

FIFTH SECTION

CASE OF VEJDELAND AND OTHERS v. SWEDEN

(Application no. 1813/07)

JUDGMENT

STRASBOURG

9 February 2012

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention.
It may be subject to editorial revision.*

In the case of *Vejdeland v. Sweden*,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Dean Spielmann, *President*,
Elisabet Fura,
Karel Jungwiert,
Boštjan M. Zupančič,
Mark Villiger,
Ganna Yudkivska,
Angelika Nußberger, *judges*,
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 10 January 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 1813/07) against the Kingdom of Sweden lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by four Swedish nationals, Mr Tor Fredrik Vejdeland, Mr Mattias Harlin, Mr Björn Täng and Mr Niklas Lundström (“the applicants”), on 4 January 2007.
2. The applicants were represented by Mr N. Ugglä, a lawyer practising in Stockholm. The Swedish Government (“the Government”) were represented by their Agent, Mrs A. Erman, of the Ministry for Foreign Affairs.
3. The applicants alleged that the Supreme Court judgment of 6 July 2006 constituted a violation of their freedom of expression under Article 10 of the Convention. They further submitted that they were punished without law in violation of Article 7 of the Convention.
4. On 27 November 2008 the President of the Third Section decided to give notice of the application to the Government.
5. The application was later transferred to the Fifth Section of the Court, following the re-composition of the Court’s sections on 1 February 2011. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).
6. In addition to written observations by the applicants and the Government, third-party comments were received jointly from the International Centre for the Legal Protection of

Human Rights and the International Commission of Jurists, whom the President had authorised to intervene in the written procedure (Article 36 § 2 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicants were born in 1978, 1981, 1987 and 1986 respectively. The first applicant lives in Gothenburg and the other applicants live in Sundsvall.

8. In December 2004 the applicants, together with three other persons, went to an upper secondary school (*gymnasieskola*) and distributed approximately a hundred leaflets by leaving them in or on the pupils' lockers. The episode ended when the school's principal intervened and made them leave the premises. The originator of the leaflets was an organisation called National Youth and the leaflets contained, *inter alia*, the following statements:

“Homosexual Propaganda (*Homosexpropaganda*)

In the course of a few decades society has swung from rejection of homosexuality and other sexual deviances (*avarter*) to embracing this deviant sexual proclivity (*böjelse*). Your anti-Swedish teachers know very well that homosexuality has a morally destructive effect on the substance of society (*folkkroppen*) and will willingly try to put it forward as something normal and good.

-- Tell them that HIV and AIDS appeared early with the homosexuals and that their promiscuous lifestyle was one of the main reasons for this modern-day plague gaining a foothold.

-- Tell them that homosexual lobby organisations are also trying to play down (*avdramatisera*) paedophilia, and ask if this sexual deviation (*sexuella avart*) should be legalised.”

9. For distributing the leaflets, the applicants were charged with agitation against a national or ethnic group (*hets mot folkgrupp*).

10. The applicants disputed that the text in the leaflets expressed contempt for homosexuals and claimed that, in any event, they had not intended to express contempt for homosexuals as a group. They stated that the purpose of their activity had been to start a debate about the lack of objectivity in the education dispensed in Swedish schools.

11. On 11 July 2005 the District Court (*tingsrätten*) of Bollnäs found that the statements in the leaflets had clearly gone beyond what could be considered an objective discussion of homosexuals as a group and that the applicants' intention had been to express contempt for homosexuals. It therefore convicted the applicants of agitation against a national or ethnic group, and sentenced the first and second applicants to two months'

imprisonment, the third applicant to a suspended sentence (*villkorlig dom*) combined with a fine, and the fourth applicant to probation (*skyddstillsyn*) combined with 40 hours of community service.

12. The applicants as well as the prosecutor appealed against the judgment to the Court of Appeal (*hovrätten*) for Southern Norrland. The applicants requested the court to reject the charges, to consider the criminal act minor, or at least to reduce the punishments. The prosecutor appealed as regards the first three applicants, requesting the court to consider the criminal act to be aggravated or at least to increase the punishments.

13. On 14 December 2005 the Court of Appeal, referring to the Supreme Court's judgment of 29 November 2005 in the case NJA 2005 p. 805 (see below under "Relevant domestic law and practice"), rejected the charges against the applicants on the ground that a conviction would amount to a violation of their right to freedom of expression as guaranteed by the Convention.

14. The Office of the Prosecutor-General (*Riksåklagaren*) appealed against the judgment to the Supreme Court (*Högsta domstolen*) and requested it to convict the applicants of agitation against a national or ethnic group, arguing that it would not amount to a violation of Article 10 of the Convention in the circumstances of the present case. The applicants disputed the appeal.

