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

CASE OF PEDERSEN AND BAADSGAARD v. DENMARK

(Application no. 49017/99)

JUDGMENT

STRASBOURG

17 December 2004

In the case of Pedersen and Baadsgaard v. Denmark,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Sir Nicolas BRATZA,
Mr L. CAFLISCH,
Mr R. TÜRMEN,
Mrs V. STRÁŽNICKÁ,
Mr C. BÎRSAN,
Mr P. LORENZEN,
Mr J. CASADEVALL,
Mr B. ZUPANČIČ,
Mr J. HEDIGAN,
Mr M. PELLONPÄÄ,
Mr A.B. BAKA,
Mr R. MARUSTE,
Mr M. UGREKHELIDZE,
Mr K. HAJIYEV, *judges*,

and Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 8 September and 17 November 2004,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 49017/99) against the Kingdom of Denmark lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Danish nationals, Mr Jørgen Pedersen and Mr Sten Kristian Baadsgaard ("the applicants"), on 30 December 1998. In the summer of 1999 the second applicant died. His daughter and sole heir, Ms Trine Baadsgaard, decided to pursue the application.

2. The applicants complained of the length of criminal proceedings against them. They furthermore alleged that their right to freedom of expression had been violated in that the Supreme Court judgment of 28 October 1998 disproportionately interfered with their right as journalists to play a vital role as "public watchdog" in a democratic society.

3. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). On 1 November 2001 the Court changed the composition of its Sections. This case was assigned to the

newly composed First Section. Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1, and composed of: Mr C.L. Rozakis, President, Mr P. Lorenzen, Mr G. Bonello, Mrs N. Vajić, Mr A. Kovler, Mr V. Zagrebelsky, Mrs E. Steiner, judges, and Mr S. Nielsen, Deputy Section Registrar. Third-party comments were received from the Danish Union of Journalists, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 61 § 3). Following a hearing on admissibility and the merits (Rule 54 § 3), the Chamber declared the application admissible on 27 June 2002.

4. On 19 June 2003 the Chamber delivered its judgment, in which it held by six votes to one that there had been no violation of Article 6 of the Convention, and by four votes to three that there had been no violation of Article 10 of the Convention. The dissenting opinion of Mr Kovler, and the partly dissenting opinion of Mr Rozakis joined by Mr Kovler and Mrs Steiner were annexed to the judgment.

5. On 18 September 2003 the applicants requested, pursuant to Article 43 of the Convention and Rule 73, that the case be referred to the Grand Chamber, contending that the Chamber should have found a violation of Articles 6 and 10 of the Convention.

6. On 3 December 2003 a panel of the Grand Chamber decided to refer the case to the Grand Chamber.

7. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

8. The applicants and the Danish Government ("the Government") each filed memorials and supplementary memorials.

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 8 September 2004 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr	P. TAKSØE-JENSEN,	*Agent*,
Ms	N. HOLST-CHRISTENSEN,	*Co-Agent*,
Mr	D. KENDAL,	
Ms	D. BORGAARD,	
Ms	N. RINGEN,	*Advisers*;

(b) *for the applicants*

Mr	T. TRIER,	*Counsel*,
Mr	J. JACOBSEN,	*Co-Counsel*,
Mr	P. WILHJELM,	
Ms	M. ECKHARDT,	*Advisers*,
Mr	J. PEDERSEN,	*Applicant.*

The Court heard addresses by Mr Trier and Mr Taksøe-Jensen.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The television programmes produced by the applicants

10. The applicants were two television journalists. At the relevant time they were employed by one of the two national television stations in Denmark, Danmarks Radio. They produced two television programmes which were broadcast at 8 p.m. on 17 September 1990 and 22 April 1991 respectively. It was estimated that approximately 30% of all viewers above the age of 12 saw the programmes. The programmes, described as documentaries, were called "Convicted of Murder" (*Dømt for mord*) and "The Blind Eye of the Police" (*Politiets blinde øje*) respectively and dealt with a murder trial in which on 12 November 1982 the High Court of Western Denmark (*Vestre Landsret*) had convicted a person, hereafter called X, of murdering his wife on 12 December 1981 between approximately 11.30 a.m. and 1 p.m. X was sentenced to twelve years' imprisonment. On appeal, the Supreme Court (*Højesteret*) upheld the sentence in 1983. On 13 September 1990, following his release on probation, X requested the Special Court of Revision (*Den Særlige Klageret*) to reopen the case.

The applicants had started to prepare the programmes in March 1989, establishing contact with witnesses through advertising in the local paper and via police reports.

11. Both programmes began with a statement of the premise on which they had been produced:

> "In this programme we shall provide evidence by way of a series of specific examples that there was no legal basis for X's conviction and that, by imposing its sentence, the High Court of Western Denmark disregarded one of the fundamental tenets of the law in Denmark, namely that the accused should be given the benefit of the doubt.
>
> We shall show that a scandalously bad police investigation, in which the question of guilt was prejudged right from the start, and which ignored significant witnesses and concentrated on dubious ones, led to X being sentenced to twelve years' imprisonment for the murder of his wife.

