observation was because she had had to attend her grandmother's funeral on that date at 1 p.m. (see paragraph 16 above).
83. The applicants' interview with the taxi driver was filmed on 4 April 1991. The applicants were at that time aware that the taxi driver, at the request of X's new counsel, had been interviewed by the police on 11 March 1991 and that during that interview she had maintained that she had told the police already in 1981 about having seen X shortly after noon on 12 December 1981 (see paragraphs 19-20 above). Despite the fact that this witness appeared over nine years after the events took place, the applicants did not check whether there was an objective basis for her timing of events. This could easily have been done, as shown by the police enquiry on 11 March 1991, which revealed that the funeral of the taxi driver's grandmother had taken place, not at 1 p.m., but at 2 p.m. on 12 December 1981 (see paragraph 22 above). This fact was indeed important, not only to the murder case, in which the crucial time was between 11.30 a.m. and 1 p.m., but also to the reliability of the taxi driver, who in calculation backwards from the time when the funeral took place, claimed to be completely accurate in her observations of the whereabouts of X. The Court also notes that the applicant journalists found their failure to verify the time of the funeral "regrettable".
84. In addition, the Court observes that the taxi driver at no point during the programme "The Blind Eye of the Police" asserted that the two police officers had definitely made a report containing her crucial statement; or that a report containing her crucial statement had been

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suppressed deliberately; or that it was the named Chief Superintendent who had intentionally suppressed the report. This being so, taking into account the nature and the seriousness of the applicant's allegation against the named Chief Superintendent, the applicants' reliance on the taxi driver's statement alone could not justify their three-fold speculation that the taxi driver had made her crucial statement to the police in 1981; that a report on it had been written; and that the Chief Superintendent had intentionally suppressed that report.

85. The applicants had obtained a copy of the report made by the two police officers in December 1981 mentioning the taxi driver's sighting on 12 December 1981 of a Peugeot taxi (which had no relevance to the murder) (see paragraph 18 above). The report itself did not contain any indication that something might have been deleted from it. Nor was there any evidence that another report had existed containing the taxi driver's statement that she had seen X on the relevant day.

86. When preparing the production of the programmes "Convicted of Murder" and "The Blind Eye of the Police", the applicants became aware that the police in Frederikshavn had not complied with section 751 (2) of the Administration of Justice Act, a provision which had been enacted on 1 October 1978 and provided that a witness should be given the opportunity to read his or her statement (see paragraph 39 above). The non-compliance was confirmed by the inquiry into the specific police investigation of X's case following the broadcast of the applicants' television programmes (see paragraph 25 above). That inquiry resulted in a report of 29 July 1991 by the Regional State Prosecutor, stating *inter alia* that the police in Frederikshavn had not, in their usual routine, implemented the relevant provision. This non-compliance had not been limited to the investigation in X's case. Instead, allegedly in order to minimise errors or misunderstandings, the police in Frederikshavn usually interviewed witnesses in the presence of two police officers and made sure that crucial witnesses repeated their statements before a court as soon as possible. In that connection the Regional State Prosecutor noted that the High Court, before which X had been convicted in 1982, had not made any comments on the non-compliance with section 751 (2) of the Administration of Justice Act with regard to the thirty witnesses who were heard before it in 1982. Finally, the Regional State Prosecutor noted that the police district of Frederikshavn was apparently not the only police district which had failed to comply with the said provision. Consequently, on 20 December 1991 the Prosecutor General found the non-compliance unfortunate and open to criticism and he informed the Ministry of Justice that he would produce a wider set of guidelines to be integrated into the Police Academy's educational material.

87. Notwithstanding this finding of a procedural failure in the conduct of the investigation in X's case, neither the inquiry nor the statement by the Prosecutor General established that the taxi driver when interviewed in December 1981 had indeed also claimed to have seen X on the day of the murder (something that was in fact contradicted by the two police officers who had interviewed her in 1981, see paragraph 25 above); or that a report had been written containing such a statement; or that the existing police report of 1981 had not contained the taxi driver's full statement; or that somebody within the Frederikshavn police had suppressed evidence in X's case or any other criminal case for that matter.

Accordingly, in the Courts' view, the fact that the police in Frederikshavn had failed to comply with section 751 (2) of the Administration of Justice Act, whether taken alone or together with the taxi driver's statement, could not provide a sufficient factual basis for the applicants' accusation that the Chief Superintendent had actively tampered with evidence.

88. The applicant journalists submitted that their programmes and the taxi driver's testimony had been a crucial element in the Special Court of Revision's decision of 29 November 1991 to re-open X's trial and the High Court's judgment of 13 April 1992 acquitting X. It is, however, to be observed that counsel for X had already requested a re-opening of the trial on 13 September 1990, four days before the broadcast of the applicants' first programme "Convicted of Murder" and more than six months before the broadcast of programme "The Blind Eye of the Police" (see paragraph 10 above). The Court also notes that the Special Court of Revision was divided when the retrial was granted on 29 November 1991, in that only two judges out of five found that new testimonial evidence, including the taxi driver's statement, had been produced on which X might have been acquitted had it been available at the trial. The re-trial was granted nevertheless because the presiding judge found that in other respects special circumstances existed which made it overwhelmingly likely that the available evidence had not been assessed correctly in 1982 (see paragraph 24 above). Finally, although X was acquitted by the High Court sitting with a jury on 13 April 1992, the judgment did not contain any specific reasoning with regard to the jury's answers to the particular questions put by the public

