

(CEDU, sez. V, sent. 19 novembre 2020, ric. n. 18068/11)

Lo Stato viola gli obblighi positivi sanciti dall'art. 8 Conv. se non tutela il rispetto alla vita privata e familiare

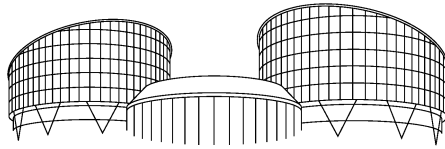
La CEDU si è pronunciata sul diritto al rispetto alla vita privata e familiare, sancito dall'art. 8 Conv. Il caso è quello della compagna del presidente di un importante partito politico che ha ritenuto violato il suo diritto per la pubblicazione, su una rivista di gossip, di due fotografie ritraenti il figlio neonato nel momento dell'uscita dall'ospedale. Nello specifico ha lamentato che lo Stato non ha osservato il suo obbligo positivo di garantire la protezione della sua vita privata e familiare.

Per il governo l'articolo contestato aveva contribuito ad un dibattito d'interesse generale su una persona pubblica, sostenendo inoltre che la ricorrente non aveva contestato un precedente articolo nel quale si annunciava la nascita di suo figlio.

La Corte parte dal presupposto che in questa causa è necessario applicare un giusto equilibrio tra il diritto alla protezione della vita privata (art. 8) della ricorrente e il diritto alla libertà di espressione (art. 10) del giornalista. Quando le informazioni in gioco sono di natura privata ed intima non vi è alcun interesse pubblico alla loro diffusione. Gli articoli finalizzati esclusivamente a soddisfare le curiosità dei lettori per ciò che attiene alla vita di una persona, non possono essere considerati come necessari a contribuire ad un dibattito d'interesse generale per la società.

La Corte ha affermato che, in linea di principio, spetta principalmente ai tribunali nazionali valutare quanto sia nota una persona. I tribunali hanno ritenuto che il compagno della ricorrente fosse un personaggio pubblico, status non attribuito a quest'ultima. La Corte ha ritenuto inoltre che l'esercizio del bilanciamento, posto in essere dai tribunali nazionali, tra il diritto al rispetto della vita privata e familiare e quello alla libertà di espressione, non è stato effettuato in conformità ai criteri stabiliti dalla giurisprudenza della Corte.

Soprattutto non è stata prestata sufficiente attenzione al contributo che l'articolo aveva dato a questioni d'importanza pubblica e alla natura delicata dell'argomento mostrato in fotografia. Nessuna distinzione è stata fatta tra informazioni che di fatto rientrano parzialmente nella sfera pubblica e la pubblicazione di fotografie scattate di nascosto che ritraggono un momento essenzialmente privato della vita della richiedente. Per questi motivi la Corte ha concluso che lo Stato non ha adempiuto ai suoi obblighi positivi sanciti dell'art. 8 Conv.



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

FIFTH SECTION

CASE OF DUPATE v. LATVIA

(Application no. 18068/11)

JUDGMENT

Art 8 • Respect for private life • Positive obligations • Magazine publication of covertly taken photographs of partner of a public person leaving hospital with their newborn baby after giving birth • Type and extent of material disclosed going well beyond any notoriety the applicant may have derived from her partner's public status or that was merited by the shared event • Degree of caution to be exercised by domestic courts when assessing the person's public status and notoriety in situations where a partner of a public person attracts media attention merely on account of his or her private or family life relations • Inherently private character of childbirth and bringing the child home • Balancing exercise between the right to private life and freedom of expression not in conformity with criteria laid down in the Court's case-law

STRASBOURG

19 November 2020

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

In the case of Dupate v. Latvia,

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

Síofra O'Leary, *President*,

Mārtiņš Mits,

Latif Hüseyinov,

Lado Chanturia,

Ivana Jelić,

Arnfinn Bårdsen,

Mattias Guyomar, *judges*,

and Victor Soloveytchik, *Section Registrar*,

Having regard to:

the application against the Republic of Latvia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Latvian national, Ms Kristine Dupate ("the applicant"), on 17 March 2011;

the decision to give notice to the Latvian Government ("the Government") of the complaint under Article 8 and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 6 October 2020,
Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns an alleged breach of the applicant's right to private life under Article 8 of the Convention by the publication of covertly taken photographs with captions that depicted her leaving hospital with her newborn baby and the ensuing domestic courts' decisions rejecting her related claims.

THE FACTS

2. The applicant was born in 1973 and lives in Riga.
3. The Government were represented by their Agent, Ms K. Līce.
4. The facts of the case, as submitted by the parties, may be summarised as follows.

BACKGROUND INFORMATION

5. The applicant is a lawyer. At the time of the impugned article her partner, J.N., was the chairman of a political party that did not have seats in Parliament. From 1995-2001 he had been the director-general of a State-owned joint-stock company. He had also taken part in a nationwide advertising campaign in a weekly celebrity-focused magazine, *Privātā Dzīve*, that appeared in 76,000 copies with a readership of about 474,000.

6. In 2003 *Privātā Dzīve* published an article about the dissolution of J.N.'s previous marriage. J.N. had commented on his new relationship with the applicant and had said that they would soon become parents. The article included two photographs of the applicant – one was a portrait and the other showed her sitting in a public location. In the autumn of 2003, the applicant's and J.N.'s first child was born.