15. On 6 July 2006 the Supreme Court convicted the applicants of agitation against a national or ethnic group. The majority of judges (three out of five) first considered decisive for the outcome of the case whether the interference with the applicants' freedom to distribute the leaflets could be considered necessary in a democratic society and whether the interference with their freedom of expression could be deemed proportionate to the aim of protecting the group of homosexuals from the violation that the content of the leaflets constituted. The majority then held:

"In the light of the case-law of the European Court of Human Rights regarding Article 10, in the interpretation of the expression "contempt" in the provision regarding incitement against a group, a comprehensive assessment of the circumstances of the case should be made, where, in particular, the following should be considered. The handing out of the leaflets took place at a school. The accused did not have free access to the premises, which can be considered a relatively sheltered environment as regards the political actions of outsiders. The placement of the leaflets in and on the pupils' lockers meant that the young people received them without having the possibility to decide whether they wanted to accept them or not. The purpose of the handing out of the leaflets was indeed to initiate a debate between pupils and teachers on a question of public interest, namely the objectivity of the education in Swedish schools, and to supply the pupils with arguments. However, these were formulated in a way that was offensive and disparaging for homosexuals as a group and in violation of the duty under Article 10 to avoid as far as possible statements that are unwarrantably offensive to others thus constituting an assault on their rights, and without contributing to any form of public debate which could help to further mutual understanding. The purpose of the relevant

sections in the leaflets could have been achieved without statements that were offensive to homosexuals as a group. Thus, the situation was in part different from that in NJA 2005 p. 805, where a pastor made his statements before his congregation in a sermon based on certain biblical quotations. The above-mentioned reasons taken together lead to the conclusion that Chapter 16, Article 8 of the Penal Code, interpreted in conformity with the Convention, permits a judgment of conviction, given the present circumstances of this case.”

16. The minority (two judges) found that convicting the applicants would not be proportionate to the aims pursued and would therefore be in violation of Article 10 of the Convention. Hence, the minority wanted to acquit the applicants but gave separate reasons for this conclusion, at least in part. One of them was of the view that the prosecution was not formulated in such a way that the Supreme Court could take into consideration that the leaflets had been distributed at a school and addressed to the pupils, while the other found it natural that the leaflets had been aimed at pupils and agreed with the majority that an overall assessment of the circumstances had to be made.

17. The first three applicants were given suspended sentences combined with fines ranging from SEK 1,800 (approximately 200 euros (EUR)) to SEK 19,000 (approximately EUR 2,000) and the fourth applicant was sentenced to probation.

II. RELEVANT DOMESTIC LAW AND PRACTICE

18. Chapter 16, Article 8 of the Penal Code (*Brottsbalken*, SFS 1962:700) provides that a person who, in a disseminated statement or communication, threatens or expresses contempt for a national, ethnic or other such group of persons with allusion to race, colour, national or ethnic origin, religious beliefs or sexual orientation, should be convicted of agitation against a national or ethnic group. The offence carries a penalty of up to two years' imprisonment. If the offence is considered minor the penalty is a fine, and if it is considered to be aggravated the penalty is imprisonment for no less than six months and no more than four years.

19. Agitation against homosexuals as a group was made a criminal offence by an amendment of the law that came into effect on 1 January 2003. According to the preparatory work on that amendment, as reproduced in Government Bill 2001/02:59 (pp. 32-33), homosexuals constitute an exposed group which is often subjected to criminal acts because of their sexual orientation, and national socialist and other racist groups agitate against homosexuals and homosexuality as part of their propaganda. The preparatory work also stated that there were good reasons to assume that the homophobic attitude that had caused certain offenders to attack individuals on account of their sexual orientation derived from the hate, threat and inflammatory propaganda against homosexuals as a group that was spread by the majority of Nazi and other right-wing extremist groups in the country.

20. The Supreme Court, in its judgment of 29 November 2005 (case NJA 2005 p. 805) concerning statements made by a pastor during a sermon which were deemed to have

expressed contempt for homosexuals as a group within the meaning of Chapter 16, Article 8 of the Penal Code, considered that the legislation was in accordance with the Convention. However, the Supreme Court found that, the word “contempt” in the provision regarding incitement against a group had to be interpreted more restrictively than the preparatory work appeared to indicate if an application of the provisions that was in line with the Convention was to be achieved. The Supreme Court then found that an application of the provision that was in line with the Convention would not permit a judgment convicting the defendant, given the circumstances of the case, and rejected the charges.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

21. The applicants complained that the judgment of the Supreme Court constituted a violation of their freedom of expression as protected by Article 10 of the Convention, which reads, in its relevant parts, 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. ...

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, ... for the protection of the reputation or rights of others, ...”

A. Admissibility

22. The Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The submissions of the parties

(a) The applicants

23. The applicants maintained that their conviction constituted an unjustified interference with their right to freedom of expression under Article 10 § 1 of the Convention.

24. They also argued, albeit in conjunction with their complaint under Article 7, that the law on agitation against a national or ethnic group was so unclear that it was not possible for them to ascertain whether or not their act was criminal.

25. Further, in the applicants' view, the text in the leaflets was not disparaging or insulting to homosexuals and hence could not justify a restriction of their right to freedom of expression pursuant to Article 10 § 2.

26. The applicants contended that the wording in the leaflets was not hateful and did not encourage anyone to commit hateful acts. In their view, the leaflets rather encouraged the pupils to discuss certain matters with their teachers and provided them with arguments to use in these discussions.

