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

FIRST SECTION

CASE OF N.Š. v. CROATIA

(Application no. 36908/13)

JUDGMENT

Art 10 • Freedom of expression • Applicant's criminal conviction for breaching the confidentiality of administrative custody proceedings concerning her granddaughter • Special protection to the confidentiality of proceedings concerning children • Applicant's discussion in a television interview concerning the proper functioning of the system of child care proceedings and disclosure without authorisation of information revealed during custody proceedings held in private • Domestic authorities' obligation to carefully balance the freedom to convey remarks concerning a matter of public interest and the necessity of protection of the child's best interests and privacy rights • Purely formalistic approach by the domestic courts to the notion of the confidentiality of proceedings • Domestic courts' failure to examine all the relevant circumstances of the case in the light of the principles set out in the Court's case-law

STRASBOURG

10 September 2020

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of N.Š. v. Croatia,

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

Krzysztof Wojtyczek, *President,*
Ksenija Turković,
Linos-Alexandre Sicilianos,
Armen Harutyunyan,
Pauliine Koskelo,
Tim Eicke,
Raffaele Sabato, *judges,*
and Abel Campos, *Section Registrar,*

Having regard to:

the application (no. 36908/13) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Croatian national, Ms N.Š. (“the applicant”), on 21 May 2013;

the decision to give notice to the Croatian Government (“the Government”) of the complaints concerning criminal conviction for breaching the confidentiality of administrative custody proceedings, and the lack of fairness of the relevant criminal proceedings, under Article 6 §§ 1 and 3 (d) and Article 10 of the Convention, and to declare inadmissible the remainder of the application;

the decision not to have the applicant’s name disclosed;

the parties’ observations;

Having deliberated in private on 19 May and 7 July 2020,

Delivers the following judgment, which was adopted on the last-mentioned date:

INTRODUCTION

1. The case concerns the applicant’s criminal conviction for breaching the confidentiality of administrative custody proceedings concerning her granddaughter.

THE FACTS

2. The applicant was born in 1954. The applicant, who had been granted legal aid, was represented by Ms L. Horvat, a lawyer practising in Zagreb.

3. The Croatian Government (“the Government”) were represented by their Agent, Ms Š. Stažnik.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. BACKGROUND TO THE CASE

5. On 20 May 2007 the applicant's daughter and son-in-law died in a car accident. The couple's daughter N.G., who was a five-month-old baby at the time, was also injured in the accident.

6. Following the death of her parents, on 24 May 2007 the local Social Welfare Centre gave provisional custody of N.G. to her uncle (her father's brother).

7. Soon afterwards a family dispute arose over custody of N.G., including issues of where she should live and with whom she should have contact. Paternal and maternal family members took up opposing sides. The dispute resulted in several sets of administrative proceedings before the Centre (first the D.S. and then the K. Social Welfare Centre; hereinafter "the Centre") and the Ministry of Health and Social Welfare (*Ministarstvo zdravstva i socijalne skrbi*, hereinafter "the Ministry"), and judicial proceedings before the relevant courts.

8. On 22 January 2009 the Centre gave custody of N.G. to her uncle but, upon an appeal by the applicant's family, on 26 February 2009 the Ministry quashed this decision and remitted the case to the Centre.

9. In the resumed proceedings, on 20 October 2010 the Centre again gave custody of N.G. to her uncle, and this decision was upheld by the Ministry on 24 February 2011. According to the information available to the Court, on 28 March 2011 the applicant's family challenged this decision in the relevant administrative court.

10. Owing to its tragic circumstances, the accident itself and the ensuing family dispute attracted significant media coverage.

11. In the context of such media interest, the applicant was interviewed in an article of 14 November 2007 in *Jutarnji list* (a newspaper with national coverage) in which she discussed the circumstances in which the Centre had granted custody of N.G. to her uncle and how that decision had been quashed by the relevant court. She also explained that the proceedings concerning contact rights were ongoing before the court. The information which the applicant provided was confirmed by the Centre's director, who also stated that the Centre had unsuccessfully sought to reconcile the views of the two families. The name of the child was explicitly mentioned by both the applicant and the Centre's director.

12. On 10 April 2008 a television show (*Provjereno*), which was broadcast on a private television channel with national coverage, discussed the case in detail. It contained interviews with neighbours of the deceased couple who spoke about how they had felt upon learning of the tragic accident in which the couple had died. The television report also discussed the fact that custody of N.G. had been granted to the father's family and how the mother's family could not accept that. N.G.'s name was explicitly mentioned by the journalist in that report. Part of the television report was

filmed on the premises of the Centre. During the report, the Centre's director talked about the details of the circumstances in which the initial custody order had been made (see paragraph 6 above), and explained that it was being challenged on appeal. The director also expressed her views on what would be the best solution as regards custody rights.

13. On 16 March 2010 an article was published in *Večernji list* (a newspaper with national coverage) in which the applicant contended that the child had been given to her uncle without anybody even consulting the applicant or her family. The article further suggested that the applicant and her family had managed to have the case transferred to the K. Centre owing to a fear that the D.S. Centre which had initially dealt with the case had lacked impartiality. It also suggested that the applicant and her family had undergone a psychiatric assessment in respect of their suitability to participate in the child's upbringing. The K. Centre declined to comment on the case.

14. In a further article of 18 March 2010 in *Jutarnji list*, the applicant contended that she suspected that various "connections" had been instrumental in the D.S. Centre's adoption of the decision in favour of the uncle. She also pointed to the findings of an expert report produced by Z.K., according to which custody of the child should be granted to the applicant's family. In the same article, the D.S. Centre explained how the proceedings had been transferred to the K. Centre, which refused to comment on the case. N.G.'s uncle also declined to comment on the case.

15. On 7 April 2010 a television show (*Proces*) was broadcast on the national television channel (HRT) in which the applicant took part, together with her other daughter, D.Š., and her husband. During the interview, a bundle of papers could be seen in front of them. The applicant and D.Š. raised various issues regarding the alleged malfunctioning of the social welfare system, including the relevant court proceedings concerning custody of N.G. and contact rights in respect of her. The applicant's husband did not speak. Further explanations about details of the case were provided by the journalist. Part of the television report was filmed on the premises of the Ministry, where a senior official was interviewed about the relevant procedures to be followed in cases such as the one in question.

16. The relevant parts of the television report contain the following scenes:

- While the journalist discusses details of the Centre's failure to follow the relevant procedures, a scene shows, in focus, the introductory and operative parts of a decision of the Ministry of 22 February 2009 by which a decision of the K. Welfare Centre of 22 January 2009 on custody rights over N.G. was quashed and remitted for further examination. No details of the reasoning are shown. It is also not possible to see whether somebody is holding or showing the document. The name of the child is visible;

- In the next scene, the journalist speaks about misgivings that the applicant's family members have as to the reasons why the Centre decided in favour of the uncle. At one point during the journalist's speech, the camera briefly scrolls through the reasoning of a decision, from which the name of the child and her uncle can be discerned, as well as the fact that the uncle was granted custody rights and the applicant's family lodged an appeal. It is not clear which decision was filmed nor is it possible to see whether somebody is holding or showing the document;

- In a later scene, the applicant is seen opening a file and touching a document, but it is not possible to see anything specific on the documents in the file;

- The report then goes back to the Ministry's premises. In the introduction to this scene, the journalist states that the Ministry is aware of the Centre's mistakes but cannot provide further details, as the case is confidential. The senior Ministry official is then shown reading some documents from a file, and she again explains the relevant procedures;

- The report further refers to the psychiatric assessments that the families underwent. While the journalist speaks, the operative part of a decision on the award of custody rights to the uncle is seen in focus. It is not clear which decision this is, nor can it be seen whether somebody is holding or showing the document. A pen is also shown, in focus, going through a psychological assessment favourable to the applicant, and in the next scene the signature of Z.K., the expert, assisted by L.B., another expert, is shown in focus. It is not possible to see who is holding the pen.

17. Following the broadcast of the *Proces* television show, N.G.'s uncle lodged a criminal complaint against the applicant and D.Š. with the relevant State Attorney's Office (*Općinsko državno odvjetništvo*), alleging that they had breached the confidentiality of the administrative proceedings before the Centre, in particular by disclosing N.G.'s full identity.

II. CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

18. On 31 August 2011 the State Attorney's Office indicted the applicant and D.Š. on charges of breaching the confidentiality of the administrative proceedings, in relation to the applicant's disclosure of N.G.'s identity in the *Proces* television show. The indictment read as follows:

> "On an unspecified day in April 2010 ..., in front of the S.K. restaurant, while filming a report for the *Proces* television show on HRT, broadcast on 7 April 2010 at 9.50 p.m., [and] although aware that the administrative proceedings before the K. Welfare Centre concerning custody of N.G. were confidential, while speaking about the course of the proceedings,[and while] a decision of the K. Welfare Centre adopted in the proceedings in question was shown on the television camera, depicting N.G.'s name, which made her identity known to the general public,

> [The applicant], the first person accused, and D.Š., the second person accused, disclosed without authorisation what they had learned in the administrative proceedings, which, according to the law, is considered to be confidential.,
>
> and thereby they committed a criminal offence against justice – breaching the confidentiality of proceedings – punishable under Article 305 § 1 of the Criminal Code."

19. The case was initially examined by the Zlatar Municipal Court (*Općinski sud u Zlataru*, hereinafter "the Municipal Court"), which issued a penalty notice (*kazneni nalog*) on the same day without holding a hearing, finding the applicant and D.Š. guilty as charged and sentencing them to two months' imprisonment, suspended for a year.

20. The applicant and D.Š. challenged that decision and the case was forwarded to the Zagreb Municipal Criminal Court (*Općinski kazneni sud u Zagrebu*, hereinafter "the Municipal Court") for trial.

