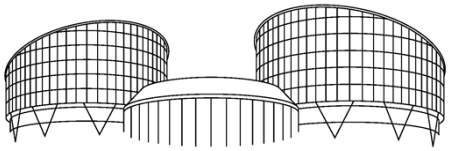

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF MRAOVIĆ v. CROATIA

(Application no. 30373/13)

JUDGMENT

Art 6 § 1(criminal) • Public hearing • Exclusion of public from entire rape trial in order to protect victim, even though she had given interviews to media about the case • Decision reviewed by Supreme Court finding no breach of applicant's rights • Judgment against applicant pronounced publicly • Victim's statements to media not dispensing the State from its positive obligation to protect her privacy as well as to protect her from secondary victimisation • Even higher degree of protection required due to unlawful breach of victim's privacy by the police at the outset of the case • Partially closed proceedings not sufficient as intimate information might be disclosed at any stage of trial

STRASBOURG

14 May 2020

THIS CASE WAS REFERRED TO THE GRAND CHAMBER WHICH DELIVERED JUDGMENT IN THE CASE ON 09/04/2021

This judgment may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Mraović v. Croatia,

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

Krzysztof Wojtyczek, *President,*
Ksenija Turković,
Armen Harutyunyan,
Pere Pastor Vilanova,
Pauliine Koskelo,
Jovan Ilievski,
Raffaele Sabato, *judges,*
and Abel Campos, *Section Registrar,*

Having regard to:

the above application 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, Mr Josip Mraović ("the applicant"), on 10 April 2013

the decision of 8 September 2015 to give notice to the Government of the complaint concerning lack of public hearing and to declare the remainder of the application inadmissible pursuant to Rule 54 § 3 of the Rules of Court

Having deliberated in private on 25 February 2020,

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

INTRODUCTION

1. The case concerns the applicant's complaint under Article 6 § 1 of the Convention about the exclusion of the public from criminal proceedings on rape charges against him.

THE FACTS

2. The applicant was born in 1948 and lives in Gospić. The applicant was represented by Ms V. Drenški Lasan, a lawyer practising in Zagreb.

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

4. On 14 April 2005 I.J., a basketball player with the Gospić Women's Basketball Club, reported to the police that the applicant had sexually assaulted her.

5. The applicant was arrested on the same day on suspicion of rape.

6. On 15 April 2005 the local police force gave a detailed statement to the media concerning the incident, in which they disclosed the personal details and identity of the victim. This subsequently gave rise to a successful action by I.J. for damages against the State.

7. On 30 June 2005 the applicant was indicted in the Gospić County Court (*Županijski sud u Gospiću*) on charges of rape.

8. The proceedings before the Gospić County Court were closed to the public at the applicant's request, in order to protect the private life of both the applicant and the victim.

9. On 1 December 2005 the Gospić County Court acquitted the applicant.

10. Following an appeal by the relevant State Attorney's Office, at a sitting held on 14 December 2006 the Supreme Court (*Vrhovni sud Republike Hrvatske*) quashed the first-instance judgment and remitted the case. The public were excluded from the Supreme Court sitting following a request by the applicant, with a view to protecting the private and family lives of the accused and the victim in accordance with section 294(4) of the Criminal Procedure Act. Permission to attend, in accordance with section 294(2) of the Criminal Procedure Act (see paragraph 29 below), was granted to representatives of the Organization for Security and Co-operation in Europe (OSCE), who had been instructed to keep the contents of the hearings secret.

11. In the resumed proceedings, the case was transferred to the Rijeka County Court (*Županijski sud u Rijeci*).

12. At the first retrial hearing held on 13 September 2007, the applicant requested that the proceedings be conducted in open court. He argued that OSCE representatives had already attended the sitting before the Supreme Court, and that the victim had given numerous statements to the media concerning the case. He stressed that during the proceedings he had been "continuously stigmatised by the media due to the exclusion of the public" from his case and "the inability of the media to transmit the real and objective state of the presented evidence". The State Attorney disagreed with the applicant's request, stressing that reasons for exclusion of the public still persisted. Both parties were heard on the matter.

13. On the same date, the trial court dismissed the applicant's request for the proceedings to be heard in open court. The relevant part of the official court record of that hearing read as follows:

> "1. the public is excluded from the main hearing, in accordance with section 293(4) of the Criminal Procedure Act, with a view to protecting the private life of the victim.
>
> 2. the [applicant's] defence counsel's application to hold the trial in open court within the meaning of section 292(1) of the Criminal Procedure Act is dismissed.
>
> The facts and information disclosed at the main hearing may have adverse consequences for the private life of the victim, as well as the private and family life of the accused.
>
> This decision is delivered publicly in accordance with section 295(1) of the Criminal Procedure Act, and an appeal against it shall not postpone its enforcement ..."

