THIRD SECTION

CASE OF GILLBERG v. SWEDEN

(Application no. 41723/06)

JUDGMENT

STRASBOURG

2 November 2010

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 Gillberg v. Sweden,

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

Josep Casadevall, *President,*
Elisabet Fura,
Boštjan M. Zupančič,
Alvina Gyulumyan,
Ineta Ziemele,
Luis López Guerra,
Ann Power, *judges,*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 28 September 2010,

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

PROCEDURE

1. The case originated in an application (no. 41723/06) against the Kingdom of Sweden lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Swedish national, Mr Christopher Gillberg ("the applicant"), on 10 October 2006.

2. The applicant was represented by Mr Bertil Bjernstam, a Bachelor of Laws from Gothenburg. The Swedish Government ("the Government") were represented by their Agent, Mrs Inger Kalmerborn from the Ministry for Foreign Affairs.

3. The applicant alleged, in particular, that in civil proceedings concerning access to various research material, and in subsequent criminal proceedings against him, his rights under Articles 6, 7, 8, 10 and 13 of the Convention had been breached.

4. On 17 June 2008 the Court decided to give notice of the application to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

5. The applicant and the Government each filed written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1950 and lives in Gothenburg.

7. He is a professor, specialising in child and adolescent psychiatry, at the University of Gothenburg.

8. In the period between 1977 and 1992 a research project was carried out at the University of Gothenburg in the field of neuropsychiatry focusing on the incidences of Attention-Deficit Hyperactivity Disorder (ADHD) or Deficits in Attention, Motor Control and Perception (DAMP) in children. The aim was to elucidate the significance thereof and associated problems from a long-term perspective. Parents to a group of one hundred and forty-one pre-school children volunteered to participate in the study, which was followed up every third year. Certain assurances were made to the children's parents and later to the young people themselves concerning confidentiality. The research papers, called the Gothenburg study, were voluminous and consisted of a large number of records, test results, interview replies, questionnaires and video and audio tapes. It contained a very large amount of privacy-sensitive data about the children and their relatives. Several doctoral theses have been based on the Gothenburg study. The material was stored by the Department of Child and Adolescent Psychiatry, of which the applicant was director. The project was originally set up and started by other researchers but the applicant had subsequently taken over the responsibility for completing the study.

9. The applicant alleged that the Ethics Committee of the University of Gothenburg in their permits had made it a precondition that sensitive information about the individuals participating in the study would be accessible only to the applicant and his staff and that therefore the applicant promised absolute confidentiality to the patients and their parents.

10. The Government maintained in their observations that they had been unable to find the permits referred to by the applicant, thus they could not confirm that the permits contained requirements of “absolute secrecy”. Instead the Government had located four research applications to the Ethics Committee of the University of Gothenburg (dated 13 January 1978, 26 January 1984, 9 October 1984 and 24 March 1988) according to which the applicant bore the main responsibility for the study in 1988 and, together with his wife, also in 1984, but not for the study in 1978. Concerning the issue of secrecy, the research applications can be summarised as follows: In the first application, it was stated that it would not be possible to identify individual children and that the research team did not intend to register any case records. In the first of the two applications submitted in 1984, it was stated that the project leader - being a medical doctor - was bound by professional secrecy and was to be responsible for the registers set up within the research project, that the registers were to be made non-personalised after the study had been carried out and that the results were to be presented in a way that would make it impossible to identify different individuals. Furthermore, if data registers were to be used, the Data Inspection Board's *(Datainspektionen)* instructions were to be followed. In an additional

application from the same year, concerning *inter alia* the use of social registers, it was stated that it would not be possible to identify different individuals through the data processing that was to be carried out and that only the project leader was to have access to the identification code. The application from 1988 contains the same language as the application submitted in January 1984.

11. Before the Court, enclosed in his observations, the applicant submitted two permits by the Ethics Committee of the University of Gothenburg of respectively 9 March 1984 and 31 May 1988.

12. Both permits bore signatures of approval on behalf of the Ethics Committee of the University of Gothenburg on the applications of 26 January 1984 and 24 March 1988, mentioned above. The submitted permits contained no reference to "absolute secrecy".

13. The assurance of confidentiality given to the participants in the study in 1984 had the following wording:

> "All data will be dealt with in confidence and classified as secret. No data processing that enables the identification of your child will take place. No information has been provided previously or will be provided to teachers about your child except that when starting school she/he took part in a study undertaken by Östra Hospital and its present results will, as was the case for the previous study three years ago, be followed up."

14. A later assurance of confidentiality had the following wording:

> "Participation is of course completely voluntary and as on previous occasions you will never be registered in public data records of any kind and the data will be processed in such a way that nobody apart from those of us who met you and have direct contact with you will be able to find out anything at all about you."

A. Proceedings concerning access to the research material

15. In February 2002, a sociologist K requested access to the background material. She was a researcher at Lund University and maintained that it was of great importance to have access to the research material and that it could, without risk of damage, be released to her with conditions under Chapter 14, section 9, of the Secrecy Act. She had no interest in the personal data as such but only in the method used in the research and the evidence the researchers had for their conclusions. Her request was refused on 27 February 2002 by the University of Gothenburg because K had not shown any connection between the requested material and any research and on the ground that the material contained data on individuals' health status which, if disclosed, could be assumed to harm an individual or persons related to that individual. The decision was appealed against to the Administrative Court of Appeal (*Kammarrätten i Göteborg*), which directed the matter to the University of Gothenburg to examine whether the material could be released after removal of identifying

information or with a condition restricting K's right to pass on or use data. The University of Gothenburg refused the request again on 10 September 2002 on the ground that the data requested was subject to secrecy, that there was no possibility of releasing the material after removal of identifying information, nor was there sufficient evidence to conclude that the requested material could be released with conditions. K appealed again against the decision to the Administrative Court of Appeal.

16. In the meantime, in July 2002, a paediatrician E, also requested access to the material. He submitted that he needed to keep up with current research, that he was interested in how the research in question had been carried out and in clarifying how the researchers had arrived at their results and that it was important to the neuropsychiatric debate that the material could be exposed to independent and critical examination. His request was refused by the University of Gothenburg on 30 August 2002 for the same reasons as its refusal to K, a decision against which E appealed to the Administrative Court of Appeal.

17. By two separate judgments of 6 February 2003, the Administrative Court of Appeal found that K and E had shown a legitimate interest in gaining access to the material in question and that they could be assumed to be well acquainted with the handling of confidential data. Therefore, access should be granted to K and E, but subject to conditions made by the University of Gothenburg in order to protect the interests of the individuals concerned in accordance with various named provisions of the Secrecy Act (*Sekretesslagen*, 1980:100).

18. The University of Gothenburg's application for a review by the Supreme Administrative Act was refused.

19. In vain the applicant and some of the individuals participating in the study requested relief for substantive defects (*resning*) to the Supreme Administrative Court (*Regeringsrätten),* which was refused on 4 April 2003 because they were not considered to be party to the case (*bristende talerätt).*

20. On 7 April 2003 the University of Gothenburg decided that – "provided that the individuals concerned gave their consent" – the documents would be released to K and E with conditions specified in detail in the decisions.

21. K and E appealed against certain of the conditions imposed by the University of Gothenburg. They also reported the University of Gothenburg's handling of the case to the Parliamentary Ombudsman, which in decisions of 10 and 11 June 2000 criticised the University of Gothenburg, notably as to the length of the proceedings for replying to the request for access.

22. In two separate judgments of 11 August 2003, the Administrative Court of Appeal lifted some of the conditions imposed by the university. It pointed out that in the judgments of 6 February 2003, K and E had already been given the right of access to the requested documents and that the only

matter under examination was the conditions set up and that such could only be imposed if they were designed to remove a given risk of damage and that a condition should be framed to restrict the recipient's right of disposal over the data. Thereafter, six conditions were set regarding K's access, including that the data was only to be used within the Swedish Research Council funded research project called "The neurological paradigm: on the establishment of a new grand theory in Sweden" which K had specified before the Administrative Court of Appeal, that she was not allowed to remove copies from the premises where she was given access to the documents and that transcripts of released documents containing data on psychological, medical or neurological examinations or treatment, or concerning the personal circumstances of individuals and notes concerning such examinations, treatment or circumstances from a document released to her, would be destroyed when the above research project was completed and at the latest by 31 December 2004. Six similar conditions were also imposed on E, including that data in the released documents referring to psychological, medical, psychiatric or neurological examinations or treatment, and data in the released documents concerning the personal circumstances of an individual was to be used for examination of how the researchers who participated in the research project in which the documents had been used had arrived at their results and conclusions and so that he could generally maintain his competence as a paediatrician.

23. The University of Gothenburg did not have a right to appeal against the judgments and on 5 November 2003 the applicant's request to the Supreme Administrative Court for relief for substantive defects was refused because he was not considered to be a party to the case.

24. In the meantime, in a letter of 14 August 2003 to the applicant, the vice-chancellor of the university stated that, by virtue of the judgments by the Administrative Court of Appeal, E and K were entitled to immediate access to the documents on the conditions specified. Furthermore, by decision of the university, E and K were to be given access to the documents on the university's premises on a named street and the documents therefore had to be moved there from the Department of Child and Adolescent Psychiatry without delay. The letter stated that the transportation of the documents was to begin on 19 August 2003 at 9 a.m. The applicant was requested to arrange for the documents to be available for collection at that time and that if necessary he should also ensure that all the keys to the rooms where the material was kept were delivered to a person P.

25. The applicant replied in a letter of 18 August 2003 that he did not intend to hand over either the material or the keys to the filing cabinets to P. On the same day the vice-chancellor had a meeting with the applicant.

26. On instruction by the vice-chancellor, on 19 August 2003 P visited the Department of Child and Adolescent Psychiatry. He was met by controller L, who handed him a document showing that L had been

instructed by the applicant not to release either the material in question or the keys to the filing cabinets.

27. By letter of 1 September 2003, the vice-chancellor of the University of Gothenburg informed K and E that since the applicant refused to transfer the material for the present he could not help them any further and that he was considering bringing the applicant before the Public Disciplinary Board (*Statens ansvarsnämnd*) on grounds of disobedience.

