



SUPREME COURT OF NORWAY

O R D E R

issued on 2 November 2022 by a division the Supreme Court composed of

Chief Justice Toril Marie Øie
Justice Ragnhild Noer
Justice Henrik Bull
Justice Espen Bergh
Justice Cecilie Østensen Berglund

HR-2022-2106-A, (case no. 22-059426STR-HRET)
Appeal against Borgarting Court of Appeal's decision of 21 February 2022

Indie Film AS

(Counsel Jon Wessel-Aas)

The Association of Norwegian Editors
(intervener)

(Counsel Halvor Manshaus)

A

(Counsel John Christian Elden)

v.

The State represented by
the Ministry of Justice and Public Security)

(Counsel Lisa-Mari Moen Jünge)

(1) Justice **Bull:**

Issues and background

- (2) The case concerns a film company's possibility to use a private audio recording from criminal court proceedings in a TV documentary.
- (3) In February 2022, the production company Indie Film AS applied for Borgarting Court of Appeal's permission to publish parts of an audio recording from a criminal case heard in the Court of Appeal in December 2016. The recording had been made in secret by a person present in the courtroom. Indie Film got access to the recording at a later stage.
- (4) The criminal case concerned bodily harm inflicted on a woman in August 2014. The hearing in the Court of Appeal was open to the public, and there were no reporting restrictions. On 15 December 2016, the defendant was sentenced to seven months of imprisonment. The Supreme Court did not grant leave to appeal. He had been convicted of bodily harm also in the District Court.
- (5) As I understand, the defendant is still protesting his innocence. It has been established that, on the evening in question, he was stabbed by the aggrieved party's husband. The married couple is from the United States and had come to visit the defendant's home. Initially, the police opened two cases, one against the defendant for bodily harm and one against the aggrieved party's husband for attempted homicide. The case against the husband was later dropped by the prosecution authority on the grounds of self-defence. During the proceedings, the husband appeared as a witness.
- (6) Indie Film is producing a documentary series for TV2 – "The CEO" – depicting the events. The company wishes to use the recording of the statements of the defendant and his counsel in the series. Both of them have consented to this.
- (7) In its application to Borgarting Court of Appeal 8 February 2022, Indie Film states that "[t]he film raises critical issues related to due process". It also points out that "[t]he Oslo police refused to send assistance during the initial phase of the incidents", and that the documentary series "addresses topics of importance to the general perception of justice, particularly related to the ability of law enforcement to protect people's safety". The company argues that "[t]he validity of our communication is weakened if we may not use such extracts". In other inquiries to the Court of Appeal, Indie Film stated more generally that "in particular, [t]he conduct of the police and the prosecution authority is dealt with". In an e-mail of 18 February 2022, the need to use recordings of the defendant and his counsel is elaborated as follows:
- "Our format is that of the documentary. We are completely dependent on communicating in a way that establishes closeness to the events to create understanding of the topic. This is different from a written medium. Our way of communicating is inextricably tied to storytelling by use of documentary material. A 'writing journalist' would easily be able to report through text what we are now seeking to publish by use of sound. We do not intend to use much of this, only a few extracts to create closeness to and a sense of being present in the situation in the courtroom."
- (8) It appears from the e-mail of 18 February 2022 that, ideally, Indie Film also would have like to use extracts of the prosecutor's closing statement, but feared that a rejection from him "would imply a 'no' to all of it". The company has stated that "we will find other ways of

telling the story to create a balance between the parties to the case, since we may not use extracts from his closing statement.”

- (9) Before the Court of Appeal, the prosecutor has argued that special factors speak against permitting the use of the recording. In his view, it is important that also the aggrieved party and her husband’s “side of the story comes to light in the documentary”. Based on information from Indie Film, his impression was that the documentary “for all practical purposes will constitute a plea by the defendant”.
- (10) The counsel for the aggrieved party stated before the Court of Appeal that he had no contact with his client and therefore did not know her stance. He would therefore formally neither oppose nor accept the use of the recording, but expressed that he considered it “problematic”.
- (11) On 21 February 2022, Borgarting Court of Appeal decided not to permit publication of the recording. The Court stated that although “private” audio recordings in the courtroom did not need the court’s permission, the publication thereof did under section 131a of the Courts of Justice Act. The Court found that there were no “special grounds” for publication, as required under the same section 131a. In the Court of Appeal’s view, the interests of the aggrieved party and her husband required that permission should not be granted.
- (12) Indie Film has appealed against the Court of Appeal’s ruling to the Supreme Court. The appeal challenges the application of the law, both the general interpretation and the individual application thereof.
- (13) The Association of Norwegian Editors has intervened in favour of Indie Film, see section 15-7 of the Dispute Act, which applies analogically in criminal proceedings, see the Supreme Court ruling in Rt-2010-1150. The Supreme Court’s Appeals Selection Committee permitted the intervention in a decision of 19 July 2022.
- (14) The documentary premiered on TV2 in August this year. Pending a ruling in the case at hand, Indie Film is using actors imitating what is being said on the audio recording.
- (15) The case has no counterparty, but the State represented by the Ministry of Justice and Public Security has acted as respondent to safeguard the interests of the public.