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prosecution (see paragraph 26 above). Thus, the assertion that the applicants' programmes or the taxi driver's testimony were a crucial element in the later acquittal of X amounts to speculation.
89. Even assuming that the applicants' programmes and the taxi driver's testimony were instrumental in the re-opening of the proceedings and the acquittal of X, the Court notes that none of those subsequent events, whether the re-opening decision or the re-trial, in any way supported the applicants' theory that led them to include their serious allegation against the Chief Superintendent in their programme "the Blind Eye of the Police" broadcast on 22 April 1991.
90. The Frederikshavn police were, it is true, invited to participate in the first programme "Convicted of Murder", which was broadcast on 17 September 1990, four days after X had requested that the Special Court of Revision order a new trial. This invitation was declined, however, since the applicant journalists were not willing to furnish beforehand and in writing the questions to be put to the police (see paragraph 12 above). On the other hand, the applicants have not substantiated their allegation that the named Chief Superintendent at some unknown time was invited to participate in the second programme "The Blind Eye of the Police", which was broadcast on 22 April 1991. In any event, noting especially the statement by X's new counsel made during the programme "The Blind Eye of the Police": "I have agreed with the public prosecutor and the President of the Special Court of Revision that statements to the press in this matter will in future only be issued by the Special Court of Revision" (see paragraph 19 above), the Court is satisfied that the named Chief Superintendent was in fact precluded from publicly commenting on the case while it was pending before the Special Court of Revision.
91. In assessing the necessity of the interference, it is also important to examine the way in which the relevant domestic authorities dealt with the case and in particular whether they applied standards which were in conformity with the principles embodied in Article 10 of the Convention (see paragraph 70 above). A perusal of the Supreme Court's judgment reveals that that court fully recognised that the present case involved a conflict between the right to impart information and protection of the reputation or rights of others, a conflict it resolved by weighing the relevant considerations in the light of the case-law under the Convention. Thus, the Supreme Court clearly recognised that the applicants' intention, in the programme, of undertaking a critical assessment of the police's investigation was a proper part of the role of the media in acting as a public watchdog. However, having balanced the relevant considerations, that court found no basis for the applicants to make such a serious charge against the named Chief Superintendent as they did, in particular because the applicants had sufficient other opportunities to achieve the objects of the programme.
92. On the basis of the various elements above and having regard to the nature and degree of the accusation, the Court sees no cause to depart from the Supreme Court's finding that the applicants lacked a sufficient factual basis for the allegation, made in the television programme broadcast on 22 April 1991, that the named Chief Superintendent had deliberately suppressed a vital piece of evidence in the murder case. The national authorities were thus entitled to consider that there was a "pressing social need" to take action under the applicable law in relation to that allegation.
93. The nature and severity of the penalty imposed are also factors to be taken into account when assessing the proportionality of the interference under Article 10 of the Convention (see, for example, *Ceylan v. Turkey* [GC], no. 23556/94, par. 37, ECHR 1999-IV; *Tammer v. Estonia*, no 41205/98, par. 69, ECHR 2001-I;and, no. 35640/97, par. 63, ECHR 2003-IV).
In the instant case the applicant journalists were each sentenced to 20 day-fines of DKK 400, amounting to DKK 8,000 (equivalent to approximately 1,078 euros (EUR)) and ordered to pay compensation to the estate of the deceased Chief Superintendent of DKK 100,000 (equivalent to approximately EUR 13,469) (see paragraphs 33 and 37 above). The Court does not find these penalties excessive in the circumstances or to be of such a kind as to have a "chilling effect" on the exercise of media freedom (see, *mutatis mutandis, Wille v. Liechtenstein* [GC], no. 28396/95, par. 50, ECHR 1999-VII; *Nikula v. Finland*, no. 31611/96, par. 54, ECHR 2002-II; and *Elci and Others v. Turkey*, nos. 23145/93 and 25091/94, par. 714, 13 November 2003).
94. Having regard to the foregoing, the Court considers that the conviction of the applicants and the sentences imposed on them were not disproportionate to the legitimate aim pursued, and that the reasons given by the Supreme Court in justification of those measures were relevant and sufficient. The interference with the applicants' exercise of their right to freedom of expression could therefore reasonably be regarded by the national authorities as necessary in a democratic society for the protection of the reputation and rights of others.
95. There has accordingly been no violation of Article 10 of the Convention.

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For these reasons, the Court

1. *Holds* unanimously that there has been no violation of Article 6 of the Convention;
2. *Holds* by 9 votes to 8 that there has been no violation of Article 10 of the Convention.

Joint partially dissenting opinion of Judges Rozakis, Türmen, Stráznická, Bîrsan, Casadevall, Zupancic, Maruste and Hajiyev

