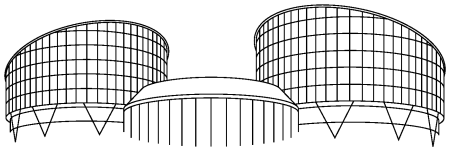

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF ERLA HLYNSDOTTIR v. ICELAND (No. 3)

(Application no. 54145/10)

JUDGMENT

STRASBOURG

2 June 2015

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 Erla Hlynsdottir (no. 3) v. Iceland,

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

András Sajó, *President,*
Nebojša Vučinić,
Helen Keller,
Paul Lemmens,
Egidijus Kūris,
Robert Spano,
Jon Fridrik Kjølbro, *judges,*

and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 20 January and 12 May 2015,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 54145/10) against the Republic of Iceland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Icelandic national, Ms Erla Hlynsdóttir ("the applicant"), on 31 August 2010.

2. The applicant was represented by Mr Gunnar Ingi Jóhannsson, a lawyer practising in Reykjavik. The Icelandic Government ("the Government") were represented by their Agent, Ms Ragnhildur Hjaltadóttir, Permanent Secretary of the Ministry of the Interior.

3. The applicant alleged that the Icelandic Supreme Court´s judgment of 11 March 2010 entailed an interference with her right to freedom of expression under Article 10 of the Convention that was not "necessary in a democratic society".

4. On 6 September 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant, Ms Erla Hlynsdóttir, is an Icelandic national who was born in 1978 and lives in Reykjavík. She is a journalist, working for the newspaper *DV*.

6. In May 2007 the Director of Public Prosecutions issued an indictment against two individuals for importing cocaine into Iceland. The cocaine had been hidden in a Mercedes Benz vehicle, where it had been discovered by customs officers. The police had removed the cocaine and put another substance in its place. One of the accused, Mr A, had collected the car from customs and had paid customs duties for it. He and the other accused had driven the vehicle to a garage, where the substance had been removed.

7. The newspaper *DV* published an article on 5 July 2007 on the ongoing criminal proceedings against Mr A and his co-accused before the Reykjavík District Court. A picture of Mr A was published on the front page of the newspaper showing him walking into the courtroom. There was a large headline under the photograph which read "Scared cocaine smugglers" and underneath that it was written that both the accused were afraid of retaliation by their accomplices and had therefore refused to identify them. Mr A´s name also appeared on the front page, with a report that he and his co-accused could expect prison sentences of seven to eight years and three to four years respectively for removing the substance.

8. The article itself was reproduced on page 2 of the newspaper and the applicant was identified as its author. Next to the article appeared another photograph of Mr A, again using his name. The article stated that Mr A had been afraid to reveal the identity of the man he claimed had actually been behind the importation, and that he feared for his family's and his own safety. The article contained the following passage:

> "The Director of Public Prosecutions is requesting a punishment of seven to eight years´ imprisonment in respect of [Mr A], who has been indicted for importing nearly 3.8 kilograms of cocaine, intended for sale, together with an unknown accomplice. A punishment of three to four years is requested in respect of [Mr B], who is also charged in the case with removing the alleged drug from the vehicle, in cooperation with [Mr A],".

9. In the next paragraph it was stated:

> "The cocaine was hidden in a vehicle which [Mr A] imported into the country and took possession of in February 2007, believing that the cocaine was still in the vehicle, but the police had already confiscated the cocaine and replaced it with a decoy drug."

This sentence was a verbatim rendering of a part of the description of the facts contained in the indictment, without explicit reference being made to that document.

10. By a judgment of 12 July 2007 the District Court acquitted both Mr A and his co-accused of all charges, and on 29 May 2008 the Supreme Court upheld the acquittal.

11. On 21 October 2008 Mr A lodged defamation proceedings before the Reykjavík District Court against the applicant and Mr S.M.E., who was the editor of *DV* at the time. In his writ he requested that the headline ("Scared cocaine smugglers") which had appeared on the front page of the newspaper

published by *DV* on 5 July 2007 and the passage quoted in paragraph 9 above be declared null and void. In addition, Mr A requested that the respondents jointly and severally be ordered to pay him 2,500,000 Icelandic krónur (ISK) in respect of non-pecuniary damage and ISK 500,000 to cover the costs of publishing the judgment in the case in three newspapers.