14. The applicant then applied for the recusal of the president of the Rijeka County Court and of the trial judge, claiming that, by dismissing his request for a public hearing, he had been put in a procedurally unequal

position in view of the public campaign against him orchestrated by the victim. His applications were dismissed on 17 September and 5 October 2007, respectively.

15. On 13 November 2007 a newspaper J. published an exclusive interview with I.J., whose name was disclosed, about the manner in which the case had affected her private life.

16. At the next hearing held on 3 December 2007, the applicant reiterated his request for the proceedings to be heard in open court. He pointed out that, in the meantime, I.J. had given four interviews to the media in which she had provided various details about her private life and the incident in issue. In particular, on 8 January 2006 she had given an interview to a national daily newspaper in which she had disclosed details about her private life and part of the statement which she had given to the investigating judge. The State Attorney disagreed with the applicant's request, stressing that reasons for exclusion of the public still persisted. In particular, he maintained that during the cross-examination of the victim she might be asked to reply to very intimate questions not revealed in her interviews. Both parties were heard on the matter.

17. The trial court again dismissed the applicant's request as ill-founded. The relevant part of the court record of that hearing read as follows:

> "1. the public is excluded from the main hearing, in accordance with section 293(4) of the Criminal Procedure Act, with a view to protecting the private life of the victim.
>
> 2. the [applicant's] defence counsel's application to hold the trial in open court within the meaning of section 292(1) of the Criminal Procedure Act is dismissed because the facts and information disclosed at the main hearing may have adverse consequences for the private life of the victim, as well as the private and family life of the accused.
>
> 3. This decision is delivered publicly in accordance with section 295(1) of the Criminal Procedure Act, and an appeal against it shall not postpone its enforcement ..."

18. At a hearing held on 4 December 2007, I.J. gave evidence before the trial court. According to the court record of that hearing, at one point during her testimony I.J. cried while the applicant was grinning.

19. On 5 December 2007 a national daily newspaper N. published an article in which I.J. and her lawyer gave statements about her examination as a witness the previous day.

20. On 21 January 2008 the applicant complained to the trial court that I.J.'s lawyer had breached the confidentiality of the proceedings by revealing to the media a statement given at the hearing in the applicant's defence.

21. At the next hearing held on 29 January 2008 the trial court heard closing remarks of the parties and closed the main hearing.

22. On 7 February 2008 the Rijeka County Court found the applicant guilty of rape and sentenced him to three years' imprisonment. The

pronouncement of the judgment was public and was covered by three television channels.

23. The applicant appealed against the first-instance judgment before the Supreme Court, claiming, *inter alia*, that the proceedings had been unjustifiably closed to the public.

24. Following a hearing which was closed to the public, on 8 June 2009 the Supreme Court dismissed the applicant's appeal and upheld his conviction, reducing his sentence to two years' imprisonment. As regards the closed nature of the proceedings against him, the Supreme Court's judgment read as follows:

> "Concerning the arguments in the appeal in respect of the first-instance court's decision to exclude the public from the main hearing, the following should be observed:
>
> In the [initial] proceedings, the defence proposed the exclusion of the public for the purposes of protection of the personal and family life of the accused, which had been granted by the courts by adopting a decision on exclusion of the public from both the main hearing and the sitting of the second-instance Chamber of this Supreme Court. However, in the retrial, the defence reversed its standpoint seeking to ensure the public nature of the proceedings so as to allow the accused to 'remove the stigma' and facilitate the media in reporting objectively. However, considering the intimate nature of the criminal offence cited in the indictment, the first-instance court [dismissed the applicant's request] and excluded the public from the main hearing – now with a view to protecting the victim's personal and family life within the meaning of Article 293(4) of the Criminal Procedure Act. The decision was publicly announced and the reasons were stated in the transcript of the main hearing of 29 January 2008, which was not opposed by the defence, even though the main hearing was starting anew. They also did not request that the decision be given in writing for the purposes of lodging an appeal.
>
> Following the above, in the opinion of the Supreme Court, there has been no major (absolute) breach of provisions regulating the criminal proceedings as laid down in section 367(1)(4) of the Criminal Procedure Act, as claimed in the appeal, because the public had been excluded from the main hearing with the aim of protecting the victim's private life in accordance with the law. By failing to provide a certified transcript of the orally rendered decision to a party, which had not explicitly waived its right to appeal, there had been a breach of section 143 of the Criminal Procedure Act; however, this did not affect the lawful and proper judgment since an appeal against that decision would not have stayed its enforcement, in accordance with section 295 (2) of the Criminal Procedure Act. Therefore, there has been no minor (relative) breach of provisions regulating criminal proceedings as laid down in section 367 (3) of the Criminal Procedure Act."

25. The applicant then challenged these findings before the Constitutional Court (*Ustavni sud Republike Hrvatske*), and on 8 November 2012 the Constitutional Court dismissed his constitutional complaint as ill-founded, finding no breach of his constitutional rights.

