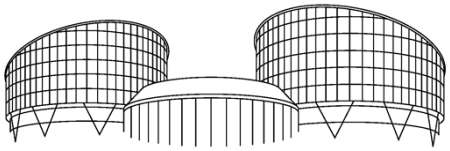

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

# CASE OF HØINESS v. NORWAY

*(Application no. 43624/14)*

JUDGMENT

STRASBOURG

19 March 2019

**FINAL**

19/06/2019

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

**In the case of Høiness v. Norway,**

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

Robert Spano, *President,*
Paul Lemmens,
Julia Laffranque,
Valeriu Griţco,
Stéphanie Mourou-Vikström,
Arnfinn Bårdsen,
Darian Pavli, *judges,*

and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 12 February 2019,

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

# PROCEDURE

1. The case originated in an application (no. 43624/14) against the Kingdom of Norway lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Norwegian national, Ms Mona Høiness ("the applicant"), on 3 June 2014.

2. The applicant was represented by Mr H. Helle, a lawyer practising in Oslo. The Norwegian Government ("the Government") were represented by Mr M. Emberland of the Attorney General's Office (Civil Matters) as their Agent, assisted by Mr R. Nordeide, Attorney.

3. The applicant alleged that there had been a breach of her right to respect for her private life as enshrined in Article 8 of the Convention, in so far as the domestic courts had not, at her request, held a media company and its editor liable to pay compensation for failing to sufficiently prevent or swiftly remove comments relating to her posted on an online debate forum.

4. On 20 June 2017 notice of the application was given to the Government.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

### A. Introduction

5. The applicant was born in 1958 and lives in Oslo. She is a well-known lawyer who mainly deals with criminal and child custody cases. She

is married to a businessman and was formerly a talk show host and active participant in public debate.

6. In August and September 2010 the applicant lodged two complaints with the Press Complaints Commission (*Pressens Faglige Utvalg*) against two publications owned and controlled by Mr Trygve Hegnar: the weekly and daily business newspapers *Kapital* and *Finansavisen*. Mr Hegnar also owned and controlled the internet portal *Hegnar Online*, which focused mainly on business and financial news.

7. All three publications had, from late summer 2010, published articles concerning the applicant's role and relationship with a wealthy, elderly widow from whom she would inherit. The publications contained direct or indirect suggestions that the applicant had exploited her emotionally or financially. After the widow passed away in 2011, her relatives instituted proceedings against the applicant, challenging the validity of her will. The inheritance case, which the applicant won both at first and second instance (in 2012 and 2014 respectively), was covered extensively in the above publications.

8. The *Hegnar Online* website featured a forum – at a separate web address, but to which access was given via the online newspaper – where readers could start debates and submit comments. There was no editorial content in the forum; all content was user-generated. It was possible for users to comment anonymously and there was no requirement to register. More than 200,000 comments were posted every month and the debate forum was among the biggest of its kind in Norway. The forum was divided into many subforums, with topic headings such as "Shipping", "IT", "Finance", "Property", "Media" and "Theme of the day" (*"Dagens tema"*).

9. On 5 November 2010 a forum thread was started in the subforum "Theme of the day" under the heading "Mona Høiness – the case is growing, according to Kapital" (*"Mona Høiness – saken vokser*, *sier Kapital"*), where the original poster wrote only "What is the status?" (*"Hva er status?*"). The next comment, posted the same day, read "Sexy lady. What is the case about ???" (*"Sexy dame. Hva gjelder saken ???"*), to which another commenter responded "Money." At 12.32 p.m. the following day another comment was made, in which the poster claimed to "know someone who knows someone" who had been "lucky to have shagged" the applicant (*"Sexy hun da! Kjenner en som kjenner en som knulla henne. Heldiggris"* – hereinafter "comment 1").

The thread continued the same day with a commenter writing: "status quo" and "ab absurdo". The following comment was made the next day: "I read about this case briefly several weeks ago. I now see that Kapital gives it the front page. The conflict relates to an apartment at Frogner + wealthy old lady with whom Høiness has developed a mother-daughter relationship over many years." (*"Leste om denne saken såvidt, for flere uker siden. Ser nå at Kapital gir den forsiden. Striden gjelder en leilighet på Frogner +*

*velstående eldre dame som Høiness har utviklet et mor/datter-forhold til over mange år."*)

The next comment read: "Is it Kapital's Case [(*"Saken til Kapital"*)] which is growing?", to which another commenter responded with the wordplay: "It is Hegnar's thing [(*"saken til Hegnar"*)] which is growing." This was followed by the comment "If you are looking for pretty ladies, look at the thread 'Pride of the nation'", to which another poster added: "And that about the Marilyn-revelation".