12. Mr A argued that the responsibility for the statements lay with the applicant as the author of the article, in accordance with section 15 (2) of the Printing Act no. 57/1956. No one had been identified as the author of the front-page headline, and therefore the publisher or editor was responsible for it (see section 15 (3) of the same Act, at paragraph 23 below).

13. By a judgment of 26 June 2009 the District Court found for the applicant and the editor. In its reasoning it referred to the right to freedom of expression and protection of private life, as guaranteed by the Icelandic Constitution. It further stated:

> "When there is an overlap of the defendant's aforementioned interest in the enjoyment of freedom of expression and the plaintiff's interest in the enjoyment of respect for his private life, it must be examined whether the publication of the material, for which the defendants are responsible, can be considered to have taken place in the context of a general public debate and therefore to be of interest to the public. The disputed comments appeared in newspaper coverage of public criminal proceedings in which the plaintiff had been accused of a serious crime. The proceedings were open to the public and to those who wanted to observe, in accordance with the usual practice, and the defendants' account is in accordance with what was revealed at the proceedings. News reporting of criminal cases being tried before the domestic courts must be considered normal and part of a journalist's work. It cannot be a requirement that news reporting must await the outcome of a trial before publication. It makes no difference that the plaintiff was later acquitted of the charges. It must therefore be held that the published material, at the time it was published, was relevant to the public and was newsworthy. Although the headline on the front page is sensationalist, it has to be kept in mind that it refers to what was revealed during the testimony of the plaintiff in the criminal case, namely that he did not want to reveal the name of the person on whose behalf he was acting in respect of the charge of importing the drugs, as he feared for his own and his family's safety. In view of all this, the statements are not considered to have been insulting or hurtful to the plaintiff, as defined in Article 234 of the Penal Code, or to contain an insinuation, as in Article 235 of the same Code. Moreover, they will not be deemed to entail an illegal injury to his character and honour ..."

Mr A appealed against the District Court's judgment to the Supreme Court.

14. By a judgment of 11 March 2010, the Supreme Court overturned the District Court judgment. It declared null and void the words "cocaine smugglers" on the front page and the statement "... believing that the cocaine was still in the vehicle" and ordered the applicant and the editor jointly and severally to pay the appellant ISK 100,000 (approximately 575 euros (EUR)) in compensation for non-pecuniary damage, plus interest,

and ISK 50,000 for the costs of publishing the judgment. Its judgment contained the following reasons:

> "When the statements at issue in the present case appeared in *DV* on 5 July 2007, the criminal proceedings against the appellant and another man were pending before the District Court. This was clearly stated in the article, in which the substance of the charges against them was reproduced, along with a few essential points from the prosecution's evidence and the statements which they had given at the hearing. It is not argued that the narrative was in any way incorrect, with the exception of those statements which are at issue in this case. The material published concerned a serious criminal case, which was being tried at a public hearing. It was therefore not subject to any limitations under Article 10 of the Code of Criminal Procedure no. 19/1991, in force at the time, which would have prevented the media from utilising its freedom [of expression] under Article 73 of the Constitution, to report on the case, including freedom to identify the accused. However, in that discussion special weight ought to be attached to the fact that it is the role of the courts, not the media, to determine whether an accused person is guilty of an offence.
>
> ... The appellant was acquitted of the ... criminal charges by a judgment of the District Court exactly one week after the publication of the statements in *DV*, and that conclusion was unaltered after the adoption of the Supreme Court judgment of 29 May 2008. By virtue of that conclusion the courts had rejected the accusation that the appellant and the co-accused in this case had been guilty of being 'cocaine smugglers', and also that the appellant in February 2007 had taken possession of the aforementioned vehicle 'believing that the cocaine was still in the vehicle'. However, these two assertions were made in the statements which the appellant seeks to have declared null and void, without any reservation being made with reference to the fact that the assertions were based on an indictment which was contested in court. Bearing in mind the outcome of the criminal proceedings that had been instituted by that indictment, the statements in question contained an insinuation against the appellant, and there is no ground for rejecting his request for them to be declared null and void. As regards the other statements which the appellant claims should be declared null and void, it must be held that the word 'scared' in the headline on the front page contained a value judgment, and was also supported by comments made by the appellant and the co-accused during the criminal proceedings. The narrative in the article inside the newspaper, stating that the cocaine had been hidden in the vehicle which the appellant had imported into the country and had taken possession of in February 2007, after the police had confiscated the drugs and replaced them with another substance, was merely a description of facts that were later substantiated during the criminal proceedings. There are therefore no grounds for declaring the statements relating to this matter null and void.
>
> The statements which are declared null and void were published in an article, of which [the applicant] was named as the author, except for one word [*kókaínsmyglarar*] in the headline on the front page. She is liable to pay compensation for them, as provided for in section 15(2) of the Printing Act. On the other hand, since the author of the front-page headline was not identified, liability to pay compensation for that statement falls on the defendant [Mr S.M.E.] as the editor of the newspaper, under section 15 (3) of the same Act. The statement in the front-page headline and those in the article on page two were linked to such a degree [*voru þau tengs*l] that the defendants must be ordered jointly to pay compensation for them. It is considered that since, in the present case, declaring the statements null and void alone rectifies the appellant's position to a great extent, compensation in the amount of ISK 100,000 is appropriate, with default interest, as further specified in the operative part of the present judgment. With reference to Article 241 § 2 of the Penal Code, the defendants