26. The decision of the Constitutional Court was served on the applicant's lawyer on 22 November 2012.

RELEVANT LEGAL FRAMEWORK

I. RELEVANT DOMESTIC LAW

27. Relevant provisions of the Constitution (*Ustav Republike Hrvatske*, Official Gazette, nos. 56/90 with subsequent amendments), read as follows:

Article 29 § 1

"Everyone shall be entitled to have his or her rights and obligations, or suspicion or accusation of a criminal offence decided upon fairly before an independent and impartial court established by law within a reasonable time."

Article 117

"Court hearings shall be open to the public and judgments shall be pronounced publicly in the name of the Republic of Croatia.

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 if minors are tried, or in order to protect the private lives of the parties, or in marital disputes and proceedings connected with custody and adoption, or for the purpose of the protection of military, official or trade secrets and for the protection of the security and defence of the Republic of Croatia, 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."

28. Article 188 of the Criminal Code (*Kazneni zakon*, Official Gazette nos. 110/97 with subsequent amendments), as in force at the material time, reads as follows:

"Whoever coerces another by force or threat of immediate attack on his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act shall be punished by imprisonment of between one and ten years."

29. The relevant provisions of the Criminal Procedure Act (*Zakon o kaznenom postupku*, Official Gazette nos. 110/97 with subsequent amendments), as in force at the material time, read as follows:

Public nature of the main hearing
Section 292

"1. The main hearing shall be held in open court ..."

Section 293

"From the start until the conclusion of the main hearing, the panel may at any time, of its own motion or following an application by the parties, but always after hearing their statements on the matter, exclude the public from the entire main hearing or a part thereof, if this is necessary for ...

...

4. the protection of the personal or family life of the defendant, the injured person or of another participant in the proceedings ..."

Section 294

"1. Exclusion of the public does not relate to the parties, the injured person, their representatives or defence counsel.

2. The panel may grant permission to certain officials, scholars or public figures, upon the defendant's request or his or her spouse ... or close relative, to be present at a main hearing closed to the public.

3. The president of the panel shall instruct persons attending a closed main hearing that they are bound to keep information learned at the trial confidential and that the failure to do so amounts to a criminal offence."

Section 295

"1. The panel shall decide on the exclusion of the public by a reasoned and publicly pronounced decision.

2. An appeal against the decision referred to in paragraph 1 of this section does not stay its enforcement."

II. RELEVANT INTERNATIONAL LAW

A. United Nations

30. Resolution adopted on 31 March 2011 (after the facts of the present case) by the General Assembly (65/228.) *Strengthening crime prevention and criminal justice responses to violence against women*, in its Annex on Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, in so far as relevant, provides as follows:

"15. Member States are urged to review, evaluate and update their criminal procedures, as appropriate and taking into account all relevant international legal instruments, in order to ensure that:

...

(c) Women subjected to violence are enabled to testify in criminal proceedings through adequate measures that facilitate such testimony by protecting the privacy, identity and dignity of the women; ensure safety during legal proceedings; and avoid 'secondary victimization'. In jurisdictions where the safety of the victim cannot be guaranteed, refusing to testify should not constitute a criminal or other offence..."

B. Council of Europe

31. On 5 May 2011 the Council of Europe adopted the Convention on Preventing and Combating Violence against Women and Domestic Violence ("the Istanbul Convention"), which entered into force in respect of Croatia on 1 October 2018. The relevant part of the Convention provides as follows:

Article 49 – General obligations

"1. Parties shall take the necessary legislative or other measures to ensure that investigations and judicial proceedings in relation to all forms of violence covered by the scope of this Convention are carried out without undue delay while taking into consideration the rights of the victim during all stages of the criminal proceedings.

2. Parties shall take the necessary legislative or other measures, in conformity with the fundamental principles of human rights and having regard to the gendered understanding of violence, to ensure the effective investigation and prosecution of offences established in accordance with this Convention."

Article 56 – Measures of protection

"1. Parties shall take the necessary legislative or other measures to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and judicial proceedings, in particular by:

(a) providing for their protection, as well as that of their families and witnesses, from intimidation, retaliation and repeat victimisation;

...

(f) ensuring that measures may be adopted to protect the privacy and the image of the victim;

...

(i) enabling victims to testify, according to the rules provided by their internal law, in the courtroom without being present or at least without the presence of the alleged perpetrator, notably through the use of appropriate communication technologies, where available."

32. The Council of Europe Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims, adopted on 14 June 2006, provides as follows:

Article 2 Principles

"2.1. States should ensure the effective recognition of, and respect for, the rights of victims with regard to their human rights; they should, in particular, respect the security, dignity, private and family life of victims and recognise the negative effects of crime on victims...."

Article 3 Assistance

"...3.3. Victims should be protected as far as possible from secondary victimisation.