This programme will show that X could not have committed the crime of which he was convicted on 12 November 1982".

1. The first programme: "Convicted of Murder"

12. At an early stage in the first programme, "Convicted of Murder", the following comment was made:

"In the case against X, the police investigation involved about 900 people. More than 4,000 pages of reports were written – and thirty witnesses appeared before the High Court of Western Denmark.

We will try to establish what actually happened on the day of the murder, 12 December 1981. We shall critically review the police investigations and evaluate the witnesses' statements regarding the time of X's wife's disappearance."

When preparing this first programme, the applicants had invited the police of Frederikshavn district, who had been responsible for the investigation of the murder case, to take part. Having corresponded with the applicants on this subject for some time, the chief of police informed them by a letter of 19 April 1990 that the police could not participate in the programme as certain conditions for granting the interview, *inter alia*, that the questions be sent in writing in advance, had not been met.

13. Following the broadcast of the first programme on 17 September 1990, the applicants were charged with defamation on the ground that they had unlawfully connected the friend of X's wife ("the schoolteacher") with the death of two women referred to, one being X's wife. The defamation case ended on 14 December 1993 before the High Court with a settlement according to which the applicants were to pay the schoolteacher 300,000 Danish kroner (DKK), apologise unreservedly, and give an undertaking never to broadcast the programme again.

2. The second programme: "The Blind Eye of the Police"

14. The applicants alleged that the chief superintendent, in a telephone conversation with Mr Pedersen at some unknown time before the broadcast of the second programme, had declined to participate in the programme.

15. In the introduction to the second programme, the following comment was made:

"It was the police of Frederikshavn district who were responsible at that time for the investigations which led to X's conviction. Did the police assume right from the start that X was the killer, and did they therefore fail to investigate all the leads in the case, as required by the law?

We have investigated whether there is substance in X's serious allegations against the police of Frederikshavn district."

16. A little later in the programme, the second applicant interviewed a taxi driver, who explained that she had been questioned by two police

officers a few days after the disappearance of X's wife, and that she had mentioned on that occasion two observations she had made on 12 December 1981: she had seen a Peugeot taxi (which was later shown to have no relevance to the murder), and before that she had seen X and his son at five or ten minutes past noon. She had driven behind them for about one kilometre. The reason she could remember the date and time so clearly was because she had to attend her grandmother's funeral on that day at 1 p.m.

17. The following comment was then made:

"*Commentator*: So in December 1981, shortly after X's wife disappeared and X was in prison, the Frederikshavn police were in possession of the taxi driver's statement, in which she reported that shortly after noon that Saturday she had driven behind X and his son for about a kilometre ... So X and his son were in Mølleparken [residential area] twice, and the police knew it in 1981."

18. The interview went on:

"*Second applicant*: What did the police officers say about the information you provided?

Taxi driver: Well, one of them said that it couldn't be true that X's son was in the car, but in fact I am a hundred percent certain it was him, as I also know the son because I have driven him to the day-care centre.

Second applicant: Why did he say that to you?

Taxi driver: Well, he just said that it couldn't be true that the son was there.

Second applicant: That it couldn't be true that you saw what you saw.

Taxi driver: No, that is, he didn't say that I hadn't seen X, it just couldn't be true that the son was with him.

Second applicant: These were the two police officers who questioned the taxi driver in 1981 and who wrote the police report.

We showed the taxi driver her statement of 1981, which she had never seen before.

Taxi driver: It's missing, the bit about – there was only ... about the Peugeot, there was nothing about the rest, unless you have another one.

Second applicant: There is only this one.

Taxi driver: But it obviously cannot have been important.

Second applicant: What do you think about that?

Taxi driver: Well it says, I don't know, well I think when you make a statement, it should be written down in any case, otherwise I can't see any point in it, and especially not in a murder case.

Commentator: So the taxi driver claims that in 1981 she had already told two police officers that she had seen X and his son. Not a word of this is mentioned in this report.

Second applicant: Why are you so sure that you told the police this at the time, which was 1981?

Taxi driver: Well I am a hundred percent sure of it and also, my husband sat beside me in the living room as a witness so... , so that is why I am a hundred percent certain that I told them.

Second applicant: And he was there throughout the entire interview?

Taxi driver: Yes, he was.

Second applicant: Not just part of the interview?

Taxi driver: No, he was there all the time.

Commentator: It was not until 1990, nine years later, that the taxi driver heard of the matter again, shortly after the 'Convicted of Murder' programme had been shown; even though the taxi driver's report had been filed as a so-called 0 report, she was phoned by a chief inspector of the Flying Squad [*Rejseholdet*] who had been asked by the public prosecutor to do a few more interviews.

Taxi driver: The chief inspector called me and asked whether I knew if any of my colleagues knew anything they had not reported, or whether I had happened to think of something, and I then told him on the phone what I said the first time about the Peugeot and that I had driven behind X and his son up to Ryets Street, and then he said that if he found anything out, or if... or if there was anything else, then... then he would get in touch with me again, which he didn't, not until a while afterwards, when he called me and asked whether I would come for another interview.

