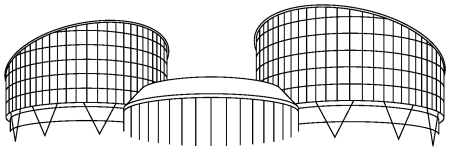

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF FRISK AND JENSEN v. DENMARK

(Application no. 19657/12)

JUDGMENT

STRASBOURG

5 December 2017

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Frisk and Jensen v. Denmark,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Robert Spano, *President,*
Ledi Bianku,
Işıl Karakaş,
Nebojša Vučinić,
Valeriu Grițco,
Jon Fridrik Kjølbro,
Stéphanie Mourou-Vikström, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 14 November 2017,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 19657/12) against the Kingdom of Denmark lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Danish nationals, Ms Mette Frisk (the first applicant), and Mr Steen Jensen, (the second applicant) on 27 March 2012.

2. The applicants were born in 1977 and 1961, and live in Copenhagen and Åbyhøj respectively. They are represented before the Court by Mr Tyge Trier, a lawyer practising in Copenhagen.

3. The Danish Government ("the Government") were represented by their former Agent, Mr Jonas Bering Liisberg, succeeded subsequently by their present Agent, Mr Tobias Elling Rehfelt, from the Ministry of Foreign Affairs, and their Co-agent, Mrs Nina Holst-Christensen, from the Ministry of Justice.

4. The applicants alleged a violation of their right to freedom of expression as guaranteed by Article 10 of the Convention.

5. On 26 June 2014 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants are journalists. At the relevant time they were employed by one of the two national television stations in Denmark,

Danmarks Radio, hereafter "DR". The first applicant produced a television programme, described as a documentary, called "When the doctor knows best", which was broadcast at 8 p.m. on 24 September 2008, and seen by 534,000 viewers. The second applicant was the first applicant's superior and responsible for the content of the programme.

7. The television programme concerned the treatment of pleural mesothelioma cancer, notably at Copenhagen University Hospital (*Rigshospitalet*), where Consultant S was in charge of treatment. It focused on two types of chemotherapy medication, Alimta, produced by L, and Vinorelbine, produced by F. Copenhagen University Hospital and S used Vinorelbine as first-line treatment in combination with Cisplatin or Carboplatin, depending on whether the treatment was related to an operation (operable patients) or to prolonging life and relieving pain and symptoms (inoperable patients).

8. Three experts participated in the programme: a medical doctor from Karolinska Hospital in Sweden, a professor from Switzerland and a medical doctor from Grosshandorf Hospital in Germany. They all used Alimta as first-line treatment, most often in combination with Cisplatin or Carboplatin. The programme followed four patients and their relatives, who told their stories, and a narrator spoke as a voice-over throughout the programme.

9. In preparation for the programme, the first applicant had carried out research on the subject which included, *inter alia*, the following.

10. On 20 September 2004 the European Union had approved the marketing of Alimta in combination with Cisplatin for treatment of patients with inoperable pleural mesothelioma cancer. The background for the approval was, among others, research which had been carried out examining the effect of treatment with Alimta in combination with Cisplatin as compared to treatment with Cisplatin alone (a phase III trial, see paragraph 14 below) as first-line therapy.

11. In July 2007 the Minister for Internal Affairs and Health replied to various questions posed by Members of Parliament as to the treatment of pleural mesothelioma cancer in Denmark. The Minister replied, *inter alia*, that there was no proof that an Alimta-based treatment was more efficient than other chemotherapy-based treatments, including that offered in Denmark; that the combination of Vinorelbine and Cisplatin, which was used at Copenhagen University Hospital, resulted in a one-year survival rate of 50% and a median lifetime of 12 months, which was exactly the survival rate from using the combination of Alimta and Cisplatin, but that there had been no direct comparison of the two treatments; and that there was no internationally accepted standard chemotherapy for the treatment of pleural mesothelioma cancer, but that several single and combined treatments were used.

12. On 11 June 2008 Copenhagen University Hospital produced a memorandum about pleural mesothelioma cancer and its treatment, which was sent to DR. It stressed that international studies, including of Vinorelbine and Alimta, had not shown that any two-combination regime was superior to other two-combination regimes. That information was confirmed by the professor from Switzerland in an email of 25 June 2008 and by the medical doctor from Grosshandorf Hospital in Germany in an email of 27 June 2008. The memorandum also referred to a fund aimed at developing research on pleural mesothelioma cancer, in the amount of 90,000 Danish kroner (DKK), equal to approximately 12,000 Euros (EUR), received by S from company F, which produces Vinorelbine. The money had been used to pay nurses and students and for data collection. It emerged that there had been no financial profit for the doctors involved.

13. Having received the above-mentioned memorandum, the first applicant again contacted the professor from Switzerland and the medical doctor at Grosshandorf Hospital in Germany. In essence, they confirmed in subsequent emails of 2 and 21 July 2008 that since there had been no direct comparative clinical studies, there was no scientific evidence that one two-combination regime was superior to another two-combination regime.

14. Medical research studies involving human subjects are called clinical trials. They are divided into different stages, called phases. Generally, it can be said that the earliest phase trials may look at whether a drug is safe or at its side-effects. A later phase II trial aims to find out whether the treatment works well enough, for which types of cancer the treatment works, more about side effects and how to manage them and more about the best dose to use. A later phase III trial aims to test whether a new treatment is better than existing treatments (standard treatment). These trials may compare a completely new treatment with the standard treatment or with different doses or ways of giving a standard treatment.

A. The proceedings before the courts

15. Subsequent to the broadcast on 24 September 2008 of the television programme, on 27 October 2008 Copenhagen University Hospital and S instituted defamation proceedings before the Copenhagen City Court (*Københavns Byret*) against the Director of DR and the two applicants, maintaining that the latter, in the programme in question, had made direct and indirect accusations, covered by Article 267 of the Penal Code (*Straffeloven*), against Copenhagen University Hospital and S, of malpractice regarding certain patients suffering from pleural mesothelioma cancer, allegedly resulting in the patients' unnecessary death and shortening of life, in the interest of S's professional prestige and private finances.

