THE SUPREME COURT OF SWEDEN

JUDGMENT Case No.

issued in Stockholm on 29 November 2005 B 1050-05

PLAINTIFF

Prosecutor General

Box 5553

114 85 Stockholm

DEFENDANT

Åke Ingemar Teodor Green

Attorney and Public Defender : Percy Bratt, Member of the Swedish Bar, Advokatbyrån Bratt & Feinsilber Aktiebolag, Box 24164, 104 51 Stockholm

NATURE OF CASE

Agitation against a national or ethnic group *et al*

DECISION APPEALED FROM

Judgment issued by the Göta Court of Appeal on 11 February 2005 in case No. B 1987-04.

JUDGMENT

The Supreme Court upholds the judgment issued by the Court of Appeal.

For services rendered for the defence of Åke Green before the Supreme Court, Percy Bratt is hereby granted compensation from the Swedish Treasury in the amount of sixty-eight thousand and forty Swedish kronor (SEK 68,040.00), which amount shall include value added tax in the amount of SEK 13,608.00.

SUBMISSIONS BY THE PARTIES BEFORE THE SUPREME COURT

The Prosecutor General has requested that Åke Green shall be convicted of agitation against a national or ethnic group *et al*, and that the penal sanction for this should be imprisonment. In connection with this, the Prosecutor General's amended description of the crime reads as follows:

'On 20 July 2003, in Borgholm, before at least about 50 persons, Åke Green did hold a sermon entitled 'Is homosexuality congenital or the powers of evil meddling with people'. The sermon included the following statements:

> "Legalising partnerships between two men or two women will clearly create unparalleled catastrophes. Already, we are seeing the consequences through the spread of AIDS. Although not all HIV infected people are homosexuals, AIDS once stemmed from homosexuality. Subsequently, innocent people can naturally have been infected by this terrible illness, without having anything to do with the homosexuality that is the underlying cause of it."

> "The Bible discusses and teaches us about these abnormalities. And sexual abnormalities are a serious cancerous growth on the body of a society.
>
> The Lord knows that sexually perverse people will even force themselves upon animals. Not even an animal is safe from the sexual needs and the burning urges of human beings. They can even do things like this."
>
> "Corrupters of boys. Even at the time the Bible was written, the Lord knew what lay ahead. We have experienced, and are experiencing this, and it disgusts us. In the First Epistle to the Corinthians, 1 and 10, Paul speaks of perverted people. The expression, "perverted people," is translated from "one who lies with boys" in the original. Those who lie with boys are the perverted people the Bible speaks of. However, I would like to emphasize that not all homosexuals are paedophiles. And not all homosexuals are perverted. Nevertheless, the door to forbidden areas has been opened, leading to sinful feelings and thoughts. The paedophiles of today do not start out as paedophiles, but begin by changing their social intercourse. That is how it starts. Being faithful in a homosexual relationship is no better than changing your partner on an everyday basis. It is not a better relationship and is just as contemptible in the eyes of God.'
>
> "I abandon purity and seek corruption." Paul tells us they choose knowingly. Homosexuality is a sickness, i.e. a wholesome and pure thought being replaced by a tainted thought, a wholesome heart being replaced by a sick heart. That is what happened. It is a wholesome body being ruined as a result of a change, according to Paul. Is homosexuality something you choose? The answer is yes. You choose it. You are not born with it. You simply choose it. It is a replacement. Without a doubt, that is how it is. Anything else would be treachery against humanity."

Through the sections of his sermon set out above, viewed in their context, Åke Green has disseminated statements showing contempt for homosexuals with reference to their sexual orientation. The intention of Åke Green was to spread his beliefs in a manner that would attract significant attention.

Åke Green has opposed the claim of the Prosecutor General.

