

NEO-NAZISM, HOLOCAUST DENIAL AND UK LAW

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Abstract

Recently two neo-Nazis were tried in Leeds Crown Court for disseminating material which incited Jew-hatred. This case was particularly important since its outcome determined whether Jews are protected under the Public Order Act of 1986.

About a year ago I was sitting in my office when the telephone rang. A soft female voice asked for Professor Cohn-Sherbok. 'This is the Counter Terrorism Division of the Crown Prosecution Service,' she said. I had a tremor of fear. Were the police after me? Was I to go to prison? 'I'm sorry to bother you,' the caller continued, 'but I've been asked if you might consider being an expert witness at the Leeds Crown Court. There is to be a major trial of two individuals, Simon Sheppard and Stephen Whittle (known also as Luke O'Farrell) who have been arrested for disseminating material which incites racial hatred, including attacks on the Jewish community. Counsel has asked if you would be prepared to assist the prosecution.' The prosecution barrister for the case was to be Jonathan Sandiford, based in Leeds. Adrian Davies, a London barrister who defended David Irving in a previous trial, would be acting for the defence. [Subsequently I learned that the Attorney General was particularly interested in the outcome of the trial since it would determine whether Jews are protected under the Public Order Act of 1986.]

Initially I was not instructed to comment on the character of the anti-Semitic material involved in the case. Instead, the CPS wanted me to address the question of whether Jews are a religious or an ethnic group. This was to be a key issue in the trial since if the Jewish community is simply a religious group, the defendants could not be prosecuted. Currently, there is no law which protects religious groups from the publication and distribution of material which incites hatred. However, if Jews constitute an ethnic group, the dissemination of anti-Semitic literature would be a criminal offence under the 1986 Public Order Act.

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Unsure of the definition of an ethnic group, I contacted the CPS lawyers who sent me a copy of a previous case in the House of Lords regarding the Sikh Community: *Mandla and another (Appellants) vs. Lee and others (Respondents)*. In 1978 a Sikh, Sewa Singh Mandla, wished to enrol his son in Park Grove School in Birmingham. He explained that he wished his son to grow up as an orthodox Sikh and thus had to wear a turban. However, the headmaster said that wearing a turban would be against the school rules, which required all pupils to wear school uniform. The father then complained to the Commission for Racial Equality, and argued that the school had discriminated against his son on racial grounds. The Commission took up the case. In the county court the judge argued that the Sikhs were not a racial group, and therefore no discrimination had taken place. The Commission then appealed to the Court of Appeal which agreed with the view taken by the county court. Dissatisfied with this judgement, the Commission appealed to the House of Lords.

In a lengthy judgement given in March 1983 Lord Fraser of Tallybelton pointed out that the 1976 Race Relations Act defines a racial group as follows: “‘Racial’ group means a group of persons defined by reference to colour, race, nationality or ethnic or national origins’. The Sikhs, he went on, are not a group defined by reference to colour, race, nationality or national origins. In these respects, he said, they are not distinguishable from many other groups, especially those living, like most Sikhs, in the Punjab. The argument turns entirely upon whether they are a group defined by ‘ethnic origins’. The question, then, was whether the Sikhs constitute an ethnic group.

For a group to constitute an ethnic group in the sense of the 1976 Act, it must in Lord Fraser’s opinion, regard itself and be regarded by others as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. According to Lord Fraser, the conditions which are essential are:

1. A long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive.
2. A cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance.

In addition to these two essential characteristics Lord Fraser listed five other relevant characteristics:

1. Either a common geographical origin, or descent from a small number of common ancestors.
2. A common language, not necessarily peculiar to the group.

3. A common literature peculiar to the group.
4. A common religion, different from that of neighbouring groups or from the general community surrounding it.
5. Being a minority or being an oppressed or a dominant group within a larger community.

In the conclusion of his judgment, Lord Fraser declared:

The evidence in my judgement shows that Sikhs are a distinctive and self-conscious community. They have a history going back to the fifteenth century. They have a written language which a small proportion of Sikhs can read but which can be read by a much higher proportion of Sikhs than of Hindus. They were at one time politically supreme in the Punjab. The result is, in my opinion, that Sikhs are a group defined by a reference to ethnic origins for the purpose of the 1976 Act.