27. They further submitted that freedom of speech should be limited only in its content and not as regards how and where it was exercised, pointing out that they were found guilty for agitation against a national or ethnic group and not for trespassing or littering.

28. In this connection they did not consider Swedish schools to be relatively sheltered from the political actions of outsiders. On the contrary, they alleged that Swedish schools had a tradition of letting political youth parties spread their messages, especially during election years.

29. The applicants further stated that the pupils at the school in question were between the ages of 16 and 19 and hence of an age to understand the content of the leaflets.

30. Lastly, they emphasised that their case should be compared to the Swedish case NJA 2005 p. 805, in which a pastor who had offended homosexuals in a sermon was acquitted by the Supreme Court of agitation against a national or ethnic group with reference to Articles 9 and 10 of the Convention.

(b) The Government

31. The Government agreed that Article 10 of the Convention was applicable to the present case and that the criminal conviction of the applicants constituted an interference with their right to freedom of expression as prescribed under the second section of that Article. However, the Government submitted that the criminal conviction and the sentence imposed were proportionate to the legitimate aims pursued, and thus necessary in a democratic society.

32. The Government stressed that the applicants were convicted of the crime of agitation against a national or ethnic group, in accordance with Chapter 16 Section 8 of the Penal Code, and that all five justices of the Supreme Court reached the conclusion that this penalty was prescribed by law within the meaning of Article 10 § 2 of the Convention.

33. The Government also contended that the interference with the applicants' right to freedom of expression served legitimate aims within the meaning of Article 10 § 2, with particular emphasis on "the protection of the reputation or rights of others", that is, homosexuals as a group.

34. In the Government's opinion several factors in the present case called for the conclusion that the domestic courts enjoyed a particularly wide margin of appreciation when examining the issue of whether the applicants' conviction was proportionate to the legitimate aims pursued. They also argued that the same factors should be taken into account when examining whether the interference was necessary in a democratic society.

35. In this regard, the Government first pointed out that the circumstances of the present case differed from those prevailing in several of the cases where the Court had ruled on the proportionality of measures interfering with the right to freedom of expression under Article 10. Many of those cases had dealt with the conviction of journalists and editors who had written or published "defamatory" statements in newspaper articles. The Government thus submitted that the Court's abundant case-law insisting on the essential role of a free press and of the press as a "public watchdog" was not of immediate relevance to the present case.

36. Secondly, the Government argued that it followed from the Court's case-law that the limits of acceptable criticism were wider as regards, for example, governments, politicians or similar actors in the public domain than for private individuals. In the Government's view, there was no reason why a group of individuals targeted by certain statements owing to a common denominator which distinguished them from other individuals – for example regarding sexual orientation or religion – should be required to display a greater degree of tolerance than a single individual in the equivalent situation.

37. Thirdly, the Government maintained that a certain distinction should be made between the present case and cases dealing with the area of political speech and statements made in the course of a political debate, where freedom of expression was of the utmost importance and there was little scope for restrictions. The reason for this was that the leaflets were distributed in a school, that is, an environment relatively sheltered from the political actions of outsiders.

38. Fourthly, the Government stressed that the Court had emphasised that balancing individual interests protected under the Convention that might well be contradictory was a difficult matter, and that Contracting States must have a broad margin of appreciation in this regard.

39. The Government also argued that the outcome of the domestic proceedings – where the applicants were convicted by the District Court, acquitted by the Court of Appeal and convicted again by three out of five justices of the Supreme Court with reference to, *inter alia*, Article 10 § 2 of the Convention – clearly showed that the task of balancing the different interests involved and interpreting Swedish criminal legislation in the light of the Convention and the Court's case-law had proved particularly difficult and delicate in the present case. They contended that in these circumstances the national authorities, by reason of their direct and continuous contact with the vital forces of their countries, were in a better position than international judges to give an opinion on the exact content of the concept "the protection of the reputation or rights of others" and to assess whether a

particular measure would constitute an unjustified interference with the right to freedom of expression under Article 10 § 2.

40. The Government further emphasised that the domestic courts had made a careful and thorough investigation of the requirements of the Convention and the Court's case-law and had carried out a proportionality test in full conformity with the standards set by the Convention and the principles embodied in Article 10.

(c) The third-party intervener

41. INTERIGHTS (the International Centre for the Legal Protection of Human Rights) and the International Commission of Jurists, referring to the Court's case-law, *inter alia*, submitted the following.

42. Despite the prevalence of homophobic hate speech, there has been a failure to adopt particularised standards to address the problem, at both the European and the international political level. While the Court has well-developed case-law with respect to permissible restrictions on freedom of expression, it has not had the opportunity to develop a comprehensive approach to hate speech directed against a person or class of persons because of their sexual orientation. The Court has, however, repeatedly held that discrimination based on sexual orientation is as serious as discrimination based on "race, origin or colour" or sex. The Court has also found incompatible with the Convention laws concerning same-sex conduct, the age of consent, military service, adoption, child custody and inheritance that discriminate on the basis of sexual orientation.

