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

FIRST SECTION

CASE OF EGELAND AND HANSEID v. NORWAY

(Applications nos. 34438/04)

JUDGMENT

STRASBOURG

16 April 2009

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

In the case of Egeland and Hanseid v. Norway,

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

Christos Rozakis, *President,*
Nina Vajić,
Anatoly Kovler,
Elisabeth Steiner,
Khanlar Hajiyev,
Sverre Erik Jebens,
Giorgio Malinverni, *judges,*
and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 26 March 2009,

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

PROCEDURE

1. The case originated in an application (no. 34438/04) against the Kingdom of Norway lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Norwegian nationals, Mr John Olav Egeland and Mr Einar Hanseid ("the applicants"), on 23 September 2004.

2. The applicants were represented by Mr. K. Eggen, a lawyer practising in Oslo. The Norwegian Government ("the Government") were represented by their Agent, Mrs F. Platou Amble, Attorney at the Attorney General's Office (Civil Matters).

3. The applicants alleged, in particular, that their conviction and sentence to a fine by the Norwegian courts for unlawful publication of photographs under section 131A of the Administration of Courts Act 1915 of a person while leaving a court building, gave rise to a violation of Article 10 of the Convention.

4. By a decision of 22 November 2007, the Court declared the application admissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1951 and 1943, respectively. The first applicant lives in Bekkestua, near Oslo, and the second applicant lives in Oslo. At the material time, the first applicant was the Editor in Chief of

Dagbladet and the second applicant was the Editor in Chief of *Aftenposten*, two major national newspapers in Norway.

A. General background to the case

6. The present case has its background in the same case-complex as a previous application, *P4 Radio Hele Norge ASA v. Norway* ((dec.), no. 76682/01, ECHR 2003-VI). Like the latter, it concerns a complaint under Article 10 of the Convention about restrictions on media coverage of a major criminal trial, in this case concerning charges against four persons of triple murder, the so-called Orderud case, which took place before the Nes District Court (*herredsrett*) from 18 April to 15 June 2001. This was probably the most spectacular and media-focused criminal case in Norwegian history. The trial involved a son (A) and his wife (B), the wife's half-sister (C) and a friend of the latter (D), who were charged with the murder of the son's parents and sister, committed in a particularly brutal manner. Because of the great media interest in the case and since the hearing room was too small to host both members of the ordinary public and media representatives, special arrangements were made enabling the press to follow the trial at a press centre, set up in a sports hall, to which sound and pictures were transmitted live and shown on a television screen. On 6 May 2003 a Chamber of the former Third Section declared inadmissible as being manifestly ill-founded *P4*'s complaint that a refusal by the District Court, under section 131A of the Administration of Courts Act 1915 (*domstolloven*- hereinafter “the 1995 Act”), to grant its application for radio broadcasting directly from the court hearing room violated Article 10 of the Convention.

B. The impugned photographs

7. The case under consideration concerns restrictions on the publication by the press of photographs taken of B without her consent outside the court house while leaving, shortly after having attended the District Court's delivery of its judgment of 22 June 2001, convicting A, B and C of the charges and sentencing each of them to 21 years' imprisonment and sentencing D to 2½ years' imprisonment.

8. The delivery of the District Court's judgment was broadcast live on TV by two leading national broadcasting companies, the *NRK* and the *TV2*. The broadcast did not contain any pictures of B.

9. In the proceedings summarised here below, the Supreme Court (in paragraph 12 of its judgment), relying on the District Court findings, described the circumstances in which the photographing of B had taken place as follows:

> "The District Court has established as a fact that during the reading out of the judgment B realised that she would be found guilty, and that she suffered a physical reaction in the form of nausea. Because of this she went to the toilet, together with one of her defence counsels, Ms Y, *Advokat*. Thereafter she entered a side room, where she cried and was in deep despair. Shortly afterwards she was notified that she had been rearrested, to be remanded in custody. The rumour had spread, and a large number of photojournalists were waiting outside the community hall. B left the building 20-30 minutes after the judgment had been pronounced, together with defence counsel, Ms Y, accompanied by a plain-clothes police officer who walked a few metres behind them. On the way to the unmarked police car, which was parked 20-30 metres from the exit, she was photographed a number of times..."

10. On 22 June 2001 *Dagbladet* published and extra edition featuring a photograph covering two thirds of a page, showing B, holding a handkerchief to her face, and her lawyer Y, taken in a side angle from behind. The picture was part of an article, entitled "The farm dispute led to homicide". An article underneath was entitled "Tense atmosphere before verdict". The caption stated "Arrested: [B] was this morning sentenced to 21 years of prison. Here, while crying, she is guided out of the premises by her lawyer [Y]".

11. On 23 June 2001 *Dagbladet* published a smaller photograph showing B seated inside an unmarked police car. The picture is part of an article entitled "Broken", with an accompanying text: "The heavy trip, [B] is lead out of the [court house] and taken to Lillestrøm police station."

12. On 23 June 2001 *Aftenposten* published a photograph covering one fifth of a page, showing B crying outside the court house, taken from the front holding a handkerchief, while her lawyer Y walks next to her and makes a deprecating gesture toward the photographer. A person walks behind, identified as a plain clothes police officer. Underneath the caption states: "21 years. [B] has realised it now – that freedom will not be the outcome. She is supported on the way out by defence counsel Y." The picture appeared next to an article entitled "Firm, clear – and appealed", commenting on the judgment. Below on the same page featured another article entitled: "The words are merciless- they fall like needles against the dense silence. Twisting around". This photograph had been purchased and published by a number of newspapers throughout the country.

13. In the above-mentioned issues *Dagbladet* and *Aftenposten* reported on the District Court's judgment and on the arrest. The prospects of arrests in the event of conviction had been an issue of discussion in the above newspapers during the weeks before.

14. B had not given her consent for photographs to be taken of her; on the contrary her lawyer Y attempted to prevent it. The authorisation to broadcast the delivery of the judgment had only concerned the reading out of the judgment as such.

C. The ensuing proceedings

15. On 6 July 2001 B's defence lawyer, F.S., reported the applicants and three of the photographers to the police for violation of section 131A of the 1915 Act, which led to charges being brought against them.

