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

SECOND SECTION

DECISION

Application no. 24683/14
ROJ TV A/S
against Denmark

The European Court of Human Rights (Second Section), sitting on 17 April 2018 as a Committee composed of:

Robert Spano, *President,*
Paul Lemmens,
Ledi Bianku,
Işıl Karakaş,
Nebojša Vučinić,
Valeriu Griţco,
Stéphanie Mourou-Vikström, *judges,*
and Stanley Naismith, *Section Registrar,*

Having regard to the above application lodged on 24 March 2014,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Roj TV A/S, is a Danish company and television channel which is represented before the Court by Mr Bjørn Elmquist, a lawyer practising in Copenhagen.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant company, may be summarised as follows.

3. The Danish company "Mesopotamia Broadcast" was the holder of several television licences in Denmark. It operated the applicant company, a Danish company and television channel, which on 9 December 2003 had been granted a licence to broadcast by the Danish Radio and Television

Board (*Radio- og TV-nævnet*), and since 2004 from Denmark had broadcast programmes by satellite, mainly in Kurdish, throughout Europe and the Middle East.

4. In 2006 and 2007 government authorities in Turkey lodged complaints with the Danish Radio and Television Board, submitting that, throught its programmes, the applicant company supported the Kurdistan Workers' Party ('the PKK'), which was classified as a terrorist organisation, *inter alia*, by the European Union. The Danish Radio and Television Board gave a ruling on those complaints by decisions of 3 May 2007 and 23 April 2008. It held that the applicant had not infringed the Danish rules implementing Articles 22 and 22a of Directive 89/552/EEC. The Committee observed, in particular, that the applicant company's programmes did not incite hatred on grounds of race, sex, religion or nationality and that it merely broadcast information and opinions, and that the violent images broadcast reflected the real violence in Turkey and the Kurdish areas.

5. In 2008, the German authorities prohibited Mesopotamia Broadcast from carrying out, through the agency of the applicant company, any activities in Germany on the grounds that its programmes conflicted with the principles of "international understanding", as defined by German constitutional law. The case was brought before the German courts to have the prohibition set aside. The German Federal Constitutional Court, after having decided to view a selection of extracts of the applicant company's television programmes, took the view that those programmes were clearly biased in favour of the PKK, reflecting to a large extent the militaristic and violent approach, with the consent of the directors of Mesopotamia Broadcast. That company attempted to justify, via its channel [the applicant company], the armed struggle led by the PKK. [The applicant company] did not report the conflict impartially but supported the PKK's use of guerrilla units and terrorist attacks by adopting the latter's point of view and propagating a cult of heroes and martyrs with respect to fallen combatants. Mesopotamia Broadcast and [the applicant company] thereby played a role in inciting violent confrontations between persons of Turkish and Kurdish origin in Turkey and in exacerbating tensions between Turks and Kurds living in Germany. [The applicant] had submitted, *inter alia*, that only the Danish authorities were competent to control its activities. In a judgment of 22 September 2011, the Court of Justice of the European Union (CJEU) gave a preliminary ruling in the joined cases (C-244/10 and C-245/10) in the light of Directive 89/552/EEC. The CJEU stated, among other things:

> "41 As regards the words 'incitation' and 'hatred', it must be observed that they refer, first, to an action intended to direct specific behaviour and, second, a feeling of animosity or rejection with regard to a group of persons.
>
> 42 Thus, the Directive, by using the concept 'incitement to hatred', is designed to forestall any ideology which fails to respect human values, in particular initiatives

which attempt to justify violence by terrorist acts against a particular group of persons.

43 As regards the infringement of the principles of international understanding, as stated in paragraph 25 of the present judgment [see the finding above by the *Bundesverwaltungsgericht*], Mesopotamia Broadcast and [the applicant], according to the referring court, play a role in stirring up violent confrontations between persons of Turkish and Kurdish origin in Turkey and in exacerbating the tensions between Turks and Kurds living in Germany, thereby infringing the principles of international understanding.

44 Consequently, it must be held that such behaviour is covered by the concept of 'incitement to hatred'.

45 Therefore, as the Advocate General observed in points 88 and 89 of his Opinion, compliance with the rule of public order laid down in Article 22a of the Directive must be verified by the authorities of the Member State which have jurisdiction over the broadcaster concerned, irrespective of the presence in that Member State of the ethnic or cultural communities concerned. The application of the prohibition laid down in Article 22a does not depend on the potential effects of the broadcast in question in the Member State of origin or in one Member State in particular, but only on the combination of the two conditions stipulated in that article, namely incitement to hatred and grounds of race, sex, religion or nationality.