21. At a hearing on 13 April 2012 the applicant pleaded not guilty, as did D.Š. The trial court allowed a request by the prosecution for D.G. to be questioned. The defence proposed that the court review the *Proces* television report and question its editor, journalist and cameraman in order to ascertain whether the applicant and her daughter could have influenced what would be filmed and later shown in the report. The trial court agreed to review the television report and reserved its decision on hearing witnesses, asking the defence to provide further contact details for these persons.

22. A further hearing was held on 17 May 2012. The record of the hearing indicated that N.G.'s uncle, who was also her legal guardian, attended the hearing as a victim and a witness. During the questioning he stated that in the *Proces* television show the applicant and her daughter had shown documents related to N.G.'s custody taken from a set of proceedings which had in the meantime become final. He also pointed out that the name of the child had been visible on those documents, although the officials of the relevant welfare centre had informed the applicant and her daughter several times that the public was excluded from the proceedings.

23. At the same hearing the defence reiterated their request for the editor and journalist of *Proces* to be heard, providing further contact details for these witnesses. The trial court refused that request on the grounds that their evidence was irrelevant to the subject matter of the proceedings. However, of its own motion, it decided to ask the K. Centre to provide its file on the case concerning N.G.'s custody rights.

24. At a hearing on 19 July 2012 N.G.'s uncle was present as the victim. At the hearing the trial court inspected the file of the K. Centre and other documents in the file. It also reviewed the disputed television report.

25. The defence again reiterated their proposal that those responsible for preparing the television report be heard, and also asked that the applicant's son and husband, both of whom had been present during the preparation of the report (the latter could be seen in the report, whereas the son did not

appear on camera, see paragraph 15 above), be heard as witnesses. The defence argued that they could provide evidence about the circumstances in which the Centre's decision had appeared in the report, including evidence about the journalists' awareness that the name of the child should not be disclosed. The defence also argued that the applicant's son and husband could give evidence as to the question of whether the accused had warned the journalists that the child's name should not be disclosed. The defence further asked that the court review the *Provjereno* television show, which would confirm that the Centre's director had already disclosed the main information about the proceedings, which had confused the accused as to the extent of the information they could provide.

26. The trial court dismissed all the proposals of the defence on the grounds that all relevant facts had already been established. It then proceeded to hear the applicant's and her daughter's defence and the parties' closing arguments.

27. In her defence, the applicant argued that she had had no intention to disclose the documents or N.G.'s name in public. She explained that she had simply had the documents with her in order to demonstrate how many things had gone wrong in the proceedings. However, the details of the case had already been disclosed earlier by the Centre's director, who had participated in another television show. The applicant stressed that she had not shown the documents to the camera and she had warned the journalist not to disclose the child's name, which he had promised not to do. In this connection, she explained that during the proceedings before the Centre she had not been warned that the proceedings were confidential but her lawyer had warned her that she should not disclose the identity of the child. The applicant also explained that the documents had been brought to the place where the report had been filmed by her son, who had been the person who had arranged for them to participate in the television report. The applicant also pointed out that she had shown one of the documents to the journalist simply to confirm what she had been saying, but he had not been able to see the child's name. She also explained that she and her daughter had not always been at the place where the report had been filmed, so it was possible that the camera had recorded the document without their knowledge. Moreover, the applicant suspected that the document could have been shown by the State official who had taken part in the show.

28. Following the hearing on 19 July 2012, the Municipal Court found the applicant and her daughter guilty as charged (see paragraph 18 above) and sentenced them to four months' imprisonment, suspended for two years. It also ordered each of them to pay 1000 Croatian kunas (HRK – approximately 130 euros (EUR)) for costs and expenses incurred in the proceedings.

29. The Municipal Court started its judgment by explaining that it had dismissed the request by the defence to hear the journalists who had

prepared the television report on the grounds that the recording of the report clearly showed that the applicant had had a bundle of documents in front of her and had displayed one of those documents while discussing the course of the administrative proceedings with the journalist. In the Municipal Court's view, in criminal proceedings, it was very rare to have such clear evidence showing that a criminal offence had been committed.

30. The Municipal Court further found it established that the applicant had clearly known that the public had been excluded from the administrative custody proceedings before the Centre. In particular, that was indicated by several transcripts of the proceedings in which it was clearly stated that the public was excluded from the proceedings. Moreover, the applicant had admitted that her lawyer had advised her that the name of the child should not be disclosed. For the Municipal Court, the circumstances in which the television report had been filmed – in particular the fact that the applicant had described the course of the administrative proceedings to the journalist and had even shown a document on that occasion, after which another document from the administrative proceedings with N.G.'s name on it could be seen in focus – left no doubt that she had acted knowingly and deliberately when disclosing the circumstances of the administrative proceedings at issue.

31. The Municipal Court did not accept the applicant's defence that the fact that the Centre's decision had been shown was the responsibility of the journalists. It stressed that the applicant bore responsibility for making the documents from the administrative proceedings available to the journalists, and that the journalists could not have known that the public had been excluded from the proceedings. For the Municipal Court, there was no logical explanation other than that the applicant (and her daughter) had provided to the journalist and the cameraman the document containing the child's name. Although the Municipal Court could not exclude the possibility that the applicant had asked the journalists not to disclose the child's name, it stressed that it was the applicant herself who had failed to observe that duty. Moreover, according to the Municipal Court, she had had a motive to do that, as she had wanted to influence the development of the administrative proceedings at issue.

32. The Municipal Court also stressed that it could not accept the applicant's arguments that she had not known that information about the administrative proceedings should not be made available to the public because the relevant information had already been disclosed. In the Municipal Court's view, if the applicant had believed this to be the case, then she would not have advised the journalists that the proceedings were confidential, as she claimed to have done.

33. In sum, the Municipal Court considered that by disclosing what had happened in the administrative custody proceedings and the child's name, the applicant had committed the criminal offence under Article 305 § 1 of

the Criminal Code, taken in conjunction with Section 271 of the Family Act. When deciding on the sanction, the Municipal Court stressed that the applicant was not a problematic person in any sense, and that this was an isolated incident in her otherwise law-abiding life. However, the Municipal Court considered as an aggravating factor the fact that the offence had been committed to the detriment of her granddaughter, whose interests she was obliged to protect. In this connection, the Municipal Court stressed that although the applicant had intended to protect the interests of her granddaughter, she had chosen the wrong way to do it (commission of a criminal offence).

34. The same findings described above were accordingly applied to the applicant's daughter, who had participated in the disputed television show with the applicant.

35. The applicant challenged that judgment before the Zagreb County Court (*Županijski sud u Zagrebu*, hereinafter "the County Court"). She argued, in particular, that the Municipal Court had failed to take into account the context and background of the case, and had failed to establish the circumstances related to the fact that the public had known about the relevant information before it had been disclosed in the disputed television report. She also argued that the Municipal Court had failed to establish the circumstances in which the Centre's report had been shown in the television report.

36. On 8 January 2013 the County Court dismissed the applicant's appeal as unfounded, endorsing the findings of the Municipal Court.

37. The applicant then lodged a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*), complaining, *inter alia*, of a breach of her right to a fair trial under Article 6 §§ 1 and 3 (d) and freedom of expression under Article 10 of the Convention, and the corresponding Articles 29 and 38 of the Constitution (see paragraph 39 below). She argued that the proceedings before the Municipal Court had fallen short of the requirements of a fair trial, owing to the fact that all her proposals to examine evidence had been dismissed. In connection with her complaint under Article 10 of the Convention, the applicant argued that she had been unjustifiably prevented from discussing the matters related to the custody proceedings concerning her granddaughter N.G. Relying on the Court's case-law, she contended that her criminal conviction had not pursued any legitimate aim and had not been lawful, as the provision of Article 305 § 1 of the Criminal Code had not been sufficiently clear and foreseeable.

38. On 25 April 2013, by means of a summary reasoning, the Constitutional Court endorsed the reasoning of the lower courts and declared the applicant's constitutional complaint inadmissible as manifestly ill-founded, on the grounds that there was nothing disclosing an issue of a breach of her rights.

RELEVANT LEGAL FRAMEWORK

I. RELEVANT DOMESTIC LAW

39. The relevant part of the Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*, Official Gazette no. 56/1990, with further amendments) provides as follows:

Article 29

"In the determination of his rights and obligations or of any criminal charge against him, everyone is entitled to a fair hearing within a reasonable time by an independent and impartial court established by law.

In case of any criminal charge brought against him, the suspect, defendant or accused shall have the following rights ...

- to question witnesses for the prosecution or to have them questioned and to have witnesses for the defence questioned under the same conditions as witnesses for the prosecution ..."

Article 38

"Freedom of thought and expression shall be guaranteed.

Freedom of expression shall include in particular ... freedom of speech and public expression ..."

Article 117

"...

The public may be excluded from proceedings or part thereof for reasons necessary in a democratic society in the interest of morals, public order or national security, in particular ... in ... proceedings connected with custody ... but only to the extent which is, in the opinion of the court, absolutely necessary in the specific circumstances where publicity may harm the interests of justice."

40. The relevant part of section 62 of the Constitutional Court Act (*Ustavni zakon o Ustavnom sudu Republike Hrvatske*, Official Gazette no. 49/2002) reads as follows:

"1. Anyone may lodge a constitutional complaint with the Constitutional Court if he or she deems that an individual act of a State body, a body of local and regional self-government, or a legal person with public authority, concerning his or her rights and obligations, or a suspicion or an accusation of a criminal act, has violated his or her human rights or fundamental freedoms or his or her right to local and regional self-government guaranteed by the Constitution (hereinafter, 'a constitutional right') ...