28. In autumn 2003, the applicant and various persons corresponded with the vice-chancellor of the University of Gothenburg, including a professor of jurisprudence and Assistant Director General of the Swedish Research Council who questioned the judgments by the Administrative Court of Appeal, which prompted the vice-chancellor to consider whether it would be possible to impose new conditions. The case was discussed within the University Board and subsequently by decision of 27 January 2004 the University of Gothenburg decided to refuse to grant access to K because in the light of a memorandum drawn up on 12 March 2003 by the Swedish Research Council there was no connection between K's research and the research project that she had specified before the Administrative Court of Appeal. Likewise, in a decision of 2 February 2004 the university decided to impose a new condition on E in order to give him access. It stated that it had reason to believe that E did not conduct activities or hold a position that justified allowing him access to the material, even subject to restrictions. E thus had to demonstrate that his duties for the municipality included reviewing or otherwise acquiring information about the basic material on which the research in question was based.

29. The decisions were annulled by the Administrative Court of Appeal by two separate judgments of 4 May 2004.

30. The applicant's request to the Administrative Supreme Court for relief for substantive defects was refused on respectively 28 September 2004 and 1 July 2005, because he was not considered to be party to the case.

31. In the meantime, according to the applicant, the research material was destroyed during the weekend of 8 and 9 May 2004 by three of his colleagues.

B. Criminal proceedings against the applicant

32. On 18 January 2005 the Parliamentary Ombudsman decided to initiate criminal proceedings against the applicant and by a judgment of 27 June 2005 the District Court (*Göteborgs Tingsrätt*) convicted the applicant of misuse of office pursuant to Chapter 20, Article 1 of the Penal Code (*Brottsbalken)*. The applicant was given a suspended sentence and ordered to pay fifty day-fines of 750 Swedish kronor (SEK), amounting to a total of SEK 37,500, (approximately 4,000 Euros (EUR). The

vice-chancellor of the university was also convicted of misuse of office for having disregarded, through negligence, his obligations as vice-chancellor by failing to ensure that the documents were available for release as ordered in accordance with the judgments of the Administrative Court of appeal. The vice-chancellor was sentenced to forty day-fines of SEK 800, amounting to a total of SEK 32,000 (approximately EUR 3,400). The Parliamentary Ombudsman had also decided to initiate criminal proceedings against the Chair of the Board of Gothenburg University, but the charges were later dismissed. Finally, by a judgment issued on 17 March 2006, the three officials who had destroyed the research material were convicted of the offence of suppression of documents and were sentenced to a conditional sentence and fines.

33. On appeal, on 8 February 2006 the applicant's conviction and sentence were upheld by the Court of Appeal (*Hovrätten för Västra Sverige*) which stated as follows:

General observations on the university's management of the case

"In its two initial judgments of 6 February 2003 the Administrative Court of Appeal laid down that K and E were entitled to have access to the documents requested. In its two subsequent judgments of 11 August 2003 the Administrative Court of Appeal decided on the conditions that would apply in connection with the release of the documents to them. The judgments by the Administrative Court of Appeal had therefore settled the question of whether the documents were to be released to K and E once and for all.

At the hearing in the Administrative Court of Appeal, the university had the opportunity to present reasons why the documents requested should not be released to K and E. Once the judgments, against which no appeal could be made, had been issued in February 2003, whether or not the university considered that they were based on erroneous or insufficient grounds had no significance. After the February judgments the university was only required to formulate the conditions it considered necessary to avoid the risk of any individuals sustaining harm through the release of the documents. Subsequently the university had the opportunity to present its arguments to the Administrative Court of Appeal for the formulation of the conditions it had chosen. After the Administrative Court of Appeal had determined which conditions could be accepted, the question of the terms on which [K and E] could be allowed access to the documents requested was also settled once and for all. There was then no scope for the university to undertake any new appraisal of K's and E's right of access to the documents.

Therefore, in the period referred to in the indictment [from 11 August 2003 until 7 May 2004] it was no longer the secrecy legislation that was to be interpreted but the judgments of the Administrative Court of Appeal. Their contents were clear. [The vice-chancellor's] letter of 14 August 2003 to [the applicant] and to K and E of 1 September 2003 show that the university administration had understood that it was incumbent on the university to release the documents without delay.

The promptness required by the Freedom of the Press Act in responding to a request for access to a public document should in itself have caused the university to avoid

measures leading to further delay in releasing the documents. Despite this, in its interpretation of the conditions and in laying down additional conditions, the university made it more difficult for K and E to gain access to the documents.

The applicant's liability

The prosecutor has maintained that after the judgments of the Administrative Court of Appeal 11 August 2003 and until 7 May 2004, when the material is said to be destroyed, the applicant in his capacity as head of the Department of Child and Adolescent Psychiatry, has wilfully disregarded the obligations of his office by failing to comply with the judgments of the Administrative Court of Appeal and allow [E and K] access to the documents. According to the indictment, the applicant in so doing has not only refused to release the documents on his own account but also refused to make the documents available to the university administration.

The research material was the property of the university and hence to be regarded as in the public domain. It was stored in the Department of Child and Adolescent Psychiatry, where [the applicant] was the head. [The vice-chancellor's] letter of 14 August 2003, to which copies of the judgments of the Administrative Court of Appeal relating to the conditions were attached, made it clear to [the applicant] that the material in question must be released. As head of the department, [the applicant] was responsible for making the material available to [K and E]. [The applicant's awareness of his immediate responsibility is revealed not least by the instructions that he gave to [L] before the visit of [P] not to allow the university administration access to the material. It is also shown by [the applicant's] written reply on 18 August 2003 to [the vice-chancellor].

Through [the vice-chancellor] the university had instructed [the applicant] to release the material to the university, so that it could be moved to premises where K and E could examine it. In view of this, the Court of Appeal, like the District Court, does not consider that [the applicant] can be held culpable because he refused on his own account to hand over the documents. However, it was incumbent upon him to make the documents available for removal in accordance with the instructions he had received from the university.

[The applicant] has protested that he did not consider that there was any serious intent behind the instruction he received from the [vice-chancellor] on 14 August 2003. Here he has referred in particular to the meeting on 18 August 2003, to the fact that P did not follow up his visit to the department and that he received no new directive to make the material available.

[The vice-chancellor], however, has stated that on no occasion did he withdraw the instructions issued on 14 August 2003, and that it must have been quite clear to [the applicant] that they continued to apply, even though they were not explicitly repeated. According to the vice-chancellor, nothing transpired at the meeting on 18 August 2003 that could have given [the applicant] the impression that these instructions no longer applied or that they were not intended seriously. [The vice-chancellor's] statement in this respect has been confirmed by the Director at the Vice-Chancellor's office, W. It is further borne out by the fact that after the meeting on 18 August 2003 W was given the task of drawing up a complaint to the Government Disciplinary Board for Higher Officials on the subject of [the applicant's] refusals and that the latter was aware that a complaint of this kind was being considered. In addition, it can be seen from a number of e-mails from [the applicant]

to [the vice-chancellor] that during the entire autumn he considered that he was required to hand over the documents and that he maintained his original refusal to obey his instructions. It has also been shown that when the Board met on 17 December 2003, [the vice-chancellor] was still considering making a complaint to the Disciplinary Board. Finally, [a witness, AW] has testified that at a meeting with [the applicant] shortly after the beginning of 2004, when asked whether he still persisted in his refusal, he confirmed that this was the case.

All things considered, the Court of Appeal finds that it has been shown that [the applicant] was aware of the instructions to make the material available to the administration applied during the entire period from when he learnt about the judgments of the Administrative Court of Appeal on 14 August 2003. It was incumbent on him to take the actions required to comply with the judgments.

[The applicant] has stated that he was never prepared to participate in the release of the documents to K and E. His actions were, in other words, intentional and their result has been that K and E were categorically denied a right that is guaranteed by the Constitution and that is also of fundamental importance in principle. All things considered, the Court of Appeal finds that [the applicant's] actions mean that he disregarded the obligation that applied to him as head of department in such a manner that the offence of misuse of office should be considered. [The applicant] has however also objected that his actions should be regarded as excusable in view of the other considerations that he had to bear in mind.

He has thus claimed that in the situation that had arisen he was prevented by medical ethics and research ethics from disclosing information about the participants in the study and their relatives. He referred in particular to international declarations drawn up by the World Medical Association and to the Convention.

The nature of the international declarations agreed on by the World Medical Association is not such as to give precedence over Swedish law. [The applicant's] objections on the basis of the contents of these declarations therefore lack significance in this case.

Article 8 of the Convention lays down that everyone has the right to respect for his or her private and family life, home and also that this right may not be interfered with by a public body except in certain specified cases. The provisions of the Secrecy Act are intended, in accordance with Article 8 of the Convention, to protect individuals from the disclosure to others of information about their personal circumstances in cases other than those that can be regarded as acceptable with regard to the right to insight into the workings of the public administration. These regulations must be considered to comply with the requirements of the Convention and the judgments of the Administrative Court of Appeal lay down how they are to be interpreted in this particular case. [The applicant's] objection that his action was excusable in the light of the Convention cannot therefore be accepted.

[The applicant] has also asserted that he risked criminal prosecution for breach of professional secrecy, if he released the documents to [K and E]. However, the judgments of the Administrative Court of Appeal had determined once and for all that the secrecy Act permitted release of the documents. For this reason there was of course no possibility of prosecution for breach of professional secrecy which, in the opinion of the Court of appeal, [the applicant] must have realised.

[The applicant] has also stated that he was bound by the assurances of confidentiality he had given to the participants in the study in accordance with the requirements established for the research project. The assurances were given in 1984 and had the following wording: "All data will be dealt with in confidence and classified as secret. No data processing that enables the identification of your child will take place. No information has been provided previously or will be provided to teachers about your child except that when starting school she/he took part in a study undertaken by Östra Hospital and its present results will, as was the case for the previous study three years ago, be followed up." A later assurance of confidentiality had the following wording: "Participation is of course completely voluntary and as on previous occasions you will never be registered in public data records of any kind and the data will be processed in such a way that nobody apart from those of us who met you and have direct contact with you will be able to find out anything at all about you."