Impugned article

7. On 30 November 2004 *Privātā Dzīve* published an article about the birth of the applicant's second child. A covertly taken photograph of the applicant was used on the magazine's cover. It showed her leaving hospital carrying her newborn baby in a car-seat. Her partner J.N. could be seen walking behind her. The photograph had the caption: "One year on [J.N.] has another child."

8. On page four under the rubric "Children of celebrities" there was a short article with the headline "[J.N.] does not make it in time for the birth of his son". The article was based on a telephone conversation with J.N., who had provided some information about the birth of his son, such as his weight, height and time of birth. The article was accompanied by nine covertly taken photographs, including the cover photograph, all showing the applicant and J.N. leaving hospital. In addition to the cover photograph, the applicant could be seen in three of them – standing at entrance to the hospital, standing together with J.N., and fixing the windscreen wiper of her car. The other photographs showed either J.N. or both of them leaving the hospital grounds in their cars. The photographs were supplemented with captions addressing the quantity and type of belongings the applicant had had while in hospital, the fact that the applicant and her partner had arrived and departed with their own cars, and that a windscreen wiper had been broken and the pair had tried to fix it.

Civil proceedings

First-instance proceedings

9. On 10 March 2006, relying on Articles 89 and 96 of the Constitution (protection of fundamental rights and right to private life), section 1635 of the Civil Law (right to compensation) and Article 8 of the Convention, the applicant brought a civil claim against the publisher, the editor-in-chief, and the journalist who had written the piece. She argued that by covertly taking photographs of an important and intimate moment of her life – leaving hospital with a newborn baby – and publishing them in a magazine without her consent and in the absence of any public interest, the defendants had infringed her right to respect for her private life.

10. In a judgment of 10 January 2007 the Riga City Central District Court ruled in the applicant's favour. It observed that it had not been contested that the photographs had been taken covertly and that they had been published without the applicant's permission. Furthermore, it had not been argued that the applicant was a public figure. While the article primarily concerned J.N., it did not refer to him as a person carrying out any active political functions. Therefore, the interference in the applicant's private life could not be justified by a reference to society's right to be informed of the activities of a public person. Having found a violation of the applicant's right to private life, the court ordered the editor-in-chief to publish an apology on pages one, four and five of the magazine, and to pay compensation for non-pecuniary damage in the amount of 700 Latvian lati (approximately 1,000 euros (EUR)).

11. In response, on 30 January 2007 *Privātā Dzīve* republished the article of 30 November 2004 with the same photographs and captions, along with an editorial note expressing disagreement with the judgment.

Appellate proceedings

12. In a judgment of 11 December 2007 the Riga Regional Court overturned the first-instance court's judgment and dismissed the applicant's claim.

13. On 10 September 2008 the Senate of the Supreme Court quashed the appellate court's judgment. It pointed out that the applicant had relied on the Court's 2004 judgment in the case of *Von Hannover v. Germany* (no. 59320/00, ECHR 2004-VI) and the appellate court had failed to provide reasons as to why this judgment had not been relevant for deciding the case.

14. On 11 December 2008 the Riga Regional Court adopted a new judgment, again dismissing the applicant's claim. It observed that the photographs featuring the applicant leaving hospital while holding her newborn baby had been taken covertly. However, relying on the Declaration on mass communication media and Human Rights (Resolution 428 (1970) of the Parliamentary Assembly of the Council of Europe, adopted on 23 January 1970), it noted that absolute privacy did not exist and a person had to come to terms with the fact that an interference with private life could take place at any time and place. The assessment of the seriousness of the interference had to be made by the domestic courts.

15. The Riga Regional Court then noted that the interference had to be assessed in the light of the person's role in society and attitude to publicity. The child's father, J.N., was a public figure – he was known as the former chair of a State-owned company, the current chair of a political party, and as the advertising face of *Privātā Dzīve*. In August 2003 *Privātā Dzīve* had published an article about J.N.'s divorce and about the fact that J.N. and the applicant had been expecting a child. The impugned article had been a continuation of that initial article and had informed the readers that the child mentioned in the article of 2003 had been born (confer paragraph 65 below). That

information had been accompanied by nine photographs that formed an essential part of the article. The photographs had been taken in a public place – in the street – and the applicant had not been depicted in a humiliating manner. They had been taken to illustrate a specific event and had not been connected with following the applicant's everyday life and covertly photographing intimate moments of her private life.

16. Furthermore, the impugned article had been written on the basis of the information provided by J.N. The applicant had had no grounds to believe that the information about the birth of her child would not be disseminated or that it would be relayed without mentioning her as the child's mother. As a partner of a public person and a mother of his child, the applicant had to take into account that she could attract media attention and that articles might contain information about his family members, as had happened in the impugned "photo story". The 2003 article had also featured the applicant's photographs, to which she had not objected. The applicant's attitude towards publicity had also been demonstrated in a subsequent interview, published in a different magazine in 2005, where she had given information about her private life, relationship with J.N., stance towards marriage, and her opinions as an activist for gender equality. In particular, the applicant had been quoted as having expressed awareness that the public had taken an interest in her owing to her being J.N.'s partner.

17. With respect to the applicant's reliance on the Court's 2004 judgment in the case of *Von Hannover* (cited above) the Riga Regional Court noted, firstly, that photographing a person in a public place, albeit without his or her consent, did not constitute an interference with private life. Furthermore, the Court's interpretation of the Convention could only be applied if the factual circumstances of the two cases were identical. However, there were fundamental differences between the two cases. The photographing of the applicant had only taken place to reflect one particular event – the birth of J.N.'s child – and had not been connected with tracking her daily life; J.N. was a public person who had given information about the birth of his child; the impugned article had depicted the private life of J.N. and the applicant had been featured there only because she had been his partner and they had had a child. Accordingly, the applicant's right to private life had not been breached.

