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

CASE OF NILSEN AND JOHNSEN v. NORWAY

(Application no. 23118/93)

JUDGMENT

STRASBOURG

25 November 1999

In the case of Nilsen and Johnsen v. Norway,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1], and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Mr C.L. ROZAKIS,
Sir Nicolas BRATZA,
Mr M. PELLONPÄÄ,
Mr B. CONFORTI,
Mr A. PASTOR RIDRUEJO,
Mr P. KŪRIS,
Mr R. TÜRMEN,
Mrs F. TULKENS,
Mrs V. STRÁŽNICKÁ,
Mr C. BÎRSAN,
Mr M. FISCHBACH,
Mr J. CASADEVALL,
Mrs H.S. GREVE,
Mr A.B. BAKA,
Mr R. MARUSTE,

and also of Mr M. DE SALVIA, *Registrar*,

Having deliberated in private on 1 July and 20 October 1999,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Norwegian Government ("the Government") on 24 November 1998 and 21 January 1999, respectively, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 23118/93) against the Kingdom of Norway lodged with the Commission under former Article 25 by Mr Arnold Nilsen and Mr Jan Gerhard Johnsen, both Norwegian nationals, on 2 November 1993.

[1] 1-2. *Note by the Registry*. Protocol No. 11 and the Rules of Court came into force on 1 November 1998.

[2]

The Commission's request referred to former Articles 44 and 48 and to the declaration whereby Norway recognised the compulsory jurisdiction of the Court (former Article 46); the Government's application referred to former Articles 44 and 48 of the Convention and to Article 5 § 4 of Protocol No. 11. The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 of the Convention.

2. In accordance with the provisions of Article 5 § 4 of Protocol No. 11 taken together with Rules 100 § 1 and 24 § 6 of the Rules of Court, a panel of the Grand Chamber decided on 14 January 1999 that the case would be examined by the Grand Chamber of Court.

3. The Grand Chamber included *ex officio* Mrs H.S. Greve, the judge elected in respect of Norway (Article 27 § 2 of the Convention and Rule 24 § 4), Mr L. Wildhaber, the President of the Court, Mrs E. Palm and Mr C.L. Rozakis, the Vice-Presidents of the Court, and Sir Nicolas Bratza and Mr M. Pellonpää, Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 § 3). The other members appointed to complete the Grand Chamber were Mr B. Conforti, Mr A. Pastor Ridruejo, Mr G. Bonello, Mr P. Kūris, Mr R. Türmen, Mrs F. Tulkens, Mrs V. Strážnická, Mr C. Bîrsan, Mr J. Casadevall, Mr A.B. Baka and Mr R. Maruste (Rule 24 § 3). Subsequently Mr M. Fischbach, substitute judge, replaced Mr Bonello, who was unable to take part in the further consideration of the case (Rule 24 § 5 (b)).

4. Mr Wildhaber, acting through the Registrar, consulted the Agent of the Government and the applicants' lawyers on the organisation of the written procedure. Pursuant to the orders made in consequence on 8 February and 17 March 1999, the Registrar received the Government's and the applicants' memorials on 2 June 1999.

5. On 17 June 1999 the Commission produced certain documents from the file on the proceedings before it, as requested by the Registrar on the President's instructions. On various dates between 25 June and 10 July 1999 the Registrar received from the parties additional observations on the applicants' Article 41 claim.

6. In accordance with the Grand Chamber's decision, a hearing took place in public in the Human Rights Building, Strasbourg, on 1 July 1999.

There appeared before the Court:

(a) *for the Government*

Mr F. ELGESEM, Attorney, Attorney-General's Office
(Civil Matters), *Agent*,

Mr H. SÆTRE, Deputy to the Permanent Representative
of Norway to the Council of Europe, *Adviser*;

(b) *for the applicants*
Mr H. HJORT, *Advokat*,
Mr J. HJORT, *Advokat*, *Counsel*.

The Court heard addresses by Mr H. Hjort and Mr Elgesem and also the latter's reply to a question put by one of its members individually.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the case

7. The first applicant, Mr Arnold Nilsen, and the second applicant, Mr Jan Gerhard Johnsen, are Norwegian citizens born in 1928 and 1943 and living in Bergen. The first applicant is a police inspector, who at the material time was Chairman of the Norwegian Police Association (*Norsk Politiforbund*). The second applicant is a police constable and was at the relevant time Chairman of the Bergen Police Association (*Bergen Politilag*), a branch of the former association. At the material time they were both working in the Bergen police force.

8. In the 1970s Mr Gunnar Nordhus, then a law student, and Mr Edvard Vogt, then an associate professor of sociology at the University of Bergen, carried out an investigation into the phenomenon of violence in Bergen, a city of some 200,000 inhabitants. They gathered material from the local hospital relating to all patients subjected to violence during the period January 1975-July 1976. Later, they included material from other sources. In 1981 Mr Nordhus and Mr Vogt published a summary of their previous reports in a book entitled *Volden og dens ofre. En empirisk undersøkelse* ("Violence and its Victims. An Empirical Study"). The book extended to some 280 pages and included a 77-page chapter on police brutality, which it defined as the unlawful use of physical force during the performance of police duties. The authors found, *inter alia*, that 58 persons had been exposed to police brutality during the aforementioned period, 28 of whom had been medically examined, and that the police in Bergen were responsible for approximately 360 incidents a year of excessive and illegal use of force.

The book gave rise to a heated public debate. This involved in part researchers concerning the methods used and the scientific basis for the conclusions drawn, and in part members of the police and the prosecution.

9. In this connection the Ministry of Justice appointed a Committee (*utvalg*) of Inquiry consisting of Mr Anders Bratholm, professor of criminal and procedural law, and Mr Hans Stenberg-Nilsen, advocate before the Supreme Court. Their mandate was to verify whether the research of Mr Nordhus and Mr Vogt provided a basis for making any general observations as to the nature and extent of police brutality in Bergen.

Assisted by a statistics expert and an expert on the use of interviews, the Committee interviewed 101 persons, including 29 police officers, 2 public prosecutors, 4 doctors who had taken blood samples at Bergen police station, 5 social workers who dealt especially with young criminals in Bergen, 2 defence lawyers with extensive experience of criminal cases in Bergen, 13 witnesses of police brutality and 27 alleged victims of such misconduct. In a report published in 1982 under the title *Politivoldrapporten* ("Report on Police Brutality") Mr Bratholm and Mr Stenberg-Nilsen concluded:

> "Since the Committee of Inquiry has been unable to reach a conclusion regarding individual accounts of situations, but has considered all the material as a whole (see remarks on p. 88 with reference to the recommendation of the Reitgjerdet Commission), it will not, on the basis of the descriptions of the situations alone, be able to give any exact figure as to the number of incidents of police violence in Bergen. However, on the basis of all the information concerning police violence in Bergen received from various sources by the Committee, it believes that the nature and the extent of police violence are far more serious than seems to be generally believed. On the strength of the evidence as a whole, the Committee assumes that the real extent hardly differs from the two researchers' estimates. However, the essential point must be that even the most cautious estimates that can be made on this basis indicate that the extent is alarming."

10. The conclusions in the 1982 report and its premises were called into question by the Norwegian Police Association, amongst others. The association considered bringing defamation proceedings against Mr Bratholm, Mr Stenberg-Nilsen, Mr Nordhus and Mr Vogt but decided in 1983 to refrain from such action.

11. Newspapers in Bergen, in particular, took a keen interest in the debate following publication of the 1982 report. Prior to that, in 1981, the newspaper *Morgenavisen* had stated that Mr Nordhus had lied in connection with the collecting of material for his research. Mr Nordhus instituted defamation proceedings against the newspaper but in 1983 the Bergen City Court (*byrett*) dismissed the action on the ground that the accusation had been justified.

12. Mr Bratholm continued his work on police brutality, eventually as an independent researcher. In the spring of 1986 he published a book entitled *Politivold* ("Police Brutality"), with the subtitle *Omfang – årsak – forebyggelse. En studie i desinformasjon* ("Extent – Causes – Prevention. A Study in Misinformation"). He explained his use of the term "misinformation" as meaning the deliberate or negligent dissemination of incorrect information. It related to the "false" – or "misunderstood" –

loyalty, leading police officers witnessing the excessive and unlawful use of force to keep quiet or cover the perpetrator by giving false testimony. Taking the 1982 report as its point of departure the book provided additional facts, analyses and conclusions. It also contained strong criticism by Mr Bratholm of the City Court's judgment in the above-mentioned case brought by Mr Nordhus against *Morgenavisen*.

B. Publications containing impugned statements by the applicants

13. Following the publication of Mr Bratholm's book *Politivold* the second applicant, as Chairman of the Bergen Police Association, was interviewed by the newspaper *Dagbladet*. The interview was published in an article on 15 May 1986 entitled (all quotations below are translations from Norwegian) "Mr Bratholm out to get the police – An entire service has been denounced by anonymous persons" and read:

> " 'The mood of officers in the police force has been swinging between despair and anger. An entire service has been denounced by anonymous persons. Many of the officers dread making an appearance in town because there is always someone to believe that there must be something in these allegations.'
>
> This is what the Chairman of the Bergen Police Association, Mr Johnsen, told *Dagbladet*. He describes Professor Bratholm's recent report on police brutality in the Bergen police force as 'pure misinformation intended to harm the police'.
>
> 'Until the contrary has been proved, I would characterise this as a deliberate lie. The allegations come from anonymous sources and are clearly defamatory of the service.'
>
> 'Are you questioning Mr Bratholm's motives for exposing police brutality?'
>
> 'There must be other ulterior motives. It appears as if the purpose has been to undermine confidence in the police.'
>
> 'Would you suggest that the information be investigated internally?'
>
> 'If there is any truth in it, we will do what we can to remedy the situation. Such a situation is not to our credit, and we are not interested in having such people in the force.'
>
> 'So you do not exclude the possibility that misconduct has occurred?'
>
> 'I discount the possibility that any officers have committed such outrages as described. But I cannot exclude that some of them have in certain instances used force and gone too far.' "

14. On 16 May 1986 the first applicant, then Chairman of the Norwegian Police Association, was quoted in an article published by the newspaper *Bergens Tidende* under the headline "Unworthy of a law professor". The article read:

" 'It is beneath the dignity of a law professor to present something like this. The allegations are completely frivolous since they are based on anonymous sources. They have nothing to do with reality.'