16. Before the City Court, the applicants, S, and Medical Director H for Copenhagen University Hospital gave evidence.

17. The first applicant stated, *inter alia*:

"... that she had not criticised Copenhagen University Hospital for improper treatment causing death. Her message was only to point out that the substance of Alimta had been better documented than the substance of Vinorelbine. She had collected statements from patients and experts, but could not state herself whether Alimta was a better product than Vinorelbine ... The experts had not stated whether Alimta in combination with another product was better than Vinorelbine in combination with another product. However, all experts had emphasised that Alimta had been evaluated in a phase III trial, for which reason it was a more thoroughly tested product. ... her questions had been answered during her conversations with professor M on 19 October 2007 and S on 22 October 2007. Subsequently no one had been willing to answer her questions. That was the only real conversation she had had with S. The next time she had called him, he had put down the receiver. When it had not been possible for her to get any response to her many points of criticism, she had contacted H ... she had wanted statements from both H and S as the programme would be unbalanced if they were not heard ... Some found that Alimta had been better documented than Vinorelbine. She was not aware of any trial demonstrating that a combination with Alimta was better than a combination with another medicinal product ...".

S stated, *inter alia*, the following:

"Alimta has been used for second-line therapy in Denmark since 2004, and since 2007 as first-line therapy. Patients had been given the impression in the media that Alimta was a miracle cure. Therefore Copenhagen University Hospital had introduced it as an option. Today, Alimta is used in combination with Carboplatin as the standard therapy for inoperable patients ... Sometimes in autumn 2008, the standard therapy for operable patients had been changed to Cisplatin in combination with Alimta. If some patients were offered Alimta everybody had to be offered Alimta ... After the programme had been broadcast ... patients started mistrusting the Vinorelbine therapy. Afterwards it was not possible to perform the trial [phase II] on this drug. Nor would it be possible to obtain funding for the trial. Therefore no trial had been performed of Vinorelbine ... he had provided the information included in professor M's memorandum of 23 September 2008 ...he had talked to [the first applicant] several times and had spent a lot of time and energy on explaining cancer therapy... he had also lost confidence in [the first applicant]..."

H stated, among other things:

" ...The approval of Alimta by the Danish Medicines Agency for the treatment of mesothelioma only means that a marketing authorisation has been granted for the drug, which means that advertisement of the product is permitted. Vinorelbine has also been approved by the Danish Medicines Agency, but for a wide range of oncological therapies ... in 2003 when Alimta was tested [phase III] the bar had been set quite low. The study compared Alimta with a clearly inferior treatment that would not actually be offered to anybody. It would have been more relevant to study Alimta in combination with Cisplatin versus Vinorelbine with Cisplatin .... S has made a phase II trial of the standard therapy [Vinorelbine] ... Subsequently the standard therapy regimen has been expanded to include Alimta, which is not a better product than Vinorelbine, but eight times more expensive ... if two drugs are equally effective, but one of them is eight times more expensive than the other, patients will be offered therapy using the cheaper drug. ... The standard therapies now offered by Copenhagen University Hospital are Vinorelbine in combination with Cisplatin for inoperable patients and Alimta in combination with Cisplatin for operable patients ... the shift to

Alimta as the standard therapy at Copenhagen University Hospital did not reflect that Alimta was medically better. The [applicants'] programme had had a large impact as patients were asking not to be treated with Vinorelbine. Copenhagen University Hospital had therefore had to change medical products because patients had the clear impression that Vinorelbine was not as good as Alimta ... It is quite usual for Copenhagen University Hospital to surrender material to the press and to answer questions, but the questions of [the first applicant] were never-ending. Copenhagen University Hospital has spent about a man-year, or about DKK 400,000, responding to inquiries from [the first applicant], and huge efforts had been made to accommodate her requests ... the programme had created distrust towards both Copenhagen University Hospital and S and had created uncertainty in both patients and relatives. He had received 50 to 100 "hate mails" himself ..."

18. By a judgment of 9 April 2010, the Copenhagen City Court found against the applicants (and the Director of DR) and sentenced them each to 10 day-fines of 1,000 Danish Kroner (DKK). The allegations were declared null and void. The reasoning was as follows:

"...

Based on the evidence, the City Court accepts as a fact that in 2004, following a phase III trial, EMEA approved Alimta in combination with Cisplatin for treating patients suffering from inoperable malignant pleural mesothelioma and that subsequently the same was approved by the Danish Medicines Agency. The court also accept as a fact that Vinorelbine is a drug dating back more than 20 years whose effect had been documented by clinical experience and approved by the Danish Medicines Agency for a wide range of oncological therapies. Finally, the court also accepts as a fact that it has not been documented that Alimta therapy in combination with a platin medicinal product is more effective than Vinorelbine therapy in combination with a platin medicinal product.

As regards the term "experimental drug" the court accepts as a fact that a drug administered to patients in a trial is referred to as an experimental drug, no matter whether the same drug is the standard therapy offered outside the trial setting.

No matter that [the applicants] are deemed to have been aware of the above circumstances following their comprehensive research of the matter, it was said in the programme that, for dying patients, [S and Copenhagen University Hospital] had prescribed a "non-approved chemotherapy regimen" not approved for the diagnosis or which was not "the correct chemotherapy", and that [S and Copenhagen University Hospital] used an "experimental drug", the "worst-case scenario being that patients would die earlier than if they had been treated with an approved substance", or that it would have "fatal consequences". Moreover, the phrase "the only drug with a known effect" was used.

Since no account was given in the programme of the above-mentioned trials and approval process and the terminology applied for that process, the court finds that it would seem to a non-professional viewer that Alimta was the only effective drug for mesothelioma, particularly because the programme linked the treatment of two patients with Vinorelbine to their death, whereas the prospect of several more years to live was held out to the one patient who had been given Alimta therapy in Germany.

Moreover, the programme also linked S's use of Vinorelbine to his personal esteem and his "personal research account", although [the applicants] had been

made aware of the research grant management procedure though Professor M's memorandum of 23 September 2008 before the broadcast.

Since no account was given either of the procedure for managing research grants, the court also finds in this respect that it would seem to a non-professional viewer that S had a personal financial interest in starting Vinorelbine treatment rather than Alimta.

The [applicants] are therefore considered to have violated Article 267 of the Penal Code.

According to the information on [the applicants'] knowledge after their comprehensive research of the matter, the court finds no basis for exempting them from punishment or remitting the penalty under Article 269 of the Penal Code, compare also Article 10 of the Convention.

...

[The applicants] are furthermore jointly and severally liable for paying legal costs of DKK 62,250."