The other judges in the House of Lords agreed with this analysis.

Subsequently the 1976 Race Relations Act was superseded by the Public Order Act of 1986, which specifically mentions the distribution and publication of offensive material. Using the judgement given by Lord Fraser in the Mandla case as a framework, I argued that the Jewish community fulfils all these seven criteria delineated by Lord Fraser and should therefore also be classed as an ethnic community:

Essential Criteria

1. Jews have a long shared history. The Jewish people is conscious of its historical past as distinguishing it from other groups.
2. Jews have a distinct cultural tradition. Over the centuries Jews developed their own cultural traditions, embracing family and social customs as well as law.

Relevant but Not Essential Criteria:

1. Jews have a common geographical origin or descent from common ancestors. According to tradition, the Jewish nation traces its origins to the patriarchs Abraham, Isaac and Jacob. For over a thousand years the Jewish people resided in their own country.
2. Jews have a common language. Hebrew is the language of the Bible as well as the Jewish liturgy. Through the centuries Hebrew has had special significance in the life of the nation.
3. Jews possess a common literature. Jewish literature covers a wide range of sources: biblical, rabbinic, liturgical, mystical and philosophic.
4. Jews practice a common religion different from neighbour groups. Through the centuries, Jews have adhered to biblical and rabbinic traditions and have suffered repeatedly at the hands of their gentile neighbours.

5. A minority group: from the time of the destruction of the Temple in 70 CE, Jews have been a minority group in the countries in which they have resided.

On two occasions I travelled to Leeds to present my witness statement – first, to the judge prior to the trial; and a second time to the jury. However, an expert for the defence, Professor Yakov Rabkin, a distinguished Orthodox Jewish scholar at the University of Montreal, put the opposite point of view. Throughout history, he argued, Jews have been defined as a religious rather than an ethnic group. Self-awareness of Jews as a nation in the European sense, he stressed, emerged only in the late nineteenth century mainly in Eastern Europe. There is little evidence of a common ethnic origin for the Jews, he continued. There is no scholarly consensus that today's Jews are actually descendants of the exiles from the Holy Land of two millennia ago. Further, the notion of a common geographic or ethnic origin is nothing more than a myth which has no basis in fact.

To summarize, he concluded, 'I do not consider the Jews a group of persons ... defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins, but rather as a group of persons defined by a shared religion'.

In stating this opinion, Professor Rabkin quoted from the writings of two distinguished Israeli scholars: Yeshayahu Leibowitz and Sholomo Sand. In *Peuple, Terre, Etat* (Paris, Plon, 1995, p. 44), Professor Leibowitz wrote:

The historical Jewish people was defined neither as a race, nor as a people of this country or that, or of this political system or that, nor as a people that speaks the same language, but as the people of the Judaism of the Torah and of its commandments, as the people of a specific way of life, both on the spiritual and the practical plane ... This consciousness exercised its effect from within the people. It formed its national essence; it maintained itself down through the generations and was able to preserve its identity irrespective of times and circumstances. The words spoken by Saadia Gaon more than one thousand years ago, 'Our nation exists only in the Torah' had not only a normative, but also an empirical meaning.

According to Sholomo Sand, the author of *When and How the Jewish People Was Invented*, the very concept of a Jewish people is problematic. In his view, it was a result of conversions of several ethnic groups of diverse provenance. There is, he states, no scholarly consensus that today's Jews are actually descendants of the exiles from the Holy Land of two millennia ago. In an interview published in the Israeli daily *Haaretz* (21 March, 2008), Sand noted that 'in the Israeli discourse about roots there is a degree of perversion. This is an ethnocentric, biological, genetic discourse'.

As an expert witness for the prosecution, I was given no opportunity to challenge Professor Rabkin. This was the task of the prosecution barrister.