Second applicant: When you told the chief inspector in your telephone call that you followed X, and that his son was in the car, what did he say about that?

Taxi driver: Well, he didn't say anything.

Second applicant: He did not say that you had never reported this?

Taxi driver: No, he didn't."

19. The second applicant then conducted a short interview with X's new counsel:

"*Second applicant*: Have you any comment on the explanation the taxi driver has given now?

X's new counsel: I have no comment to make at this time.

Second applicant: Why not?

X's new counsel: 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.

Commentator: Even though X's new counsel does not wish to speak about the case, we know from other sources that it was he who, in February this year, asked for the taxi driver to be interviewed again. So in March she was interviewed at Frederikshavn police station in the presence of the chief superintendent, which is clearly at odds with what the public prosecutor previously stated in public, namely that the Frederikshavn police would not get the opportunity to be involved in the new inquiries."

20. The interview with the taxi driver continued:

"Second applicant: And what happened at the interview?

Taxi driver: What happened was that I was shown into the office of the chief inspector of the Flying Squad and the chief superintendent was there too.

Second applicant: Was any explanation given about why he was present?

Taxi driver: No.

Second applicant: So what did you say in this interview?

Taxi driver: I gave the same explanations as I had done the first time when I was interviewed at home.

Second applicant: Ten years before, that is.

Taxi driver: Yes.

Second applicant: And that was?

Taxi driver: Well, that I had driven behind X and his son up to Ryets Street.

Second applicant: What did they say about that?

Taxi driver: They didn't say anything.

Second applicant: The report which was made in 1981, did you see it?

Taxi driver: No.

Second applicant: Was it there in the room?

Taxi driver: There was a report there when I was being interviewed, but I wasn't allowed to see it.

Second applicant: Did you expressly ask whether you could see the old report?

Taxi driver: I asked whether I could see it but the chief inspector said I couldn't ..."

21. After the interview with the taxi driver the commentator said:

"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 bear 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 named chief superintendent] who decided that the report should not be included in the case file? Or did he and the chief inspector of the Flying Squad conceal the witness's statement from the defence, the judges and the jury? ..."

Pictures of the two police officers, the named chief superintendent and the chief inspector of the Flying Squad, were shown on the screen simultaneously and parallel with the above questions. The questions went on:

"Why did the chief inspector phone the taxi driver shortly after the television programme 'Convicted of Murder'? After all, the police had taken the view that the taxi driver had no importance as a witness and had filed her statement among the 0 reports.

Why did the chief inspector not call her in for an interview when she repeated her original explanation on the telephone?

Why was the taxi driver interviewed at the Frederikshavn police station in the presence of the chief superintendent, which was completely at odds with the public prosecutor's public statement?

On 20 September last year [a named] Chief Constable stated to [a regional daily]: 'All the information connected to the case has been submitted to the defendants, the prosecution and the judges.' Did the Chief Constable know about the taxi driver's statement, when he made this statement? Did the State Prosecutor know already in 1981 that there was a statement from a witness confirming that X had been in Mølleparken twice, and that X's son had been with him both times? Neither of them have agreed to make any statement at all about the case."

22. In the meantime, on 11 March 1991, before the broadcast of the second programme, the taxi driver had again been interviewed by the police, at the request of X's new counsel. She stated that on 12 December 1981 she had attended her grandmother's funeral at 1 p.m. and that on her way there, around five or ten minutes past noon, she had driven behind X and his son. She had arrived at the funeral just before 1 p.m. She also explained that she had told the police about this when first interviewed in 1981. Later on 11 March 1991 the police carried out a check which revealed that the funeral of the taxi driver's grandmother had indeed taken place on 12 December 1981, but at 2 p.m.

Subsequently, the police held three interviews with the taxi driver, during which she changed her explanation, in particular as follows.

On 24 April 1991 she maintained having seen X shortly after noon but agreed that the funeral had taken place at 2 p.m. On her way there she

realised she had forgotten a wreath. She had had to return home and had consequently arrived at the funeral just before 2 p.m.

On 25 April 1991 she stated that she was not sure about the date or the time she had seen X and his son. Moreover, she was uncertain whether, shortly after the murder, she had told the police about having seen X. She also explained that, during the shooting of her interview with Mr Baadsgaard on 4 April 1991, he had suggested that she say something like "where is the other report?" when he showed her the 1981 report.

On 27 April 1991 she initially stated that she had not seen X and his son on 12 December 1981. She had never before connected this episode to the funeral. She also admitted having made up the story about the forgotten wreath, but had wanted "things to fit". Later during the interview she maintained that she had seen X and his son on 12 December 1981, but at around 1 p.m.

B. The criminal proceedings against the applicants

23. On 23 May 1991 the chief superintendent reported the applicants and the television station to the police for defamation. It appears, however, that the prosecution's decision as to whether or not to charge the applicants was adjourned pending the decision whether to reopen X's case.