(Translation)
1. We voted unanimously for the finding that there had been no violation of Article 6 of the Convention in the present case. On the other hand, we cannot follow the majority as regards their decision on Article 10 of the Convention, which in our opinion has been breached.
2. In this case the context of the application - in particular X's acquittal after nearly 10 years in prison following an alleged malfunctioning of the Danish judicial system, which was incontestably a serious question of general interest - supports our position. There is no need at this stage to refer to the principles governing freedom of expression and the fundamental role of the press in a democratic society, which have been reiterated by the Court throughout its case-law (see paragraph 71 of the judgment).
3. In a judgment of 28 October 1998 the Danish Supreme Court (by a majority) convicted the applicants under Article 267 par. 1 of the Penal Code, for impugning the honour of a chief superintendent of police. The Supreme Court held (unanimously) that the statements covered by the indictment, despite being framed as questions, had to be regarded as indictable under Article 267 and that the applicants had the requisite intentions.
The applicants maintained that the questions posed by them in the programme "The Blind Eye of the Police", were to be read as a whole and in context. It would then be seen that the questions were not directed at defaming any particular person and did not contain any assertion that the Chief Superintendent had committed a violation of the Penal Code. In their submission, the questions merely implied a range of possibilities in the criticised police handling of the investigation of the murder case in 1981-82, especially as regards the taxi driver's observations and the identity of those responsible for concealing or misplacing her important witness statement.
4. We consider that the questions asked by the applicants after the interview with the taxi driver implied a range of possibilities in response to the criticisms concerning the investigation conducted by the police under the responsibility of the chief superintendent. The question why the taxi driver's statement was not included in the file and the identity of those responsible were matters left open for the television viewers to provide their own answers. A careful reading of the questions raised after the interview supports our view that:

- **a).** after the introductory explanations and before the journalists' questions the television viewers were duly warned that these were merely questions to which the applicants had no answer ("Now we are left with all the questions");
- **b).** the applicants raised broad-focus and logical questions intended to cover the various possible explanations why the witness's statement was not in the file and left open the possibility that the two police officers were responsible, although they added that, according to police sources, this was unlikely;
- **c).** they then referred to the possibility that the chief superintendent had decided not to include the witness evidence in the file, and expressed doubt as to whether he had correctly assessed the importance of the taxi driver's statement, but without accusing him of contravening the Penal Code;
- **d).** it was only after raising these questions that the applicants entered into details ("Or did he and the Chief Inspector of the Flying Squad conceal the witness's statement from the defence, the judges and the jury?") and implicitly accused the two police officers, although, as we have pointed out, this was only one possibility among others which were evoked and left for the viewers alone to decide.

As the questions posed by the applicants after the interview were presented as possibilities, or indeed as value judgments or provocative hypotheses concerning factual information given out during the programme, we cannot agree with the majority that they amounted to an accusation that the chief superintendent had committed a criminal offence.
5. Even if the questions amounted to an allegation against the chief superintendent, the applicants, as investigative journalists reporting on an item of such high public interest, alerting the public to a possible malfunctioning of the justice system, could not have been expected to prove their assertions beyond a reasonable doubt.
Admittedly, the right of journalists to impart information on questions of general interest is protected only on condition that they express their views in good faith and on a correct factual basis. However, as paragraph 81 of the judgment makes clear, the police investigation and the criminal proceedings against X were complex and not without difficulties. The

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applicants had also conducted a large-scale search for witnesses when preparing their programmes. The taxi driver was one of those witnesses. During the programme "The Blind Eye of the Police" she declared:
a) that in 1981 she had told the two police officers who interviewed her about two observations she had made on the day of the murder: she had seen a Peugeot taxi (which had no relevance to the murder) and she had seen X and his son at about 12.05 or 12.10 p.m.;
b) that she had driven behind them for about one kilometre;
c) that she remembered the date and time so clearly because she had to attend her grandmother's funeral at 1 p.m. on that date;
d) that she was 100% certain that she had told the police about the latter observation because her husband had sat beside her in the living room throughout the entire interview in 1981 (see paragraph 18 of the judgment).
6. The interview with the taxi driver was prepared on 4 April 1991. The applicants were at that time aware that she, at the request of X's new counsel, had been interviewed by the police on 11 March 1991 and that during that interview she had maintained that she had already told the police in 1981 that she had seen X shortly after noon on 12 December 1981. Furthermore, the applicants were in possession of a copy of the report produced by the Frederikshavn police on the taxi driver's statement of 1981. Since it did not contain any information about her alleged observation, the applicants confronted the taxi driver with the report during the programme. Nevertheless, the taxi driver upheld her statement that she had already told the police about this observation in 1981.
The Prosecutor General confirmed in a letter of 20 December 1991 to the Ministry of Justice that the Frederikshavn police at the relevant time had not complied with section 751(2) of the Administration of Justice Act, which provides that a witness must be given the opportunity to read his or her statement He found this non-compliance unfortunate and open to criticism (see paragraph 25 of the judgment). Before or during the production of their television programmes the applicants became aware of this non-compliance on the part of the Frederikshavn police. In our opinion, this was another element reinforcing their reliance on the taxi driver, when the latter claimed that something was missing from the police report shown to her during the second programme (see paragraph 18, previously mentioned).
7. Having regard to the foregoing, we consider that when the second programme was broadcast, on 22 April 1991, the applicants had a sufficient factual basis to believe the taxi driver's version of events and to believe that the report of December 1981 did not contain her full statement or that there was another report. The subsequent discovery that the funeral of the taxi driver's grandmother had actually taken place one hour later than the taxi driver had remembered did not detract from the fact that at the relevant time the applicants could reasonably assume that the funeral actually had taken place at 1.00 p.m. and that the taxi driver's statement could thus be considered of crucial importance. The reasonableness of their belief is not to be assessed with the benefit of hindsight.
8. In addition, some weight must be attached to the fact that the programme may have played a role in the Special Court of Revision's decision to grant a re-opening of the case, and the fact that X was ultimately acquitted (see paragraphs 24 and 26 of the judgment). The fact that a person who had been sentenced to twelve years' imprisonment for murder and spent almost ten years of his life behind bars was later acquitted on a retrial, serves at least to confirm the high degree of public interest involved in the TV programme in its endeavour to alert the public to a possible miscarriage of justice.
9. As the judgment makes clear, civil servants acting in an official capacity are, like politicians, subject to wider limits of acceptable criticism than private individuals. We accept that a civil servant should not be "treated on an equal footing with politicians" (paragraph 80 of the judgment). However, their sensitive duties, which are frequently crucial for the liberty, security and well-being of society as a whole, place police officers at the centre of the social tension generated on the one hand by their exercise of State power and on the other by the right of the individual to be protected against the abuse of power on their part.
It seems obvious to us that a chief superintendent of police, as a senior civil servant and the head of the unit which had conducted the investigation which led to X's conviction, ultimately quashed, must necessarily accept, regard being had to his duties, powers and responsibilities, that his acts and omissions should be subjected to close and indeed rigorous scrutiny.
10. In short, we conclude that the justification put forward by the Danish authorities for the interference with the exercise by the applicant journalists of their right to the freedom of expression, albeit relevant, were not sufficient to show that that interference was "necessary in a democratic society".