46 Therefore, it follows from the foregoing that Article 22a of the Directive must be interpreted as meaning that facts such as those at issue in the main proceedings, covered by national legislation prohibiting infringements of the principles of international understanding, must be regarded as being included in the concept of 'incitement to hatred on grounds of race, sex, religion or nationality' laid down in that article."

In conclusion, the CJEU found:

"Article 22a of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, must be interpreted as meaning that facts such as those at issue in the disputes in the main proceedings, covered by a rule of national law prohibiting infringement of the principles of international understanding, must be regarded as being included in the concept of 'incitement to hatred on grounds of race, sex, religion or nationality'. That article does not preclude a Member State from adopting measures against a broadcaster established in another Member State, pursuant to a general law such as the Law governing the public law of associations (Gesetz zur Regelung des öffentlichen Vereinsrechts), of 5 August 1964, as amended by Paragraph 6 of the Law of 21 December 2007, on the ground that the activities and objectives of that broadcaster run counter to the prohibition of the infringement of the principles of international understanding, provided that those measures do not prevent retransmission per se on the territory of the receiving Member State of television broadcasts made by that broadcaster from another Member State, this being a matter to be determined by the national court."

6. By indictment of 28 September 2010, the applicant company and its parent company were charged with breach of Article 114 e, in conjunction with Articles 114, 114a, 114b, 114c, and 114d of the Penal Code

(*Straffeloven*) for having promoted the PKK through television programmes broadcast in the period from 10 June 2006 to 24 September 2010.

7. Before the City Court (*Københavns Byret*) the representative for the applicant company and twelve witnesses were heard. Substantial evidential material was submitted, *inter alia,* accountant material obtained via searches carried out at the location of the applicant company, and its related company, ROJ NV, located in Belgium, which had produced the programmes to be broadcast. Moreover, the Danish Intelligence Service, Center for Terror Analysis (CTA) had submitted a report of 1 July 2011, which included information about the PKK and persons related to the organisation. The City Court viewed selected extracts of the programmes, in total for approximately 15 hours, including one extract from 23 September 2006, three extracts from 23 October 2007, and several extracts which had been broadcast regularly in the period from 7 February 2008 to 10 September 2010.

8. By a judgment of 10 January 2012, which ran to 190 pages, the City Court convicted the applicant (and its parent company) for breach of Article 114 e, in conjunction with Articles 114, 114a, 114b, 114c, and 114d, and sentenced it to 40 day-fines of 65,000 Danish Kroner (DKK), totalling DKK 2,600,000, equal to approximately 349,000 Euros (EUR).

9. The City Court noted that the PKK was on the list of terrorist organisations within the EU, Canada, USA, Australia and the United Kingdom. Moreover, having regard to the evidence submitted, it found it established that the PKK had committed, or intended to commit, the acts described in Article 114 of the Penal Code. Moreover, when covering the conflict between the Turkish authorities and the PKK, the applicant had mainly used sources from the PKK's factions, and supporters of the PKK, who were quoted, or referred to, or allowed speeches at length, without the involvement of any other sources. In a number of programmes, PKK leaders were heard talking via telephone, explaining the organisation's views and, among other things, inciting to revolt, while the TV host listened passively. There was no effort on behalf of the applicant company to distance itself from the incitements or to include other views, for example by posing critical questions. As a result the programmes unilaterally showed the views of the PKK, often supported by photos or films of riots, guerrillas who were shooting, and so on. This one-sided coverage of the PKK's actions, incitements and messages was reinforced by the language used by the TV host in the programmes, for example when he referred to the arrest of Öcalan as "the international complot", and when celebrating the anniversary of Öcalan and the PKK. Moreover, the guerrilla was shown in an idealised way and deceased members were referred to as heroes and martyrs, their names and photos appearing with a flag. The support to the PKK was underlined by the many mentions of concrete actions carried out which had resulted in loss within the Turkish military and police. The City Court found

that the one-sided coverage with repetitive incitement to participate in fights and actions, incitement to join the organisation/the guerrilla, and the portrayal of deceased guerrilla members as heroes, amounted to propaganda for the PKK, and that it could not only be considered a declaration of sympathy. However, finding that the notion of "propaganda" would require incitement on a steady basis, and having regard to the extracts of the programmes shown to it, including [only] one from 2006 and [only] three from 2007, the City Court found that the conviction should be limited to cover only the period from 7 February 2008 to 10 September 2010. The City Court observed that the applicant company had also broadcast programmes about the general situation for Kurds, including language, culture and politics. In response to the applicant company's reference to the former decisions by the Danish Radio and Television Board, the City Court pointed out that there had been no examination in those decisions of whether Article 114e of the Penal Code had been breached. Having regard to the evidence before it, the City Court also found that the applicant company had been financed to a significant extent by the PKK in the years 2006 to 2010. Having regard to the nature of the offence, promoting a terrorist organisation, the City Court dismissed the applicant company's submission that it would be in breach of Article 10 of the Convention to impose a sentence on it. Finally, the City Court turned down a request by the prosecution to deprive the applicant company of its licence to broadcast by virtue of Article 79 of the Penal Code, as in the City Court's view the said provision could only apply to physical persons.