2. If another legal remedy exists in respect of the violation of the constitutional right [complained of], a constitutional complaint may be lodged only after that remedy has been used."

41. The relevant provisions of the Criminal Code (*Kazneni zakon*, Official Gazette no. 110/1997, with further amendments) which was applicable at the relevant time read:

Chapter I General provisions
Article 8

"(1) Criminal proceedings in respect of criminal offences shall be instituted by the State Attorney's Office in the interest of the Republic of Croatia and its citizens.

(2) In exceptional circumstances the law may provide for criminal proceedings in respect of certain criminal offences to be instituted on the basis of a private prosecution, or for the State Attorney's Office to institute criminal proceedings following [a private] application."

Chapter XXII Criminal offences against the judiciary
Breach of the confidentiality of proceedings
Article 305

"(1) Whoever, without authorisation, discloses what he or she has learnt in ... administrative proceedings ... and what, pursuant to the law or a decision based upon the law, is deemed to be confidential, shall be punished by a fine or a term of imprisonment not exceeding six months."

42. The relevant provisions of the currently applicable Criminal Code (Official Gazette no. 125/2011, with further amendments) read:

Article 307

"(1) Whoever, without authorisation, discloses what he or she has learnt in ... administrative proceedings ... and what, pursuant to the law or a decision based upon the law, is deemed to be confidential, shall be punished by a term of imprisonment of up to three years.

(2) The sanction under paragraph 1 of this Article shall be applicable with respect to anyone who, without a court authorisation, discloses the course of the proceedings which are according to the law or the court decision confidential or who, without court authorisation, discloses the course of ... the proceedings concerning the protection of the rights and interests of a child, or who discloses a decision from those proceedings."

43. The Code of Criminal Procedure (*Zakon o kaznenom postupku*, Official Gazette no. 110/1997, with further amendments), as applicable at the relevant time, provided as follows:

Article 2

"(1) Criminal proceedings shall only be instituted and conducted upon the order of a qualified prosecutor. ...

(2) In respect of criminal offences subject to public prosecution, the qualified prosecutor shall be the State Attorney, and in respect of criminal offences that may be prosecuted privately, the qualified prosecutor shall be a private prosecutor.

(3) Unless otherwise provided for by law, the State Attorney shall undertake a criminal prosecution where there is a reasonable suspicion that an identified person has committed a criminal offence subject to public prosecution, and where there are no legal impediments to the prosecution of that person.

...”

Article 173

“(1) Criminal complaints shall be submitted to the competent State Attorney in writing or orally.”

Article 174

“(1) The State Attorney shall reject a criminal complaint by a reasoned decision if the offence in question is not an offence subject to automatic prosecution, if the prosecution is time-barred or an amnesty or pardon has been granted, or [if] other circumstances excluding criminal liability or prosecution exist, or [if] there is no reasonable suspicion that the suspect has committed the offence. ...”

Article 321

“(1) The taking of evidence concerns matters which the trial court considers relevant for the judgment ...”

Article 322

“(1) The parties and the victim may lodge requests for the taking of further evidence up to the end of the hearing ...

...

(4) A request for the taking of evidence may be dismissed if ...

...

2) if the facts of the matter at issue have already been established or are irrelevant, or if there is no link between the matter whose facts are supposed to be established and the operative matters in the case, or if such a link cannot be established because of some legal impediment (an irrelevant request)

3) if there is a suspicion that, with the evidence proposed, the facts of the relevant matter could either not be established at all or could only be established with significant difficulties, or if the evidence at issue could not be obtained in the course of the proceedings and it is probable that it cannot be obtained within a reasonable time (an inapplicable request) ...

(5) The decision by which the request for the taking of evidence is dismissed must be reasoned ...”

Article 354

“A judgment acquitting the accused shall be adopted when:

(1) the offence with which the accused is charged is not a criminal offence under the law;

(2) there are circumstances that exclude the accused’s guilt;

(3) it has not been proved that the accused committed the criminal offence with which he or she is charged."

44. The relevant provision of the applicable Family Act at the time (*Obiteljski zakon*, Official Gazette no. 116/2003, with further amendments) provided as follows:

Court proceedings
General provisions
Section 263

"The provisions of this part of the Act provide for the rules which the courts must apply when deciding in civil disputes, non-contentious proceedings and the special execution or interim measures proceedings in marital and family matters and other matters regulated under this Act."

Section 264

"In the proceedings referred to in Section 263 of this Act the provisions of the Civil Procedure Act and the Enforcement Act shall apply, if something is not differently regulated under this Act."

Section 271

"In the proceedings concerning [personal] status matters the public is excluded."

45. The Administrative Procedure Act (*Zakon o općem upravnom postupku*, Official Gazette nos. 53/1991 and 103/1996), applicable at the relevant time, provided:

Section 1

"This Act shall be applicable when administrative and other State bodies (in administrative matters) directly applying the law decide on the rights and obligations or legal interests of citizens ..."

Article 150

(1) The oral hearing is open to the public.

(2) The official conducting the proceedings may close either all or part of the oral hearing to the public:

...

3) if relations within a family have to be discussed;

...

(3) Any interested party may file an application for the public to be excluded.

(4) As regards the public being excluded, an order [in this regard] has to be adopted, which has to be explained and publicly pronounced.

(5) The public may not be excluded at the moment when the order is pronounced.

Form and content of a decision
Article 206

"(1) Every decision has to be identified as such. ...

(2) The decision has to be adopted in writing. ...

(3) A written decision shall include: an introduction, an operative part, a statement of reasons, instructions about the legal remedy, an indication of which authority [has adopted the decision], with the number and date of the decision, [and] a signature of the [relevant] official and a seal of the authority. ...

...

(5) The party has to be provided with either the original [decision] or a certified copy of the decision.

Section 207

(1) The introduction of the decision shall include: an indication of which authority is adopting the decision, rules on its jurisdiction, the name of the party and his or her legal [and other] representative, if he has one, and a brief explanation of the subject matter of the proceedings"

Section 208

"(1) The operative part shall contain an indication of the decision on the subject matter of the proceedings and on all parties' requests which have not been separately decided during the proceedings.

(2) The operative part shall be brief and specific and, when necessary, may be divided in several points."

46. The relevant provision of the Media Act (*Zakon o medijima*, Official Gazette no. 59/2004) reads as follows:

Section 16(1)

"The media shall respect the privacy ... particularly of children ... It is prohibited to publish information disclosing the identity of a child if that endangers the well-being of the child."

47. The Code of Honour of Croatian Journalists (*Kodeks časti hrvatskih novinara*, 2009) provides that journalists should not abuse the trust of their sources and should advise the source of the context in which the given information will be published (paragraph 8). Journalists must also comply with the provisions on the confidentiality of data. Breaches of these provisions are permitted only if such provisions are abused with a view to prevent the publication of information of a particular public interest (paragraph 10).

48. Furthermore, journalists must act to protect privacy from any sensationalistic reporting. Breaches of a person's privacy are permitted only if that is justified by an overriding public interest (paragraph 14). Special care is required when reporting about, amongst other, accidents and family tragedies. Journalists should avoid interviewing or showing persons who are

directly or indirectly affected by the events in question, unless there is an overriding public interest. However, in that case, the journalist must take into account honour and reputation and dignity of the person subject to the reporting (paragraph 15). When reporting about court proceedings, the journalist must respect the integrity and feelings of all parties to a dispute (paragraph 17). Journalists should not take any action endangering well-being of a child which includes, amongst other, direct or indirect disclosure of the child's identity. In this connection, the well-being of the child overrides the public interest (paragraph 19).

II. RELEVANT INTERNATIONAL MATERIALS

49. The relevant provisions of the United Nations Convention on the Rights of the Child, 20 November 1989, read as follows:

Article 3

"1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Article 16

"1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks."

50. The relevant parts of the General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) read as follows:

"A. Legal analysis of article 3, paragraph 1

1. "In all actions concerning children"

(a) "in all actions"

17. Article 3, paragraph 1 seeks to ensure that the right is guaranteed in all decisions and actions concerning children. This means that every action relating to a child or children has to take into account their best interests as a primary consideration. The word "action" does not only include decisions, but also all acts, conduct, proposals, services, procedures and other measures.

18. Inaction or failure to take action and omissions are also "actions", for example, when social welfare authorities fail to take action to protect children from neglect or abuse.

(b) "concerning"

19. The legal duty applies to all decisions and actions that directly or indirectly affect children. Thus, the term "concerning" refers first of all, to measures and decisions directly concerning a child, children as a group or children in general, and

secondly, to other measures that have an effect on an individual child, children as a group or children in general, even if they are not the direct targets of the measure. As stated in the Committee's general comment No. 7 (2005), such actions include those aimed at children (e.g. related to health, care or education), as well as actions which include children and other population groups (e.g. related to the environment, housing or transport) (para. 13 (b)). Therefore, "concerning" must be understood in a very broad sense.

...

4. "Shall be a primary consideration"

36. The best interests of a child shall be a primary consideration in the adoption of all measures of implementation. The words "shall be" place a strong legal obligation on States and mean that States may not exercise discretion as to whether children's best interests are to be assessed and ascribed the proper weight as a primary consideration in any action undertaken.

37. The expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness. Children have less possibility than adults to make a strong case for their own interests and those involved in decisions affecting them must be explicitly aware of their interests. If the interests of children are not highlighted, they tend to be overlooked.

38. In respect of adoption (art. 21), the right of best interests is further strengthened; it is not simply to be "a primary consideration" but "the paramount consideration". Indeed, the best interests of the child are to be the determining factor when taking a decision on adoption, but also on other issues.