REASONING OF THE COURT

Chapter 16, Section 8 of the Criminal Code provides that a person becomes guilty of agitation against a group by making a statement or otherwise spreads a message that threatens or expresses contempt for an ethnic group or any other group of people with reference to their race, skin colour, nationality or ethnic origin, religious belief or sexual orientation. On 1 January 2003, an amendment of the Act criminalized incitement against homosexuals as a group. The *travaux préparatoires* specified that homosexuals are a vulnerable group in society, and are often victims of crimes as a result of their sexual orientation and that Nazis and other groups with racist ideologies agitate against homosexuals and homosexuality, as a part of their propaganda and interlinked with their general racist and anti-Semitic campaigns (Govt. Bill 2001/02:59, page 32 *et seq*.).

In conjunction with the amendment of the Act, there was a discussion regarding "expressing contempt," which is an element of the crime (see Govt. Bill 2001/02:59, page 21 *et seq*.). This element was introduced in 1970, and in the case law has been broadly interpreted (see NJA 1982, p. 128 and 1996, p. 577). However, not every statement of a demeaning or degrading nature is included in this concept. Statements that are not considered to go beyond the limits of objective criticism of certain groups are not liable to punishment. For a statement to trigger criminal liability, it must clearly overstep the limits of objective and responsible debate regarding the group in question. Naturally, the principles of freedom of speech and the right to criticize may not be used to protect statements expressing contempt for a group of people, for example, because they are of a certain nationality and hence are inferior, (see Govt. Bill 1970:87, p. 130 compared to Govt. Bill 2001/02:59, p. 14 *et*

seq. and 37 *et seq*.). However, the purview of criminal behaviour may not extend to an objective discussion about, or criticism against, homosexuality. Criminalization must not be used to restrict freedom of speech or to threaten free public debate. In addition, the freedom of science shall be maintained. This also means that these kinds of statements, which are best contested or corrected in a free and open debate, shall not be criminalized (Govt. Bill 2001/02:59, p. 35 *et seq*.).

As a result of a demand by the Swedish Council of Free Churches during the legislative process leading up to the amendment in 2003 for a clear definition of what is criminal, and an exclusion of sermons and similar situations from that definition, the Government made the following statement regarding the purview of criminality here (Govt. Bill. P. 41 *et seq*.):

"As previously observed, the purpose of this legislative solution is the underscore that the same principles are to be used in considering whether an act against homosexuals, for example, is within the purview of the provisions regarding incitement against a group, as when considering an act against any of the other groups that are protected by these provisions. In response to those views expressed by the Swedish Council of Free Churches (FSR), the Government wishes to state that our proposal to criminalize incitement on the grounds of sexual orientation is not intended to restrict free and objective debate, any more than does the current law against incitement against ethnic groups. The purpose, therefore, is not to serve as an obstacle to discussions of homosexuality, bisexuality or heterosexuality, whether in churches or elsewhere in society. It must also be possible for homosexuals and others to reply to and correct erroneous opinions in free and open discourse, and thus counteract prejudices that otherwise might well be preserved and continued in secret.

The present legislation regarding agitation against groups also contains limitations so that not every statement that includes judgments regarding a group, and not every expression of contempt, is criminalized. This is

> reflected in the *travaux préparatoires* that provide that an action is criminal only if it oversteps the limits of objective and responsible discourse regarding the group in question. When determining whether an action constitutes criminal incitement against a group (e.g. homosexuals), the statement or message must always be examined in its context, in the same way as in determining whether an action constitutes incitement against an ethnic group. The reason behind the action must be considered in doing so.

Naturally, a certain allowance must be made for criticism and similar expressions that are not criminalized. The determining factor is how the message appears when objectively examined. In addition, the context must clearly demonstrate that the intent of the perpetrator was to spread a message that constitutes a threat against, or expresses contempt for, the group in question. In this context, one should consider the express instructions contained in the Freedom of the Press Act and the constitutional Freedom of Speech Act. This means that those determining cases of violations of the freedom of speech or freedom of the press, or who are charged with protecting those freedoms, must bear in mind that these principles constitute the basis of a free society, look more to the purpose than to the actual expression, and give those charged the benefit of the doubt.