However, I was asked to give him advice to help with his cross-examination of Professor Rabkin. These were the points I made:

1. Professor Rabkin's first point is that throughout history Jews have been defined as a religious rather than an ethnic group. To substantiate this claim, he quotes from Professor Leibowitz who alleges that the Jewish people have been defined as the people of Judaism of the Torah and its commandments, rather than a race, a nation, or a group that speaks the same language. Professor Leibowitz then quotes the early medieval Jewish philosopher and legalist Saadia Gaon who stated that 'our nation exists only in Torah'.

In a sense Professor Rabkin (and Professor Leibowitz whom he relies on) are correct. Throughout history the Jewish people embraced Judaism as their religious tradition. The beliefs and practices of the Jewish faith bound them together, and their religious convictions have sustained them in the face of persecution and suffering. But, the question is whether the Jewish people should be defined solely in this way. Of course the Jewish people have embraced Judaism as a living faith through nearly four millennia of history. But does this mean that they are nothing more than adherents of a religious system?

The Jewish theologian Mordecai Kaplan, the founder of Reconstructionist Judaism in the first half of the twentieth century, wrote a seminal study entitled *Judaism as a Civilization* in which he argued the opposite point of view. According to Kaplan, Judaism is something far more comprehensive than the Jewish faith – it includes the nexus of history, literature, language, social organization, folk sanctions, ethics, social and spiritual ideas, and aesthetic interests. This is exactly the point I was trying to make in my witness statement: the Jewish people are not simply a religious community. They are that certainly, but they are far more.

There is, I believe, a degree of disingenuousness in Professor Rabkin's statement. He knows fully well that Orthodox Jewish law defines Jewish identity not in terms of religious belief and practice but solely in terms of maternal descent. A person is Jewish if that individual's mother is Jewish. This is a universally accepted criterion across the Jewish religious spectrum. For the vast majority of Jews worldwide (and this has been so for thousands of years), Jewish identity is a question of descent, not conviction. If Professor Rabkin were correct in his claim about the Jewish people, then one would expect Jewish identity to be defined in terms of religious belief, but this is simply not the case. Moreover, Professor Rabkin knows that, according to Orthodox law, a person remains Jewish even if he or she has converted to another faith. This undermines his contention that the Jewish people must be defined in terms of Judaism and nothing else.

2. Professor Rabkin goes on to claim that the concept of nationhood is a modern notion which emerged in the late nineteenth century, mainly in Eastern Europe. Only then did Jews consider themselves as a distinct national group with particular properties. In making such a statement, Professor Rabkin hopes to undermine any claim to Jewish nationality – this would help support his initial contention that the Jews should be understood solely in religious terms. Here he notes that there were many Jews, particularly the Orthodox, who had no interest in embracing Zionism.

Professor Rabkin is correct in pointing out that Zionism was not universally accepted by Jewry when it originated in the late nineteenth and early twentieth centuries. Orthodox as well as liberal critics condemned the movement, but this does not mean that the concept of nationhood is foreign to Judaism. For over a thousand years the Jewish people constituted a nation in ancient Israel. From 70 CE until 1948, Jewry endured without a homeland of their own, although they longed for return to Zion under a messianic figure who would bring about their deliverance. While it is true that the notion of a modern democratic state is of recent origin, this does not mean that the Jews were not a nation in the past.

3. Professor Rabkin maintains that there is little evidence of a common ethnic origin of the Jewish people. Here he quotes from Professor Sand who states that the concept of a Jewish people is problematic since it consists of various ethnic groups of diverse provenance. Professor Rabkin then goes on to assert that there is no scholarly consensus that today's Jews are the descendants of the exiles of the Holy Land two millennia ago. The weakness of this argument is that most peoples, such as today's British population, cannot scientifically demonstrate that they are the descendants of the original inhabitants of the British Isles. No DNA testing can be forthcoming to prove a direct link. Yet, there is no question that the British believe they have a common ancestry. Similarly, the Jewish people claim a common ancestry which is celebrated in the Hebrew Scriptures, rabbinic sources, the liturgy and festival celebrations. A common ethnic origin does not require forensic evidence as Professor Rabkin states. Indeed, this is the point Lord Fraser made with regard to the concept of ethnicity in the 1976 Race Relations Act. He wrote: 'it would be absurd to suppose that Parliament can have intended that membership of a particular racial group should depend upon scientific proof that a person possessed the relevant distinctive biological characteristics.'
4. According to Professor Rabkin, the founding myths of Judaism have not been substantiated by independent historians. What Professor Rabkin appears to seek in his regard is historical confirmation of the claims made in the Bible and rabbinic sources. He is no doubt correct in pointing out that historians have been unable to prove that many of the events recorded in Scripture took place. Indeed, biblical archaeology has called into question the historicity of much of the scriptural account of ancient Israel and its surrounding neighbours. Yet, I believe this is beside the point. The founding myths of the Jewish nation have