39. However, since article 3, paragraph 1, covers a wide range of situations, the Committee recognizes the need for a degree of flexibility in its application. The best interests of the child – once assessed and determined – might conflict with other interests or rights (e.g. of other children, the public, parents, etc.). Potential conflicts between the best interests of a child, considered individually, and those of a group of children or children in general have to be resolved on a case-by-case basis, carefully balancing the interests of all parties and finding a suitable compromise. The same must be done if the rights of other persons are in conflict with the child's best interests. If harmonization is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best.

40. Viewing the best interests of the child as "primary" requires a consciousness about the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned."

51. The Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, 17 November 2010, in the part concerning the protection of private and family life in the context of judicial proceedings, provide as follows:

> “6. The privacy and personal data of children who are or have been involved in judicial or non-judicial proceedings and other interventions should be protected in accordance with national law. This generally implies that no information or personal data may be made available or published, particularly in the media, which could reveal or indirectly enable the disclosure of the child’s identity, including images, detailed descriptions of the child or the child’s family, names or addresses, audio and video records, etc.
>
> 7. Member states should prevent violations of the privacy rights as mentioned under guideline 6 above by the media through legislative measures or monitoring self-regulation by the media.
>
> 8. Member states should stipulate limited access to all records or documents containing personal and sensitive data of children, in particular in proceedings involving them. ...
>
> ...
>
> 10. Professionals working with and for children should abide by the strict rules of confidentiality, except where there is a risk of harm to the child.”

52. In the Explanatory memorandum to the Guidelines, it is further explained as follows:

> “59. Other possible ways to protect the privacy in the media are, *inter alia*, granting anonymity or a pseudonym, using screens or disguising voices, deletion of names and other elements that can lead to the identification of a child from all documents, prohibiting any form of recording (photo, audio, video), etc.
>
> 60. Member states have positive obligations in this respect. Guideline 7 reiterates that monitoring on either legally binding or professional codes of conduct for the press is essential, given the fact that any damage made after publication of names and/or photos is often irreparable.
>
> 61. Although the principle of keeping identifiable information inaccessible to the general public and the press remains the guiding one, there might be cases where exceptionally the child may benefit if the case is revealed or even publicised widely, for example, where a child has been abducted. Equally, the issue at stake may benefit from public exposure to stimulate advocacy or awareness raising.”

53. The relevant part of the Recommendation CM/Rec(2018)7 of the Committee of Ministers to member States on Guidelines to respect, protect and fulfil the rights of the child in the digital environment, 4 July 2018, provides as follows:

> “26. Children have a right to private and family life in the digital environment, which includes the protection of their personal data and respect for the confidentiality of their correspondence and private communications.
>
> 27. States must respect, protect and fulfil the right of the child to privacy and data protection. States should ensure that relevant stakeholders, in particular those processing personal data, but also the child’s peers, parents or carers, and educators, are made aware of and respect the child’s right to privacy and data protection.”

54. In the European Union Fundamental Rights Agency (FRA) study on Child-friendly justice: Perspectives and experiences of professionals on

children's participation in civil and criminal judicial proceedings in 10 EU Member States (2015) the following was noted:

> "A child's privacy is also at serious risk when he or she comes into contact with the justice system, especially when the case catches the attention of the media. Bearing this in mind, the Council of Europe guidelines establish a range of safeguards to ensure that children's privacy is fully protected. In particular, personal information about children and their families, including names, pictures, addresses, should not be published by the media. The use of video cameras should be encouraged whenever a child is being heard or giving evidence. In these cases, the people present should be limited to those who are directly involved, and any information provided by the child should be kept confidential if there is a risk that the child might be hurt. Furthermore, access to and transfer of personal data should take place only when absolutely necessary, and taking into account the child's best interests."

55. In the further FRA study on Child-friendly justice – perspectives and experiences of children and professionals (2017), the following was noted:

> "Children convey being scared and stressed about insufficient confidentiality and data protection when they participate in legal proceedings. They are afraid that details of their cases and the proceedings may become public. Several children complained about details of their judicial cases becoming known in their schools, communities or neighbourhoods. Children reported feeling distressed when people in their environment knew about their role in proceedings, their family situation or the court's decisions. Sometimes children also reported being bullied or stigmatised by their peers or in the local community due to information revealed by teachers, parents, relatives, professionals, or through the media."

56. Accordingly, FRA expressed the following opinion (Opinion 24):

> "EU Member States and, as appropriate, the EU must ensure that appropriate legislation and measures protect the identity and privacy of children involved in court proceedings – for example, by excluding the public from the court room or using live video links or pre-recorded testimony in hearings. Steps need to be taken to ensure that children's personal data remain strictly confidential and are kept from the media and the general public. Recordings need to be safely stored and children's identities protected online, in all areas of law and independent of the child's role in proceedings. Personal data should only be accessed and transferred when absolutely necessary, and always take the child's best interests and opinions into account."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

57. The applicant complained that her criminal conviction for breaching the confidentiality of administrative custody proceedings had been contrary to Article 10 of the Convention, the relevant parts of which read 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 ...
>
> 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."

A. Admissibility

1. Applicability of Article 10 of the Convention

(a) The parties' arguments

58. The Government contended that the information which the applicant had unlawfully conveyed to the public fell out of the scope of the protection under Article 10. In the Government's view, there was no indication that there had been any attempt by the public authorities to silence the applicant in her criticism of the work of the social welfare centres in question. The only reason why the applicant had been punished was because she had disclosed the details of confidential custody proceedings to the public. Otherwise, the applicant had been free to criticise the work of the social welfare centres, and in fact their work had been criticised in the media before. In these circumstances, the Government considered that the applicant's complaint under Article 10 was manifestly ill-founded.

59. The applicant pointed out that the Court had already accepted that different forms of expression of various information and opinions, including those amounting to criticism of the work of domestic authorities, fell within the scope of Article 10 of the Convention. Thus, in the applicant's view, given that her statements and the whole context of the disputed television report had been aimed at criticising the work of the social welfare centres in the custody proceedings concerning N.G., there was no doubt that her statements fell under the scope of Article 10.

(b) The Court's assessment

60. At the outset the Court notes that although the Government pleaded that the applicant's complaint was manifestly ill-founded, they essentially challenged the applicability of Article 10 of the Convention in the circumstances of the present case. As the question of applicability is an issue of the Court's jurisdiction *ratione materiae*, the Court will address it at the admissibility stage of its assessment (see *Denisov v. Ukraine* [GC], no. 76639/11, § 93, 25 September 2018).

61. The Court reiterates that Article 10 is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society" (see, amongst many others, *Morice v. France* [GC], no. 29369/10, § 124,

23 April 2015; *Bédat v. Switzerland* [GC], no. 56925/08, § 48, 29 March 2016; and *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no 17224/11, § 75, 27 June 2017). Moreover, Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see, for instance, *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06 and 3 others, § 53, ECHR 2011).

62. According to the Court's case-law, it would be inconceivable to consider that there can be no prior or contemporaneous discussion of the subject matter of court proceedings, be it in specialised journals, in the general press or amongst the public at large (see *Dupuis and Others v. France*, no. 1914/02, § 35, 7 June 2007). Indeed, Article 10 finds its applicability, for instance, in cases of public dissemination of confidential information in the media (see *Stoll v. Switzerland* [GC], no. 69698/01, §§ 108-112, ECHR 2007-V), including information related to the alleged malfunctioning of public services (see *Ricci v. Italy*, no. 30210/06, § 42, 8 October 2013), as well as information covered by the confidentiality of judicial proceedings (see *Bédat*, cited above, §§ 44-47 and 55).

63. However, it is widely recognised to be a legitimate interest to afford special protection to the confidentiality of the relevant proceedings concerning children and to limit access to related records and documents containing personal and sensitive data of children in order to protect their privacy (see paragraphs 49-56 above). Still, there is, as a matter of principle, no reason to consider that the above principles under Article 10 do not apply with respect to such proceedings. However, in applying these principles the best interests of the child should be taken into account as a primary consideration (see paragraphs 49-50 above and 97-98 below).

64. In the present case, the applicant in a television show sought to raise her concerns about the alleged malfunctioning of the social welfare services in relation to their handling of her granddaughter's custody proceedings, and thereby, according to the domestic authorities, disclosed information covered by the confidentiality of those proceedings. In these circumstances, and in the light of its case-law, the Court finds that Article 10 is applicable to the present case. The Government's objection challenging its applicability must therefore be rejected.

2. *Exhaustion of domestic remedies*

(a) The parties' arguments

65. The Government submitted that the applicant had failed to raise properly her complaints of a breach of her right to freedom of expression under Article 10 of the Convention before the domestic courts. In particular, she had failed to substantiate her complaints before the Constitutional Court

and had thus prevented that court from examining on the merits her arguments concerning the alleged breach of Article 10.

66. The applicant argued that she had complained of a breach of her right to freedom of expression throughout the domestic proceedings. In particular, she had raised the issue in her appeal before the criminal courts in so far as that was relevant for their assessment of the charges against her under Article 305 of the Criminal Code. Moreover, in her constitutional complaint before the Constitutional Court, she had explicitly relied on Article 10 of the Convention and provided detailed reasons as to why there had been a breach of her right to freedom of expression.

(b) The Court's assessment

67. Article 35 § 1 of the Convention requires that complaints intended to be made subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 72, 25 March 2014).

68. In the present case, in the course of the criminal proceedings the applicant raised in substance the issues pertaining to the question of her freedom of expression by pointing to the context and background of her participation in the television show and the disclosure of various pieces of information during her interview (see paragraphs 21, 25, 27 and 35 above). In the proceedings before the Constitutional Court, which particularly concerned the examination of the case from the perspective of the relevant Convention and Constitution requirements, the applicant explicitly relied on Article 10 of the Convention and the corresponding provision of the Constitution. Moreover, relying on the Court's case-law, she elaborated on the reasons why her conviction had fallen short of the requirements of Article 10 of the Convention (see paragraph 37 above).