What is now being proposed is the criminalization of incitement against collectively defined groups on the basis of sexual orientation. Thus, this concerns insulting judgments and threatening statements primarily regarding homosexuals as a group, based on the fact that this group has this sexual preference. Merely citing and discussing religious scriptures, for example, does not fall within the purview of criminalized behaviour pursuant to this proposal. However, it should not be permissible to use this kind of material to threaten, or to express contempt for, homosexuals as a group, any more than it would be permissible to use religious texts to threaten, or express contempt for, Muslims or Christians. It is important here to distinguish between statements and communications that refer to sexual orientation, *per se,* and express threats or contempt against the collective on these grounds, from other statements and communications that relate to behaviour or the expression of a sexual preference, but in no way intend to insult or threaten the entire group of people who have that sexual orientation. Analogously, it must be allowed, as it is today regarding religious matters, to discuss various lifestyles and philosophies of life, for example."

During the Riksdag's consideration of the amendment of 2003, the Constitution Committee stated its opinion, in response to a member's bill, that the concept of this legislation did not include having special rules for statements made in the context of a sermon, for example, as opposed to those applying to the same statements made in some other context. The committee agreed with the view the Chancellor of Justice expressed in a submission to the committee to the effect that there should be no general rules prescribing special treatment as the motion requests, for statements that are normative or prescriptive.

According to the committee, in sermon situations, citing scripture, and only urging an audience to adhere to the precepts contained therein, should normally not lie within the criminalized area (Report 2001/02:KU23, p. 36 *et seq.*).

In the first of the sections cited by the Prosecutor General in the amended description of the crime, Åke Green linked homosexuality with the origin and spread of AIDS. In the second section, he speaks of sexual abnormalities (apparently including homosexuality in this group) as a deep cancerous growth, and about sexual use of animals in connection with a Biblical verse from Leviticus 18:22-30, which begins "you shall not lie with a man, as a man lies with a woman," but also refers to bestiality. In the third section, he refers to the First Epistle to the Corinthians, using the expressions "corrupter of boys," "perverted people" and "paedophiles" when speaking of homosexuals. Finally, before addressing the First Epistle to the Corinthians 6:18, he characterizes homosexuality as something sick, and a corrupted thought that displaces a pure one.

These statements should be assessed on the basis of the content they directly express rather than through a critical reading of their exact wording. The basis

for this assessment should be how a member of the audience listening to Åke Green's sermon must have perceived these statements.

Another basis for this assessment is that Åke Green, at the time he made his statements, acted out of his Christian conviction to improve the situation of his fellow man, and did so according to what he considered to be his duty as a pastor.

The statements in question cannot be considered to be direct expressions of Biblical verses referred to by Åke Green, and must be seen as insulting judgments about the group in general, even though he was not completely categorical, and made certain reservations to the effect that not all homosexuals are like those he is criticizing. Åke Green has claimed that his statements are not directed against homosexuals as a group, but rather targets those behaviours that the Bible, as he sees it, unambiguously characterizes as a sin. Nevertheless the fundamental point in these statements is the sexual preference, *per se*, even though he is actually referring to the practice of homosexuality. Neither is it possible to draw a sharp distinction between the sexual preference, *per se*, and such practice of it, which constitutes the focus of that sexual preference. These statements can clearly be deemed to have overstepped the limits of an objective and responsible discourse regarding homosexuals as a group. Åke Green has intentionally spread these statements in this sermon before the congregation, with the awareness that they could be perceived as insulting. According to the meaning of Chapter 16, Section 8 of the Criminal Code, as expressed in the *travaux préparatoire*, these statements can therefore be deemed to have expressed contempt for homosexuals as a group.

The issue, however, is whether consideration to freedom of religion and freedom of expression should favour giving the word “contempt” a more restrictive interpretation than what a direct reading of the statutory text and its legislative history would.