16. On 15 October 2003 the Nedre Romerike District Court acquitted the defendants of the charges, giving inter alia the following reasons:

> "The District Court underlines that the main rule must still be that the taking of photographs of a convicted person on his or her way out of the court premises is prohibited, as is the publication of such images, but that the prohibition will not apply where entirely special considerations so indicate.
>
> In the assessment of the District Court such entirely special and weighty considerations are present in this case. In this regard the District Court notes that [B] had been convicted of a horrific crime involving the triple homicide of the parents and sister of her husband. As has already been noted, this crime, the investigation and subsequent criminal trial hearing were the subject of unprecedented attention on the part of the media and the general public. A further point for the Court is that [B]'s identity had since long been revealed. Photographs of her had appeared in all the country's newspapers numerous times during the course of the investigation and in connection with the trial hearing before Nes District Court. During the period prior to the trial in the District Court, [B] had rarely consented to being photographed. Nevertheless, the press took a number of photographs of her without her knowledge. However, the situation was different during the almost eight week long trial. According to the information provided, [B] and her husband had consented to being photographed once per week during the trial. The photographs taken during these photo sessions appeared almost daily in the country's biggest newspapers and on various television channels. The issue of protection against identification through photographs was accordingly not an argument in this case. ...
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> ...
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> A key consideration underlying the prohibition against the taking of photographs in section 131A is to protect the accused or convicted person against portrayal in situations in which their self-control is reduced. In this case [B] had been sentenced to the most severe penalty permitted under the law for the triple homicide and was in a form of shock. On the other hand, the weight of this consideration is somewhat reduced by the fact that the taking of photographs did not take place until 25-30 minutes after the end of the court hearing at which the judgment was delivered. In the meantime she had had the opportunity to compose herself in a side room to the hearing room, in the presence of her two defence counsel and members of her family.
>
> In the assessment of the District Court it may be doubtful that these circumstances of themselves are sufficient for it to be necessary to limit the application of the prohibition with the result that publication must be considered permissible pursuant to Article 10 § 2 of the ... Convention ... . However, the court views this in the context of the fact that an arrest situation must be said to have existed at the time. [A], [B] and [C] were all arrested by the police during the minutes following the pronouncement of judgment while they were in the side rooms to the court premises in the company of their defence counsel. Two of the photographs that formed the basis for the penalty charge notices in this case depict [B] as she crosses the 20 - 30 metres between the

court premises and the police car that would take her to the police station in Lillestrøm. The third photograph depicts her seated inside the unmarked police vehicle. It is clear that the issue of arrest had been discussed in a number of mass media during the days preceding the pronouncement of judgment. There was speculation about whether in the event of a conviction the police would arrest the convicted persons or whether they would remain at liberty awaiting the appeal proceedings before the High Court that most people expected would come, whatever the outcome in the District Court. As noted earlier, the various editorial boards discussed what the significance of the prohibition against the taking of photographs would be in the event of an arrest situation. This issue was also discussed amongst the photojournalists who gathered at the exit from the court premises when it became known that three of the convicted persons had been rearrested. Based on the information on the case presented before the District Court it must be assumed that reasonable doubt as to whether any photographs whatsoever would have been taken of the convicted persons on this occasion had they not been arrested.

An arrest of this nature must be regarded as a new situation in terms of fact and law. This was an event that was awaited with considerable interest by the media and the general public. Interestingly, in the wake of the arrest, there was discussion amongst centrally placed lawyers about whether it was correct to arrest the convicted persons or not. The District Court regards the arrest as a new situation and an event that the mass media could legitimately cover as a news item using both words and images. In the assessment of the District Court the arrest aspect of the situation overshadows the fact that the convicted persons were on their way out of the court premises. *Aftenposten*'s feature on 23 June 2001 states on the front page, on which [B] is shown being escorted into the prison building, that an arrest took place immediately after judgment had been pronounced. The arrest is also described in detail in the extra edition of *Dagbladet* on 22 June 2001. The Court's assessment of the photographs concerned by the penalty charge notices [*foreleggene*] is that it is made clear to the reader that the intention of the photographs is to illuminate the situation surrounding the arrest.

As a general rule there is no prohibition against taking photographs of arrest situations. Notwithstanding the fact that the arrest in this case was undramatic involving no use of physical force on the part of the police and was carried out with the use of plain-clothes officers and unmarked police vehicles, the decisive point as regards the news aspect and the information needs of the media must be that these arrests marked a provisional end to a criminal case that had been the subject of extensive discussion. The three defendants who, prior to the trial before Nes District Court, had been at liberty for over a year were immediately arrested and subsequently remanded in custody. As a result of subsequent developments in the case, these three have not been out of prison since their arrest on 22 June 2001.

The District Court accordingly finds having assessed the circumstances as a whole, that entirely special considerations are present such that the prohibition against the taking of photographs in section 131A of the 1915 Act cannot entail criminal liability for the journalists and editors charged in this case. All five defendants will accordingly be acquitted.”

17. The Public Prosecutor appealed against the applicants' acquittal (not that of the photographers) directly to the Supreme Court.

18. By a judgment of 23 March 2004 the Supreme Court convicted the applicants of having published the impugned photographs in violation of sections 131A and 198 (3) of the 1915 Act and sentenced each of them to pay NOK 10,000 in fines, failing which the fines were to be converted into 15 days' imprisonment. The Supreme Court rejected a claim by B for compensation of non-pecuniary damage. Its reasoning, stated by Mrs Justice Stabel and joined in the main by the other members of the formation, included the following:

> "(13) The District Court held that B had not given her consent to being photographed. On the contrary, Y made active attempts on her behalf to prevent the taking of photographs. I find in addition that the consent that the District Court gave for the pronouncement of the judgment to be transmitted live on television applied only to the reading of the judgment. It is in any event clear that the authority of the Court to grant an exemption from the prohibition against the taking of photographs in section 131A(2) of the 1915 Act applies only during the trial itself. This provision will accordingly not apply in our case.
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> (14) The question in this case is whether it constituted a breach of section 131A of the 1915 Act and thus a criminal offence pursuant to its section 198 (3) to publish photographs of a weeping B, distraught and dissolved in tears, leaving the court premises having been convicted of aiding and abetting in a triple homicide. If this question were to be answered in the affirmative, a further question would arise as to whether the enforcement of the prohibition would be contrary to ... Article 10 of the Convention, cf. section 3 of the Human Rights Act. ...
>
> (15) It is the second sentence [of section 131A(1)] that is of interest in our case. ...
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> (16) The question is: What restrictions will follow from the phrase 'on his or her way to, or from, the hearing'. I agree with the District Court that the restrictions on the taking of photographs will apply only 'in the immediate vicinity of the court premises, i.e. normally up to the car parking area, and that the special protection that follows from section 131A will not apply after the accused has driven away from the court premises'. The District Court concluded that the provision therefore also encompassed B as she made her way out of the courtroom and into the waiting vehicle. I agree with this. I also agree with the District Court that the fact that she was under arrest at the time does not render the provision inapplicable.
>
> (17) I must accordingly conclude that the photographs in question contravene the prohibition against the taking of photographs in section 131A .... I must therefore examine whether ... Article 10 of the Convention would nevertheless lead to a different outcome.
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> (18) On the subject of the general balancing of interests I refer to the discussion in Supreme Court's judgment in the *Valebrokk* case (2003)... . The Supreme Court held by three votes to two that the filming by *TV2* of one of the convicted persons following the pronouncement of judgment in the *Baneheia* case did not constitute a punishable offence. The majority found, with the support of the minority, that the general rule must be that the taking of photographs in the courtroom was prohibited, including after the court had adjourned, but that this restriction would not apply 'where entirely special considerations suggest that the taking and publishing of photographs must be permitted'.