43. When the Court comes to the "proportionality" analysis under Article 10 § 2 of the Convention, the means of communication is a relevant factor, since the impact of speech is proportional to the size of the audience it is likely to reach. It follows that when the impugned speech reaches a wider audience more caution is demanded in using that means of communication. However, as the Court has noted, where children and adolescents are concerned certain restrictive measures may be necessary to prevent pernicious effects on the morals of that group.

44. The present case provides an opportunity for the Court to consolidate an approach to hate speech directed against a person or class of persons because of their sexual orientation that is elaborated in such a way so as to ensure that they are protected from the harmful effects of such expression. A clear analogy can be drawn between racism and xenophobia – which have been the subject matter of much of the Court's jurisprudence – and sexual orientation.

45. Sexual orientation should be treated in the same way as categories such as race, ethnicity and religion which are commonly covered by hate-speech and hate-crime laws, because sexual orientation is a characteristic that is fundamental to a person's sense of self. It is, moreover, used as a marker of group identity.

46. When a particular group is singled out for victimisation and discrimination, hate-speech laws should protect those characteristics that are essential to a person's identity and that are used as evidence of belonging to a particular group. Restrictions on freedom of expression must therefore be permissible in instances where the aim of the speech is to degrade, insult or incite hatred against persons or a class of person on account of their sexual orientation, so long as such restrictions are in accordance with the Court's well-established principles.

2. The Court's assessment

47. The Court finds, and this is common ground between the parties, that the applicants' conviction amounted to an interference with their freedom of expression as guaranteed by Article 10 § 1 of the Convention.

48. Such an interference will infringe the Convention if it does not meet the requirements of Article 10 § 2. 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.

(a) Lawfulness and legitimate aim

49. The Court observes that the applicants were convicted of agitation against a national or ethnic group in accordance with Chapter 16, Article 8 of the Swedish Penal Code (see paragraph 18 above), which at the time of the alleged crime included statements that threatened or expressed contempt for a group of people with reference to their sexual orientation. The Court hence considers that the impugned interference was sufficiently clear and foreseeable and thus "prescribed by law" within the meaning of the Convention. The Court further considers that the interference served a legitimate aim, namely "the protection of the reputation and rights of others", within the meaning of Article 10 § 2 of the Convention.

(b) Necessity of the interference

50. It remains for the Court to consider whether the interference was "necessary in a democratic society".

51. The test of "necessity in a democratic society" requires the Court to determine whether the interference complained of corresponded to a "pressing social need". In this respect, the Contracting States enjoy a margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a 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 other authorities, *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 68, ECHR 2004-XI).

52. In reviewing under Article 10 the decisions taken by the national authorities pursuant to their margin of appreciation, the Court must determine, 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, whether the interference at issue was “proportionate” to the legitimate aim pursued and whether the reasons adduced by them to justify the interference are “relevant and sufficient” (see, among other authorities, *Pedersen and Baadsgaard*, cited above, §§ 69 and 70, and *Kobenter and Standard Verlags GmbH v. Austria*, no. 60899/00, § 29, 2 November 2006).

53. The Court further reiterates that 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, *Pedersen and Baadsgaard*, cited above, § 71).

54. The Court notes that the applicants distributed the leaflets with the aim of starting a debate about the lack of objectivity of education in Swedish schools. The Court agrees with the Supreme Court that even if this is an acceptable purpose, regard must be paid to the wording of the leaflets. The Court observes that, according to the leaflets, homosexuality was “a deviant sexual proclivity” that had “a morally destructive effect on the substance of society”. The leaflets also alleged that homosexuality was one of the main reasons why HIV and AIDS had gained a foothold and that the “homosexual lobby” tried to play down paedophilia. In the Court’s opinion, although these statements did not directly recommend individuals to commit hateful acts, they are serious and prejudicial allegations.

55. Moreover, the Court reiterates that inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner (see *Féret v. Belgium*, no. 15615/07, § 73, 16 July 2009). In this regard, the Court stresses that discrimination based on sexual orientation is as serious as discrimination based on “race, origin or colour” (see, *inter alia*, *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 97, ECHR 1999-VI).

56. The Court also takes into consideration that the leaflets were left in the lockers of young people who were at an impressionable and sensitive age and who had no possibility to decline to accept them (see, *mutatis mutandis*, *Handyside v. the United Kingdom*, 7 December 1976, § 52, Series A no. 24). Moreover, the distribution of the leaflets took place at a school which none of the applicants attended and to which they did not have free access.

57. In considering the approach of the domestic courts when deciding whether a “pressing social need” existed, and the reasons the authorities adduced to justify the interference, the Court observes the following. The Supreme Court acknowledged the

applicants' right to express their ideas while at the same time stressing that along with freedoms and rights people also have obligations; one such obligation being, as far as possible, to avoid statements that are unwarrantably offensive to others, constituting an assault on their rights. The Supreme Court thereafter found that the statements in the leaflets had been unnecessarily offensive. It also emphasised that the applicants had left the leaflets in or on the pupils' lockers, thereby imposing them on the pupils. Having balanced the relevant considerations, the Supreme Court found no reason not to apply the relevant Article of the Penal Code.