Noot

1. De bovenstaande uitspraak is van belang voor een drietal aspecten van de vrijheid

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van meningsuiting: 1) de omvang van de margin of appreciation bij kritiek op politieambtenaren, 2) de verstrekkendheid van de journalistieke zorgvuldigheid, en 3) het verschil tussen feitelijke oordelen en waardeoordelen. Procedureel bezien is de zaak eveneens interessant, met name als deze uitspraak van de Grote Kamer naast die van de Kamer wordt gelegd. Aan deze vier punten zal in deze annotatie nader aandacht worden besteed. Bovendien zal hierin commentaar worden gegeven op een andere uitspraak die het Hof op dezelfde dag deed en die elders in deze aflevering is opgenomen: *Cumpana en Mazare t. Roemenië*. Ook die zaak betrof een smadelijke perspublicatie, waarbij de vraag rees of daarbij sprake was van feitelijke dan wel waardeoordelen. Bovendien richtte de beoordeling zich ook daar op de vraag of de journalistieke zorgvuldigheid voldoende in acht was genomen. Ten slotte is ook *Cumpana en Mazare* interessant vanuit procedureel opzicht, al is dit om een andere reden dan in bovenstaande zaak.
Hierna zal eerst worden ingegaan op de verschillende procedurele aspecten van de beide zaken. Vervolgens zal de aandacht worden geconcentreerd op de eerdergenoemde inhoudelijke punten.
2. Zowel uit *Cumpana en Mazare* als uit *Pedersen en Baadsgaard* blijkt dat de procedure voor de Grote Kamer nog niet helemaal is uitgekristalliseerd. Veel vragen naar de wijze van beoordelen en de omvang van het geding zijn nog onbeantwoord. Het duidelijkst blijkt dit uit *Cumpana en Mazare*, waarin het Hof antwoord diende te geven op de vraag wat er gebeurt als slechts één van twee of meer klagers intern hoger beroep instelt. Volgens de Roemeense overheid moet dit betekenen dat alleen die aspecten van de zaak worden herbeoordeeld die betrekking hebben op de klager die het beroep heeft ingesteld. Het doel van de procedure voor het EHRM, zo lijkt dan de impliciete stelling, is immers het bieden van individuele rechtsbescherming. Het gaat er niet om dat het objectieve recht getoetst wordt, in die zin dat ook buiten de klacht om kan worden bekeken of een bepaald optreden of handelen verenigbaar is met het EVRM. Hiermee is een belangrijk punt aangesneden, dat tot nu toe weinig in de belangstelling heeft gestaan. Inderdaad lijkt het voor de hand te liggen dat, als gekozen wordt voor een stelsel van individuele rechtsbescherming, de klager zelf bepaalt welke aspecten van een bepaald overheidshandelen aan het EVRM worden getoetst. De gebruikelijke benadering van het Hof komt daaraan in zoverre tegemoet dat alleen aan die artikelen van het EVRM wordt getoetst die door de klager in zijn verzoekschrift genoemd zijn. Bij de toetsing aan die artikelen kiest het Hof vervolgens een meer objectieve benadering. Zelfs als een klager alleen heeft gesteld dat een inbreuk naar zijn mening disproportioneel is, toetst het Hof ambtshalve of ook is voldaan aan de andere beperkingscriteria, zoals de eis van een wettelijke grondslag en de eis van een gerechtvaardigde doelstelling. In zoverre treedt het Hof dan buiten de grenzen van het geschil zoals die door de verzoeker in zijn klacht getrokken zijn. Geheel consequent is het Hof daarin overigens niet: er zijn gevallen waarin het Hof constateert dat partijen het erover eens zijn dat voldaan is aan de vereisten van een wettelijke basis of een gerechtvaardigd doel, of dat een bepaald aspect niet relevant is, zodat het Hof geen reden ziet dit nog nader te beoordelen (zie recentelijk bijv. EHRM 16 december 2004, *Supreme Holy Council of the Muslim Community*, opgenomen onder nr. 15 in deze aflevering, par. 90). Dit is merkwaardig, omdat het feit dat partijen het erover eens zijn dat aan deze eisen is voldaan, nog niet betekent dat dit ook volgens het objectieve recht het geval is. Hier lopen een op de klacht en de partijen gerichte toetsing en een toetsing aan het objectieve recht door elkaar heen. De benadering die het Hof nu in *Cumpana en Mazare* kiest, brengt in dit opzicht zeker niet meer duidelijkheid. Op het eerste gezicht lijkt dit wel het geval te zijn. Het Hof stelt immers dat “the ‘case’ referred to the Grand Chamber necessarily embraces all aspects of the application previously examined by the Chamber in its judgment, there being no basis for a merely partial referral of the cases” (par. 66). Hierdoor lijkt de gebruikelijke benadering te worden bevestigd: het zijn de partijen die de grenzen van het geschil aangeven, namelijk door te bepalen op welke bepalingen de klacht betrekking heeft; vervolgens dient het Hof ambtshalve, volledig en objectief na te gaan of de overheid in de voorgelegde feitenconstellatie gehandeld heeft in overeenstemming met de genoemde bepalingen. Daarbij wordt de gehele zaak opnieuw bekeken: het is niet zo dat alleen de punten worden bekeken waarover opmerkingen zijn gemaakt door de partij die het beroep instelt, of alleen die punten waarop de Kamer al dan niet een schending heeft vastgesteld (zie reeds EHRM 12 juli 2001, K. en *T. t. Finland,*