The assurances of confidentiality given to those participants in the study go, at least in some respects, further than the Secrecy Acts permits. The Court of Appeal notes that there is no possibility in law to provide greater secrecy than follows from the Secrecy Act and that it is not possible to make decisions on issues concerning confidentiality until the release of a document is requested. It follows therefore that the assurances of confidentiality cited above did not take precedence over the law as it stands or a court's application of the statutes. [The applicant's] objections therefore have no relevance in assessing his criminal liability.

Finally, [the applicant] has claimed that his actions were justifiable in view of the discredit that Swedish research would incur and the decline in willingness to participate in medical research projects that would ensue if information submitted in confidence were then to be disclosed to private individuals. The Court of Appeal notes that there are other possibilities of safeguarding research interests, for example by removing details that enable identification from research material so that sensitive information cannot be divulged. What [the applicant] has adduced on this issue cannot exonerate him from liability.

[The applicant's] actions were therefore not excusable. On the contrary, for a considerable period he failed to comply with his obligations as a public official arising from the judgments of the Administrative Court of Appeal. His offence cannot be considered a minor one. [The applicant] shall therefore be found guilty of misuse of office for the period after 14 August 2003, when he was informed of the judgments of the Administrative Court of Appeal. The offence is a serious one as [the applicant] wilfully disregarded the constitutional right of access to public documents. On the question of the sentence, the Court of Appeal concurs with the judgment of the District Court.

34. Leave to appeal to the Supreme Court was refused on 25 April 2006.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The right of public access to official documents

35. The principle of public access to official documents

(*offenligthetsprincipen*) has a history of more than two hundred years in Sweden and is one of the cornerstones of Swedish democracy. One of its main characteristics is the constitutional right for everyone to study and be informed of the contents of official documents held by the public authorities. This principle allows for the public and the media to exercise control of the State, the municipalities and other parts of the public sector which, in turn, contributes to the free exchange of opinions and ideas and to efficient and correct management of public administration and, thereby, to maintaining the legitimacy of the democratic system (see Govt. Bill 1975/76:160 p. 69 et seq.). The principle of public access to official documents is enshrined in Chapter 2, Sections 1 and 12, of the Freedom of the Press Act. Thus, every Swedish citizen shall be entitled to have free access to official documents, in order to encourage the free exchange of opinion and the availability of comprehensive information (Chapter 2, Section 1; foreign nationals enjoy the same rights in this respect as Swedish citizens, Chapter 14, Section 5).

36. A document is official if it is held by and is regarded as having been received or "drawn up" by a public authority (Chapter 2, Sections 3 and 6-7, of the Freedom of the Press Act). A document is "drawn up" when it is dispatched by an authority. A document that is not dispatched is "drawn up" when the matter to which it relates is finally settled by the authority in question. In case the document does not belong to any specific matter, it is "drawn up" when it has been finally checked or otherwise received its final form. As research is considered to be an activity in its own right *(faktiskt handlande) (*see, for example, the Chancellor of Justice, 1986 p. 139), it cannot be said to belong to any specific matter. This means, in turn, that research material, as a rule, is "drawn up" and thereby official, as soon as it has been finally checked or otherwise received its final *form.* It could be added that preliminary outlines, drafts, and similar documents enumerated in Chapter 2, Section 9, of the Freedom of the Press Act, are not deemed to be official unless they introduce new factual information or have been accepted for filing. Finally, there is no general requirement that a document be filed in order to be considered official, and registration does not affect the issue of whether a document is official or not (cf. Chapter 15, Section 1, of the Secrecy Act).

37. An official document to which the public has access shall be made available on request forthwith, or as soon as possible, at the place where it is held, and free of charge, to any person wishing to examine it, in such form that it can be read, listened to, or otherwise comprehended; a document may also be copied, reproduced or used for sound transmission (Chapter 2, Section 12). Such a decision should normally be rendered the same day or, if the public authority in question has to consider whether the requested document is official or whether the information is public, within a few days (see, for example, the Parliamentary Ombudsman's decision of 23 November 2007 in case no. 5628-2006). A certain delay may also be

acceptable if the request concerns very extensive material. If a document cannot be made available without disclosure of such part of it as constitutes classified material, the rest of the document shall be made available to the applicant in the form of a transcript or copy (Section 12). A public authority is under no obligation to make a document available at the place where it is held, if this presents serious difficulty.

B. Restrictions on the right of public access to official documents

38. An unlimited right of public access to official documents could, however, result in unacceptable harm to different public and private interests. It has therefore been considered necessary to provide exceptions. These exceptions are laid down in Chapter 2, Section 2 (first paragraph), of the Freedom of the Press Act, which reads as follows:

> The right of access to official documents may be restricted only if restriction is necessary having regard to
> 1. the security of the State or its relations with another state or an international organisation;
> 2. the central fiscal, monetary or currency policy of the State;
> 3. the inspection, control or other supervisory activities of a public authority;
> 4. the interest of preventing or prosecuting crime;
> 5. the economic interest of the public institutions;
> 6. the protection of the personal or economic circumstances of private subjects;
> 7. the preservation of animal or plant species.

39. According to paragraph 2 of the same provision, restrictions on the right of access to official documents shall be scrupulously specified in a provision of a special act of law or, if this is deemed more appropriate in a particular case, in another act of law to which the special act refers (see, for example, Govt. Bill 1975/76:160 p. 72 et seq. and Govt. Bill 1979/80:2, Part A, p. 48 et seq.). The special act of law referred to is the Secrecy Act (*Sekretesslagen*; SFS 1980:100). Pursuant to such a provision, the Government may issue more detailed provisions for its application in an ordinance (*förordning).* Since the mandate to restrict the right of public access to official documents lies exclusively with the Swedish Parliament (*Riksdag*), it is not possible for a public authority to enter into an agreement with a third party exempting certain official documents from the right of public access to official documents or to make similar arrangements.

40. The Secrecy Act contains provisions regarding the duty to observe secrecy in the activities of the community and regarding prohibitions against making official documents available (Chapter 1, Section 1 of Act). In the latter respect, the provisions limit the right of access to official documents provided for in the Freedom of the Press Act (*Tryckfrihetsförordningen*, SFS 1949:105). The provisions relate to prohibitions against disclosing information, irrespective of the manner of disclosure. The question of whether secrecy shall apply to information contained in an official

document cannot be determined in advance, but shall be examined each time a request for access to a document is made. Decisive for this issue is whether making a document available could imply a certain risk of harm. The risk of harm is defined in different ways in the Secrecy Act having regard to the interests that the secrecy is intended to protect. Thus, the secrecy may be more or less strict depending on the interests involved. The secrecy legislation has been elaborated in this way in order to provide sufficient protection, for example, for the personal integrity of individuals, without the constitutional right of public access to official documents being circumscribed more than considered necessary. In the present case, the Administrative Court of Appeal, in its judgments of 6 February 2003, found that secrecy applied to the research material under Chapter 7, Sections 1, 4, 9 and 13, of the Secrecy Act (Chapter 7 deals with secrecy with regard to the protection of the personal circumstances of individuals).

41. If a public authority deems that such risk of loss, harm, or other inconvenience, which pursuant to a provision on secrecy constitutes an obstacle to information being communicated to a private subject, can be removed by the imposition of a restriction which limits the private subject's right to re-communicate or use the information, the authority shall impose such a restriction when the information is communicated (Chapter 14, Section 9, of the Secrecy Act). As an example of such a restriction, the preparatory notes mention a prohibition against disseminating the content of a document or against publishing secret information contained in a document (see Govt. Bill 1979/80:2, Part A, p. 349). An individual who has been granted access to a document subject to a restriction limiting the right to use the information may be held criminally liable if he or she does not respect such a restriction (see Chapter 20, Section 3, of the Penal Code).

C. Procedure concerning requests for public access to official documents

42. A request to examine an official document shall be made to the public authority which holds the document (Chapter 2, Section 14, of the Freedom of the Press Act and Chapter 15, Section 6, of the Secrecy Act). As mentioned above, there are specific requirements of speediness regarding the handling of such requests. A decision by an authority other than the Swedish Parliament or the Government to refuse access to a document is subject to appeal to the courts - as a general rule, an administrative court of appeal - and further to the Supreme Administrative Court (Chapter 2, Section 15, of the Freedom of the Press Act; Chapter 15, Section 7, of the Secrecy Act and Sections 33 and 35 of the 1971 Administrative Court Procedure Act (*Förvaltningsprocesslagen*; SFS 1971:291), leave to appeal is required in the last mentioned court). Only the applicant has a right of appeal. Thus, if the Administrative Court of Appeal - contrary to the public

authority holding the document in question - decides that a document shall be made available, its judgment may not be appealed against by the public authority in question, or private subjects who consider that harm would be inflicted on them as a consequence of the fact that access to the document is granted (see RÅ 2005 note 1 and RÅ 2005 ref. 88). The reason why the right of appeal has been narrowly limited is that once the competing interests have been considered by a court the legislator has given priority to the principle of public access to official documents over other private and public interests (see, for example, Govt. Bill 1975/76:160 p. 203 and RÅ 2003 ref. 18, which concerned the applicant's request for relief for substantive defects).

D. Responsibility of public officials and criminal provisions

43. The principle of public access to official documents is applicable to all activities within the public sector and every public official is obliged to be acquainted with laws and regulations in this area. This is in particular the case where a certain official - following a special decision or otherwise - has the duty to examine requests for access to official documents (Chapter 15, Section 6, second paragraph of the Secrecy Act). Formally, the head of the public authority has the primary responsibility to ensure that such requests are duly examined. However, the task may be delegated to other office holders within the authority and this is what is also done in practice for the purposes of the authority's daily activities. Such delegation has to be in accordance with the regulations of the authority (Section 21 of the former Government Agencies and Institutes Ordinance, *Verkförordningen* SFS 1995:1322, applicable at the relevant time). Irrespective of whether a public official has certain competence or power under the regulations of the authority in question, he or she has a general duty to perform the tasks that are part of his or her official duties. As previously mentioned, this duty involves the obligation to assist in making official documents available forthwith, or as soon as possible, to persons who are considered to have the right of access to them under the legislation described above.