The contentions of the parties, the intervener and the State

- (16) *Indie Film AS* contends that the Court of Appeal has interpreted the law incorrectly when finding that permission to publish the recording is required under section 131a of the Courts of Justice Act. The refusal lacks a legal basis and is therefore contrary to Article 10 (2) of the European Convention of Human Rights – ECHR – on the conditions for interference with the freedom of expression and with Article 113 of the Constitution on the requirement of a basis in law for restrictions on the freedom of action of individuals.
- (17) In the alternative, Indie Film contends that the Court of Appeal has applied section 131a of the Courts of Justice Act incorrectly when finding that the conditions for publication are not met. The refusal is also contrary to Article 10 of the ECHR.

- (18) Indie Film AS asks that Borgarting Court of Appeal's decision 21 February 2022 be set aside, in the alternative that the company be permitted to publish the recording of the defendant and his counsel in the criminal case. The company also asks that the State represented by the Ministry of Justice and Public Security be ordered to compensate the company's costs.
- (19) *A*, the defendant in the criminal case, is also a party to the case concerning the publication of the recording. As Indie Film, he contends that there is no legal basis for refusing publication of the recording and that such refusal in any case is contrary to Article 10 of the ECHR. *A* also asks that the Court of Appeal's decision be set aside, in the alternative that Indie Film be permitted to publish the recording of him and his counsel.
- (20) *The Association of Norwegian Editors* supports Indie Film's view. The Association stresses that the Court of Appeal's refusal constitutes precensorship, and that a refusal to publish such a recording will have a "cooling effect" on the media's possibility to investigate activities carried out in the administration of justice and convey this to the public in an effective manner. The Association of Norwegian Editors claims costs in the Supreme Court.
- (21) *The State represented by the Ministry of Justice and Public Security* contends that section 131a of the Courts of Justice Act gives the necessary legal basis for refusing publication of the recording. The Court of Appeal's refusal is in accordance with the provision's requirements. Nor is the refusal contrary Article 10 of the ECHR or Article 100 of the Constitution on the freedom of expression. The State has not asked for a specific ruling in the case.

My opinion

The Supreme Court's jurisdiction

- (22) The case concerns an appeal against a decision by the Court of Appeal. The Supreme Court therefore has full jurisdiction to review the appeal. More specifically, the appeal concerns the publication of an audio recording in a criminal case. This give rise to the question whether the Supreme Court's jurisdiction therefore is limited by section 377 of the Criminal Procedure Act, where – following an amendment effective from 1 July 2022 – the following is set out in subsection 2:

“An procedural order or decision, which according to law requires an assessment of what is appropriate and necessary for the proper conduct of the case may, as far as the discretionary assessment is concerned, only be appealed on the grounds that the ruling is unsound or clearly unreasonable.”

- (23) The provision is justified by considerations of active case management by the judge in charge of the case, see Proposition to the Storting 146 L (2020–2021) page 91. Its purpose is to contribute to effective proceedings. When, as in this case, one is to review a decision made by the Court of Appeal after final judgment in the case has been given, the considerations behind the provision do not apply. If the lower instance still has a better basis for ruling than the appellate instance, typically due to closer proximity to the actual criminal case, this may be compensated by the appellate instance exercising a certain restraint in its review.
- (24) In my view, the Supreme Court has full jurisdiction in the case.