> must also be ordered to pay ISK 50,000 to the appellant to cover the costs of publication of the outcome of this case; he has not claimed interest on that amount."

15. After his acquittal, Mr A initiated proceedings before the domestic courts, seeking compensation from the Icelandic State for unlawful detention during the above-mentioned criminal investigation, but to no avail. The Supreme Court, in its judgment of 16 June 2010, found the detention to have been justified even though he was later acquitted.

16. In April 2009, Mr A was again arrested for involvement in importing drugs into Iceland, and in December 2009 he was sentenced by a final judgment to ten years´ imprisonment for his part in the crime.

II. RELEVANT DOMESTIC LAW

17. Article 70 of the Constitution of the Republic of Iceland, Act No. 33/1944, reads:

> "Everyone shall, for the determination of his rights and obligations or in the event of a criminal charge against him, be entitled, following a fair trial and within a reasonable time, to the resolution of an independent and impartial court of law. A hearing by a court of law shall take place in public, except if the judge decides otherwise as provided for by law in the interest of morals, public order, the security of the State or the interests of the parties.
>
> Everyone charged with criminal conduct shall be presumed innocent until proven guilty."

18. Article 71 of the Constitution reads:

> "Everyone shall enjoy freedom from interference with privacy, home, and family life.
>
> A body or personal search or a search of a person´s premises or possessions may only be conducted in accordance with a judicial decision or a statutory law provision. This shall also apply to the examination of documents and mail, communications by telephone and other means, and to any other comparable interference with a person´s right to privacy."

19. Article 73 of the Constitution reads:

> "Everyone has the right to freedom of opinion and belief.
>
> Everyone shall be free to express his thoughts, but shall also be liable to answer for them in court. The law may never provide for censorship or other similar limitations on freedom of expression.
>
> Freedom of expression may only be restricted by law in the interests of public order or the security of the State, for the protection of health or morals, or for the protection of the rights or reputation of others, if such restrictions are deemed necessary and in agreement with democratic traditions."

20. Chapter XXV of the Penal Code No. 19/1940, entitled 'Defamation of character and violations of privacy', contained the following relevant provisions:

Article 234

"Any person who harms the reputation of another person by an insult in words or in deed, and any person spreading such insults, shall be subject to fines or to imprisonment of up to one year."

Article 235

"If a person alleges against another person anything that might be harmful to his or her honour or spreads such allegations, he shall be subject to fines or to imprisonment of up to one year."

Article 236

"If an injurious insinuation is made or spread against a person´s better knowledge, this shall be subject to up to two years´ imprisonment.

If an insinuation is published or spread in a public manner, even where the person spreading the allegation did not have a plausible reason to believe it to be correct, this shall be subject to fines or up to two years' imprisonment."

Article 241

"In a defamation action, defamatory remarks may be declared null and void at the request of the injured party.

A person who is found guilty of a defamatory allegation may be ordered to pay the injured person, at the latter's request, a reasonable amount to cover the cost of publication of a judgment, its main contents or reasoning, as circumstances may warrant, in one or more public newspapers or publications."