Appeal-on-points-of-law proceedings

18. In an appeal on points of law lodged by the applicant she argued that the appellate court had incorrectly applied the case-law of the Court. In particular, the Court's case-law should be applied in a general manner, and not only in analogous factual circumstances. The appellate court had not analysed whether the interference in her private life had had a legitimate aim and whether it had been necessary in a democratic society, as required by Article 8 of the Convention.

19. On 22 September 2010 the Senate of the Supreme Court dismissed the applicant's appeal on points of law. It endorsed the appellate court's findings and reasoning, having found no support for the applicant's assertion that there had been systematic flaws in the application of the Court's case-law. Contrary to the applicant's allegation, the appellate court had applied the principles established by the Court in its 2004 judgment in case of *Von Hannover* (cited above).

20. The Supreme Court considered the conclusion that the taking of photographs in a public place without the person's consent did not constitute an interference with the right to private life to be in line with the Court's case of *Peck v. the United Kingdom* (no. 44647/98, ECHR 2003-I). The appellate

court had also rightly found that the photographs had not depicted the applicant in a humiliating manner and that they had been obtained to depict one particular event, and had not been the result of following her daily life or secretly photographing intimate moments of her life. As J.N. had informed the public about the pregnancy, the child's birth and leaving hospital had been turned into a public event.

21. The Senate of the Supreme Court disagreed with the applicant that the appellate court had failed to assess whether the article depicting her private life had contributed to a public debate. Firstly, J.N. was a public person. Secondly, some aspects of their private life had already been disclosed in the 2003 article in *Privātā Dzīve*, where J.N.'s divorce and the applicant's pregnancy had been mentioned. Thirdly, the 2003 article had stirred a debate about J.N.'s private life and family values, as at that time he had still been married to another woman. The impugned photographs had shown that the awaited event described in the 2003 article – the birth of the child – had taken place (confer paragraph 65 below).

22. The Senate of the Supreme Court also dismissed the applicant's argument that her failure to challenge the 2003 article had not rendered future publication of her photographs lawful. As the applicant had not objected to the article in 2003, the journalist could have concluded that she would also have no objections against the publication of information and photographs about the birth of her child. The applicant had to take into account that articles about a public person might contain information about their family members. The "photo story" had depicted an event in J.N.'s private life and, in the absence of objections to the previous article, had also showed the applicant.

RELEVANT LEGAL FRAMEWORK

23. The relevant Articles of the Constitution provide:

Article 89

"The State shall recognise and protect fundamental human rights in accordance with this Constitution, laws and international agreements binding upon Latvia."

Article 96

"Everyone has the right to inviolability of his or her private life, home and correspondence."

24. Section 1635 of the Civil Law provides that any infringement of rights, that is to say every unlawful activity, gives the person who has suffered damage, including non-pecuniary damage, the right to claim compensation from the wrongdoer, to the extent that he or she may be held liable for such act.

25. The domestic courts in their judgment relied on the Declaration on mass communication media and Human Rights, adopted by Resolution 428 (1970) of the Parliamentary Assembly of the Council of Europe on 23 January 1970. In its relevant part the declaration reads as follows:

"C. Measures to protect the individual against interference with his right to privacy

15. There is an area in which the exercise of the right of freedom of information and freedom of expression may conflict with the right to privacy protected by Article 8 of the Convention on Human Rights. The exercise of the former right must not be allowed to destroy the existence of the latter.

16. The right to privacy consists essentially in the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and

embarrassing facts, unauthorised publication of private photographs, protection against misuse of private communications, protection from disclosure of information given or received by the individual confidentially. Those who, by their own actions, have encouraged indiscreet revelations about which they complain later on, cannot avail themselves of the right to privacy.

17. A particular problem arises as regards the privacy of persons in public life. The phrase "where public life begins, private life ends" is inadequate to cover this situation. The private lives of public figures are entitled to protection, save where they may have an impact upon public events. The fact that an individual figures in the news does not deprive him of a right to a private life.

...

21. The right to privacy afforded by Article 8 of the Convention on Human Rights should not only protect an individual against interference by public authorities, but also against interference by private persons or institutions, including the mass media. National legislations should comprise provisions guaranteeing this protection."

26. The Court in its 2004 *Von Hannover* judgment (cited above, § 42) cited Resolution 1165 (1998) on the right to privacy, adopted by the Parliamentary Assembly of the Council of Europe on 26 June 1998. The most pertinent parts of the Resolution read as follows:

"6. The Assembly is aware that personal privacy is often invaded, even in countries with specific legislation to protect it, as people's private lives have become a highly lucrative commodity for certain sectors of the media. The victims are essentially public figures, since details of their private lives serve as a stimulus to sales. At the same time, public figures must recognise that the special position they occupy in society - in many cases by choice - automatically entails increased pressure on their privacy.

7. Public figures are persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain.

8. It is often in the name of a one-sided interpretation of the right to freedom of expression, which is guaranteed in Article 10 of the European Convention on Human Rights, that the media invade people's privacy, claiming that their readers are entitled to know everything about public figures.

9. Certain facts relating to the private lives of public figures, particularly politicians, may indeed be of interest to citizens, and it may therefore be legitimate for readers, who are also voters, to be informed of those facts.

10. It is therefore necessary to find a way of balancing the exercise of two fundamental rights, both of which are guaranteed by the European Convention on Human Rights: the right to respect for one's private life and the right to freedom of expression."