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EHRC 2001/65, m.nt. Van der Velde). Het maakt dan ook geen verschil of slechts één van beide klagers het hoger beroep heeft ondertekend: de zaak wordt immers toch als geheel herbeoordeeld. Tegen de achtergrond van de in eerdere jurisprudentie gemaakte keuzes is dit oordeel niet onredelijk. Opnieuw geldt echter dat het Hof zijn eigen keuze relativeert, net zoals het in eerste aanleg soms plotseling elementen van een grievenstelsel introduceert. In par. 68 stelt het Hof namelijk in een soort obiter dictum dat zijn conclusie dat de gehele klacht moet worden bekeken, "is all the more appropriate in the present case as Mr. Mazare(...) expressly joined the referral request signed on behalf of both applicants by the first applicant, thereby indicating, albeit retrospectively, his intention to pursue the complaint (...)". De functie van deze toevoeging is ten enenmale onduidelijk. Als het Hof immers, zoals het in de eerdere paragrafen stelt, tot fundamenteel uitgangspunt kiest dat in hoger beroep de gehele feitenconstellatie opnieuw getoetst moet worden, dan doet het ook niet terzake dat de tweede klager alsnog het beroep ondertekende. Als deze ondertekening toch een functie heeft, zoals de overweging impliceert, dan blijkt uit de uitspraak niet wat deze precies is. Zou de omvang van het geding toch anders zijn gedefinieerd als de ondertekening achterwege was gebleven? Zo ja, wat zou de betekenis daarvan dan zijn geweest? Is het inderdaad mogelijk om een zaak dan te "splitsen", zoals *dissenter* Costa beweert? Het Hof zou er goed aan doen hierover meer helderheid te bieden en duidelijker aan te geven wat nu precies de rol is van partijen bij de bepaling van de omvang van het geding. Dit geldt zowel voor het niveau van het intern hoger beroep als voor de behandeling van een zaak door een Kamer.
3. Een tweede merkwaardig aspect van de beoordeling in het interne hoger beroep komt naar voren in *Pedersen en Baadsgaard*. In een hoger beroep is het niet ongebruikelijk dat verwezen wordt naar de uitspraken van eerdere instanties en vervolgens een oordeel wordt gegeven over de redelijkheid daarvan. Er zijn ook wel uitspraken van de Grote Kamer bekend waarin die benadering inderdaad gekozen wordt. In een aantal uitspraken van de Grote Kamer zijn uitgebreide citaten opgenomen uit de Kameruitspraak, waarna de Grote Kamer zich beperkt tot het beoordelen van de redelijkheid van de daarin gegeven beoordeling (bijv. EHRM 28 mei 2002, *Kingsley*, Reports 2002-IV, par. 34, *K. en T. t. Finland*, par. 198-199, EHRM 11 juli 2002, *Göç*, EHRC 2002/63, EHRM 8 juli 2003, *Sommerfeld*, EHRC 2003/70, m.nt. Gerards, par. 67 en 87). Alternatief is dat de Grote Kamer weliswaar een eigen beoordeling geeft, maar in ieder geval uitgebreid verwijst naar de uitspraak van de Kamer en de daar gegeven interpretatie en toepassing (bijv. *K. en T. t. Finland*, par. 194, maar ook EHRM 13 februari 2002, *Refah Partisi*, EHRC 2002/28, m.nt. Janssen, par. 119 e.v., EHRM 9 oktober 2003, *Ezeh en Connors, EHRC* 2003/90, m.nt. Albers en EHRM 16 december 2003, *Cooper, EHRC* 2004/8). De beoordeling is dan relatief terughoudend en beperkt zich tot de hoofdpunten. In de beide bovenstaande zaken lijkt het er echter op dat de Grote Kamer daadwerkelijk de gehele beoordeling over wil doen. Zowel in *Cumpana en Mazare* als in *Pedersen en Baadsgaard* verwijst de Grote Kamer in het geheel niet naar de Kameruitspraak of de redelijkheid daarvan, maar geeft hij een eigen, nieuwe beoordeling van de zaak. Het wordt dan aan de lezer van de uitspraak overgelaten om vast te stellen waarin deze beoordeling verschilt van die van de Kamer, en of dit verschil overwegend feitelijk van aard is dan wel daadwerkelijk de interpretatie van het Verdrag betreft. Dit is een verre van logische keuze van het Hof, nu de taak van de Grote Kamer primair is om mogelijk onjuiste interpretaties van Kamers te verbeteren en de uniformiteit van de interpretatie te waarborgen - dit blijkt wel uit de gronden die in art. 43 EVRM genoemd worden om een zaak door de Grote Kamer te laten beoordelen. Het ligt dan voor de hand dat de Grote Kamer uitdrukkelijk ingaat op de juistheid van een gegeven interpretatie of toepassing. Alleen daardoor wordt, ook naar de lidstaten toe, duidelijk gemaakt welke interpretatie en toepassing aan het Verdrag moet worden gegeven. Zeker vanuit de vaak geuite wens om, in algemene zin, meer duidelijkheid te verkrijgen over de uitleg van het Verdrag, valt de nu gekozen benadering van het Hof moeilijk te verdedigen.
De uitspraak in *Pedersen en Baadsgaard* kan illustreren hoe weinig het oordeel van de Grote Kamer toevoegt in termen van duidelijkheid over interpretatie en toepassing. De uitspraak van de Grote Kamer bestuderende kan de lezer het gevoel bekruipen de verschillende overwegingen al eens eerder gezien te hebben. En inderdaad: als de