69. In view of the above, the Court accepts that the applicant provided the domestic authorities with the opportunity which is in principle intended to be afforded to Contracting States by Article 35 § 1 of the Convention, of putting right the violations alleged against them (see, for instance, *Guberina v. Croatia*, no. 23682/13, § 52, 22 March 2016, with further references). The Court therefore rejects the Government's objection.

3. Conclusion

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

B. Merits

1. *The parties' arguments*

(a) The applicant

71. The applicant argued that there had clearly been an interference with her right to freedom of expression on account of her criminal conviction for the statements made in the disputed television show. In her view, there was serious doubt as to the lawfulness of that interference, since the domestic law did not regulate in a clear and comprehensive manner the issue of the confidentiality of administrative proceedings and the consequences of a breach of that confidentiality. Moreover, it was not clear to her why she had really been convicted: for disclosing the child's name or for disclosing information about the course of the administrative proceedings. If it was for the former reason, then, in her view, Article 305 of the Criminal Code had clearly been inapplicable, since that provision did not address the issue of the identity of a child participating in proceedings. No other domestic provision declared the identity of a child confidential information. In any event, N.G.'s name had been disclosed to the public on a large scale beforehand, and nobody had been prosecuted because of that. On the other hand, if she had been convicted for disclosing information about the course of the administrative proceedings, then it was not clear to her which part of the proceedings had been confidential, particularly since information about the course of the administrative proceedings had already been disclosed by the Centre's director.

72. The applicant further argued that she had never been clearly informed of the confidentiality of the administrative proceedings, and the domestic administrative authorities and courts had treated the issue of confidentiality differently in the course of the various sets of proceedings concerning custody and other rights in respect of N.G. In the applicant's view, all this confusion over the confidentiality of the proceedings had not been clarified by the criminal courts, although they had found her guilty of breaching such unclear confidentiality rules. She added that they had never clearly established who had shown the decisions from the administrative custody proceedings to the journalists.

73. In the applicant's view, it was clear that the criminal prosecution had been aimed at silencing her criticism of the manner in which the domestic authorities had handled N.G.'s case. This aim had been achieved, as after her criminal conviction she had effectively been silenced and had refrained from any criticism, fearing that the suspension element of her custodial sentence could be revoked and she could be imprisoned. She stressed that nothing confidential concerning N.G.'s custody proceedings had been disclosed, as all the relevant information had already been disclosed to the public on a number of occasions. The applicant also submitted that her

criminal conviction had been excessive, as the domestic authorities had had other means to ensure that she complied with the rule of confidentiality, such as warning her about what information they considered to be confidential. In addition, the domestic courts had failed to take into account the fact that she had never acted contrary to the interests of N.G. Referring to the Government's argument that her sentence could be erased from the criminal record (see paragraph 76 below), the applicant argued that her rehabilitation and the erasure of that criminal record had nothing to do with her conviction. She pointed to the fact that rehabilitation was an automatic measure under the relevant domestic law, which had nothing to do with the particular circumstances of her case.

(b) The Government

74. The Government stressed that the applicant had not been convicted for criticising the social welfare centres, but because during her interview for the *Proces* television show she had shown to the journalist and the cameraman a decision adopted in the confidential custody proceedings, which had amounted to unjustified disclosure of confidential information from a family-related dispute. In the Government's view, although it was not possible to see in the television report who had showed the decision to the journalists, there could be no doubt that it had been the applicant, since she had had a pile of documents in front of her and had gone through those documents and pointed to something during the interview. Moreover, her statements as to the manner in which the document had become available to the journalists had been inconsistent, which supported the conclusion that she had been behind its disclosure to the public.

75. The Government further argued that it had been legitimate to restrict public access to the information from the custody proceedings, and the applicant had no reason or justification for her conduct, particularly since she had clearly been aware that the custody proceedings were confidential. In this connection, the applicant could not rely on the fact that an official from the Centre had previously participated in the *Provjereno* television show, as on that occasion she had provided only limited information on the course of the custody proceedings. The Government considered that the applicant had clearly acted contrary to the rule of the confidentiality of custody proceedings under the Family Act, and thus her conviction had been lawful. The Government also submitted that the applicant's conviction had pursued a legitimate aim of protecting the rights of N.G. and ensuring the proper conduct of the custody proceedings, proceedings which had to be conducted in accordance with the principle of the best interests of the child. Moreover, the applicant's conviction had pursued the aim of protecting the authority of the judiciary.

76. In the context of the proportionality assessment, the Government argued that it was a duty of the State to prosecute any unlawful conduct,

irrespective of the particular consequences of that conduct. Thus, the fact that the criminal complaint had been lodged by N.G.'s uncle had been of no relevance, as the domestic authorities had been obliged to react, even if they had considered that the applicant's conduct had not created significant consequences. Moreover, the fact that N.G.'s name had already been known to the public before the applicant's interview in *Proces* had been of no relevance to the applicant's duty not to disclose confidential information to the public. In this connection, the Government argued that the applicant had not been convicted for disclosing N.G.'s name to the public, but for disclosing a confidential decision from the custody proceedings. In any event, in the Government's view, if the applicant had wanted to criticise the work of the social welfare centres, she had had various means at her disposal other than committing a criminal offence. The Government further submitted that the domestic courts had properly examined all the relevant circumstances of the case. The Government also argued that the applicant's suspended sentence had not been excessive, particularly since it could be erased from her criminal record.

2. *The Court's assessment*

(a) Existence of an interference

77. The Court has already found above that Article 10 of the Convention is applicable in the circumstances of the present case, where the applicant sought to raise her concerns about the alleged malfunctioning of the social welfare services' handling of her granddaughter's custody proceedings in public and thereby, according to the domestic authorities, disclosed information covered by the confidentiality of those proceedings (see paragraph 64 above). In these circumstances, her criminal conviction for the disclosure of information from confidential custody proceedings amounts to an interference with her Article 10 rights (see, *mutatis mutandis*, *Stoll*, §§ 46-47 and 108; *Ricci*, § 42; and *Bédat*, §§ 44, 47 and 55, all cited above).

(b) Whether the interference was prescribed by law

(i) General principles

78. The expression "prescribed by law" in the second paragraph of Article 10 not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects. The notion of "quality of the law" requires, as a corollary of the foreseeability test, that the law be compatible with the rule of law; it thus implies that there must be adequate safeguards in domestic law against arbitrary interferences by public authorities (see *Magyar Kétfarkú Kutya Párt v. Hungary* [GC], no. 201/17, § 93, 20 January 2020, with further references).

79. As regards the requirement of foreseeability, the Court has repeatedly held that a norm cannot be regarded as a "law" within the meaning of Article 10 § 2 unless it is formulated with sufficient precision to enable a person to regulate his or her conduct. That person must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. Whilst certainty is desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice. A law which confers a discretion is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference (Ibid., § 94, and cases cited therein).

80. That said, it is not for the Court to express a view on the appropriateness of the methods chosen by the legislature of a respondent State to regulate a given field. Its task is confined to determining whether the methods adopted and the effects they entail are in conformity with the Convention (see *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 184, 8 November 2016). Moreover, although it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, among other authorities, *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, § 123, 17 May 2016, with further references), the Court must satisfy itself that the impugned interference was based on a reasonable interpretation of the relevant law (see *M.P. v. Finland*, no. 36487/12, § 50, 15 December 2016, and cases cited therein).

81. The Court would also reiterate that in proceedings originating in an individual application under Article 34 of the Convention, its task is not to review domestic law in the abstract but to determine whether the way in which it was applied to, or affected, the applicant gave rise to a breach of the Convention (see *Žaja v. Croatia*, no. 37462/09, § 91, 4 October 2016; see also *Perinçek v. Switzerland* [GC], no. 27510/08, § 136, ECHR 2015 (extracts), with further references).

82. A margin of doubt in relation to borderline facts does not by itself make a legal provision unforeseeable in its application. Nor does the mere fact that a provision is capable of more than one construction mean that it fails to meet the requirement of "foreseeability" for the purposes of the Convention. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain, taking into account the changes in everyday practice (see *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 65, ECHR 2004-I). As regards the scope of the notion of

foreseeability, it depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (see, among many other authorities, *Delfi AS,* cited above, § 122, and *Gorzelik and Others,* cited above, § 65).

83. Moreover, when using the "blanket reference" or "legislation by reference" technique in criminalising acts or omissions the referencing provision and the referenced provision, read together, must enable the individual concerned to foresee, if need be with the help of appropriate legal advice, what conduct would make him or her criminally liable (*Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law* [GC], request no. P16-2019-001, Armenian Constitutional Court, § 74, 29 May 2020).

(ii) Application of the above principles to the present case

84. In the present case, the applicant's conviction was based on Article 305 § 1 of the 1997 Criminal Code. That provision – as opposed to the current regulation (see paragraphs 41-42 above) – did not specifically forbid the disclosure of information in proceedings concerning the protection of the rights and interests of a child. However, it proscribed the disclosure without authorisation of information which a person learnt in administrative proceedings, provided that the information in question was deemed to be confidential, according to the law or a decision based upon the law (see paragraph 41 above).

85. In this connection, the Court notes that Article 305 § 1 of the 1997 Criminal Code is a blanket norm (see paragraph 83 above) and that, when convicting the applicant, the Municipal Court also relied on section 271 of the Family Act, which provided that the public was excluded from the proceedings concerning personal status matters (see paragraphs 33 and 44 above).