24. This was decided in the affirmative by the Special Court of Revision on 29 November 1991 after two hearings and the examination of ten witnesses, including the taxi driver. Two judges (out of five) in the Special Court of Revision found that new testimonial evidence had been produced on which X might have been acquitted, had it been available at the trial. Two other judges found that no new testimonial evidence had been produced on which X might have been acquitted, had it been available at the trial. The fifth judge agreed with the latter, but found that in other respects special circumstances existed which made it overwhelmingly likely that the available evidence had not been judged correctly. Accordingly, the court granted a retrial.

25. In the meantime, following the television programmes, an inquiry had commenced into the police investigation of X's case. The inquiry resulted in a report of 29 July 1991 by the Regional State Prosecutor, according to which the police in Frederikshavn had not complied with section 751(2) of the Administration of Justice Act (*Retsplejeloven*). This provision, introduced on 1 October 1978, provides that a witness must be given the opportunity to read through his or her statement. The 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 this 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 failure to comply with section 751(2) of the Administration of Justice Act with regard to the witnesses who were heard before it in 1982. Finally, the Regional State Prosecutor noted that the Frederikshavn district police were apparently not the only district police failing to comply with the said provision. The Regional State Prosecutor considered it unjustified to maintain that the taxi driver, when interviewed in December 1981, had stated that she had seen X on the day of the murder. During the inquiry this had been contradicted by the two police officers who had interviewed her in 1981. Moreover, the inquiry did not indicate that anyone within the Frederikshavn police had suppressed any evidence in X's case, or in any other criminal case for that matter.

Consequently, on 20 December 1991, the Prosecutor General (*Rigsadvokaten*) stated in a letter to the Ministry of Justice that it was unfortunate and open to criticism that the police in Frederikshavn had not implemented the above provision as part of their usual routine, and informed the Ministry that he had agreed with the State Police Academy that he would produce a wider set of guidelines concerning the questioning of witnesses, which could be integrated into the Police Academy's educational material.

26. X's retrial ended with his acquittal in a judgment of 13 April 1992 by the High Court of Western Denmark, sitting with a jury.

27. A lawyer who represented the applicants in another case had become aware of a letter of 18 May 1992 from the Prosecutor General to the Legal Affairs Committee (*Retsudvalget*) of the Danish parliament mentioning that, subsequent to the broadcast of the programme "The Blind Eye of the Police", the applicants had been reported to the police by three police officers from Frederikshavn. By a letter of 10 July 1992, the lawyer requested that the Prosecutor General state whether the applicants had been charged, and if so with what offence. By a letter of 17 July 1992, he was told that no charge had been brought against the applicants.

28. On 19 January 1993 the Chief Constable in Gladsaxe informed the applicants that they were charged with defaming the chief superintendent. On 28 January 1993 the applicants were questioned by the police in Gladsaxe.

1. Preliminary procedural questions

29. A request of 11 February 1993 by the prosecution to seize the applicants' research material was examined at a hearing in the Gladsaxe City Court (*Retten i Gladsaxe)* on 30 March 1993, during which the applicants' counsel, claiming that the case concerned a political offence, requested that a jury in the High Court – instead of the City Court – try the case. Both requests were refused by the Gladsaxe City Court on 28 May

1993. In June 1993 the prosecution appealed against the decision on seizure and the applicants appealed against the decision on venue. At the request of one of the applicants' counsel, an oral hearing was scheduled to take place in the High Court of Eastern Denmark (*Østre Landsret*) on 15 November 1993. However, on 7 October 1993 counsel challenged one of the judges in the High Court, alleging disqualification, and requested an oral hearing on the issue. The High Court decided on 15 October 1993 to refuse an oral hearing and on 11 November 1993 it decided that the judge in question was not disqualified. It appears that counsel requested leave to appeal against this decision to the Supreme Court (*Højesteret*), but to no avail. As to the appeal against non-seizure and the question of venue, hearings were held in the High Court on 6 January and 7 March 1994, and by a decision of 21 March 1994 the High Court upheld the City Court's decisions. The applicants' request for leave to appeal to the Supreme Court was refused on 28 June 1994.

2. Proceedings before the City Court

30. On 5 July 1994 the prosecution submitted an indictment to the City Court. A preliminary hearing was held on 10 November 1994 during which it was agreed that the case would be tried over six days in mid-June 1995. However, as counsel for one of the parties was ill, the final hearings were rescheduled to take place on 21, 24, 28 and 30 August and 8 September 1995.

31. On 15 September 1995 the Gladsaxe City Court delivered a sixty-eight-page judgment, finding that the questions put in the television programme concerning the named chief superintendent amounted to defamatory allegations, which should be declared null and void. However, the court did not impose any sentence on the applicants as it found that they had had reason to believe that the allegations were true. The court also ruled in favour of the applicants regarding a compensation claim by the widow of the named chief superintendent, who had died before the trial. The judgment was appealed against by the applicants immediately, and by the prosecution on 27 September 1995.