The next day, on 8 November 2010, a new comment was made: "With 100 million at stake it is clear that one would bend the ethical rules a little" (*"Med 100 mill i potten er det klart du tøyer de etiske reglene litt"*), before another poster asked: "Has she become pregnant, or is she only gaining weight?", and yet another poster followed with the above wordplay: "Is Hegnar's stake [(*"staken til Hegnar"*)] still growing?". At 5.55 p.m. another commenter wrote: "If I were to s— her, it would have to be blindfolded. The woman is dirt-ugly – looks like a wh—" (*"Skulle jeg k— henne måtte det bli med bind for øya. Synes dama er dritstygg – ser ut som en h—"* – hereinafter "comment 2"). Thereafter a poster asked: "How old is she now?", to which the last commenter responded: "She's 83 by now [(*"etter hvert"*)]. Time flies!"

All the comments were made anonymously and thus the number of possible different posters was unknown. According to a printout made at 7.26 p.m. on 8 November 2010, comment 1 had by then been read 176 times, while comment 2 had been read twelve times.

10. The same day, 8 November 2010, the applicant's counsel wrote a letter to the Press Complaints Commission, in the course of the proceedings concerning one of the above-mentioned complaints in respect of the coverage of the inheritance case (see paragraph 7 above). The counsel stated, *inter alia*, that a new report had been published in *Kapital* and that the case had been chosen as the "Theme of the day" on *Hegnar Online*. In particular, Hegnar "allowed the posters to present serious and degrading sexual harassment" of the applicant. In the letter, it was expressly stated that this was not to be made part of the existing complaint against *Kapital*, so as not to further delay the handling of that complaint by the publisher. A copy of the printout of the forum thread in question was attached (see paragraph 9 above).

11. Mr Hegnar received a copy of the letter and in an email to the Press Complaints Commission on 9 November 2010 stated, *inter alia*, that *Hegnar Online* was a separate newspaper with its own editor, unrelated to *Kapital*. He submitted that it could not therefore be taken into account in a complaint against the latter. The Commission wrote an email to both parties the following day stating that it – having spoken with the applicant's counsel – noted that the letter of 8 November 2010 did not amount to a new

complaint, but was an appendix to the documents in the pending case against *Kapital* and did not relate to *Hegnar Online*.

12. Comments nos. 1 and 2 were not deleted. The applicant's counsel sent an email at 12.32 p.m. on 17 November 2010 to Mr B. and Mr H., an editor working for *Hegnar Online*, requesting written confirmation that the comments would be deleted immediately and arguing that Mr Hegnar himself had "declined all responsibility for the matter" ("*fraskrev seg alt ansvar for saken*").

13. Mr B. from *Hegnar Online* responded at 12.45 p.m. the same day, saying that he was sorry that comments in breach of their guidelines had not been deleted, and that he had now deleted the comments he had found.

14. On 19 November 2010 Mr Hegnar wrote an editorial in *Kapital* commenting on the applicant's remarks on the forum comments in the context of the complaint against *Kapital* (see paragraph 10 above). In the editorial, he stated that *Hegnar Online* was unrelated to *Kapital* and, furthermore, that *Kapital* would not take responsibility for what eager commenters wrote on *Hegnar Online*, which he described as "an open forum". The editorial read, *inter alia*, as follows:

> "... Many strange, annoying and plainly wrong things are written on such open websites, where there is subsequent control and no editorial treatment prior to publishing.
>
> Also we ourselves must, at times, endure harsh comments ("*tåle røff omtale*") on such websites, but we cannot rush off to the Press Complaints Commission with it."

15. On 23 November 2010 the Press Complaints Commission examined the applicant's complaints against *Kapital* and *Finansavisen* (see paragraph 6 above), and found that both publications had breached the code of conduct for journalists (*Vær varsom-plakaten*): *Kapital* for their use of a misleading headline (case no. 187/10) and *Finansavisen* for not giving the applicant the opportunity to reply simultaneously (case no. 192/10).

16. On 28 November 2010 a forum thread was started on the subforum "Media". The thread starter, under the headline "Mona Høiness vs Trygve Hegnar", commented on the inheritance case and the applicant's allegation that she was being sexually harassed (see paragraphs 7 and 10 above). The next posting in the thread, made the same day, said only: "Ask if Mona knows trønderbjørn? :))" (*"Spør om Mona kjenner trønderbjørn? :))"*)

On 30 November 2010 the next poster commented: "some have a passion for popstars and football players, while others like to hang around centres for the elderly and old people's homes", before another wrote: "are you old, ill and confused? The law firm MH takes the case. NB! Pre-payment only". At 11.02 a.m. the same day a comment raising the question whether the applicant was "still shagging" someone referred to by the nickname "*trønderbjørn*" (see paragraph 27 below) (*"Driver hun fortsatt å knuller på denne trønderbjørn?"* – hereinafter "comment 3") was posted.

On 1 December 2010 a poster wrote: "saw a woman sneak out of borgen kremat. [(a crematorium in Oslo)] with two handbags filled with golden jewellery and wallets. She smiled knowingly ... [(*"smilte lurt"*)]".

All the comments in the thread were made anonymously.

17. On 3 December 2010 an editor at a radio station (*Radio Norge*) drew the applicant's counsel's attention to the debate that had been started on the *Hegnar Online* forum on 28 November 2010 (see paragraph 16 above) and enclosed a copy of the relevant thread in an email. From that it emerged that comment 3 had by then been read 115 times.