86. However, it is unclear from the reasoning of the Municipal Court how and on which grounds Section 271 of the Family Act applied with respect to the administrative proceedings before the Centre (see paragraph 44 above) since it formally regulates the exclusion of public from court proceedings.

87. In this connection, it should also be noted that it could be understood from the reasoning of the Municipal Court that the exclusion of the public from the administrative proceedings concerning child care matters operated in an automatic and absolute manner. However, that would sit uncomfortably with the requirements of the Constitution where any exclusion of public from such proceedings must be subject to a strict proportionality control (see paragraph 39 above). Moreover, the Court has accepted under Article 6 of the Convention that in the proceedings relating

to the issues of child custody it is legitimate to designate an entire class of cases as an exception to the general rule that proceedings should take place in public – where considered necessary in the interests of juveniles or the protection of the private life of the parties - although the need for such a measure must always be subject to the Court's control (see *B. and P. v. the United Kingdom*, nos. 36337/97 and 35974/97, §§ 38-39, ECHR 2001 III).

88. On the other hand, the Court notes that during the domestic proceedings the applicant never complained of the exclusion of the public in the custody proceedings. It further notes that, as the applicant herself acknowledged, she had been advised by her lawyer that she should not disclose the identity of the child and she claimed that she had warned journalists that custody proceedings were confidential. The Municipal Court relied on these facts in coming to its conclusion that she had knowingly violated the confidentiality of the proceedings (see paragraph 32 above). In addition, the Municipal Court found that the relevant custody proceedings before the Centre had formally excluded the public from the proceedings (see paragraphs 30 and 44 above), a finding which the Court has no reason to call into question.

89. Having regard to its findings below, the Court considers that it does not have to reach a definite conclusion on the question of lawfulness of the impugned interference.

(c) Whether the interference pursued a legitimate aim

90. The Government invoked the legitimate aim of protecting the rights and interests of others, namely N.G.'s rights and her interests in the custody proceedings, and protecting the authority of the judiciary.

91. In view of the sensitive issues involved in matters concerning children, where the best interests of the child must be a primary consideration (see, for instance, *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, § 208, 24 January 2017), and in view of the fact that the confidentiality of proceedings concerning children's personal matters protects, amongst other things, the privacy of the child (see *B. and P. v. the United Kingdom*, cited above, §§ 38 and 52), the Court can accept that the interference in question pursued the legitimate aim of protecting the rights and interests of others, namely N.G.

(d) Necessary in a democratic society

(i) General principles

92. The relevant principles for assessing the necessity of an interference with the exercise of freedom of expression, as recently set out in the Court's case-law (see *Medžlis Islamske Zajednice Brčko and Others*, cited above, § 75), are as follows:

> “(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...
>
> (ii) The adjective ‘necessary’, within the meaning of Article 10 § 2, implies the existence of a ‘pressing social need’. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a ‘restriction’ is reconcilable with freedom of expression as protected by Article 10.
>
> (iii) The Court’s task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was ‘proportionate to the legitimate aim pursued’ and whether the reasons adduced by the national authorities to justify it are ‘relevant and sufficient’... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ...”

93. It is further to be reiterated that all persons who exercise their freedom of expression undertake “duties and responsibilities”, the scope of which depends on their situation and the technical means they use (see *Stoll*, cited above, § 102, and *Klein v. Slovakia*, no. 72208/01, § 47, 31 October 2006). Thus, their freedom of expression set forth in Article 10 is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see *Erla Hlynsdóttir v. Iceland*, no. 43380/10, § 57, 10 July 2012, with further references).

94. According to the Court’s case-law, a high level of protection of freedom of expression, with the authorities thus having a particularly narrow margin of appreciation, will normally be accorded where remarks concern a matter of public interest (see *Morice*, cited above, § 125), which may include issues related to the functioning of a system for deciding on the custody rights and fate of children (see *De Haes and Gijsels v. Belgium*, 24 February 1997, § 39, *Reports of Judgments and Decisions* 1997-I). Moreover, when a particular expression constitutes criticism directed at State bodies acting in an official capacity, those bodies must accept wider limits of acceptable criticism than private individuals (see *Novaya Gazeta and Milashina v. Russia*, no. 45083/06, § 62, 3 October 2017, and *Morice*,

cited above, § 131, concerning the context of "maintaining the authority of the judiciary").

95. It is possible that in the particular circumstances of a case, such as in the case at issue, the exercise of an applicant's freedom of expression under Article 10 conflicts with the rights of the child under Article 8, including that of the child's privacy. There is a general acknowledgment in the Court's case-law under Article 8 of the importance of privacy and the values to which it relates. These values include, among others, well-being and dignity (see *Beizaras and Levickas v. Lithuania*, no. 41288/15, § 117, 14 January 2020), personality development (see *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 95, ECHR 2012), physical and psychological integrity (see *Söderman*, cited above, § 80), relations with other human beings (see *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 83, ECHR 2015 (extracts)), the protection of personal data (see *M.L. and W.W. v. Germany*, nos. 60798/10 and 65599/10, § 87, 28 June 2018) and the person's image (see *Reklos and Davourlis v. Greece*, no. 1234/05, § 38, 15 January 2009).

96. In cases which require the right to respect for private life to be balanced against the right to freedom of expression, the Court has held that the outcome of the application should not, in principle, vary according to whether it has been lodged with the Court under Article 8 or Article 10 of the Convention. Indeed, these rights deserve equal respect and thus the margin of appreciation should in principle be the same (see *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 163, 27 June 2017).

97. However, as the Court confirmed on many occasions, where children are involved, their best interests must be taken into account (see *Tuquabo-Tekle and Others v. the Netherlands*, no. 60665/00, § 44, 1 December 2005; *mutatis mutandis*, *Popov v. France*, nos. 39472/07 and 39474/07, §§ 139-140, 19 January 2012; *Neulinger and Shuruk v. Switzerland*, cited above, § 135; and *X v. Latvia* [GC], no. 27853/09, § 96, ECHR 2013). In connection with this particular point the Court reiterates that there is a broad consensus – including in international law – in support of the idea that in all decisions concerning children, directly or indirectly, their best interests are a primary consideration (see among many, *Paradiso and Campanelli*, cited above, § 208 and Article 3 of the Convention on the Rights of the Child, cited in paragraph 49 above).

98. The expression "primary consideration" does not mean that the child's best interests may be considered as necessarily determinative, namely that they automatically and absolutely outweigh any conflicting interests. The expression actually means that such interest may not be considered on the same level as all other considerations, but significant weight must be attached to what serves the child's best interest (see *Jeunesse v. the Netherlands* [GC], no. 12738/10, § 109, 3 October 2014, and

Strand Lobben and Others v. Norway [GC], no. 37283/13, § 207, 10 September 2019).

99. In this connection, it should be borne in mind that children are particularly vulnerable (see *Söderman v. Sweden* [GC], no. 5786/08, § 81 ECHR 2013), and the domestic authorities have a duty to ensure that their right to privacy is adequately protected including in certain types of civil proceedings, most notably proceedings related to adoption, child abuse, custody or residency. The Court reiterates that the protection of children's privacy is in such proceedings a valid reason for excluding the public (see paragraph 63 above). Indeed, protection of confidentiality of such proceedings is essential not only to ensure that the parents and other witnesses feel able to express themselves candidly on highly personal issues without fear of public curiosity or comment (*B. and P. v. the United Kingdom*, cited above, §§ 37-38), but to protect the child's personal data for the sake of protecting his or her identity, well-being and dignity, personality development, psychological integrity and relations with other human beings, in particular between family members (see paragraph 96 above).

100. In the specific context of the need to protect the confidentiality of information, one of the considerations is whether the information was (un)known to the public (see *Stoll*, cited above, § 113). When a particular piece of information has already become known to the public, the interest in maintaining its confidentiality might no longer constitute an overriding requirement (see *Weber v. Switzerland*, 22 May 1990, §§ 49-51, Series A no. 177, and *Aleksey Ovchinnikov v. Russia*, no. 24061/04, §§ 49-50, 16 December 2010, with further references). However, this fact will not necessarily remove the protection of Article 8 of the Convention, especially if information was neither revealed by a person concerned nor that person has consented to its disclosure (see, *mutatis mutandis*, *Egeland and Hanseid v. Norway*, no. 34438/04, §§ 62-63, 16 April 2009, and *Shabanov and Tren v. Russia*, no. 5433/02, §§ 44-55, 14 December 2006). Indeed, even with respect to a further dissemination of "public information", the Court found that the interest in publication of that information had to be weighed against privacy considerations (see *Von Hannover*, cited above, §§ 74-75 and 77). This is so because privacy is not only about maintaining secrecy, but also about preventing intrusion (see *Couderc and Hachette Filipacchi Associés*, cited above, §§ 86-87 and 138, and *Khadija Ismayilova v. Azerbaijan*, no. 65286/13, 57270/14, § 164, 10 January 2019).

101. As the Court has stressed on many occasions, because of their direct, continuous contact with the realities of the country, a State's courts are in principle in a better position than an international court to determine how, at a given time, the right balance can be struck between the various interests involved. For this reason, in matters under Article 10 of the Convention, the Contracting States have a certain margin of appreciation in assessing the necessity and scope of any interference in the freedom of

expression protected by that Article (see for instance, *Bédat*, cited above, § 54, with further references).

102. Where the national authorities have weighed up the interests at stake in compliance with the criteria laid down in the Court's case-law, strong reasons are required if the Court is to substitute its view for that of the domestic courts (ibid.). The quality of judicial review is thus of particular importance in the context of the proportionality assessment under Article 10 of the Convention. Indeed, the margin of appreciation is measured by reviewing the extent to which the reasoning of the national courts engages with the general principles under Article 10, and the extent to which the balance struck between the competing rights at domestic level is satisfactory (see *M.P. v. Finland*, cited above, § 51, and cases cited therein).