(19) The majority held that the purpose of the prohibition was to protect the 'reputation or rights' of the accused or convicted person, and that accordingly the Act pursued a legitimate aim. Although enforcement of the restrictions on the taking of photographs would generally constitute a serious interference pursuant to Article 10 § 1, it ought to be considered whether the interference nevertheless was necessary in a democratic society according to Article 10 § 2. The point of departure must be that it was generally important to protect accused and convicted persons against exposure through the taking of photographs in the courtroom, both during the hearing itself and in immediate connection with the hearings. The majority noted that most countries had prohibitions against the taking of photographs, although the scope and wording varies. By way of conclusion, paragraph 62 noted that:

'The reality of this is a general rule prohibiting the taking of photographs in the courtroom after court session has been adjourned, and a prohibition against the publication of the photographs, although the prohibition will not apply if warranted by entirely special considerations. The prosecution has argued that a rule of this nature would undermine the prohibition against the taking of photographs. It is of course true that a rule with certain limitations will be less absolute. Even so, a rule of this nature will not give the news media a 'free hand' to take and publish photographs when deemed expedient. The prohibition against the taking of photographs is supported by weighty and genuine considerations, not least in the situation immediately after the pronouncement of a judgment. Accordingly, in such a situation, strong reasons will have to be adduced for it to be accepted that it is required to photograph the convicted person and to put these pictures on display.'

(20) The view that the prohibition against the taking of photographs does not violate Article 10 would appear to be supported by the inadmissibility decision of 6 May 2003 rendered by the European Court in *P4 Radio Hele Norge ASA v. Norway* (dec.), no. 76682/01, ECHR 2003-VI. ...

(21) The European Court found the application to be 'manifestly ill-founded'. The Court held that the prohibition against recording and broadcasting must to some extent be viewed as an interference with the freedom of expression provided for in Article 10 § 1. Nevertheless, the Court held that there was no common ground in the legal systems of the Contracting States with regard to radio and television transmission from court proceedings. The balance between the need for openness and the need for court proceedings to be conducted without disturbance could be resolved in various ways. Moreover ... the Court held:

'Depending on the circumstances, live broadcasting of sound and pictures from a court hearing room may alter its characteristics, generate additional pressure on those involved in the trial and, even, unduly influence the manner in which they behave and hence prejudice the fair administration of justice. ...'

(22) The Court also held that the national authorities, particularly the courts, were best placed to assess whether in the individual case the broadcasting of proceedings would conflict with the 'fair administration of justice'. By way of conclusion the Court noted that on this point the Contracting States must enjoy a 'wide margin of appreciation'. Thus the general rule provided for in section 131A of the Administration of Courts Act, which applies equally to broadcasting and the taking of photographs, was not found to be problematic in relation to Article 10 of the Convention.

(23) ...It must be assumed that the margin of appreciation with regard to measures that are considered necessary with a view to securing 'fair administration of justice' is relatively broad.

(24) The opinions expressed in this decision must also have a bearing in relation to section 131A(1), second sentence, of the 1915 Act. The interests that the prohibition against the taking of photographs seeks to safeguard have been summarised in the following way in a note on the case by the Director General of Public Prosecutions:

-Protection against identification through the taking of photographs.

- Protection against portrayal in photographs in situations in which the subject's control is reduced.

- The safeguarding of one of the fundamental requirements for due process of law, namely that it should inspire trust and show consideration towards the persons involved. An accused or convicted person who has to force his or her way through press photographers and television teams may - quite apart from the issues of protection of personal integrity that arise - feel this to be a considerable additional burden.

- The need to protect the dignity and reputation of the courts. Since in general it is the courts that require the presence of the accused, which of itself may be burdensome, it is important that the courts should at the same time ensure that accused persons receive fair and considerate treatment. A failure to do so will affect not only the accused person him or herself, but also the court, which is required to ensure that the accused is treated in a considerate manner while being within and in the vicinity of the court premises.

(25) This means that in addition to privacy considerations the prohibition against the taking of photographs is supported by entirely central principles for due process. Although the need to safeguard the openness of proceedings, including satisfactory opportunities for an active and alert press, is a central consideration, this means that a balancing of interests must be conducted. The legislators conducted this balancing of interests with the introduction of section 131A of the 1915 Act, and the penal provision in section 19(3), in connection with the enactment of the Criminal Procedure Act of 22 May 1981 nr. 25. It is apparent from the legislative history that the background to this was that the existing legislation, including the Photography Act of 1960, was not found to afford the accused and convicted persons sufficient protection against being treated as 'fair game' by the press, particularly in cases of major interest to the public.

(26) I should add that the provision has not been regarded as a problem in relation to Article 10 of the Convention. Doubt on this point has mainly attached to other aspects of the new Article 390C of the Criminal Code, which was enacted with the legislative change of 4 June 1999 nr. 37, but which has not yet entered into force. This provision entails an extension of the prohibition against the taking of photographs, inter alia in relation to suspected persons in the custody of the police. Given the position of our case, I will not discuss this in further detail.

(27) Accordingly I will now move on to consider whether in our case there exist entirely special considerations, see the *Valebrokk* ruling, according to which the prohibition against the taking of photographs must yield to the freedom of expression.

In paragraph 63 of the judgment in that case (HR-2003-00037a-A63) the majority attached weight to the fact that the case - the harrowing child killings in Baneheia - had attracted extensive public interest and that the identity of the convicted person was known. It was also noted that the photographs might reveal something significant - in a negative sense - about his personality. The decisive point, however, which was discussed in paragraph 64, was that by their nature the photographs were corrective in that they showed a different and more unaffected reaction to the judgment than had been publicly expressed by defence counsel. This was viewed as information which the public had a right to receive in such a case.

(28) Applied to our case it is clear that the Orderud case, too, was horrifying and was the subject of enormous public interest. Moreover, B's identity was already widely known when the photographs were taken. However, the photographs of B were in my view of an entirely different nature. The reaction that she displayed to the judgment - distress and sobbing - must be characterised as normal and expected in the circumstances. She was in a situation in which she had reduced control, in immediate connection with her conviction by the District Court - in other words she was within the core area of what the prohibition against the taking of photographs is intended to protect. The decisive point must therefore be whether other elements were present that would give the press the right to take the photographs and the public the right to see them.

(29) The decisive point as regards the District Court's acquittal was that the arrest - which took place directly after judgment was pronounced - was perceived as a new situation in fact and in law. According to the District Court the arrest was an event that it was legitimate for the mass media to cover, including with the aid of photographs. In my view there are no grounds for maintaining that the arrest meant that 'entirely special considerations' applied. An arrest after a conviction by a court is not entirely unusual and would not have been unexpected in a serious homicide case such as the Orderud case, in which the accused persons had been at liberty throughout the trial. Moreover, I cannot conclude that the considerations that justify the protection against the taking of photographs in and around the court premises should be any less in such a situation. As long as the photographs do not show something entirely special, for example relating to the procedures of the police during the arrest itself, the protection must in my view remain the same.