58. Finally, an important factor to be taken into account when assessing the proportionality of an interference with freedom of expression is the nature and severity of the penalties imposed (see *Ceylan v. Turkey* [GC], no. 23556/94, § 37, ECHR 1999-IV; *Tammer v. Estonia*, no. 41205/98, § 69, ECHR 2001-I; and *Skajka v. Poland*, no. 43425/98, §§ 41-42, 27 May 2003). The Court notes that the applicants were not sentenced to imprisonment, although the crime of which they were convicted carries a penalty of up to two years' imprisonment. Instead, three of them were given suspended sentences combined with fines ranging from approximately EUR 200 to EUR 2,000, and the fourth applicant was sentenced to probation. The Court does not find these penalties excessive in the circumstances.

59. 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.

60. The foregoing considerations are sufficient to enable the Court to conclude that the application does not reveal a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

61. The applicants complained that they were convicted of a crime not prescribed by law. They relied on Article 7 of the Convention, which reads, in so far as relevant, as follows:

“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. ... “

62. Having regard to the finding under Article 10 that the measure complained of was “prescribed by law” within the meaning of the Convention (see paragraph 49 above), the Court finds that this part of the application should be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 a) and 4 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 10 admissible and the remainder of the application inadmissible;
2. *Holds* unanimously that there has been no violation of Article 10 of the Convention.

Done in English, and notified in writing on 9 February 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek Dean Spielmann
Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Judge Spielmann joined by Judge Nußberger;
- (b) concurring opinion of Judge Zupančič;
- (c) concurring opinion of Judge Yudkivska joined by Judge Villiger.

D.S.

C.W.

CONCURRING OPINION OF JUDGE SPIELMANN
JOINED BY JUDGE NUSSBERGER

1. I have to confess that it is with the greatest hesitation that I voted in favour of finding no violation of Article 10 of the Convention.

2. As my colleague, Judge András Sajó, pointed out in his dissenting opinion joined to the *Féret v. Belgium* judgment:

“Content regulation and content-based restrictions on speech are based on the assumption that certain expressions go “against the spirit” of the Convention. But “spirits” do not offer clear standards and are open to abuse. Humans, including judges, are inclined to label positions with which they disagree as palpably unacceptable and therefore beyond the realm of protected expression. However, it is precisely where we face ideas that we abhor or despise that we have to be most careful in our judgment, as our personal convictions can influence our ideas about what is actually dangerous.”¹

3. In paragraph 54 of the judgment the Court elaborates its reasoning step by step, applying for the first time the principles relating to speech offensive to certain groups to speech against homosexuals.

Firstly, the reasoning endorses the position of the Swedish Supreme Court that the aim of starting a debate about the lack of objectivity of education in Swedish schools is an acceptable one.

Secondly, the Court also admits that these statements did not encourage individuals to commit hateful acts.

Thirdly, and relying on the judgment of *Féret v. Belgium*,² the Court then reiterates that inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts, and that attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner.

Finally, the Court extends the findings in *Féret* to offensive speech directed against homosexuals.

4. The leaflets at issue undoubtedly contained statements that were totally unacceptable. However, to equate the content of the leaflets to hate speech within the meaning of our case-law needs robust justification. In my opinion, establishing this link by mere reference to the *Smith and Grady* precedent³ (paragraph 55 *in fine*) is not sufficient. Indeed, the offending statements should have been defined more precisely, bearing in mind that, by virtue of Article 17 of the Convention,⁴ “hate speech”, in the proper

meaning of the term, is not protected by Article 10. A careful, in-depth analysis of the aim of the speech would have been necessary. As already indicated, the Supreme Court considered the aim (starting a debate) as being acceptable.⁵ However, the domestic courts should have examined more thoroughly whether behind the apparent aim there was any hidden agenda to degrade, insult or incite hatred against persons or a class of persons on account of their sexual orientation. In the case at hand the Supreme Court, after having admitted that the applicants' actions had a legitimate purpose, namely starting a debate on a matter of public concern, characterised the impugned statements, not without contradiction, as being "unnecessarily offensive." It justified the interference by acknowledging the applicant's right to express his ideas, while at the same time stressing that freedoms and rights went hand in hand with obligations; one of which was "to avoid, as far as possible, statements that are unwarrantably offensive to others, constituting an assault on their rights" (paragraph 57 of the judgment).

5. It is submitted that this is a rather vague test which seems to me to be inconsistent with the traditional and well-established case-law of our Court going back to *Handyside*,⁶ namely that "*Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man. 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 the State or any sector of the population. ...*"⁷