THE LAW

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

27. The applicant complained that the dismissal of her complaint about the publication of covertly taken photographs with captions that depicted her leaving hospital with her newborn baby had violated her rights to private and family life as provided in Article 8 of the Convention, which reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Submissions by the parties

The Government

28. According to the Government, the impugned article had contributed to a debate of general interest about a public person’s private life and family values. J.N. had previously disclosed details about his and the applicant’s private life, and the applicant had not objected.

29. As to how known the person concerned had been, the Government noted that J.N. had been at that time a public person and the article had addressed the birth of his child. J.N. had raised no objections to the publication of that article. While cohabiting with a public person did not deprive the applicant of her rights, she had to be aware that articles about a public person could contain information about his or her family members.

30. In relation to the applicant’s conduct *vis-à-vis* the media, the Government referred to the applicant’s interview in 2005 where she had acknowledged society’s interest in her as J.N.’s partner. They also pointed to the 2003 article in *Privāta Dzīve* where information about J.N.’s and the applicant’s expecting their first child had been published and which the applicant had not challenged.

31. As to the content, form and consequences of the article, the Government noted that the photographs had been taken in a public place and had addressed one particular event in the applicant’s life. They had not been taken as a result of tracking and secretly photographing the applicant’s intimate life. The photographs had not shown the applicant in a humiliating manner. In the Governments view, from the standpoint of an unbiased observer, the photographs could never be perceived as intimate, provocative or offensive.

32. With respect to the circumstances in which the photographs had been taken, the Government believed that the domestic courts had paid due regard to the fact that the photographs had been taken covertly and that the applicant had not consented to their publication. At the same time, the photographs had been taken in a lawful manner and not in circumstances harmful to the applicant or by illicit means.

33. The Government argued that on the above-mentioned grounds the present case should be distinguished from the 2004 case of *Von Hannover v. Germany* (no. 59320/00, ECHR 2004-VI), and that the domestic courts had properly balanced the competing interests at stake.

The applicant

34. The applicant submitted that the State had failed in its positive obligation to ensure protection of her private and family life. The relevant domestic law did not regulate how to balance the right to private and family life with the right to freedom of expression, and the domestic courts had failed to apply the Convention correctly.

35. In particular, they had failed to rule that photographs formed part of the concept of private life. Incorrectly referring to the Court's case of *Peck v. the United Kingdom* (no. 44647/98, ECHR 2003-I), the domestic courts had noted that the taking of photographs in a public place had not breached private life. They had also failed to consider that the taking and the publishing of photographs concerned different aspects of the right to private life. With respect to the applicant's case, they had disregarded the fact that most of the photographs had been taken in the hospital grounds or next to its entrance and that it had not been possible to leave the hospital without crossing those spaces.

36. With respect to the necessity in a democratic society, the courts had merely found that the article as a whole had contributed to the general debate on family values of a public person. However, they had failed to analyse what contribution to that debate had been made by the photographs and their captions. The applicant emphasised that she had not contested the publication of the information about the birth of the child. Her grievance concerned the publication of the photographs and their captions, which had shown when and how the applicant, her partner and their newborn baby had left hospital. The captions had spoken about the belongings she had had with her and the issues they had been dealing with during that process. The domestic courts had failed to recognise that the contested photographs and their captions had been "tawdry allegations" about the applicant's private life.

37. The domestic courts had also not paid sufficient regard to the fact that the applicant had been a private person. They had only addressed her partner's status as a public person. However, the majority of the photographs had depicted the applicant and not her partner, and all of the photographs had been accompanied by comments regarding the applicant, her belongings and her actions.

38. With respect to her prior conduct the applicant noted that she had not provided any information to the press prior to the impugned article. Furthermore, even previous cooperation with the press could not deprive a person of protection of his or her right to private life and justify further publication of photographs and information about that private life. As to her interview of 2005, the applicant emphasised that it had been given subsequent to the impugned article and therefore could not be relied on to demonstrate her prior conduct. Besides, that interview had been given voluntarily and with a purpose of promoting the ideas of gender equality and addressing the importance of women's participation in the labour market following childbirth.

39. The applicant emphasised that the domestic courts had failed to analyse the case from the perspective of duties and responsibilities associated with the exercise of the freedom of expression. The impugned article had revealed information about very private details of her life, such as how she had looked when leaving hospital, the belongings she had taken to hospital, and her interactions with her partner at that moment. Those facts had had no relevance to any debate of general interest. The applicant also pointed to her obvious vulnerability at the moment when the photographs had been taken – she had given birth only a couple of days prior and had been breastfeeding her newborn baby. While the domestic courts had considered that the photographs had not been taken as a result of following her daily activities, they had nonetheless been taken by following her – only after leaving the hospital grounds had the applicant noticed that she had been covertly filmed from a car with tinted windows. The car had followed them to their home and had

continued observing them from outside their garden. The applicant highlighted the stress experienced due to the covert filming, the feeling of helplessness caused by the article, and her vulnerable post-partum state.