General remarks on transparency in the administration of justice

- (25) It is set out in Article 95 subsection 1 second sentence of the Constitution that legal proceedings shall be public. A similar principle is expressed in Article 6 (1) of the ECHR. The principle of public proceedings safeguards the rule of law by allowing the public to control that due process is observed in the individual case. More generally, the principle contributes to strengthening the rule of law, as well as freedom of expression and democracy, by providing a basis for public debate on the legal system and legislation. A consequence of this is thus the right to report to the public what is expressed during a hearing and in judicial rulings, see section 124 subsection 1 of the Courts of Justice Act.
- (26) The importance for the rule of law of the media's reporting of criminal proceedings was at issue in the Council of Europe Recommendation (2003)13 of 10 July 2003 "on the provision of information through the media in relation to criminal proceedings". In *Dupuis and Others v. France*, judgment 7 June 2007, paragraph 42, and in *Pinto Coelho v. Portugal (No. 2)*, judgment 22 March 2016, paragraph 43, the European Court of Human Rights – ECtHR – stresses the importance of the press for the rule of law and refers to the Recommendation.
- (27) However, it follows from Article 95 of the Constitution and Article 6 (1) of the ECHR that the principle of transparency in the administration of justice does not apply without exceptions. Strong privacy considerations and other important considerations in democratic states governed by the rule of law imply that certain hearings are held behind closed doors, or that a ban on reporting is imposed. The right to respect for private life, protected by Article 102 of the Constitution and Article 8 of the ECHR, may necessitate a balancing of conflicting fundamental rights.
- (28) Public reporting from legal proceedings may take various forms. The traditional form is to report in writing after the actual hearing. The use of audio and image recordings from the hearing often has a stronger effect – as Indie Film argues in its application to the Court of Appeal. The use of such recordings may therefore more easily than other means of communication conflict with privacy or other legitimate considerations.
- (29) It follows from *Pinto Coelho v. Portugal (No. 2)* that Article 10 of the ECHR on the freedom of expression does not confer an general right to publish recordings from court proceedings, including after the case has been concluded. True, Portugal was found to have violated Article 10 by having refused such use after a specific case, but that was because no convincing reasons for the refusal had been provided. However, the judgment demonstrates that Article 10 of the ECHR, also, may entail a duty to permit publication of recordings from a criminal case. I will return to this.
- (30) I mention in this regard that item 14 of the Council of Europe's Recommendation (2003)13 reads:
- “Live reporting or recordings by the media in court rooms should not be possible unless and as far as expressly permitted by law or the competent judicial authorities. Such reporting should be authorized only where it does not bear a serious risk of undue influence on victims, witnesses, parties to criminal proceedings, juries or judges.”
- (31) In other words, open doors and the right to report from criminal cases do not necessarily entail a right to make audio and image recordings from the hearing or to pass on such recordings. The starting point is rather the opposite.

- (32) The Recommendation mentions the risk of “undue influence” on witnesses and parties. The fear that recordings might be published may affect how freely and detailed witnesses and parties dare to express themselves, and thus how well the case is clarified. This applies even if the publication does not take place until after the criminal case is concluded.
- (33) Often, there will be a link between the individual’s need of privacy and the “undue influence” that fear related to how recordings may be used, may have on the person giving testimony, and thus on the proceedings.
- (34) In this regard, private recordings, particularly those made in secret, are in a different position than recordings made by the court itself. Firstly, when the court is responsible for the recording, as was the case in *Pinto Coelho (No. 2)*, it is clear to everyone that recordings are made. Secondly, the use and particularly the publication of such recordings are often subject to strict limitations. To the extent Norwegian courts make audio and image recordings in criminal cases, the lending thereof after the case is concluded is regulated by Regulations of 28 September 2018 no. 1471 on recordings in court. Section 4 subsection 4 of the Regulations refers to chapter 27 of the Police Database Regulations. According to 27-2 of the latter, lending may only take place if the applicant has a justifiable reason. Applicants other than advocates and insurance companies “should normally only be allowed a controlled inspection” – which in this context must mean controlled listening. In other words, no one is automatically entitled to borrow such recordings for use in radio- and TV programmes. As mentioned, Article 10 of the ECHR may nonetheless be relevant here. The Supreme Court said as much in Rt-2013-374 concerning the court’s audio recordings in the Treholt case.

Does the use of audio recordings from criminal cases on radio or TV require the court’s permission even if the recording was not made for such use?