3.4. States should ensure that victims who are particularly vulnerable, either through their personal characteristics or through the circumstances of the crime, can benefit from special measures best suited to their situation."

Article 10 Protection

"10.1. States should ensure, at all stages of the procedure, the protection of the victim's physical and psychological integrity. Particular protection may be necessary for victims who could be required to provide testimony.

10.2. Specific protection measures should be taken for victims at risk of intimidation, reprisals or repeat victimisation.

...

10.5. States should develop policies to identify and combat repeat victimisation. The prevention of repeat victimisation should be an essential element in all strategies for victim assistance and crime prevention.

...

10.8. States should take appropriate steps to avoid as far as possible impinging on the private and family life of victims as well as to protect the personal data of victims, in particular during the investigation and prosecution of the crime....”

III. EUROPEAN UNION LAW

33. The relevant part of the Directive of the European Parliament and of the Council (2012/29/EU; adopted after the facts of the case) establishing minimum standards on the rights, support and protection of victims of crime, provides as follows:

Recital 66

“This Directive respects fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union. In particular, it seeks to promote the right to dignity, life, physical and mental integrity, liberty and security, respect for private and family life, the right to property, the principle of non-discrimination, the principle of equality between women and men, the rights of the child, the elderly and persons with disabilities, and the right to a fair trial.”

Article 22 – Individual assessment of victims to identify specific protection needs

“1. Member States shall ensure that victims receive a timely and individual assessment, in accordance with national procedures, to identify specific protection needs and to determine whether and to what extent they would benefit from special measures in the course of criminal proceedings, as provided for under Articles 23 and 24, due to their particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation.

2. The individual assessment shall, in particular, take into account:

(a) the personal characteristics of the victim;

(b) the type or nature of the crime; and

(c) the circumstances of the crime.

3. In the context of the individual assessment, particular attention shall be paid to victims who have suffered considerable harm due to the severity of the crime; victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics; victims whose relationship to and dependence on the offender make them particularly vulnerable. In this regard, victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime, and victims with disabilities shall be duly considered. ...”

Article 23 – Right to protection of victims with specific protection needs during criminal proceedings

"1. Without prejudice to the rights of the defence and in accordance with rules of judicial discretion, Member States shall ensure that victims with specific protection needs who benefit from special measures identified as a result of an individual assessment provided for in Article 22(1), may benefit from the measures provided for in paragraphs 2 and 3 of this Article. A special measure envisaged following the individual assessment shall not be made available if operational or practical constraints make this impossible, or where there is a an urgent need to interview the victim and failure to do so could harm the victim or another person or could prejudice the course of the proceedings.

...

3. The following measures shall be available for victims with specific protection needs identified in accordance with Article 22(1) during court proceedings:

...

(d) measures allowing a hearing to take place without the presence of the public."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

34. The applicant complained that criminal proceedings against him had not been public, contrary to Article 6 § 1 of the Convention, which reads as follows:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a ... public hearing. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

A. Admissibility

35. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' arguments

36. The applicant maintained that the trial court never issued separate written decisions on exclusion of the public, which rendered those decisions arbitrary and disabled him from lodging a separate appeal against them. Instead, in the court record of the relevant hearings, the trial court merely

referred to the applicable reason for exclusion of the public, that is to say the protection of the private life of the victim.

37. The applicant further argued that none of the domestic courts had ever balanced his right to a public hearing with the right to protection of the private life of the victim, despite the fact that she had given detailed newspaper interviews on the matter during the trial. The domestic courts had also never explained why it had been necessary to exclude the public from the entire proceedings and not only from certain hearings.

38. While agreeing that the right to a public hearing could be restricted where this was "strictly necessary", the applicant stressed that in his case the domestic courts had never assessed the necessity of such a measure, relying instead only on the fact that such a measure had been justified under domestic law.

39. The Government maintained that the exclusion of the public in the applicant's case had been both justified and necessary and that it had not adversely affected the applicant's defence rights. They pointed out that the applicant's trial had overall been fair; he had had the possibility to present his defence, question the victim and witnesses, propose evidence and be represented by an attorney.

40. The public was excluded from the main hearing for the reasons and in the manner provided for by law and the exclusion of the public in the present case had been necessary for the protection of the private life of a rape victim. The case had been widely reported in the media and it had required a reinforced protection of the victim from secondary victimisation, in particular since the authorities had at the very beginning of the investigation published her full name in those media.

41. Furthermore, the victim's newspaper interviews had not dispensed the State from its positive obligation to protect her rights in the present case. In her interviews, she had had control over the information she had shared with the public, whereas in court hearings this had not been the case, bearing in mind the rights of the accused. It had been equally open to the applicant to give statements to the media and, when he had done so, the applicant had made offensive remarks about the victim using racist and discriminatory language.

