



DIRECTOR OF PUBLIC PROSECUTIONS

To whom it may concern

YOUR REF.:

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14488448 375/19-63

DATE:

03/05/19

DOC.NO.:

ENQUIRIES ADDRESSED TO THE NORWEGIAN DIRECTOR OF PUBLIC PROSECUTIONS CONCERNING A DECISION

Reference is made to the Director of Public Prosecutions' (DPP's) decision of 26 February 2019 in appeal case 14488448 and your subsequent letters to the DPP. We can inform you that the DPP has received several enquiries concerning this matter, and we have therefore deemed it practical to prepare one account in response to all the enquiries received.

The formal handling of the matter

The DPP is ultimately in charge of all prosecuting authorities in Norway, which means that decisions on whether or not to prosecute fall within our remit.

In Norway, decisions made by police prosecutors can be appealed to a public prosecutor, and decisions made by a public prosecutor can be appealed to the DPP. The DPP considered the matter in question on 26 February 2019. (In spite of the fact that all avenues of appeal had been exhausted – under the Norwegian Criminal Procedure Act, the appellate body's decision cannot be appealed – we considered the matter, in light of our serious concern about the issue of hate speech.) In our decision, we described how the Penal Code section 185 relating to hate speech should be understood, and that protection of freedom of speech entails that the provision will apply only to the most hateful statements, statements which are also clearly offensive. We then assessed, specifically and overall, the statements in question, emphasising aspects such as wording and context. Our conclusion was that the statements in question were not punishable. However, the DPP understands why certain NGOs, faith communities and others reacted to the statements by reporting them to the police, as witnessed by the following quote from the decision:

Over time, hate speech in Norway has increased, not least online, and it is therefore necessary to monitor this negative development closely. The police must be alert to new statements of a similar nature. There is no doubt that Jews as a group and over time have often been subjected to different negative statements, that they are a small minority in Norway and that they therefore are deserving of special protection. In this connection, the DPP would like to emphasise the importance of considering such statements in a wider context and that the police, upon receiving any future reports of anti-Semitism – hate directed against Jews – should consider obtaining expert opinions that may help shed light on the message in its true context.

The decision of the DPP is final under the provisions of the Norwegian Criminal Procedure Act and cannot be appealed.

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The comments of the Director of Public Prosecutions

Our branch of government has no tradition of discussing our decisions in public, partly out of a concern to maintain the presumption of innocence and to avoid the risk of arguing a case before it comes to trial. Therefore, we will not elaborate any further on the content and deliberations of the matter in question, with the exception of one important clarification:

The following is quoted from the decision:

However, when the DPP concludes that the said statement is not punishable, this is partly due to the fact that the statement could be considered inherently ambiguous. It is seemingly directed at Jews, but may also be said to address the state of Israel and discontent with its policies. Moreover, the statement was retracted shortly after it was pronounced, and this must be taken into account.

The intention of the above was to point out that the statements in the matter in question had a form and a context which could allow for some interpretive doubt. In general, all doubt should benefit the suspect in an assessment of criminal liability, and the burden of proof rests with the prosecuting authority. We were aware that the suspect could adopt such a strategy if the matter came to trial. As an illustration of the potential interpretive doubt, we used the example of Israel. In retrospect, we realise that this was not a good choice. The DPP emphasises that this was in no way decisive for the decision and that the Director is very well aware that the Jews as a group should not be identified with policies of the state of Israel. It is regrettable if our comments gave cause to conclude otherwise.

Freedom of speech is, as we have pointed out, strongly protected in Norway, and Norwegian courts have (rightly) placed decisive emphasis not just on the statements themselves, but also on the context in which they are made. The penal provision is aimed at clearly offensive statements. However, this is a legal area undergoing rapid developments, and it is important that the prosecuting authority selects the right cases for prosecution in order to determine the limits of criminal liability. Our assessment is, as stated, that this case would not have been conducive to such clarification.

The DPP hopes that this reply can help correct the somewhat incomplete impression of the substance of the decision and its material content that has arisen in the public sphere, and that those affected as well as others with a stake in the issue can retain their confidence in the Norwegian legal process. The enquiries we have received and a copy of this account will be filed with the case documents.

Meeting

For your information, those affected, represented by the Norwegian Jewish community organisation Det Mosaiske Trossamfund and the Norwegian Centre Against Racism, have been invited to a meeting with the DPP in May. We are looking forward to a *general* discussion of the prosecuting authority's and the courts' handling of cases involving hate speech. This is an issue that has preoccupied the Director of Public Prosecutions for several years, and the undersigned has argued several such cases before the full Supreme Court.

Tor-Aksel Busch

Reidar Bruusgaard
Public Prosecutor