served as the basis for the evolution of the Jewish people for nearly four millennia. They do not have to be historically true for them to be regarded as fundamental to Jewish identity.

The trial continued for six weeks; at the conclusion the jury adjourned for three days. There were eighteen counts against Simon Sheppard and five against Steven Whittle. On the third day – a Friday – the judge summoned the jury who found Whittle guilty on twelve counts and Whittle on five. However, the jury was undecided about six further counts against Sheppard, all of which related to publication and distribution of anti-Semitic literature and it was agreed that the trial would resume on Monday. Over the weekend, however, both Whittle and Sheppard fled via Ireland to Los Angeles where they claimed political asylum on the grounds that the dissemination of material designed to incite racial hatred is not a crime in the United States since the second amendment of the Constitution protects freedom of speech. Both Sheppard and Whittle were taken into custody at Los Angeles International Airport and were then transported to Santa Ana jail. The judge presiding over their case refused to grant them bail and they remained in police custody under the order of the US Department of Home Security. During this time I was in touch with the Humberside police who gave me updates on the progress of Sheppard and Whittle's claim for asylum. They remained in custody and refused to return to the United Kingdom despite the fact that a second trial was imminent. Undaunted, the CPS was determined to press on with the case and a second jury was summoned to deal with the outstanding six counts against Sheppard. Again I was called to Leeds. This time I was asked to present my previous argument that the Jews are an ethnic group, but I was also instructed to consider whether the material distributed by Sheppard was designed to incite racial hatred.

The central document is entitled *Tales of the Holofoax* which was distributed by Sheppard to the synagogue in Blackpool and also to the London School of Economics as well as published on his website: www.heretical.com. This text was first published in the USA in 1989 by Siswell Ruffin House. The work is dedicated to Professor Robert Faurisson, an infamous Holocaust denier. In 1988 Faurisson appeared in the trial of Ernst Zundel in Canada. Previously (in 1985) Zundel had been found guilty of promoting anti-Semitism through false documents about the Holocaust. He was sentenced to 15 months in prison, but this was overturned on appeal.

At the 1988 trial, Faurisson was anxious to be of assistance. Faurisson argued that the apparatus in concentration camps was too small and primitive to have functioned as gas chambers. Joining in Zundel's defence, the historian David Irving together with Faurisson solicited the help of Fred A. Leuchter, who believed that it would have been impossible for the Germans to have

gassed the Jews. After visiting Auschwitz and Majdanek, Leuchter argued on the basis of fragments from these sites that execution chambers did not exist during the Nazi era.

According to Leuchter, the contention that 6 million victims were gassed in the camps is a myth. His findings are contained in the *Leuchter Report: An Engineering Report on the Alleged Execution Gas Chambers at Auschwitz, Birkenau and Majdanek. Tales of the Holohoax*, page 15, footnote 3 notes that on 16 September Faurisson was savagely beaten by three Jews for writing scholarly articles which were sceptical of the gas chambers. Further, page 15, footnote 3 goes on to state that Zundel too was assaulted and his Toronto home fire-bombed for publishing *Did Six Million Really Die*. At the time of this printing, page 15 footnote 3 points out that Zundel was in prison.