(30) [The applicants'] defence counsel has argued forcibly that the shocking offences of which B was convicted and the extensive public interest in the case, gave the media a right and a duty to inform, even if this was contrary to the interests of the convicted persons. Moreover, in today's media-based society this information would not be complete without photographs, which suggested that the scope of the prohibition against the taking of photographs should be limited. In my view the protection afforded to the convicted person pursuant to section 131A of the 1915 Act must in principle apply regardless of the nature of the case and of the media interest that the case evokes. In practice, persons who have been convicted of very serious and sensational crimes will usually not be able to avoid being identified. Nevertheless, the other considerations justifying the prohibition against the taking of photographs will be present, frequently to a greater degree than in the case of other convicted persons.

(31) ...

(32) I have accordingly concluded that the District Court's acquittal is not based on a correct application of the law. The case has been sufficiently elucidated for the

Supreme Court to render a new judgment, cf. Section 345 second paragraph of the Criminal Procedure Act. The Defendants have not objected to this. I find that [the applicants] must be convicted in accordance with the indictment and that the sentence proposed by the prosecution, a fine of NOK 10,000, in the alternative a prison sentence of 15 days, is appropriate for both parties.

(33) I will conclude by considering the criminal injuries compensation claim.

(34) B has filed a claim for damages for non-pecuniary loss, not to exceed NOK 50,000, from each of the accused. She submits that given their convictions for breaches of sections 131A and 198(3) of the 1915 Act, the preconditions for awarding damages pursuant to section 3-6(1), last sentence, of the Damage Compensation Act will also have been met. I agree that this may frequently be the case. However, I will not consider this further since this involves a 'may' provision and I do not find that there are sufficient grounds to award economic compensation in this case.

(35) It will be clear from my comments on the question of penalty that considerations of protection of personal privacy have not been dominant in my assessment. Moreover it is clear from B's testimony that she was not even aware that the photographs had been taken. The violation lies solely in the publication of the photographs, which were not particularly conspicuous in relation to what had been published about her otherwise. This case has first and foremost revolved around the drawing of boundaries between the information work of the press and key principles of legal process. Given this situation it is my view that criminal sanctions against the editors in the form of fines will be sufficient for the purpose of emphasising that that boundary was transgressed and that there are no grounds for awarding damages."

II. RELEVANT DOMESTIC LAW

19. Section 131A, as in force at the material time, of the Administration of Courts Act 1915 (*domstolloven*) provided:

"During oral proceedings in a criminal case, photographing, filming and radio - or television recordings are prohibited. It is also prohibited to take photographs or make recordings of the accused or the convicted on his or her way to, or from, the hearing or when he or she is staying inside the building in which the hearing takes place, without his or her consent.

If there are special reasons for doing so, the court may in the course of the proceedings make an exception from the [above] prohibition if it can be assumed that it would not unduly affect the examination of the case and no other reasons militate decisively against doing so. Before authorisation is given the parties should have an opportunity to express their views."

20. Section 198(3) provided that the taking of photos or recordings made in breach of section 131A is punishable by the imposition of fines.

III. RECOMMENDATION BY THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE

21. The Appendix to the Recommendation Rec(2003)13 of the Committee of Ministers to member states on the provision of information through the media in relation to criminal proceedings (Adopted by the Committee of Ministers on 10 July 2003 at the 848th meeting of the Ministers' Deputies) contains the following principle of particular interest to the present case:

> "**Principle 8 - Protection of privacy in the context of on-going criminal proceedings**
>
> The provision of information about suspects, accused or convicted persons or other parties to criminal proceedings should respect their right to protection of privacy in accordance with Article 8 of the Convention. Particular protection should be given to parties who are minors or other vulnerable persons, as well as to victims, to witnesses and to the families of suspects, accused and convicted. In all cases, particular consideration should be given to the harmful effect which the disclosure of information enabling their identification may have on the persons referred to in this Principle."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

22. The applicants complained under Article 10 of the Convention that the Supreme Court's judgment of 23 March 2004 entailed an interference with their right to freedom of expression that was not supported by sufficient reasons and was therefore not "necessary" within the meaning of this provision.

In so far as is relevant, Article 10 of the Convention reads:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 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, ... for the protection of the reputation or rights of others, ... or for maintaining the authority and impartiality of the judiciary."

23. The Court notes form the outset that it was undisputed that the Supreme Court's judgment of 23 March 2004, concluding that the publication of the photographs in question by *Dagbladet* and *Aftenposten* on

respectively 22 and 23 June 2001 constituted an offence under sections 131A and 198(3) of the 1915 Act and ordering that they each pay NOK 10,000 in fine, amounted to an interference with their right to freedom of expression as guaranteed by the first paragraph of Article 10. The Court, having regard to its own case-law, sees no reason to hold otherwise (see *News Verlags GmbH & Co.KG v. Austria*, no. 31457/96, § 40, ECHR 2000-I).

24. As to the fulfilment of the conditions in paragraph 2 it was common ground between the parties that the interference was prescribed by law, namely the aforementioned provisions of the 1915 Act. The Court is satisfied that this condition was fulfilled.

25. Nor did the applicants contest that the interference pursued a legitimate aim, without however specifying which of the aims listed in paragraph 2 were relevant.

26. The Government, referring to the considerations mentioned by the Supreme Court in paragraph 24 of its judgment, affirmed that the interference pursued the aims of protecting the privacy of an individual and maintaining central principles of due process.

27. The Court considers that the interference could be deemed to pursue the legitimate aims of protecting "the reputation or rights of others" and "maintaining the authority and impartiality of the judiciary" in the sense of paragraph 2 of Article 10.

28. On the other hand, the parties were in disagreement as to whether the restriction was necessary in a democratic society for the achievement of the legitimate aims.

A. Submissions of the parties

1. The applicants' arguments

29. As to whether the interference was necessary in a democratic society, the applicants did not contest that, generally, there would be weighty reasons for prohibiting the taking of photographs of defendants in criminal cases in court or on their way to or from the court. However, they argued that the reasons relied on by the Supreme Court in imposing the restrictions on the publication of the impugned photographs, although they were relevant, were not sufficient for the purposes of the necessity test to be carried out under Article 10 § 2 of the Convention.

30. The disputed pictures of B had been taken when she was arrested by the police, about half an hour after she had been convicted and sentenced in open court to the maximum statutory penalty for aiding and abetting triple murder. The delivery of the judgment had been broadcast live. Not only had there been a great public interest in the case as a whole but the arrest of B had marked a new development in the case of which the public had the right

to be informed. The public interest had not laid in her identity, which had already been well known, but in the fact that she had been arrested and taken into police custody after being free for the last 18 months.

31. The applicants disputed the Government's argument to the effect that pictorial reporting on a subject of public interest could only be regarded as covered by that interest if it showed something special or unexpected. In any event, when assessing the degree of public interest in the pictures at issue, regard should also be had to the fact that B's own lawyer had been reported by the press to have stated that the arrest had been an unnecessary harassment by the police. Furthermore, the legitimacy of the arrest had been discussed in public by legal professionals, rendered by *Dagbladet* on 23 June 2001 and had definitely represented a turning point in the *Orderud* case.

32. The crucial question was not, as the Government claimed, whether the pictures had been of public interest, which they where, but whether there were sufficiently pressing needs to ban their publication. Neither the interests of B nor the interests of fair administration of justice required such a ban in the present case.