44. A person who in the exercise of public authority, by act or by omission, intentionally or through carelessness, disregards the duties of his office, shall be sentenced for misuse of office (*tjänstefel)* to a fine or imprisonment of a maximum of two years (Chapter 20, Section 1, of the Penal Code). If, having regard to the perpetrator's official powers or the nature of his office considered in relation to his exercise of public power in other respects, or having regard to other circumstances, the act may be regarded as petty, punishment shall not be imposed. If a crime mentioned in the first paragraph has been committed intentionally and is regarded as gross, a sentence for gross misuse of office to imprisonment of a minimum of six months and a maximum of six years shall be imposed. Members of a

national or municipal decision-making assembly shall not be held responsible under the provisions previously mentioned for any action taken in such capacity. Nor shall the said provisions apply if the offence is subject to a punishment under another provision of the Penal Code or some other law. Concerning the question of sanctions, a conditional sentence may be imposed by the courts for an offence for which the sanction of a fine is considered inadequate, and such a sentence shall, as a general rule, be combined with a day-fine (maximum 200 day-fines, see Chapter 27, Sections 1-2 and Chapter 30, Section 8, of the Penal Code; the day-fine may not exceed 1,000 Swedish kronor (SEK), see Chapter 25, Section 2, of the Penal Code; when determining the amount account is taken of the economic circumstances of the accused).

45. The relevant provision of the 1962 Swedish Penal Code (*Brottsbalken)* reads as follows:

Chapter 20, Article 1:

> A person who in the exercise of public authority, by act or by omission, intentionally or through carelessness, disregards the duties of his office, shall be sentenced for misuse of office to a fine or a maximum term of imprisonment of two years. If, having regard to the perpetrator's official powers or the nature of his office considered in relation to his exercise of public power in other respects or having regard to other circumstances, the act may be regarded as petty, punishment shall not be imposed. If an offence mentioned in the first paragraph has been committed intentionally and is regarded as serious, the perpetrator shall be sentenced for gross misuse of office to a term of imprisonment of at least six months and at most six years. In assessing whether the crime is serious, special attention shall be given to whether the offender seriously abused his position or whether the crime occasioned serious harm to an individual or the public sector or gave rise to a substantial improper benefit. A member of a national or municipal decision-making assembly shall not be held responsible under the provisions of the first or second paragraphs of this Article for any action taken in that capacity. Nor shall the provisions of the first and second paragraphs of this Article apply if the crime is punishable under this or some other Law. (Law 1989:608).

E. The Parliamentary Ombudsmen

46. The functions and powers of the four Parliamentary Ombudsmen are laid down in particular in Chapter 12, Section 6 of the Instrument of Government (*Regeringsformen*) and in the Act with Instructions for the Parliamentary Ombudsmen (*Lagen med instruktion för Riksdagens ombudsmän;* SF5 1986:765), their main task is to supervise the application of laws and other regulations within public administration. It is their particular duty to ensure that courts and administrative authorities observe the provisions of the Constitution regarding objectivity and impartiality and that the fundamental rights and freedoms of citizens are not encroached upon in the process of public administration. An Ombudsman exercises

supervision either on complaint from individuals or of his or her own motion by carrying out inspections and other investigations which he or she deems necessary. The examination of a matter is concluded by a decision in which the Ombudsman states his or her opinion on whether the measure of the authority contravenes the law or is otherwise wrongful or inappropriate. The Ombudsmen may also make pronouncements aimed at promoting uniform and proper application of the law. An Ombudsman's decisions are considered to be expressions of his or her own personal opinion. They are not legally binding upon the authorities. However, they are of persuasive force, command respect and are usually followed in practice. An Ombudsman may, among many other things, institute criminal proceedings against an official who has committed an offence by departing from the obligations incumbent on him or her in his or her official duties (for example, as in the present case, misuse of office). The Ombudsman may also report an official for disciplinary measures to those who have the competence to decide on such measures. The Ombudsman may be present at the deliberations of the courts and the administrative authorities and is entitled to have access to their minutes and other documents.

F. Compensation for violations of the Convention

47. It follows from Chapter 3, Section 2 of the Tort Liability Act (*Skadeståndslagen*, SFS 1972:207) that the State is liable to pay compensation for, *inter alia*, financial loss caused by a wrongful act or omission in connection with the exercise of public authority. From Chapter 3, Section 3 of the Act it follows that, under certain circumstances, the State is liable to pay compensation for financial loss caused by an erroneous instruction or advice given by an authority.

48. In a judgment of 9 June 2005 (NJA 2005 p. 462), the Supreme Court found that an individual had a right to bring a civil action against the State before the national courts on the ground that there had been a violation of Article 6 § 1 of the Convention because a criminal case against the individual had not been concluded within a reasonable time.

In a decision of 4 May 2007 the Supreme Court held that the principle established in NJA 2005 p. 462 also applied with regard to the rights contained in Article 5 of the Convention.

49. The Supreme Court has subsequently, in a judgment on 21 September 2007 (NJA 2007 p. 584), found that individuals have a right to bring civil suits against the State for violations of any Articles of the Convention when the State, according to the Convention, has an obligation to pay damages for the violation and such obligation cannot be based on national legislation. In the same case, the Court of Appeal also concluded, in a judgment dated 12 January 2006, that there had been a violation of Article 8 and that non-pecuniary damages should be awarded on the basis of

the principle established in NJA 2005 p. 462.

50. A further Supreme Court judgment of 28 November 2007 (NJA 2007 p. 891) concerned a claim for damages against the Swedish State on the basis of an alleged violation of Article 2 of the Convention relating to the plaintiffs' father's suicide while in detention. The Supreme Court concluded that the case revealed no violation of Article 2 but noted that the right to an effective remedy in such a case should, in principle, include a possibility of obtaining compensation for damage.

51. Finally, in a decision of 11 October 2007, concerning a claim for damages against the Swedish State, the Chancellor of Justice (*Justitskanslern*) concluded that the individual concerned was entitled to compensation from the State for non-pecuniary damage on account of excessive length of civil proceedings.

52. Anyone who wishes to claim compensation from the State for financial loss, which he or she considers has been caused by a wrongful decision taken by a court or an administrative State authority, may proceed in either of the two different ways: He or she may either petition the Chancellor of Justice in accordance with Section 3 of the Ordinance on the Administration of Claims for Damages against the State (*Förordningen om handläggning av skadeståndsanspråk mot staten*, SFS 1995:1301), or bring a civil action against the State in the ordinary courts. No appeal lies against a decision of the Chancellor of Justice. However, if the claim is rejected, the claimant still has the possibility to institute civil proceedings before the courts.

III. THE HELSINKI DECLARATION

53. The Helsinki Declaration, adopted by the 18th World Medical Association's General Assembly, Helsinki in Finland in June 1964, with later amendments states *inter alia*:

INTRODUCTION

> 1. The World Medical Association (WMA) has developed the Declaration of Helsinki as a statement of ethical principles for medical research involving human subjects, including research on identifiable human material and data. The Declaration is intended to be read as a whole and each of its constituent paragraphs should not be applied without consideration of all other relevant paragraphs.
>
> 2. Although the Declaration is addressed primarily to physicians, the WMA encourages other participants in medical research involving human subjects to adopt these principles.
>
> 3. It is the duty of the physician to promote and safeguard the health of patients, including those who are involved in medical research. The physician's knowledge and conscience are dedicated to the fulfilment of this duty.

4. The Declaration of Geneva of the WMA binds the physician with the words, "The health of my patient will be my first consideration," and the International Code of Medical Ethics declares that, "A physician shall act in the patient's best interest when providing medical care."

5. Medical progress is based on research that ultimately must include studies involving human subjects. Populations that are underrepresented in medical research should be provided appropriate access to participation in research.

6. In medical research involving human subjects, the well-being of the individual research subject must take precedence over all other interests.

...

10. Physicians should consider the ethical, legal and regulatory norms and standards for research involving human subjects in their own countries as well as applicable international norms and standards. No national or international ethical, legal or regulatory requirement should reduce or eliminate any of the protections for research subjects set forth in this Declaration.

BASIC PRINCIPLES FOR ALL MEDICAL RESEARCH

11. It is the duty of physicians who participate in medical research to protect the life, health, dignity, integrity, right to self-determination, privacy, and confidentiality of personal information of research subjects.

...

14. The design and performance of each research study involving human subjects must be clearly described in a research protocol. The protocol should contain a statement of the ethical considerations involved and should indicate how the principles in this Declaration have been addressed. The protocol should include information regarding funding, sponsors, institutional affiliations, other potential conflicts of interest, incentives for subjects and provisions for treating and/or compensating subjects who are harmed as a consequence of participation in the research study. The protocol should describe arrangements for post-study access by study subjects to interventions identified as beneficial in the study or access to other appropriate care or benefits.

15. The research protocol must be submitted for consideration, comment, guidance and approval to a research ethics committee before the study begins. This committee must be independent of the researcher, the sponsor and any other undue influence. It must take into consideration the laws and regulations of the country or countries in which the research is to be performed as well as applicable international norms and standards but these must not be allowed to reduce or eliminate any of the protections for research subjects set forth in this Declaration. The committee must have the right to monitor ongoing studies. The researcher must provide monitoring information to the committee, especially information about any serious adverse events. No change to the protocol may be made without consideration and approval by the committee.

...

23. Every precaution must be taken to protect the privacy of research subjects and the confidentiality of their personal information and to minimize the impact of the study on their physical, mental and social integrity.

24. In medical research involving competent human subjects, each potential subject must be adequately informed of the aims, methods, sources of funding, any possible conflicts of interest, institutional affiliations of the researcher, the anticipated benefits and potential risks of the study and the discomfort it may entail, and any other relevant aspects of the study. The potential subject must be informed of the right to refuse to participate in the study or to withdraw consent to participate at any time without reprisal. Special attention should be given to the specific information needs of individual potential subjects as well as to the methods used to deliver the information. After ensuring that the potential subject has understood the information, the physician or another appropriately qualified individual must then seek the potential subject's freely-given informed consent, preferably in writing. If the consent cannot be expressed in writing, the non-written consent must be formally documented and witnessed. ...