10. On appeal to the High Court of Eastern Denmark (*Østre Landsret*) the main issues concerned whether the PPK was a terrorist organisation within the meaning of the Penal Code, whether the applicant, through its programmes, had promoted the PKK in breach of Article 114e in the period indicated in the indictment, and whether there was a connection personally, financially, organisationally and historically between the applicant company (and its parent company) and the PKK.

11. The appeal was heard over 36 days. The applicant company and the witnesses before the City Court were heard anew. Six additional witnesses were heard. The evidence submitted before the City Court was submitted anew before the High Court, including the extracts of the programmes, which in total lasted approximately 15 hours. The High Court viewed additional selected extracts, thus in total more than 30 hours of extracts of programmes. A supplementary report of 6 September 2012 by the CTA was also submitted.

12. By a judgment of 3 July 2013, running to 104 pages, the High Court upheld the conviction and extended it to cover the whole period between 10 June 2006 and 24 September 2010, as set out in the indictment. In its reasoning, the High Court mainly confirmed the findings of the City Court. It found that the extracts of the programmes viewed were representative of

the programmes broadcast during the whole period. Like the City Court, it made a separate examination of whether the PKK could be considered a terrorist organisation within the meaning of the Danish Penal Code. Having made an overall assessment, which took the nature and extent of the PKK's actions into account, the High Court found it established without a doubt that the PKK's armed conflict with the Turkish Government in order to achieve its goals constituted terrorism within the meaning of the Penal Code. It also found that there was a connection between the operation of the applicant company and its parent company, with the companies Med TV and Medya TV, which had had their licences to broadcast revoked and refused by respectively the British and French authorities, due to the content of the programmes and the connection to the PKK.

13. Having regard notably to the programmes' content, presentation and connection, the High Court found that "[the case] does not concern independent and impartial journalistic activity but, on the contrary, promotion of the PKK's terror operation. Accordingly, in our view, the right to freedom of expression as protected by Article 10 of the Convention cannot give reason for exemption from punishment".

14. Taking into account the extension of the conviction and the applicant company's net turnover during the relevant period, totalling DKK 256,800,000, the High Court increased the sentence to 50 day-fines of DKK 100,000, in total DKK 5,000,000, equal to approximately EUR 671,141.

15. Finally, finding that Article 79, by analogy, provided a legal basis, the High Court deprived the applicant company of its licence to broadcast. It noted in this respect that, according to the UN Convention for the suppression of financing terrorism of 9 December 1999 and the EU's Council Framework Decision of 3 December 2001 on combating terrorism, there was an obligation to secure the punishment of such offences by effective, proportionate and dissuasive criminal penalties.

16. On 25 September 2013, the Appeals Permission Board (*Procesbevillingsnævnet*) granted leave to appeal to the Supreme Court (*Højesteret*), but only as far as concerned the prohibition to broadcast.

17. By a judgment of 27 February 2014 the majority of the Supreme Court (five votes to two) found that Article 79 of the Penal Code could also apply to legal persons (companies, and so on), and that there was a basis in this case for disqualifying the applicant company from broadcasting on television.

18. In the meantime, on 19 August 2013, the applicant company had declared itself bankrupt.

B. Relevant domestic law

19. The relevant provisions of the Danish Penal Code read as follows:

Article 27

"(1) Criminal liability of a legal person is conditional upon a transgression having been committed within the establishment of this person at the fault of one or more persons connected to this legal person or at the fault of the legal person himself. As for punishment for attempt, Article 21(3) similarly applies.

(2) Agencies of the state and of municipalities may only be punished for acts committed in the course of the performance of functions comparable to functions exercised by natural or legal persons.

Article 78

(1) A punishable offence shall not involve the suspension of civil rights, including the right to carry on business under an ordinary licence or a maritime licence.

(2) A person who has been convicted of a punishable offence may be debarred from a business requiring a special public authorisation or permission, if the offence committed carries with it an obvious risk of abuse of the position or the occupation concerned.

(3) The question of whether the offence committed implies an objection to carrying on a business of the nature referred to in Subsection (2) above shall, at the request of the person whose application for such authorisation or approval has been refused or of any competent authority, be brought before the court by the Prosecuting Authority. Section 59(2) of this Act shall similarly apply here. The question shall be decided by Court Order. If, according to the decision, the person concerned shall not be allowed to carry on his business, the question may be brought before the court again, but at the earliest after at least two years. Authorisation or permission may also be given by the competent authority before the expiry of this time-limit.