(ii) Application of the above principles to the present case

103. The Court notes that in the present case a legal dispute arose between the applicant's family and N.G.'s paternal family members over custody and care of N.G., at the time an infant, which followed the exceptionally tragic incident in which N.G.'s parents lost their lives. The case caught the attention of the media, putting the child's privacy at serious risk (see paragraphs 10-15 above). The Court further notes that by participating in the disputed television show and discussing, amongst other things, the course of the pending administrative custody proceedings by pointing to various deficiencies in the processing of N.G.'s case – many of which, according to the television report, were also acknowledged by the Ministry (see paragraphs 15-17 above) – the applicant engaged in a debate capable of contributing to matters of public interest, particularly as regards the proper functioning of the system of child care proceedings (see paragraph 94 above; and compare *Bédat*, cited above, § 55).

104. Accordingly, in the present case, the applicant's right to inform the public of alleged deficiencies in the manner in which the domestic authorities were handling the case concerning N.G. came up against the right of N.G. to have her privacy, including her identity, protected and against the prohibition on disclosure without authorisation of information revealed during custody proceedings held in private (see paragraphs 41 and 44-45 above). The Court has already had occasion to rule on the matters concerning the disclosure of confidential information, albeit in circumstances different from those in the instant case (see *Stoll*, § 108; *Bédat*, § 55; *Ricci*, § 54, all cited above, and *Pinto Coelho v. Portugal*, no. 28439/08, § 36, 28 June 2011).

105. In the Court's view, a similar logic applies in cases concerning - as the present one - a disclosure of the child's identity and personal data in the press or on TV in connection with the custody proceedings (see paragraphs 97-98 above). If proceedings are held in private, there may be a

reasonable expectation that the information revealed in their course will be kept private (see paragraph 51, 54 and 56 above). The Court emphasises that children, especially infants, have little or no practical control over the use of their personal data, which includes the inability to consent or understand the issues over which their consent would, in case they were adult, be required (see further, paragraphs 51-54 and 56 above).

106. In this context, the domestic authorities must carefully balance between the freedom to convey remarks concerning a matter of public interest and the necessity of protection of the child's best interests and privacy rights. In so doing, they must examine the particular circumstances of the case, while bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and are not just one of several considerations. Therefore, a significant weight must be attached to what serves the child's best interest, especially when an action has an undeniable impact on the child concerned (see paragraphs 51-52 and 98 above).

107. However, in the judgments of the domestic courts none of the considerations flowing from the Court's case-law concerning the relevant interests at stake and the conduct of the applicant were balanced against the competing need to protect child's identity and privacy through ensuring the confidentiality of the administrative custody proceedings by having recourse to criminal law and prosecuting and convicting the applicant under Article 305 § 1 of the Criminal Code.

108. In particular, the Municipal Court, whose reasoning was accepted and endorsed by both the County Court and the Constitutional Court (see paragraphs 36 and 38 above), failed to consider whether and to what extent the case involved an issue of public interest, and whether the applicant had engaged in a debate capable of contributing to matters of public interest. In this connection, the Court would stress that the confidentiality of custody proceedings cannot be protected at any price. As in other cases where confidentiality has played an important role (see *Stoll*, cited above, § 128, concerning diplomatic confidentiality, and *Bédat*, cited above, § 64, concerning the secrecy of judicial investigations), the various aspects of a particular case need to be taken into account, and the various interests at stake need to be weighed against each other.

109. The Court reiterates that comments on the functioning of a system set in motion to decide on the custody rights and fate of children, in so far as they concern issues of public interest, should enjoy a high level of protection of freedom of expression (see paragraph 94 above). However, in the present case, they should be addressed in the context of the necessity of protection of the child's privacy, even though she is only an infant, including her identity and the values to which privacy relates such as her well-being and dignity, personality development, psychological integrity and relations with other human beings, in particular between family

members, taking into account the best interests of the child as a primary consideration (see paragraphs 97-98 above).

110. Furthermore, despite a specific request by the applicant in that regard (see paragraphs 25-27 above), the court refused to consider issues related to the fact that the main information disclosed in the television report had already been known to the public, and that on several occasions the domestic authorities themselves saw fit to inform the media about certain aspects of the family dispute and the relevant proceedings (see paragraphs 11-15 above). Indeed, some of this information had been disclosed by the Centre's director who even publicly expressed her views on the best solution as regards custody rights over N.G. in the *Provjereno* television show in 2008 (see paragraph 12 above).

111. Consequently, the disputed television report in which the applicant participated essentially did not provide any information that was not already known to the public. In particular, the child's name and the names of other persons involved were already well known from previous media reports, as were details about the course and stage of the proceedings concerning N.G.'s case (see paragraphs 11-15 above). Notwithstanding that some elements of the information in question were already known to the public, a further dissemination of "public information" had still to be weighed against the child's privacy considerations (see paragraphs 99-100 above). In this context, the Court emphasises that an alleged infringement of N.G.'s privacy cannot, in itself, be justified by the fact that the information about N.G. and the custody proceedings concerning her had been in the public domain, without considering how it has come there.

112. Moreover, the Municipal Court, although requested by the applicant, failed to distinguish disclosure of the information about the custody proceedings from the disclosure of the child's identity and her personal and sensitive data. In this connection, the Court notes that, according to the relevant international materials, information on personal data which could reveal or indirectly enable the disclosure of the child's identity as a rule should be kept inaccessible to the general public and the press, although there might be cases where exceptionally the child might benefit if his or her identity is revealed or where strict abidance by the rules of confidentiality might pose a risk of harm to the child (see paragraphs 51-52, 54 and 56 above).

113. When examining the interests at stake and the applicant's conduct, the Court finds it also important to stress that the applicant's participation in the disputed television report cannot be considered in isolation. It has to be seen in the wider context of the media coverage of the issues discussed in that report (see, *mutatis mutandis*, *Stoll*, cited above, § 117). However, despite the applicant's repeated requests for taking evidence in that respect, the Municipal Court failed to clarify the role of the journalists in the disclosure of the confidential information (see paragraphs 25-27 above). In

this connection, it is also important to note that according to the domestic law and the relevant provisions on journalistic ethics, the journalists who participated in the preparation of the television show had an important responsibility to ensure that the confidential information concerning children was not disclosed (see paragraphs 47-48 above). Nevertheless, the Municipal Court failed to hear evidence from the journalists in order to ascertain the advice they had given to the applicant and the circumstances in which the confidential information was filmed and later shown in the report.

114. The Court also notes that the domestic courts failed to take into account the fact that the applicant's participation in the disputed television show was not aimed at satisfying the curiosity of a particular audience regarding details of a person's private life. Indeed, as the Municipal Court itself found, the applicant had acted in good faith to protect N.G.'s interests by raising issues as to the malfunctioning of the social welfare services (see, *mutatis mutandis*, *Juppala v. Finland*, no. 18620/03, §§ 44-45, 2 December 2008).

115. The reasoning of the domestic courts indicates that the above considerations were not taken into account, chiefly owing to a purely formalistic approach to the notion of the confidentiality of proceedings protected under Article 305 § 1 of the Criminal Code. Thus, for the Municipal Court, this was a simple case, as it was, in its view, clear that the applicant had disclosed confidential information from the administrative custody proceedings and thus committed a criminal offence under Article 305 § 1 of the Criminal Code (see paragraphs 29-33 above). As already noted, this was accepted and endorsed by the County Court and the Constitutional Court (see paragraphs 36 and 38 above).

116. In the Court's view, such a formalistic approach by the domestic courts, contrary to the requirements of the Court's case-law, led to them not conducting a proper review as to whether the interference with the rights protected by Article 10 of the Convention was justified (see paragraph 102 above; and compare *Görmüş and Others*, cited above, §§ 65 66).

117. In view of the foregoing, the Court places a particular emphasis on the domestic courts' failure to examine all the relevant circumstances of the case in the light of the principles set out in the Court's case-law.

118. Accordingly, there has been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (D) OF THE CONVENTION

119. The applicant, invoking Article 6 §§ 1 and 3 (d) of the Convention, complained of a lack of fairness of the criminal proceedings against her for breaching the confidentiality of the administrative custody proceedings.

120. The Government contested that argument.

121. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible. However, having regard to the finding relating to Article 10 of the Convention (see paragraphs 115-116 above), the Court considers that it is not necessary to examine it separately (see, for instance, *Müdür Duman v. Turkey*, no. 15450/03, § 40, 6 October 2015, with further references).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

122. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

123. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

124. The Government contested the applicant's claim as unfounded and unsubstantiated.

125. Having regard to all the circumstances of the present case, the Court accepts that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant EUR 7,500 in respect of non-pecuniary damage, plus any tax that may be chargeable to her.

B. Costs and expenses

126. The applicant also claimed 18,750 Croatian kunas (HRK) for the costs and expenses incurred before the domestic courts, and HRK 31,350 for those incurred before the Court, which in total amounted to HRK 50,100 or EUR 6,592.10.

127. The Government considered the applicant's claim unfounded and unsubstantiated.

128. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, as well as the amount paid to the applicant's representative in connection with the granted legal aid (EUR 850), the Court considers it reasonable to award the sum of EUR 4,170 covering costs under all heads, plus any tax that may be chargeable to the applicant.

C. Default interest

129. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds* that there is no need to examine separately the complaint under Article 6 §§ 1 and 3 (d) of the Convention;

4. *Holds*

   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Croatian kunas at the rate applicable at the date of settlement:

   (i) EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

   (ii) EUR 4,170 (four thousand one hundred and seventy euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 10 September 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos Registrar	Krzysztof Wojtyczek President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Koskelo and Eicke is annexed to this judgment.