21. Section 25(1) of the Tort Liability Act No. 50/1993, provided:

"If two or more parties are liable *in solidum* for damages, their liability shall be divided as is considered reasonable in light of the nature of their liability and the particulars in other respects."

22. Section 26(1) of the same Act provided:

"A person who

a. deliberately or through gross negligence causes physical injury or

b. is responsible for an unlawful injury against the freedom, peace, honour or person of another party

may be ordered to pay non-pecuniary damages to the injured party."

23. Section 15 of the Printing Act No. 57/1956 provided:

Section 15

"As regards liability for newspapers or magazines other than those listed in section 14, the following rules shall apply.

The author is subject to criminal liability and liability for damages if he or she is identified and either resident in Iceland when the publication is published or within Icelandic jurisdiction at the time proceedings are initiated.

If no such author is identified, the publisher or editor are liable, thereafter the party selling or distributing the publication, and finally the party responsible for its printing or lettering."

24. The Code of Ethics of the Icelandic Journalists' Association included the following provisions:

Article 1

"A journalist shall endeavour to do nothing which will bring discredit upon his or her profession or professional association, paper or newsroom. A journalist shall avoid any actions which could undermine the public opinion of journalists' work or damage the interests of the profession. A journalist shall always exhibit fairness in dealings with colleagues."

Article 2

"A journalist is aware of his or her personal responsibility for what he or she writes. He or she shall bear in mind that he or she will generally be regarded as a journalist in his or her writings and speech, even when he or she is acting outside his or her profession. A journalist shall respect the confidentiality of his or her sources."

Article 3

"A journalist shall exercise care in his or her gathering of material, the use of the material and presentation as far as possible, and show due consideration in sensitive matters. A journalist shall avoid any actions which could cause unnecessary distress or dishonour."

Article 4

"... In the reporting of court- and criminal cases, journalists shall respect the principle that everyone shall be presumed innocent until proved guilty."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

25. The applicant complained that the Icelandic Supreme Court´s judgment of 11 March 2010 entailed an interference with her right to freedom of expression that was not "necessary in a democratic society" and thus violated Article 10 of the Convention, which 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. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

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, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or

rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

26. The Government contested that argument.

A. Admissibility

27. According to the Government, the liability for publishing the headline on the front page of the newspaper "Scared cocaine smugglers", had fallen on the editor, Mr S.M.E., who was not a party to the proceedings before the European Court. In their submissions the applicant had "only" been found liable for the article on page 2 of the newspaper, containing the words "believing that the cocaine was still in the vehicle". The fact that the applicant and the editor had been ordered to pay compensation jointly and severally was a separate issue, which meant that, under section 25 (1) of the Tort Liability Act, the applicant would be able to request partial reimbursement from the editor if she paid the entire amount herself. The Printing Act did not rule out compensation being paid jointly and severally. However, as pointed out by the applicant, criminal responsibility for printed material could never be attributed jointly and severally, but that had not been an issue in the present case. The Government noted that there was nothing in the case file to indicate that the applicant had paid the whole amount, or even a part of it. This part of the application should therefore be declared inadmissible *ratione personae.*

28. The applicant disputed this argument, emphasising that she and Mr S.M.E. had been ordered to pay damages jointly and severally. Mr S.M.E. had not paid the amount in full, but even if he had, that would not have affected her right to seek recognition that the Supreme Court judgment had violated her right to freedom of expression. It would only affect her claim for just satisfaction.

29. The Court notes that, while the Supreme Court attributed the impugned words *cocaine smugglers* in the headline on the front page, not to the applicant but to the editor, it nonetheless found this affirmation and the one attributed to her at page 2 to be linked to such a degree that it was justified to hold her and the editor jointly liable to pay compensation in respect of both statements. The Government's objection must therefore be dismissed.

30. Moreover, the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

31. The Court considers that the impugned measure constituted an "interference by [a] public authority" with the applicant´s right to freedom of expression as guaranteed under the first paragraph of Article 10.

32. That interference had a legal basis in Articles 235 and 241 § 1 of the Penal Code, section 15 (2) and (3) of the Printing Act and section 25 (1) of the Tort Liability Act (see paragraphs 20 to 23 above), and was in this sense "prescribed by law" for the purposes of the second paragraph of Article 10.