This was stated by Mr Nilsen, Chairman of the Norwegian Police Association, in connection with the allegations made by Professor Bratholm in his book on police brutality.

'I have spent my whole working life in the Bergen police force, and can safely say that the allegations concerning police brutality bear no relation to reality. They are stories that would have been better suited to a weekly with space to fill than a so-called serious study', says Mr Nilsen.

Full parity

'I am puzzled by the motives behind such allegations,' continues the Chairman of the Police Association. 'At any rate, it cannot be in the interests of the rule of law and the public good to create such problems for an entire service. I would claim that the quality of the human resources within the police is fully on a par with that found among professors. We would not be able to base a charge against anyone on such flimsy grounds as Professor Bratholm does. Then, at any rate, there would not be any rule of law in this country.'

Would not be tolerated

'But you are not denying that police brutality does occur?'

'Of course not, but that is a different question. Here it is a question of systematic use of violence and pure theft. Such conduct would not be tolerated within a police force.'

Mr Nilsen points out that, although he has not studied the book closely, he considers that one cannot leave what has emerged so far unchallenged. The problem is that it is difficult to contest the allegations because it is not an individual, but an entire service, which feels it has been libelled. He does, however, agree with Chief of Police, Mr Oscar Hordnes, who told *Bergens Tidende* yesterday that there must be good reason for the Prosecutor-General [*Riksadvokaten*] to examine the matter more closely. The Police Association will also consider seeking a legal opinion on the book."

C. Further publications on police brutality

15. In the autumn of 1986 Mr Bratholm and Mr Nordhus published a book – *Dokumentasjon av politivold og andre overgrep i Bergen-politiet* ("Documentation of police brutality and other misconduct in the Bergen police force") in which Mr Bratholm stated:

"The harassment and persecution to which Mr Nordhus – and in part Mr Vogt – have been subjected in Bergen are reminiscent of the fate of dissidents in east European countries. I doubt that there is anyone among us whose situation is closer to that of these dissidents than Mr Nordhus. It is almost a wonder that he has had the courage and strength to continue his struggle to bring the truth to light.

…

It is impossible to say how many officers in the Bergen police force are involved in the unlawful practice described here; hopefully only a small minority. It is, however, difficult to believe that a great many in the force could be unaware of the conduct of certain colleagues. But their silence is ensured by the pressing demand for 'loyalty'. This has made it possible for the criminal sub-culture in the Bergen police force – whose activities encompass various kinds of offences – to survive and most likely to flourish.

...

There is reason to believe that many of the actions against Mr Nordhus and Mr Vogt are headed by somebody who is centrally placed – that there is somebody behind the scenes in the Bergen police force who is pulling the strings, plotting strategies and laying plans together with a few highly trusted persons. According to information that has come to light, it may now be possible to identify the key people responsible for some of the misconduct."

16. In the spring of 1987 Mr Bratholm published a further book entitled *Politiovergrep og personforfølgelse. 220 forklaringer om politivold og andre overgrep i Bergenspolitiet* ("Police misconduct and individual harassment. 220 statements concerning police brutality and other forms of misconduct in the Bergen police force"), which to some extent was an update of Mr Bratholm's and Mr Nordhus's book of 1986. In the introduction Mr Bratholm stated:

"Although abuse of power by the police does occur, and in some places far more frequently than in others, this does not mean that the majority of Norwegian police officers are guilty of such abuse. All the investigations indicate that a small minority of police officers have committed most of the incidents of abuse and are able to continue because the demands for 'loyalty' are so strong within the police."

17. In early 1988 the Norwegian law journal *Lov og Rett* published a special volume devoted to the issue of police violence. It included a number of articles by academics, amongst others by Mr Bratholm, criticising an investigation ordered by the Prosecutor-General (see paragraph 18 below).

Mr Bratholm also published a number of other articles on the subject of police brutality.

D. The "boomerang cases"

18. After receiving from Mr Bratholm an unexpurgated version of the book published in autumn 1986 mentioning the informers' names (which until then had been known to the researchers only), the Prosecutor-General ordered an investigation headed by *ad hoc* prosecutor Mr Erling Lyngtveit and police officers from another district.

In June 1987 the result of the Prosecutor-General's investigation was made public: 368 cases of alleged police brutality in Bergen had been investigated. Some 500 persons, including 230 police officers, had been

interviewed. Charges were brought against one police officer, who was subsequently acquitted. The overall conclusion reached in the investigation was essentially that the various allegations of police brutality were unfounded.

At the close of the investigation, fifteen of the interviewees were charged with having made false accusations against the police. Ten of these persons were later convicted in jury trials before the Gulating High Court (*lagmannsrett*), which took place during the period from November 1988 to March 1992 and were referred to as the "boomerang cases".

E. Further publications containing impugned statements

19. On 2 March 1988 a new statement by the first applicant was printed in *Annonseavisen* in Bergen in an article carrying the following headlines:

> "Dramatic turn in the debate on brutality
>
> Amnesty contacted
>
> The Police Association is preparing legal action"

The article read:

> "Not only has Professor Bratholm now issued a demand that a government committee of inquiry should be set up to review what was long ago concluded by the Prosecutor-General, but the Bergen Police Department has now been reported to Amnesty International for violating human rights! A delegation from the international secretariat in London has already been in Bergen. Their report is expected to be ready this spring.
>
> 'I have to admit that I was quite surprised when I was told about this recently. It seems as if gentlemen like Mr Nordhus, Mr Vogt and Mr Bratholm now realise that when one move does not work they try another', commented Mr Nilsen, Chairman of the Norwegian Police Association.
>
> In [his] view, the matter is about to get out of hand. He describes the reporting of the matter to Amnesty as an insult and feels that with the recent, sharp attacks by Professor Bratholm and others, the limits of what can be called impartial research have long since been exceeded. 'In my view, one is faced with a form of skulduggery and private investigation where there is good reason to question the honesty of the motives', Mr Nilsen said to *Annonseavisen*.
>
> Just before the weekend Mr Nilsen was in Bergen, where he had talks with the newly appointed board of the Bergen Police Association ... Mr Nilsen says it was natural that the recent sharp attacks by Mr Nordhus, Mr Vogt and Mr Bratholm were one of the topics discussed.
>
> 'I intend to contact our lawyer ... early this week. He has long ago sent a letter to Mr Bratholm in which we demand an apology for the statements he has made. I think you can count on our instituting defamation proceedings in this matter. We cannot put up with a situation where the same accusations continue to be made

against the Bergen police despite the fact that the force has been cleared after one of the greatest investigations of our time.'

Extended accusations

'But Mr Bratholm has no confidence in [prosecutor] Lyngtveit's competence and desire to have the whole matter investigated?'

'The fact that Professor Bratholm now calls into question the work carried out by Mr Lyngtveit and instituted by the Attorney-General [*Regjeringsadvokaten*] is in itself serious and remarkable. Now the charges have been extended to include superior police authorities as well.'

According to *Annonseavisen*'s sources, Mr Nilsen will very soon contact the Prosecutor-General to hear what the latter intends to do about Mr Bratholm's extended insinuations.

As regards the fact that Amnesty International is being brought into [the matter], Mr Vogt ... affirms that this is as a result of the organisation's wish to gain full insight into the situation in the Bergen police force."

20. In June 1988 the first applicant gave a speech as Chairman of the Norwegian Police Association at its annual general assembly, from which *Bergens Tidende* quoted in an article dated 7 June 1988 carrying the headline "Mr Bratholm accused of defamation". The article read, *inter alia*, as follows:

"... The Norwegian Police Association is serious about its threat to bring defamation proceedings against Professor Bratholm. According to Mr Nilsen, Chairman of the Association, a summons against Mr Bratholm will be issued within the next days requesting that two specific written statements he has made in connection with the police brutality case in Bergen be declared null and void.

...

Refused

'Professor Bratholm has had an opportunity to apologise for the two specific points which we find to be defamatory of the police as a professional group, but he has refused. Therefore we are instituting proceedings. No compensation will be claimed; we are merely seeking to have the statements declared null and void.'

Critical eyes

Mr Nilsen also mentioned this matter in his opening speech to the national assembly and said, among other things, that society's power structure had to tolerate critical eyes. However, this presupposed a responsible and reliable attitude on the part of the critics. He strongly denounced unobjective debates on police brutality fostered by powerful forces of high social status.

Dilettantes

'Mr Bratholm's status as a professor has lent credibility to the allegations of police brutality, and this has undermined the respect for and confidence in the

police. The Norwegian Police Association will not accept the appointment of a new commission to investigate allegations of police brutality; nor will it accept private investigations on a grand scale made by dilettantes and intended to fabricate allegations of police brutality which are then made public', said Mr Nilsen.

...

Verbal attacks

Mr Nilsen described verbal attacks on the police as an attempt to undermine the dignity and authority of the police."

21. In a special edition of the law journal *Juristkontakt*, published in the autumn of 1988, the police and the prosecution authorities presented their views on the investigation ordered by the Prosecutor-General and the ensuing investigation into the suspected false statements given by Mr Bratholm's informers.