K.W.O.
A.C.

CONCURRING OPINION OF JUDGES KOSKELO AND EICKE

1. We agree with our colleagues that there has been a violation of Article 10 of the Convention in the present case. We have, however, certain reservations regarding the reasoning that has been adopted in the judgment to arrive at the outcome.

Lawfulness of the interference

2. At the outset, we hesitate to endorse the conclusion that the domestic law which was applied in the present case as the basis for the applicant's criminal conviction satisfied the requirements of the "quality of the law" as set out in the Court's case-law. The applicant was charged with, and convicted of, disclosing the identity of her granddaughter in breach of the confidentiality of the administrative proceedings conducted before the K. Welfare Centre (see §§ 20, 30 and 39 of the present judgment). The penal provision applied provides for the punishment of anyone "who, without authorisation, discloses what he or she has learnt in ... administrative proceedings ... and what, pursuant to the law or a decision based upon the law, is deemed to be confidential" (see § 44 of the present judgment). According to the Administrative Procedure Act (Article 150(2) as cited in § 48 of the present judgment), the official conducting the proceedings may close either all or part of the oral hearing to the public, if (inter alia) relations within a family have to be discussed. It is obvious that the identity of her grandchild as such was not something the applicant "learned" in those administrative proceedings. Moreover, by discussing, as a party to the case, the course and conduct of the proceedings in public with her own identity disclosed, the identity of the grandchild would probably not have remained secret even if the latter's name had not been directly disclosed.

3. Thus, under the circumstances of the case, it is not clear what actually constituted the punishable conduct and how the specific facts could be subsumed under the domestic provisions. Accordingly, it seems doubtful whether it was foreseeable to the applicant, or another person in a similar position, that he or she could be held criminally liable for the facts as set out.

Lack of balancing

4. As regards the issues of necessity/proportionality of the interference, the present case is basically a fairly simple one. The crux of the matter is that the domestic courts failed to engage in any balancing exercise as required by the Court's case-law in situations of conflict between the applicant's rights under Article 10 on the one hand and the rights of another person, in this case the grandchild, under Article 8 on the other hand. This

deficiency in the approach taken by the domestic courts dealing with the charge brought against the applicant is at the root of the problem.

5. The manner in which proceedings relating to the care and custody of a child are conducted in situations such as those at stake in the present case, where an infant has been orphaned through an accident, is undeniably a matter of legitimate public interest, in relation to which relevant problems and issues may undoubtedly be raised and brought to light through the discussion of particular proceedings. The key issue therefore is to what extent, and how, the necessity of ensuring proper protection of the rights of the child concerned requires and justifies restrictions on the manner in which a party may exercise his or her freedom of expression by engaging in public discussion relating to a specific case in which he or she is involved. In the present case, the domestic courts dealing with the criminal charge brought against the applicant following a complaint by the child's uncle, whose continued custody of the child was the subject of the administrative proceedings in question (as well as court proceedings), convicted her without addressing these questions as required under the Court's established case-law. Hence, there has been a violation of Article 10.

6. In this context, it is perhaps also worth noting that the Court has already had to deal with a case in which an individual's right to exercise his freedom of expression in relation to a criminal case prosecuted against him was at issue under circumstances where the competing consideration were the privacy rights of his children, as victims (see *Yleisradio Oy and Others v. Finland* (dec.), no. 30881/09, 8 February 2011). The background of this case was that a person had been convicted of sexual abuse of his two minor children in criminal proceedings which had been declared confidential on the grounds of the need to protect the victims. The court's order entailed, inter alia, that both the casefile and the judgment were declared confidential apart from the operative part of the conviction. After his conviction, the defendant was interviewed on national television in a programme addressing issues relating to the rights of defence in criminal proceedings of this nature. In this context, his identity was not entirely concealed (he appeared with his face and with his forename disclosed). This prompted a criminal complaint by the victims, on the grounds that the convicted father, by discussing his prosecution and conviction in public, thereby also revealed, albeit indirectly, the identity of the children as victims. Charges were brought against the man as well as the journalists in charge of the TV show. In these proceedings, following a balancing exercise by the Supreme Court as the final instance, the defendants were convicted of dissemination of information violating the personal privacy of the victims. This case was precisely about the conflict between freedom of expression – of the convicted individual and the journalists who published his interview – and the Article 8 rights of the children, in this case victims of a serious crime, whose identity had not been expressly disclosed but whose privacy was

compromised by the fact that their convicted father had chosen not to give his interview "*incognito*". The balancing performed at the domestic level was subsequently endorsed by this Court, which dismissed the complaint as manifestly ill-founded. Thus, this case is an illustration from previous case-law to the effect that it may be legitimate to enforce certain restrictions on the freedom of expression even in the context of a convicted person discussing his own case, on the grounds of the competing need to ensure protection for the privacy rights of the victims.

7. Accordingly, the above case serves to underline yet further the basic problem in the present case, namely the lack of any specific balancing exercise conducted at the domestic level.

8. Finally under this heading there are two aspects of this case which are particularly striking arising out of the fact that the domestic measures and proceedings only focussed on the applicant and her conduct in the context of the TV programme in which she was interviewed. The first is that, while it is obvious under the circumstances that the applicant must have provided the documents with which she appeared in the TV studio, it is a separate question how it actually came about that the child's name, as picked out from those documents, was displayed on the TV screen. It is difficult to see any justification for the fact that the role played by the journalists in charge of the programme, as the professionals in the field, was not addressed in this context. Instead, the applicant alone was prosecuted as a result of what took place in the course of the TV interview whereas the responsibility incumbent on the journalists was not taken into consideration. The second is that it is clear from the evidence that, before the television show in question (on 7 April 2010), the child's case had already been discussed in detail and the child's name given, including by the director of the K. Social Welfare Centre responsible for conducting the very administrative proceedings concerning the custody of the child treated by the domestic criminal courts as having been "confidential" (§§ 11 and 12).

The significance of the best interests of the child

9. The judgment devotes plenty of attention to the principle of the best interests of the child. The manner in which this subject-matter is addressed, however, gives rise to certain reservations. Without contesting the importance of the general principle that the best interests of the child must be taken into account, it is somewhat incongruous to focus on the requirements of the best interests of the child in a case where the core problem is that *no other* consideration was taken into account than the one which underlies the secrecy of the childcare proceedings, the breach of which led to the applicant's conviction. In the final analysis, these passages in the judgment are therefore plainly *obiter dictum*. This is, of course, even more so as the domestic criminal courts at no stage appear to have made any

reference to having considered the best interest of the child in question whether as a primary consideration or at all.

10. More importantly, the general statements made regarding the principle of the best interests of the child do not in all respects appear sufficiently clear. The judgment purports to assert a wholesale transposal into the ECHR framework of the tenet derived from the UNCRC according to which the best interests of the child must be taken as a primary consideration in any decision directly or indirectly concerning children (§§ 63, 97-99). The ECHR, however, is an instrument enshrining a specific set of human rights and fundamental freedoms, some of which are of an absolute character whereas others very often involve, according to well-established case-law, the assessment and balancing of various competing rights and interests. In the context of the Convention, therefore, it is not plausible to suggest, in such broad and sweeping terms, that whenever children are directly or even indirectly concerned, their best interests are a primary consideration which may "not be put on the same level as all other considerations" (§ 99). It cannot be argued, for instance, that in the context of the application of Articles 2, 3, 5 or 7 the best interests of a child could operate as a limitation of someone else's rights under the said provisions which otherwise would not be permissible; the absolute nature of the rights involved may not be diluted although it might be in the best interests of a child to do so. For an illustration in concrete terms: in a *Gäfgen* type of scenario, the consideration of the child's best interests did not then, and would not now, affect the application of Article 3 (see *Gäfgen v. Germany* [GC], no. 22978/05, § 107, ECHR 2010, where the Court held that the prohibition on ill-treatment of a person applies irrespective of the conduct of the victim or the motivation of the authorities to safe a child's life). Or, to take another example from the context of Article 7, a criminal court would not be justified in deviating from the principle of *nullum crimen sine lege* even if it were in the best interest of a child victim to do so. In the latter situation, the demand to accommodate the best interests of children would instead require a response by the legislator.

11. The key point is that the consideration of a child's best interest in the application of the Convention must take place within the legal parameters set by its own provisions. Therefore, even when the best interests of children are directly or indirectly at stake, the specific weight to be given to them in relation to the other considerations which impose themselves must depend on the context.

12. In the same vein, it cannot plausibly be suggested that the best interests of children could operate as some sort of blanket restriction or an overall constraint on the right of freedom of expression under Article 10 whenever such interests are at stake, whether directly or indirectly. In the application of Article 10, the fact that the best interests of a child are affected will not remove the need for a balancing exercise.

13. As stated above, the crux of the present case lies precisely in the fact that no balancing was undertaken at all in the criminal proceedings against the applicant at the domestic level. The affected child's interests are an important element in the necessary balancing, but the proper resolution of the conflict between the competing rights nonetheless requires a careful, contextual and specific assessment.

14. In sum, overstating the role which the best interests of children are legitimately capable of playing in the application of the various provisions of the Convention by broad and sweeping general statements is not very helpful and, in fact, risks being misleading. In the present case, the secrecy obligation held to have been imposed on the applicant may indeed have been intended (though there is no evidence before this Court either way) to protect the interests of the child (as well as those of other family members). Yet we are unanimous in concluding that the grandmother's criminal conviction in the present circumstances gave rise to a violation of her rights under Article 10.