

DRENŠKI LASAN LAW FIRM
ATTORNEY-AT-LAW VIŠNJA DRENŠKI LASAN

Kralja Držislava 4, 10000 Zagreb
Tel: (01) 3773-905; Mobile: 098 207-973
Fax: (01) 3773-905
E-mail: visnja.drenski@inet.hr

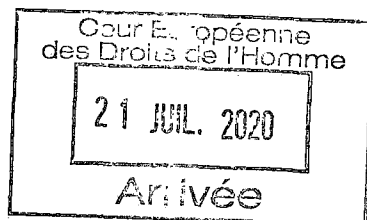
16 June 2020



TO THE EUROPEAN COURT OF HUMAN RIGHTS

CASE OF MRAOVIĆ v. CROATIA

(Application no. 30373/13)



**REQUEST FOR REFERRAL TO THE GRAND CHAMBER
SUBMITTED ON BEHALF OF THE APPLICANT JOSIP MRAOVIĆ**

Applicant's Representative
Višnja Drenški Lasan

As the legal representative of the applicant, Mr Josip Mraović, a national of the Republic of Croatia, I am submitting, within the prescribed time-limit, a request for the review of his judgment before the Grand Chamber in accordance with Article 43 of the Convention.

On 14 May 2020, the European Court of Human Rights ("the ECHR") delivered a judgment in the case of *Mraović v. Croatia* (Application no. 30373/13), holding, by six votes to one, that there had been no violation of Article 6 § 1 of the Convention in respect of the applicant's right to a public hearing in criminal proceedings conducted against him in the Republic of Croatia.

The applicant, Mr Josip Mraović, maintains that the case at issue raises serious and important questions concerning the interpretation of the Convention as well as serious issues of general importance, as set out in Article 43 § 2 of the Convention, and that it should therefore be reviewed by the Grand Chamber. The dissenting opinion of Judge Pauline Koskelo supports such a view.

The present case concerns criminal proceedings conducted against the applicant in the national legal system for sexual violence. In such proceedings, the protection of privacy of the alleged victim of crime may require restrictions to be imposed on the right to a public hearing to which the accused is entitled.

GENERAL POSITIONS IN THE ECHR'S CASE-LAW

A general position in the ECHR's case-law is that the conduct of trials with the exclusion of the public must be strictly required by the circumstances of a particular case, keeping in mind the fact that the holding of court hearings in public constitutes a fundamental principle enshrined in Article 6 § 1 of the Convention.

This means that in a particular criminal case a specific finding must be made in that regard. Such a finding must provide sufficient and relevant reasoning to demonstrate such necessity and the exclusion of the public is to be limited to the extent necessary in order to preserve the interest for the protection of which the measure is taken (see *Belashev v. Russia*, Application no. 28617/03, § 83, 4 December 2008; *Pichugin v. Russia*, Application no. 38623/03, § 23, 23 October 2012; and *Boshkoski v. North Macedonia*, Application no. 71034/13, §§ 50-52, 4 June 2020).

In other words, in its case-law, the ECHR has hitherto required that the manner in which criminal proceedings are conducted in the national system in cases of suspicion of sexual violence 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 of the Convention and the rights of defence protected by Article 6 of the Convention (see *Y. v. Slovenia*, Application no. 41107/10, § 115, 28 May 2015 or *Boshkoski v. North Macedonia*, Application no. 71034/13, §§ 50-52, 4 June 2020).

The general position of the ECHR is that it is for the domestic courts to perform such balancing, while their failure to do so gives rise to a violation of Article 6 of the Convention.

THE CIRCUMSTANCES OF THE CRIMINAL PROCEEDINGS AT ISSUE

In the present case, during the re-trial before the County Court of Rijeka, the applicant requested on several occasions that the case be heard in open court considering that: a) before the criminal proceedings against him were formally instituted, the police had made a public statement, disclosing all the details of the incident, the identity of the victim, as well as some information on the basis of which it was easy, in a small community such as Gospić, to discern the identity of the accused, a local public figure due to his business and political activities; b) before the trial, on several occasions in high-circulation papers, the victim herself had revealed her own identity, the identity of the perpetrator and all the circumstances of the alleged incident; c) the victim's lawyer had also disclosed to the media a detail from the hearing from which the public had been excluded.