42. The Government found it relevant to point out that during his trial before the Gospić County Court, the applicant himself requested the exclusion of the public as he deemed it necessary for the protection of his private and family life. After the remittal of the case, he requested that the proceedings be made public, not in order to safeguard the fairness of his trial, but to "remove the stigma" around himself in the media.

43. In the Government's view, the presence of OSCE representatives at the appeal hearing before the Supreme Court and of court trainees and trainee lawyers at other hearings had shown that the domestic courts had ensured requisite control of the conduct of the trial and had struck a fair

balance between the opposing interests. The applicant, on the other hand, had never asked that his family members or other healthcare or public officials be present at any of the hearings, although he had had the right to do so under domestic law. Lastly, the Government stressed that the judgment had been pronounced publicly.

2. *The Court's assessment*

(a) General principles

44. The Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in Article 6 § 1. This public character of proceedings protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. Administration of justice, including trials, derives legitimacy from being conducted in public. By rendering the administration of justice transparent, publicity contributes to fulfilling the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention (see *Volkov v. Russia*, no. 64056/00, § 25, 4 December 2007, and *Riepan v. Austria*, no. 35115/97, § 27, ECHR 2000-XII).

45. Article 6 § 1 does not, however, prohibit courts from deciding, in the light of the special features of the case submitted to them, to derogate from this principle: in accordance with the actual wording of this provision, "the press and public may be excluded from all or part of the trial where ... the protection of the private life of the parties so require". Thus, it may on occasion be necessary under Article 6 to limit the open and public nature of proceedings in order, for example, to protect the safety or privacy of witnesses, or to promote the free exchange of information and opinion in the pursuit of justice (see *B. and P. v. the United Kingdom*, nos. 36337/97 and 35974/97, § 37, ECHR 2001-III, with further references). The Court has further held that holding proceedings, whether wholly or partly, *in camera*, must be strictly required by the circumstances of the case (see *Welke and Białek v. Poland*, no. 15925/05, § 74, 1 March 2011) and that domestic courts are requested to provide reasons for closing the trial to the public (see *Chaushev and Others v. Russia*, nos. 37037/03, 39053/03, 2469/04, § 24, 25 October 2016.

46. The Court has held on several occasions, in the context of the right under Article 6 § 3 (d) of the Convention to call and cross-examine witnesses, that criminal proceedings should be organised in such a way as not to unjustifiably imperil the life, liberty or security of witnesses, and in particular those of victims called upon to testify, or their interests coming generally within the ambit of Article 8 of the Convention. Thus, the interests of the defence were to be balanced against those of witnesses or

victims called upon to testify (see *Doorson v. the Netherlands*, 26 March 1996, § 70, *Reports of Judgments and Decisions* 1996-II).

47. The Court has also stressed that in criminal proceedings concerning sexual offences, which are often conceived of as an ordeal by the victim, certain measures may be taken for the purpose of protecting the victim, provided that the protection of their right could be reconciled with an adequate and effective exercise of the rights of the defence (see *S.N. v. Sweden*, no. 34209/96, § 47, ECHR 2002-V, and *Lučić v. Croatia*, no. 5699/11, § 75, 27 February 2014). In its judgment *Y. v. Slovenia* (no. 41107/10, § 115, ECHR 2015 (extracts)), examining a complaint brought by a rape victim from the perspective of Article 8 of the Convention, the Court found that the manner in which the criminal proceedings had been conducted in that case had failed to afford the applicant the necessary protection so as to strike an appropriate balance between her rights and interests protected by Article 8 and the defence rights of the accused protected by Article 6 of the Convention.

(b) Application of the general principles in the present case

48. Applying the above principles, the Court's task in the present case is to establish whether in the specific circumstances of the applicant's case the exclusion of the public from the trial before the Rijeka County Court had been justified and necessary. In doing so, the Court is called upon to balance, on the one hand, the applicant's right to be tried in public and, on the other, the protection of the private life of a rape victim, which includes protecting her personal integrity and dignity (see, *mutatis mutandis*, *Y. v. Slovenia*, cited above, §§ 114-15).

49. At the outset, the Court would like to stress the importance of the protection of the rights of sexual abuse victims in criminal proceedings (see paragraph 47 above). In that sense, the Court subscribes to the assertion that in criminal proceedings concerning such a serious and intimate crime as rape, in line with the applicable international and European Union standards, the exclusion of the public from part or from the entire proceedings may be necessary for the protection of rape victims' private life, in particular their identity, personal integrity and dignity. This might be necessary not only to protect the victims' privacy, but to protect them from secondary and/or repeat victimisation (see paragraphs 30 – 33 above). The foregoing is crucial in order to encourage the victims of sexual abuse to report the incidents and allow them to feel secure and able to express themselves candidly on highly personal issues – often humiliating or otherwise damaging to their dignity – without fear of public curiosity or comment.

