COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

EUROPEAN COMMISSION OF HUMAN RIGHTS

SECOND CHAMBER

DECISION

AS TO THE ADMISSIBILITY OF

Application No. 29188/95
by Hans Kristian PEDERSEN
against Denmark

The European Commission of Human Rights (Second Chamber) sitting in private on 16 April 1998, the following members being present:

MM J.-C. GEUS, President
M.A. NOWICKI
G. JÖRUNDSSON
A. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
Mrs G.H. THUNE
MM F. MARTINEZ
I. CABRAL BARRETO
J. MUCHA
D. ŠVÁBY
P. LORENZEN
E. BIELIŪNAS
E.A. ALKEMA
A. ARABADJIEV

Ms M.-T. SCHOEPFER, Secretary to the Chamber

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

Having regard to the application introduced on 4 September 1995 by Hans Kristian PEDERSEN against Denmark and registered on 9 November 1995 under file No. 29188/95;

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

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Danish citizen, born in 1961. He resides in Aalborg, Denmark.

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

The applicant owns a business which deals, *inter alia*, with the distribution of video programmes. Due to different opinions as to the interpretation of the Danish copyright legislation and its compliance with EU provisions the applicant has been in dispute for years with the Association of Danish Video Programme Distributors (*Foreningen af Danske Videogramdistributører*, hereinafter called the FDV). Eventually the applicant wrote a book called "*sådan tjener man 1 milliard kr.*" (How to make a billion kroner) which was published on 5 June 1992. In the book the applicant, *inter alia*, criticised the FDV and its legal representative, JS, in their methods of implementing the applicable legislation.

On 26 June 1992 JS instituted private criminal proceedings at the Aalborg City Court (*Retten i Aalborg*) against the applicant requesting his conviction for defamation pursuant to section 267 subsections 1 and 3 of the Penal Code which read as follows:

(Translation)

> "Any person who violates the personal honour of another by offensive words or conduct or by making or spreading accusations of an act likely to lower him in the esteem of his fellow citizens, shall be liable to a fine or to simple detention."
>
> "In fixing the penalty it shall be considered an offence of an aggravated form if the insult was made in a printed document or in any other way likely to give it wider circulation, or in such places or at such times as greatly to aggravate the offensive character of the act."

JS also requested that the following passages of the book be considered unwarranted:

(Translation)

a) "The Danish government which is headed by Poul Schlüter, a cousin of [JS], intervene in support of Metronome Video Aps. [JS] changes his submissions and concurs with those of the government."

b) "For each day which goes by, the cash register in [JS's] office rings.

The video sector in Denmark is headed by men for whom money is decisive. The man up front is someone with political influence, a man whom politicians and civil servants listen to uncritically, a man who does not care about the personal tragedies his mafia-like methods leave behind. [EVC] lost everything and got diabetes due to the pressure which has not stopped yet.

> [JS's] law office makes a living out of terrorising video agents. Lawsuit after lawsuit is instituted without basis in law. [JS] and [TS] have thorough knowledge of copyright legislation which, in connection with the principle of negotiation, is used in a cynical way, through bluff, to present allegations which are groundless. If it does not work in one case, it will in the next case. Arguments, paragraphs and explanations are turned around in order to fit each particular case. The subject is each time an individual who neither has the legal knowledge nor financial means to defend himself properly."

c) "Nevertheless I cannot be quite sure. In my view [JS] is the biggest criminal in Danish history. During 10 years of monopoly the turnover has been at least 3 billion kroner. In open competition the price would have been a third less. His trick vis-à-vis [EVC] was worth more than one billion kroner. What does it cost to arrange a little accident."

d) "... the government have given false evidence before the EC Court in case no. 158/86, following which Danish video programme distributors have obtained a monopoly in Denmark. In particular I draw attention to [JS's] statements in the High Court of Eastern Denmark."

e) "[AJ] from the Library Supervisory Board, who previously was put under pressure by [JS]."

Finally, JS requested damages not exceeding 250,000 DKK.

On 6 January 1993 JS's Counsel requested the City Court as follows:

(Translation)

> "Today I have received from [the applicant] very extensive documentary evidence (96 exhibits with an estimated number of 200 pages) and having skimmed the documents I shall suggest, pursuant to Section 341 of the Administration of Justice Act, that the exhibits are not admitted as evidence as none of them appears to be of relevance to the case.
> ...
> Copy sent by fax to [the applicant]."

On 11 January 1993 the City Court announced, in a letter addressed to JS's Counsel, the following:

(Translation)

> "Referring to your letter of 6 January 1993 I hereby declare that on the basis of the available facts I intend to reject the documentary evidence proposed by [the applicant] ...
> ...
> Copy sent to [the applicant]."