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Kameruitspraak ernaast wordt gelegd, dan is duidelijk dat de beide uitspraken op belangrijke punten bijna woordelijk hetzelfde zijn (vgl. bijv. par. 43-46 van de Kameruitspraak met par. 48-51 van de uitspraak van de Grote Kamer en vgl. par. 69 e.v. van de Kameruitspraak met par. 74 e.v. van de uitspraak van de Grote Kamer). Kennelijk vond de Grote Kamer de benadering van de Kamer volkomen redelijk en achtte hij de door de Kamer gegeven interpretatie geheel correct. Waarom dan niet wordt volstaan met een dergelijk oordeel, waarbij wordt uitgelegd waarom deze interpretatie de correcte is, is onduidelijk. Zelfs vanuit het oogpunt van individuele rechtsbescherming voegt deze uitspraak niet veel toe. Klagers hadden in hun verzoek om intern beroep specifiek aangegeven dat zij vonden dat een bepaalde beoordeling door de Kamer op onjuiste uitgangspunten was gebaseerd (par. 54), maar de Grote Kamer besteedt daaraan geen enkele aandacht: het herhaalt slechts de door klagers betwiste redenering. Een dergelijke benadering van de Grote Kamer heeft weinig toegevoegde waarde. Het zou in dit licht goed zijn als de Grote Kamer zich opnieuw zou bezinnen over de vraag welke functie het interne hoger beroep nu precies heeft.

4. Een belangrijk inhoudelijk punt dat in beide zaken aan de orde komt is de tolerantiegraad voor kritiek die bepaalde groepen van personen moeten kunnen verdragen. Het is vaste rechtspraak dat “publieke personen” een dikkere huid moeten hebben dan private personen als het gaat om kritische perspublicaties, maar het is nog niet helemaal duidelijk hoe deze categorie moet worden gedefinieerd. Helder is evenmin hoe moet worden om-gegaan met factoren die ten aanzien van bepaalde categorieën van personen in een tegengestelde richting wijzen, dat wil zeggen in de richting van een *minder* hoge acceptatiegrens. Dit is een punt dat vooral kan spelen bij kritiek op politieambtenaren, maar ook bij rechters. Het Hof stelt in *Pedersen en Baadsgaard*, terecht, dat het daarbij gaat om personen die in de openbaarheid treden en die daarom meer kritiek moeten kunnen verdragen dan privé-personen. Belangrijk is echter ook een andere factor, die in het eerdere arrest *Janowski* aandacht kreeg (EHRM 21 januari 1999, Reports 1999-I, par. 33 *in fine*; idem in EHRM 21 december 2004, *Busuioc*, n.n.g., par. 60). Daarin stelde het Hof vast dat de politie een belangrijke taak heeft als het gaat om handhaving van de openbare orde en dat een goede uitoefening van deze taak in belangrijke mate afhankelijk is van het gezag van de politie en de publieke perceptie daarvan. Op het moment dat de politie al te gemakkelijk beschimpt en bekritiseerd mag worden, is het niet ondenkbaar dat dit gezag afneemt en dat het moeilijker wordt om wezenlijke politietaken goed uit te oefenen. Misschien speelt dit in iets mindere mate bij hogere functies (in *Janowski* ging het om een stadswacht, die vaak en rechtstreeks met weinig gezagsgetrouwe mensen in aanraking komt), maar ook hier kan de bescherming van het aanzien en het gezag van de politie een rol spelen bij de hoeveelheid ongezouten kritiek die acceptabel moet worden geacht. Opmerkelijk genoeg besteedt het Hof geen aandacht aan deze factor, maar stelt het slechts dat hoofdinspecteurs niet in dezelfde mate als politici “knowingly lay themselves open to close scrutiny of their every word and deed” (par. 80). Het criterium om de tolerantiegrens te verhogen is kennelijk alleen nog dat een persoon zichzelf willens en wetens blootstelt aan kritiek. Het is de vraag of dit niet een te subjectief criterium is en of niet ook rekening moet worden gehouden met meer objectieve factoren als het behoud van het aanzien en het gezag van een bepaalde groep. In ieder geval is het jammer dat het Hof in dit verband niet meer doet met het *Janowski*-criterium. Dit geldt al helemaal voor het arrest *Cumpana en Mazare*, nu het Hof daarin in zijn geheel geen aandacht besteedt aan de tolerantiegraad. Toch zou dat erg interessant zijn geweest, nu de smadelijke uitingen waren gericht aan het adres van een rechter. Onduidelijk blijft nu of ook een rechter als een publieke persoon moet worden aangemerkt, al dan niet in dezelfde mate als een hoge politieambtenaar, en onduidelijk blijft eveneens in hoeverre de bescherming van het gezag van de rechterlijke macht de grens van de acceptabele kritiek kan verlagen.