3. Proceedings before the High Court

32. On 15 April 1996 the prosecutor sent a notice of appeal to the High Court, and on 30 April 1996 he invited counsel for the applicants and the attorney for the widow of the chief superintendent to a meeting concerning the proceedings. Counsel for one of the parties stated that he was unable to attend before 17 June 1996, and accordingly the meeting was held on 25 June 1996. The High Court received the minutes of the meeting, from which it appeared that counsel for one of the parties was unable to attend the trial before November 1996, and that he preferred the hearings to take place

in early 1997. On 16 August 1996 the High Court scheduled the hearings for 24, 26 and 28 February and 3 and 4 March 1997.

33. On 6 March 1997 the High Court gave judgment convicting the applicants of tarnishing the honour of the chief superintendent by making and spreading allegations of an act likely to disparage him in the eyes of his fellow citizens, under Article 267 § 1 of the Penal Code. The allegations were declared null and void. The applicants were each sentenced to twenty day-fines of DKK 400 (or twenty days' imprisonment in default) and ordered to pay compensation of DKK 75,000 to the estate of the deceased chief superintendent.

4. Proceedings before the Leave-to-Appeal Board

34. On 6, 16 and 25 March 1997 the applicants sought leave from the Leave-to-Appeal Board (*Procesbevillingsnævnet*) to appeal to the Supreme Court. Before deciding, the Board requested an opinion from the prosecuting authorities, namely the Chief of Police, the State Prosecutor and the Prosecutor General. On 27 June 1997 they submitted a joint opinion opposing leave to appeal. However, in the meantime, it appears that a lawyer representing the television station Danmarks Radio had contacted the State Prosecutor, proposing that the public prosecution assist in bringing the case before the Supreme Court as, according to the television station, the High Court's judgment was incompatible with the Media Responsibility Act (*Medieansvarsloven*). Consequently, the public prosecutors initiated a new round of consultation on this question, and their joint opinion was forwarded to the Board on 3 September 1997. On 29 September 1997, having heard the applicants' counsel on the prosecution's submissions, the Board granted the applicants leave to appeal to the Supreme Court.

5. Proceedings before the Supreme Court

35. The Prosecutor General submitted a notice of appeal and sent the case file to the Supreme Court on 3 October and 6 November 1997 respectively.

36. As counsel for the applicants wanted to engage yet another counsel, on 20 November 1997 they asked the Supreme Court whether costs in this respect would be considered legal costs. Moreover, they stated that their pleadings could not be submitted until early January 1998. On 17 March 1998 the Supreme Court decided on the question of costs, and on 19 March 1998 scheduled the hearing for 12 and 13 October 1998.

37. By a judgment of 28 October 1998, the Supreme Court upheld the High Court's judgment, but increased the compensation payable to the estate to DKK 100,000. The majority of judges (three out of five) held:

> "In the programme 'The Blind Eye of the Police', [the applicants] not only repeated a statement by the taxi driver that she had already explained to the police during their

inquiries in 1981 that shortly after noon on 12 December 1981 she had driven behind X for about one kilometre, but also, in accordance with the common premise for the programmes 'Convicted of Murder' and 'The Blind Eye of the Police', took a stand on the truth of the taxi driver's statement and presented matters in such a way that viewers, even before the final sequence of questions, were given the impression that it was a fact that the taxi driver had given the explanation as she alleged she had done in 1981 and that the police were therefore in possession of this statement in 1981. This impression was strengthened by the first of the concluding questions: '... why did the vital part of the taxi driver's explanation disappear and who, in the police or public prosecutor's office, should bear the responsibility for this?'. In connection with the scenes about the two police officers [the applicants] include two questions in the commentator's narrative, to which the indictment relates; irrespective of the fact that they were phrased as questions, viewers undoubtedly received a clear impression that a report had been made about the taxi driver's statement that she had seen X at the relevant time on 12 December 1981; that this report had subsequently been suppressed; and that such suppression had been decided upon either by the named chief superintendent alone or by him and the chief inspector of the Flying Squad jointly. The subsequent questions in the commentator's narrative do not weaken this impression, and neither does the question whether the Chief Constable or the public prosecutor were aware of the taxi driver's statement. On this basis we find that in the programme 'The Blind Eye of the Police' [the applicants] made allegations against the named superintendent which were intended to discredit him in the eyes of his peers, within the meaning of Article 267 § 1 of the Penal Code [*Straffeloven*]. We find further that it must have been clear to [the applicants] that they were, by way of their presentation, making such allegations.

[The applicants] have not endeavoured to provide any justification but have claimed that there is no cause of action by virtue of Article 269 § 1 of the Penal Code – [which protects] a party who in good faith justifiably makes an allegation which is clearly in the general public interest or in the interest of other parties ...

As laid down in *Thorgeir Thorgeirson v. Iceland* (judgment of 25 June 1992), there is a very extensive right to public criticism of the police. As in that decision there is, however, a difference between passing on and making allegations, just as there is a difference between criticism being directed at the police as such and at individual named officers in the police force. Even though being in the public eye is a natural part of a police officer's duties, consideration should also be given to his good name and reputation.