The 2003 amendment was intended to satisfy the requirements regarding the limitation of freedom of speech, based on our constitutional protection of this right, as well as the European Convention on Human Rights and Fundamental Freedoms (Govt. Bill 2001/02:59, 34 *et seq*.).

The Supreme Court, however, must now determine whether Chapter 16, Section 8 of the Criminal Code should not be applied, because such an application would violate the Constitution (cf. NJA 2000, p. 132 and 2005, p. 33) or the European Convention on Human Rights (cf. Govt. Bill 1993/94:117, p. 37 *et seq.* and report 1993/94:KU24, p.17 *et seq.*).

Chapter 2, § 1, sub-section 1, point 6 of the Instrument of Government Act defines freedom of religion as the freedom to practice one’s religion alone or with others. This freedom may not be restricted (Chapter 2, § 12, sub-section 1 of the Instrument of Government Act). Its definition is narrow, and such aspects that fall within other freedoms such as freedom of speech, may be limited in the same way as these freedoms (Holmberg-Stjernquist, Grundlagarna, p. 79). An act that is generally criminalized is not protected merely because it occurs in a religious context, as the constitutional protection means a prohibition against provisions that expressly target a certain religious practice, or which, despite a more general wording, apparently are intended to hinder a certain religious direction.

It is apparent that the constitutional provision regarding freedom of religion cannot absolve Åke Green from criminal liability. Nevertheless, it must be born in mind, as shown below, that freedom of religion with a broader definition has been accorded great importance in the constitutional protection of civil rights and liberties.

Chapter 2, § 1, sub-section 1, point 6 of the Instrument of Government Act provides that freedom of speech may be limited to a certain extent by statute (Chapter 2, §§ 12 and 13 of the Instrument of Government Act). Generally, this kind of restriction may be done only for achieving a purpose that is acceptable in a democratic society, and may never exceed that which is necessary in light of the purpose for which it is created, and may not go so far as to constitute a threat against the free exchange of opinions, which is one of the foundations of democracy, and may not be done only on the grounds of political, religious, cultural or other such philosophy (§12, second sub-section). In addition, § 13, first sub-section, lists a number of special interests for which freedom of speech may be restricted. To this list may be added the principle that this freedom may otherwise be limited if especially important reasons justify this. The second sub-section of this section indicates that in considering which restrictions may be imposed pursuant to the first sub-section, the importance of having the broadest possible freedom of speech in political, religious, labour, scientific and cultural matters shall be considered.

The constitutional protection of freedom of speech does not appear to constitute a reason not to convict Åke Green according to the indictment (cf. Chapter 11, § 14 of the Instrument of Government Act). Neither does the constitution otherwise prevent him from being convicted pursuant to the provisions regarding incitement against a group.

The assessment to be made now is the extent to which the European Convention on Human Rights affects the criminal liability of Åke Green. Freedom of religion is regulated in Article 9 of that document, with freedom of speech regulated in Article 10. From the start, we can note that the first of these freedoms is more extensive here than in the Instrument of Government Act, but to a certain degree, this can be limited by an ordinary statute. Freedom of speech is the same under both regulatory schemes, except that the possibilities of imposing limitations are narrower under the Convention.

Freedom of religion pursuant to Article 9 includes the freedom to practice one's religion or belief alone or together with others, in public or in private, through religious services, study, customs and rituals. Freedom of speech pursuant to Article 10 includes the freedom to receive and disseminate information and thoughts without the interference from government authorities. Both of these freedoms may be made subject to limitations embodied in statutes, and which are necessary in a democratic society in order to maintain public safety, protect health or morality or to defend the rights of other persons. In general, freedom of religion can also be restricted in order to maintain public safety, and freedom of speech can be restricted to prevent disorder or crime, as well as to protect a person's good name and reputation.