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 6 AND 13 OF THE CONVENTION

54. The applicant complained under Articles 6 and 13 of the Convention that in the civil proceedings concerning access to the research material he did not have a standing before the Administrative Court of Appeal and the Supreme Administrative Court.

Admissibility

55. In its two initial judgments of 6 February 2003 the Administrative Court of Appeal laid down that K and E were entitled to have access to the documents requested. In its two subsequent judgments of 11 August 2003 the Administrative Court of Appeal decided on the conditions that would apply in connection with the release of the documents to them. Subsequently, in two separate judgments of 4 May 2004 the Administrative Court of Appeal annulled the decisions by the University of Gothenburg of 27 January 2004 and 2 February 2004 to refuse respectively to grant access to K and to impose a new condition on E in order to give him access to the research material. The judgments by the Administrative Court of Appeal had therefore settled the question of access.

56. Several times the applicant's requests for relief for substantive defects to the Supreme Administrative Court were refused because he could

not be considered a party to the case. Such decisions were taken on 4 April and 5 November 2003, 28 September 2004 and 1 July 2005, thus more than six months before 10 October 2006, which is the date on which the application was lodged before the Court.

57. It follows that this part of the application has been submitted too late and must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

58. The applicant also complained under Article 7 of the Convention that in the criminal proceedings he was punished without law because he did not have a standing in the civil proceedings.

Admissibility

59. The Court has examined the applicants' complaint under Article 7 of the Convention as it was submitted for the first time in his observations of 12 January 2009, which is more than six months after leave to appeal to the Supreme Court was refused on 25 April 2006 in the criminal proceedings.

60. It follows that this part of the application has been submitted too late and must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention

III. ALLEGED VIOLATION OF ARTICLES 8 AND 10 OF THE CONVENTION RELATING TO THE CIVIL PROCEEDINGS CONCERNING ACCESS TO THE RESEARCH MATERIAL

61. The applicant invoked Articles 8 and 10 in relation to the civil proceedings concerning access to the research material.

Admissibility

62. In so far as these complaints related to the private and family life of the individuals participating in the study carried out by him and his research team or related to the question of whether the Administrative Court of Appeal's judgments were in accordance with the Swedish secrecy legislation or the Convention, the Court notes that before the Court the applicant does not represent the individuals participating in the study carried out by him. In any event, as stated above, these issues were dealt with by the Administrative Court of Appeal in its judgments of 6 February and 11 August 2003, and of 4 May 2004.

63. The applicant did not by himself initiate any court proceedings and his requests for relief for substantive defects to the Supreme Administrative Court were refused because he could not be considered a party to the case

on 4 April and 5 November 2003, 28 September 2004 and 1 July 2005. All the said judgments and decisions were taken more than six months before 10 October 2006, which is the date on which the application was lodged before the Court.

64. It follows that this part of the application has been submitted too late and must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLES 8 AND 10 OF THE CONVENTION RELATING TO THE CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

65. The applicant also complained that the outcome of the criminal proceedings infringed his rights under Article 8 or Article 10 of the Convention, notably because allegedly the promise of confidentiality was imposed on him as a precondition for carrying out his research by the public authority, the Ethics Committee of the University of Gothenburg.

A. Admissibility

66. The Government submitted that this part of the application should be declared inadmissible for non-exhaustion of domestic remedies.

67. They maintained that Swedish law provided a remedy in the form of compensation for both pecuniary and non-pecuniary damage in respect of any violation of the Convention, including the violations alleged in the present case and that the applicant had failed to avail himself of this remedy.

68. The said remedy had been established for the first time by a Supreme Court judgment of 9 June 2005, whereby compensation for pecuniary and non-pecuniary damage on account of excessive length of criminal proceedings was awarded. Subsequently, by decision of 4 May 2007 and judgments of 21 September and 28 November 2007 the Supreme Court had examined compensation claims on the basis of Articles 2, 5 and 8 of the Convention and had, in the two former cases, found the individual entitled to compensation for non-pecuniary damage due to violations of Articles 5 and 8 respectively. Finally, the Government referred to a decision of 11 October 2007 by the Chancellor of Justice granting compensation for non-pecuniary damage for excessive length of civil proceedings. Thus, in the Government's view, Swedish law provided a remedy in the form of compensation for both pecuniary and non-pecuniary damage in respect of any violation of the Convention, including the violations alleged in the present case. In their submission, that remedy had been available to the applicant at the time when he lodged the present application or was at least currently available.

69. The applicant disputed the Government's submissions and claimed that the remedy suggested was not effective in regard to his complaints.

70. The Court has set out the general principles pertaining to the exhaustion of domestic remedies in a number of judgments (see, for example *Akdivar and Others v. Turkey* [GC], 16 September 1996, §§ 66-69), *Reports of Judgments and Decisions* 1996-IV).

71. In the present case, the applicant was convicted by the District Court on 18 January 2005. This was upheld by the Court of Appeal on 8 February 2006. The latter judgment became final when the Supreme Court on 25 April 2006 refused leave to appeal. Before the Swedish courts, the applicant relied among other things on the Convention and argued that he was prevented by medical ethics and research ethics from disclosing information about the participants in the study and their relatives. He thus did what was required of him in order to afford the national authorities the opportunity to remedy the violation alleged by him.

72. The Government claimed, however, that the applicant failed to avail himself of available remedies capable of affording him sufficient redress in the form of compensation for the alleged violations. In this respect, the Court notes that, of the final domestic judgments and decision referred to by the Government, only one was delivered before the introduction of the present application, namely the Supreme Court's judgment of 9 June 2005. Although that case and the present application concerned criminal proceedings, the former concerned excessive length of criminal proceedings whereas the latter concerned Article 8 of the Convention in relation to a charge for misuse of office for having failed to comply with obligations as a public official arising from previous judgments by the Administrative Court of Appeal. In these circumstances, in the Court's view, it has not been shown that, at the time of the applicant's lodging the present application, there existed a remedy which was able to afford redress in respect of the violations alleged by the applicant (see also *Bladh v. Sweden* (dec.), no. 46125/06, 10 November 2009, §§ 23-27).

73. The Government further claimed that the existence of such a remedy had, in any event, become certain through several decisions and judgments issued by the Supreme Court in 2007 and that, consequently, the applicant had had the opportunity to claim compensation before the Swedish courts after the introduction of the present application. Leaving open the question of whether the applicant could have been obliged to institute domestic compensation proceedings after the date of introduction, the Court notes, again, that the underlying issues in the cases mentioned by the Government were different to the ones raised in the present case. While the Court welcomes the development in Swedish law concerning the possibility to claim compensation on the basis of alleged violations of the Convention, it must be kept in mind that this development is a rather recent one. Consequently, it cannot generally be required of an individual applicant to pursue a compensation claim in respect of Convention issues that have not been determined by the domestic courts or are not closely related to issues

that have been so determined. The reason for this is that, in many of these cases, the existence of the remedy cannot yet be considered as sufficiently certain. This consideration is even more important in a situation where the decisions allegedly establishing the remedy were issued after the introduction of the application before the Court.

74. The Court finds that, in the instant case, it could not be required of the applicant to pursue the remedy invoked by the Government. The Government's objection as to the exhaustion of domestic remedies must therefore be dismissed.

75. It also noted that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. The merits of the complaint under Article 8 of the Convention

76. The applicant maintained that, having regard to his promise of confidentiality to the families of the children who took part in the research, his criminal conviction infringed his right to private life or his right to negative freedom of expression as set out in Article 8 of the Convention:

> "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."

1. Submissions to the Court

77. From the outset the Government noted that the applicant was convicted of a crime relating to his duties as a public official, or his professional activities, and that the invoked "assurances of confidentiality" were also given by him in his professional capacity. Thus, although the Court has found that certain activities of a professional or business nature could, in some particular circumstances, affect a person's private life, in the Government's view there is no support in the Court's case law for the conclusion that the applicant's conviction had any bearing on his "private life" within the meaning of Article 8 of the Convention.

78. Moreover, they questioned that a conviction in a criminal case in itself could constitute an interference with the applicant's rights under Article 8. In addition they noted that in the present case, the applicant was convicted of misuse of office for having disregarded his duties as a public official, as he had not complied with the orders of his employers and the

Administrative Court of Appeal's judgments to grant access to the research material on certain conditions. Moreover, it was not possible in law to provide greater secrecy than followed from the Secrecy Act, or to make decisions concerning confidentiality until the release of a document was requested. Nor was it possible, for that reason, to refuse access to official documents by invoking "assurances of confidentiality" previously made or to be exempted from criminal responsibility for having acted in this way. In these circumstances the Government questioned whether it could reasonably be argued that the applicant's conviction amounted to an "interference" within the meaning of Article 8 § 2 for the sole reason that the grant of access to the documents at issue would have been in breach of "assurances of confidentiality" given to the patients involved.

79. Nevertheless, should the Court find that there had been an interference with the applicant's "private life" the Government contended that it was in accordance with the law, pursued the legitimate aims of preventing crimes and disorder, and protecting the rights and freedoms of others, and was necessary in a democratic society.

80. As to the latter assessment, the primary issue was whether and to what extent the right of public access to official documents should be given priority or precedence over other public and individual interest or rights. They pointed out that the purpose of the principle of public access to official documents was to allow for the public and the media to exercise control of the State, the municipalities and other parts of the public sector which, in turn, contributed to the free exchange of opinions and thoughts, and to efficient and correct management of public administration and, thereby, to maintain the legitimacy of the democratic system.

81. In the context of the present case, where K and E were two professionals critical of the applicant's research, it could also be argued that access to the documents was in the interest not only of contributing to the free exchange of opinions and thoughts, but also to the advance of science.