As stated, [the applicants] did not limit themselves in the programme to referring to the taxi driver's statement or to making value judgments on this basis about the quality of the police investigations and the chief superintendent's leadership thereof. Nor did [the applicants] limit themselves to making allegations against the police as such for having suppressed the taxi driver's explanation; they alleged that the named chief superintendent had committed a criminal offence by suppressing a vital fact.

When [the applicants] were producing the programme, they knew that an application had been made to the Special Court of Revision for the case against X to be reopened and that, as part of the Court of Revision's proceedings in dealing with the said application, the taxi driver had been interviewed by the police on 11 March 1991 at the request of X's defence as part of the proceedings to reopen the case. In consequence of the ongoing proceedings for reopening the case, [the applicants] could not count on the chief superintendent and the two police officers who had interviewed

the taxi driver in 1981 being prepared to participate in the programme and hence possibly anticipate proceedings in the Court of Revision. Making the allegations cannot accordingly be justified by lack of police participation in the programme.

[The applicants'] intention, in the programme, of undertaking a critical assessment of the police investigation was legitimate in relation to the role of the media as public watchdog, but this does not apply to every allegation. [The applicants] had no basis for making such a serious allegation against a named police officer, and [the applicants'] opportunities for achieving the aims of the programme in no way required the questions upon which the charges are based to be included.

On this basis, and even though the exemptions provided in Article 10 § 2 of the Convention must be narrowly interpreted and Article 10 protects not only the content of utterances but also the manner in which they are made, we agree that the allegation made was not caught by the exemption in Article 269 § 1 of the Penal Code. Indeed, as a result of the seriousness of the allegation, we agree that there is no basis for the punishment to be remitted in accordance with Article 269 § 2 of the Penal Code. We agree further that there are no grounds for a remittal of penalty under Article 272.

We also concur with the findings on defamation.

We agree with the High Court that the fact that the allegation was made in a programme on the national television station Danmarks Radio and hence could be expected to get widespread publicity – as indeed it did – must be regarded as an aggravating factor for the purposes of Article 267 § 3. Considering that it is more than seven years since the programme was shown, we do not find, however, that there are sufficient grounds for increasing the sentence.

For the reasons given by the High Court, we find that [the applicants] must pay damages to the heirs of the chief superintendent. In this connection, it should be noted that it cannot be regarded as crucial that the nature of the claim for damages was not stated in the writ of 23 May 1991, since the chief superintendent's claim for financial compensation could not relate to anything other than damages. Due to the seriousness of the allegation and the manner of its presentation, we find that the compensation should be increased to DKK 100,000."

38. The minority of two judges who argued for the applicants' acquittal held, *inter alia*:

"We agree that the statements covered by the indictment, irrespective of their having been phrased as questions, have to be regarded as indictable under Article 267 § 1 of the Penal Code and that [the applicants] had the requisite intention.

As stated by the majority, the question of culpability must be decided in accordance with Article 269 § 1, taken together with Article 267 § 1, interpreted in the light of Article 10 of the European Convention on Human Rights and the European Court of Human Rights's restrictive interpretation of the exemptions under Article 10 § 2.

In reaching a decision, consideration must be given to the basis on which [the applicants] made their allegations, their formulation and the circumstances under which they were made, as well as [the applicants'] intentions in the programme.

... We find that [the applicants] had cause to suppose that the taxi driver's statement that she had seen X on 12 December 1981 shortly past noon was true. We further find ... that [the applicants] had reason to assume that the taxi driver, when interviewed in 1981, had told the two police officers that she had seen X ...We accordingly attach weight to the fact that it is natural for such an observation to be reported to the police; that it is also apparent from her explanation in the police report of 11 March 1991 that she had already told the police about her observations in 1981; and that her explanation about the reaction of the police to her information that X's son had been in the car strengthened the likelihood of her having reported the observation at the interview in 1981.

... It is apparent from the television programme that [the applicants] were aware that the Frederikshavn police had not at that time complied with the requirement to offer a person interviewed an opportunity to see the records of his or her statements. [The applicants] may accordingly have had some grounds for supposing that the December report did not contain the taxi driver's full statement or that there was another report thereon ...

We consider that [the applicants], in putting the questions covered by the indictment, did not exceed the limits of the freedom of expression which, in a case such as the present one, which relates to serious matters of considerable public interest, should be available to the media. We also attach some weight to the fact that the programme was instrumental in the Court of Revision's decision to hear witnesses and we attach some weight to X's subsequent acquittal.

Overall, we accordingly find that [the allegation] is not punishable by virtue of Article 269 § 1 of the Penal Code ...

[We agree that] the allegation should be declared null and void since its veracity has not been proved ..."

II. RELEVANT DOMESTIC LAW

39. The relevant provisions of the Danish Penal Code applicable at the time read as follows:

Article 154

"If a person in the exercise of a public office or function has been guilty of false accusation, an offence relating to evidence ... or breach of trust, the penalty prescribed for the particular offence may be increased by not more than one-half."