18. On 6 December 2010 the applicant's legal counsel wrote to Mr H., attaching the email from the editor at the radio station and demanding confirmation that harassing comments in the "Media" subforum would be deleted immediately. In an email the same day Mr H. replied that he had also been contacted by the radio editor directly on 3 December 2010 and, on checking, had seen that the comments had by then already been deleted.

19. On 7 January 2011 a complaint concerning the two forum threads as a whole (see paragraphs 9 and 16 above) was lodged with the Press Complaints Commission. On 22 February 2011 it concluded in general terms that neither comments with sexual content nor comments that accused the applicant of unethical or unlawful behaviour in the inheritance case were in compliance with the code of conduct for journalists, and that the editors should accordingly have removed them immediately, pursuant to a provision in that code (case no. 002/11).

20. On 7 April 2011 the applicant's counsel sent a letter to *Hegnar Online* stating the applicant's intention to instigate civil proceedings against *Hegnar Online* and the editor, Mr H., because comments 1 to 3 had been defamatory and contrary to Article 246 of the Penal Code (see paragraph 43 below). For the defamation she would claim redress under section 3-6 of the Compensation Act (see paragraph 44 below), of amounts limited to 250,000 Norwegian kroner (NOK - today approximately 25,000 euros (EUR)) from the company *Hegnar Online* and NOK 25,000 (approximately EUR 2,500) from Mr H. personally.

The applicant's counsel argued that comments 1 to 3 had constituted sexual harassment beyond what a publicly known person had to endure and that it was settled law that such derogatory comments, discriminatory to women, were not protected by Article 10 of the Convention under any circumstances. Reference was made to the case of *Tammer v. Estonia* (no. 41205/98, ECHR 2001-I).

21. *Hegnar Online* and Mr H.'s counsel responded in a letter of 28 April 2011. The counsel stated that the company *Hegnar Media AS*, into which *Hegnar Online* had by then been incorporated, had a procedure that made it simple to complain about forum comments that anyone might consider inappropriate. Next to each post was a link which could be clicked on in order to warn the company ("warning button"). When the company received

such complaints, this usually led to deletion of the comment. Between 1,800 and 2,000 comments per month were deleted on the basis of such complaints. In addition, the company had moderators who on their own initiative removed comments in breach of the forum guidelines. Comments 1 and 2 had been removed immediately – within eight minutes of the applicant's complaint – and comment 3 had been removed on the initiative of a moderator.

In the letter it was further stated that *Hegnar Media AS* apologised for three of its users having made comments with sexual content, directed at the applicant, but that it did not consider itself liable to pay compensation. The three comments had had nothing to do with the company's journalistic work or editorial responsibility; they had not been uttered or produced by the company, nor had it authorised them for publication. Furthermore, the comments in question had not been defamatory and had been removed as soon as the company had become aware of them. Although the company did not consider itself legally liable, it offered the applicant NOK 10,000 (today approximately EUR 1,000) for the inconvenience she had suffered because of the comments.

### B. Proceedings before the City Court

22. On 4 May 2011 the applicant instigated civil proceedings before the Oslo City Court (*tingrett*) against *Hegnar Media AS* and the editor, Mr H., for defamation. As previously stated in the letter to *Hegnar Online* (see paragraph 20 above), she claimed that her honour had been infringed because of comments 1 to 3 and that she was therefore entitled to redress. She maintained, *inter alia*, that the conclusion of the Press Complaints Commission (see paragraph 19 above) supported her argument that the defendants had exactly the same editorial responsibility for the comments as if they had been letters from readers printed in a newspaper.

23. The City Court heard the case from 19 to 20 December 2011. The parties attended with their counsel and one witness was heard. During the proceedings the applicant invoked Articles 246 and 247 of the Penal Code (see paragraph 43 below), in conjunction with section 3-6 of the Compensation Act (see paragraph 44 below). The defendants argued principally that the situation at hand was governed by section 18 of the E-Commerce Act (see paragraph 45 below). They also maintained that Articles 246 and 247 of the Penal Code were inapplicable since they required intent (*forsett*) on the part of the wrongdoer. In the case at hand the defendants had not even been aware of the comments in question, and the principles relating to editorial responsibility were in any event irrelevant. In any case, editorial responsibility could not apply to the situation before the editor had become aware of the comments, and in the instant case they had been removed as soon as Mr H. had become aware of them.

24. On 4 January 2012 the Oslo City Court ruled in favour of the defendants. It considered that the three comments had not amounted to unlawful defamation as they had been incapable of offending either the applicant's honour or reputation.

25. As to comment 1, the City Court noted that the comment had been tasteless and vulgar, but had not in itself been an accusation (*beskyldning*) of promiscuity or some sort of immoral behaviour. In the City Court's view, it could not harm the applicant's reputation (*omdømme*) under Article 247 of the Penal Code (see paragraph 43 below). Furthermore, it had not expressed disdain or disapproval of her, so could not harm her honour (*æresfølelse*) under Article 246 of the Penal Code (ibid.).