5. Verder hebben beide zaken betrekking op journalistieke zorgvuldigheid bij feitelijke oordelen. In *Cumpana en Mazare* vond het Hof dat de journalisten meer moeite hadden moeten doen om hun stellingen met feiten te onderbouwen, en ook in *Pedersen en Baadsgaard* stelde het Hof dat de zeer vergaande feitelijke beweringen van de journalisten onvoldoende gestaafd werden. Belangrijk is daarbij dat het Hof vooral in *Pedersen en Baadsgaard* een duidelijke opsomming geeft van de eisen waaraan

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een zorgvuldige journalist moet voldoen. Allereerst moet hij te goeder trouw handelen, op basis van een zorgvuldige feitelijke basis. Ook moet de gegeven informatie betrouwbaar en precies zijn. Daarbij is van belang dat de eisen die aan de journalistieke zorgvuldigheid gesteld worden hoger mogen zijn als de informatie schade aan iemands reputatie tot gevolg kan hebben. In *Cumpana en Mazare* voegt het Hof hier nog aan toe dat bescherming van bronnen niet altijd een reden kan zijn om bepaalde feiten achter te houden: de feiten kunnen vaak ook genoemd worden zonder de namen van rechtstreeks betrokkenen te vermelden (par. 106). Verder moet de feitelijke informatie waarop smadelijke of lasterlijke uitlatingen zijn gebaseerd uiterst zorgvuldig worden gecontroleerd, tenzij zich heel bijzondere omstandigheden voordoen - ook dat is een niet meer dan redelijke eis. Ten slotte acht het Hof van belang dat individuen onschuldig moeten worden geacht totdat hun schuld bewezen wordt. Juist dit laatste aspect wordt in *Pedersen en Baadsgaard* benadrukt. Dit is interessant, omdat het Hof hiermee in wezen een soort horizontale werking toekent aan de presumptie van onschuld: deze kan kennelijk niet alleen worden ingeroepen tegen de overheid, maar ook tegen de media. Het lijkt er daarmee op dat een journalist geen uitlatingen mag doen over de strafbaarheid van bepaalde gedragingen, totdat de rechter die strafbaarheid daadwerkelijk heeft vastgesteld. Het is niet helemaal duidelijk hoe dit te verenigen valt met het oordeel in *Vides Aizsardzîbas Klubs*, dat betrekking had op een beschuldiging van illegaal handelen aan het adres van een Letse burgemeester (EHRM 27 mei 2004, n.n.g.). Het Hof stelde daar juist dat de media niet meer deden dan inschatten hoe bepaalde rechts-regels in een concreet geval geïnterpreteerd konden worden en hoe dit voor het concrete geval zou uitpakken (par. 46). Helemaal consistent lijkt het Hof in dit opzicht dus niet te zijn. Toch valt er wel iets te zeggen voor de strikte benadering van *Pedersen en Baadsgaard*. Ook in Nederland wordt regelmatig geklaagd over het feit dat de media soms al iemand veroordeelt, terwijl de rechter hierover nog geen uitspraak heeft gedaan. Zeker als de beeldvorming in de media uitgesproken negatief is, zal het voor de rechter soms best moeilijk zijn om, tegen de stroom in, toch een andere uitspraak te doen. Wellicht kan het nu door het Hof geformuleerde criterium ook op nationaal niveau dienstig zijn, bijvoorbeeld omdat het in een regeling van zelfregulering voor de media wordt opgenomen.

6. Een ander aspect dat in beide zaken centraal staat betreft het onderscheid tussen feitelijke oordelen en waardeoordelen. Inmiddels is hierover een grote hoeveelheid rechtspraak tot stand gebracht. Daaruit blijkt dat het niet alleen op nationaal niveau moeilijk is om hierover een goed oordeel te geven, maar dat dit ook voor het Hof geldt: in *Pedersen en Baadsgaard* verschillen de meningen van de meerderheid en de minderheid juist waar het om dit punt gaat. De rechtspraak van het Hof illustreert ook hoe moeilijk het is om praktische toepasbare criteria te formuleren voor het onderscheiden van feitenoordelen en waardeoordelen - het Hof reikt dergelijke criteria in ieder geval in geen van beide zaken aan (hoewel het hiertoe in *Cumpana en Mazare* wel een poging doet, zie par. 100). Het komt echt aan op interpretatie van de feiten van het concrete geval. Het beoordelen van grensgevallen blijft daarbij buitengewoon lastig en het is niet eenvoudig aan te geven hoe hiermee beter kan worden omgegaan. Het zou de moeite waard zijn hiernaar nader onderzoek te verrichten en te bezien of meer bruikbare criteria kunnen worden aangereikt om grensgevallen op een goede manier te beoordelen. In de tussentijd blijft het de vraag of het Hof er nu echt goed aan doet om hier steeds een eigen oordeel over te geven. Weliswaar stelt het steeds voorop dat het primair aan de nationale rechter is om in te schatten of er sprake is van een feitelijk oordeel of van een waardeoordeel, maar beide zaken laten zien dat het Hof zich hierover een geheel eigen oordeel aanmatigt. Het stelt zich daardoor op als een soort “court of fourth instance”, terwijl dit niet in overeenstemming is met zijn subsidiaire functie. Juist *Pedersen en Baadsgaard* illustreert welke problemen het Hof zichzelf hiermee op de hals haalt. Hoewel dit moeilijk uit de feiten valt af te leiden, lijkt het erop alsof het Hof alleen een vertaald transcript onder ogen heeft gekregen van de relevante televisiedocumentaire. Daarin stond de volgende vraag opgenomen, die de kern vormt van de zaak voor het Hof: “Now we are left with all the questions: why did the vital part of the taxi driver’s explanation disappear - and who in the police or public prosecutor’s office should carry the responsibility for this?” Een meerderheid van 9 rechters vindt dat deze vraag zodanig is geformuleerd dat daarmee een standpunt