Tales of the Holohoax calls itself a 'Journal of Satire' and is in the form of a comic-book. On the cover there is an illustration of Alice in Wonderland with the White Rabbit and the March Hare, But here Alice is in Lampshade Land. There is a clock with a Jewish star in the background and a face on the lampshade. Alice is holding an object which is presumably a bar of soap with a face. Both the lampshade and the bar of soap are themes that are referred to later in the text. On page 15 there are sixteen endnotes which are cited throughout the text. The first is a reference to the Book of Jeremiah. Other references are to works written by Jews such as Elie Wiesel's *The Jews of Silence* and Martin Gilbert's *Auschwitz and the Allies*. Other references are to first-hand accounts of the Holocaust such as Filip Mueller, *Eyewitness Auschwitz: Three Years in the Gas Chambers* and the testimony of Arnold Friedman which was given during the trial of Ernst Zundel. There are also references to works by Holocaust revisionists such as the interview of Lucius Clay in the *Journal of Historical Review*. Simon Sheppard is also cited in endnote 7 concerning Anne Frank's diary.

Tales of the Holohoax can be read as a satirical presentation of some of the central themes of Holocaust denial. Yet, the central question is whether the text also aims to generate hostility and contempt for the Jewish community. In other words, is *Tales of the Holohoax* a work of historical revisionism in cartoon form, or is it designed to incite anti-Semitism? What is immediately striking about some of the cartoons is the way in which they present stereotypic images of Jews as curly-haired, hook-nosed, repulsive figures. The Jewish angels, for example on page 12, the Jewish bearded figure reading the Talmud on the same page, and the bearded, hook-nosed Jewish army surgeon again on page 12 are similar to the kinds of Jewish images used in anti-Semitic propaganda including cartoons of the Nazi period. In anti-Semitic literature Jews were presented in this grotesque way to stimulate revulsion and distaste.

There is little question that *Tales of the Holohoax* similarly employs offensive caricatures to evoke Judeophobia.

Repeatedly *Tales of the Holohoax* emphasizes the deliberate attempt on the part of Jews to falsify history. Over and over again, the claim is made that Jews intentionally lie about the past. On page 16, for example, a Jewish survivor cannot remember how many times he was gassed. Perhaps, he says, it was six times, or possibly ten. He even mentions once in San Quentin. And then he states there are 5,999,999 other Jews just like him who live in Brooklyn. These statistics are blatantly inconsistent and obviously untrue. He then goes on to recount how many of his relatives including aunts, parents and children were gassed. The SS doctor Mengele kept human eyeballs pinned to his office wall, he says. They even tried to turn him into a lampshade. This survivor is deliberately made to appear ridiculous as he describes events which could not have taken place. Here the Holocaust is presented as a deliberate myth – a hoax – perpetrated by the Jewish people for their own exploitative aims. Such a presentation is not serious historical revisionism, nor is this comic-book journal designed as a work of inoffensive satire. Rather it is a searing critique and condemnation of Jews who are depicted as liars and cheats who distort history for their own ends.

This negative picture of Jews is reinforced throughout *Tales of the Holohoax*. Repeatedly, it is asserted that Jews are untruthful. On page 3 it is alleged that the Talmud states that 40 million Jews were slaughtered by the Romans during the siege of Israel during the time of Bar Kokhba. However, there weren't that many Jews alive at the time. On the next page there is a reference to Filip Mueller who claimed that Nazi doctors cut off flesh of victims which made the buckets they were put into jump about. This obvious distortion of the facts is viciously satirized – in the background is a nurse who clicks her fingers and says: 'Der buckets have r-r-rhythm'. Again, on page 5, Arnold Friedman's claim that he could tell who was being burned in the ovens by the colour of the flames is presented as ridiculous and misleading. In these cases the intention is to present Jews as deliberate liars who make up false accounts of what occurred in the camps to elicit sympathy from the non-Jewish world.

In this context, Anne Frank's diary dealing with the Nazi era – which is commonly regarded as of seminal importance for understanding the plight of Jewish victims – is portrayed on page 6 as a fake. Sarcastically referred to as 'St Anne', she is depicted as astonished by the appearance of an angel from the future who brings her a magic pen. It is alleged that this pen changed dates and rewrote the diary. Eventually when Anne died of typhus the pen was inherited by her father who wrote the diary over and over again. The aim here is to illustrate that Anne Frank did not write her diary as is commonly believed. It

too is a Jewish deception perpetrated against an unsuspecting non-Jewish public.