Article 79

(1) A person carrying on one of the undertakings referred to in Section 78(2) of this Act may, on conviction for a punishable offence, be deprived of the right to continue to carry on the business concerned or to carry it on in certain forms if the offence committed carries with it an obvious risk of abuse of the position.

(2) If warranted by special circumstances, the same shall apply to the carrying on of other forms of business. According to the same rule a person can be deprived of his right to be original subscriber to a joint-stock company, or to be manager or board member of a joint-stock company, or a company or association presupposing a specific public confirmation, or a foundation.

(3) The deprivation of such a right shall be made for a period of not less than one year nor more than five years, as from the date of the final sentence, or indefinitely; in the latter case, the question as to whether the person concerned shall continue to be excluded from carrying on the business may, at the expiry of five years, be brought before the court according to the rules contained in Section 78(3) of this Act. If warranted by special circumstances, the Minister of Justice may permit the case to be brought before the court before the expiry of the time-limit of five years referred to in the first sentence.

(4) While a case of the kind referred to in Subsections (1) and (2) above is being heard, the court may, by Court Order, debar the person concerned from carrying on the business until the case is finally decided. In its judgment, the court may decide that appeal shall have no suspensive effect.

Article 114

(1) Any person who, by acting with the intent to frighten a population to a serious degree or unlawfully to coerce Danish or foreign public authorities or an international organisation to carry out or omit to carry out an act or to destabilise or destroy a country's or an international organisation's fundamental political, constitutional, financial or social structures, commits one or more of the following acts, when the act due to its nature or the context in which it is committed can inflict on a country or an international organisation serious damage, **shall be guilty of terrorism [emphasis added]** and liable to imprisonment for any term extending to life imprisonment:

1) Homicide pursuant to section 237.

2) Gross violence pursuant to section 245 or section 246.

3) Deprivation of liberty pursuant to section 261.

4) Impairment of the safety of traffic pursuant to section 184(1); unlawful disturbances in the operation of public means of communication, etc. pursuant to section 193(1); or gross damage to property pursuant to section 291(2); if these violations are committed in a way which can expose human lives to danger or cause considerable financial losses.

5) Seizure of transportation means pursuant to section 183a.

6) Gross weapons law violations pursuant to section 192a of the Act on Weapons and Explosives, section 10(2).

7) Arson pursuant to section 180; explosion, spreading of noxious gases, flooding, shipwrecking, railway or other traffic accident pursuant to section 183(1) and (2); health-endangering contamination of the water supply pursuant to section 186(1); health-endangering contamination of products intended for general use, etc. pursuant to section 187(1).

8) Possession or use, etc. of radioactive substances pursuant to section 192b.

(2) Similar punishment shall apply to any person who, with the intent mentioned in section 1, transports weapons or explosives.

(3) Similar punishment shall apply to any person who, with the intent mentioned in subsection 1, threatens to commit one of the acts mentioned in subsections 1 and 2.

Article 114a

If one of the acts mentioned in items 1-7 below is committed without being covered by section 114, the punishment may exceed the highest punishment prescribed for the violation by up to half the punishment. If the highest punishment prescribed for the relevant act is shorter than 4 years' imprisonment, the punishment may, however, be increased to imprisonment for a term not exceeding six years.

1) Contravention of section 180, section 181(1), section 183(1) or (2), section 183a, section 184(1), section 192a(2), section 193(1), sections 237, 244, 245, 246, 250, section 252(1), section 266, section 288 or section 291(1) or (2) when the act is covered by article 1 of the Convention of 16 December 1970 for the Suppression of Unlawful Seizure of Aircraft, article 1 of the Convention of 23 September 1971 for the Suppression of Unlawful Acts against the Safety of Civil Aviation or article II of the Protocol of 24 February 1988 for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation.

2) Contravention of section 180, section 181(1), section 183(1) or (2), section 184(1), sections 237, 244, 245, 246, 250, section 252(1), section 260, section 261(1) or (2), section 266 or section 291(1) or (2) when the act is covered by article 2 of the Convention of 14 December 1973 on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.

3) Contravention of section 261(1) or (2) when the act is covered by article 1 of the International Convention of 17 December 1979 against the Taking of Hostages.

4) Contravention of section 180, section 181(1), section 183(1) or (2), section 186(1), sections 192a(2), 192b, 237, 244, 245, 246, 260, 266, 276, 278, 279, 279a, 281, 288 or section 291(2) when the act is covered by article 7 of the IAEA Convention (the Convention of the International Atomic Energy Agency) of 26 October 1979 on the Physical Protection of Nuclear Material.