6. Still, I agreed, albeit very reluctantly, to find no violation because the distribution of the leaflets took place at a school which none of the applicants attended and to which they did not have free access (paragraph 56). Admittedly, the "place of distribution" is neither an incriminating factor, part of the *actus reus*, nor an aggravating circumstance in Swedish law. However, the factual circumstances of the distribution have an impact regarding the scope of the margin of appreciation in a case where, as is rightly pointed out in paragraph 58, the penalties were not excessive or disproportionate. As highlighted in paragraph 56, the leaflets were in the lockers of young people who were at an impressionable and sensitive age and who had no possibility to decline to accept the leaflets. Noting that members of the LGBT community face deeply rooted prejudices, hostility and widespread discrimination all over Europe,⁸ I would like also to mention in this context the Resolution adopted by the Committee of Ministers on 21 October 2009 concerning collective complaint No. 45/2007 and containing the findings of the European Committee of Social Rights recognising that statements of a homophobic nature contribute to an atmosphere of hostility and violence against sexual minorities. Dealing with the provision of sexual and reproductive health education in schools, in its report finding a violation of Article 11 § 2 in the light of the non-discrimination clause of the European Social Charter, the European Committee of Social Rights criticised certain passages in educational materials provided by the state which said that "... [n]owadays it has become evident that homosexual relations are the main culprit for increased spreading of sexually transmitted diseases (e.g. 'AIDS'), or 'The disease [AIDS] has spread amongst promiscuous groups of people who often change their sexual partners. Such people are homosexuals, because of sexual contacts with numerous partners, drug

addicts, because of shared use of infected drug injection equipment, and prostitutes’.” It was rightly pointed out that *“these statements stigmatise homosexuals and are based upon negative, distorted, reprehensible and degrading stereotypes about the sexual behaviour of all homosexuals.”* (Resolution CM/ResChS(2009)7, Collective complaint no. 45/2007 by the International Centre for the Protection of Human Rights (*INTERIGHTS*) v. *Croatia*). Moreover, in Recommendation CM/Rec(2010)5 of the Committee of Ministers to member States on measures to combat discrimination on grounds of sexual orientation or gender identity (31 March 2010), specific action to ensure the full enjoyment of human rights by LGBT persons is called for, albeit in accordance with the principles of Article 10 of the Convention,⁹ by recognising that non-discriminatory treatment by State-actors, as well as, where appropriate, positive State measures for protection against discriminatory treatment, including by non-State actors, are fundamental components of the international system protecting human rights and fundamental freedoms.

7. It should also not be forgotten that a real problem of homophobic and transphobic bullying and discrimination in educational settings may justify a restriction of freedom of expression under paragraph 2 of Article 10. Indeed, according to studies carried out across member States and supported by some government research, LGBT students suffer from bullying from both peers and teachers.¹⁰

8. It is against this background that I am satisfied, on balance, that the conviction concerning the distribution at a school of leaflets containing statements directed against the homosexual community did not violate Article 10 of the Convention.

CONCURRING OPINION OF
JUDGE BOŠTJAN M. ZUPANČIČ

1. It was with some hesitation that I voted for no violation of Article 10 of the Convention. I would agree with the finding in this case without any impediment were the judgment based predominantly on its paragraph 56. There we maintain that it ought to be considered “*that the leaflets were left in the lockers of young people who were at an impressionable and sensitive age and had no possibility to decline to accept them. ... Moreover, the distribution of the leaflets took place at a school which none of the applicants attended and to which they did not have free access.*”
2. In this respect, the case before us may relevantly be compared to *Snyder v. Phelps et al*, 562 U.S. ___ (2011), decided last year by the Supreme Court of the United States. In *Snyder* an anti-homosexual demonstration far more insensitive than the events in the case at hand took place about 300 metres from the church where the funeral of Mr. Snyder’s son, Corporal Matthew Snyder, who was killed in Iraq in the line of duty, was taking place. There is no need to repeat here the contents of the offensive picketing signs displayed by the members of the congregation of the Westburo Baptist Church, who were in the habit of picketing military funerals in order to communicate their belief that God hates the United States for its tolerance of homosexuality, particularly in America’s military.
3. It is interesting to note that the American Supreme Court takes a very liberal position concerning the contents of the controversial messages. That the statement is arguably of inappropriate or controversial character “... *is irrelevant to the question of whether it deals with a matter of public concern*”¹¹. In other words, freedom of speech in *Snyder* – *a fortiori* as a tort case, not a criminal case – was not to be impeded by considerations of proportionality as long as the statement in question could be “*fairly considered as relating to any matter of political, social, or other concern to the community*”. “*Speech on public issues occupies the highest rank of the hierarchy of First Amendment values, and is entitled to special protection*”.¹²
4. Moreover, the American Supreme Court has set a higher standard for the applicable law in such cases to be facially constitutional. First, it must avoid *content* discrimination (i.e., the State cannot forbid or prosecute inflammatory speech only on *some* “disfavoured” subjects) and, second, it must avoid *viewpoint* discrimination (i.e., forbidding or prosecuting inflammatory speech that expresses one particular view on the subject).¹³ Thus, for example, the legislator may impose a general ban on the public use of rude racial slurs; it cannot, however, criminalise their use solely in race-related public discourse, or their use in order to express only a racist viewpoint. It is interesting to note that if this American double test were applied to the present case, the applicable law (Chapter 16, Article 8 of the Swedish Penal Code) would not pass muster on either count, especially the second: had the applicants defended homosexuality and railed against “wicked homophobes” in their leaflets, they would probably not have been convicted.

5. In our case we have relied on a different kind of logic as did the Swedish Supreme Court, among others (although divided three to two), which considered the relatively inoffensive language of the leaflets to be a cause for *criminal* prosecution and eventually for conviction and punishment.