The Criminal Code provision regarding incitement against a group fits within the limits set forth by the European Convention on Human Rights (cf. Chapter 2 § 23 of the Instrument of Government Act). The question, however, is whether applying these provisions in Åke Green's case would be a violation against the commitments of Sweden under the Convention. In making that

determination, the case law of the European Court of Human Rights must be considered ("the European Court") (see report 993/94:KU24, p. 19).

The primary matter of interest here in the European Court's application of Article 9, which can be deemed to be a special case of protecting the freedom of speech as it relates to the expression of thoughts and ideas based on a religion in a sermon-like situation (cf. Danelius, *Mänskliga rättigheter i europeisk praxis*, 2nd edition, p. 306, and the judgment of the European Court dated 25 May in the case of Kokkinakis v. Greece, p. 31, Publications Series A, No. 260-A). The determining factor appears to be whether the restriction of Åke Green's freedom to preach is necessary in a democratic society. This means that it must be asessed whether the restriction is proportionate to the protected interest. In assessing such an issue, the Signatory State to Convention is accorded a certain flexibility known as a margin of appreciation (cf. Danielius, op. cit. 302, and, *inter alia*, the European Court's judgment of 4 December 2003 in the case of Gündüz v. Turkey, p. 37, Reports of judgments and decisions, 2003-XI p. 229).

Considering the central role that religious conviction plays for an individual, it can be assumed a certain restraint in applying the European Convention to accept restrictions as legitimate pursuant to Article 9. The same principles apply if Åke Green's statements are to be evaluated pursuant to Article 10. The case law of the European Court in applying Article 10 can also provide some guidance even when the evaluation is being made on the basis of Article 9.

One starting point for this evaluation is the statement of the European Court in its judgment of 7 December 1976 in the case of Handyside v. United Kingdom

(Publications Series A No. 24).

“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. . . 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. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". (Danelius, op. cit. p 306)

The European Court, in various cases, has underscored the importance of freedom of speech in political contexts (cf. e.g. the Court’s judgements on 27 February 2001 in the case of Jerusalem v. Austria, p. 32, Reports of judgments and decisions 2001-IX p. 69, and on 10 July 2003 in the case of Murphy v. Ireland, p. 67, Reports of judgments and decisions 2003-IX p. 1). A similar approach can be assumed to apply in religious contexts (see the judgment in the Kokkinakis case, p. 31).

At the same time, the Court has also underscored that a person who uses his or her rights and freedoms pursuant to Article 10, as indicated in the second sub-section of that section, has responsibilities and obligations. In religious contexts, these should include a duty to avoid, to the extent possible, statements that are unjustifiably insulting to others and constitute attacks on their rights. These statements therefore do not contribute to any form of public discourse that will lead to progress in relations among people. In addition, the state generally is accorded a certain latitude, known as a margin of appreciation, in regulating

freedom of speech regarding matters that can be deeply insulting to personal views on issues of morality and religion (see e.g. the European Court's judgment of 4 December 2003 in the Gündüz case, p. 37).

It should also be noted that Article 10 protects not only the content of opinions and information, but also the way these are disseminated (see e.g. the European Court's judgment of 23 September 1994 in the case of Jersild v. Denmark, p. 31, Publications Series A, No. 298). The same principles apply correspondingly to Article 9 (European Court's judgment of 26 September 1996 in the case of Manoussakis et al v. Greece, p. 47, Reports of judgments and decisions, 1996-IV p. 1346).

When the European Court determines whether an alleged restriction is necessary in a democratic society, the court considers whether the restriction meets a pressing social need, whether it is proportionate to the legitimate purpose to be achieved, and whether the reasons asserted by the national authorities to justify it are relevant and sufficient (the Court's judgment of 26 April 1979 in the case of Sunday Times v. United Kingdom, p. 62, Publication Series A No. 30). In the case of modes of expression that disseminate, advocate, encourage or justify hate based on intolerance (including religious hate), which is known as "hate speech", the European Court is of the opinion that it can be necessary to punish, or even prevent statements of this nature. A comprehensive assessment shall be made of the circumstances, including the content of what was said and the context in which the statements were made, in order to determine whether the restriction is proportionate in relation to the purpose, and whether the reasons for it are relevant and sufficient. The nature and severity of the penal sanction shall also be considered in this context (See

judgment in the Gündüz case, p. 40; cf. also the Court's judgment of 9 June 2004 in the case of Abdullah Aydin v. Turkey, p. 35; application 42435/98, not published).