F. Defamation proceedings

22. In July 1988 the Norwegian Police Association and its Bergen branch brought defamation proceedings against Mr Bratholm, seeking to have his above-cited statements in "Documentation of police brutality and other misconduct in the Bergen police force" declared null and void (see paragraph 15 above).

23. In May 1989 Mr Bratholm, for his part, instituted defamation proceedings against the applicants, requesting that a number of their statements be declared null and void.

24. In 1992, in view of the European Court of Human Rights' Thorgeir Thorgeirson v. Iceland judgment of 25 June 1992 (Series A no. 239), the associations withdrew their defamation action against Mr Bratholm. The latter refused to withdraw his case against the applicants.

25. The Oslo City Court heard the case against the applicants from 24 August to 8 September 1992, during which evidence was taken from twenty-three witnesses and extensive documentary evidence was submitted.

In its judgment of 7 October 1992 the City Court observed, *inter alia*, that it was established that unlawful use of violence had occurred in Bergen and that, although it had emanated from very few police officers, the extent of the violence was problematic. Mr Bratholm had not assailed his opponents' integrity and had not expressed himself in a manner that could justify the applicants' attack on him. It found the following statements defamatory under Article 247 of the Penal Code and declared them null and void (*død og maktesløs, mortifisert*) under Article 253 § 1 (the numbering below follows that appearing in the national courts' judgments):

(Statements by the second applicant published by *Dagbladet* on 15 May 1986)

1.1 "He describes Professor Bratholm's recent report on police brutality in the Bergen police force as 'pure misinformation intended to harm the police'."

1.2 "Until the contrary has been proved I would characterise this as a deliberate lie."

1.3 "There must be other ulterior motives. It appears as if the purpose has been to undermine confidence in the police."

(Statements by the first applicant published by *Annonseavisen* and *Bergens Tidende* on 2 March and 7 June 1988 respectively)

2.2 "In my view, one is faced with a form of skulduggery and private investigation where there is good reason to question the honesty of the motives."

2.3 "The Norwegian Police Association will not accept ... private investigations on a grand scale made by dilettantes and intended to fabricate allegations of police brutality which are then made public."

On the other hand, the City Court rejected Mr Bratholm's claims with respect to the following statements by the first applicant published by *Bergens Tidende* on 16 May 1986 and 7 June 1988:

2.1 "I am puzzled by the motives behind such allegations. At any rate, it cannot be in the interests of the rule of law and the public good to create such problems for an entire service."

2.4 "Mr Nilsen described verbal attacks on the police as an attempt to undermine the dignity and authority of the police."

The City Court ordered the first applicant to pay 25,000 Norwegian kroner (NOK) for non-pecuniary damage to Mr Bratholm but dismissed the latter's claim for non-pecuniary damage against the second applicant on the ground that it had been submitted out of time. The City Court further ordered that the applicants pay Mr Bratholm respectively NOK 112,365.83 and NOK 168,541.91 for legal costs.

The City Court's judgment included the following reasons:

"Statement 1.1 ... is an unequivocal allegation that Mr Bratholm's book contains false allegations of police violence within the Bergen police. The expression 'misinformation' may be understood as being a neutral assertion that Mr Bratholm provides false information, or to mean that he should be aware that he [does so], or that he [does it] deliberately. The Court emphasises that the phrase 'pure misinformation intended to harm the police' must be read in connection with the rest of the text – particularly statement 1.2 and the last paragraph of the interview – and has come to the conclusion that an ordinary reader would understand the statement as follows:

'With the intent of harming the police, Mr Bratholm is deliberately imparting false information on police brutality.'

The Court has no doubt that this is an assertion that constitutes a defamatory allegation. It is both offensive to Mr Bratholm's sense of honour and liable to harm his reputation. The allegation is not a subjective characterisation, but an assertion about a

matter of fact that can be proved by means of evidence. The accusation can thus be declared null and void.

The Court would add that, when read in context, the statement cannot be construed as an accusation that Mr Bratholm himself is making false allegations of police brutality. However, even if the statement must be understood to be an allegation against persons other than Mr Bratholm (of making false accusations of police brutality), this does not alter its character as an allegation aimed at Mr Bratholm. When read in its entirety, the text clearly indicates that it is Mr Bratholm's book which Mr Johnsen is referring to.

…

When statement [1.2] is read in the context of the rest of the text, which essentially deals with Mr Bratholm's book, an ordinary reader would understand it as follows:

'Mr Bratholm is deliberately passing on assertions about police brutality which he knows are lies.'

Whether statement 1.2 can be interpreted in such a way that it also targets the informers is of no significance here either. Nor does the Court doubt that this statement constitutes a defamatory allegation directed at Mr Bratholm which may be declared null and void because its truth can be tested by evidence.

…

[Statement 1.3] must be understood as a clear assertion that Mr Bratholm's purpose (in writing the book *Politivold*) has been to undermine confidence in the police. When read in the context of the rest of the text, especially statements 1.1 and 1.2, it must be understood as an assertion that Mr Bratholm for this purpose is passing on allegations of police brutality which he knows to be untrue. The statement also includes an implicit denigration of Mr Bratholm's purpose as questionable and unworthy. 'Other motives' answers the question whether Mr Bratholm's motives can be doubted, i.e. as opposed to honourable motives such as, for instance, to promote the rule of law.

...

The Court has no doubt that the assertion is an allegation which has both offended Mr Bratholm's sense of honour and is liable to harm his reputation. The part of the assertion alleging that Mr Bratholm's intention is to undermine the police can be proved to be true or false. That Mr Bratholm's intention, with the statement worded as it is, must be understood by the reader as questionable or reprehensible is a subjective value judgment that can hardly be proved true or false. However, this does not in principle mean that statement 1.3 may not be declared null and void.

[Statement 2.2] is not unequivocal as to whom it is directed against. It can be understood as being directed against Mr Bratholm (probably also against others), when seen in the light of the two preceding passages stating that Mr Bratholm (together with Mr Vogt and Mr Nordhus) is trying a new move and that Mr Bratholm (amongst others) is transgressing the limits of neutral research. When read in its context, the statement may also be understood to imply that it is not at all directed against Mr Bratholm, but against Amnesty. Such an interpretation must be based on the fact that the newspaper interviewed Mr Nilsen just because Amnesty had become involved in the matter. As a third possibility, the Court mentions that the statement –

especially when read in the context of the caption in the newspaper – may be understood by an ordinary reader to imply that it is first of all directed at Mr Vogt and Mr Nordhus, but also at Mr Bratholm.

The Court has reached the conclusion that when read in context statement [2.2] must be interpreted in any event as an assertion that Mr Bratholm, among others, has questionable motives for his involvement, and that Mr Bratholm is engaged in and/or contributes to what Mr Nilsen describes as skulduggery and private investigation, not impartial research.

The statement in part includes value judgments ('skulduggery', 'private investigation'), which are not liable to be declared null and void. However, the statement also includes an assertion on matters of fact, i.e. that there are dishonest motives and that Mr Bratholm is not neutral.

The statement must obviously be understood to be an assertion that it is Mr Bratholm whose motives are dishonest. This follows from the first and second paragraphs preceding the statement, where Mr Nilsen first mentions that Mr Bratholm (together with Mr Nordhus and Mr Vogt) is trying a new move, and then claims that Mr Bratholm, among others, has exceeded the limits of impartial research.

The Court has no doubt that this assertion constitutes a defamatory allegation against Mr Bratholm. It is both offensive to his sense of honour and liable to harm his reputation. The truth of the allegation can be tested by evidence and it may therefore be declared null and void.

…

Statement 2.3 contains an assertion that allegations of police brutality are being fabricated and then made public. When read in connection with the rest of the text, this must be interpreted by an ordinary reader as an assertion that Mr Bratholm publicises false allegations of police brutality. This assertion can be proved to be true or false, and is in principle liable to be declared null and void.

The statement does not include only the said assertion. When the assertion is also understood to mean that Mr Bratholm is publicising allegations that he should have realised are false it follows that it is also offensive to Mr Bratholm's sense of honour and liable to harm his reputation. The assertion implies that he, as an expert, is heedlessly publicising false allegations of police brutality. However, when read in context the statement cannot be understood solely in this way.

The statement must be interpreted as an assertion that Mr Bratholm is taking part in a private investigation for the purpose of fabricating allegations of police brutality.

If the assertion is to be interpreted as also being directed at persons other than Mr Bratholm, this does not preclude its being directed at him. Accordingly, statement 2.3 must also be interpreted as a defamatory allegation against Mr Bratholm, the truth of which can be tested by evidence."

26. The applicants appealed against the City Court's judgment to the Supreme Court (*Høyesterett*), challenging the former court's interpretation of their statements. Without any support in their wording or the context, it had interpreted the statements as calling into question Mr Bratholm's

honesty and motives. In no event could the statements be regarded as unlawful, as they had been expressed in response to his damaging value judgments of the profession. The applicants invoked, *inter alia*, Article 250 of the Penal Code pursuant to which a court could refrain from imposing a penalty if the injured party had provoked the defendant or retaliated in a reprehensible manner. A crucial factor was that Mr Bratholm's attacks on the associations which the applicants represented constituted such provocation and retaliation.

In his cross-appeal Mr Bratholm challenged the City Court's findings with respect to statements 2.1 and 2.4. Moreover, he emphasised, *inter alia*, that he had not questioned the honesty of the applicants or any other officials. His criticism had been directed against a system and enjoyed special protection under Article 100 of the Constitution.

On 19 November 1992 the Appeals Selection Committee (*kjæremålsutvalget*) of the Supreme Court granted leave to appeal on points of law.

27. On 5 May 1993 the Supreme Court rejected both appeals, thereby upholding the City Court's judgment, and ordered each of the applicants to pay NOK 45,000 in additional costs to Mr Bratholm.