33. As to B's interests, the Government had attached decisive weight to the fact that she had not consented to being photographed. However, it was contrary to press freedom to grant persons who, like B, had played a central role in issues of great public interest the opportunity to govern press coverage of such issues through their own consent. It would imply that B could use her consent to get media coverage when it suited her case and at the same time restrict media coverage by withholding consent when circumstances were less favourable to her or if she disliked the particular media coverage. B had actually made active use of the press when it suited her interests.

34. In addition, as also noted by the District Court, the contents of the photographs could not be considered to have been particularly offensive or defamatory.

35. The applicants would not dispute that B, when she was leaving the court building, had been in a situation that fell within the prohibition in section 131A of the 1915 Act. However, the Supreme Court, which had dealt with the matter only in a general manner, had failed to assess any particular need relating to the particular photographs or to her specific circumstances. In the applicants' opinion these were not such that the interference with their freedom of expression could be justified by the interests of protecting B's privacy. The pictures had not been taken in court or immediately after the verdict or in the court building, but outside the court building half an hour after the verdict. There was no prohibition against taking photographs of an arrest, and it was exactly this latter circumstance that had motivated the taking and publishing of the pictures. In

that sense, B had been outside the intended core protection area of section 131A.

36. In the applicant's view, none of the general justifications for the prohibition in section 131A of the 1915 Act had applied with any or much strength in this case. Firstly, B had since long been identified, wherefore protecting her against identification would have been futile. As to the second consideration – the need to protect the convicted person or the accused from being photographed in situations of reduced self control, the applicants stressed that B had left the court room when she understood that she was about to be convicted and had naturally reacted to the conviction. Before the pictures had been taken, she had spent more than half an-hour alone with her family and lawyers to gather herself. The Supreme Court had stated that the interests of protection of personal privacy had not been predominant. This was illustrated by the fact that none of the other persons convicted had complained about pictures having been taken of them and been published. Also the third consideration - to ensure that legal proceedings as far as possible inspire confidence in and show consideration for the persons involved - carried limited weight compared to the considerable public interest in the case generally and in the arrest of B specifically. To allow the taking and publishing of the pictures in the present case would not have undermined the prohibition in section 131A of 1915 Act. As to the fourth reason, the applicants stressed that the pictures had been taken in a parking area outside the court house and that it had been difficult therefore to see how they could have prejudiced the dignity and reputation of the judiciary.

37. The applicants emphasised that, contrary to what was suggested by the Supreme Court, none of the considerations relied on by the European Court in *P4 Radio Hele Norge ASA*, cited above, for allowing States a wide margin of appreciation applied in the present case. Whereas the disputed restriction in the former case had not involved the prohibition of publication of specific expressions, but only limitations of a more trivial nature on the freedom to report from the proceedings by the means of live radio broadcasting, the present case concerned criminal conviction of members of the press for publication of specific expressions, notably pictures that documented the arrest of B. Referring to the Court's judgment in *News Verlags GmbH & Co.KG v. Austria*, (no. 31457/96**,** ECHR 2000-I), the applicants argued that pictorial reporting should be judged by the same standards as written articles in the media.

38. Finally, the applicants submitted that the interference complained of had been disproportionate to the legitimate aim pursued. In their view, the Supreme Court had erroneously adopted an approach which was the inverse of the one implied by Article 10 of the Convention. According to the Supreme Court, the question had not been whether there existed weighty reasons to justify the interference but, the other way round, whether there

had existed very special considerations warranting the prohibition in section 131A to yield to the freedom of expression as protected by Article 10. In finding that a photograph must show something special in order to fall within the protection of Article 10, the Supreme Court had failed to have due regard to the freedom of speech. The application of such a norm constituted a serious infringement of the freedom of the media to report on serious criminal court cases.

39. In short, the applicants submitted, the disputed interference with the applicants' right to freedom of expression was not offset by any weighty countervailing interests pertaining either to B's interest of privacy or to considerations of fair administration of justice.

2. The Government's arguments

40. On the question whether the interference was necessary in a democratic society the Government maintained that even though the *Orderud* case had been horrifying and the subject of enormous public interest, the photographs in question had been of limited public interest. B's identity had been well known to the public at the time when the photographs had been taken. The arrest of the four freshly convicted persons admittedly represented developments of public interest, as was also recognized by the Supreme Court. However, a crucial fact for the assessment of the present case was that the impugned photographs had not been primarily used to illustrate the arrest. Rather than contributing to any debate of public interest, the sole purpose had been to satisfy readers' curiosity about B's emotional reaction to her conviction, which showed nothing abnormal or unexpected. Thus the impugned reporting in the present case fell outside the function of the press to serve as a public watchdog.

41. While not contesting the Court's powers to make its own interpretation of the pictures in the context that they had been published, knowledge of national conditions was an important element in assessing the degree of public interest in a given subject. In the Government's opinion, the national Supreme Court was better placed than the Court to assess this matter.

42. The Government maintained that although B's previous co-operation with the press was a valid argument with regard to her general protection against being photographed, this consideration did not apply in the present case. The pictures had been taken shortly after she had been found guilty of having wilfully murdered three persons and sentenced to 21 years' imprisonment. B had throughout the proceedings claimed her innocence. Both the fact that she had been found guilty and that she had been imposed the maximum penalty according to Norwegian law were clearly life-altering decisions for her, resulting in shock and utmost despair.

43. It was, in the Governments view, undisputable that, despite her previous co-operation with the press, in this particular situation B was

entitled to the same protection against being photographed as any other person who had been convicted. She was in a situation of reduced self-control, which was precisely the kind of situation in which the prohibition was designed to afford protection. Convicted persons had, even in serious criminal cases like the present one, a legitimate right to be protected from being photographed in situations of reduced self-control. Without such a prohibition undignified situations could easily arise in which accused and convicted persons would have to force their way past photographers waiting outside the court room or in the immediate premises. Like in *Von Hannover v. Germany*, (no. 59320/00, § 68, ECHR 2004-VI), an additional element was that the photographs had been taken without B's consent. The Government stressed that any person, including persons considered as public figures, had a legitimate interest in protection against being photographed in certain situations. This was certainly the case of convicted persons.

44. The Government, referring to the Court's ruling in *P4 Radio Hele Norge ASA v. Norway* (dec.), no. 76682/01, ECHR 2003-VI, maintained that a wide margin of appreciation should apply in the instant case. The Supreme Court had furthermore presented relevant and sufficient reasons for accepting the interference.

45. The interference in this case had been of rather trivial nature in that it had only involved a restriction on the newspaper's choice as to the means of imparting information. B's reaction could have been appropriately described by words. The extent of the restriction had also been limited. According to Section 131A of the 1915 Act, the prohibition had included only the immediate vicinity of the court premises, i.e. normally up to the car parking area. Photographing beyond that point was not prohibited. Thus, the prohibition had entailed only a minor interference with the applicants' freedom of expression. Accordingly, even the arrest could be illustrated in another way, for example by photographing B at the police station or in prison.