5) Contravention of section 180, section 181(1), section 183(1) or (2), section 183a, section 184(1), section 192a(2), section 193(1), sections 237, 244, 245, 246, section 252(1), sections 260, 266, 288 or section 291(1) or (2) when the act is covered by article 3 of the Convention of 10 March 1988 for the Suppression of Unlawful Acts against the Safety of Maritime Navigation or article 2 of the Protocol of 10 March 1988 for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.

6) Contravention of section 180, section 181(1), section 183(1) or (2), section 183a, section 184(1), section 186(1), section 192a(2), section 193(1), sections 237, 244, 245, 246, 250, section 252(1), section 266 or section 291(2) when the act is covered by article 2 of the International Convention of 15 December 1997 for the Suppression of Terrorist Bombings.

7) Contravention of section 192 b, section 260 or section 266, when the act is covered by article 2 of the international Convention of 13 April 2005 for the Suppression of Nuclear Terrorism.

Article 114b

Any person who

1) directly or indirectly provides financial support to;

2) directly or indirectly procures or collects means to; or

3) directly or indirectly places money, other assets or financial or other similar means at the disposal of; a person, a group or an association which commits or intends to commit acts included under section 114 or section 114a,

shall be liable to imprisonment for any term not exceeding ten years.

Section 114c

(1) Any person who recruits a person to commit or advance acts covered by section 114 or section 114a or to join a group or an association to promote the committing of acts of this nature by the group or the association shall be liable to imprisonment for a term not exceeding ten years. Under especially aggravating circumstances, the punishment may be increased to imprisonment for a term not exceeding 16 years. Especially cases involving contraventions of a systematic or organised nature shall be considered especially aggravating circumstances.

(2) Any person who recruits a person to commit or advance acts covered by section 114b or to join a group or an association to promote the committing of acts of this

nature by the group or the association shall be liable to imprisonment for a term not exceeding six years.

(3) Any person who allows himself to be recruited to commit acts covered by section 114 or section 114a shall be liable to imprisonment for a term not exceeding six years.

Section 114d.

(1) Any person who trains, instructs or in any other way educates a person to commit or promote acts covered by section 114 or section 114a knowing that the person has the intention of using the skills for this purpose shall be liable to imprisonment for a term not exceeding ten years. Under especially aggravating circumstances, the punishment may be increased to imprisonment for a term not exceeding 16 years. Especially cases involving contraventions of a systematic or organised nature shall be considered especially aggravating circumstances.

(2) Any person who trains, instructs or in any other way educates a person to commit or promote acts covered by section 114b knowing that the person has the intention of using the skills learned for this purpose shall be liable to imprisonment for a term not exceeding six years.

(3) Any person who allows himself to be trained, instructed or in any other way educated to commit acts covered by section 114 or section 114a shall be liable to imprisonment for a term not exceeding six years.

Section 114e

Any person who otherwise promotes the activities of a person, a group or an association committing or intending to commit acts covered by sections 114, 114a, 114b, 114c or 114d shall be liable to imprisonment for a term not exceeding six years.

Article 306

Companies etc. (legal persons) can be held criminally liable according to the provisions in Chapter 5 for violation of this Act."

C. Relevant European Union law

20. Council Directive 89/552/EEC [no longer in force] on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities set out in Article 22:

"Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include programmes which might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or gratuitous violence. This provision shall extend to other programmes which are likely to impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts.

Member States shall also ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality."

21. Directive 89/522/EEC was amended by Directive 97/36/EC [no longer in force] of the European Parliament and of the Council. The above Article 22 was replaced by another Article 22 setting out that Member States should take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction did not include any programmes which might seriously impair the physical, mental or moral development of minors. Moreover the following Article 22a was inserted:

> "Member States shall ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality."

22. In December 2001 the European Union established a list of persons, groups and entities involved in terrorist acts and subject to restrictive measures. Set down in common position 2001/931/CFSP, these were additional measures adopted in order to implement UN Security Council resolution 1373 (2001). The list includes persons and groups active both within and outside the EU. It is reviewed regularly, and at least every 6 months. The Kurdistan Workers' Party, *alias* PKK, KADEK and KONGRA-GEL has been on the EU's list of terrorist organisations since 2002.

COMPLAINT

23. The applicant company complained that its conviction by the Danish courts, and the sentence imposed, were in breach of Article 10 of the Convention.

THE LAW

24. The applicant company invokes Article 10 of the Convention, which sets out:

> "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."