On behalf of the court, Mr Justice Schei stated, *inter alia*:

> "In the present case the interest in freedom of expression carries particular weight. The statements sought to be declared null and void were made in a public debate concerning police brutality. Police brutality – and by this I mean the use of illegal physical force by the police against individuals – is a matter of serious public concern. It is of central importance for democracy that a debate concerning such matters may take place as far as possible without a risk of sanctions being imposed on those who participate. It is of particular importance to allow a wide leeway for criticism in matters of public concern (see Article 100 of the Constitution). However, those who act in defence against the criticism, for instance the representatives of the Bergen police, should of course also enjoy this freedom of expression.
>
> ...
>
> However, freedom of expression does not go as far as [allowing] every statement in a debate, even if the debate relates to matters of public concern. Freedom of expression must be weighed against the rights of the injured party. The limit between statements which may be permissible and statements which may be declared null and void must in principle be set at statements which relate to the other person's personal honesty or motives ...
>
> Nor do accusations of lies, improper motives, dishonesty ... serve to promote freedom of expression but, perhaps, rather to suppress or prevent a debate which should have been allowed to take place.
>
> ...
>
> [The applicants'] argument that the [impugned] statements cannot be declared null and void because they include subjective value judgments which are not susceptible of proof, is in my view untenable. The statements include, among other things,

accusations of deliberate lies, unworthy motives and intent to damage the police. The truth of this type of statement can in principle be proved. The fact that [the applicants] have made no attempt to present such proof is another matter.

In the assessment of whether the [statements] are to be considered unlawful [*rettsstridig*] the aggrieved party's own conduct may also be relevant. A person who uses strong language may have to tolerate more than others. I will revert to Mr Bratholm's conduct. Suffice it to say, in this context, that I cannot see that his strong involvement [in the debate] can be decisive with respect to those statements which clearly question whether he is lying or has acceptable motives.

[The applicants] have submitted that, regardless of whether the statements are unlawful, the request for a null and void order must be refused, in accordance with an application by analogy of Article 250 of the Penal Code. To this I would ... say that [this] provision scarcely has any independent significance any longer – at least as regards provocation. In the case-law, the injured party's own conduct has become more central in the determination of [whether a statement should be considered unlawful] and in violation of Article 247 of the Penal Code. I fail to see that there can be any room for exemption from penalty if the statement is unlawful. This approach would be the same if Article 250 ... had also been applicable to nullification. For this reason alone, there are no grounds for application by analogy, as pleaded by [the applicants].

I should think that the reasoning I have ... presented is also correct in respect of retaliation. In any event there [was in the present case] no retaliation such as that required ...

...

I agree with the City Court that [the statements in question] fall under Article 247 of the Penal Code. Read in their context, they are directed against Mr Bratholm. In statement 1.2 he is accused of deliberate lies. An accusation of falsehood is also implied in statement 1.1 by the word 'misinformation'. [Statement] 1.3 implies unworthy motives and suggests malicious intent [underlying Mr Bratholm's attacks against the police]. This is also implied in statement 1.1. The defamatory nature of the [second applicant's] statements becomes clearer and is thus reinforced when the statements are read together.

The interest in freedom of expression cannot make these statements lawful. I refer to what I have said about statements which are directed against personal honesty and integrity.

It has been submitted that Mr Bratholm's own situation must be of central importance in the evaluation of the issue of lawfulness. He has, it is being alleged, made strong and derogatory statements against his opponents in the debate and must accept that an embarrassing light is put on him as well.

I agree that Mr Bratholm voices harsh criticism in his book 'Police Brutality'. A lot of this criticism is against a system, but a lot of it is also directed against persons.

Mr Bratholm uses a number of derogatory expressions. 'Misinformation' has been singled out as one of them. I cannot see, for instance, that the use of that expression carries any significant weight when the lawfulness of the impugned statements is being assessed. Mr Bratholm's point in using this expression has been, *inter alia*, to

expose a deliberate or negligent denial of the existence of police brutality. Such denial is a prerequisite for the occurrence of police brutality on an appreciable scale.

The word despotism has also been mentioned. In the manner it is used in the preface to Mr Bratholm's book it is not linked to the Bergen police force ... The fact that the use of words such as 'despotism' probably contributed to raising the temperature and the general noise level of the debate may be relevant to the assessment of the lawfulness [of the impugned statements]. Having regard to the entire context, however, I cannot see that Mr Bratholm's choice of words or manner of presentation of his views either in 'Police Brutality' or in connection with the commercialisation of the book can justify calling into question his integrity as was done in the statements under consideration.

It is noted that the appellants have forcefully submitted that their statements were made in their capacity as representatives of the police and that, as such, they must enjoy a particular protection against their statements being declared null and void. I agree that it was natural for Mr Johnsen and Mr Nilsen as representatives to look after the interests of the police officers in the debate. As I have already mentioned, their freedom of expression should be protected to the same extent as the freedom of those who direct the attention towards possible questionable circumstances within the police force. But, as already pointed out, there is a limit also in respect of them. That limit has been overstepped in this case.

Accordingly, I conclude along with the City Court that statements 1.1, 1.2 and 1.3 must be declared null and void.

I will now turn to Mr Nilsen's statements ...

[Statement 2.2] ... directly assails the honesty of Mr Bratholm's motives. That this is what is being questioned is reinforced when the statement is read in the context of the whole article ...

I therefore agree with the City Court that statement 2.2 must be declared null and void ...

...

Statement 2.3 is tantamount to an assertion that allegations of police brutality are being fabricated and then made public. In this, there clearly lies a statement to the effect that the published material is being tampered with. The statement appears in close connection with Mr Bratholm and must at any rate be perceived as applying also to him ...

... I therefore conclude that statement 2.3 but not statement 2.4 must be declared null and void ..."

28. In a concurring opinion Mr Justice Bugge stated, *inter alia*:

"I have reached the same conclusion and I agree on the essential points of the reasoning. However, for my part I have reached this conclusion with considerable doubts as to whether the appellants' statements were unlawful, having regard to the circumstances in which they were made. The basis for my doubts is as follows:

[Mr Justice Schei] pointed out that in a public debate on 'matters of public concern' ... the threshold for what the participants may state without being found liable for defamation should be very high. Even if this is accepted, I agree that it should not legitimise attacks directed against the opponent's personal integrity, or which devalue or throw suspicion on his motives for participating in the debate.

...

For my part, I find it hard to see how the statements which the City Court ... declared null and void could be said to have been particularly directed against Mr Bratholm as a private individual. But I shall leave that aside, since I consider that in a heated public debate attacking another person's integrity and motives instead of what the person has stated must be deemed unlawful as such.

What in particular causes a problem for me is that – as I see it – it was Mr Bratholm himself who had called into question the integrity of the police, in particular that of the Bergen Police Department, when the debate on police brutality resumed in 1986. In Chapter 15 of [the book] he states the following about the concept 'misinformation':

> ' "Misinformation" can be defined in various ways. One possible definition is untrue information, irrespective of whether the information is provided in good faith. It may, for example, be discovered subsequently that the research was mistaken on some point.
>
> There is little reason to place such a wide construction on the concept of misinformation. It is more practical to understand it as meaning deliberate or negligent dissemination of incorrect information. Misinformation in this sense is a problem that is easier to deal with than when our understanding is broadened only gradually.
>
> ...
>
> If I were to base my conclusion on scattered information and impressions, it would be that the misinformation has been rather successful. The police, their organisations and supporters appear to have convinced fairly large parts of public opinion – which is hardly surprising. It is natural to call to mind how successful misinformation concerning the old Greenland police force has been for several decades. In spite of the extremely bad conditions there – and the fact that sound documentation of these conditions was provided by at least some of the Oslo newspapers from time to time, it was the misinformation that prevailed. The many members of the police that knew of the brutality did nothing to bring the circumstances to light.'

I cannot read this in any other way than that Mr Bratholm here indeed himself accuses his opponents in the debate – 'the police, its organisations and defenders' – of lack of integrity, of knowingly hiding factual circumstances and of acting on the basis of inappropriate motives.

It is in my view on this basis that the appellants' statements must be evaluated – and in particular those which were made after the publication of 'Police Brutality' in 1986. The appellants' submission that they, who naturally must have felt offended on behalf of the police, were entitled to reply in the same manner is not as such ill-founded.

In this connection it is in my view also of importance that the appellants expressed themselves on behalf of the police organisations in Bergen and at the national level, respectively. They acted as elected representatives and spokesmen of the members. Very likely, and rightly so, they considered it an organisational duty to react to the attacks which were directed against the working methods of the police. It is not unusual in our society for the representatives of a profession to reply to public attacks in a way which might be lacking the necessary reflection and which might be somewhat inappropriate. The appellants were not familiar with the legislation on defamation either.

Mr Bratholm has maintained that there must be a difference between what well-known politicians must endure in respect of statements related to their political activities and the protection he enjoys when 'from his professional standpoint he engages in important matters of public concern'. I do not agree ... and do not understand ... how this can be argued. In my opinion and as a matter of principle, when a scholar – for example in law – embarks on a public debate on matters of public interest he should not enjoy a greater right to protection under the defamation legislation than a politician.

If I nevertheless agree with [Mr Justice Schei's] conclusions, it is because I accept that there is a need to provide the best possible terms for a debate on 'matters of public concern' and that [such a debate] might suffer if statements such as those dealt with in this case are not declared null and void, even if their background is taken into consideration."