Article 164

"1. Any person who gives false evidence before a public authority with the intention that an innocent person shall thereby be charged with, convicted of, or subject to the legal consequence of, a punishable act shall be liable to mitigated detention [*hæfte*] or to imprisonment for a term not exceeding six years.

2. Similar punishment shall apply to any person who destroys, distorts or removes evidence or furnishes false evidence with the intention that any person shall thereby be charged with, or convicted of, a criminal act ...”

Article 267

“1. Any person who tarnishes the honour of another by offensive words or conduct or by making or spreading allegations of an act likely to disparage him in the eyes of his fellow citizens shall be liable to a fine or to mitigated detention.

...

3. When imposing sentence it shall be considered an aggravating circumstance if the insult was made in printed documents or in any other way likely to give it wider circulation, or in such places or at such times as greatly to aggravate the offensive character of the act.”

Article 268

“If an allegation has been maliciously made or disseminated, or if the author has no reasonable ground to regard it as true, he shall be guilty of defamation and liable to mitigated detention or to imprisonment for a term not exceeding two years. If the allegation has not been made or disseminated publicly, the punishment may, in mitigating circumstances, be reduced to a fine.”

Article 269

“1. An allegation shall not be punishable if its truth has been established or if the author of the allegation has in good faith been under an obligation to speak or has acted in lawful protection of an obvious public interest or of the personal interest of himself or of others.

2. The punishment may be remitted where evidence is produced which justifies the grounds for regarding the allegations as true.”

Article 272

“The penalty prescribed in Article 267 of the Penal Code may be remitted if the act has been provoked by improper behaviour on the part of the injured person or if he is guilty of retaliation.”

40. Section 751 of the Administration of Justice Act read as follows:

“(1) The relevant parts of the given testimonies must be included in the reports and particularly important parts of the testimonies should as far as possible be reported using the person’s own words.

(2) The person interviewed shall be given the opportunity to acquaint himself with the report. Any corrections or supplementary information shall be included in the

report. The person interviewed shall be informed that he is not obliged to sign the report.

(3) Audio recordings of the interview may only take place after informing the person interviewed."

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 § 1 of the Convention, the relevant parts of which read 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 them to the police, until January 1993, when they 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 § 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 § 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, *Hozee v. the Netherlands*, judgment of 22 May 1998, *Reports of Judgments and Decisions* 1998-III, p. 1100, § 43).

The applicants became aware on 10 July 1992 that they had been reported to the police; however, upon enquiry, they were informed that no decision had yet been taken as to possible charges against them. Further, no criminal procedure measures were taken against the applicants before 19 January 1993, when they 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 § 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 § 1 of the Convention was five years, nine months and nine 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, § 67, ECHR 1999-II).

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 State, which was responsible for the conduct of the prosecuting authorities and the functioning of the court system as such.

(b) The Government

47. The Government maintained that the criminal proceedings had been very comprehensive and thus time-consuming, involving the two television 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 it could be blamed. Accordingly, in the Government's opinion, the duration of the proceedings, lasting 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 applicants

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* [GC], no. 26614/95, § 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, *Capuano v. Italy*, judgment of 25 June 1987, Series A no. 119, pp. 12-13, § 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 § 1 of 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 in 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 contravened 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 that she had had no reason not to tell the truth about what she had observed on 12 December 1981. Furthermore, 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 made 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 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 enjoy 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 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 taken it upon themselves to make 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 effect 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 of evidence 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 had the possibility of giving such justification, but had not done so. In this connection 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 when questioned by the police in 1981 the taxi driver 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 they 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 reopening 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 reopen the murder trial or the subsequent judgment acquitting X.

B. Submissions by the Danish Union of Journalists

62. In their comments submitted under Article 36 § 2 of the Convention and Rule 61 § 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 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 applicants' right to freedom of expression, as guaranteed by Article 10 § 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 § 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, § 39, ECHR 2003-V, and *Association Ekin v. France*, no. 39288/98, § 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, § 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 & Co. KG v. Austria*, no. 31457/96, § 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, § 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, *Zana v. Turkey*, judgment of 25 November 1997, *Reports* 1997-VII, pp. 2547-48, § 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 premise "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] disregarded 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 twelve 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. 23-24, § 31; *Janowski v. Poland* [GC], no. 25716/94, § 30, ECHR 1999-I; and *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 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 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, § 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, § 63, and Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 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, § 38; *Thoma v. Luxembourg*, no. 38432/97, §§ 45-46, ECHR 2001-III; and *Perna*, cited above, § 39).