26. With respect to comment 2, the City Court again found that it had been tasteless and "unserious". An anonymous comment of this sort could not, however, harm the applicant's reputation or honour. It might be considered to be ridicule, but had not exceeded the threshold over which ridicule would be unlawful. The City Court also had regard to the fact that "Theme of the day" was a marginal forum frequented mostly by anonymous people. It was generally unserious and, according to the City Court, most readers would find that the comments said more about those posting them than about the people mentioned in the comments. The City Court expressed that it completely understood that the applicant found it unpleasant that anonymous persons had posted "sleazy" remarks about her on the Internet. However, based on an overall assessment, the City Court concluded that comment 2, either alone or in conjunction with comment 1, had not been capable of harming the applicant's honour.

27. Turning to comment 3, the City Court said that this was again a comment that most people would consider inappropriate, tasteless and vulgar. It had to be interpreted as an allegation that the applicant had had a sexual relationship with a person nicknamed *trønderbjørn*. No further information about who or what kind of person that might be had been given either in the forum or during the civil case. The court found that an anonymous comment indicating that the applicant had had a sexual relationship with an unidentified person could not harm the applicant's reputation or honour. There had been nothing expressly negative in the comment. Moreover, since the writer had been anonymous there had been no reason to take him or her seriously.

28. The City Court also made an overall assessment of the three comments viewed as a whole, but found that they still had not amounted to unlawful defamation. It remarked that several of the other comments in the forum threads in question, that the applicant had not complained about, could possibly be defamatory, as had also been indicated by the defendants briefly during the hearing, but since the applicant had not complained about any other comments, the City Court could not decide on their lawfulness.

29. The applicant was ordered to pay the defendants' litigation costs of 225,480 Norwegian kroner (NOK - approximately 24,650 euros (EUR)). The City Court stated that it was in no doubt as to the result of the case and noted that the applicant had turned down the defendant's offer of settlement (see paragraph 21 above). The defendants had claimed NOK 290,880 (approximately EUR 30,615), an amount which the City Court considered exceeded what was reasonable and necessary under the relevant provisions of the Dispute Act (see paragraph 47 below).

### C. Proceedings before the High Court

30. On 31 January 2012 the applicant appealed against the City Court's judgment to the Borgarting High Court (*lagmannsrett*). Apart from maintaining that the three statements (comments 1 to 3) had amounted to unlawful defamation, she submitted that her right to privacy (*privatlivets fred*) as enshrined in Article 390a of the Penal Code, and her rights under the general principles concerning the protection of personality (*det ulovfestede alminnelige rettsvern for personligheten*) had been breached. Moreover, she argued that the comments had been in breach of section 8a of the Gender Equality Act and that under section 17 of that Act compensation was payable (see paragraph 46 below). Lastly, she submitted that the defendants had been awarded an amount of litigation costs exceeding what had been necessary.

31. The High Court heard the case on 10 and 11 September 2013. The parties attended and gave evidence, and one witness was heard. The judgment was delivered on 24 October 2013.

32. The High Court stated at the outset of the judgment that there had been an extensive coverage of the inheritance case both by the Hegnar Group and other media. The coverage had undoubtedly been a strain on the applicant, but was not the topic of the proceedings. It did however form a background to the case and explained why the applicant had come into the spotlight and subsequently been the topic of anonymous statements on the debate forum related to *Hegnar Online*.

33. The High Court went on to state that it was of the view that the applicant had had good reason to react to the statements on the *Hegnar Online* forum. The statements had been unserious and sexually loaded. Accordingly, she had by way of a complaint to the Press Complaints Commission achieved a declaration that *Hegnar Online* had breached the code of conduct for journalists because the content of the forum threads had exceeded what she had had to accept and that *Hegnar Online* should on its own initiative have discovered and removed the comments more quickly than had happened.

34. Turning to the question of liability to pay compensation, the High Court stated that this was a different question to that considered by the Press

Complaints Commission. At this point the High Court had reached the same conclusion as the City Court had, but on different grounds. The City Court had considered each of the three comments in detail and concluded that, although inappropriate, unserious and tasteless (*"usaklige, useriøse og smakløse*"), they did not fall within the scope of Articles 246 and 247 of the Penal Code (see paragraphs 24-28 above and 43 below). The High Court stated that it shared the City Court's view with regard to the lack of seriousness, but deemed it unnecessary to assess the three comments against the provisions on defamation.

35. Instead, the High Court proceeded on the basis that the applicant's claim for compensation could in any event not succeed unless the defendants had acted with sufficient culpability. It would be decisive whether such culpability had been demonstrated by *Hegnar Online* and Mr H. not having done enough to discover and thereafter remove the impugned comments.

36. The High Court further stated that one characteristic of posts on the type of debate forum in question, and also of comments on editorial content posted online, was that they were posted in real time without any prior censorship being possible. This meant that controls needed to be carried out subsequently, regardless of whether it concerned content subject to editorial responsibility or a website with only user-generated content.