19. On appeal, on 10 June 2011 the judgment was upheld by the High Court of Eastern Denmark (*Østre Landsret*) with the following reasoning:

"In the introduction to the programme 'When the doctor knows best' a narrator states, among other things: 'A Danish doctor is entering a medical congress to show his research results. For years he has gone his own way, he has treated dying patients with chemotherapy that is not approved.'

Later during the programme, it is stated at which hospitals one can receive treatment for pleural mesothelioma cancer, that these hospitals co-operate with Copenhagen University Hospital, and a reference is made to a named Consultant, S, head of the Scandinavian Centre for treatment of pleural mesothelioma cancer.

During the various interviews, a narrator states, *inter alia*:

- 'The doctor does not give his patients the only approved medication. Instead, he uses a test medication. In the worst scenario, that may result in the patients dying earlier than if they had been given the approved substance.'

- 'There is only one approved chemotherapy against pleural mesothelioma cancer, but that is not offered to SP [one of the patients followed in the programme]. The doctors chose to treat her with a substance that is not approved for the diagnosis, and whose effect on pleural mesothelioma cancer is not substantiated.'

- 'However, that chemotherapy turned out to have huge consequences for her [SP].'

- 'S can freely choose the medication that he thinks is best. There is only one treatment which, in comparative studies, has proved to have an effect on pleural mesothelioma cancer. Accordingly, that is the only medication which is approved as treatment. That medication is called Alimta. However, S chose not to use that medication on his patients.'

- 'Thus, it has not been proved whether Vinorelbine works. According to the calculations made by DR, close to 300 patients in Denmark have been given test medication. In the worst scenario, that may result in patients dying earlier than if they had been given the approved medication.'

-'For her [SP] the lack of effect of treatment by Vinorelbine turns out to have had fatal consequences.'

- 'The family K ask themselves why S goes his own way. They suspect that he has other interests than those of the patients. That suspicion grows, when they talk to SK's personal doctor.'

- 'It turns out, however, that S may also have had other reasons for choosing Vinorelbine. Because he has used this medication in medical tests on the patients. In a phase when they are fighting for their lives.'

-'The question remains: why does S carry out tests with Vinorelbine? Could it have something to do with the prestige which is implicit in having research articles published?'

- 'We do not know whether it is prestige that impels S.'

- 'Thus, S will not acknowledge what leading experts agree on; [namely] that Alimta is the only medication whose effect is substantiated.'

- 'Here it turns out that S has received more than DKK 800,000 over the last five and a half years from the company F. That is the company behind the test medication Vinorelbine. The money has been paid into S's personal research account. DKK 90,000 is earmarked for the tests. S withheld that information.'

The programme ends by informing us, among other things, that two of the patients who were interviewed have passed away. The narrator says, *inter alia*:

'TJ, who was part of S's tests with Vinorelbine, died on 4 January 2008.'

With these statements, [the applicants] not only passed on assertions by patients, relatives and experts, but also took a stand, so that the programme undisputedly gave the viewers the impression that malpractice has occurred at Copenhagen University Hospital, in that S has deliberately used medication (Vinorelbine), which is not approved for treatment of pleural mesothelioma cancer, and whose effect has not been substantiated, that the medication in question was part of a test, and that the test medication has resulted in patients dying or having their lives shortened. The way that the programme is built up with its beginning and ending, the viewers get the clear impression that the reasons behind this choice of medication [Vinorelbine] were S's professional prestige and personal finances.

Against this background, in the programme, the applicants, as producer of the programme and as chief sub-editor, have made an allegation against Copenhagen University Hospital and S of malpractice and of nourishing irrelevant considerations to the detriment of the lives and health of patients. Such an accusation is likely to disparage [Copenhagen University Hospital and S] in the eyes of their fellow citizens as set out in Article 267 of the Penal Code. It must have been clear to them [the applicants] that they were making such an allegation by way of their presentation of the programme.

The applicants have not attempted to establish the truth of the allegation, but have submitted that the allegation shall be unpunishable by virtue of Article 269 (1) of the Penal Code as they acted in lawful protection of an obvious public interest or the interest of others or, in the alternative, that punishment should be remitted under Article 269 (2) of the Penal Code because they were justified in regarding the allegations as true.

These provisions must, in connection with Article 267 of the Penal Code, be understood in the light of Article 10 of the Convention on the protection of freedom of

expression. A very considerable public interest is related to journalistic discussion about risk to life and health, or suspicion thereof, as regards public hospital treatment. When balancing considerations of freedom of expression with considerations of the protection of the name and reputation of persons and companies, the former is accorded tremendous weight on the scale. That entails acknowledgement of a very far-reaching freedom of expression for the press, and accordingly the press must be permitted, as the public control- and information organ ('public watchdog'), a certain amount of exaggeration and provocation in connection with their discussion of these questions, when factually there are reasons for expressing criticism.

On the basis of the information in the case, including the research material that the applicants possessed before the broadcast of the programme, in particular the emails from [the medical doctor from Grosshandorf Hospital in Germany and the professor from Switzerland], the replies by the Minister for Internal Affairs and Health to various questions [posed by Members of Parliament], and the memorandum of 11 June 2008 produced by Copenhagen University Hospital [about pleural mesothelioma cancer], it can be established that Vinorelbine in combination with Cisplatin or Carboplatin was standard treatment at Copenhagen University Hospital, that the European Union on 20 September 2004 approved the marketing of Alimta in connection with Cisplatin for treatment of inoperable patients with pleural mesothelioma cancer, that there was no substantiation or basis for believing that an Alimta-based treatment was more efficient than the treatment offered by Copenhagen University Hospital, that some patients at Copenhagen University Hospital, who were already about to receive Vinorelbine as standard treatment, were chosen and offered the same medicine as part of a test [it is not known for what], and that S did not make any private financial profit from these tests.

Against this background, including the fact that the word 'approved' was not explained during the programme, namely the difference between medication approved for treatment and [medication] approved for marketing, and by consistently using the word "test medication", even though only one patient in the programme participated in tests, [the applicants] made allegations which were based on an incorrect factual basis, of which they must have been aware via the research material.

