



TV journalists' defamation conviction for programme criticising hospital's treatment of cancer patients was justified

In today's **Chamber judgment**¹ in the case of **Frisk and Jensen v. Denmark** (application no. 19657/12) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 10 (freedom of expression) of the European Convention on Human Rights.

The case concerned two Danish journalists working for a national television station and their conviction of defamation following a programme broadcast in 2008 criticising the treatment of cancer at Copenhagen University Hospital. The Danish courts concluded that their programme had undisputedly given viewers the impression that malpractice had occurred at the hospital. They found in particular that the programme had accused the hospital's cancer consultant of preferring to use a chemotherapy which was just a test product in order to promote his professional prestige and personal finances; and that that had resulted in certain patients dying or having their lives cut short.

The Court agreed with the Danish courts' decisions, finding that they had struck a fair balance between the journalists' right to freedom of expression and the hospital's and the consultant's right to protection of their reputation. In particular the Court saw no reason to call into question the domestic courts' conclusion that the programme had been factually incorrect. It also agreed that those wrongful accusations, disseminated on primetime national television, had had considerable negative consequences, namely public mistrust in the chemotherapy used at the hospital.

Principal facts

The applicants, Mette Frisk and Steen Jensen, are two Danish journalists employed by a national television station, Danmarks Radio. They were born in 1977 and 1961 and live in Copenhagen and Åbyhøj (Denmark) respectively.

The applicants were producer and chief sub-editor of the documentary programme "When the doctor knows best". On 24 September 2008 at 8 p.m. the programme was broadcast on the topic of lung cancer and the types of chemotherapy used at Copenhagen University Hospital. It reported on patients' and families' frustration at being denied a choice in chemotherapy, Vinorelbine being the preferred option at the hospital. It questioned whether patients should have been informed of other options, namely Alimta which allegedly had been more thoroughly tested than Vinorelbine.

Shortly after, the hospital and the consultant in charge of cancer treatment at the hospital instituted defamation proceedings against the applicants for accusing them of malpractice. During the proceedings before the courts, the consultant and the medical director for the hospital gave evidence, stating in particular that the programme had given patients the impression that Alimta was the only approved cure and that Vinorelbine was just a test product, even though the applicants knew that this was not true, and that in addition there were no studies to show that Alimta was medically better.

Ultimately, in June 2011, the courts found against the applicants and sentenced them each to 10 day-fines of 1,000 Danish Kroner (equal to approximately 1,340 euros in total). Although giving

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

weight to the fact that the programme dealt with a matter of considerable public interest, namely risk to life and health in public hospital treatment, the courts found that the programme had undisputedly given viewers the impression that malpractice had occurred at Copenhagen University Hospital. In particular, the programme had accused the consultant of preferring to use chemotherapy which was part of a test, with the clear insinuation that this was in order to promote the consultant's professional prestige and personal financial situation, and that this had resulted in certain patients dying or having their lives shortened.

Furthermore, assessing various research material, the courts concluded that the accusations had been factually incorrect as there had been no documentation to show that Alimta therapy was more effective than Vinorelbine and that the applicants had to have been aware of this as they were in possession of the same material when preparing their programme.

Lastly, the courts found that the allegations could not be justified by the fact that the hospital had refused to participate in the programme. On the contrary, the hospital had cooperated by responding to Ms Frisk's extensive inquiries, the hospital's cancer consultant notably producing a memorandum in June 2008 stressing that international studies had not shown that any combination of chemotherapy was superior to another.

Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression), the applicants complained that their conviction of defamation had been disproportionate. They maintained in particular that the documentary had been based on significant journalistic research and had had various important consequences, including a public demand for Alimta therapy and a change in practice at Copenhagen University Hospital.

The application was lodged with the European Court of Human Rights on 27 March 2012.

Judgment was given by a Chamber of seven judges, composed as follows:

Robert **Spano** (Iceland), *President*,
Ledi **Bianku** (Albania),
Işıl **Karakaş** (Turkey),
Nebojša **Vučinić** (Montenegro),
Valeriu **Griţco** (the Republic of Moldova),
Jon Fridrik **Kjølbro** (Denmark),
Stéphanie **Mourou-Vikström** (Monaco),

and also Stanley **Naismith**, *Section Registrar*.

Decision of the Court

First, the Court accepted that Copenhagen University Hospital, although a public body and not a person as such, could rely on "the protection of the reputation or rights of others" under Article 10 because it represented the interests of management and staff, including the hospital's cancer consultant.

It then went on to agree with the domestic courts that the applicants' programme had dealt with issues of legitimate public interest, namely the treatment of cancer patients; and that the limits of acceptable criticism were wider in their case as the subject of their criticism was a public hospital whose activities had an impact on the life and health of the general public.

Similarly, the Court saw no reason to call into question the conclusions of the domestic courts that the accusations made in the programme had been factually incorrect. Although the domestic courts

had not disputed that the journalists had carried out thorough research, they pointed to the fact that they had not informed viewers that there was no documentation to show that Alimta was more effective than Vinorelbine, despite the research material in their possession and in particular the memorandum prepared by the hospital's cancer consultant of June 2008. Indeed, in their submissions to this Court, the applicants stated that they had not found the memorandum suitable for inclusion in their documentary as it had not answered their specific questions.

Moreover, those wrongful accusations, disseminated on primetime national television, had had considerable consequences, namely a public demand for Alimta chemotherapy and a change in practice at Copenhagen University Hospital. Like the courts, the Court considered that that was because the programme had encouraged patients to mistrust Vinorelbine chemotherapy based on an incorrect portrayal of the facts, and not, as the applicants alleged, because of journalism playing its essential and indispensable role in a democratic society.

Nor could the applicants justify their allegations by the fact that the hospital had refused to participate in their programme. There was no dispute during the domestic proceedings that the hospital had cooperated with the preparation of the programme by replying to the journalists' questions and giving them relevant information, including the memorandum of June 2008.

Lastly, the Court found that the applicants' conviction for defamation and their sentences had not been excessive in the circumstances.

In conclusion, the reasons the domestic courts had given for convicting the applicants of defamation had been "necessary in a democratic society". The Danish authorities' decisions had moreover struck a fair balance between the competing interests at stake, namely the journalists' right to freedom of expression and the hospital's and its consultant's right to the protection of their reputation.

There had therefore been no violation of Article 10 of the Convention.

The judgment is available only in English.

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Press contacts

echrpess@echr.coe.int | tel.: +33 3 90 21 42 08

Tracey Turner-Tretz (tel: + 33 3 88 41 35 30)

Denis Lambert (tel: + 33 3 90 21 41 09)

Inci Ertekin (tel: + 33 3 90 21 55 30)

Patrick Lannin (tel: + 33 3 90 21 44 18)

The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.