The public was excluded from all of the trials.

The applicant's requests for hearings to be open to the public were rejected. However, the first-instance court failed to provide any decisions thereon in writing, which it was bound to do under national law, thus depriving the applicant of the right to appeal. This failure on the part of the court in question constitutes a violation of his right to a fair trial. The appellate court, the Supreme Court of the Republic of Croatia, found that the breach in question had indeed occurred, but attached little importance to it, given that an appeal would not have stayed the enforcement of the decision excluding the public from the trial. Moreover, in its decision, the Supreme Court of the Republic of Croatia retrospectively explained the reasons for the exclusion of the public from the proceedings before the first-instance court.

The domestic courts provided an across-the-board explanation as to the reasons for the full exclusion of the public from the trials and resorted to merely citing the statutory provisions allowing the exclusion of the public from all or part of the trial in this type of proceedings. However, the domestic courts never assessed the necessity to exclude the public from all the hearings, even though the law also provides that the public may be excluded from only part of the proceedings and that other measures to protect the identity of witnesses, such as, for example, voice and image distortion and the use of video and audio devices during examination, may be applied. The domestic first-instance court was technically equipped to do the latter.

THE ECHR JUDGMENT OF 14 MAY 2020

In its judgment of 14 May 2020, the ECHR, after stating the general principles in §§ 44-47, held that there had been no violation of Article 6 in respect of the applicant's right to a public hearing.

The ECHR found that, since, in the case at hand, there had been a need 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 to the public would not have sufficed to protect her right to privacy and to protect her from secondary victimisation, considering the large media attention given to this case.

The ECHR further found that the decision of the County Court of Rijeka to exclude the public from all of the proceedings had had a clear basis in domestic law, but nevertheless noted that the court in question had applied the provisions of Article 293(4) of the Criminal Procedure Act 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 the victim 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.

The ECHR then erroneously stated that, as regards the fact that the County Court of Rijeka had failed to provide written versions of the decisions rejecting the applicant's requests for a public hearing, which the applicant would have had the right to appeal, the Supreme Court of the Republic of Croatia had concluded that such a decision had not resulted in a breach of any of the applicant's rights in the criminal proceedings, which in fact contradicts the facts from the proceedings (§ 24, last paragraph, of the ECHR judgment).

Accepting the fact that the right to a judgment pronounced publicly is distinct from the right to a public hearing as such, the ECHR held that the pronouncement of the judgment had been open to the public and had contributed to the public scrutiny of administration of justice.

The ECHR took the view that the fact that, before the trial, the victim had made public statements by giving interviews in the national media had not dispensed the State from its positive obligation to protect her privacy as well as to protect her from secondary victimisation, given the fact that in her statements to the media she had controlled the information, whereas in the courtroom this had not been possible in view of the applicant's rights of defence. In fact, the ECHR was of the view that, in the present case, the State had been under an obligation to provide an even higher degree of protection to the victim, given that the police authorities had breached her privacy by unlawfully publishing her personal information at the very outset of the case.

Finally, the ECHR considered that intimate details from a rape victim's life might be disclosed at any stage of the proceedings against the alleged perpetrator and not only during cross-examination of the victim. Consequently, closing only part of the proceedings to the public would not have sufficed to protect the victim's rights. The ECHR was satisfied that the discretion which the County Court of Rijeka had exercised to exclude the public from all of the proceedings had not been incompatible with the applicant's right to a public hearing and that such an approach had been in line with the current international standards on the matter.

DISSENTING OPINION OF JUDGE PAULIINE KOSKELO

Judge Pauliine Koskelo, a member of the Chamber, annexed a dissenting opinion as she could not agree with the conclusion of the majority that since, in the present case, there had been a need 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 to the public would not have sufficed to protect her rights.