37. With regard to the general system for monitoring content, the High Court noted that there were "warning buttons" on the website, which readers could click on in order to react to comments. Furthermore, the editorial staff had the task of monitoring content and removing comments on their own initiative. However, there were a very large number of posts on the forum as a whole, and the High Court presumed that only a few discoveries of content to be removed had been made at the relevant time.

38. Turning to the three specific comments in question, the High Court noted that comments 1 and 2 had been posted on 6 and 8 November 2010 respectively. The applicant had been notified by others of the comments, and had not read them herself on the website. The editorial staff had been notified of the two comments by email on 17 November 2010, and had responded thirteen minutes later that they had been removed. This had clearly been an adequate reaction. However, the High Court discussed whether the letter from the applicant's counsel to the Press Complaints Commission on 8 November 2010 (see paragraph 10 above) implied that Mr Hegnar should have initiated a deletion process at that time. Having regard to the fact that the letter was formally made in a different context, namely the pending complaint against *Kapital* (see paragraph 6 above), and did not contain any request that the comments be removed, the High Court found it appropriate that Mr Hegnar had only considered the letter as a document in the *Kapital* case.

39. With respect to comment 3, this had been posted on 30 November 2010. On 3 December 2010 staff at *Radio Norge* had informed the applicant's counsel, who had contacted *Hegnar Online* on 6 December 2010. *Hegnar Online* had by then already looked into the matter, as it had received a similar notification from *Radio Norge* on 3 December 2010, and had on that date noticed that the comment had already been deleted, presumably by a moderator at *Hegnar Online*. As this comment had, thus, rapidly been deleted of the staff's own motion, there was nothing to suggest liability on the part of *Hegnar Online*.

40. The High Court upheld the City Court's decision on litigation costs before the City Court and awarded the defendants NOK 183,380 (approximately EUR 20,050) for their costs before the High Court. It remarked that the case had been clear and that neither considerations on the parties' welfare nor relative strength (see paragraph 47 below) could justify not awarding the winning party costs. The defendants had claimed NOK 231,980 (approximately EUR 24,416), but the High Court found that as their counsel charged a high hourly rate, appropriate for a specialist lawyer, this should have been reflected in a lower amount of hours.

### D. Proceedings before the Supreme Court

41. On 22 November 2013 the applicant appealed against the High Court's judgment to the Supreme Court (*Høyesterett*). She contested the High Court's assessment that the defendants had acted with sufficient care and alleged that the High Court had erred in law as its reasoning had not been clear with respect to the standard of care required, notably whether it had proceeded on the basis that negligence would suffice for liability, or whether the establishment of gross negligence had been necessary. She also contested the High Court's assessment of evidence concerning Mr Hegnar's dealing with the letter of 8 November 2010 addressed to the Press Complaints Commission. The applicant pointed out that Mr Hegnar had written an editorial in *Kapital* on 19 November 2010, making remarks about how the applicant had complained about comments on the forum (see paragraph 14 above). Furthermore, the applicant argued that the High Court had wrongfully proceeded on the basis that the standards for the moderation of websites with user-generated content had been more lenient in 2010 than at the time of the High Court's judgment. Lastly, she appealed against the High Court's decision on litigation costs. The defendant's counsel charged an hourly rate of up to NOK 3,900 (approximately EUR 410), which was so high that there would be a chilling effect on individuals' willingness to challenge violations of Article 8 of the Convention.

42. On 7 February 2014 the Supreme Court's Appeals Leave Committee (*Høyesteretts ankeutvalg*) refused the applicant leave to appeal against

either the High Court's judgment as a whole or against its decision on legal costs.

## II. RELEVANT DOMESTIC LAW

43. The relevant provisions of the Penal Code of 22 May 1902 (*straffeloven*), in force at the relevant time, provided as follows:

**Article 246**

"Any person who by words or deeds unlawfully defames another person, or who aids and abets thereto, shall be liable to a fine or imprisonment for up to six months."

**Article 247**

"Any person who by words or deeds behaves in a manner that is likely to harm another person's good name and reputation or to expose him to hatred, contempt or loss of the trust necessary for his position or business, or who aids and abets thereto, shall be liable to a fine or imprisonment for up to one year. If the defamation is committed in print or in broadcasting or otherwise under especially aggravating circumstances, imprisonment for up to two years may be imposed."

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

**Article 390a**

"Any person who by frightening or annoying behaviour or other inconsiderate conduct violates another person's right to privacy, or who aids and abets thereto, shall be liable to a fine or imprisonment for up to two years. ..."

44. Section 3-6 of the Compensation Act of 13 June 1969 (*skadeserstatningsloven*) reads:

"Anybody who commits libel or slander or infringes the privacy of another person shall, if he has been negligent or the conditions for imposing a punishment are fulfilled, pay compensation for the damage sustained and such compensation for loss of future earnings as the court finds reasonable with due regard to the degree of guilt and other circumstances. He may also be ordered to pay such compensation (redress) for non-pecuniary damage as the court finds reasonable.