The case was heard in the Aalborg City Court on 13 January 1993. JS and the applicant were heard as well as four witnesses. Judgment was pronounced on 16 February 1993. The applicant was found guilty of defamation and sentenced to pay a fine of 3,000 DKK. He was ordered

also to pay 10,000 DKK in damages to JS as well as costs. Finally, the above parts of the book were declared to be unwarranted. In its judgment the City Court stated, *inter alia*, as follows:

(Translation)

> "The statements mentioned under a)-d) are, due to their contents, obviously to be considered as defamatory accusations. The quotation under e) is, in the light of its context and background, to be considered as an allegation that [JS] put pressure on [AJ], as a legal representative for the FDV, in an inappropriate manner. In these circumstances all statements are considered to fall under section 267, subsection 1 of the Penal Code.
> ...
> (On the basis of the available evidence the court does not find) that [the applicant] has presented proof which shows that the accusations are true. Since [the applicant] cannot be considered as having had any reasonable ground for believing that the accusations were true, and since when making the very grave accusations [the applicant] cannot be considered as having acted in a justified manner in order to protect the interest of others, the Court finds that there is no reason ... to refrain from punishment or to remit it."

The applicant appealed against the judgment to the High Court of Western Denmark (*Vestre Landsret*). He maintained in particular that the City Court had not taken into consideration all the documentary evidence submitted by him and that the court had made an incorrect evaluation of his views. Furthermore, the applicant requested the High Court to adjourn the case pending the outcome of another case which involved copyright legislation and which was to be brought before the EC Court. JS objected to the adjournment maintaining, in particular, that issues relating to copyrights were not of relevance to the outcome of the case.

On 22 September 1993 the High Court refused the request for an adjournment. A subsequent request to that effect was refused on 8 June 1994. On the same date the court also decided on the question of hearing witnesses. The court refused to hear four witnesses proposed by the applicant as, in the court's opinion, their statements would be superfluous since the issues relating to these witnesses were considered to be covered by the documentary evidence.

However, the court observed *ex officio* that due to the character of documentary evidence submitted to the court and in expectation of the time needed for production of evidence and arguments of parties the one day scheduled for the hearing would not suffice. Thus, the court decided to adjourn the case in order to schedule two whole days for the hearing.

The hearing took place on 15 and 16 March 1995. The applicant was not represented by counsel. The applicant submits that he was interrupted by the presiding judge during the hearings and that he was not given the opportunity to produce evidence fully.

The High Court gave judgment on 31 March 1995 in favour of the defendant. The judgment reads, *inter alia*, as follows:

(Translation)

> "In determining whether or not the statements are defamatory it is of no relevance whether [the applicant] is right or wrong in considering that section 25 of the Copyright Act (as the section was formulated before its amendment on 10 June 1989) implied that video programmes, which were released without restrictions on distribution by the copyright holder in another Member State of the Community, as a consequence of its release by the copyright holder could be distributed freely in Denmark as well. In addition, it is of no relevance whether [the applicant] is right or wrong in assuming that, subsequent to the amendment of the Copyright Act ... the Act could not be interpreted, in light of the supremacy of Community Law, to require that permission to distribute video programmes is confined to a territory.
>
> Notwithstanding whether [the applicant] is right in this assumption, with regard to proving whether the accusations are true, it must be observed that all the applicant's statements when read in their context, must be considered to express the view that the defendant as a lawyer representing [FDV] for years has attempted to interfere with [the activities of] video agents and with the issuing of video programmes from libraries ... contrary to his knowledge about the state of law ... . Neither with regard to this nor with regard to other of [the applicant's] characterisations of the defendant's conduct in the quoted passages, has he proven that the accusations quoted are true.
>
> With regard, in particular, to [the applicant's] statements in quotations a) and d) it should be observed that the defendant's general remarks to the European Court of Justice ... cannot be considered incompatible with the defendant's written statements ... .
>
> Accordingly, for these reasons and by referring to the other part of the reasoning of the City Court, the High Court agrees that there is no reason to refrain from punishment ... or to remit it ... .
> ... ."

The applicant then made a petition to the Ministry of Justice for leave to appeal to the Supreme Court (*Højesteret*) claiming, *inter alia*, that he had not been given a full opportunity to produce evidence. He did not allege that his right to freedom of expression had been infringed. On 31 July 1995 the Ministry of Justice refused to grant the applicant leave to appeal.

COMPLAINTS

The applicant complains, under Article 6 para. 1 of the Convention, that in the proceedings before the national courts he was not afforded a fair trial.

The applicant also alleges that his right to freedom of expression under Article 10 of the Convention has been violated.

Finally, he complains that he has not had an effective remedy before a national authority as guaranteed in Article 13 of the Convention.

THE LAW

1. The applicant claims that in the proceedings in the City Court and the High Court he did not have a fair trial. He invokes in this respect Article 6 of the Convention which, in so far as relevant, reads as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ... .
>
> 2. Everyone charged with a criminal offence has the following minimum rights:
> ...
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> ... ."