Admissibility

40. The Court reiterates that the concept of “private life” extends to aspects relating to personal identity, such as person’s image. A person’s image constitutes one of the chief attributes of his or her personality, as it reveals the person’s unique characteristics and distinguishes the person from his or her peers. The right of each person to the protection of his or her image presupposes the right to control the use of that image. Whilst in most cases it entails the possibility to refuse publication of the image, it also covers the individual’s right to object to the recording, conservation and reproduction of the image (see *López Ribalda and Others v. Spain* [GC], nos. 1874/13 and 8567/13, §§ 87 and 89, 17 October 2019)

41. As to whether a person’s private life is concerned by measures effected outside a person’s home or private premises, the Court has held that since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person’s reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor in this assessment. In order to determine whether Article 8 applies, the Court also finds it relevant to address whether the individual in question was targeted by the monitoring measure or whether personal data was processed, used or made public in a manner or to a degree surpassing what those concerned could reasonably have foreseen (*ibid.*, §§ 89-90).

42. The Court emphasises that the domestic courts’ conclusion that the taking of photographs in a public place without the person’s consent did not constitute an interference with the right to private life finds no support in the case of *Peck* (cited above). In that case the Court’s finding that the monitoring of the actions and movements of an individual in a public place did not, as such, give rise to an interference with the individual’s private life concerned the use of photographic equipment which did not record visual data. The Court did, however, add that the recording of the data and the systematic or permanent nature of the record may give rise to such considerations (see *Peck*, cited above, § 59, see also *López Ribalda and Others*, cited above, § 89).

43. In the present case, the applicant was photographed leaving hospital after childbirth. While the hospital’s entrance is a public place, it had to be traversed for the child to be brought home. The applicant was unaware that she was being recorded. Furthermore, she was individually targeted by the photographer and the photographs with captions were published in a magazine nationwide. Accordingly, the applicant’s exposure when leaving hospital in order to bring her newborn home far exceeded any exposure to a passer-by she could have anticipated (contrast *Vučina v. Croatia* (dec.), no. 58955/13, §§ 35-36, 24 September 2019, where the applicant was openly photographed in a public concert).

44. Accordingly, the Court considers that the publication of the covertly taken photographs without the applicant’s consent encroached on the applicant’s private life and Article 8 is therefore applicable in the present case.

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

Merits

General principles

46. The Court starts from the premise that the present case requires an examination of the fair balance that has to be struck between the applicants' right to the protection of their private life under Article 8 of the Convention and the publisher's, editor's and journalist's right to freedom of expression as guaranteed by Article 10 (see, for example, *Lillo-Stenberg and Sæther v Norway*, no. 13258/09, § 25, 16 January 2014). The principles with respect to the State's positive obligations and the criteria for balancing the protection of private life against freedom of expression were set out in the Court's 2004 judgment in the case of *Von Hannover* (cited above, §§ 57-60) and have subsequently been elaborated in *Von Hannover v. Germany (no. 2)* ([GC], nos. 40660/08 and 60641/08, §§ 95-113, ECHR 2012); *Axel Springer AG v. Germany* ([GC], no. 39954/08, §§ 78-95, 7 February 2012); and *Couderc and Hachette Filipacchi Associés v. France* ([GC], no. 40454/07, §§ 83-93, ECHR 2015 (extracts)), amongst other authorities. As identified in those cases, the main criteria of assessment are: contribution to a debate of public interest; the degree of notoriety of the person affected; the subject of the report; the prior conduct of the person concerned; the content, form and consequences of the publication; and the circumstances in which photos were taken.

47. The Court has frequently emphasised that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment (see, amongst other authorities, *Von Hannover*, cited above, § 101). While freedom of expression includes the publication of photographs, this is nonetheless an area in which the protection of the rights and reputation of others takes on particular importance, as the photographs may contain very personal or even intimate information about an individual and his or her family (see *Lillo-Stenberg and Sæther* cited above, § 30, and *Rothe v. Austria*, no. 6490/07, § 47, 4 December 2012). The task of imparting information necessarily includes "duties and responsibilities", as well as limits which the press must impose on itself spontaneously. Wherever information bringing into play the private life of another person is in issue, journalists are required to take into account, in so far as possible, the impact of the information and pictures to be published prior to their dissemination. Certain events relating to private and family life enjoy particularly attentive protection under Article 8 of the Convention and therefore merit particular prudence and caution when covering them (see *Couderc and Hachette Filipacchi Associés*, cited above, §§ 89 and 140).

48. In the cases in which the Court has had to balance the protection of private life against freedom of expression, it has always stressed the contribution made by photos or articles in the press to a debate of general interest. In its 2004 judgment in the case of *Von Hannover* the Court made a distinction between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society, and reporting details of the private life of an individual who does not exercise official functions. While in the former case the press exercises its vital role of "watchdog" in a democracy by imparting information and ideas on matters of public interest, it does not do so in the latter case. Where the situation does not come within the sphere of any

political or public debate and published photos and accompanying commentaries relate exclusively to details of the person's private life with the sole purpose to satisfy the curiosity of a particular readership freedom of expression calls for a narrower interpretation (see *Von Hannover*, cited above, §§ 60-66, see also *Couderc and Hachette Filipacchi Associés*, cited above, §§ 100-03).

Application

49. The issue in the present case is whether the domestic courts ensured a fair balance between the protection of the applicant's private life and the right of the opposing party to freedom of expression. In exercising its supervisory function, the Court's task is to review, in the light of the case as a whole, whether the decisions the domestic courts have taken pursuant to their power of appreciation are in conformity with the criteria laid down in the Court's case-law. Accordingly, the Court will analyse in turn the elements identified as relevant in this regard in its case-law (see paragraph 46 above) and the domestic courts' assessment thereof.