50. The Court is of the opinion that the justice system should operate in a manner that does not increase the suffering of victims of crime or discourage them from participating in it. However, due regard must also be

had to the rights of the accused, including their right to public scrutiny of the criminal proceedings against them (ibid.).

51. The Court concedes that the nature of the charges and the sensitive content of the testimony to be provided by I.J. in the present case might and did call for limitations of the applicant's right to a public hearing, all the more so given the large media attention given to this case since its very outset (see paragraph 6 above). Under Croatian law, the courts have discretion to decide whether or not public is to be excluded from criminal trials in sexual abuse cases (see paragraphs 27 and 29 above).

52. The Court notes that at the initial stage of the proceedings, while the case was heard before the Gospić County Court and for the first time before the Supreme Court, the applicant himself had requested the exclusion of the public because he had deemed it necessary for the protection of his private and family life (see paragraphs 8 and 10 above). In the resumed proceedings, he changed his position on the matter and twice requested that the case be heard in open court (see paragraphs 13 and 17 above). In examining both of his motions, the Rijeka County Court took its decision each time after the prosecution and the defence had been given an opportunity to submit their arguments on the matter (see *Volkov*, cited above, § 32).

53. The Court notes that the reasons given by the Rijeka County Court for the exclusion of the public had a clear basis in domestic law, namely section 293(4) of the Criminal Procedure Act, and were aimed at protecting the private life of I.J., in particular her dignity and personal integrity (see *Y. v. Slovenia*, cited above, § 114). It is true that the Rijeka County Court applied the said provision somewhat automatically, without performing a detailed balancing of the applicant's right to a public hearing against the interests of the protection of the private life of I.J, or providing an extensive explanation as to why it was necessary to exclude the public from the entire trial, and not only from certain hearings.

54. The Court further notes that the decision to allow the trial to be held *in camera* was subsequently reviewed on appeal and that the Supreme Court concluded that such a decision had not resulted in a breach of any of the applicant's rights in the criminal proceedings (see paragraph 24 above). Furthermore, even if the right to a judgment pronounced publicly is distinct from the right to a public hearing as such, the Court observes that the pronouncement of the Rijeka County Court's judgment against the applicant had been open to the public and broadcast by multiple television channels (see paragraph 22 above), which must have contributed to the public scrutiny of administration of justice in this particular case, as required by Article 6 § 1 (see paragraph 44 above).

55. The specificity of the present case lies in the fact that I.J. had previously given interviews in national newspapers on several occasions (see paragraphs 15 and 19 above). However, in the Court's view the

foregoing did not dispense the State from its positive obligation to protect her privacy as well as to protect her from secondary victimisation. This is so, firstly, because in her statements to the media I.J. controlled the information she was sharing, whereas in the courtroom this had not been possible in view of the applicant's rights of defence. Indeed, cross-examination of a rape victim in court is highly sensitive as it necessarily reveals information about the most intimate aspects of the victim's life (see, as regards the instant case, paragraph 18 above). Secondly, the Court accepts the Government's contention that in the present case the State had been under an obligation to provide an even higher degree of protection to I.J., given that the police authorities had breached her privacy by unlawfully publishing her personal information at the very outset of the case (see paragraph 6 above).

56. The Court finds it important to emphasize that intimate details from a rape victim's life may be disclosed at any stage of a criminal trial against the alleged perpetrator and not only during cross-examination of the victim. Consequently, since the present case concerned the need to protect I.J.'s integrity and dignity, as well as protect her from further embarrassment and stigmatisation, in the Court's view, closing only part of the proceedings would not have sufficed to protect her rights in the particular circumstances of the present case.

57. In sum, bearing in mind the highly intimate nature and the seriousness of the charges in the present case, which involved one of the most humiliating attacks on a person, the Court is satisfied that the discretion which the Rijeka County Court exercised in the present case was not incompatible with the applicant's right to a public hearing. Moreover, such approach was in line with the current international standards on the matter (see, in particular, Article 23 § 3 (d) of the EU Directive, cited in paragraph 33 above, Article 56 § 1 (f) of the Istanbul Convention, cited in paragraph 31 above, and other international materials cited in paragraphs 30 and 32 above).

58. The foregoing considerations are sufficient to enable the Court to conclude that, in the particular circumstances of the present case, the Rijeka County Court could reasonably consider that the exclusion of the public in the criminal proceedings against the applicant had been required for the protection of the private life of a rape victim.

59. There has accordingly been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by six votes to one, that there has been no violation of Article 6 § 1 of the Convention;

Done in English, and notified in writing on 14 May 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos	Krzysztof Wojtyczek
Registrar	President

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

K.W.O.
A.C.