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wordt ingenomen over het verdwijnen van de verklaring, terwijl een minderheid van 8 rechters juist van mening is dat de vraag heel open is geformuleerd en het televisiekijkende publiek hierop zelf een antwoord kan geven. Puur en alleen op basis van het transcript is dit inderdaad nog niet zo gemakkelijk te beoordelen. Dit zou anders kunnen zijn als je de documentaire daad-werkelijk bekijkt en als je kennis hebt van de nationale gebruiken en gewoonten als het gaat om verslaggeving. De intonatie die wordt gebruikt door de commentator of het laten vallen van een betekenisvolle pauze kunnen van grote invloed zijn op de betekenis van een vraag, net als het al dan niet gebruiken van stemmingmakende muziek. Een nationale rechter kan zo'n documentaire inderdaad op deze manier bekijken en hieraan een passende interpretatie geven, maar voor het Hof zal dit veel lastiger zijn. Het is daardoor maar de vraag of het Hof echt in staat is om een beter oordeel te geven over de feitenoordelen/waardeoordelendiscussie dan de nationale rechter. Het Hof zou er daarom beter aan doen zich in dit opzicht iets terughoudender op te stellen en de redelijkheid van de door de nationale rechter gegeven waardering slechts oppervlakkig te controleren.

7. Ten slotte moet nog aandacht worden besteed aan de aard en ernst van de sancties die kunnen worden opgelegd bij smadelijke perspublicaties. Juist met het oog op de opgelegde sancties kwam het Hof in *Cumpana en Mazare* tot de conclusie dat er sprake was van een schending van art. 10, ook al was het eerder tot de conclusie gekomen dat de journalisten met hun stuk de grenzen van het toelaatbare hadden overschreden. De Roemeense regering had echter extreem vergaande straffen opgelegd. Niet alleen waren de journalisten veroordeeld tot 7 maanden onvoorwaardelijke gevangenisstraf en de betaling van een aanzienlijke schadevergoeding aan de beledigde rechter, maar ook werd hen verboden bepaalde grondrechten uit te oefenen en werd hen voor de duur van een jaar een beroepsverbod opgelegd. Opmerkelijk genoeg was geen van deze straffen, op de schadevergoedingsplicht na, feitelijk geëffectueerd. De Roemeense regering vond om die reden dat de straffen uiteindelijk toch als niet al te zwaar mochten worden aangemerkt: de journalisten hadden er feitelijk immers maar weinig hinder van ondervonden. Het Hof stelt echter, terecht, dat dit niet terzake doet. Het gaat er vooral om dat het dreigen met dit soort zware straffen een "chilling effect" kan hebben op de media. Voordat zij een belangrijke aantijging of misstand naar buiten brengen, zelfs als deze feitelijk goed is onderbouwd, zullen journalisten zich wel drie keer bedenken als er zo'n zware strafbedreiging bestaat. Met het oog hierop is het ook wel redelijk dat het Hof een, oppervlakkig, oordeel geeft over de ernst van de opgelegde straffen, hoewel dit normaal gesproken een taak is voor de nationale rechter. Alleen door ook hierover een oordeel te geven kan het Hof immers beoordelen of de persvrijheid in onaanvaardbare mate is aangetast. Wel zal het zeker nog nadere uitwerking behoeven hoever het Hof in dit opzicht kan gaan. In *Cumpana en Mazare* was wel heel duidelijk dat de Roemeense regering te zware straffen had opgelegd, maar er zijn ook zaken waarin de zaken genuanceerder liggen. Het Hof moet dan goed zijn subsidiaire functie in het oog houden en mag niet al te zeer in detail een herbeoordeling geven van de strafoplegging door de nationale rechter.

8. Alles bij elkaar genomen zijn dit twee opmerkelijke uitspraken, die vragen doen rijzen over de wenselijkheid van de werkwijze van de Grote Kamer. Niet alleen roepen beide zaken twijfel op over procedurele punten, zoals de definitie van de omvang van het geding, maar ook inhoudelijk valt er het nodige op af te dingen. Het Hof stelt zich al te zeer op als feitenrechter en geeft onvoldoende duidelijkheid, in abstracte en algemene zin, over de interpretatie die moet worden gegeven aan art. 10. Met name wordt weinig duidelijkheid geboden over de criteria die kunnen worden gebruikt om feitenoordelen en waardeoordelen van elkaar te onderscheiden. Hoogstens wordt dit gecompenseerd door het feit dat het Hof meer helderheid geeft over de eisen waaraan journalistieke zorgvuldigheid moet voldoen als het gaat om het staven van feitelijke, maar smadelijke uitspraken.

J.H. Gerards

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