82. Furthermore, it should be kept in mind that the applicant acted as a public official at the university, that the research material was the property of the university, and that by virtue of the Administrative Court of Appeal's judgments of 6 February 2003 and 11 August 2003 the applicant, in his capacity as a public official, was under an obligation to make the documents available to the University administration. Accordingly, after 14 August 2003, when the applicant was informed about the judgments, there was no room for interpreting and applying the secrecy legislation, but only for interpreting and applying the Administrative Court of Appeal's judgments.

83. Nevertheless, when examining the issue of whether the applicant should be held criminally responsible, the Court of Appeal did take the "assurances of confidentiality" given by the applicant into consideration. It concluded that the relevant legislation did not permit public authorities to

make “assurances of confidentiality” that are more far-reaching than the secrecy legislation provides or to decide that secrecy should apply before a request for access to certain documents has been received.

84. Finally, the Court of Appeal took into consideration that the applicant, over a long period of time, had intentionally disregarded his duties as a public official by not complying with the Administrative Court of Appeal's judgments and thus set aside the constitutional right of public access to official documents.

85. The applicant complained that the outcome of the criminal proceedings infringed his rights under Article 8 of the Convention, notably because his promise of confidentiality to the participants in the research allegedly was imposed on him by the public authority, the Ethics Committee of the University of Gothenburg, as a precondition for carrying out his research.

86. He maintained that he had suffered personally, socially, psychologically and economically, although he had followed in every respect the relevant ethical regulatory system provided by the State and despite the fact that the rulings of the Administrative Court of Appeal were allegedly probably completely mistaken. The applicant submitted that the rulings of the Administrative Court of Appeal implied that he would have to share sensitive, personalised psychiatric medical record data, contained in non-archived working material in progress from a research project with allegedly two private individuals with no approved research agendas, although he had given promises of confidentiality about the material under the instruction of the State, and although such would have violated the integrity and human rights of hundreds of individuals participating in the research project. Thus, although the case also concerned the applicant's criminal conviction for misuse of office, in the applicant's view he was subjected to violations of his rights under the Convention due to a whole chain of negative events stemming from the probably mistaken rulings by the Administrative Court of Appeal, which the applicant could not have reviewed.

87. The applicant contended that he was given only two options by his employer, the State, both of which would render him liable to prosecution or defamation: either he did not break the promises with the consequence that he would be prosecuted for misuse of office and defamed, or he did break the promises for which he would be reported in the media with undesired consequences as a result. He further alleged that it would also have had detrimental effects on the conduct of scientific research in general in Sweden.

88. Furthermore, he alleged that the research material was probably not the property of the university. The Administrative Court of Appeal just assumed this without analysing the context of the study in which the material had been collected and did not realise that the material was an

unfinished longitudinal study containing only non-registered, non-archived data, which therefore was not in the public domain, but in the domain of the researcher responsible.

89. The applicant also maintained that his criminal conviction was based on judgments by the Administrative Court of Appeal, which were not "in accordance with the law" and that it was illogical that he, who was not a party to the proceedings before the Administrative Court of Appeal, could be convicted for misuse of office by the criminal courts or that the latter did not identify any mitigating circumstances. He referred in this respect, *inter alia*, to tapplicant's compliance with the Helsinki Declaration, and to other professions, for example priests and journalists, for whom it would be taken as a mitigating circumstance that they were protecting the integrity of their informants.

90. Finally, the applicant pointed out that he had no part in the destruction of the research material or the decision to destroy it. It was three members of the research team who decided to destroy the material, and did so on 7 to 9 May 2004.

2. Clarification of the complaint to be examined

91. On the face of it, the present case raises important ethical issues involving, among other things, the interest of the children participating in the research, their parents who under certain conditions gave their consent to the children's participation in the study, the researchers, including the applicant, medical research in general, the public and public access to information. In order to avoid confusion, however, the Court finds it necessary to clarify the complaint to be examined and emphasise the following.

92. As to the notion of public access, it will be recalled that in the present case, access was granted only to K and E. The former was a sociologist and a researcher at Lund University, who maintained that she had no interest in the personal data as such but only in the method used in the research and the evidence the researchers had for their conclusions (see paragraph 15). E was a paediatrician, who submitted that he needed to keep up with current research, that he was interested in how the research in question had been carried out and in clarifying how the researchers had arrived at their results, and that it was important to the neuropsychiatric debate that the material could be exposed to independent and critical examination (see paragraph 16). Both were granted access on certain conditions (see paragraph 22). K and E were not allowed to remove copies from the premises where they were given access to the documents and transcripts of released documents containing data on psychological, medical or neurological examinations or treatment, or concerning the personal circumstances of individuals and notes concerning such examinations, treatment or circumstances from a document released to them, would be

destroyed when the above research project was completed. When granting access the Administrative Court of Appeal found that K and E had shown a legitimate interest in gaining access to the material in question and that they could be assumed to be well acquainted with the handling of confidential data.

93. As to the children participating in the research and their parents, it will be recalled that the applicant does not represent them before the Court. Nor are they parties in the proceedings before the Court and there is no indication that they instituted any proceedings before the domestic authorities relating to the circumstances of the present case.

94. There is no indication either that the applicant acted as the children's private physician or psychiatrist. He was a professor and a researcher who, at the time when he became part of the research team, and later when he became responsible for the study, every third year followed a group of one hundred and forty-one pre-school children with the aim of elucidating the significance of Attention-Deficit Hyperactivity Disorder (ADHD) or Deficits in Attention, Motor Control and Perception (DAMP) in children and the associated problems from a long-term perspective.

95. The domestic courts noted that the research material consisted of a large number of records, test results, interview replies, questionnaires and video and audio tapes and contained a very large amount of privacy-sensitive data about the children and their relatives. Before the Court the applicant maintained that the background material also contained non-registered, non-archived data, personal handwritten documents and copies of medical/psychiatric reports. The latter submission can neither be confirmed nor excluded as the material was destroyed.

96. It will be recalled that in various judgments, *inter alia, Z v. Finland*, Reports 1997-I, §§ 95- 99, and *M.S. v. Sweden*, Reports 1997-IV, § 41, the Court stated that “respecting the confidentiality of health data is a vital principle in legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the privacy of a patient but also to preserve his or her confidence in the medical profession and in the health service in general”. The Court accepted, however, in the former judgment “that the interests of a patient and the community as a whole in protecting the confidentiality of medical data may be outweighed by the interest in investigation and prosecution of crime and in the publicity of court proceedings, (see, *mutatis mutandis*, Article 9 of the above-mentioned 1981 Data Protection Convention), where such interests are shown to be of even greater importance”.

97. It will also be recalled from the Court's finding above, that the applicant's complaints relating to the Administrative Court of Appeal's judgments of 6 February 2003, 11 August 2003 and 4 May 2004 concerning K's and E's access to the background material were lodged out of time and that the Court is therefore prevented from examining any alleged violation

in this connection.

98. Accordingly, the Court can only examine whether the outcome of the criminal proceedings against the applicant contravened the Convention.

99. In this respect it will be recalled that by the Court of Appeal's judgment of 8 February 2006, which became final on 25 April 2006, when the Supreme Court refused leave to appeal, the applicant was convicted pursuant to Chapter 20, Article 1 of the Penal Code for, in his capacity as head of the Department of Child and adolescent Psychiatry, from 11 August 2003 until 7 May 2004, wilfully having disregarded the obligations of his office by failing to comply with the judgments of the Administrative Court of Appeal, allowing E and K access to the research material on certain conditions, by refusing to make the documents available for removal in accordance with the instructions he had received from the university administration. He was given a suspended sentence and ordered to pay fifty day-fines of 750 Swedish kronor, amounting to a total of approximately EUR 4,000 Euros.

100. The vice-chancellor of the university was also convicted of misuse of office for having disregarded, through negligence, his obligations as vice-chancellor by failing to ensure that the documents were available for release. He was sentenced to forty day-fines of SEK 800, amounting to a total of approximately EUR 3,400.

101. The conviction of the applicant and the vice-chancellor were exclusively related to their roles as public officials at a public institution, namely the University of Gothenburg. The disputed material, to which the Administrative Court of Appeal had decided that K and E could have access under various conditions, was the property of the university and it was therefore considered to be in the public domain.

102. The applicant was not convicted for having destroyed the research material. Nor did he risk criminal prosecution for breach of professional secrecy, if he had released the documents to K and E. The Court refers in this respect to the finding by the Court of Appeal that “the Administrative Court of Appeal had determined once and for all that the Secrecy Act permitted release of the documents. For this reason, there was of course no possibility of prosecution for breach of professional secrecy which, in the opinion of the Court of Appeal, the applicant must have realised”.

103. Hereafter, what is left for the Court to examine is whether it was in violation of Article 8 (or 10) of the Convention that the applicant was convicted for, in his capacity as head of the Department of Child and adolescent Psychiatry, from 11 August 2003 until 7 May 2004, wilfully having disregarded the obligations of his office by failing to comply with the judgments of the Administrative Court of Appeal, allowing E and K access to the research material on certain conditions, by refusing to make the documents available for removal in accordance with the instructions he had received from the university administration.

3. The Court's assessment

104. The Court reiterates that the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III, and *Y.F. v. Turkey*, no. 24209/94, § 33, ECHR 2003-IX) and may extend to certain activities of a professional nature (see, for example *Halford v. the United Kingdom*, 25 June 1997, *Reports of Judgments and Decisions*1997-III). Moreover, in several cases concerning consequences of a criminal conviction, Article 8 has been found applicable (see, for example, *Üner v. the Netherlands* [GC], no. 46410/99, ECHR 2006-XII, and *Maslov v. Austria*[GC], no. 1638/03, 23 June 2008) or concerning measures related to criminal proceedings (see, for example, *S. and Marper v. the United Kingdom*[GC], nos. /04 and 30566/04, 4 2008). However, there appears to be no case-law where the Court has assumed that a criminal conviction in itself constituted an interference with the right to respect for private life within the meaning of Article 8 of the Convention.

105. In the circumstances of the present case the Court leaves it open whether there has been an interference with the applicant's right to respect for his private life, because even assuming that there has been an interference, it finds that there has been no violation of the invoked provision for the reasons set out below.