DISSENTING OPINION OF JUDGE KOSKELO

1. I have regrettably been unable to agree with the conclusion that there was no violation of Article 6 in the present case. In my opinion, Article 6 was breached because the domestic courts failed to conduct the necessary balancing of the competing rights and interests by assessing the specific circumstances of the case.

2. At the outset, I would like to emphasise that I concur with the majority in stressing the importance of the protection of the rights of sexual abuse victims in criminal proceedings (see paragraph 49 of the present judgment). This consideration, however, does not justify a total exclusion of public access to trials concerning such cases on schematic grounds, especially when the defendant explicitly insists on the right to be tried in open court.

3. It is precisely the importance of the competing interests at stake that demands a very careful and specific assessment of the relevant circumstances. On the one hand, as the Court has consistently emphasised, it is a fundamental principle under Article 6 § 1 that court hearings should be held in public. This public character protects litigants against the administration of justice without public scrutiny; it is also one of the means whereby people's confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the principles of any democratic society (see, for instance, *Welke and Białek v. Poland*, no. 15924/05, § 73, 1 March 2011). On the other hand, as acknowledged by the very wording of Article 6 § 1, there are circumstances where it may be necessary, and therefore justified, to exclude or limit public access to all or part of the trial, the protection of private life of the parties being one of the grounds on which such measures may be legitimate. These starting points are, of course, common ground.

4. In criminal proceedings, the protection of the alleged victim of crime, especially in cases of sexual violence, may well require restrictions to be imposed on public access to the trial. A general position in the Court's case-law is, however, that the conduct of trials "*in camera*" must be strictly required by the circumstances of the case. Consequently, the trial court must be required to make a specific finding in this regard, to provide sufficient reasoning to demonstrate such necessity, and to limit secrecy to the extent necessary to preserve the interest for the protection of which the measure is taken (see *Belashev v. Russia*, no. 28617/03, § 83, 4 December 2008). More generally, the Court has required that the manner in which criminal proceedings are conducted in each case must afford the parties the necessary protection so as to strike an appropriate balance between the victim's rights and interests protected by Article 8 and the rights of defence protected by

Article 6 of the Convention (see *Y v. Slovenia*, no. 41107/10, 28 May 2015, § 115).

5. In the present case, the applicant, as the defendant in the criminal proceedings, repeatedly requested that the (re)trial be conducted in public. Accordingly, the trial court was under an obligation to examine in detail whether and to what extent this was impermissible on account of the protection to be afforded to the alleged victim. The limitations on public access called for careful consideration and balancing by the trial court. The domestic court, however, decided to completely exclude public access to the trial without giving any specific reasons to justify its decision. It merely cited the relevant statutory norms. There is therefore no indication that the trial court actually performed the requisite balancing in the light of the specific circumstances of the case. (On the contrary, the trial court twice referred to the adverse consequences for the victim's private life,as well as the the accused's private and family life, even though the latter clearly were not a relevant justification for *in camera* proceedings in circumstances where the accused himself insisted on being tried in open court; see paragraphs 13 and 17 of the present judgment.) Nor is there any indication that the domestic court considered the extent to which the protection of the rights of the victim required the public to be excluded from the hearings.

6. My conclusion therefore is that the trial court failed to comply with the requirements incumbent on it under Article 6 § 1 of the Convention. Under such circumstances, as it is not clear that the competent domestic court engaged in the necessary balancing exercise and made its assessment in line with the standards set out under that provision, the Court cannot defer to the position taken by the domestic court. It must review the situation on the basis of the elements and observations submitted to it. In this regard, I am not persuaded by the arguments put forward by my colleagues in the majority.

7. The applicant stated that his request for the retrial to be conducted in open court, apart from the critical publicity that had followed his acquittal in the first trial, had been prompted by the fact that the alleged victim had in the meantime given four long interviews to the highest-circulation papers in Croatia, providing a detailed account of the incident. Even if the coverage of the events in the media cannot be decisive for the assessment of whether and to what extent there are grounds for limiting public access to the trial, the conduct of the parties in relation to the media in the course of the pending proceedings is not wholly irrelevant for the balancing required under Article 6 § 1. Where a party to live proceedings grants interviews to the media on the subject matter of those proceedings while at the same time wishing to benefit from closed doors at the trial on the grounds of protection for his or her private life, such a situation calls for closer scrutiny from the angle of the balancing exercise required under Article 6 § 1.

8. In the present context, the Government has argued, and my colleagues in the majority agree, that the alleged victim's public appearances during the ongoing proceedings were not relevant to the assessment of the exclusion of the public from the trial. What is stressed in this context is that in the interviews, she was able to control what she shared with the public, whereas this was not the case at the trial, where the alleged victim could and would be required to respond to questions that might be of a highly intimate nature (see paragraph 55).