46. The Government further pointed out that rules which limited the right of the press to cover court proceedings could be found in the national legal systems of several European States. Sweden and Denmark had corresponding rules to those that applied in Norway.

47. In light of the above and, in particular, due process considerations and the need to protect the person concerned in a situation of reduced self-control following her conviction, the interference with the applicants' freedom of expression was "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention.

B. Assessment by the Court

1. General principles

48. The test of "necessity in a democratic society" requires the Court to determine whether the "interference" complained of corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient (see Sunday Times *v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, p. 38, § 62). In assessing whether such a "need" exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not, however, unlimited but goes hand in hand with European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10.

49. An important factor for the Court's determination is the essential function of the press in a democratic society. Although the press must not overstep certain bounds, in particular in respect of the reputation and rights of others or of the proper administration of justice, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 59, ECHR 1999-III). This duty extends to the reporting and commenting on court proceedings which, provided that they do not overstep the bounds set out above, contribute to their publicity and are thus consonant with the requirement under Article 6 § 1 of the Convention that hearings be public. Not only do the media have the task of imparting such information and ideas: the public has a right to receive them (see *News Verlags GmbH & Co.KG v. Austria*, no. 31457/96, §§ 55-56, ECHR 2000-I; *Worm v. Austria*, judgment of 29 August 1997, *Reports of Judgments and Decisions* 1997-V, p. 1551-2, § 50).

50. In sum, the Court's task in exercising its supervisory function is not to take the place of the national authorities but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation (see, among many other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I).

51. In this connection, the Court notes that in convicting and sentencing the applicants in this case, the Norwegian Supreme Court attached considerable weight to the European Court's decision in the above cited *P4 Radio Hele Norge ASA v. Norway* ((dec.), no. 76682/01, ECHR 2003-VI.), relating to the same case complex and in which it held *inter alia*:

> "... [T]he Contracting States must enjoy a wide margin of appreciation in regulating the freedom of the press to transmit court hearings live. The Court does not consider that a legal presumption on the national level against allowing live transmission, such

> as that contained in section 131A of the Administration of Courts Act, in itself raises an issue of failure to comply with Article 10 of the Convention."

52. That case dealt with an issue of prohibition, pursuant to the *first* sentence of section 131A(1) of the 1915 Act, to transmit the trial hearing before the Nes District Court live (by radio), thereby limiting the choice of the means available to the press in covering the proceedings. Also in this case there is a question of restriction on the choice of journalistic means, in that it concerns a prohibition, according to the *second* sentence of section 131A(1), to take photographs of one of the convicted persons outside the court building after the proceedings had come to a close. Although the situations were different, the Court notes that the two rules pursued the same interests, notably the need to avoid additional pressure being brought on those involved in the trial. The Court therefore considers that the rationale for according States a wide margin of appreciation in the former case is applicable to the present instance.

53. The subject matter at issue in this case relates, on the one hand, to the right of the press under Article 10 of the Convention to inform the public on matters of public concern regarding ongoing criminal proceedings and, on the other hand, to the State's positive obligations under Article 8 of the Convention to protect the privacy of convicted persons in criminal proceedings (see Principle 8 in the Appendix to Recommendation Rec(2003)13 of the Committee of Ministers to member States on the provision of information trough media in relation to criminal proceedings, quoted at paragraph 21 above) and its obligations under Article 6 of the Convention to ensure a fair administration of justice.

54. It is to be noted that Norway is not in an isolated position with regard to prohibition to photograph charged or convicted persons in connection with court proceedings. According to information available to the Court, similar prohibitions exist in the domestic laws of Cyprus, England and Wales, and legal restrictions apply also in Austria and Denmark. Whilst in a number of countries such matters are left to self-regulation by the press, it cannot be said that there is a European consensus to this effect.

55. In light of the above considerations, the Court considers that the competent authorities in the respondent State should be accorded a wide margin of appreciation in their balancing of the conflicting interests.

2. *Application of those principles*

56. The Court observes that the national legal provision contained in the second sentence of section 131A(1) of the 1915 Act, stipulated a prohibition against the taking of photographs of an accused or a convicted person, without his or her consent, on his or her way to or from the court hearing. According to the Supreme Court's case-law, the prohibition was not absolute but would be set aside in instances where the national court found

that it would conflict with Article 10 of the Convention. The Court will therefore confine its examination to the manner in which the national courts applied the prohibition to the concrete circumstances of the case.

57. In this regard, the Court notes that the Supreme Court based its decision in part on considerations of protection of privacy and in part on the need to safeguard due process (see paragraphs 24 and 25 of the Supreme Court's judgment quoted at paragraph 18 above). In the Court's view, these were undoubtedly relevant reasons for the purposes of the necessity test to be carried out under Article 10 § 2. It will next consider whether they were also sufficient.

58. Largely because of the exceptionally heinous character of the criminal offences in respect of which B and her co-accused had been charged, the trial had been given unprecedented media coverage. It is undisputed before the Court that the passing of the judgment and the arrest immediately after conviction and sentence at first instance was a matter of public interest.

59. However, under the terms of Article 10 § 2, the exercise of the freedom of expression carries with it “duties and responsibilities”, which also apply to the press. In the present case this relates to protecting “the reputation or rights of others” and “maintaining the authority and impartiality of the judiciary”. These duties and responsibilities are particularly important in relation to the dissemination to the wide public of photographs revealing personal and intimate information about an individual (see *Von Hannover v. Germany*, no. 59320/00, § 59, ECHR 2004-VI; *Hachette Filipacchi Associés c. France*, n° 71111/01, § 42, 14 juin 2007). The same applies when this is done in connection with criminal proceedings (see Principle 8 in the Appendix to Recommendation Rec(2003)13 of the Committee of Ministers to member States on the provision of information trough media in relation to criminal proceedings, quoted at paragraph 21 above). The Court reiterates that the notion of private life in Article 8 of the Convention extends to a person's identity, such as a person's name or a person's picture (*Von Hannover* , cited above, § 50; see also *Schüssel v. Austria* (dec.), no. 42409/98, 21 February 2002).

60. It is undisputed that at the time when the photos were taken B's identity was already well known to the public and that, accordingly, there was no need to restrict the disclosure of her identity. The Court must nevertheless examine whether the contents of the photos, seen in the context of their publication, was such that the restriction on publication was justified.

61. The Court notes that two of the impugned photographs, one taken from the side, the other from a more frontal angle, depicted B as she had left the court house accompanied by her lawyer and was being followed by a civil clothed police officer to an unmarked police car. The third photograph, taken through the window of the police car, depicted her seated in the back

near the window. All three photographs portrayed her distraught with a handkerchief close to her face in a state of strong emotion. She had just been arrested inside the court house after being notified of the District Court's judgment convicting her of triple murder and imposing on her a 21 years' prison sentence, the most severe sentence contemplated under Norwegian law. It must be assumed that B, who was shown in tears and great distress, was emotionally shaken and at her most vulnerable psychologically. As observed by the Supreme Court, immediately in connection with the delivery of the District Court judgment she was in a state of reduced self control, a situation which lay at the core of the protection which the relevant statutory provision was intended to provide. Although the photographs had been taken in a public place (see, *mutatis mutandis*, *Peck v. the United Kingdom*, no. 44647/98, §§ 57-63, ECHR 2003-I) and in relation to a public event, the Court finds that their publication represented a particularly intrusive portrayal of B. She had not consented to the taking of the photographs or to their publication.