25. Article 17 of the Convention reads as follows:

> "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

1. General principles

26. The Court has consistently held that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it 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. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". As enshrined in Article 10, freedom of expression is subject to exceptions which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see *Von Hannover v. Germany* (no. 2) [GC], nos. 40660/08 and 60641/08, § 101, ECHR 2012; *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 88, ECHR 2015 (extracts); and *Bédat v. Switzerland* [GC], no. 56925/08, § 48, ECHR 2016).

27. Although the press must not overstep certain bounds, regarding in particular protection of the reputation and rights of others, its task is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. The task of imparting information necessarily includes, however, "duties and responsibilities", as well as limits which the press must impose on itself spontaneously (see *Couderc and Hachette Filipacchi Associés*, cited above, § 89; and *Von Hannover* (no. 2), cited above, § 102).

28. The vital role of the media in facilitating and fostering the public's right to receive and impart information and ideas has been repeatedly recognised by the Court. 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 as "public watchdog" (see, among many others, *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 165, 8 November 2016, ECHR 2016).

29. The principles concerning the question of whether an interference with freedom of expression is "necessary in a democratic society" are well-established in the Court's case-law (see, among other authorities, *Delfi AS v. Estonia* [GC], no. 64569/09, § 131 to 132, ECHR 2015, with further references). The Court has to examine the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to

the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'. In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts.

30. The purpose of Article 17, in so far as it refers to groups or to individuals, is to make it impossible for them to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention; "... therefore, no person may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms ..." (see *Lawless v. Ireland*, 1 July 1961, § 7, Series A no. 3). Although to achieve that purpose it is not necessary to take away every one of the rights and freedoms guaranteed from groups and persons engaged in activities contrary to the text and spirit of the Convention, the Court has found that the freedoms of religion, expression and association guaranteed by Articles 9, 10 and 11 of the Convention are covered by Article 17 (see, among other authorities, *W.P. and Others v. Poland* (dec.), no. 42264/98, ECHR 2004-VII (extracts); *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX (extracts); *Pavel Ivanov v. Russia* (dec.), no. 35222/04, 20 February 2007; and *Hizb ut-Tahrir and Others v. Germany* (dec.), no. 31098/08, §§ 72-75 and 78, 12 June 2012).

31. Speech that is incompatible with the values proclaimed and guaranteed by the Convention is not protected by Article 10 by virtue of Article 17 of the Convention (see, among others, *Delfi AS v. Estonia* [GC], cited above, § 136). The decisive point when assessing whether statements, verbal or non-verbal, are removed from the protection of Article 10 by Article 17, is whether the statements are directed against the Convention's underlying values, for example by stirring up hatred or violence, and whether by making the statement, the author attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it (see for example, *Perinçek v. Switzerland* [GC], no. 27510/08, § 115, ECHR 2015 (extracts).

32. The Court has applied Article 17, *inter alia*, in *Garaudy v. France* (dec.), cited above, and found the applicant's Article 10 complaint incompatible *ratione materiae* with the provisions of the Convention. The applicant was the author of a book that systematically denied crimes perpetrated by the Nazis against the Jewish community. The Court based its conclusion on the observation that the main content and general tenor of the applicant's book, and thus its aim, were markedly revisionist and therefore ran counter to the fundamental values of the Convention and of democracy, namely justice and peace, and inferred from that observation that he had attempted to deflect Article 10 from its real purpose by using his right to freedom of expression to ends which were contrary to the text and spirit of

the Convention (see also *Witzsch v. Germany* (dec.), no. 4785/03, 13 December 2005).

33. The Court reached the same conclusion in, for example, *Norwood v. the United Kingdom* ((dec.), no. 23131/03, ECHR 2004-XI), and *Pavel Ivanov v. Russia* ((dec.), no. 35222/04, 20 February 2007), which concerned the use of freedom of expression for Islamophobic and anti-Semitic purposes respectively.

34. In *Orban and Others v. France* (no. 20985/05, § 35, 15 January 2005) the Court noted that statements pursuing the unequivocal aim of justifying war crimes such as torture or summary executions likewise amounted to deflecting Article 10 from its real purpose.

35. In *Hizb ut-Tahrir and Others v. Germany* ((dec.), cited above), the applicant's Article 10 complaint was dealt with under Article 11 (see §§ 78, 73 and 74). The Court observed that the Federal Administrative Court, having carefully analysed a substantial number of written statements published in magazine articles, flyers and transcripts of public statements concluded that the first applicant, the association Hizb ut-Tahrir, did not only deny the State of Israel's right to exist, but called for the violent destruction of this State and for the banishment and killing of its inhabitants, and that the propagation of these aims was one of the association's main concerns. The Court observes that this assessment was based on a number of articles indisputably published by the first applicant and on two public statements made by the second applicant, who acted as the first applicant's representative in the proceedings. The Court noted, in particular, that the second applicant, in the above-mentioned statements, repeatedly justified suicide attacks in which civilians were killed in Israel and that neither the first nor the second applicant distanced themselves from this stance during the proceedings before the Court. Having regard to the above, the Court considered that the first applicant attempted to deflect Article 11 of the Convention from its real purpose by employing this right for ends which are clearly contrary to the values of the Convention, notably the commitment to the peaceful settlement of international conflicts and to the sanctity of human life. Consequently, the Court found that by reason of Article 17 of the Convention, the first applicant could not benefit from the protection afforded by Article 11 of the Convention (or Article 10, see ibid., § 78).