The issue

- (35) Section 131a of the Courts of Justice Act regulates photographing and audio and image recording in Norwegian courtrooms. The first three subsections of the provision are relevant to this case. They read:

“Photographing, filming and recording for radio or television are prohibited during criminal proceedings. Photographing or filming the defendant or the convicted party en route to or from the hearing, or in the building in which the hearing is being held, is also forbidden without that party’s consent.

Where special grounds allow, the court may, during the main proceedings, make an exception to the ban, where it cannot be deemed to have a detrimental effect on the conducting of proceedings, and where no other factors are present which may be deemed potentially detrimental. The parties shall have the opportunity to comment before permission is granted.

The King may provide more detailed regulations pertaining to satisfying and implementing these provisions.”

- (36) This case deals with neither photographing, filming nor recording initially made “for radio or television”. The question is thus whether the provision must be interpreted to mean that the recording is still covered if – as in this case – only later it becomes relevant to use in radio or

TV. In practice, the question is whether such use requires permission under section 131a subsection 2.

The relationship between section 131a and the penal provision in section 198 subsection 3 of the Courts of Justice Act, and the legality principle

- (37) Since the need for permission constitutes an infringement against the citizens, such an interpretation of the provision must comply with the legality principle, which is currently laid down in Article 113 of the Constitution. In Rt-2014-1281 paragraph 48 and later in HR-2020-1967-A paragraph 37 the legality principle is described as follows:

“The legality principle is generally applicable where the authorities interfere with the rights of the individual, as such interference requires a basis in law, see Article 113 of the Constitution. This implies that the wording is essential to the interpretation. However, any interpretive doubt must be solved based on what best follows from a balancing of all sources of law and what ensures sufficient clarity and predictability for the citizens.”

- (38) In the area of criminal law, the requirement of a legal basis is stricter, see Article 96 of the Constitution. Section 198 subsection 3 of the Courts of Justice Act contains a penal provision on violation of section 131a. This provision reads:

“Fines will be incurred also by any party photographing or making recordings in violation of the regulations contained in section 131a, or who publishes a photograph or a recording that was taken or made in violation of these regulations.”

- (39) In my view may, the legal basis requirement in criminal law cannot be decisive for the interpretation of section 131a, considered in isolation. If, in a criminal case, it should turn out that an interpretation of a ban that meets the ordinary requirement for a legal basis does not meet the stricter requirement for a legal basis in criminal law, the consequence must be that a violation of the relevant part of the provision does not give rise to criminal liability. However, this does not mean that this part of the ban does not apply.
- (40) Although the possibility to sanction possible violations is lost, the ban will not be without an effect. Most people comply with prohibitions, whether or not they are sanctioned.
- (41) With regard to section 131a of the Courts of Justice Act in particular, I also note that in a potential case on compensation for libel, see section 3-6a of the Compensatory Damages Act and section 8 of the Media Liability Act, it may be relevant whether a libellous statement has been published contrary to a ban on the use of recordings from a criminal case.

The interpretation of section 131a of the Courts of Justice Act

- (42) In a ruling by the Supreme Court’s Appeals Selection Committee, see Rt-2012-380 paragraph 15, it concluded that section 131a of the Courts of Justice Act does not cover the actual act of recording when, at the time of the act, there were no plans for using the recording on radio or TV. However, the question now is whether section 131a must be interpreted to mean that permission is nonetheless required for possible use on radio or TV *later*.