(a) Contribution to a debate of general interest

50. The Court reiterates that in the balancing of interests under Articles 8 and 10 of the Convention, the contribution made by photos or articles in the press is an essential criterion (see *Von Hannover*, cited above, § 109, with further references). While the applicant argued that the impugned article had made no contribution to a debate of public interest, the domestic courts and the Government contended that it had made such a contribution by addressing the private life and family values of a public person – the applicant's partner.

51. The Court has previously held that, although the publication of news about the private life of public figures is generally for the purposes of entertainment, it contributes to the variety of information available to the public and undoubtedly benefits from the protection of Article 10 of the Convention. However, such protection may cede to the requirements of Article 8 where the information at stake is of a private and intimate nature and there is no public interest in its dissemination. Articles aimed solely at satisfying the curiosity of a particular readership regarding the details of a person's private life, however well known that person might be, cannot be deemed to contribute to any debate of general interest to society (see *Couderc and Hachette Filipacchi Associés*, cited above, §§ 89 and 100, see also *Standard Verlags GmbH v. Austria (no. 2)*, no. 21277/05 § 52, 4 June 2009.) Additionally, the Court reiterates that, although the birth of a child is an event of an intimate nature, it also falls within the public sphere, since it is in principle accompanied by a public statement (the civil-status document) and the establishment of a legal parent-child relationship. A news report about a birth cannot be considered, in itself, a disclosure concerning exclusively the details of the private life of others intended merely to satisfy the public's curiosity (see *Couderc and Hachette Filipacchi Associés*, cited above, § 107).

52. The impugned article concerned an inherently private and intimate event in the lives of the applicant and J.N. – the birth of their second child and their coming home from hospital. Neither the impugned article, nor other material in the case file demonstrate that the information about the applicant's and her partner's private life was a matter of a general importance (contrast *Éditions Plon v. France*, no. 58148/00, § 53, ECHR 2004-IV, concerning the state of health of the former President during his time in office; *Karhuvaara and Iltalehti v. Finland*, no. 53678/00, § 45, ECHR 2004-X, concerning the conviction of a politician's spouse; and *Couderc and Hachette Filipacchi Associés*, cited above, §§ 105-16, concerning the existence of an heir, born out of wedlock, in a

hereditary monarchy). While J.N. did hold a post in a political party, at the time of the impugned article that party held no seats in Parliament and J.N. did not exercise any official functions. Furthermore, at the time of the impugned article, in November 2004, time had passed since the events covered by the press in 2003, such as the dissolution of J.N.'s marriage and the fact that he had the first child with the applicant (see paragraph 6 above). Accordingly, it has not been substantiated that J.N.'s private life as such was among the issues that affected the public in November 2004 (compare *Tammer v. Estonia*, no. 41205/98, § 68, ECHR 2001-I).

53. At the same time, the Court considers that in so far as the impugned article addressed the birth of J.N.'s second child, it did touch on a matter that had a public side. The Court notes, however, that the contribution such an article makes to matters of general importance is lower compared to the articles that advance political or other public debate, for example, relating to politicians in the exercise of their functions, with respect to which the press exercises its vital role of "public watchdog" (compare *Von Hannover*, cited above, §§ 63-65).

(b) How well known is the person concerned

54. The Court has previously stated that it is, in principle, primarily for the domestic courts to assess how well known a person is, especially in cases where he or she is known primarily at national level (see *Axel Springer AG*, cited above, § 98). The domestic courts considered that J.N. was a public figure. Such status was not attributed to the applicant. They further noted that as a partner of a public person and a mother of his child, the applicant had to take into account that she could attract media attention and that she had no grounds to believe that the information about the birth of J.N.'s child would be disseminated without mentioning her as the child's mother (see paragraphs 16 and 22 above).

55. The Court has previously accepted that, with respect to shared events, the degree to which an applicant is considered well known in relation to that specific occasion could be derived from the public status of the partner (see *Sihler-Jauch and Jauch v. Germany* (dec.), nos. 6823/10 and 34194/11, § 35, 24 May 2016). Similarly, the Court has considered that a private person can enter the public domain with his or her conduct and association with a public person (see *Flinkkilä and Others v. Finland*, no. 25576/04, §§ 82-83, 6 April 2010). However, in those cases the Court also assessed whether the information disclosed primarily concerned the public figure and did not touch the core of the private person's privacy (see *Sihler-Jauch and Jauch*, § 38, and *Flinkkilä and Others*, §§ 84-85, both cited above). Accordingly, while a private person may become susceptible to public exposure, the Court pays due regard to the extent of the information made public.

56. In the present case, the birth of the applicant's and J.N.'s child did make the applicant, herself a private person, susceptible to certain exposure with respect to that shared event. The domestic courts were right to consider that the applicant could have anticipated that she would be mentioned as the child's mother and that articles about the birth of her son might contain information about her (see paragraphs 16 and 22 above). However, in view of the type and extent of the material disclosed and its focus on the applicant, the Court considers that the impugned publication went well beyond any notoriety the applicant may have derived from the public status of her partner or that was merited by the particular shared event.

57. Additionally, the Court is of the view that the domestic courts should exercise a degree of caution when assessing the person's public status and notoriety in situations, such as the present one, where a partner of a public person attracts media attention merely on account of his or her private or family life relations.

(c) What is the subject of the report

58. The applicant did not complain, neither domestically, nor before this Court, about the fact that the article contained information about the birth of her son or that she was mentioned as the child's mother. Her complaint was directed at the publication of the covertly taken photographs showing her leaving hospital after the labour and their captions.