In support of his allegations the applicant submits that, in the proceedings in the national courts, he was not given full opportunity to produce evidence and, in the High Court, he was prevented from presenting his case in the order he had planned. In effect, this made his defence difficult. In addition, the applicant complains that his case was not adjourned until the European Court of Justice had decided in a related case.

The Commission recalls that, at the outset, the admissibility of evidence is primarily a matter for regulation by national law and, as a general rule, it is for the national courts to assess the evidence before them. In the light of these principles it is the task of the Commission not to express a view as to whether the statements in question were correctly admitted and assessed but rather to ascertain whether the proceedings considered as a whole were fair, including the way in which evidence was taken (Eur. Court HR, Kostovski v. the Netherlands judgment of 20 November 1989, Series A no. 166, p. 19, para. 39).

Furthermore, the Commission recalls that the right to a fair hearing entails, in both civil and criminal proceedings, that everyone who is a party to such proceedings shall have reasonable opportunity of presenting his case to the court under conditions which do not place him or her at a substantial disadvantage vis-à-vis his or her opponent (see, *inter alia*, No. 10938/84, Dec. 9.12.86, D.R. 50, p. 98). This principle of "equality of arms" can be based not only on Article 6 para. 1 but also on Article 6 para. 3 (cf. No. 8403/78, Dec. 14.12.81, D.R. 27, p. 61). However, it is not incumbent on the national courts to admit all evidence on the accused's behalf (cf. *mutatis mutandis* Eur. Court HR, Engel v. the Netherlands judgment of 1 October 1975, Series A no. 22, p. 38, para. 91).

In the present case it appears that, before the hearings, the applicant had sent 96 exhibits (including 200 pages) to the City Court. The City Court dismissed the exhibits as irrelevant pursuant to section 341 of the Administration of Justice Act. On 8 June 1994 the

High Court decided to dismiss the request for the hearing of four witnesses as the testimony of these witnesses was covered by documentary evidence. At the same time the High Court decided *ex officio* to schedule two whole days for the hearing due to the extent and character of the evidence in the case. On the day of the hearing, so the applicant alleges, the presiding judge dismissed some of the applicant's documents as irrelevant to the case and interfered with the way in which the applicant intended to put forward his arguments.

Having assessed the facts, the Commission is of the opinion that the decisions as to the admission of evidence must be viewed as the national courts' efforts to concentrate and structure the proceedings in order to reach a judgment in accordance with the rule of law and that they did not place the applicant at a substantial disadvantage vis-à-vis his opponent. In particular the Commission has not found it established that the national courts in their refusals to admit evidence went beyond their discretion to do so when the evidence is considered to be of no importance to the outcome of a case. Furthermore, it falls within the national courts' discretion whether to adjourn a criminal case pending the outcome of another case. In the circumstances of the present case this did not make the proceedings unfair within the meaning of Article 6 of the Convention.

Accordingly, the Commission finds that the facts as presented by the applicant do not disclose any appearance of a violation of Article 6 of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2.

2. The applicant claims, furthermore, that his right to freedom of expression guaranteed under Article 10 of the Convention has been violated by the decisions of the national authorities. In support of his allegation he claims that the public has a right to be informed about illegal practices performed by certain persons acting in a public interest.

Before entering into these aspects of the application the Commission recalls that Article 26 of the Convention provides that the Commission may deal with the matter only after all domestic remedies have been exhausted, according to the general recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

As far as the exhaustion of remedies is concerned the Commission recalls that the mere fact that an applicant has submitted his or her case to the various competent courts does not constitute compliance with this rule. It is also required that the substance of any complaint made before the Commission should have been raised during the proceedings concerned. In this respect the Commission refers to established case-law of the Convention organs (see e.g. Eur. Court HR Ahmet Sadik v. Greece judgment of 15 November 1996, Reports 1996-V, p. 1653, para. 30).

In the present case the applicant did not raise the complaint, either in form or in substance, in the proceedings before the domestic courts that his conviction in the City Court and subsequently in the High Court amounted to an interference with his right of freedom of expression guaranteed by Article 10 of the Convention. Moreover, an examination of the case as it has been submitted does not disclose the

existence of any special circumstances which might have absolved the applicant, according to the generally recognised rules of international law, from raising these complaints in the proceedings referred to.

It follows that the applicant has not complied with the condition as to the exhaustion of domestic remedies and, hence, that this part of the application must be rejected under Article 27 para. 3 of the Convention.

3. Finally, the applicant complains that he has not had an effective remedy before a national authority. In this respect he invokes Article 13 of the Conventon which reads as follows:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in public authority."

The Commission notes that the applicant's case has been tried by two levels of domestic courts, each conferred with full competence to examine the case. The Commission concludes, therefore, that effective remedies were available to the applicant within the meaning of Article 13 of the Convention. It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.-T. SCHOEPFER
Secretary
to the Second Chamber

J.-C. GEUS
President
of the Second Chamber