- (43) The ban is aimed at “photographing, filming and recording for radio and television”. A main objective is to prevent disturbance of the proceedings. However, considering the wording in context, a natural interpretation would be that it also intended to prevent images and sound from being spread without the court’s permission. Although both the ban in subsection 1 and the exceptions under subsection 2 are aimed at the act of recording, the possibility to prevent publication of the recording also appears to be a central consideration behind the provision.
- (44) Section 131a subsection 1 second sentence clearly shows that the ban is not only meant to prevent that the proceedings are disturbed by the act of recording. The provision extends the ban to include image recording of the defendant or the convicted person without his consent en route to or from the hearing and during his presence in the court building. This is clearly for the protection of the person’s privacy. The key factor then is, exactly, the risk of spread of the image recordings. The privacy violation that the publication itself may entail is not reduced by the fact there initially were no plans to publish the recording. The same privacy considerations apply to recording during the actual hearing – the need to avoid disturbance of the proceedings is a consideration on top of that.
- (45) Furthermore, “photographing” and “filming” are prohibited already by subsection 1 first sentence, without there being any requirement of publication purposes. One may hold that photographing and filming generally have a more aggressive effect than an audio recording, but also here, the privacy considerations manifest themselves in earnest only when the recording is spread. An audio recording may also give a very intimate portrait of the person speaking. Testimonies in court often relate to circumstances that are emotionally difficult to talk about.
- (46) Section 131a of the Courts of Justice Act was adopted in 1981. The wording alone shows that the provision is created based on the technology available at the time. As for the issue at hand, it is essential that modern mobile phones have made it much easier to make good audio recordings in secret than what the case in 1981. In addition, the internet and social media have made it easier to spread such recordings further.
- (47) This brings me to the preparatory works to the provision.
- (48) The implementation of the ban in section 131a of the Courts Act was first discussed by the Standing Committee on Criminal Procedure in Norwegian Official Report 1969: 3 on the new Criminal Procedure Act. Referring to German law, the Committee pointed out on page 378, that the fear of an unlimited and invisible circle of listeners or viewers might prevent the defendant and counsel from expressing themselves the way an effective defense would require, and that witnesses and experts might feel inhibited from speaking freely. The defendant might also “be exposed to the public spotlight in an unbearable way”. Although these factors related to “broadcast recordings and other audio and film recordings intended for publication”, the point is the effect of the spread to the public, not the manner in which it occurs.
- (49) I note here that the fear pointed out by the Committee also manifests itself upon publication after the case is concluded. Then, also another consideration emerges: The defendant as well as the aggrieved party and the witnesses should be able to put the case behind them and move on in life.

- (50) The implementation of section 131a of the Courts of Justice Act was proposed in Proposition to the Odelsting no. 35 (1978–1979). On page 246, the Ministry discusses the idea launched by the National Association of Senior Police Officers that a ban should also apply to “private audio recordings during the hearing”. The argument was that in certain cases, “recordings had taken place on a large scale without the judge being able to prevent audio-recordings from the hearing”. In the Association’s view, “this presumably entails risk of misuse and may be detrimental to the proceedings”. The Ministry went against the idea, stating that if audio recording disturbed the proceedings or impugned the dignity of the court, the court could ban it in accordance with section 133 of the Courts of Justice Act. The Ministry stated:
- “On the other hand, a general ban on private audio recordings from the proceedings is probably not necessary. Where there is reason to fear that that such recordings might be misused, the necessary conditions for banning the recording will in all likelihood be fulfilled.”
- (51) In other words, the reason for rejecting the idea of including “private” audio recordings in section 131a was not that it was deemed acceptable to publish such recordings without the court’s permission, but that in practice it would always be possible to prohibit the recording altogether under section 133 if there was a risk of “misuse”. The precondition here must be the use of older recording equipment – tape recorders – easily detected from the judges’ bench. As mentioned, the situation is different today.
- (52) Neither the National Association of Senior Police Officers nor the Ministry specified what would constitute “misuse”. However, considering the arguments for banning recording for radio or TV, it is natural to imagine that it at least included radio or TV broadcasting – or publication via other current media platforms – without the court’s permission.
- (53) It is possible under section 133 of the Courts of Justice Act to impose a ban on audio recording, for instance if it disturbs the proceedings. If there is a risk that the recording has a negative effect on how the defendant, witnesses and others express themselves in court, this condition will normally be met. As mentioned, the recording may have this effect, even if it is unclear whether it was made for publication purposes – in the current media reality, one can never rule out that it may take place nonetheless. If section 131a is interpreted such that the only way to prevent publication is to issue a recording ban in accordance with section 133, the result may be that such bans are issued more often. Particularly counsel for the aggrieved party might request a ban in many cases. Moreover, the risk of recordings being made in secret and then freely published, could lead to increased demand for behind-closed-doors hearings or reporting bans.
- (54) The new media reality also entails an increased risk of circumvention. A person who, some decades ago, appeared in a courtroom with recording equipment suitable for radio or TV, would have to argue well indeed to be believed that the purpose was not to broadcast the recording. However, in a time where mobile phones are in everyone’s hands, the court will have less reason to assume that a recording by phone is made with the purpose of radio or TV broadcasting if the owner denies having had such an incentive. The practical result of that is there would not be much left of the ban on recording “for radio or television” in section 131a.
- (55) Against this background, I find that section 131a of the Courts of Justice Act must be interpreted such that the use of recordings from criminal cases on radio or TV requires the court’s permission even if the recording initially was not made for broadcasting purposes. I find that this interpretation complies with the legality principle as it applies in this case. Nor

may such a system in itself conflict with Article 10 of the ECHR. Another aspect is that this provision may dictate when permission should be granted.