The Danish Supreme Court clearly acknowledged the weight to be attached to journalistic freedom in a democratic society when stating that "[the applicants'] intention, in the programme, of undertaking a critical assessment of the police investigation was legitimate in relation to the role of the media as 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 § 1 of the Penal Code. This provision provides that "any person who tarnishes the honour of another by offensive words or conduct or by making or spreading allegations of an act likely to disparage him in the eyes 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 § 1 of the Penal Code and that the applicants had the requisite intention. 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 bear the responsibility for this?" (see paragraph 21 above), took a stand on the truth of the taxi driver's statement and presented 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 file? 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 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, § 46, and *Oberschlick v. Austria (no. 1)*, judgment of 23 May 1991, Series A no. 204, pp. 27-28, § 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 margin of appreciation of the national authorities, in particular the domestic courts (see *Prager and Oberschlick*, cited above, p.18, § 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 (see *Jerusalem v. Austria*, no. 26958/95, § 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 proved. 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 according to whether the statements emanate from the journalist or are 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, pp. 25-26, § 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*, cited above, § 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 connection 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, for example, *Fressoz and Roire*, § 54, Bladet Tromsø *and Stensaas*, § 58, and *Prager and Oberschlick*, pp. 18-19, § 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 the 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, *McVicar v. the United Kingdom*, no. 46311/99, § 84, ECHR 2002-III, and Bladet Tromsø *and Stensaas*, cited above, § 66). Also of relevance for the balancing of competing interests which the Court must carry out is the fact that under Article 6 § 2 of the Convention individuals have a right to be presumed innocent of any criminal offence until proved guilty (see, among other authorities, *Worm v. Austria*, judgment of 29 August 1997, *Reports* 1997-V, pp. 1551-52, § 50, and *Du Roy and Malaurie v. France*, no. 34000/96, § 34, ECHR 2000-X).

During the domestic proceedings the applicants never endeavoured to prove their allegation, which was declared null and void. However, relying on Article 10 of the Convention and Article 269 § 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 television station in a programme devoted to objectivity and pluralism, that it was therefore seen by a wide audience, and that the audiovisual 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, pp. 1274-75, § 29; *Janowski*, cited above, § 33; and *Thoma*, cited above, § 47). Thus, although the chief superintendent was subject to wider limits of acceptable criticism than a private individual, 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. All the 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 proved guilty according to law.

81. The police investigation in the original criminal trial against X involved about 900 people and more than 4,000 pages of reports, and 30 witnesses made 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 noon on 12 December 1981. The reason she could remember the exact date and time so well was because she had to attend her grandmother's funeral on that day 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 check carried out by the police 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 in relation to the murder case, in which the crucial time was between 11.30 a.m. and 1 p.m., but also as regards the reliability of the taxi driver who, calculating 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 themselves found their failure to verify the time of the funeral "regrettable".

84. In addition, the Court observes that at no point during the programme "The Blind Eye of the Police" had the taxi driver 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 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 programmes, 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 the course of their routine procedure, 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 reopen X's trial and the High Court's judgment of 13 April 1992 acquitting him. It is, however, to be observed that counsel for X had already requested a reopening of the trial on 13 September 1990, four days before the broadcast of the applicants' first programme and more than six months before the broadcast of the second (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 retrial 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 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 reopening of the proceedings and the acquittal of X, the Court notes that none of those subsequent events, whether the reopening decision or the retrial, in any way supported the theory that led the applicants to include a 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 that second programme that he had "agreed with the public prosecutor and the President of the Special Court of Revision that statements to the press in this matter [would] 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 investigation was legitimate in relation to the role of the media as public watchdog. However, having balanced the relevant considerations, that court found no basis for the applicants to make such a serious allegation against the named chief superintendent as they did, in particular because they had sufficient other opportunities to achieve the aims of the programme.

92. Having regard to the various elements above and to the nature and force 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, § 37, ECHR 1999-IV; *Tammer v. Estonia*, no. 41205/98, § 69, ECHR 2001-I; and *Lešník v. Slovakia*, no. 35640/97, § 63, ECHR 2003-IV).

In the instant case, the applicant journalists were each sentenced to twenty day-fines of 400 Danish kroner (DKK), 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, § 50, ECHR 1999-VII; *Nikula v. Finland*, no. 31611/96, § 54, ECHR 2002-II; and *Elci and Others v. Turkey*, nos. 23145/93 and 25091/94, § 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.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been no violation of Article 6 of the Convention;

2. *Holds* by nine votes to eight that there has been no violation of Article 10 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 17 December 2004.

Luzius WILDHABER
President

Paul MAHONEY
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint partly dissenting opinion of Mr Rozakis, Mr Türmen, Mrs Strážnická, Mr Bîrsan, Mr Casadevall, Mr Zupančič, Mr Maruste and Mr Hajiyev is annexed to this judgment.

L.W.
P.J.M.

JOINT PARTLY DISSENTING OPINION OF JUDGES ROZAKIS, TÜRMEN, STRÁŽNICKÁ, BÎRSAN, CASADEVALL, ZUPANČIČ, 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 ten years in prison following an alleged malfunctioning of the Danish judicial system, which is 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 § 1 of the Penal Code for tarnishing 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 intention.

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 contravened the Penal Code. In their submission, the questions merely implied a range of possible criticisms concerning the 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 judicial 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 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 five or ten minutes past noon;

(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 day;

(d) that she was a hundred percent 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 does not detract from the fact that at the relevant time the applicants could reasonably assume that the funeral actually had taken place at 1 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 reopening 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

television 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" (see 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 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 freedom of expression, albeit relevant, were not sufficient to show that that interference was "necessary in a democratic society".