G. Reopening of the "boomerang cases"

29. On 16 January 1998 the Supreme Court ordered the reopening of seven of the "boomerang cases". The requests to this effect which had been lodged in 1996 had been rejected by the Gulating High Court. The Supreme Court granted leave to appeal. Pursuant to section 392 of the Criminal Procedure Act the Supreme Court found, in its final decision, that in the special circumstances at hand the correctness of the convictions was doubtful and that weighty considerations warranted a reassessment of the guilt of the convicted persons. In the Supreme Court's view it was evident that police brutality had existed to a certain extent during the years 1974-86. The reason for the denial by police officers of any knowledge of such incidents had to be sought in "misunderstood loyalty". It was highly probable that some police officers had given false evidence during the investigations of police brutality in Bergen. On 16 April 1998 the seven convicted persons were acquitted at the request of the prosecution which had found it unnecessary to bring new charges, failing a sufficient general interest.

II. RELEVANT DOMESTIC LAW AND PRACTICE

30. Under Norwegian defamation law, there are three kinds of response to unlawful defamation, namely the imposition of a penalty under the

provisions of the Penal Code, an order under its Article 253 declaring the defamatory allegation null and void (*mortifikasjon*) and an order under the Damage Compensation Act 1969 (*Skadeserstatningsloven* – Law no. 26 of 13 June 1969) to pay compensation to the aggrieved party. Only the latter two were at issue in the present case.

31. Under Article 253 of the Penal Code, a defamatory statement which is unlawful and has not been proved may be declared null and void by a court. The relevant part of this provision reads:

> "1. When evidence of the truth of an allegation is admissible and such evidence has not been produced, the aggrieved person may demand that the allegation be declared null and void unless otherwise provided by statute."

Such a declaration is applicable only with regard to factual statements, the truth of value judgments not being susceptible of proof.

Although the provisions on orders declaring a statement null and void are contained in the Penal Code, such an order is not considered a criminal sanction but a judicial finding that the defendant has failed to prove its truth and is thus viewed as a civil-law remedy.

In recent years there has been a debate in Norway as to whether one should abolish the remedy of null and void orders, which has existed in Norwegian law since the sixteenth century and which may also be found in the laws of Denmark and Iceland. Because of its being deemed a particularly lenient form of sanction, the Norwegian Association of Editors has expressed a wish to maintain it.

32. Section 3-6 of the Damage Compensation Act 1969 reads:

> "A person who has injured the honour or infringed the privacy of another person shall, if he has displayed negligence or if the conditions for imposing a penalty are fulfilled, pay compensation for the damage sustained and such compensation for loss of future earnings as the court deems reasonable, having regard to the degree of negligence and other circumstances. He may also be ordered to pay such compensation for non-pecuniary damage as the court deems reasonable.
>
> If the infringement has occurred in the form of printed matter, and the person who has acted in the service of the owner or the publisher thereof is responsible under the first subsection, the owner and publisher are also liable to pay the compensation. The same applies to any redress imposed under the first subsection, unless the court finds that there are special grounds for dispensation …"

33. Conditions for holding a defendant liable for defamation are set out in Chapter 23 of the Penal Code, Articles 246 and 247 of which provide:

> "Article 246. Any person who by word or deed unlawfully defames another person, or who is accessory thereto, shall be liable to fines or imprisonment for a term not exceeding six months.
>
> Article 247. Any person who, by word or deed, behaves in a manner that is likely to harm another person's good name and reputation or to expose him to hatred, contempt, or loss of the confidence necessary for his position or business, or who is accessory thereto, shall be liable to fines or imprisonment for a term not exceeding one year. If the defamation is committed in print or in broadcasting or otherwise under

> especially aggravating circumstances, imprisonment for a term not exceeding two years may be imposed."

A limitation to the applicability of Article 247 follows from the requirement that the expression must be unlawful (*rettsstridig*). While this is expressly stated in Article 246, Article 247 has been interpreted by the Supreme Court to include such a requirement.

Further limitations to the application of Article 247 are contained in Article 249, the relevant part of which reads:

> "1. Punishment may not be imposed under Articles 246 and 247 if evidence proving the truth of the accusations is adduced.
>
> …"

PROCEEDINGS BEFORE THE COMMISSION

34. Mr Arnold Nilsen and Mr Jan Gerhard Johnsen lodged an application (no. 23118/93) with the Commission on 2 November 1993. They complained that the City Court's and the Supreme Court's judgments constituted an unjustified interference with their right to freedom of expression under Article 10 of the Convention, which provision had therefore been violated.

35. The Commission declared the application admissible on 10 September 1997. In its report of 9 September 1998 (former Article 31 of the Convention), it expressed the unanimous opinion that there had been a violation of Article 10. The full text of the Commission's opinion is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

36. At the hearing on 1 July 1999 the Government invited the Court to hold that, as submitted in their memorial, there had been no violation of Article 10 of the Convention.

37. On the same occasion the applicants reiterated their request to the Court to find a violation of Article 10 and to make an award of just satisfaction under Article 41.

[1] 1. *Note by the Registry*. For practical reasons this annex will appear only with the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but copies of the Commission's reports are obtainable from the Registry.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

38. The applicants complained that the Oslo City Court's judgment of 7 October 1992 (see paragraph 25 above), which the Supreme Court upheld on 5 May 1993 (see paragraphs 27-28 above), had constituted an unjustified interference with their right to freedom of expression under Article 10 of the Convention, which reads:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

39. It was common ground that the impugned measures constituted an "interference by [a] public authority" with the applicants' right to freedom of expression as guaranteed under the first paragraph of Article 10. Nor was it disputed that the interference was "prescribed by law" and pursued a legitimate aim, namely "the protection of the reputation or rights of others". The Court sees no reason to doubt that these two conditions for regarding the interference as permissible under the second paragraph of this Article were fulfilled.

The arguments of those appearing before the Court centred on the third condition, that the interference be "necessary in a democratic society". The applicants and the Commission argued that this condition had not been complied with and that Article 10 had therefore been violated. The Government contested this.

A. Arguments of those appearing before the Court

1. The Commission and the applicants

40. The Commission stressed that the impugned statements had been expressed in the course of a public debate on a matter of serious public concern. Mr Bratholm's position was not very different from that of a politician, bearing in mind his function as government-appointed expert

responsible for reviewing the findings published by Mr Nordhus and Mr Vogt in the early 1980s and his frequent participation in public debates (see paragraphs 8-12 and 15-17 above); accordingly, he had to display a greater degree of tolerance, also because of his own choice of words which were susceptible of arousing indignation notably within the police. Like Mr Bratholm, the applicants and their membership too were entitled under Article 6 § 2 of the Convention to be presumed innocent until proved guilty of having committed an offence. A common denominator of all the impugned statements was their character as responses by elected police representatives to the serious and repeated accusations voiced, in particular by Mr Bratholm, to the effect that police officers in Bergen had committed criminal offences on a large scale. The principal aim of the applicants' statements was not to question the qualities of Mr Bratholm's research and his personal motives but to defend the police force against very serious accusations emanating from various sources (see paragraphs 13-14 and 19-21 above). Although the impugned statements were no doubt polemical, they did not constitute a gratuitous attack on Mr Bratholm. The statements in issue were scarcely susceptible of proof and could in any event not be regarded as having been made in bad faith. The more recent acquittals of seven informers convicted in the "boomerang cases" was irrelevant to the present case (see paragraph 29 above). Considering the circumstances as a whole and, in particular, the tone of the debate which had been set not least by Mr Bratholm himself, the applicants' statements were not of such a character as to require protection of Mr Bratholm's reputation in the manner opted for by the national courts.

41. The applicants, who shared the view of the Commission, further stressed that it should be borne in mind that the impugned expressions were oral statements, allowing greater latitude to their authors in resorting to strong wording and exaggerations. Moreover, the applicants argued that their statements had been misconstrued by the Norwegian courts. The applicants had not questioned Mr Bratholm's personal honesty but had criticised his carelessness in promoting the untrue statements of his informers while giving these an appearance of veracity by shielding them under his cloak of moral authority. The Norwegian Supreme Court had based its reasoning on an untenable presupposition that statements relating to opinions and motives were not value judgments but could be proved as facts. In any event, the findings made by the Prosecutor-General in his investigations (1986-87) were sufficient proof of the veracity of the factual part of their statements (see paragraph 18 above). Moreover, when expressing his own value judgments of his opponents' acts and motives, Mr Bratholm had failed to display caution in his choice of words and had succeeded in undermining the authority of the police. In books, articles in law journals and newspapers and elsewhere he had repeatedly accused the police, especially in Bergen, of systematic criminal conduct (see paragraphs 12 and 15-17 above). The applicants were provoked to respond

in a public debate in which Mr Bratholm had acted as the attacker and set the tone. The applicants did nothing more than they were expected to do: they had a duty to stand up and speak for the average policeman and to defend their service and its reputation. Not only were the applicants expected, they were elected, to do so.

2. The Government

42. In the Government's submission, all the statements in issue had been directed at Mr Bratholm (or at least at him together with others) and conveyed possibly the most serious accusations that might be made against a scholar and researcher. They were principally aimed at, and did in fact amount to a gratuitous personal attack against, his honesty, integrity and motives. This was how the ordinary reader was bound to perceive the statements (see paragraphs 13-14 and 19-20 above). In this respect the domestic courts' interpretations of the expressions were well reasoned and were based on an acceptable assessment of the facts (see paragraphs 25 and 27 above). While the applicants never offered any explanation for their choice of words, the impugned allegations were statements of fact, which in principle were susceptible of proof. It was clear that the defamation proceedings at issue were an important stepping-stone on the way to the Supreme Court's decision in 1998 to reopen the "boomerang cases", a fatal blow to a central part of the applicants' reasoning, namely that the previous convictions proved that Mr Bratholm's informers had been lying (see paragraph 29 above). It was the Norwegian Police Association, not Mr Bratholm, who had set the tone of the debate, by describing the report of the 1981 Committee of Inquiry as a deliberate attempt to damage the reputation of the police (see paragraph 10 above). Mr Bratholm for his part had never accused the applicants or any named members of their associations of dishonesty or unworthy motives. Rather than promoting or facilitating a public debate on police violence, the statements were capable of obstructing the debate. Moreover, the present case did not concern freedom of the press.