Should permission be granted under section 131a subsection 2?

- (56) The question then becomes whether Indie Film should be permitted to use the particular parts of the recording that it seeks to use.
- (57) Section 131a subsection 2 of the Courts of Justice Act requires “special grounds” for making an exception from the ban in subsection 1. An exception must also not be deemed to have a detrimental effect on the conducting of proceedings, but that is not relevant in this case. Finally, no other potentially detrimental factors may be present. The parties must have the opportunity to comment before permission is granted.
- (58) In other words, it is the permission, and not the a rejection to grant permission, that requires “special grounds”. Regulations 5 November 1985 no. 1910, given in accordance with section 131a of the Courts of Justice Act, provide further rules on photographing and recording. It is set out in section 3 that the court “may permit photographing or recording during the main hearing” including if “the case is of significant public interest” or if “other” special grounds are present. Indie Film has pointed out the large public interest in the case while it was pending. I agree that this suggests that permission should be granted.
- (59) Although significant public interest thus may constitute “special grounds” in itself, other considerations, such as privacy interests, may point decisively in the opposite direction.
- (60) Indie Film and The Association of Norwegian Editors contend that the Court of Appeal’s rejection interferes with the freedom of expression as set out in Article 10 of the ECHR. Article 10 (2) allows for an exception if it has a legal basis and is necessary in a democratic society, among other things for the protection of the reputation or rights of others or for maintaining the authority and impartiality of the judiciary.
- (61) As mentioned, I believe that a requirement of permission to publish has the necessary legal basis. It is also clear that the considerations behind this, privacy and the protection of the courts’ need for as much clarification of the facts of the case as possible, are legitimate bases for limiting the freedom of expression. Then, the decisive factor becomes the proportionality assessment specific to this case– the determination of whether the limitation is necessary in a democratic society.
- (62) As I have already mentioned, the use of audio recordings from a criminal case was dealt with by the ECtHR in *Pinto Coelho v. Portugal (No. 2)*. A person from Cape Verde had been given a long prison sentence for stealing a mobile phone. A journalist wrote an article on the case where she tried to demonstrate that the evidence was not sufficient for conviction. In the article, she used parts of the courts’ own recordings without having obtained the court’s permission. When the recording aired, the voices of the judges and the witnesses had been made unrecognisable. The journalist was sentenced to a fine of EUR 1 500 for having published the recordings without permission. The Portuguese Constitutional Court dismissed an appeal from the journalist, arguing that the general purpose of the permission requirement was to protect the administration of justice and the right of the witness to control his own statements.

- (63) The ECtHR took as its starting point that the journalist's right to inform the public and the public's right to information conflicted with the witnesses' right to privacy and the protection of the authority of the judiciary. However, the ECtHR missed an assessment of whether the protection of the administration of justice in this case suggested that the recording should not have been published, since the criminal case was already concluded when the publication took place. As for the protection of the right to control own statements, the ECtHR held that the hearing had been public, that the witnesses had not exercised their right under Portuguese law to claim compensation after the news report had aired, and that the voices had been made unrecognisable. Against this background, the ECtHR found that the State had not sufficiently justified the limitation on the journalist's freedom of expression in the light of Article 10 (2).
- (64) As mentioned, the case shows that, under the circumstances, it may be contrary to Article 10 (2) of the ECHR to prohibit the press from publishing recordings from criminal proceedings. However, the judgment must also be read to mean that it is possible to refuse such use in order to protect the privacy of the parties involved and the function of the judiciary if, in the individual case, it may be justified as proportionate interference with the freedom of expression.
- (65) In this case, the applicants wish to use the recording in a documentary on a specific criminal case to shed a critical light on the conduct of the police and the prosecution authority. This is at the core of the social responsibility of the press and clearly suggests that permission should be granted. In addition, it involves a criminal case that drew a lot of media attention at the time.
- (66) As mentioned, the criminal case was concluded a long time ago, and publication may not have a negative effect of its outcome. Thus, in this particular case, privacy considerations are what primarily advise against permitting the use of the audio recording from the hearing.
- (67) Like in *Pinto Coelho v. Portugal ((2))*, the hearing of the case was open to the public, and any statement made may be reported freely and word for word. The question is whether this may be done by playing original recordings from the courtroom.
- (68) In the case at hand, the two people heard on the relevant extracts have consented to the use. If privacy considerations had applied to these two only, "special grounds" for permitting publication would have been present due to the social responsibility of the press.
- (69) However, that is not the situation in the case at hand. The Court of Appeal stated in its decision that it appears from the Court's judgment in the criminal case – where, incidentally, the same judge sat on the panel – that the convicted person accused the aggrieved party and her husband of having threatened to kill him, of which the Court of Appeal found no evidence when determining guilt. It has not been held before the Supreme Court that the Court of Appeal has erred with regard to the content of the extracts Indie Film wishes to use.
- (70) The Court of Appeal then gave this reason for its rejection:
- “In the Court of Appeal's view, there are circumstances here suggesting that the recording should not be allowed to be published. Counsel for the aggrieved party does not have contact with the aggrieved party who lives in a different country, and her consent has therefore not been obtained. The case also involved her husband to a great extent, who had previously been indicted and gave evidence as a witness. Nor is it possible to obtain his consent at this point.