The aim of the programme – to make a critical assessment of the treatment of patients with pleural mesothelioma cancer offered by Copenhagen University Hospital and the responsible consultant – is a legitimate part of the press's role as 'public watchdog', but it cannot justify an allegation, which is built on a factually incorrect basis, and thus a wrong premise. [The applicants], who did not limit themselves to referring to or disseminating statements by experts, patients and relatives, did not have any basis for making such serious allegations against Copenhagen University Hospital and S. The allegations cannot be justified on the grounds that Copenhagen University Hospital and S refused to participate in the programme.

Against this background, and since in relation to Article 10 there is no interest to protect when there is no factual basis for the accusations, the allegations are not unpunishable under Article 269 (1), nor is there any basis for remitting the punishment under Article 269 (2) [of the Penal Code].

It is an aggravating factor that the wrongful accusations were disseminated on national television during primetime and on DR's homepage, by means of which the accusations had a significant spread.

Accordingly, [the High Court] agrees [with the Copenhagen City Court's judgment] that [the applicants] be fined under Article 267, and that the allegations be declared null and void by virtue of Article 273 (1).

The High Court thus dismisses the appeal and upholds the judgment of the Copenhagen City Court.

The applicants shall be jointly and severally liable for paying legal costs of the High Court appeal to Copenhagen University Hospital and S, in the amount of DKK 90,000, which constitutes the legal fee inclusive of VAT. In fixing the amount, the High Court took into account the scope and duration of the case."

20. On 27 October 2011 the Appeals Permission Board (*Procesbevillingsnævnet*) refused the applicants' request for leave to appeal to the Supreme Court (*Højesteret*).

B. Complaints lodged with the Patient Insurance Association

21. Subsequent to the broadcast on 24 September 2008 of the television programme, four complaints were lodged with the Patient Insurance Association (*Patientforsikringen*) relating to the issues raised by the programme. A press release published on the Associations' website on 9 March read as follows:

"As of today, the Patient Insurance Association has received four complaints relating to the treatment of mesothelioma patients with combinatorial drugs other than Carboplatin and Alimta. That treatment was questioned by the Danish Broadcasting Corporation (DR) in a documentary programme in September 2008.

The Patient Insurance Association has received four complaints relating to the criticism raised. This means that the persons claiming compensation are either patients or their dependants, one of the reasons being their belief that the combinatorial drugs administered to treat the disease were incorrect ones.

All four complaints have been refused, one of the reasons being that the independent medical oncologists who assessed the cases found that it was in compliance with optimum medical standards to treat patients with the selected combination therapy.

Two of the cases have been appealed against to the National Agency for Patients' Rights and Complaints (*Patientskadeankenævnet).* The National Agency for Patients' Rights and Complaints upheld the decision of the Patient Insurance Association, finding, *inter alia:'...* [patients] were offered Carboplatin and Vinorelbine, which must be considered to be as active as other combinations with a favourable profile of adverse reactions'. The other appeal does not concern the issue of combination therapy."

II. RELEVANT DOMESTIC LAW

22. The relevant provisions of the Danish Penal Code applicable at the time read as follows:

Article 267

"Any person who tarnishes the honour of another by offensive words or conduct or by making or spreading allegations of an act likely to disparage him in the eyes of

his fellow citizens shall be liable to a fine or to imprisonment not exceeding four months."

Article 268

"If an allegation has been maliciously made or disseminated, or if the author has no reasonable ground to regard it as true, he shall be guilty of defamation, and the punishment mentioned in Article 267 may increase to a term not exceeding two years."

Article 269

"1. An allegation shall not be punishable if its truth has been established or if the author of the allegation has in good faith been under an obligation to speak or has acted in lawful protection of an obvious public interest or of the personal interest of himself or of others.

2. The punishment may be remitted where evidence is produced which justifies the grounds for regarding the allegations as true."

Article 272

"The penalty prescribed in Article 267 of the Penal Code may be remitted if the act has been provoked by improper behaviour on the part of the injured person or if he is guilty of retaliation."

Article 273

"1. If a defamatory allegation is unjustified, a statement to that effect shall, at the request of the injured party, be included in the sentence.

2. Any person convicted of defamation may be ordered at the request of the insulted person to pay to the insulted person an amount fixed by the court to cover the costs of promulgating the judgment conclusion alone or also the grounds in one or more official gazettes. This also applies even if the judgment only provides for retraction under the provision of subsection 1."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

23. The applicants complained that the judgment of the High Court amounted to a disproportionate interference with their right to freedom of expression guaranteed by Article 10 of the Convention, which reads as follows:

"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."

24. The Government contested that argument.

A. Admissibility

25. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

26. The applicants recognised that their conviction was prescribed by law and that, in respect of S, it pursued a legitimate aim.

27. They submitted, however, that Copenhagen University Hospital could not, in its capacity as a public body, rely on "the protection of the reputation or rights of others" under Article 10 of the Convention and referred in this respect, *inter alia*, to the dissenting opinion in *Romanenko and Others v. Russia*, no. 11751/03, 8 October 2009. In the applicants' opinion it would seriously harm democratic principles and legal certainty if the State were able to protect itself from public scrutiny by limiting the freedom of expression of a journalist where a public body is involved. The judiciary is the only public authority whose protection is capable of constituting a legitimate aim within the meaning of Article 10 § 2.

28. Moreover, they maintained that the interference constituted a breach of their rights as journalists as the interference was not necessary in a democratic society.

29. The main purpose of the programme was to perform a critical assessment of the treatment of mesothelioma at Copenhagen University Hospital, compared to the treatment by other leading experts, and to raise questions about whether patients should have been informed of other therapeutic options than Vinorelbine. It presented the patients' and the families' frustrations over being denied the choice of their preferred chemotherapy, especially given the fact that Alimta had undergone phase III examination and thus was more thoroughly tested than Vinorelbine. The programme was not scientific and did not claim to give a scientific account of the advantages of one cancer treatment over the other.

30. The documentary was based on substantive and significant journalistic research carried out over a period of approximately one year. It included international medical experts and a very broad range of open source material. The applicants acted in good faith and in full compliance with press ethics when preparing and airing the programme. Both S and Copenhagen University Hospital were invited to comment on the allegations in the documentary on numerous occasions. The memorandum of 11 June 2008 produced by Copenhagen University Hospital was not suitable for inclusion in the documentary as it did not answer the specific questions asked by the applicants.