B. The Court's assessment

1. General principles

43. According to the Court's well-established case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic

society". 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.

The test of "necessity in a democratic society" requires the Court to determine whether the "interference" complained of corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient (see the *Sunday Times* v. the United Kingdom (no. 1) judgment of 26 April 1979, Series A no. 30, p. 38, § 62). In assessing whether such a "need" exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not, however, unlimited but goes hand in hand with a European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10 (see, among many other authorities, Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 58, ECHR 1999-III).

The Court's task in exercising its supervisory function is not to take the place of the national authorities but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation (ibid., § 60).

44. A particular feature of the present case is that the applicants were sanctioned in respect of statements they had made as representatives of police associations in response to certain reports publicising allegations of police misconduct. While there can be no doubt that any restrictions placed on the right to impart and receive information on arguable allegations of police misconduct call for a strict scrutiny on the part of the Court (see the Thorgeir Thorgeirson v. Iceland judgment of 25 June 1992, Series A no. 239, pp. 27-28, §§ 63-70), the same must apply to speech aimed at countering such allegations since it forms part of the same debate. This is especially the case where, as here, the statements in question have been made by elected representatives of professional associations in response to allegations calling into question the practices and integrity of the profession. Indeed, it should be recalled that the right to freedom of expression under Article 10 is one of the principal means of securing effective enjoyment of the right to freedom of assembly and association as enshrined in Article 11 (see *Rekvényi v. Hungary* [GC], no. 25390/94, § 58, ECHR 1999-III; the United Communist Party of Turkey and Others v. Turkey judgment of 30 January 1998, *Reports of Judgments and Decisions* 1998-I, p. 20, § 42; the Vogt v. Germany judgment of 26 September 1995, Series A no. 323, p. 30, § 64; the Young, James and Webster v. the United Kingdom judgment of 13 August 1981, Series A no. 44, pp. 23-24, § 57; see also, *mutatis mutandis*, the Swedish Engine Drivers' Union v. Sweden judgment of 6 February 1976, Series A no. 20, p. 15, § 40).

2. Application of those principles to the present case

45. In the case at hand the Norwegian Supreme Court, upholding the City Court's conclusions, found that two of Mr Nilsen's statements published on 2 March and 7 June 1988 and three of Mr Johnsen's statements published on 15 May 1986 were defamatory, "unlawful" (*rettsstridig*) and not proved to be true. The Supreme Court considered that the statements amounted to accusations against Mr Bratholm of falsehood (statement 1.1), of deliberate lies (statement 1.2), unworthy and malicious motives (statements 1.1 and 1.3), dishonest motives (statement 2.2) and having fabricated allegations of police brutality (statement 2.3). The manner in which Mr Bratholm had expressed his views in the book "Police Brutality", published in the spring of 1986, and in other publications, could not in the Supreme Court's view justify calling into question his integrity in the way done by the applicants. It therefore upheld the City Court's judgment declaring the statements in question null and void and ordering that the first applicant pay compensation to the plaintiff (the latter's compensation claim against the second applicant had been submitted out of time – see paragraphs 25 and 27 above).

The Court has considered the applicants' argument that the expressions at issue were primarily aimed at Mr Bratholm's informers and were not intended to harm him personally. However, it sees no grounds to question the Norwegian courts' findings that the statements were capable of adversely affecting Mr Bratholm's reputation. The reasons relied on by the national courts were clearly relevant to the legitimate aim of protecting his reputation.

46. As regards the further question whether the reasons were also sufficient, the Court observes that the case has its background in a long and heated public debate in Norway on investigations into allegations of police violence, notably in the city of Bergen. The occurrence, nature and extent of police violence were investigated by university researchers, a committee of inquiry and the Prosecutor-General and the issue was fought in the literature, in the press and in the courtroom (see paragraphs 8-21 above). As noted by the Norwegian Supreme Court, the impugned statements clearly bore on a matter of serious public concern (see paragraph 27 above). It must be recalled that, according to the Strasbourg Court's case-law, there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest (see the Wingrove v. the United Kingdom judgment of 25 November 1996, *Reports* 1996-V, p. 1957, § 58; and *Sürek v. Turkey (no. 1)*[GC], no. 26682/95, § 61, ECHR 1999-IV).

47. However, as also observed by the Supreme Court, even in debate on matters of serious public concern, there must be limits to the right to freedom of expression (see paragraph 27 above). Despite the particular role played by the applicants as representatives of professional associations and the privileged protection afforded under the Convention to the kind of speech in issue, the applicants had to act within the bounds set, *inter alia*, in

the interest of the "protection of the reputation or rights of others". What is in issue is whether the applicants exceeded the limits of permissible criticism.

48. In determining this question, the Court will have particular regard to the words used in the statements and to the context in which they were made public, in the light of the case as a whole, including the fact that they were oral statements reported by the press, thereby – presumably – reducing or eliminating the applicants' possibilities of reformulating, perfecting or retracting their statements before publication.

49. As regards one allegation, namely statement 1.2 accusing Mr Bratholm of deliberate lies, the Court agrees with the Government that it exceeded the limits of permissible criticism. This could be regarded as an allegation of fact susceptible of proof, for which there was no factual basis and which could not be warranted by Mr Bratholm's way of expressing himself. Declaring this statement null and void was justifiable in terms of Article 10.

50. On the other hand, unlike the national courts, the Court does not consider that, in so far as statements 1.1, 1.3, 2.2 and 2.3 were imputing improper motives or intentions to Mr Bratholm, they should be regarded as allegations of fact requiring the applicants to prove their truth (see paragraphs 13-14, 19-21 above). From the wording of the statements and the context, it is apparent that they were intended to convey the applicants' own opinions and were thus rather akin to value judgments.

51. In so far as the said statements implied that Mr Bratholm had misinformed about police violence and fabricated allegations of such misconduct, there existed at the material time certain objective factors supporting the applicants' questioning of Mr Bratholm's investigations. The libel action brought by Mr Nordhus and Mr Vogt in respect of allegations of lies in certain newspaper articles had been unsuccessful and the Prosecutor-General's criminal investigations of the Bergen police had reached the overall conclusion that the various allegations of police brutality were unfounded (see paragraphs 11 and 18 above). In the ensuing "boomerang cases" a number of informers had been convicted of false accusations against the police (see paragraph 18 above). It is true that the manner of conduct of those proceedings gave rise to criticism, notably by Mr Bratholm himself (see paragraph 17 above). The Court is also mindful of the differences as to focus, approach and evidentiary standards between these investigations and those conducted by Mr Bratholm. The Court is further aware that in the libel case against the applicants the City Court observed that the occurrence of unlawful use of force by the Bergen police had been established during the hearings before it and that, although this concerned very few police officers, the extent of the misconduct was problematic (see paragraph 25 above). It remains, however, that at the time when the Norwegian courts adjudicated the applicants' case (see paragraphs 25 and 27 above) there was some factual basis for their

statements to the effect that false and fabricated allegations of police brutality had been made. This is not altered by the fact that the Supreme Court subsequently reopened the "boomerang cases" and acquitted the defendants (see paragraph 29 above).

52. Moreover, like the Norwegian courts in their balancing of the competing interests under national law (see paragraphs 25 and 27 above), the Court, in applying the necessity test under Article 10, will also have regard to the role played by the injured party in the present case (see the Oberschlick v. Austria (no. 2) judgment of 1 July 1997, *Reports* 1997-IV, pp. 1275-76, §§ 31-35). In this respect, the Court disagrees with the Commission's opinion that on the strength of his activity as a government-appointed expert Mr Bratholm could be compared to a politician who had to display a greater degree of tolerance. In the Court's view, it was rather what he did beyond this function, by his participation in public debate, which is relevant.

In this connection, the Court notes that Mr Justice Schei had regard to the harsh criticism voiced by Mr Bratholm in his book "Police Brutality" (published in the spring of 1986) against a system and, to a large extent, also against individuals. He had used a number of derogatory expressions, such as "misinformation" and "despotism" (see paragraph 27 above). Mr Justice Bugge, who in his concurring opinion (see paragraph 28 above) attached more significance to this factor, quoted certain passages from the book which commented on the phenomenon of misinformation by the police. Mr Justice Bugge could not read this in any other way than that Mr Bratholm himself was thereby accusing his opponents in the debate – "the police, its organisations and defenders" – of lack of integrity, of deliberately covering up the actual situation and of professing false motives for their actions. In the view of Mr Justice Bugge, it was against this background that the applicants' statements had to be assessed, especially those which followed the publication of the book. The applicants were therefore not entirely unjustified in claiming that they were entitled to "hit back in the same way". In this context it was also significant that the applicants were speaking, as elected representatives of the national and local police associations, on behalf of their members and had rightly felt that they had an obligation to counter the attacks on the police's working methods (ibid.).

The Court cannot but share this reasoning and notes, in addition, that Mr Bratholm spoke, amongst other things, of a "criminal sub-culture" in the Bergen police (see paragraph 15 above). However, bearing in mind that the applicants were, in their capacity as elected representatives of professional associations, responding to criticism of the working methods and ethics within the profession, the Court considers that, in weighing the interests of free speech against those of protection of reputation under the necessity test in Article 10 § 2 of the Convention, greater weight should be attached to the plaintiff's own active involvement in a lively public discussion than was

done by the national courts when applying national law (see paragraph 44 above). The statements at issue were directly concerned with the plaintiff's contribution to that discussion. In the Court's view, a degree of exaggeration should be tolerated in the context of such a heated and continuing public debate of affairs of general concern, where on both sides professional reputations were at stake.

