ECtHR: N.Š. v. Croatia

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Balancing the freedom to convey remarks in a television interview concerning a matter of public interest and the necessity of protecting a child's best interests and privacy rights, the European Court of Human Rights (ECtHR) found a violation of the right to freedom of expression as protected by Article 10 of the European Convention on Human Rights (ECHR). The ECtHR found that the domestic courts in Croatia had applied a too formalistic approach as to the confidentiality of information revealed in a television programme about a child's custody case.

The applicant in this case, N.Š., is the grandmother of a young child whose parents died in a car accident. Soon after the accident, a family dispute arose over the child's custody, and following administrative proceedings, custody was given to the child's uncle. The accident itself and the ensuing family dispute attracted significant media coverage. N.Š. was interviewed in a newspaper article, with a reaction by the director of the social welfare centre dealing with the child's custody procedure. The name of the child was explicitly mentioned by both N.Š. and the director. A few months later, a television show on a commercial television channel discussed the case in detail. The child's name was explicitly mentioned by the journalist, and the director of the social welfare centre talked in detail about the circumstances of the custody. A few days later, N.Š. took part in another television show, this time on the national public television channel. During the interview, a bundle of papers could be seen in front of N.Š. while she criticised the malfunctioning of the social welfare system, including the relevant court proceedings concerning the child's custody. Following the broadcast of this television show, the child's uncle lodged a criminal complaint against N.Š. for breach of confidentiality of the administrative proceedings concerning the child's custody, and in particular for disclosing the child's full identity. The Croatian courts found that by revealing information about the custody proceedings, N.Š. had committed a criminal offence under the Criminal Code, taken in conjunction with a provision of the Family Act. N.Š. was sentenced to four months' imprisonment, suspended for two years, and she was ordered to pay 1000 Croatian kunas (HRK) (EUR 130) for costs and expenses incurred in the proceedings. N.Š. lodged an application before the Strasbourg Court, complaining that her criminal conviction for breaching the confidentiality of administrative custody proceedings had been contrary to Article 10 ECHR.

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First, the ECtHR referred to its established case law, reiterating that there is a high level of protection of freedom of expression in relation to discussions or debate on matters of public interest, including on issues related to the functioning of a system for deciding on the custody rights and fate of children. 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. However, as children are particularly vulnerable, the domestic authorities have a duty to ensure that their right to privacy is adequately protected, including in proceedings related to adoption, child abuse, custody or residency. Indeed, the protection of the 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, 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.

The ECtHR observed that the case had caught the attention of the media, putting the child's privacy at serious risk. But it also noted that by participating in the disputed television show and by pointing to various deficiencies in the processing of the custody case, N.Š. had 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. In this context, the domestic authorities must carefully strike a balance between the freedom to convey remarks concerning a matter of public interest and the necessity of protecting 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 a 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. The ECtHR found that the domestic courts had not taken into account the above-mentioned considerations, chiefly owing to a purely formalistic approach to the notion of the confidentiality of the proceedings and solely focusing on the disclosure of confidential information as a criminal offence. The formalistic approach taken by the domestic courts is contrary to the requirements developed in the case law of the ECtHR, as it lacks a proper review as to whether the interference with the rights protected by Article 10 ECHR was justified. The ECtHR referred to the fact that the disputed television report in which N.Š. participated 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 in the custody case. Furthermore, N.Š.'s participation in the disputed television report could not be considered in isolation, but had to be seen in the wider context of the media coverage of the case. The

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domestic courts had also failed to clarify the role of the journalists in the disclosure of the confidential information, and they had not take into account the fact that N.Š.'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, but had sought to protect the child's interests by raising issues relating to the malfunctioning of the social welfare services. The ECtHR placed particular emphasis on the domestic courts' failure to examine all these relevant circumstances and their omission to engage in a balancing exercise as required by the Court's case law in situations of conflict between the rights under Article 10 and Article 8 ECHR. Therefore it found, unanimously, a violation of Article 10 ECHR.

Judgment by the European Court of Human Rights, First Section, case of N.Š. v. Croatia, Application no. 36908/13, 10 September 2020.

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