59. As the Court has previously held, the "duties and responsibilities" linked with the exercise of the freedom of expression are particularly important in relation to the dissemination to the wide public of photographs revealing personal and intimate information about an individual (see *Egeland and Hanseid v. Norway*, no. 34438/04, § 59, 16 April 2009). Certain events in the life of a family must be given particularly careful protection and must therefore lead journalists to show prudence and caution when covering them (see *Couderc and Hachette Filipacchi Associés*, cited above, § 140, see also *Hachette Filipacchi Associés v. France*, no. 71111/01, § 46, 14 June 2007).

60. The Court has already had an opportunity to observe that giving birth is a unique and delicate moment in a woman's life that encompasses issues of physical and moral integrity, health-related information and the choice of the place of birth, amongst others (see *Dubská and Krejzová v. the Czech Republic* [GC], nos. 28859/11 and 28473/12, § 163, 15 November 2016). The bringing home of the newborn child shortly after the labour forms part of that experience and takes place in the sensitive postpartum period. Any assessment of how such events were reported, in the Court's view, must bear that in mind.

61. In that regard the Court observes that the domestic courts did not make a distinction between the information about the birth of the child, which the child's father had been willing to disclose, and the publication of the covertly taken photographs depicting the applicant at the private moment of leaving hospital after her labour (contrast *MGN Limited v. the United Kingdom*, no. 39401/04, §§ 147-51, 18 January 2011, where the domestic courts made a distinction between the private information that had already been disclosed and had been legitimately the subject of a public debate on the one hand, and the publication of additional private information and covertly taken photographs on the other; see also *Rothe*, cited above, § 73). The Court emphasises that even where the article makes a contribution to the public debate, the disclosure of private information must not exceed the latitude accorded to editorial assessment and has to be justified (see *MGN Limited*, cited above, §§ 147-51; compare also *Alkaya v. Turkey*, no. 42811/06, §§ 34-36, 9 October 2012). Particular regard has to be had to situations of vulnerability (see *Egeland and Hanseid*, cited above, § 61).

62. The Court observes that nothing in the domestic courts' reasoning suggests that the publication of the applicant's photographs depicting her after the labour would have been necessary to ensure the credibility of the story about the birth of her child or that there would have been a compelling need for the public to have this additional material disclosed (compare *MGN Limited*, § 151, and contrast *Couderc and Hachette Filipacchi Associés*, § 148, both cited above). The Court is also of the view of that the domestic courts did not provide sufficient explanation for their

finding that J.N.'s having informed the public about the applicant's pregnancy turned bringing the newborn baby home into a public event. While the journalists could indeed legitimately consider that they could publish information about the birth of the child, the childbirth and the bringing home of the child did not lose their inherently private character merely from the disclosure of such fact.

(d) Prior conduct of the person concerned

63. The Court observes that the domestic courts held against the applicant the fact that she had not challenged the article of August 2003 where information concerning her first pregnancy had been disclosed, as they regarded the impugned article to be its narrative continuation. Furthermore, the fact that the applicant had subsequently given an interview one year later where she had acknowledged society's interest in her, due to the relationship with a public figure, was viewed as her acceptance of the publicity (see paragraph 16 above).

64. The Court has already held that the mere fact of having cooperated with the press on previous occasions or an alleged or real previous tolerance or accommodation with regard to articles touching on private life cannot serve as an argument for depriving the person of the right to privacy (see *Couderc and Hachette Filipacchi Associés*, § 130, and *Lillo-Stenberg and Sæther*, § 38, both cited above). *A fortiori*, a failure to challenge a less intrusive article cannot be relied on to justify more invasive articles in future (see *Egeland and Hanseid*, cited above, §§ 61-62). Furthermore, even when persons have made public some private information about themselves, the manner in which it is subsequently portrayed has to be justified in the circumstances of the case (see *Tammer*, cited above, § 66). The person having given interviews does not dispense the State from its positive obligation to protect the person's privacy, as seeking to avail of media to share information in a setting the person has selected cannot, in principle, be held against him or her (compare *Peck v. the United Kingdom*, no. 44647/98, § 86, ECHR 2003-I, where the applicant made media appearances to expose and complain about a wrongdoing against him).

65. The Court observes that the 2003 article mentioned the applicant's first pregnancy and featured two photographs of her, neither of which appeared to have been taken covertly or depicted her in private circumstances. Moreover, these were not photographs of the applicant with her baby but of her alone (see paragraph 6 above). Noting particularly the differing levels of intrusion, the Court considers that the failure to challenge that article could not have been relied on in the impugned proceedings concerning the covertly taken photographs that depicted a very private moment in the applicant's life with her second baby. The Court also observes the narrative and temporal gap between the two articles: the impugned article addressed the birth of the applicant's second child and could not have been viewed as showing that the awaited event mentioned in the 2003 article, which concerned the applicant's pregnancy with the first child, had taken place (contrast the domestic courts' reasoning in paragraphs 15 and 21 above). Lastly, the applicant's subsequent interview in a different magazine approximately a year after the impugned article did not change the nature of the interference caused by the publication of that article and could not have been relied on to justify the prior disclosure of private information (compare *Peck*, cited above, § 86). Also the applicant's acknowledgment that the public took an interest in her owing to the public-person status of her partner could in no way be viewed as a posterior consent to the publication of the covertly taken photographs.

66. Accordingly, the Court considers that no elements of the applicant's prior conduct referred to in the domestic proceedings could have been invoked in order to limit the protection of her right to privacy.