62. The Court is unable to agree with the applicants' argument that the absence of consent by B was irrelevant in view of her previous cooperation with the press. Her situation could not be assimilated to that of a person who voluntarily exposes himself or herself by virtue of his or her role as a politician (*Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 26, § 42; *News Verlags GmbH & Co.KG* , cited above, § 56; *Krone Verlag GmbH & Co. KG* , cited above, §§ 35-39) or as a public figure (see *Fressoz and Roire v. France* [GC], no. 29183/95, § 50, ECHR 1999-I; *Tønsbergs Blad A.S. and Haukom v. Norway*, no. 510/04, § 87, ECHR 2007-...) or as a participant in a public debate on a matter of public interest (see, for instance, *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 52, ECHR 1999-VIII; *Oberschlick v. Austria (no. 2)*, judgment of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, pp. 1275-76, §§ 31-35). Accordingly, the fact that B had cooperated with the press on previous occasions could not serve as an argument for depriving her of protection against the publication by the press of the photographs in question.

63. The Court therefore finds that the need to protect B's privacy was equally important as that of safeguarding due process. While the Supreme Court attached more weight to the latter (see paragraph 35 of its judgment quoted at paragraph 18 above), for the European Court the former is predominant. However, when considered in the aggregate, both reasons corresponded to a pressing social need and were sufficient. The interests in restricting publication of the photographs outweighed those of the press in informing the public on a matter of public concern.

64. Finally, the Court notes that the fines imposed were not particularly severe.

65. In sum, the Court finds that, by prohibiting the taking and publication of the photographs of B on the way from the court building to

an awaiting police car, the respondent State acted within its margin of appreciation in assessing the need to protect her privacy and those of fair administration of justice. It is satisfied that the restriction on the applicant editors' right to freedom of expression resulting from the Supreme Court's judgment of 23 March 2003 was supported by reasons that were relevant and sufficient, and was proportionate to the legitimate aims pursed.

There has therefore been no violation of Article 10 of the Convention in the present case.

FOR THESE REASONS, THE COURT UNANIMOUSLY

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

Done in English, and notified in writing on 16 April 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Registrar	Christos Rozakis President

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

(a) concurring opinion of Judge Rozakis;
(b) concurring opinion of Judge Malinverni.

C.L.R.
S.N.

CONCURRING OPINION OF JUDGE ROZAKIS

While I fully subscribe to the conclusion reached by the Chamber that there had been no violation in the circumstances of the present case, I am unable to agree with part of its reasoning leading to its operative findings. More particularly I contest the view of the majority that the national authorities of "the respondent State should be accorded a wide margin of appreciation in their balancing of the conflicting interests" (see paragraph 55 of the judgment); a finding which is mainly based on an admissibility decision given by a Chamber of the Court in 2003 in the case of *P4 Radio Hele Norge ASA v. Norway* (see paragraph 50).

The reasons for my departure from such an approach are the following:

(a) The Chamber has applied in the circumstances of the case the concept of the margin of appreciation with a degree of automaticity, as the Court has done many times in similar situations, although the facts of the case do not require – I would say "allow" – such a step to be taken. Indeed, if the concept of the margin of appreciation has any meaning whatsoever in the present-day conditions of the Court's case-law, it should only be applied in cases where, after careful consideration, it establishes that national authorities were really better placed than the Court to assess the "local" and specific conditions which existed within a particular domestic order, and, accordingly, had greater knowledge than an international court in deciding how to deal, in the most appropriate manner, with the case before them. Then, and only then, should the Court relinquish its power to examine, in depth, the facts of a case, and limit itself to a simple supervision of the national decisions, without taking the place of national authorities, but simply examining their reasonableness and the absence of arbitrariness.

(b) The facts of the present case do not lend themselves to any argument that the application of the concept of the margin of appreciation – in an automatic manner, as I said before – was an indispensable tool for the Court in order to reach its conclusions. This is a rather banal case of freedom of expression, with the specificity that it concerns the taking of pictures of a person in a vulnerable situation, while she was leaving a court house, after having been convicted for a triple murder committed together with three other co-accused. Pictures taken without her consent show her crying outside the court "while her lawyer walks next to her and makes a deprecating gesture towards the photographers" (paragraph 12). One may reasonably question what is the particular element in these facts which led the First Chamber of our Court to consider that the national authorities were better placed than the judges of our Court to balance the interests involved –

namely the interest of freedom of expression against the interests of privacy – and allow the national authorities a "wide" margin of appreciation. Particularly, if one takes into account that in matters of clashes between freedom of expression (and more specifically the taking of photographs in a public place) and the right to private life, the Court has already developed jurisprudence to the effect that the balance should be tipped in favour of private life (see paragraph 59); a finding which could easily have been transposed by analogy to the circumstances of this case. Furthermore, it is my opinion that the mere absence of a wide consensus among European States concerning the taking of photographs of charged or convicted persons in connection with court proceedings does not suffice to justify the application of the margin of appreciation. This ground is only a *subordinate* basis for the application of the concept, if and when the Court first finds that the national authorities are better placed than the Strasbourg Court to deal effectively with the matter. If the Court so finds, the next step would be to ascertain whether the presence or absence of a common approach of European States to a matter *sub judice* does or does not allow the application of the concept.

(c) But the most catalytic argument against the application of the margin of appreciation in the circumstances of the case is given by the reasoning of the judgment itself. Perusal of the text clearly shows that the Chamber did not confine itself simply to a review of the reasonableness and non-arbitrariness of the national decisions in the case. By examining whether the reasons for the necessity test were not only relevant but also sufficient, it proceeded in reality with an in-depth analysis of the circumstances of the case. Paragraphs 61 et seq. speak eloquently for themselves. In paragraphs 61 and 62 the Court clearly undertakes the task of reassessing the facts to balance the interests involved, in a way which indicates its autonomous task to examine them afresh. In paragraph 63 it even disagrees with the national Supreme Court, by attaching greater importance to the applicant's privacy than the national court did, in relation to the safeguards of due process. One can really wonder, when reading this part of the judgment, what is really left to the margin of appreciation invoked by the Court, and how different its judgment would have been if no reference to the concept had been made.

(d) Lastly, it should be underlined that the respondent State's Government themselves do not dispute, in their observations, the powers of the Court "to make its own interpretation of the pictures in the context in which they had been published"; although admittedly they also point out that "knowledge of national conditions was an important element in assessing the degree of public interest in a given subject", a matter which leads the Government to the conclusion that the national Supreme Court was better placed than the Court to assess the issues of the case. Yet, despite

these reservations concerning the limits of the Court's interference in the case, it is interesting to note the acknowledgment by the respondent State of the Court's autonomous power to reassess *de novo* the material before it.