31. The subject matter, that the patients and their families felt that they were not being properly informed and given the choice of which chemotherapy treatment they preferred at Copenhagen University Hospital, was clearly of public interest, and the documentary gave rise to a broad public debate. The impact was significant and had various important consequences, *inter alia*, a public demand for Alimta therapy and a change in practice at Copenhagen University Hospital, all of which highlighted why this kind of journalism was essential and indispensable in a democratic society.

32. The domestic courts failed to carry out a careful balancing exercise between the right to impart information and protection of the reputation of others. They gave a distorted picture of the content of the documentary and the responsibility of the journalist reporting what was being said by others. The applicants noted, for example, that the charge against them did not relate to any specific statements in the documentary and that the domestic courts did not mention any specific statements by the applicants which were considered incorrect. Moreover, the voice-overs provided in the programme should not be considered in isolation, but in the context of the journalistic production as a whole with respect for the function of the documentary and of the documentary genre as a dissemination tool for statements of named third parties. The High Court performed a crucial change of the conclusions of the documentary by finding that the programme gave a defamatory impression that Alimta was a superior product and that S had caused unnecessary death for his personal benefit. This was clearly not stated in the documentary. The judicial authorities placed a disproportionate and unfair burden on the applicants requiring, under criminal law, that they provide medical documentation about Alimta compared to Vinorelbine. The wording of the High Court judgment also indicated that there had been no specific assessment by the judges of the value of the documentary to general society.

33. Finally, the applicants submitted that the penalties imposed were disproportionate to the harm alleged and likely to deter journalists from performing their essential role as “public watchdogs” and keeping the public informed about matters of public interest. They pointed out that they had

received criminal convictions, had had to pay fines and there had been the final "punishment" of paying costs to S and Copenhagen University Hospital.

34. The Government maintained that the interference was prescribed by law and pursued the legitimate aim of protecting the reputation of others. They referred to case-law in which the Court had presupposed that a public body could also fall within "the protection of the reputation or rights of others", for example, *Romanenko and Others v. Russia*, cited above, § 39; *Lombardo and Others v. Malta*, no. 7333/06, §§ 50 and 54, 24 April 2007; and *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Series A no. 239. They further contended that since it was recognised that the reputation of the police may be a legitimate aim, the same should apply to several other public bodies. The conditions at a public hospital constitute an issue of considerable public interest and entail a need for wider limits for public scrutiny, but this is partly for other reasons than for a public body exercising power in the traditional sense. Public interest may therefore be deemed to be interconnected with the relevance of the activities of the hospital to the life and health of individuals. Allegations made on a factually incorrect basis will affect the patient's confidence in the treatment offered and may weaken the possibilities of the hospital to function in an optimal manner. In addition, it would amount to unfounded arbitrariness in the protection of the health interests of the contracting States if they were to have the possibility of interfering with attacks on the reputation of private hospitals but not of public hospitals.

35. With respect to the proportionality test, the Government found it of vital importance that the case at hand did not concern dissemination of defamatory statements made by others. It concerned defamatory statements independently worded and made by the applicants, notably when they had used the voice-over to convey the impression to the viewers that improper treatment had been given and that this was S's deliberate choice, motivated by his desire for professional esteem and his personal financial situation. This should lead to a stricter assessment of the applicants' defamatory statements when balanced against the protection of the reputation or rights of S and Copenhagen University Hospital.

36. The Government also submitted that, although the High Court did not make an explicit classification of the allegations, the wording of the reasoning clearly illustrated that it considered them to be allegations of facts, at least those elements of the allegations that did not relate to S's motives.

37. Referring to the High Court's finding, the Government maintained that the applicants did not act on a factually correct basis, nor did they provide reliable and precise information in accordance with the ethics of journalism when making their very serious allegations. They did not act in good faith. Among other things, they deliberately omitted to inform the

viewers that according to the research material available to them, the effect of Vinorelbine had been documented, and that there was no basis for stating that Alimta-based chemotherapy was more effective than the Vinorelbine-based treatment offered by Copenhagen University Hospital. They also omitted to mention that Copenhagen University Hospital, in a memorandum of 11 June 2018 to the applicants, had given a thorough account of the reasons for the medical product chosen, and an explanation of the research, which emphasised that the doctors involved did not themselves benefit financially. Furthermore, as stated by the High Court, by not defining the term "approved" or the difference between a drug approved for treatment and a drug approved for marketing, and by consistently using the term "experimental drug", the applicants made accusations resting on a factually incorrect basis, of which they must be deemed to have become aware through the research material.

38. In the assessment of the nature and seriousness of the defamation the Government found that great importance had to be attached to the fact that audio-visual media are very effective, and that the allegations were made in a television programme by a national television company which is generally perceived as highly reliable.

39. The Government fully recognised that the subject at issue was of considerable public interest, for which reason a broader protection of the freedom of expression applies. The aim could have been achieved, however, without making the impugned accusations. They also pointed out that the High Court found that it had not been substantiated that there was any medical difference between Vinorelbine and Alimta, which was also the conclusion of the independent medical oncologist of the Patient Insurance Association. The changes of treatment regime at Copenhagen University Hospital caused by the programme thus illustrated that allegations made by the press on a factually incorrect basis may harm individuals' confidence in the national health authorities.

40. Finally they pointed out that the applicants had been given very mild sentences.

2. The Court's assessment

(a) Whether there was an interference prescribed by law

41. It is common ground between the parties that the impugned judgment constituted an "interference by [a] public authority" with the applicants' right to freedom of expression as guaranteed under the first paragraph of Article 10 and that it was prescribed by law.

(b) Whether it pursued a legitimate aim

42. The applicants disputed that Copenhagen University Hospital, being a public body, could rely on "the protection of the reputation or rights of

others" under Article 10 of the Convention and referred in this respect, *inter alia*, to the dissenting opinion in *Romanenko and Others v. Russia* (cited above).

43. The Court reiterates that in *Thorgeir Thorgeirson v. Iceland* (cited above, § 59), concerning charges for defamation of an unspecified member of the police, it was not disputed, or questioned by the Court, that the applicant's conviction and sentence were aimed at protecting the "reputation ... of others" and thus had a legitimate aim under Article 10 § 2 of the Convention.

44. Moreover, in *Romanenko and Others v. Russia* (cited above, § 39), concerning a court's management department, being a public body, the Court acknowledged "that there may be sound policy reasons to decide that public bodies should not have standing to sue for defamation in their own capacity; however, it is not its task to examine the domestic legislation in the abstract but rather to consider the manner in which that legislation was applied to, or affected, the applicant in a particular case". Thereafter, it went on to examine the issue in the analysis of the proportionality of the interference.