6. It is interesting to note that speech inflaming national, racial, etc. hatred was first incriminated in the 1952 Criminal Code of Communist Yugoslavia and this has since been copied by many other jurisdictions, and cited in leading American case books on criminal law, for example. Therefrom developed the notion of hate speech subject to criminal prosecution where one protected class of people was “*unwarrantably offensive to others thus constituting an assault on their rights, and without contributing to any form of public debate which could help to further mutual understanding.*” If we compare the two cases we might find that the American approach to free speech deriving from the First Amendment is perhaps insensitive. On the other hand, we might certainly also conclude that the above quotation from the Swedish Supreme Court judgment of 6 July 2006 demonstrates an oversensitivity in collision with free speech postulates.

7. This in my opinion is a culturally predetermined debate and is not necessary in a situation where even the Swedish Supreme Court, in its famous pastor’s sermon speech case (*NJA* 2005 p.805), acquitted the defendant, considering that his conviction would be contrary to the Convention.¹⁴

8. In comparative constitutional law terms, the Swedish pastor’s sermon case would be based on the notion of a captive audience.¹⁵

9. A captive audience is one that finds itself in an inescapable situation and is bombarded with information that is offensive to some of the members of that audience. If a church audience is in that sense captive because an individual cannot escape being subjected to a verbal assault, then in the case of a school audience, where leaflets were distributed – as we do emphasise in § 56 – in the young people’s lockers, that is certainly a decisive consideration. A church is in essence a public place accessible to everybody. School grounds, on the other hand, are more protected and are in this sense a non-public place, requiring an intrusion in order to distribute any information of whatever kind that has not been previously approved by the school’s authorities. Coming back to the Supreme Court of the United States, it has held that “*the undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behaviour*”.¹⁶

10. Admittedly high-school grounds may not be seen primarily as the setting for a captive audience in the same sense as in the pastor’s sermon case, yet they are definitely a protected setting where only those authorised to distribute any kind of information may do so. This is the key difference between the pastor’s sermon case of the Swedish Supreme Court and the case before us and this is why I maintain that I would be in perfect agreement with the judgment were it based solely (or at least predominantly) on the considerations contained in paragraph 56 of the judgment.

11. For my controversial concurring opinion in *von Hannover v. Germany*, I have been repeatedly attacked for the phrase mentioning the fetishisation of the freedom of the press under American influence.¹⁷ Recent events in the United Kingdom, where serious abuses on the part of the Murdoch press have been uncovered, tend to vindicate the position taken in the *von Hannover* case.

12. Nevertheless, we seem to go too far in the present case – on the grounds of proportionality and considerations of hate speech – in limiting freedom of speech by over-estimating the importance of what is being said. In other words, if exactly the same words and phrases were to be used in public newspapers such as *Svenska Dagbladet*, they would probably not be considered as a matter for criminal prosecution and condemnation.

CONCURRING OPINION OF JUDGE YUDKIVSKA
JOINED BY JUDGE VILLIGER

1. I have no difficulties in finding that Article 10 was not violated.
2. However, I regret that the Court missed an opportunity to “consolidate an approach to hate speech” against homosexuals, as commented by the third-party intervener. Further, it was recognised that “although the Court has not yet dealt with this aspect, homophobic speech also falls into what can be considered as a category of “hate speech”¹⁸, which is not protected by Article 10”.
3. Although there is no agreed definition of hate speech in international law, the Committee of Ministers of the Council of Europe was very clear in its Recommendation No. R (97) 20: the term “hate speech” is to be “*understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance...*”.
4. In the present case the applicants described homosexuality as a “deviant sexual proclivity” and accused homosexuals of having a “morally destructive effect on the substance of society” and being the main reason for the spread of HIV and AIDS. To my mind, such accusations clearly match the above definition.
5. Yet in paragraph 54 the majority affirm that statements which do not “directly recommend individuals to commit hateful acts”, can be described as “serious and prejudicial allegations”, not as hate speech.
6. This appears to be the American approach, where hate speech is protected until it threatens to give rise to imminent violence. This is a very high threshold, and for many well-known political and historical reasons today’s Europe cannot afford the luxury of such a vision of the paramount value of free speech.
7. Obviously, as the Court has often emphasised, “freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual’s self-fulfilment” (see, among many other authorities, *Rekvényi v. Hungary* [GC], no. 25390/94, § 42, ECHR 1999-III). Nevertheless, the Court has also held that “abuse of freedom of expression is incompatible with democracy and human rights and infringes the rights of others” (see *Witzsch v. Germany* (dec.), no. 4785/03, 13 December 2005).
8. I do not think that accusations that homosexuals are deviants and responsible for the spread of HIV and AIDS are in harmony with the Convention’s values. There is a fine line between verbal abuse and incitement to violence, and such accusations are capable of prompting aggression against them. Although the majority give weight in paragraph 54 to the applicants’ intention to start “a debate about the lack of objectivity of education in

Swedish schools”, it is hard to see the wording of the leaflets simply as starting a debate on an issue concerning a matter of public interest; it appears rather that the applicants wanted to disseminate their views among teenagers, who are vulnerable to different kinds of influence.