In conclusion, I respectfully submit that in cases like the present case the Court should carefully reconsider the applicability of the concept of the margin of appreciation, avoid the automaticity of reference to it, and duly limit it to cases where a real need for its applicability better serves the interests of justice and the protection of human rights.

CONCURRING OPINION OF JUDGE MALINVERNI

(Translation)

1. I agree with my colleagues that there has not been a violation of Article 10 of the Convention in this case. I cannot agree, however, with their reasoning.

2. Basing its reasoning on a similar case, namely *P4 Radio Hele Norge ASA v. Norway* ((dec.) no. 76682/01, ECHR 2003-VI), in which the Court had asserted that “the Contracting States must enjoy a wide margin of appreciation in regulating the freedom of the press to transmit court hearings live” (§ 51), the Court states that “the rationale for according States a *wide* margin of appreciation in the former case is applicable to the present instance”[1] (see paragraph 52 of the judgment). The Court concludes from this that “the competent authorities in the respondent State should be accorded a *wide* margin of appreciation in their balancing of the conflicting interests”[2] (paragraph 55 of the judgment).

3. It is the adjective “wide” that I cannot accept, and thus my disagreement with my colleagues is centred on the scale of the margin of appreciation. An argument built upon a single case is not enough to convince me.

4. Legal writers have made several criticisms with regard to the relatively fluctuating and imprecise nature of the criteria by which the Court decides to accord States a more or less wide margin of appreciation.[3] It is therefore essential that the case-law establish clear, objective and specific criteria that make it possible to identify in which cases it is appropriate to accord States a wide margin of appreciation or, on the contrary, to limit it. In other words, we need criteria that make it possible to determine in which scenarios the Court must show judicial self-restraint and in which it may exercise more extensive European supervision, typical of the “judicial activism” approach.

5. An examination of the case-law indicates a number of trends. First of all, the Court recognises that the States have a wide margin of appreciation

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[1] Italics added.
[2] Italics added.
[3] W.J. Ganshof van der Meersch, “Le caractère autonome des termes et la marge nationale des gouvernements dans l’interprétation de la Convention européenne des droits de l’homme”, in *Mélanges G. Wiarda*, Köln, 1990, p. 17; R. St. MacDonald, “The margin of appreciation”, in R. St. MacDonald, F. Matscher and H. Petzold, *The European System for the Protection of Human Rights*, Dordrecht, 1993, p. 93; P. Lambert, “Marge nationale d’appréciation et contrôle de proportionnalité”, in F. Sudre, *L’interprétation de la Convention européenne des droits de l’homme*, Brussels, 1998, p. 64; J. Callewaert, “Quel avenir pour le marge d’appréciation?” in *Mélanges R. Ryssdal*, Köln, 2000, pp. 147-166.

where they must adopt the necessary measures in the event of a public emergency threatening the life of the nation, within the meaning of Article 15 of the Convention.[1]

6. Apart from this particular case, the Court generally recognises that States have a wide margin of appreciation in fields in which there is no common ground between the legal systems of the Contracting States.[2] Thus, the lack of a uniform conception of the significance of religion[3], or the absence of common principles with regard to adoption by homosexuals[4] enabled the Court to grant the States substantial discretion.

7. On the other hand, in the well-known judgment *Sunday Times v. the United Kingdom (No. 1)*, a more extensive European supervision was considered acceptable with regard to restrictive measures justified by the need to guarantee the authority and impartiality of the judiciary. The Court found that in this area the domestic law and practice of the States revealed a fairly substantial measure of common ground and that the latter's margin of appreciation was necessarily more limited.

8. We may therefore conclude that, although the States' margin of appreciation will vary according to the circumstances, the subject matter and the background, a determining factor is the existence or non-existence of common ground between the legal systems of the Contracting States.

9. Another criteria enabling the Court to extend or, on the contrary, to limit the scope of the margin of appreciation is the nature of the Convention right in issue and its importance.[5]

10. Firstly, the Court's scrutiny is all the stricter and the State's margin of appreciation all the more limited where the interference concerns a right which touches on the individual's private sphere, such as the right to have

[1] See the judgment in *Ireland v. the United Kingdom*, 18 January 1978, Series A no. 25 § 207.
[2] See, for example, the judgment in *Rasmussen v. Denmark*, 28 November 1984, Series A no. 87, § 41; *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24, § 48.
[3] See the judgment in *Otto Preminger Institut v. Austria*, 20 September 1994, Series A no. 295-A, § 50.
[4] See the judgment in *Fretté v. France*, 26 February 2002, Reports 2002-I, § 59.
[5] See, for example, the judgment in *Buckley v. the United Kingdom*, 25 September 1996, Rec. 1996-VI, § 74, or *Laskey, Jaggard and Brown v. the United Kingdom*, 19 February 1997, Rec. 1997-I, § 42.

homosexual relationships[1], the parental right of access[2], or the right to confidentiality of personal medical data.[3]

11. Further, we find that the Court's supervision increases, to the extent of limiting the States' margin of appreciation to its simplest form, where a case directly concerns the essential values of democratic society. This observation is valid with regard to freedom of the press[4], but also in respect of freedom of association[5] and, in general, of all the freedoms protected in Articles 9 to 11 of the Convention.[6]

12. In the Court's case-law, the criterion of the importance of the right in issue, and especially of its relationship with the values that should prevail in a democratic society, is thus equally as important as the existence of common ground between the member States' legal systems.

13. If we consider these two criteria – the existence of a European consensus and the importance of the right in issue – it follows that, in the instant case, the Court ought to have accorded the Norwegian authorities a limited margin of appreciation.

14. With regard to the first criterion, there is in fact little unanimity within the member States of the Council of Europe concerning the prohibition on taking photographs of individuals who have been charged or convicted. By the Court's own admission, only four States have imposed a prohibition: in addition to Norway, these are Denmark, Cyprus and the United Kingdom (England and Wales) (see paragraph 54 of the judgment).

15. As to the second criterion, the freedom in issue here is the freedom of the press, which plays an essential role in a democratic society, as the Court itself acknowledges (see paragraph 49).

16. Contrary to what one might think, the fact of allowing only a limited margin of appreciation does not necessarily lead to a finding that there has been a violation of the Convention. It is enough that the interference found does not exceed this margin.

17.

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[1] See the judgment in *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45.

[2] See the judgment in *B. and Others v. the United Kingdom*, 8 July 1987, Series A, no. 21.

[3] See the judgment in *Z. v. Finland*, 25 February 1997, Reports 1997-II.

[4] See the judgment in *Sunday Times v. the United Kingdom (No. 1)*, 26 April 1979, Series A, no. 30, §§ 65 et seq.; and *Castells v. Spain*, 23 April 1992, Series A, no. 236, § 43.

[5] See the judgment in *United Communist Party of Turkey v. Turkey*, 30 January 1998, Reports 1998-I.

[6] See the judgments in *Fressoz and Roire v. France* [GC], § 45, 1999-I, and *Bladet Tromsø and Stensaas v. Norway*, Reports 1999-III, § 59.