If the offence takes the form of libel, and anybody who has acted in the service of the owner or publisher of the printed matter is responsible under the preceding paragraph, the owner and publisher shall also be liable to compensation. The same rule applies to any redress imposed under the preceding paragraph, unless the court for special reasons decides to exempt them. The owner or publisher may also be ordered to pay such additional redress as the court finds reasonable in respect of them. The Norwegian Broadcasting Corporation is similarly liable when anybody acting in its service is responsible under the preceding paragraph for a broadcast. The same rule applies to any other broadcasting institution.

In pronouncing a judgment which imposes a punishment or declares a statement void, the court may order the defendant to pay the victim an amount covering the costs of publishing the judgment. The same rule applies in the case of any conviction under § 130 of the General Civil Penal Code. ...”

45. Section 18 of the E-Commerce Act of 23 May 2003 (*ehandelsloven*) reads:

**Section 18**

***Exemption from liability for certain storage services***

“A service provider who stores information at the request of a service recipient, may only

(a) be punished for storing unlawful information or contribution to unlawful activities by storing unlawful information if he has acted with intent, or

(b) be held liable to pay compensation for storing unlawful information or contribution to unlawful activities by storing unlawful information if he has acted with intent or gross negligence.

The service provider is in any event exempt from criminal or civil liability if he without undue delay takes necessary measures to remove or block access to the information upon the intent or gross negligence under the first paragraph having appeared.

A service provider is not exempt from liability pursuant to this section if the service recipient is acting on behalf of the service provider or under his control.”

46. The two first paragraphs of section 8a of the Gender Equality Act of 9 June 1978 (*likestillingsloven*), in force at the relevant time, provided:

**Section 8a (Harassment on the basis of gender and sexual harassment)**

“Harassment on the basis of gender and sexual harassment is not permitted.

‘Harassment on the basis of gender’ means unwanted behaviour connected to a person’s gender and which has the effect or as purpose to harm another person’s dignity. ‘Sexual harassment’ means unwanted sexual attention that is troublesome to the person receiving the attention.”

Pursuant to the second paragraph of section 17, the general rules on civil liability applied to intentional or negligent infringements of the Gender Equality Act.

47. The relevant sections of the Dispute Act of 17 June 2005 (*tvisteloven*) read:

**Section 20-2 Award of costs to the successful party**

“(1) A party who is successful in an action is entitled to full compensation for his legal costs from the opposing party. ...

(3) The court may exempt the opposing party from liability for legal costs in whole or in part if the court finds that there are compelling grounds to justify an exemption. The court shall, in particular, have regard to:

(a) whether there was justifiable cause to have the case heard because the case was uncertain or because the evidence was clarified only after the action was brought,

(b) whether the successful party can be reproached for bringing the action or whether he has rejected a reasonable offer of settlement, or

(c) whether the case is important to the welfare of the party and the relative strength of the parties justifies an exemption."

**Section 20-5**

***Assessment of compensation for costs***

"(1) Full compensation for costs shall cover all necessary costs incurred by the party in relation to the action, unless there is cause to exclude the costs pursuant to special provisions. In assessing whether costs have been necessary, the court shall have regard to whether it was reasonable to incur them in view of the importance of the case. The party may claim reasonable remuneration for his own work on the case if the work has been particularly extensive or would otherwise have had to be undertaken by counsel or another qualified assistant. ...

(3) In cases that are decided following an oral hearing, a party who claims costs shall submit a statement of costs. The statement shall be submitted at the conclusion of the court hearing. If the amount of some items is unknown, the statement shall be supplemented within the time-limit fixed by the court. Items of expenditure shall be specified so as to give the court an adequate basis upon which to make an assessment. Lawyers' fees shall always state the amount and number of hours related to the following stages of the case:

(a) the period up to the submission of a writ of summons or reply, alternatively notice of appeal and reply to notice of appeal,

(b) the period up to the start of the main hearing or oral finalisation of the case, alternatively the appeal hearing, and

(c) the period up to the conclusion of the case at the current instance. ..."

# THE LAW

## ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

48. The applicant complained that the domestic authorities, by not sufficiently protecting her right to respect for her private life and requiring her to pay litigation costs to the extent seen in her case, had acted contrary to Article 8 of the Convention, which reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the

country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

49. The Government contested that argument.

## A. Admissibility

50. 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*

#### (a) The applicant

51. The applicant submitted that the comments in question had clearly been unlawful and that the domestic courts had not undertaken the exercise of balancing the rights protected by Articles 8 and 10, respectively.

52. The applicant acknowledged that the inheritance case had been in the public interest, but argued that the articles published by *Hegnar Online* and the two other publications had not been balanced. Reference was made to the statement by the Press Complaints Commission to the effect that *Kapital* and *Finansavisen* had breached the code of conduct for journalists.