9. In my view, this argument is somewhat too simplistic. I fully accept that the avoidance of secondary victimisation is a significant consideration in the conduct of the trial in these types of cases. When, however, the alleged victim has already voluntarily exposed herself to publicity, during the ongoing criminal proceedings, by giving interviews and sharing her own view and perspective on their subject matter, such an approach will to some extent lighten the weight to be attributed to the risk of secondary victimisation through the publicity of the trial, in particular where – as in the present case – the entire trial is closed to the public and not only the testimony or cross-examination of the alleged victim.[1]

10. Furthermore, both the Government in their observations and the majority in its reasoning rely on the fact that at the initial stage of the criminal investigation, the police committed an error by making public the identity of the alleged victim. This error is invoked by the Government, and acknowledged by the majority, as a factor demanding heightened protection for the latter in the context of the trial (see paragraph 55). It should be noted, however, that according to the applicant's submissions, although the press release issued by the police had not identified him by his full name but only by his initials and age, in reality his identity was known to both the community and the media, where the ensuing coverage referred to him, too, by his full name. Thus it appears that the identity of both the alleged perpetrator and the alleged victim were revealed to the public by the police. It cannot therefore be said that the adverse consequences only concerned the alleged victim. Rather, both parties seem to have been affected. Under such circumstances, it could not be argued that the initial error committed by the police, and subsequent media coverage and public attention relating to the case, were capable of dispensing the domestic court from its duty to carry out careful balancing of the competing interests arising in the specific context of the trial.

1. I note that according to the applicant's (uncontested) submissions, the alleged victim's attorney even disclosed part of the applicant's defence to the media. To the extent that this has occurred, I find it troubling that the party in whose interest the whole trial has been closed to the public may nevertheless feel free to make selective disclosures from the ongoing proceedings to the media. Such a risk renders it even more questionable to apply such a global measure.

11. In any event, it would be inappropriate to consider that the domestic authorities were free to compensate for an infringement by the investigators of the rights and interests of one party to the proceedings at the expense of the rights and interests of the defendant. Thus the requirement of specific consideration of all the circumstances relating to the trial in its context could not be cancelled out by the need to make amends for the prior harm caused to either party: the need to balance the conflicting rights and interests, and to account for that balancing, necessarily remained in place.

12. The majority also attach importance to the fact that the trial court's judgment was pronounced in public, and also broadcast on TV channels. It is of course important that the outcome of the case was made public, together with a statement of the main reasons on which it was based. Yet the public pronouncement of the court's conclusions cannot replace the public scrutiny of the actual trial, and is therefore not sufficient to compensate for the fact that the entire trial was closed to the public without adequate consideration and balancing of the competing rights and interests. The same is true for the retrospective finding by the Supreme Court acting on appeal that the defendant's procedural rights had (otherwise) not been breached (paragraph 54).

13. As recalled above, the Court has previously held that the secrecy of trials must be limited to the extent necessary to preserve the interests for the protection of which the measure is taken. In the present case, the majority consider that since the need was to protect the alleged victim's integrity and dignity, as well as to protect her from further embarrassment and stigmatisation, closing only part of the proceedings would not have sufficed to protect her rights (paragraph 57). I find such a conclusion disturbing in the light both of the Court's existing case-law and of the requirement of a specific and substantiated balancing of the competing rights and interests at stake. Although the protection of the victim's rights under Article 8 is an important and weighty consideration, I find it problematic to suggest that this protection can only be provided by closing the entire trial to all public scrutiny, without a specific account and balancing of the circumstances justifying such an outcome. Even where the aim is to protect the victim's rights, the need remains to conduct a balancing exercise based on the specific features of the case. In my view, it would be inappropriate to encourage a systematic and total closure of criminal trials from the public by invoking the rights of the victim in a general manner. A sufficiently differentiated and reasoned approach remains necessary.

14. Finally, the majority conclude by observing that the approach taken in the present case was in line with the current international standards on the matter (see paragraph 57 of the judgment). I am not convinced that this statement can be regarded as correct. Those instruments require, and rightly so, the availability of measures designed to protect the rights and interests of the victim. By contrast, nothing in those instruments can be taken as

diluting the obligation to conduct a specific assessment and balancing of the competing rights and interests and to consider in detail which measures should be applied in each situation and at each stage of the proceedings.

15. I would like to stress that my conclusion to the effect that there was a violation of Article 6 § 1 in the present case is based on the finding that the requisite balancing exercise was not conducted in accordance with the relevant Convention requirements: the reasons given were insufficient to justify the decision to close the entire trial to the public. At the same time, I am very mindful of the fact that extent and manner in which the possibility of public scrutiny of criminal trials in cases of the present kind calls for a very careful approach, given the risk that some of the media, and some users of the social media, might tend to abuse the possibilities of access to such trials. It is therefore clear that a sufficient margin must be left to the domestic authorities to determine, and impose, limitations in this respect so as to ensure that appropriate professionally and ethically responsible public scrutiny remains possible, while enabling abusive practices to be avoided.