106. In the Court's view the conviction of the applicant was in accordance with the law, namely Chapter 20, Article 1 of the Penal Code, and it pursued legitimate aims, namely preventing disorder and crime, and the protection of the rights and freedoms of others.

107. In the examination of whether the disputed assumed interference was necessary in a democratic society the Court notes the Government's observation that the purpose of the principle of public access to official documents was to allow for the public and the media to exercise control of the State, the municipalities and other parts of the public sector which, in turn, contributed to the free exchange of opinions and thoughts, and to efficient and correct management of public administration and, thereby, to maintain the legitimacy of the democratic system. That observation relates rather, however, to the outcome of the judgments by the Administration Court of Appeal, which are not under examination for the reasons stated above.

108. What is crucial in the examination at hand is whether the disputed interference, namely the conviction of the applicant for misuse of office, was necessary in a democratic society.

109. The Court reiterates in this connection that the Contracting States' domestic legal systems must ensure that a final binding judicial decision does not remain inoperative to the detriment of one party and that the execution of a judgment given by any court must be regarded as an integral part of the "trial" for the purposes of Article 6 (see *Burdov v. Russia*,

no. 59498/00, § 34, ECHR 2002-III, and *Hornsby v. Greece*, judgment of 19 March 1997, *Reports of Judgments and Decisions* 1997-II, p. 510, § 40).

110. Seen in this light, the Swedish State had to react to the applicant's refusal to execute the judgments by the Administrative Court of Appeal granting E and K access to the research material on various conditions.

111. In the examination of whether the conviction and the sentence imposed on the applicant were proportional to the aims pursued, the applicant has submitted that the criminal courts failed to take various mitigating elements into account.

112. Firstly, the Court notes that before the Court the applicant has submitted two permits by the Ethics Committee of the University of Gothenburg dated 9 March 1984 and 31 May 1988, but that they do not constitute evidence that the Ethics Committee of the University of Gothenburg required an absolute promise of confidentiality as a precondition for carrying out his research. Moreover, in the criminal proceedings the applicant stated that he was bound by the assurances of confidentiality he had given to the participants in the study in accordance with the requirements established for the research project. The Court of Appeal stated in that connection that "the assurances of confidentiality given to those participants in the study go, at least in some respects, further than the Secrecy Act permits. The Court of Appeal notes that there is no possibility in law to provide greater secrecy than follows from the Secrecy Act and that it is not possible to make decisions on issues concerning confidentiality until the release of a document is requested. It follows therefore that the assurances of confidentiality cited above did not take precedence over the law as it stands or a court's application of the statutes."

113. In the Court's view, while different interpretations of the legislation at issue cannot be excluded, it does not overstep the State's margin of appreciation in this case if the Court of Appeal found that the assurances of confidentiality cited above could not take precedence over the law as it stood. The decision thereon did not appear arbitrary.

114. The same can be said as to the Court of Appeal's finding that the nature of the international declarations agreed on by the World Medical Association was not such as to give precedence over Swedish law.

115. The applicant also submitted that, had he been a member of another profession, such as a priest or a journalist, the Court of Appeal would have taken into account as a mitigating circumstance the fact that he had attempted to protect the integrity of the informants/participants in the research. In so far as the applicant invoked this argument in the criminal proceedings, the Court finds that the Court of Appeal replied to them by emphasising that the judgments by the Administrative Court of Appeal had settled once and for all the question of whether the documents were to be released to K and E, that before the Administrative Court of Appeal the university had had the opportunity to present reasons why the documents

requested should not be released to K and E, and that it had no significance for the validity of the Administrative Court of Appeal's judgments whether or not the university considered that they were based on erroneous or insufficient grounds. What mattered was that the university administration had understood that it was incumbent on it to release the documents without delay and that for a considerable period the applicant, in his capacity as head of the Department of Child and Adolescent Psychiatry, intentionally failed to comply with his obligations as a public official arising from the judgments of the Administrative Court of Appeal.

116. Such a finding, or the fact that the Court of Appeal did not take into account as a mitigating circumstance the fact that the applicant had attempted to protect the integrity of the participants in the research does not, in the Court's view, overstep the State's margin of appreciation in this case.

117. Finally, the sentenced imposed on the applicant cannot be said to be disproportionate.

118. In these circumstances, there are no elements which could suggest that Court of Appeal's judgment was arbitrary or disproportionate to the legitimate aims pursued.

119. Accordingly, the Court considers that in the present case there has been no violation of Article 8 of the Convention.

B. The merits of the complaints under Article 10 of the Convention

120. The Court will proceed to examine whether the applicant's complaint, that having regard to his promise of confidentiality to the families of the children who took part in the research, his criminal conviction infringed his right to freedom of expression under Article 10 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."

121. It notes from the outset that the applicant was not prevented from exercising his "positive" right to freedom of expression under the provision: rather he was convicted for failing to make the disputed documents available in compliance with the judgments of the Administrative Court of

Appeal.

122. The applicant submitted that it should have been taken into account as a mitigating circumstance that he, like for example priests and journalists, had attempted to protect the integrity of their informants. The Court observes in this respect that doctors, psychiatrists and researchers may have a similar interest to that of journalists in protecting their sources (see e.g. *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I and *Roemen and Schmit v. Luxembourg*, application no. 51772/99, 25 February 2003).

123. Moreover, doctors, psychiatrists and researchers may have a similar interest to that, for example, of lawyers in protecting professional secrecy with clients (see e.g. *Niemietz v. Germany*, judgment of 16 December 1992, series A no. 251-B, *Foxley v. The United Kingdom*, no. 33274/96, 20 June 2000 and *Strohal v. Austria*, no. 20871/92, Commission decision of 7 April 1994). In the latter case, the former Commission stated "that the right to freedom of expression by implication also guarantees a "negative right" not to be compelled to express oneself, i.e. to remain silent". However, when referring to the aspect of remaining silent, the former Commission referred to *K. v. Austria*, Commission Report of 13 October 1992, § 45, cf. also *Ezelin v. France*, judgment of 26 April 1991, Series A no. 202, § 33, where the Court stated that a refusal to give evidence does not in itself come within the ambit of Article 10 of the Convention. However, as opposed to doctors, psychiatrists and researchers, where a lawyer is involved an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 of the Convention (see *Niemietz v. Germany* and *Foxley v. The United Kingdom*, both cited above).

124. Moreover, the applicant in the present case was not convicted for having refused to give evidence, he was convicted for misuse of office, in his capacity as head of the Department of Child and Adolescent Psychiatry at the University of Gothenburg, from 11 August 2003 until 7 May 2004, for having wilfully disregarded the obligations of his office by failing to comply with the judgments of the Administrative Court of Appeal, by refusing to make the documents available for removal in accordance with the instructions he had received from the university administration. He was thus part of the university that had to comply with the judgments of the Administrative Court of Appeal.

125. In addition, the conviction of the applicant did not as such concern the university's or the applicant's interest in protecting professional secrecy with clients or the participants in the research. That part was settled by the Administrative Court of Appeal's judgments of 6 February 2003, 11 August 2003 and 4 May 2004, in relation to which the Court is prevented from examining any alleged violation of the Convention, as stated above.

126. In these circumstances, the Court is not convinced that the outcome

of the criminal proceedings against the applicant amounted to an interference with his rights within the meaning of Article 10 of the Convention, but finds it unnecessary to examine this issue further since in any event it finds that there has been no violation of Article 10 for the reasons stated when examining the complaint under Article 8 of the Convention, and concludes that there are no elements which could suggest that Court of Appeal's judgment was arbitrary or disproportionate to the legitimate aims pursued, namely preventing disorder and crime, and the protection of the rights of others.

127. Accordingly, the Court considers that in the present case there has been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint under Articles 8 and 10 relating to the criminal proceedings against the applicant admissible and the remainder of the application inadmissible;

2. *Holds* by five votes to two that there has been no violation of Article 8 of the Convention;

3. *Holds* unanimously that there has been no violation of Article 10 of the Convention.

Done in English, and notified in writing on 2 November 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Power;

(b) joint dissenting opinion of Judges Gyulumyan and Ziemele.

J.C.M.
S.Q.

CONCURRING OPINION OF JUDGE POWER

I voted for a finding of no violation of Articles 8 or 10 of the Convention but I would like to add some additional remarks to the reasoning of the majority. Relying on his promise of confidentiality given to research participants, the applicant obstructed, intentionally, the University of Gothenburg from complying with a Court Order for disclosure of documents under restricted conditions. The documents, which related to a research project conducted from 1977 to 1992 were subsequently destroyed thus frustrating compliance with a lawful Court Order.

The documentation in question had been sought by third party researchers who had established, before the domestic courts, a legitimate interest in having certain access to the material. According to the Judgment of the domestic court, their interest did not relate to the personal data of the research subjects, as such, but only to "*the methods used in the research and the evidence the researchers had for their conclusions*". It was "*important to the neuropsychiatric debate that the material in question could be exposed to independent and critical examination*"[1]. The public has an obvious interest in the findings and implications of research. Progress in scientific knowledge would be hampered unduly if the methods and evidence used in research were not open to scrutiny, discussion and debate. Thus, the requests for access, in my view, represented important matters of public interest.

The public also has an interest in protecting the confidentiality that attaches to the doctor-patient and other kinds of fiduciary relationship, including the one that arose in this case. The purpose of the duty of confidence is to support the development of fiduciary and other special relationships that involve an element of reliance or trust between persons for the social and personal benefits they provide. It is important to note, however, that the applicant was not the children's treating doctor but acted, rather, in his capacity as Director of Research.