36. Likewise, in *Kasymakhunov and Saybatalov v Russia* ((dec.) nos. 26261/05 and 26377/06, 14 March 2013) the Court found that the dissemination of the political ideas of Hizb ut-Tahrir by the applicants clearly constituted an activity falling within the scope of Article 17 of the Convention. The applicants' complaints under Articles 9, 10 and 11 were therefore incompatible *ratione materiae* with the provisions of the Convention.

37. In *Dieudonné M'Bala M'Bala v. France* ((dec.), no 25239/13, §§ 34 to 42, 20 October 2015), the applicant, a comedian who had also engaged in

political activities, had been convicted for proffering a racial insult during a performance. The domestic courts found that he had publicly paid tribute to a person who was known for his negationist ideas, arranging for an actor dressed as a Jewish inmate of the Nazi concentration camps to award him a prize in the form of an object which mocked a symbol of the Jewish religion, after announcing by way of introduction that he intended to "do better" than in a previous show which had allegedly been described as the "biggest anti-Semitic rally since the Second World War". The judges took the view that the sketch, presented by the applicant as a "*quenelle*", an expression which, according to the Court of Appeal, evoked sodomy, had been addressed to persons of Jewish origin or faith as a community. The domestic courts' finding was based on an assessment of the facts with which the Court could agree. The Court emphasised that while Article 17 of the Convention had, in principle, always been applied to explicit and direct remarks not requiring any interpretation, it was convinced that the blatant display of a hateful and anti-Semitic position disguised as an artistic production was as dangerous as a fully-fledged and sharp attack. It thus did not warrant protection under Article 10 of the Convention. Accordingly, since the impugned acts, both in their content and in their general tone, and thus in their aim, had a marked negationist and anti-Semitic character, the Court found that the applicant had attempted to deflect Article 10 from its real purpose by seeking to use his right to freedom of expression for ends which are contrary to the text and spirit of the Convention and which, if admitted, would contribute to the destruction of the rights and freedoms guaranteed by the Convention.

38. Finally, the most recent decision, *Belkacem v. Belgium* ((dec.), no. 4367/14, 20 July 2017), concerns the conviction of the applicant, the leader and spokesperson of the organisation "Sharia4Belgium", which was dissolved in 2012, for incitement to discrimination, hatred and violence on account of remarks he made in YouTube videos concerning non-Muslim groups and Sharia. The Court noted that in his remarks the applicant had called on viewers to overpower non-Muslims, teach them a lesson and fight them. The Court was in no doubt as to the markedly hateful nature of the applicant's views, and agreed with the domestic courts' finding that the applicant, through his recordings, had sought to stir up hatred, discrimination and violence towards all non-Muslims. In the Court's view, such a general and vehement attack was incompatible with the values of tolerance, social peace and non-discrimination underlying the Convention. With reference to the remarks concerning Sharia, the Court observed that it had previously ruled that defending Sharia while calling for violence to establish it could be regarded as "hate speech" (see, *Refah Partisi (The Welfare Party) and Others v. Turkey* [GC], nos. 41340/98 and 3 others, §§ 123-124, ECHR 2003-II) and that each Contracting State was entitled to oppose political movements based on religious fundamentalism.

2. Application of those principles in the present case

39. The Court would note at the outset that it is not called upon to examine the constituent elements of the offence under Article 114e, in conjunction with Articles 114, 114a, 114b, 114c and 114d of the Danish Penal Code law. It is in the first place for the national authorities, especially the courts, to interpret and apply domestic law (see, among many other authorities, *Lehideux and Isorni v. France*, 23 September 1998, § 50, *Reports of Judgments and Decisions* 1998-VII). The Court's task is only to review under Article 10 the decisions delivered by the competent domestic courts pursuant to their power of appreciation. In so doing, it must satisfy itself that the national authorities based their decisions on an acceptable assessment of the relevant facts (see, for example, *Incal v. Turkey*, 9 June 1998, § 48, *Reports* 1998-IV, *Molnar v. Romania* (dec.), no. 16637/06, § 21, 23 October 2012, and *Dieudonné M'Bala M'Bala*, cited above, § 30).