53. Against this background, notwithstanding the Norwegian courts' conclusions under domestic law, the Court is not satisfied that statements 1.1, 1.3, 2.2 and 2.3 exceeded the limits of permissible criticism for the purposes of Article 10 of the Convention. At the heart of the long and heated public discussion was the question of the truth of allegations of police violence and there was factual support for the assumption that false allegations had been made by informers. The statements in question essentially addressed this issue and the admittedly harsh language in which they were expressed was not incommensurate with that used by the injured party who, since an early stage, had participated as a leading figure in the debate. Accordingly, the Court finds that the resultant interference with the applicants' exercise of their freedom of expression was not supported by sufficient reasons in terms of Article 10 and was disproportionate to the legitimate aim of protecting the reputation of Mr Bratholm. There has thus been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

54. Mr Nilsen and Mr Johnsen sought just satisfaction under Article 41 of the Convention, which provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Non-pecuniary damage

55. The applicants each requested 25,000 Norwegian kroner (NOK) in compensation for non-pecuniary damage flowing from the violation of their right to freedom of expression.

56. The Court agrees with the Government that the finding of a violation in itself constitutes adequate just satisfaction for any non-pecuniary damage allegedly sustained by the applicants.

B. Pecuniary damage

57. The applicants further requested the Court to make an award in respect of certain sums totalling NOK 440,242.74 which the Norwegian

courts had ordered them to pay to Mr Bratholm. This included NOK 370,907.74 for the latter's costs before the City Court and the Supreme Court, NOK 25,000 for non-pecuniary damage (to be paid by the first applicant) and NOK 44,335 for loss of interest (see paragraphs 25 and 27 above).

The applicants explained that the above amounts had been covered on an *ex gratia* basis, without any prior agreement, by the Norwegian Police Association and that, if an award were made under this head, they would reimburse the amounts to the association.

58. The Government did not object to the above claims.

59. The Court recalls that, according to its case-law, compensation of damage is recoverable only to the extent that a causal link is established between the violation of the Convention and the damage sustained. In the instant case a violation of Article 10 has been found by reason of the decisions concerning all of the impugned statements made by the first applicant and two of the three contested statements made by the second applicant. In the light of this, the Court awards the first applicant the amount – NOK 25,000 – which he was ordered to pay in compensation and both applicants jointly NOK 350,000 in respect of the remainder of their claim under this head.

C. Costs and expenses

60. The applicants further claimed reimbursement of costs and expenses in respect of the following items:

(i) NOK 645,912 for their costs and expenses in the domestic proceedings;

(ii) NOK 175,000 for the work of their lawyers in the Strasbourg proceedings;

(iii) NOK 22,000 in costs for translation;

(iv) NOK 18,000 for travel and subsistence expenses in connection with the hearing before the Court on 1 July 1999.

In so far as the above amounts had been covered *ex gratia* by the Norwegian Police Association, the applicants undertook to reimburse to the latter any award made by the Court.

61. The Government contested the above claim, arguing that the number of hours and the rates were excessive.

62. The Court, in accordance with its case-law, will consider whether the costs and expenses claimed were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see, for instance, the Tolstoy Miloslavsky v. the United Kingdom judgment of 13 July 1995, Series A no. 316-B, p. 83, § 77). As regards item (i), the Court recalls its finding that the decision of the national courts declaring one of the second applicant's statements null and void was justified under Article 10 § 2.

Accordingly, deciding on an equitable basis, it awards the applicants NOK 250,000 on this point, while items (ii) to (iv) should be reimbursed in their entirety.

D. Interest pending the proceedings before the national courts and the Convention institutions

63. The applicants in addition claimed NOK 325,000 in simple interest (approximately 5% per year for six years) on the amounts claimed in respect of pecuniary damage and domestic costs and expenses.

64. The Government considered this claim unfounded.

65. The Court finds that some pecuniary loss must have been occasioned by reason of the periods that elapsed from the times when the various costs were incurred until the Court's award (see, for example, the Darby v. Sweden judgment of 23 October 1990, Series A no. 187, p. 14, § 38; the *Observer* and *Guardian* v. the United Kingdom judgment of 26 November 1991, Series A no. 216, p. 38, § 80 (d); and Bladet Tromsø *and Stensaas* cited above, § 83). Deciding on an equitable basis and having regard to the rates of inflation in Norway during the relevant period, it awards the applicants NOK 50,000 with respect to their claim under this head.

E. Default interest

66. According to the information available to the Court, the statutory rate of interest applicable in Norway at the date of adoption of the present judgment is 12% per annum. The Court, in accordance with its established case-law, deems this rate appropriate with regard to the sums awarded in the present judgment.

FOR THESE REASONS, THE COURT

1. *Holds* by twelve votes to five that there has been a violation of Article 10 of the Convention;

2. *Holds* by thirteen votes to four that the finding of a violation of Article 10 in itself constitutes adequate just satisfaction for the non-pecuniary damage alleged by the applicants;

3. *Holds* by twelve votes to five that the respondent State is to pay the applicants, within three months,
   (a) for pecuniary damage 375,000 (three hundred and seventy-five thousand) Norwegian kroner;

(b) for costs and expenses, 465,000 (four hundred and sixty-five thousand) Norwegian kroner;
(c) for additional interest, 50,000 (fifty thousand) Norwegian kroner;

4. *Holds* by twelve votes to five that simple interest at an annual rate of 12% shall be payable from the expiry of the above-mentioned three months until settlement;

5. *Dismisses* unanimously the remainder of the applicants' claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 November 1999.

Luzius WILDHABER
President

Michele DE SALVIA
Registrar

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) dissenting opinion of Mr Rozakis;
(b) dissenting opinion of Mr Kūris, Mr Türmen, Mrs Strážnická and Mrs Greve.

L.W.
M. de S.

DISSENTING OPINION OF JUDGE ROZAKIS

I am regretfully unable to follow the majority of the Court and find a violation of Article 10 in this case. I believe that this is a case where the courts in Norway acted correctly by properly weighing the conflicting interests of the parties involved in the dispute, in proceedings concerning defamation of an individual by two police officers.

I would like to start the discussion on my dissenting view by identifying the statements of the policemen that I consider not only defamatory, from a domestic-law point of view, but also not covered by the protection of the freedom of expression enshrined by Article 10 of the Convention. These are the statements of the second applicant that (a) "until the contrary has been proved, I would characterise this as a deliberate lie" and (b) "there must be other ulterior motives. It appears as if the purpose has been to undermine confidence in the police". The first can be regarded, as the Court rightly said, "as an allegation of fact susceptible of proof, for which there was no factual basis and which could not be warranted by Mr Bratholm's way of expressing himself", while the second was aimed at casting doubt on the integrity, impartiality and good faith of Mr Bratholm, and to affect adversely his reputation. These two statements would have sufficed, to my mind, to lead the Norwegian courts to the sanction imposed, and our Court, correspondingly, to find a non-violation of Article 10. The fact that the latter has, while distancing itself from the first statement, opted for finding a violation in the present case, obliges me to append my dissent to the judgment.

The reasons which have led me to a different conclusion from that of the majority of the Court are the following:

(a) The nature of the speech that we have been called upon to protect in this case does not necessarily belong to the highest "echelon" of the speech that, according to the Strasbourg case-law, merits protection under Article 10 of the Convention. Indeed it does not enter within the sphere of the freedom of the press; it is not even, properly speaking, political speech. The interests protected by the expression of the two policemen are basically trade-union interests within the framework of a discussion of a matter of public concern. Although the criminally sanctioned statements were uttered in the course of a debate of more general public interest, their aim was to protect the particular interests of a professional body – the Norwegian police.

(b) The person against whom the speech was directed was a private person, an individual whose main aim was to establish the responsibility of the police in respect of instances of ill-treatment by the latter, through research into the matter and using scientific techniques. The exchange of views between the two parties – Mr Bratholm and the police – became heated, and Mr Bratholm may be considered as having also contributed to the increase of tension during the debate. Yet, it should not be forgotten that Mr Bratholm was not a politician and could not be equated with a politician, and that the character of his speech was heavily influenced by the strong language used by the Norwegian police to attack his views. In any event, the character of Mr Bratholm's expressions, although severely criticising the Norwegian police, never deteriorated to the level of personal insults and statements degrading the honour of specific persons. I should also add, at this juncture, that Mr Bratholm was careful enough to underline that his accusations against the Norwegian police, documented by pieces of evidence, were not directed generally against the force as such, but against a minority of policemen whom he considered responsible for the ill-treatment of citizens.

(c) The Norwegian courts imposed sanctions on the applicants which were proportionate to the legitimate aim pursued, namely the protection of the reputation of Mr Bratholm. It should be recalled that the Supreme Court of Norway, which was the last court having dealt with the matter, upheld the City Court's judgment, declaring the statements in question null and void and ordering that the first applicant pay compensation to the plaintiff. The second applicant did not pay compensation, because the plaintiff's compensation claim against him had been submitted out of time. It is obvious that the applicants did not suffer any other inconvenience, or a criminal conviction, imprisonment, etc.

Under these circumstances and for the reasons explained, I consider that Article 10 of the Convention has not been violated. I should, in conclusion, stress that all European legal systems, in their effort to protect the reputation of individuals, provide for defamation as a criminally punishable offence. This homogeneity of the European legal systems must be taken into account when our Court deals with matters of violations of Article 10, because it represents a common denominator, a common stance of the European States *vis-à-vis* a specific type of human behaviour. Although the Court is not obliged to conclude that defamation proceedings and the ensuing convictions are always and indiscriminately justified, in application of paragraph 2 of Article 10, the common approach of the European States in this matter is a factor to be seriously taken into account when weighing the various rights and interests involved in Article 10 cases.