Judge Koskelo found such a conclusion (§ 57 of the judgment of 14 May 2020) disturbing in the light of the ECHR's existing case-law which requires a specific and substantiated balancing to be conducted of the competing rights and interests at stake. Although the protection of the victim's rights under Article 8 of the Convention is extremely important, Judge Pauliine Koskelo found it problematic to suggest that this protection could only be provided by closing the entire trial to the public, without specific consideration being given to the right to a public hearing and the balancing of the circumstances justifying such an outcome.

In the Judge's view, the majority's position amounted to inappropriate encouragement to a systematic and total closure of criminal trials to the public by invoking the rights of the victim in a general manner.

Judge Pauliine Koskelo was of the opinion that the majority's position constituted a departure from the ECHR's established case-law, which calls for a differentiated and completely reasoned approach to the matter, and that the first-instance court (the County Court of Rijeka) had been under an obligation to examine in detail whether and to what extent the exclusion of the public from the trial had been permissible on account of the protection to be afforded to the alleged victim in view of the accused's right to a public hearing. Since the first-instance court had not given any specific reasons to justify its decision to exclude the public from all the proceedings, it had failed to perform the requisite balancing between the rights of the victim and the rights of the accused in the light of the particular circumstances of the case. It had also failed to consider the extent to which the protection of the rights of the victim required the public to be excluded from the hearings.

Judge Pauliine Koskelo in particular pointed out the following:

- The applicant's trial was initially closed to the public, but the applicant subsequently requested that he be tried in open court, 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 all the circumstances of the incident;
- Even if the coverage of the proceedings in the media is not decisive for the assessment of whether and to what extent there are grounds to exclude the public from the trial, the conduct of the parties in relation to the media in the course of the proceedings is not wholly irrelevant for the balancing required under Article 6 § 1 of the Convention;
- Situations where a party, in the course of proceedings, gives live interviews to the media on the subject-matter of those proceedings but at the same time wishes to benefit from proceedings closed to the public on the grounds of protection of his or her private life call for closer scrutiny during the balancing exercise required under Article 6 § 1 of the Convention;
- In the ECHR judgment, the majority held that the alleged victim's public appearances during the specific criminal proceedings against the applicant were not relevant to the assessment of the exclusion of the public from the trial on account of the fact that in the interviews, she had been able to control what she shared with the public, whereas this had not been the case at the trial. Judge Pauliine Koskelo disagreed with this view due to the arguments of the majority being too simplistic. She considered that, since the alleged victim had already voluntarily exposed herself to publicity by giving interviews and sharing her own views on the subject-matter of the proceedings, such conduct was relevant as it decreased the risk of secondary victimisation and rendered the process of balancing required under Article 6 § 1 of the Convention easier;
- The majority of judges ignored the fact that, at the very outset of the case, the police had disclosed the identity of both the alleged victim and the accused, as well as the details of the incident. This can be seen from the ensuing media coverage which referred to the applicant by his full name. It can hence be inferred that the adverse consequences of the conduct of the police had not concerned only the alleged victim, but also the applicant. In such circumstances, it could not be argued that the initial error committed by the police was capable of dispensing the domestic court from its duty to carry out a careful balancing of the competing interests arising in the specific context of the trial;
- The alleged victim's lawyer disclosed to the media part of the proceedings closed to the public, which Judge Pauliine Koskelo found troubling since it had been done by

the party in whose interest the whole trial had been closed to the public. Such conduct certainly did not justify the imposition of the strictest measure of exclusion of the public from all of the trial;