In the European Court's judgment of 23 September 2004 in the case of Feridun Yasar et al v. Turkey, p. 35, application 42713/98, not published), the Court determined in the case of the majority of the plaintiffs that they had stated their opinions (at two party congresses) in the role of politicians participating in Turkish political life, and had not urged others to use violence, armed resistance or revolt, and that this was not a question of hate speech, which, in the eyes of the Court was the determinative factor to be considered. Another plaintiff had, by his statements, created a doubt as to his attitude toward using violence to achieve independence (for the Kurds), which prompted the Court to opine that the punishment in his case could be deemed to relate to a pressing social need, but that the nature and severity of the punishment were not proportionate. The plaintiffs had therefore been victims of a violation of Article 10 (Judgment pages 27-29).

In a comprehensive assessment of the circumstances of Åke Green's case, in light of the case law of the European Court, it is at first clear that there is no question there of the kind of hateful statements known as "hate speech." This even applies to his most extreme statement, in which he describes sexual abnormalities at a cancerous growth, as that statement, viewed in light of what he said in connection with this in his sermon, is not something that can be deemed to encourage or justify hatred of homosexuals. The way he expressed himself perhaps cannot be deemed that

much more derogatory than the wording of the Bible verses in question, but must be viewed as extreme also when considering what he was preaching to his audience. He made his statements in a sermon to his congregation regarding a theme found in the Bible. Whether the belief approach on which he has based his statements is legitimate should not be considered in the determination of the case (European Court's judgment of 26 September 1996 in the case of Manoussakis et al v. Greece, p. 47).

Under these circumstances, it is likely that the European Court, in a determination of the restriction of Åke Green's right to preach his Biblically-based opinion that a judgment of conviction would constitute, would find that this restriction is not proportionate, and would therefore be a violation of the European Convention on Human Rights.

The expression "contempt" in the provision regarding incitement against a group cannot be considered to have such a fixed meaning so as to lead to an actual conflict of law between the European Convention on Human Rights and the Criminal Code (cf. report 1993/94:KU24 pp. 18 *et seq*.). Admittedly, according to the *travaux préparatoires*, the intent was that statements of such a nature as the Prosecutor General has cited in the amended description of the crime, were meant to be deemed as an expression of contempt, and within the purview of the provisions. One of the reasons for receiving the European Convention as Swedish law, however, was to create an express basis to directly apply the Convention before Swedish courts (See Govt. Bill 1993/94:117 p. 33). The Supreme Court has also, in several decisions, established that it must be possible to depart from this type of statement made during the legislative process or in case law when this is required pursuant to the interpretation of

the Convention expressed in the decisions of the European Court (see most recently, NJA 2005 p. 462, cf. previous cases, e.g. NJA 1988 p. 572 and 1991, p. 188, 1992, p.532 and 2003 p. 414). As a result of the aforementioned, the criminal provisions regarding agitation against a group in this case should be interpreted more restrictively than what the *travaux préparatoires* would seem to indicate, in order to achieve an application of these provisions that is in line with the Convention. As stated immediately above, such an application that conforms to the Convention would not permit a judgment of conviction against Åke Green, given the present circumstances of this case.

In light of what is stated above, the indictment of Åke Green shall be dismissed.

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(Signature) (Signature) (Signature)

(Signature) (Signature)

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The following persons have participated in this decision: Justices of the Supreme Court Munck, Regner (the reporter), Blomstrand, Calissendorff and Skarhed.

Supreme Court referee responsible for preparing this case: Ihrfelt