53. Although *Hegnar Online* had established a system with a "warning button" and some members of staff had been tasked with monitoring content on the forum, this had clearly been insufficient. The system had been incapable of handling the large amount of comments posted on it.

54. The applicant had not been in any position to identify the anonymous commenters; she would have needed to contact the police and report the incidents, but even then the discovery of their identity would not have been guaranteed.

55. Recognising that liability for third-party comments might have some negative consequences for freedom of expression on the Internet, the applicant maintained that the website in the present case was one of the biggest platforms and debate forums in Norway and that liability would not have any significant negative impact.

56. The requirement for the applicant to pay the defendants' legal costs of approximately EUR 49,964 (including interest) in the domestic proceedings formed a separate reason why there had been a breach of Article 8 of the Convention.

**(b) The Government**

57. The Government argued that the comments in question had not attained such a level of seriousness or been carried out in such a manner as to have caused prejudice to the personal enjoyment of the right to respect for private life.

58. The media coverage of the inheritance case had formed the background for the instant case and the applicant was, *inter alia*, a well-known lawyer, a former talk show host and had previously been active in public debate. The City Court's assessment of the context of the comments had been in line with the European Court of Human Rights' case-law in respect of Article 8 of the Convention.

59. The High Court had examined the measures applied by the defendants in the domestic proceedings in order to prevent or remove the defamatory comments, and had assessed those measures in a manner consistent with the criteria developed by the Court.

60. The Government did not dispute that the impugned comments had been made by anonymous posters and that there had not, at the time, been a system for registering users. The applicant had not taken any steps to discover the identities of the posters.

61. The Court's assessment in the case of *Pihl v. Sweden* ((dec.), no. 74742/14, 7 February 2017) and the similarities to that case weighed clearly in favour of the overall conclusion that there had been no violation in the instant case.

62. With respect to the litigation costs, the Government submitted that Article 6 § 1 of the Convention was *lex specialis* and that Article 8 could therefore not come into play. The case of *MGN Limited v. the United Kingdom* (no. 39401/04, 18 January 2011) was factually different and concerned Article 10; its rationale could not be applied to Article 8. The domestic courts had performed a balancing act in accordance with the Dispute Act which had been in line with the obligation to secure access to the courts and which had not disclosed any unreasonable lack of proportionality between the aims pursued and the means employed.

*2. The Court's considerations*

63. The Court reiterates that the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which extends to a number of aspects relating to personal identity, such as a person's name or image, and furthermore includes a person's physical and psychological integrity (see, for instance, *Von Hannover v. Germany*, no. 59320/00, § 50, ECHR 2004-VI, and *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, § 159, ECHR 2017). It has also been accepted by the Court that a person's right to protection of his or her reputation is encompassed by Article 8 as

part of the right to respect for private life (see *Bédat v. Switzerland* [GC], no. 56925/08, § 72, ECHR 2016, with further references).

64. In order for Article 8 of the Convention to come into play, the attack on personal honour and reputation must attain a certain level of seriousness and must have been carried out in a manner causing prejudice to personal enjoyment of the right to respect for private life (see *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012; *Delfi AS v. Estonia* [GC], no. 64569/09, § 137, ECHR 2015; and *Denisov v. Ukraine* [GC], no. 76639/11, § 112, 25 September 2018).

65. The Court observes that what is at issue in the present case is not an act by the State but the alleged inadequacy of the protection afforded by the domestic courts to the applicant's private life. While the essential object of Article 8 of the Convention is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may also involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. The boundary between the State's positive and negative obligations under Article 8 does not lend itself to precise definition; the applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the relevant competing interests (see *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, §§ 98-99, ECHR 2012).

66. In this respect, as concerns competing interests under Article 8 and Article 10 of the Convention, the Court has established the following general principles, as summarised in *Delfi AS*, cited above, § 139:

> "The Court has found that, as a matter of principle, the rights guaranteed under Articles 8 and 10 deserve equal respect, and the outcome of an application should not, in principle, vary according to whether it has been lodged with the Court under Article 10 of the Convention by the publisher of an offending article or under Article 8 of the Convention by the person who has been the subject of that article. Accordingly, the margin of appreciation should in principle be the same in both cases (see *Axel Springer AG*, cited above, § 87, and *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 106, ECHR 2012, with further references to the cases of *Hachette Filipacchi Associés*, cited above, § 41; *Timciuc v. Romania* (dec.), no. 28999/03, § 144, 12 October 2010; and *Mosley v. the United Kingdom*, no. 48009/08, § 111, 10 May 2011). Where the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see *Axel Springer AG*, cited above, § 88, and *Von Hannover (no. 2)*, cited above, § 107, with further references to *MGN Limited*, cited above, §§ 150 and 155, and *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, § 57, 12 September 2011). In other words, there will usually be a wide margin afforded by the Court if the State is required to strike a balance between competing private interests or competing Convention rights (see *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR

2007-I; *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 113, ECHR 1999-III; and *Ashby Donald and Others v. France*, no. 36769/08, § 40, 10 January 2013)."