What is the attitude of the Jews toward the non-Jewish world? This is revealed on page 12. Here three Jewish angels proclaim that they love everyone and believe in peace, equality and love for all mankind. Yet, on the same page a Jew reading the Talmud declares that ‘even the best of the gentiles should all be killed’. The source for this quotation is verified in the article titled ‘Gentiles’ in the Jewish Encyclopedia. What *Tales of the Holofoax* fails to point out, however, is that such an assertion is an aberration of Jewish attitudes. Judaism does not advocate hatred of the non-Jew, and in modern times the vast majority of Jews would not subscribe to such an attitude. It is a distortion to claim that modern Jews have adopted a genocidal and racist mentality despite what Army Chief Rabbi Chief Chaplain Shmuel Derlich may have claimed, as quoted on page 12. If he did preach a sermon in the summer of 1986, he was expressing an eccentric attitude rather than giving voice to the view of Jews living in Israel and the diaspora. The intention here as elsewhere is to portray Jews as vicious hypocrites who seek the destruction of non-Jews.

The belief that Jews seek to undermine gentile civilization parallels the claims of Nazi party officials during the Third Reich. Embracing the belief in a world conspiracy as depicted in the forgery *The Protocols of the Elders of Zion*, Hitler maintained that the Jews seek to dominate world events. In pursuit of this aim a small group of wealthy and influential Jewish figures meet secretly to devise their plans. By inciting social division, the Jew is able to burrow into a healthy society and thereby prepare for the domination of the world. Such logic led Hitler to conclude that the Jew is the personification of Satan who ravages his victims.

Freedom of Speech is a cardinal principle of a democratic society. Yet, in the United Kingdom there are limits to what can be written. Publications that seek to foster hatred of racial groups are forbidden, and those involved in their dissemination are punishable by law. The central question is whether *Tales of the Holofoax* is designed to incite such racial hatred. As we have seen, it is not simply a satirical journal, nor a comic-book style presentation of historical revisionism, nor a satire of political correctness. Rather, it is a searing critique of Jews who are portrayed as liars who deceptively distort the events of the past for their own purposes. In summary, *Tales of the Holofoax* seeks to inflame hostility and incite hatred to the Jewish community.

After two weeks of deliberation, the jury at this second trial found Simon Sheppard guilty on four more counts including those referring to the dissemination of anti-Semitic material. During the period of the trial, Sheppard and Whittle remained incarcerated in the United States.

Subsequently they appeared at a hearing to give evidence about their experiences at the hands of the British police and the Crown Prosecution Service. The American judge, however, ruled against granting them political asylum and Simon Sheppard stated in a letter to a supporter (also signed by Whittle): 'Our asylum claim has been denied, as has withholding of our removal. We were thinking of appealing and sticking it out, but really this place is replete with people hanging on hoping for a miracle that's never going to happen, and we don't want to join them.'

On 15 May, Sheppard was sentenced at the Leeds Crown Court to a five-year prison sentence, and Whittle to two years. As might be expected, their supporters have been anxious to defend Sheppard and Whittle's actions. On numerous websites they have lambasted the British police and the CPS. In their view, Sheppard and Whittle are champions of free speech. The Goodinformation.org website for example quotes the following: 'That is a very bad blow to their hopes of freedom in the near future, and indeed to all asylum seekers and defenders of free speech in the United States,' said Paul Ballard from the United Kingdom, coordinator of the legal defence fund for the pair ... who consider themselves political satirists and nonviolent gadflies. As the American lawyer for the defence explained:

Here are two British individuals who published speech that was legally protected in the United States, for which they were criminally prosecuted in Britain and now the case has taken an even more Kafkaesque turn since the one country that should be protecting them from imprisonment in Britain has thrown them into U.S. jail for an indefinite period of time, based only on the fact that they requested political asylum.

Viewing themselves as champions of free speech, Sheppard and Whittle, who refer to themselves as 'The Heretical Two', are determined to press on with a legal challenge to the decision of the Crown Court, and have appealed to the Court of Appeal which is now considering their case: we are thus only at the beginning of a long legal struggle which will inevitably end with a final decision by the House of Lords.

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