- It would be inappropriate to consider that the exclusion of the public from all of the trial could have made amends for the harm caused by the domestic authorities (the police) at the outset of the case when they disclosed the identity of both the alleged victim and the alleged perpetrator. Such circumstances did not decrease the need for the conflicting rights and interests to be balanced by the court;
- The fact that the first-instance judgment had been pronounced in public was important, but it could not replace the public scrutiny of the course of the actual trial and was therefore not sufficient to compensate for the fact that the entire trial had been closed to the public without prior balancing of the competing rights and interests. The same was true for the retrospective finding by the Supreme Court of the Republic of Croatia;
- Even when the aim is to protect the victim's rights, the need remains to conduct a balancing exercise based on the specific characteristics of the case. It would be inappropriate to encourage a systematic and total closure of criminal trials to the public by invoking the rights of the victim in a general manner;
- The majority of the judges, members of the Chamber, took the view that the approach taken in the present criminal case had been in line with the current international standards on the matter. Judge Pauliine Koskelo did not consider this statement to be correct, because the international instruments require the contracting States to ensure the availability of a system of measures designed to protect the victim's right to privacy and to protect the victim from secondary victimisation. However, there is nothing in those instruments to suggest that the availability of a system of such measures dispenses the court from 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.

REASONS FOR WHICH THE PRESENT CASE SHOULD BE REVIEWED BEFORE THE GRAND CHAMBER

The applicant maintains that the ECHR judgment of 14 May 2020 in the case of *Mraović v. Croatia* (Application no. 30373/13) should be reviewed before the Grand Chamber so that it could set forth its views on the following:

1. Do the conclusions of the majority of judges in the judgment in question constitute a departure from the ECHR's practice in ruling on the right to a public hearing, given the dissenting opinion of Judge Pauliine Koskelo, in which she points to the need of conducting a balancing exercise, and the decision to exclude the public from all of the proceedings?
2. Did the majority of judges, in view of their arguments set forth in the judgment, in fact retrospectively balance the competing rights and interests (the accused's right to a public trial and the victim's right to privacy and to protection from secondary victimisation), given the finding in the judgment (§ 53) that the first-instance court had based its decision to exclude the public from all of the proceedings on Article 293(4) of the Criminal Procedure Act, applying it somewhat automatically and without performing a detailed balancing of the applicant's right to a public hearing against the victim's right to protection of privacy and to protection from secondary victimisation?

3. Is the task of the ECHR's judgment to justify, by a retrospective presentation of arguments, failures in the actions taken by the domestic courts or should it determine whether the domestic courts, through their actions, committed the violation of which the applicant complained?
4. Should a voluntary waiver of the right to privacy by an alleged victim of sexual violence, as occurred in the case at issue, be taken into account when balancing the interests relating to restrictions on the right to a public hearing? The right to privacy under Article 8 of the Convention is not absolute and individuals may voluntarily waive it.
5. Should the previous conduct of a party, more specifically, the fact that the victim's lawyer revealed to the media part of the proceedings that were confidential given that they had been closed to the public, also be taken into account when performing the balancing?
6. Should the positive obligation of a State to protect a victim's right to privacy and to protect a victim from secondary victimisation be examined, and how exactly, when balancing the right to a public hearing, in a situation where such a victim has voluntarily waived that right and has herself given information to the media about herself, the accused and the incident?
7. Should the fact that the State itself (the police) disclosed to the public the identities of the victim and the accused as well the details of the incident and that the victim, in separate proceedings, received adequate pecuniary compensation for it, be examined, and how exactly, when balancing the right to a public hearing?
8. Given the importance of the right to a public hearing in a democratic society, can it be rightly maintained that the impugned judgment constitutes inappropriate encouragement to a systematic and total closure of criminal trials to the public by invoking the rights of the victim, in that it failed to take into account all the instruments that the court had had at its disposal, from partially closed proceedings to examination via a video link with the distortion of the image and voice of the individual being heard?
9. To what extent can the public pronouncement of a judgment replace the public character of the entire trial and can the fact that a judgment will be pronounced in public dispense the relevant court from performing a balancing of the interests of the victim for privacy against the accused's right to a public hearing, given that, under national law, all judgments, including those passed in proceedings closed to the public, are pronounced in public?
10. Do the current international legal standards on the protection of the right of the victim to privacy and to protection from secondary victimisation, cited in the impugned judgment, dispense the courts conducting criminal proceedings with elements of sexual violence from balancing the accused's right to a public hearing against the victim's right to privacy and to protection from secondary victimisation?

Attorney-at-Law
Višnja Drenški Lasan