67. In making this proportionality assessment, the Court has also identified the following specific aspects of freedom of expression as being relevant for the concrete assessment of the interference in question: the context of the comments, the measures applied by the company in order to prevent or remove defamatory comments, the liability of the actual authors of the comments as an alternative to the intermediary's liability, and the consequences of the domestic proceedings for the company (see *Delfi AS*, cited above, §§ 142-143 and *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, no. 22947/13, § 69, 2 February 2016).

68. The question is thus whether, in the present case, the State has struck a fair balance between the applicant's right to respect for her private life under Article 8 and the online news agency and forum host's right to freedom of expression guaranteed by Article 10 of the Convention.

69. In this connection, the Court notes at the outset that the comments made about the applicant were found by the City Court not to constitute defamation under Articles 246 or 247 of the Penal Code (see paragraph 43 above), while the High Court deemed it unnecessary to take a stand on whether the comments were defamatory. The Court also considers that it is not necessary to examine in depth the nature of the impugned comments, as they in any event did not amount to hate speech or incitement to violence (contrast *Delfi AS*, cited above, §§ 18, 114 and 162; compare *Pihl*, cited above, §§ 23-25).

70. Turning to the possibilities for the applicant to pursue claims against the anonymous individual or individuals who had written the comments, the Court sees no reason to contest the applicant's allegation that she would have faced considerable obstacles in attempting to do so.

71. As to the context in which the comments were made, the Court takes account of the fact that *Hegnar Online* was a large, commercially run news portal and that the debate forums were popular. It does not appear, however, from the judgments of the domestic courts that the debate forums were particularly integrated in the presentation of news and thus could be taken to be a continuation of the editorial articles.

72. With respect to the measures adopted by *Hegnar Online*, it appears that there was an established system of moderators who monitored content, although it is stated in the High Court's judgment that they may not have discovered a great number of unlawful comments to remove of their own motion. Moreover, readers could click on "warning" buttons in order to notify their reaction to comments (see paragraph 37 above). Lastly, it appears from the present case that a response was also given to warnings by other means, such as email.

73. In the instant case, "comment 1" and "comment 2" had not been picked up by the moderators, but on 17 November 2017, thirteen minutes after having notified them, the applicant's counsel received an email stating that the comments had been deleted (compare *Pihl*, cited above, § 32, about removal of an unlawful comment one day after notification had been given). The comments had been online since 6 and 8 November 2010, respectively. "Comment 3", posted on 30 November 2010, had been deleted on the moderator's own initiative before receipt of the notification on 3 December 2010. Based on an overall assessment, the High Court found it irrelevant that the comments had been mentioned in a letter to the Press Complaints Committee and that it had in that way become known to the chairman of *Hegnar Online* that the applicant had reacted to comments that she found to constitute sexual harassment. Upon an overall examination and assessment of the measures that had been put in place in order to monitor the forum comments – hereunder taking account of the control being only subsequent and that the commentators did not have to register – and the specific responses to the applicant's notifications, the High Court found that the news portal company and its editor had acted appropriately (see paragraphs 36-39 above).

74. The Court observes that the applicant's case was considered on its merits by two judicial instances at the domestic level before the Supreme Court refused leave to appeal (compare *Pihl*, cited above, § 36). The domestic courts reviewed the relevant aspects of the case (see paragraph 67 above). In line with the principles set out in *Delfi AS*, cited above, § 139 (see paragraph 66 above), there are no reasons for the Court to substitute a different view for that of the domestic courts.

75. In view of the above, the Court finds that the domestic courts acted within their margin of appreciation when seeking to establish a balance between the applicant's rights under Article 8 and the news portal and host of the debate forums' opposing right to freedom of expression under Article 10.

76. With respect to the complaint about the compensation for litigation costs awarded, the Court observes that the expenses did not involve any success fees or similar constructions. The case was tried in full before two court instances and both instances conscientiously reviewed, and considerably reduced, the extent of the compensable costs (see paragraphs 29 and 40 above). In the circumstances of the case, the domestic courts found that there were no reasons to deviate from the starting point that the winning party be awarded compensation for their fees and expenses.

77. While regard must be had to the general level of expenses in the jurisdiction (see, for example, *AS Dagbladet v. Norway* (dec.), no. 60715/14, § 33, 20 February 2018, and *Avisa Nordland AS v. Norway* (dec.), no. 30563/15, § 48, 20 February 2018), the Court notes the considerable amount of costs imposed on the applicant. However, taking

account of the nature of the claim lodged before the national courts and the subject matter, the Court does not consider that it in the instant case can call into question the domestic courts' assessment as to the imposition of costs, also in view of the High Court's examination of the "parties' welfare" and their "relative strength" (see paragraph 40 above). Against that background, the Court does not need to address the Government's argument that Article 6 § 1 is *lex specialis*, as it is in any event satisfied that the domestic courts sufficiently safeguarded the applicant's rights under Article 8 and that there has been no violation of that provision.

## FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 19 March 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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| Stanley Naismith<br>Registrar | Robert Spano<br>President |