The Administrative Court of Appeal was thus faced with two competing public interests. In balancing those interests, it listened to the arguments against disclosure submitted by the University of Gothenburg (in which, it would appear, ownership of the records vested, the research not being the private research of the applicant) and it heard the submissions of the third party researchers who wanted to test the reliability of that University's research findings. In reaching its decision, it balanced the competing interests and imposed rather stringent and restrictive conditions prior to the making of the Order for disclosure. During the course of the dispute it directed the matter back to the University to examine whether the material

[1] Cited in the Court of Appeal's Judgment, 8 February 2006.

could be released "*after the removal of identifying information*[2] – a condition which, to my mind, appeared entirely appropriate and which would indicate that the applicant's concerns regarding confidentiality had been considered, at least in substance, by the domestic courts[3]. Further conditions also attached to the Order granting access, the breach of which gave rise to criminal liability on the part of those to whom access had been granted. Notwithstanding the existence of such safeguards, the applicant nevertheless persisted in his opposition to the release of the documentation insisting upon the binding nature of his promise of confidentiality to the research participants.

Part of the applicant's difficulty seems to lie in his perception of the legal boundaries of a doctor's duty of confidence. It seems to me that, as a general principle, once a doctor is required to give evidence or, by order of the court, to disclose confidential notes concerning a patient's treatment, no privilege exists which would entitle the patient to prevent disclosure of the relevant information. The corollary is, of course, that in the absence of a court order or of patient consent, medical records cannot be released by a doctor to third parties[4]. The fact is that in this case the records that related to the research participants (who were not the applicant's "patients") *were* the subject of a court order.

The applicant complains, essentially, that he had to choose between breaking the law or breaking a promise of confidentiality (which he was obliged both by his profession and by the state, to make). He chose to break the law even though a court of law had previously considered the confidential nature of the records in question in its balancing of the interests

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[2] See summary of the administrative proceedings as set out in the Judgment of the Court of Appeal dated 8 February, 2006 as translated and referred to in Appendix I of the State's submissions dated 14 October, 2008.

[3] The applicant contends, however, that the records were to be shared "in fully identifiable form" (paragraph 53 of his submissions dated 12 January, 2009). One could reasonably argue that constitutional and natural justice would require that the persons to whom the information in the records related ought to have been put on notice of the application for disclosure thereof. One might also argue that fair procedures would require that before making such orders the person or persons likely to have been affected thereby ought to have been given notice by the Court of its intention to make such an order, and ought to have been afforded the opportunity of making representations in this regard. That said, however, even where a subject's consent to disclosure is withheld, a Court may nevertheless be justified in dispensing with it if, having regard to other important interests, the demands of justice so require. It would appear that some of the persons whose records were the subject of the disclosure sought in this case did, in fact, apply to the Supreme Administrative Court for relief for substantive defects but that their applications were refused. Problematic as this aspect of the background to the case may be, these persons have not raised complaints before this Court.

[4] This general rule may be subject to exceptions, namely, that disclosure may be permitted in circumstances where it is necessary to protect the interests of the patient and/or the welfare of society and/or the welfare of another individual.

involved and had imposed strict conditions attaching to disclosure. The applicant was thus protected by law and I do not accept that in complying with a court order his future career as a doctor would have been destroyed[5].

Confidentiality in medical research relationships, although an important matter of public interest and meriting the law's protection, cannot be said to be absolute. There may be times when a person owing a duty of confidence is obliged to disclose information that was given "in confidence" as, for example, where disclosure is necessary to prevent a risk of foreseeable harm to a patient or to a third party or where it is made on foot of a court order. Thus, at the outset of any clinical research project or other "confidential" therapeutic relationship, the legal boundaries within which the duty of confidence arises ought to be clearly established.

If what appears to be the applicant's perception of the binding nature of his promise of confidentiality were correct, then courts could rarely, if ever, order disclosure of "confidential" records even where the protection of other important interests were in issue. Yet case law from various jurisdictions indicates that applications for disclosure of "confidential" records are frequently brought before the courts[6] and it is not unusual for courts to engage in a balancing exercise of the competing interests involved.

No medical practitioner or academic researcher, no matter how committed to the principle of confidentiality, is permitted to act outside the law. Respect for the rule of law upon which the foundations of democracy rest requires respect for lawful Court orders. The applicant was not entitled to do what he did and his conviction with a suspended sentence was not, in my view, disproportionate having regard to all the circumstances of the case.

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[5] See paragraph 4 of the applicant's submissions dated 12 January, 2009.

[6] For the approach of the Canadian Supreme Court see *R. v Stinchcombe* [1991] 3 SCR 326; *R. v O'Connor* [1995] 4 SCR 411; and *R. v Beharriell* [1995] 4 SCR 536. See also, the Decision of the U.S. Supreme Court in *Jaffee, Special Administrator for Allen, Deceased -v- Redmond et al* (Decision of 13 June 1996) where that Court considered whether it was appropriate for federal courts to recognise the existence of "psychotherapist privilege" and whether statements made to a therapist were protected from compelled disclosure in a federal civil action. See also the Judgment of the British House of Lords in *D. v N.S.P.C.C.* [1978] AC 171.

JOINT DISSENTING OPINION
OF JUDGES GYULUMYAN AND ZIEMELE

1. We do not share the view of the majority that the criminal conviction of the applicant was a proportionate measure and that his rights under Article 8 were therefore not violated.

2. First of all, we would point out that the reasons for the destruction of the research material by the applicant's research team (see paragraph 31) concerned the best interests of the children and the protection of the families involved in this research at the University of Gothenburg. The researchers had promised confidentiality of the information collected about the individuals concerned. There is no question that the promise of confidentiality is essential for the purposes of medical, social and behavioural studies. It is only with this guarantee that researchers can expect research subjects to submit the most accurate data. In other words, if science is to make progress in areas that are important for human beings, the confidentiality and protection of research data is of key importance. Admittedly, the protection of research data for the advancement of science is another legitimate aim to be protected. However, the two aims are closely linked: the first sets the limits on the second. It has been repeatedly emphasised within the framework of professional debate and the World Health Organization in particular that "Advancement of medical knowledge depends, to a large extent, on expansion of research involving experimentation on human subjects. [However] it is not acceptable that the respect of the individuals be compromised in the pursuit of benefits that may accrue to science and society. ...The principle of respect implies that participation in the research should be completely voluntary and based on informed consent. Where research involves collection of data on individuals, privacy should be protected by ensuring confidentiality" (see http://whqlibdoc.who.int/emro/2004/9290213639_chap2.pdf visited on 18 October 2010).

3. Article 8 of the Convention in this case not only refers to the protection of the privacy of third persons, it also refers to the notion of privacy which covers the applicant's work as a researcher in a sensitive medical sphere and his authority as a professional medical researcher. Therefore, the arguments advanced by the applicant in the criminal proceedings – namely, that his behaviour had been dictated by both medical and research ethics and the Convention – ought to have been examined in much more detail then the court actually did (paragraph 33). Likewise, the arguments advanced by the applicant to the effect that the promise of confidentiality given to the children and their families and the importance of upholding the value of confidentiality for the future of research in Sweden, which form the core of the professional debate on how to carry out medical research in compliance with human rights (see World Medical Association

Declaration of Helsinki – Ethical Principles for Medical Research Involving Human Subjects, as last amended in October 2008), were dismissed in two short paragraphs by the Court of Appeal.

4. We note that the Helsinki Declaration addresses the question of publication of the results of research. It provides that "Authors, editors and publishers all have ethical obligations with regard to the publication of the results of research. Authors have a duty to make publicly available the results of their research on human subjects and are accountable for the completeness and accuracy of their reports. They should adhere to accepted guidelines for ethical reporting. Negative and inconclusive as well as positive results should be published or otherwise made publicly available. Sources of funding, institutional affiliations and conflicts of interest should be declared in the publication. Reports of research not in accordance with the principles of this Declaration should not be accepted for publication." The approach in the field of medical research is not to maintain secrecy. On the contrary, it is recognised that public debate about research results is important for quality, transparency and various other reasons. There is a duty to make public the results of research irrespective of whether the outcome has been positive or negative. However, this has to be balanced against the principle of confidentiality as it applies to research subjects (see point 2 above). The question arises whether the system, as developed in Sweden over a long period of implementing the principle of public access to official documents (see paragraphs 35-41) is adapted to the modern challenges of medical research and the right of privacy in its various forms in this context. The main aspects of this issue had to be debated within the framework of administrative proceedings which fall outside the Court's competence. It is, in our view, misleading, however, to think that these questions are irrelevant in criminal proceedings (see point 3 above).

5. It is true that the values of science may clash with the values of law, as in the case before us. The national courts and the European Court of Human Rights should bear this in mind and accordingly be prepared to balance all the arguments. In our view, the Swedish courts, in adjudicating the criminal charges against the applicant, were too formalistic and, in a sense, self-righteous. Of course, the State has every right and obligation to see to it that order is maintained and that court judgments are complied with. We agree that the State had to make sure that the applicant complied with the judgment of the Administrative Court of Appeal, even if we have a number of questions regarding this judgment (see point 4 above). However, in the criminal proceedings the national courts should have had regard to the major chilling effect that an imposition of a criminal sentence on a researcher and the subsequent criminal record will have. A criminal sentence is clearly disproportionate in view of the important interests involved, even if balanced against the fundamental principle of access to information as regulated in Sweden. Surely, the State would want to

promote medical science both in the interests of the population and also for reasons of competition and economic development. Surely, Sweden would want to be among those States which promote medical research in compliance with the human rights of those individuals who agree to participate in such research and with respect for the researchers. It is therefore desirable that a more nuanced approach to the principle governing access to information be called for today.

6. It may very well be that the applicant was liable to disciplinary punishment for his behaviour, but criminal responsibility for protecting at least equally important public and State interests seems to be an exaggerated reaction. It is relevant in this respect to note that there was an ongoing expert debate at the University concerned about the release of the documents ordered by the administrative courts. A Swedish Research Council report attested that there was no connection between the research carried out by one of the people requesting access to the applicant's research data and the former's research project as specified before the Administrative Court, and the University decided that this person should not have access; there is also no evidence that any disciplinary proceedings were brought between the beginning of 2004 and the start of criminal proceedings in 2005 (see paragraphs 28 and 32).

7. We consider that the protection of the right to privacy in the context of medical research is a complex matter and that the courts of law should try not to overlook all the interests at stake. Against this big picture, the line taken against the applicant in domestic criminal proceedings was clearly inadequate and the result disproportionate.