DISSENTING OPINION OF JUDGES KŪRIS, TÜRMEN, STRÁŽNICKÁ AND GREVE

We formed part of the minority which voted against the finding of a violation of Article 10 of the Convention in this case.

The case concerns freedom of expression, not freedom of the press. Article 10 § 2 of the Convention sets out the limits of the permissible restrictions on freedom of expression. The question in this case is whether the interference complained of by the applicants was "necessary in a democratic society", that is whether:

– it corresponded to a pressing social need,

– it was proportionate to the legitimate aim pursued, and

– the reasons given by the national authorities to justify it are relevant and sufficient.

National authorities, in particular the courts, have a certain margin of appreciation in assessing whether such a need exists and what measures should be adopted to deal with it. This Court's function is to review the latter and give a final ruling as to whether a restriction is reconcilable with freedom of expression as protected by Article 10.

The restrictions imposed in the present case derived from five of the applicants' statements reported in the Norwegian press being declared null and void and the first applicant being ordered to pay compensation to Professor Bratholm (the latter's compensation claim against the second applicant being time-barred).

In short, the case concerns the language used by two members of the police force in Bergen in a long-lasting and heated debate over research-based allegations of police brutality – or more precisely the use of excessive force – in Bergen. Professor Bratholm entered the debate as a member of a government-appointed commission of inquiry set up to examine the matter. He later acted outside this official framework and pursued the issue, participating in the public debate also in his capacity as a criminal-law specialist. The two members of the Bergen police force – that is members of the very police force under scrutiny/investigation – held office in the local and the national police association respectively.

Before addressing the specifics of the case, we wish to emphasise the ever present and vital need for every society to exercise strict supervision over all use of force in the name of society. States have a monopoly over

force to protect democracy and the rule of law in society, but this monopoly also entails the danger of force being abused to the detriment of the very values it is meant to uphold. The abuse of force by officials is not just one of many issues of broad general interest, it is considered to be a matter of primary concern in any society. It suffices to recall the provisions in the 1984 United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Norway is a Party to that Convention and has to abide by its provisions. The European Convention on Human Rights provides in Article 53 ("Safeguard for existing human rights"):

> "Nothing in [the] Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party."

By virtue of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Norway has undertaken to prevent in any territory under its jurisdiction not only torture but also other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity (Article 16 § 1); the State shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture or other form of cruel, inhuman or degrading treatment or punishment has been committed (Article 12); the State shall, moreover, ensure that any individual who alleges that he has been subjected to torture or other forms of cruel, inhuman or degrading treatment or punishment has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities, and steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given (Article 13).

In the present case we cannot ignore the fact that Professor Bratholm was attacked by the applicants because of his work on alleged police brutality in Bergen. The purpose of these attacks was to suppress the debate on this issue which was of vital public concern. As Justice Bugge of the Norwegian Supreme Court stated in his concurring opinion: "I accept that there is a need to provide the best possible terms for a debate on 'matters of public concern' and that [such a debate] might suffer if statements such as those dealt with in this case are not declared null and void, even if their background is taken into consideration."

The Oslo City Court and the Supreme Court of Norway found the applicants' statements that were declared null and void to be defamatory, unlawful and not proved to be true.

The four impugned statements on which we disagree with the majority were made at different times; they were as follows:

On 15 May 1986 an interview with Mr Jan Gerhard Johnsen was published by *Dagbladet*, an Oslo-based newspaper. The interview included the following:

> 1.1 "He describes Professor Bratholm's recent report on police brutality in the Bergen police force as 'pure misinformation intended to harm the police'."
>
> 1.3 "There must be other ulterior motives. It appears as if the purpose has been to undermine confidence in the police."

Mr Johnsen, as mentioned above, himself worked in the Bergen police force – against which the allegations of police brutality were made – and he was Chairman of the Bergen Police Association (*Bergen Politilag*). In the same interview he made the statement 1.2 on which we agree with the findings of the majority.

On 2 March 1988 an interview with Mr Arnold Nilsen was published by *Annonseavisen*, a newspaper circulated for free to every household in Bergen. The interview, *inter alia,* read:

> 2.2 "In my view, one is faced with a form of skulduggery and private investigation where there is good reason to question the honesty of the motives."

On 7 June 1988 Mr Nilsen's opening address to the annual general assembly meeting of the Norwegian Police Association was published by *Bergens Tidende*, a Bergen-based newspaper. It included, *inter alia*:

> 2.3 "The Norwegian Police Association will not accept ... private investigations on a grand scale made by dilettantes and intended to fabricate allegations of police brutality, which are then made public."

Mr Nilsen himself worked in the Bergen police force – against which the allegations of police brutality were made – and he was Chairman of the Norwegian Police Association (*Norsk Politiforbund*).

As regards all the five statements it is obvious that the two applicants when speaking wore more than one hat. They were part of the police force under scrutiny/investigation and at the same time they held office in the local or national association of that force. Thus, statement 2.3 was made to the annual general assembly of the national police association. Notwithstanding this, none of the statements has been demonstrated actually to have been made on behalf of the police associations. Conversely, the press releases and statements from the police as such presented to this Court were carefully worded to balance the need for the police service to maintain respect and a good general reputation and the need for whatever were untrue allegations to be properly dismissed. We appreciate that particularly the role of Mr Nilsen, holding office in the national police association when working in the Bergen police force as he did, cannot have been easy.

Under these circumstances we do not share the findings of the majority to the effect that, at the time when the Norwegian courts adjudicated on the applicants' case, there was some factual basis for their statements that false

and fabricated allegations of police brutality had been made. Both of the applicants worked inside the force in question – about which the final conclusion was that

> "the occurrence of unlawful use of force by the Bergen police force had been established ... and that, although this concerned very few police officers, the extent of the misconduct was problematic".

This conclusion, which was reached by the Oslo City Court, was based, *inter alia*, on witness statements from police officers who worked or had worked within the Bergen police force. With insider knowledge of this very police force the applicants could both at the very least – already when the statements were made in 1986 (statements 1.1 and 1.3) – have known that Professor Bratholm's allegations ought to merit a proper investigation.

Mr Nilsen's statements (statements 2.2 and 2.3) were made after the investigation of November 1986 to May 1987 ordered by the Prosecutor-General. This investigation was based on the allegations made in the material from Professor Bratholm and others, but was supplemented during the course of the investigation by additional information. A total of 368 cases were registered and some 500 persons interviewed, including 230 officers and officials from the police service. The outcome of the investigation was that:

– 264 cases were dropped as there was found to be no criminal offence;
– 45 cases were not prosecuted due to the lack of solid evidence;
– 46 cases were not prosecuted as they were time-barred;
– 12 cases were not prosecuted for other reasons;
– one case was eventually tried in court and the accused was acquitted.

Thus, a total of 104 cases turned out to be of some substance. The findings of the investigators were made public at a press conference attended by Mr Nilsen.

The applicants argued only that under the Convention the statements should be allowed as far as they had some factual basis and were not made in bad faith. We find it to be of significance that neither of the two applicants has expressly stated that he was acting in good faith when he made his statements.

At the time when Mr Nilsen made his statements, a number of informants who had alleged excessive use of force by members of the Bergen police force had already been formally reported by the latter for having given false statements.

After the investigation, 50 to 60 of the informants who had alleged police brutality were investigated for having provided false information. Of these 15 were indicted and 10 were convicted. Seven of those convicted who were given prison sentences (one a suspended prison sentence only) – they were all convicted between 2 November 1988 and 23 May 1990 – later had their cases retried by the Norwegian Supreme Court and were all acquitted on 16 January 1998. In the meantime they had already served their prison

sentences. We find this relevant to this case, in particular because it proves that Justice Bugge was right in his predictions in his concurring opinion in the Norwegian Supreme Court.

The language used in each of the impugned statements made by the applicants was, as recognised by our colleagues in the majority, *de facto* capable of affecting Professor Bratholm's reputation. Furthermore – and that we find significant to the Court's test under Article 10 of the Convention – each statement, by the very influence it could have on the reputation of Professor Bratholm, had a strong potential for denying or hampering the urgent social needs as spelled out in the provisions of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment quoted above. A potential that was demonstrated in the later "boomerang cases" – informants on police brutality actually had to serve prison sentences and wait for a decade or more to see justice done.

We share the finding of the Norwegian Supreme Court that the impugned statements were statements of fact that were capable of being proved. All five statements were, in our opinion, essentially different ways of saying that Professor Bratholm was deliberately not telling the truth. The intention with all the statements was the same, and one that does not correspond to the purpose of the police or its associations.

It seems to us that two separate cases of freedom of speech are involved in the present case. One is the freedom of speech of Professor Bratholm to publish the results of his research as to alleged police brutality in Bergen. The second is the freedom of speech of the applicants as representatives of the police force endeavouring to intimidate Professor Bratholm and to cover up any police brutality as may have occurred in Bergen. It appears clear to us that between these two conflicting freedoms the public interest lies in protecting Professor Bratholm's freedom of expression against defamation and intimidation by the police association.

Against this background we would hold that there has been no violation of Article 10 of the Convention in the present case. We find that the interference complained of by the applicants was "necessary in a democratic society", that is, the interference corresponded to a "pressing social need" and was proportionate to the legitimate aim pursued and the reasons given by the Norwegian Supreme Court are relevant and sufficient.

The contrary conclusion will in our opinion have the consequence in practice of allowing debates on matters of public concern to be suppressed by defamatory remarks and as such does not contribute to enhancing freedom of expression in the States Party to the Convention.