45. Likewise, in *Lombardo and Others v. Malta* (cited above, § 50) although stating that it is only in exceptional circumstances that a measure proscribing statements criticising the acts or omissions of an elected body such as a council can be justified with reference to "the protection of the rights or reputations of others", the Court was prepared to "assume that this aim can be relied on", and went on to the proportionality test.

46. Furthermore, in *Kharlamov v. Russia* (no. 27447/07, § 25, 8 October 2015) concerning a University's authority, the Court went on to consider the issue in the analysis of the proportionality of the interference. It did state, though (ibid. § 29), that the protection of the University's authority is a mere institutional interest of the University, that is, a consideration not necessarily of the same strength as "the protection of the reputation or rights of others" within the meaning of Article 10 § 2 (see *Uj v. Hungary*, no. 23954/10, § 22, 19 July 2011). The latter reference concerned a State-owned company in respect of which the Court observed (ibid. § 22);

> "...the impugned criminal charges were pressed by a company which undisputedly has a right to defend itself against defamatory allegations. In this context the Court accepts that, in addition to the public interest in open debate about business practices, there is a competing interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good. The State therefore enjoys a margin of appreciation as to the means it provides under domestic law to enable a company to challenge the truth, and limit the damage, of allegations which risk harming its reputation (see *Steel and Morris v. the United Kingdom*, no. 68416/01, § 94, ECHR 2005-II; *Kuliś and Różycki v. Poland*, no. 27209/03, § 35, ECHR 2009-...). However, there is a difference between the commercial reputational interests of a company and the reputation of an individual concerning his or her social status. Whereas the latter

> might have repercussions on one's dignity, for the Court interests of commercial reputation are devoid of that moral dimension. In the instant application, the reputational interest at stake is that of a State-owned corporation; it is thus a commercial one without relevance to moral character."

47. Having regard to the above-cited case-law, the Court is not convinced by the applicants' submission that the judiciary is the only public authority whose protection is capable of constituting a legitimate aim under Article 10 § 2.

48. In the present case, the High Court found that the applicants, as producer of the programme and as chief sub-editor, had made an allegation against Copenhagen University Hospital and S of malpractice and of nourishing irrelevant considerations to the detriment of the lives and health of patients, and that such an accusation was likely to disparage Copenhagen University Hospital and S in the eyes of their fellow citizens as set out in Article 267 of the Penal Code (see paragraph 19 above).

49. The Court notes, in addition, that the impugned allegations were strongly linked to S and his alleged motives for using the product Vinorelbine on his patients suffering from mesothelioma. The allegations were also found to be defamatory for Copenhagen University Hospital which, in the Court's view, rather acted as the representative for its unnamed management and staff, who were also concerned by the accusations in the programme, than being a mere institution representing its interests in the form of prestige or commercial success. The case thus appears comparable to the situation in *Thorgeir Thorgeirson v. Iceland* (cited above). In such circumstances the Court can agree with the Government that there is no basis in the notion of "others" set out in the second paragraph of Article 10 to distinguish between attacks on the reputation of medical staff at private hospitals as opposed to public hospitals.

50. Having regard thereto, and to the particular circumstances of case, the Court concludes that also in respect of Copenhagen University Hospital, the applicant's conviction and sentence were aimed at protecting the "reputation ... of others" and had a legitimate aim under Article 10 § 2 of the Convention.

(c) Whether the interference was necessary in a democratic society

(i) General principles

51. The principles concerning the question of whether an interference with freedom of expression is "necessary in a democratic society" are well-established in the Court's case-law (see, among other authorities, *Delfi AS v. Estonia* [GC], no. 64569/09, § 131 to 132, ECHR 2015, with further references). The Court has to examine the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to

the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'. In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts.

52. In this context, the Court recalls that the interference aimed at protecting the reputation of an individual, consultant S, as well as a public body in its capacity of representing its unnamed staff, the University Hospital (see paragraphs 49-50). As regards, in particular, protection of the reputation of an individual, the Court has held that a person's reputation, even if that person is being criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity and therefore falls within the scope of his or her "private life". In order for Article 8 to come into play, though, the attack on personal honour and reputation must attain a certain level of gravity and in a manner causing prejudice to personal enjoyment of the right to respect for private life (see, *inter alia*, (see *Delfi*, cited above, § 137; *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012; and *A. v. Norway*, no. 28070/06, § 64, 9 April 2009).

53. Having been required on numerous occasions to consider disputes requiring an examination of the fair balance to be struck between the right to respect for private life and the right to freedom of expression, the Court has developed general principles emerging from abundant case-law in this area (see, among other authorities, *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, §§ 83 to 93, ECHR 2015 (extracts)). The criteria which are relevant when balancing the right to freedom of expression against the right to respect for private life are, *inter alia*: the contribution to a debate of general interest; how well-known the person concerned is and what the subject of the report is; his or her prior conduct; the method of obtaining the information and its veracity; the content, form and consequences of the publication; and the severity of the sanction imposed (see, for example, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 165, ECHR 2017 (extracts); *Axel Springer AG v. Germany* [GC], cited above, §§ 83 and 89 to 95, 7 February 2012 and *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, §§ 108 to 113, ECHR 2012).

54. Finally, the Court reiterates that where the national authorities have weighed up the freedom of expression with the right to private life in compliance with the criteria laid down in the Court's case-law, strong reasons are required if it is to substitute its view for that of the domestic courts (see, *inter alia*, *Von Hannover v. Germany (no. 2)* [GC], cited above, § 107, *Axel Springer AG v. Germany* [GC], cited above, § 88; *Lillo-Stenberg and Sæther v. Norway*, no. 13258/09, § 44, 16 January 2014; and

Couderc and Hachette Filipacchi Associés v. France [GC], cited above, § 92).

55. Even though the interference aimed at protecting the reputation of the University Hospital, which is covered by "reputation of ... others" in Article 10 § 2, and consultant S, who is not only covered by the same provision but who may also rely on the right to respect of private life as protected by Article 8 § 1 of the Convention, the Court will proceed with assessing the proportionality of the interferences on the basis of the same criteria (see paragraph 53 above) in relation to both the University Hospital and consultant S.