When consent from the aggrieved party is not present, and the convicted person's statement largely concerns her and her husband, the Court has concluded that publication of the recording should not be permitted. The interests of the aggrieved party and her husband suggest this. Also, there are no special grounds for making an exception, see section 131a of the Courts of Justice Act."

- (71) In other words, this case emphasises the privacy protection of the persons to whom the convicted person and – presumably – his defence counsel refer in the audio recording. Accusations of death threats are made against them. It is thus of little consequence that the accusers have consented to publication. It must be assumed that the aggrieved party and her husband would not have consented if it had been possible to contact them.
- (72) It is true that the convicted person's statement under any circumstances may be cited in the documentary. Indie Film has therefore argued in its application that the use of original sound from the proceedings adds "validity" and "closeness", and that this is vital in documentaries.
- (73) As the ECtHR notes in *Pinto Coelho v. Portugal ((2))* paragraph 46, Article 10 does not only protect the content of what is expressed, but also the manner in which it is expressed. Given that a permission system for the use of audio recording in itself is not in conflict with Article 10 of the ECHR, the judiciary must nonetheless, after an individual assessment based on Article 10 (2), be able to emphasise privacy, even if it conflicts with the film makers' editorial preferences.
- (74) As I see it, it must be emphasised that permission in this case implies that highly libellous accusations against persons who have not consented to the use, will make a stronger impression on the viewers than alternative presentation of their statements. In a privacy perspective, the use of the original recording is more problematic than other types of reporting.
- (75) It would be problematic in the light of the presumption of evidence if the courts were to contribute to accusations against specific persons of serious criminal acts for which the criminal justice system found no basis, being presented in a manner that gives them more "validity" and "closeness". This is a crucial factor in my opinion. Very few of those who watch the relevant documentary will read the judgment in the criminal case, which means that the public will only be left with the impression given by the documentary.
- (76) The convicted person has argued that the aggrieved party and her husband themselves used the media while the case was pending, and that this suggests that publication of his recorded statements in the Court of Appeal should be permitted. As this case stands, this does not weaken the need to protect of the couple's privacy. A newspaper interview with the aggrieved party has been presented, made while her husband was still on remand charged with attempted homicide, as well as a newspaper interview with the husband after the prosecution authority had dismissed the case against him. Some other newspaper articles have also been presented referring to the aggrieved party by her first name, and where in one of them a statement is cited from her earlier interview together with a photograph of her from that article. In my opinion, the media reports from that time do not weaken the husband's legitimate interest in avoiding renewed attention several years later regarding the accusations against them.
- (77) This also implies that the aggrieved party and her husband are not served by being given a chance to respond in the documentary, as exactly that would force them to rehash the events.