(e) Content, form and consequences of the article

67. The impugned article consisted of a short text informing the public of the birth of the applicant's and J.N.'s child and nine covertly taken photographs with captions depicting the moment when the applicant and J.N. were leaving hospital with their newborn baby. The applicant's photograph was also put on the magazine's cover. The Court considers that while the impugned article did contain some factual information, the emphasis was on the photographs and their captions, leading the domestic courts to characterise it as a "photo story" (see paragraphs 16 and 22 above).

68. While the Court agrees that the impugned photographs did not show the applicant in a humiliating manner, this fact cannot be considered decisive in view of the private nature of the event they depicted (see paragraphs 60-62 above). Furthermore, the Court observes that the accompanying captions did not meaningfully supplement the main news about the birth of the child and could not be seen as contributing to any matter of public interest.

69. With respect to the consequences of the article the Court observes that *Privatā Dzīve* was a celebrity-focused magazine with a nationwide reach read by a significant portion of the population. Furthermore, the same article was subsequently republished in full in January 2007, again accompanied by the covertly taken photographs (see paragraph 11 above). The potential subsequent use of the photographs is one of the factors the Court takes into account in assessing the level of intrusion (see *Couderc and Hachette Filipacchi Associés*, cited above, § 148, and *Reklos and Davourlis v. Greece*, no. 1234/05, § 42, 15 January 2009).

(f) Circumstances in which photos were taken

70. It is not contested that the photographs of the applicant leaving hospital were taken covertly without her knowledge or consent. Nonetheless, the domestic courts attributed great importance to the fact that they had been taken in a public place – on the street. The courts also considered that these photographs had been taken to illustrate a specific event and "had not been connected with following the applicant's everyday life and covertly photographing intimate moments of her private life" (see paragraphs 15 and 20 above).

71. The Court reiterates that the fairness of the means used to obtain the information and reproduce it for the public is an essential criterion to be taken into account (see *Von Hannover*, § 68, and *Couderc and Hachette Filipacchi Associés*, § 132, both cited above). With respect to the present case the Court considers that the applicant did not lay herself open to the possibility of having her photograph taken in the context of an activity that was likely to be recorded or reported in a public manner. The domestic courts did not take into account that the applicant needed to traverse the public space between the hospital's entrance and her car in order to bring her newborn child home. This inherently private event was not an activity with respect to which the applicant should have anticipated publicity. In such circumstances an effective protection of a person's image presupposes obtaining the consent of the person concerned at the time the picture is taken and not only if and when it is published. Otherwise an essential attribute of personality is retained in the

hands of a third party and the person concerned has no control over any subsequent use of the image (see *Reklos and Davourlis* (cited above), §§ 37 and 40).

72. With respect to the domestic courts' conclusion that the photographs were taken to illustrate a specific event and were not connected with following the applicant's everyday life the Court notes that there is nothing in its case-law to suggest that a violation of the right to private life could only occur if the person had been followed systematically (for examples of cases where the violation emanated from a single incident see *Peck*, cited above; *Egeland and Hanseid*, cited above; and *Gurgenidze v. Georgia*, no. 71678/01, 17 October 2006).

73. Furthermore, the conclusion that the impugned photographs were not connected with covert photographing of intimate moments of the applicant's private life was manifestly incompatible with the facts of the case. The Court draws attention to the applicant's submissions, which were not contested by the Government, that after leaving the hospital grounds she had noticed that they had been covertly filmed from a car with tinted windows, which had followed them to their home and had continued observing them in their garden. The Court observes that the domestic courts did not address the fact that such an experience, particularly so soon after childbirth, could have caused feelings of anguish and helplessness. Similarly, they did not analyse whether such conduct was compatible with the duties and responsibilities associated with the exercise of the freedom of expression, triggering the State's positive obligation to adopt measures securing respect for private life.

(g) Conclusion

74. The Court considers that while the domestic courts did engage in the balancing exercise between the right to private life and freedom of expression, this exercise was not carried out in conformity with the criteria laid down in the Court's case-law. Most importantly, sufficient attention was not paid to the limited contribution the article had made to issues of public importance and the sensitive nature of the subject matter shown in the photographs. No distinction was made between factual information partially falling within the public sphere and the publication of covertly taken photographs depicting an essentially private moment of the applicant's life. The assessment of the applicant's prior conduct was flawed and the intrusive manner of taking the photographs – which had been the focus of the article – was not taken into account.

75. In these circumstances, and notwithstanding the margin of appreciation which the domestic courts enjoy when balancing the conflicting interests of the right to private life with freedom of expression, the Court concludes that the State has failed to fulfil its positive obligations under Article 8 of the Convention.

76. There has accordingly been a violation of Article 8 of the Convention.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

77. Article 41 of the Convention provides:

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

Damage

78. The applicant claimed 9,114 euros (EUR) in respect of non-pecuniary damage.

79. The Government considered that the applicant had not substantiated this claim.

80. The Court accepts that the applicant must have suffered non-pecuniary damage. Ruling on an equitable basis, it awards the applicant EUR 7,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

Costs and expenses

81. The applicant also claimed EUR 532 for the costs and expenses incurred before the domestic courts.

82. The Government agreed that the compensation award should be limited to this sum.

83. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 532 for costs and expenses in the domestic proceedings, plus any tax that may be chargeable to the applicant.

Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

Declares the complaint under Article 8 admissible;

Holds that there has been a violation of Article 8 of the Convention;

Holds

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 7,000 (seven thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 532 (five hundred and thirty-two euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

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

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

Done in English, and notified in writing on 19 November 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor

Soloveytchik Síoфра

O'Leary

RegistrarPresident