40. The domestic courts found it established that the applicant company, via its programmes, for a period of more than four years between 10 June 2006 and 24 September 2010, had promoted the PKK's terror operation. They observed that the PKK was on the list of terrorist organisations within the EU, Canada, USA, Australia and the United Kingdom, and found that the organisation had committed or intended to commit the acts described in Articles 114-114d of the Danish Penal Code. They also found it established that the applicant company, to a significant extent, had been financed by the PKK in the years 2006 to 2010.

41. The Court notes that the City Court viewed selected extracts of the programmes in total for approximately 15 hours, and that its judgment of 10 January 2012, at length, namely over 190 pages, described the facts of the case and its assessment of the evidence before it. Thereafter, the appeal was heard over 36 days, the High Court viewed in total more than 30 hours of extracts of programmes, and its judgment of 3 July 2013 ran to 104 pages. Moreover, leave to appeal to the Supreme Court was granted regarding the prohibition to broadcast, which was therefore examined by three judicial instances. In the light of all the above-mentioned considerations, the Court considers that the domestic courts carefully assessed the evidence before them and conducted a balancing exercise, which took the applicant company's right to freedom of expression into account. The Court has not found any elements indicating that the domestic courts did not base their findings on an acceptable assessment of the relevant facts.

42. As to the specific question of whether the applicant company's conviction, and the sentence imposed, were in breach of Article 10 of the Convention, the Court recalls that in, for example, *Zana v. Turkey* (25 November 1997, §§ 52-62, *Reports* 1997-VII), the Court found no breach of Article 10 for imposing a penalty on the applicant for having

expressed his support for the "PKK national liberation movement", while going on to say that he was not "in favour of massacres" and that "Anyone can make mistakes, and the PKK kill women and children by mistake." It was accepted, at that time, that the PKK was a terrorist organisation (ibid., § 58, see also, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, §§ 58-65, ECHR 1999-IV).

43. In the present case, the domestic courts concluded, having regard notably to the programmes' content, presentation and connection, that the right to freedom of expression as protected by the Convention could not give reason for exemption from punishment.

44. Having regard thereto, the Court will proceed to examine whether Article 17 is applicable in the present case.

45. The impugned "statements" consisted of numerous television programmes, broadcast over four years in the period from 10 June 2006 to 24 September 2010, which the domestic courts found amounted to promotion of the PKK's terror operation. They therefore convicted the applicant company under Article 114e, in conjunction with Articles 114, 114a, 114b, 114c, and 114d of the Penal Code. It was noted that the PKK was on the list of terrorist organisations within the EU, Canada, USA, Australia and the United Kingdom. In addition, having made their own assessment, both the City Court and the High Court were convinced that the PKK's armed conflict with the Turkish Government in order to achieve their goals constituted terrorism within the meaning of the Danish Penal Code.

46. The Court recalls that Article 17 of the Convention is, as recently confirmed by the Court, only applicable on an exceptional basis and in extreme cases (see *Perincek*, cited above, § 114). In the present case, the Court attaches significant weight to the fact that in the proceedings before the national courts, the City Court found (see paragraph 9 above) that the one-sided coverage with repetitive incitement to participate in fights and actions, incitement to join the organisation/the guerrilla, and the portrayal of deceased guerrilla members as heroes, amounted to propaganda for the PKK, a terrorist organisation, and that it could not be considered only a declaration of sympathy. In addition, the applicant company had been financed to a significant extent by the PKK in the years 2006 to 2001. Furthermore, the High Court of Eastern Denmark found explicitly that, having regard to the content, presentation and connection of the programmes of the applicant company, the case concerned the promotion of the PKK´s terror operation (see paragraph 13 above).

47. Consequently, the Court finds that, taking firstly account of the nature of the impugned programmes, which included incitement to violence and support for terrorist activity, elements extensively examined by the national courts, secondly, the fact that the views expressed therein were disseminated to a wide audience through television broadcasting and,

thirdly, that they related directly to an issue which is paramount in modern European society - the prevention of terrorism and terrorist-related expressions advocating the use of violence - the applicant company´s complaint does not, by virtue of Article 17 of the Convention, attract the protection afforded by Article 10.

48. Having regard thereto, the Court considers that the applicant company is attempting to deflect Article 10 of the Convention from its real purpose by employing this right for ends which are clearly contrary to the values of the Convention. Consequently, the Court finds that, by reason of Article 17 of the Convention, the applicant company may not benefit from the protection afforded by Article 10 of the Convention.

49. It follows that the application is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 24 May 2018.

Stanley Naismith
Registrar

Robert Spano
President