- (78) Furthermore, a proportionality assessment must take into account the extent to which the freedom of expression in fact will be violated. Refusing the use of original sound appears to be less of an interference than refusing any reporting of what was said.
- (79) The intervener, the Association of Norwegian Editors, contends that a refusal will have a chilling effect on the press's possibility to effectively scrutinise the administration of justice and communicate its findings to the public. However, a refusal in this case does not prevent the press from reporting statements, or permission from being granted to use the recording if the person heard on the recording consents to it and strong privacy considerations do not suggest otherwise. Therefore, I have difficulty believing that a refusal in this case will have much significance for the press's ability and will to scrutinise the administration of justice.
- (80) The Association of Norwegian Editors also contends that a refusal will constitute precensorship contrary to Article 10 of the ECHR and Article 100 of the Constitution. However, it is not a question of prohibiting reporting of statements made in court, but of refusing permission to report them by use of audio recordings. In my opinion, a system where such use requires the court's permission, which may be withheld when strong privacy considerations and considerations of the court's function so suggest, cannot be characterised as precensorship in conflict with the provisions invoked. Nor can I see that Article 100 of the Constitution in this case prescribes a wider duty for the judiciary to permit the use of audio recordings than the ECHR, and I will therefore not elaborate on the application of the Constitution.
- (81) Against this background, neither Article 10 of the ECHR nor Article 100 of the Constitution confer a right on Indie Film to use the audio recording from the relevant criminal case.
- (82) Also, due to the privacy considerations that I have presented, no "special grounds" are present under section 131a of the Courts of Justice Act subsection 2 for permitting publication.

Conclusion

- (83) Against this background, I find that the appeal must be dismissed, which means that I do not need to consider the award of costs.
- (84) I vote for the following

O R D E R :

The appeal is dismissed.

- (85) **Justice Østensen Berglund:**

Dissent

- (86) As for the interpretation of the law on a general level, I support Justice Bull's outline in all material respects. I agree that section 131a of the Courts of Justice Act must be interpreted to

mean that the use of recordings from criminal cases on the radio or on TV is subject to the court's permission, even if the recording initially was not made with that aim.

- (87) In this case, however, it is my view that permission should be granted under section 131a subsection 2.
- (88) I therefore find that the appeal must succeed.
- (89) In my individual balancing of interests, I give more weight to the central role of the press as a watchdog of institutions and persons exercising public authority, including the courts and other participants in the administration of justice, see the *Treholt* order paragraph 50. The reason for the application is that the recording is wanted in a documentary to shed a critical light on the police's and the prosecution authority's work. As pointed out by Justice Bull, this is at the core of the press's social mission. The case received much media attention both during the investigation and during the proceedings, and the persons whose recorded statements Indie Film wishes to use, have consented to publication.
- (90) Although according to the wording of the Act, it is permission, and not rejection, that requires "special grounds", I believe in the case at hand that this condition should be practised more liberally to best respect the weighty considerations forming the basis for Article 10 of the ECHR, see Justice Bull's presentation thereof. As I perceive it, such an interpretation will also be in accordance with present case law.
- (91) In my view, it is essential that, here, the recordings in question are of persons who themselves have consented to the publication. I therefore do not consider it a weighty argument that the playing of an authentic recording will make a stronger impression than other ways of reporting the statements.
- (92) When assessing whether permission should be refused due to privacy considerations, due regard must be had to the fact that both the aggrieved party and her husband gave interviews while the case was pending. Accusations made in court and that will be heard on the audio recording, have previously been reported to the public, including in this context. Although this dates along way back, I believe it carries a certain weight.
- (93) I find that the presumption of innocence has been safeguarded through the reasoning of the judgment in the criminal case, where it is apparent that the court did not believe the accusations made by the convicted person.
- (94) Decisive to me in this case is that the judiciary should be careful about overturning the professional assessments of the press. The way I read the Court of Appeal's reasoning, it carries out the editorial assessment ascribed to the press. It is the press's responsibility to ensure a balanced presentation, give counterparties a chance to respond etc., which was also described by Indie Film in its application. Although I understand that the aggrieved party and her husband may perceive the documentary as incriminating, I believe that the conditions for granting permission under section 131a subsection 2 of the Courts of Justice Act are met.
- (95) As I am outvoted, there is no reason for me, to consider whether there may be a basis for awarding costs to the appellants or the intervener in spite of the case having been heard under criminal procedure rules.

- (96) Against this background, I find that Indie Film AS should be given permission to publish an audio recording of the convicted person and his defence counsel in case 16-024246AST-BORG/01.
- (97) Justice **Bergh:** I agree with Justice Østensen Berglund in all material respects and with her conclusion.
- (98) Justice **Noer:** I agree with Justice Bull in all material respects and with his conclusion.
- (99) Chief Justice **Øie:** Likewise.
- (100) Following the voting, the Supreme Court issued this

O R D E R :

The appeal is dismissed.