(ii) Application of those principles to the present case

(α) The subject matter of the programme and its contribution to a debate of general interest

56. The applicants maintained that the main purpose of the programme was to perform a critical assessment of the treatment of mesothelioma at Copenhagen University Hospital, compared to treatment by other leading experts, and to raise questions about whether patients should have been informed of other therapeutic options than Vinorelbine. It presented the patients' and the families' frustrations over being denied the choice of their preferred chemotherapy, especially given the fact that Alimta had undergone phase III examination and thus had been more thoroughly tested than Vinorelbine. The programme was not scientific and did not claim to give a scientific account of the advantages of one cancer treatment over another.

57. It is evident from the judgments of the domestic courts, though, that the programme also raised the question of whether the applicants had made, directly and indirectly, allegations that S and Copenhagen University Hospital had given certain patients suffering from mesothelioma improper treatment resulting in their unnecessary death and the shortening of their lives in order to promote S's professional esteem and personal financial situation.

58. The domestic courts acknowledged that such a subject was of public interest. In fact, the High Court pointed out in its judgment of 10 June 2011 that the matter was an issue of very considerable public interest by stating the following:

> "A very considerable public interest is related to journalistic discussion about risk to life and health, or suspicion thereof, as regards public hospital treatment. When balancing considerations of freedom of expression with considerations of the protection of the name and reputation of persons and companies, the former is accorded tremendous weight on the scale. That entails acknowledgement of a very far-reaching freedom of expression for the press, and accordingly the press must be permitted, as the public control- and information organ ('public watchdog'), a certain

amount of exaggeration and provocation in connection with their discussion of these questions, when factually there are reasons for expressing criticism."

59. The Court agrees with the domestic courts that the programme dealt with issues of legitimate public interest.

(β) How well-known the person concerned is and his conduct prior to the programme

60. In the present case, the impugned criticism was directed at S and Copenhagen University Hospital, being a public hospital, including its unnamed management and staff, who were also concerned by the accusations in the programme (see paragraph 49 above). They were all vested with official functions. The Court reiterates in this respect that the limits of acceptable criticism are wider as concerns public figures than private individuals (see, for example, *Couderc and Hachette Filipacchi Associés v. France [GC]*, cited above, §§ 117 to 123, with further references). The Government also accepted that in the present case, there was a need for wider limits for public scrutiny, not because Copenhagen University Hospital could be compared to a public body exercising power in the traditional sense, but rather because the activities of the hospital and its conditions had an impact on the life and health of individuals. A similar view was expressed by the High Court (see paragraph 58 above) when pointing out that in respect of public hospital treatment, when balancing considerations of freedom of expression with considerations of the protection of the name and reputation of persons and companies, the former is accorded tremendous weight on the scale.

(γ) Content, form and consequences of the impugned programme

61. The domestic courts found that the applicants in the programme had made allegations that S and Copenhagen University Hospital had given certain patients suffering from mesothelioma improper treatment, resulting in their unnecessary death and the shortening of their lives to promote the professional esteem and personal financial situation of S. More precisely, in its judgment of 10 June 2011, the High Court found, after having seen the programme and by quoting various voice-overs that:

"With these statements, [the applicants] not only passed on assertions by patients, relatives and experts, but also took a stand, so that the programme undisputedly gave the viewers the impression that malpractice has occurred at Copenhagen University Hospital, in that S has deliberately used medication (Vinorelbine), which is not approved for treatment of pleural mesothelioma cancer, and whose effect has not been substantiated, that the medication in question was part of a test, and that the test medication has resulted in patients dying or having their lives shortened. The way that the programme is built up with its beginning and ending, the viewers get the clear impression that the reasons behind this choice of medication [Vinorelbine] were S's professional prestige and personal finances.

> On this background, in the programme, the applicants, as producer of the programme and as chief sub-editor, have made an allegation against Copenhagen University Hospital and S of malpractice and of nourishing irrelevant considerations to the detriment of the lives and health of patients. Such an accusation is likely to disparage [Copenhagen University Hospital and S] in the eyes of their fellow citizens as set out in Article 267 of the Penal Code. It must have been clear to them [the applicants] that they made such an allegation by way of their presentation of the programme."

62. It further concluded that those accusations rested on a factually incorrect basis:

> " ... On the basis of the information in the case, including the research material, that the applicants possessed before the broadcast of the programme, in particular the emails from [the medical doctor from Grosshandorf Hospital in Germany and the professor from Switzerland], the replies by the Minister for Internal Affairs and Health to various questions [posed by Members of Parliament], and the memorandum of 11 June 2008 produced by Copenhagen University Hospital [about pleural mesothelioma cancer], it can be established that Vinorelbine in combination with Cisplatin or Carboplatin was standard treatment at Copenhagen University Hospital, that the European Union on 20 September 2004 approved the marketing of Alimta in connection with Cisplatin for treatment of inoperable patients with pleural mesothelioma cancer, that there was no substantiation or basis for believing that an Alimta-based treatment was more efficient than the treatment offered by Copenhagen University Hospital, that some patients at Copenhagen University Hospital, who were already about to receive Vinorelbine as standard treatment, were chosen and offered the same medicine as part of a test [it is not known for what], and that S did not make any private financial profit from these tests.
>
> Against this background, including the fact that the word 'approved' was not explained during the programme, namely the difference between medication approved for treatment and [medication] approved for marketing, and by consistently using the word "test medication", even though only one patient in the programme participated in tests, [the applicants] made allegations which were based on a wrong factual basis, of which they must have been aware via the research material."

63. The Court has no reason to call into question those conclusions reached by the High Court.

64. The Court is also satisfied that the accusations against S reached the level of seriousness required to fall within the scope of Article 8 of the Convention (see paragraph 52 above).

65. The Court reiterates that the potential impact of the medium of expression concerned is an important factor in the consideration of the proportionality of an interference and that the audio-visual media have a more immediate and powerful effect than the print media (see, for example, *Jersild v. Denmark*, judgment of 23 September 1994, § 31, Series A no. 298). The High Court found that it was an aggravating factor that the wrongful accusations were disseminated on national television during primetime and on DR's homepage, by means of which the accusations had a significant spread. The Court notes, in addition, that the programme was broadcast by one of the two national television stations in Denmark and

described as a "documentary", which could add to the viewers' expectations that they would be presented with the truth.

66. The applicants maintained that the impact of their programme was significant and had various important consequences, *inter alia*, a public demand for Alimta therapy and a change in practice at Copenhagen University Hospital, all of which highlighted why this kind of journalism was essential and indispensable in a democratic society.