9. The majority found that the applicants’ conviction in the present case served a legitimate aim, namely “the protection of the reputation and the rights of others”. As a matter of fact, cases like the present one should not be viewed merely as a balancing exercise between the applicants’ freedom of speech and the targeted group’s right to protect their reputation. Hate speech is destructive for democratic society as a whole, since “prejudicial messages will gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups”,¹⁹ and therefore it should not be protected.

10. In the case of *Norwood v. the United Kingdom*, although in what was perhaps a more serious context²⁰, the Court found that “a general, vehement attack against a ... group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination” and thus fell outside the protection of Article 10. Linking the whole group in the present case to the “plague of the twentieth century” should not be granted the protection of Article 10 either.

11. Our tragic experience in the last century demonstrates that racist and extremist opinions can bring much more harm than restrictions on freedom of expression. Statistics on hate crimes show that hate propaganda always inflicts harm, be it immediate or potential. It is not necessary to wait until hate speech becomes a real and imminent danger for democratic society.

12. In the words of the prominent US constitutionalist Alexander Bickel: “... This sort of speech constitutes an assault. More, and equally important, it may create a climate, an environment in which conduct and actions that were not possible before become possible ... Where nothing is unspeakable, nothing is undoable.”²¹

1. *Féret v. Belgium*, no. 15615/07, 16 July 2009, Dissenting opinion of Judge András Sajó, joined by Judges Vladimiro Zagrebelsky and Nona Tsotsoria.

2. *Féret v. Belgium*, no. 15615/07, 16 July 2009.

3. *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, ECHR 1999-VI.

4. “Nothing in [the] 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.”

5. Compare this case with *Alekseyev v. Russia*, concerning a repeated unjustified ban on Gay-Rights Marches in Moscow (nos. 4916/07, 25924/08 and 14599/09, 21 October 2010), where the Court held:

“86. ... [t]here is no scientific evidence or sociological data at the Court's disposal suggesting that the mere mention of homosexuality, or open public debate about sexual minorities' social status, would adversely affect children or “vulnerable adults”. On the contrary, it is only through fair and public debate that society may address such complex issues as the one raised in the present case. Such debate, backed up by academic research, would benefit social cohesion by ensuring that representatives of all views are heard, including the individuals concerned” In that case, the Government had relied on the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, which guaranteed individuals respect for and protection of their religious and moral beliefs and the right to bring up their children in accordance with them.

6. *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24.

7. § 49.

8. Also apparently in Sweden, as highlighted in paragraph 19 of the judgment:

“Agitation against homosexuals as a group was made a criminal offence by an amendment of the law that came into effect on 1 January 2003. According to the preparatory work on that amendment, as reproduced in *Government Bill 2001/02:59* (pp. 32-33), homosexuals constitute an exposed group which is often subjected to criminal acts because of their sexual orientation, and national socialist and other racist groups agitate against homosexuals and homosexuality as part of their propaganda. The preparatory work also stated that there were good reasons to assume that the homophobic attitude that had caused certain perpetrators to attack individuals on account of their sexual orientation derived from the hate, threat and inflammatory propaganda against homosexuals as a group that was spread by the majority of the Nazi and other right-wing extremist groups in the country.”

9. “...6. Member States should take appropriate measures to combat all forms of expression, including in the media and on the Internet, which may be reasonably understood as likely to produce the effect of inciting, spreading or promoting hatred or other forms of discrimination against lesbian, gay, bisexual and transgender persons. Such “hate speech” should be prohibited and publicly disavowed whenever it occurs. All measures should respect the fundamental right to freedom of expression in accordance with Article 10 of the Convention and the case-law of the Court.” (emphasis added)

10. See the very recent report of Human Rights Commissioner Thomas Hammarberg, *Discrimination on grounds of sexual orientation and gender identity in Europe*, Strasbourg, Council of Europe, 2011, pp. 114 et seq., with extended research material.

11. Citing *Rankin v. McPherson*, 483 U.S. 378, 387, pp. 5-7.

12. Citing *Connick v. Myers*, 461 U.S. 138, 145 and 146.

13. *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

14. See the extract from the Supreme Court judgment in § 15 *in fine*.

15. The notion has been developed in *Rowan v. Post Office Dept.*, 397 U.S. 728, 736-738, and in *Frisby and Schultz* 487 U.S. 474, at 484-485.

16. *Bethel School District v. Fraser*, 478 U.S. 675 (1986).

17. *Von Hannover v. Germany*, no. 59320/00, ECHR 2004-VI.

18. See “Manual on Hate Speech” (2009) by Anne Weber, Council of Europe Publishing

19. Judgment of the Supreme Court of Canada in the case of *R. v. Keegstra*, [1990] 3 S.C.R. 697

20. *Norwood v. the United Kingdom* (dec.), no. 23131/03, ECHR 2004-XI. In this case the applicant was convicted for displaying in his window a poster with a photograph of the Twin Towers in flame and the words “Islam out of Britain – Protect the British People”.

21. Alexander M. Bickel, Domesticated Civil Disobedience: The First Amendment, from Sullivan to the Pentagon Papers, in *THE MORALITY OF CONSENT* 72-73 (1975).

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