67. The Court points out, however, that the domestic courts assessed the material before them, which the applicants possessed, and concluded that there was no documentation to show that Alimta therapy in combination with a platin medicinal product was more effective than Vinorelbine therapy in combination with a platin medicinal product, nor was there substantiation or basis for believing that an Alimta-based treatment was more efficient than the treatment offered by Copenhagen University Hospital. The Court has found no reason to call into question those conclusions.

68. It therefore also accepts that the reason why, after the programme had been broadcast, the public demand for Alimta therapy may have increased and Copenhagen University Hospital changed its standard therapy for operable patients to Cisplatin in combination with Alimta, was that the programme, on an incorrect factual basis, had encouraged patients to mistrust Vinorelbine therapy, as also stated by S and H before the City Court.

69. The Court further observes that before the City Court, H added that the programme had created distrust towards both Copenhagen University Hospital and S, that it had created uncertainty in patients and relatives, and that he himself had subsequently received 50 to 100 "hate mails".

(δ) Method of obtaining the information and its veracity

70. Before the domestic courts, the applicants maintained that they acted in good faith and in full compliance with press ethics when preparing and airing the programme and that the documentary was based on substantive and significant journalistic research carried out over a period of approximately one year. It included international medical experts and a very broad range of open source material. The first applicant also stated that S and Copenhagen University Hospital had been invited to comment on the allegations in the documentary on numerous occasions.

71. The applicants had received the memorandum of 11 June 2008 (see paragraph 12 above) about pleural mesothelioma cancer and its treatment produced by Copenhagen University Hospital, which stressed that international studies, including of Vinorelbine and Alimta, had not shown that any two-combination regime was superior to other two-combination regimes. That information was confirmed by the professor from Switzerland in an email of 25 June 2008 and by the medical doctor from Grosshandorf Hospital in Germany in an email of 27 June 2008 (see paragraph 13 above).

The memorandum also referred to a fund aimed at developing research on pleural mesothelioma cancer, in the amount of DKK 90,000 received by S from company F, and stated that the money had been used to pay nurses and students and for data collection. It emerged that there had been no financial profit for the doctors involved. The applicants stated that they did not find the memorandum suitable for inclusion in their documentary as it did not answer the specific questions asked by them.

72. The Court notes that the domestic courts did not dispute that the applicants had conducted thorough research. As stated above, however, based on the particulars of the case, which included the research material, which the applicants had possessed before the programme was broadcast, they found that the applicants had made accusations resting on a factually incorrect basis, of which they must be deemed to have become aware through the research material. In conclusion, the High Court stated:

> "The aim of the programme – to make a critical assessment of the treatment of patients with pleural mesothelioma cancer offered by Copenhagen University Hospital and the responsible consultant – is a legitimate part of the press's role as 'public watchdog', but it cannot justify an allegation, which is built on a factually wrong basis, and thus a wrong premise. [The applicants], who did not limit themselves to referring to or disseminating statements by experts, patients and relatives, did not have any basis for making such serious allegations against Copenhagen University Hospital and S ... "

73. Again, the Court sees no reason to call into question the High Court's conclusions. It reiterates that the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the provision that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism (see, for example, *Bédat*, cited above, § 58).

74. It notes in particular that there is no indication that the judicial authorities placed a disproportionate and unfair burden on the applicants, including, as alleged by them, requiring under criminal law that they provide medical documentation about Alimta compared to Vinorelbine.

75. Finally, the High Court stated that the allegations made by the applicants could not be justified by the fact that Copenhagen University Hospital and S refused to participate in the programme. The Court notes in addition that it is not in dispute that Copenhagen University Hospital participated and cooperated during the preparation of the programme, by replying to questions by the applicants and furnishing them with relevant information, including the memorandum of 11 June 2008 produced by S. In this respect the Court cannot ignore the statement by H before the City Court (see paragraph 19 above) that: "It is quite usual for Copenhagen University Hospital to surrender material to the press and to answer questions, but the questions of [the first applicant] were never-ending. Copenhagen University Hospital has spent about a man-year, or about

DKK 400,000, on responding to inquiries from [the first applicant], and huge efforts were made to accommodate her requests".

(ε) Severity of the sanction imposed

76. The defamation proceedings brought by S and Copenhagen University Hospital against the applicants ended in an order declaring the allegations null and void, a criminal conviction of the applicants and a sentence for each of them amounting to 10 day-fines of DKK 1,000 (a total of 10 000 DKK equal to approximately 1,340 euros (EUR)).

77. The Court notes that a criminal conviction is a serious sanction, having regard to the existence of other means of intervention and rebuttal, particularly through civil remedies (see for example, *Perinçek v. Switzerland* [GC], no. 27510/08, § 273, ECHR 2015 (extracts). In the circumstances of the present case, however, the Court does not find the conviction and the sentence excessive or to be of such a kind as to have a "chilling effect" on the exercise of media freedom (see, *inter alia*, *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 93, ECHR 2004-XI, with further references).

78. The applicants emphasised that they had also been punished by having to pay legal costs to S and Copenhagen University Hospital. Those costs amounted to DKK 62,250 (equal to approximately EUR 8,355) before the City Court and DKK 90,000 (equal to approximately EUR 12,080) before the High Court. The Court has found that the most careful scrutiny on the part of the Court is called for when measures taken by a national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern (see, for example, *Jersild v. Denmark*, cited above, § 35 and *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 64, ECHR 1999-III). In the present case, however, the Court finds that the decision that the applicants pay legal costs does not appear unreasonable or disproportionate (see, by contrast, *MGN Limited v. the United Kingdom*, no. 39401/04, § 219, 18 January 2011).

(ζ) Conclusion

79. In the light of all the above-mentioned considerations, the Court considers that the domestic courts, and most recently the High Court in its judgment of 10 June 2011, balanced the right of freedom of expression with the right to respect for private life, and took into account the criteria set out in the Court's case-law. The reasons relied upon were both relevant and sufficient to show that the interference complained of was "necessary in a democratic society" and that the authorities of the respondent State acted within their margin of appreciation in striking a fair balance between the competing interests at stake.

80. The Court therefore concludes that there has been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 10 of the Convention;

Done in English, and notified in writing on 5 December 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Robert Spano
Registrar	President