33. On the latter point it is to be observed that for the first time in her observations of 27 March 2013 in reply to those of the Government of 15 January 2013, the applicant submitted with reference to the above-mentioned criterion, namely "prescribed by law", that the Supreme Court had disregarded the hierarchy of responsibility that was to be found in section 15 of the Printing Act (see paragraph 23 above). Since no author of the headline on the front page had been identified, the editor was the next in line to be found liable. Although the Printing Act was ambiguous about who should be identified as the author of a statement or material, it was clear that responsibility within the meaning of the Act entailed financial and criminal responsibility which could not, in the applicant´s view, be joint and several. In other words, she argues that the interference was not prescribed by law. However, the Court sees no reason to question the interpretation and application of national law made by the Supreme Court. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. The Court's role is thus confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see, amongst other authorities, *Pérez de Rada Cavanilles v. Spain*, 28 October 1998, § 43, *Reports of Judgments and Decisions* 1998-VIII; *Rekvényi v. Hungary* [GC], no. 25390/94, § 35, ECHR 1999-III; and *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 140, ECHR 2012). It will consider her argument under the necessity test below.

34. The Court is moreover satisfied that the interference pursued the legitimate aim of protecting "the reputation or rights of others".

35. It remains to be considered whether the interference was "necessary in a democratic society".

1. Arguments of the parties

(a) The applicant

36. The applicant contested the Government´s description of the Icelandic statutory law and practice, which in her view was inaccurate and/or misleading. Whilst it was true that Article 73 of the Icelandic Constitution guaranteed the right to freedom of expression, and that the

Convention had been incorporated as statutory law in Iceland, the domestic courts had applied the provisions of the Convention in a manner which was inconsistent with the Court's case-law, and rarely applied Article 73 of the Constitution in accordance with the Convention and the Court's case-law.

37. The finding of the Supreme Court in its judgment of 11 March 2010 entailed a violation of the journalistic right to impart to the public information about ongoing criminal proceedings. That criminal trials be open to the public and the media was an important feature of democratic societies governed by the rule of law. The criminal case against Mr A had been a high-profile one, as the quantity of drugs which had been confiscated by the police rendered it one of the largest cocaine cases in Iceland. The case had therefore attracted the attention of the media and was a matter of public concern.

38. The newspaper article did not contain any allegations against Mr A which were at variance with the charges against him. The applicant contested the Supreme Court's finding that a verbatim citation of the indictment could constitute an insinuation. Moreover, when the article was read as a whole, it was obvious that it was describing the charges that had been brought against Mr A by the Director of Public Prosecutions. The article also clearly stated that the case was being tried before the Reykjavík District Court at the time it was published, and that a judgment was not expected until later.

39. The applicant disputed the Supreme Court's assessment that, since Mr A was later acquitted of the criminal charges against him, the impugned statements had unavoidably to be declared null and void. This could scarcely be reconciled with the fact that in the compensation proceedings brought by Mr A against the Icelandic State, the Supreme Court had found in favour of the latter and had done so notwithstanding the former's acquittal (see paragraph 15 above).

40. Furthermore, pursuant to Article 145 of the Code of Criminal Procedure, the prosecution was obliged to dismiss a case if it found the evidence in the case insufficient to ground a conviction in court. Thus it could be deduced that the Director of Public Prosecutions had been of the opinion that the evidence in the criminal case against Mr A was sufficient for him to be convicted. In the light of the foregoing, it was difficult to follow the Supreme Court's reasoning in the defamation case that it is the role of the courts, not the media, to determine whether an accused person is guilty of an offence.

41. Moreover, in finding the words "cocaine smugglers" defamatory, the Supreme Court had failed to take into account that freedom of expression also covered possible recourse to a degree of exaggeration or even provocation (see, for instance, *Prager and Oberschlick v. Austria*, 26 April 1995, Series A no. 313, and *Stoll v. Switzerland* [GC] no. 69698/01, ECHR 2007-V). Contrary to what the Government had suggested, those

principles were indeed relevant to the present case. Accordingly, she argued that Mr A ought to expect to endure public debate on this particular case, and could not be entitled to the same level of protection as others. Moreover, she emphasised that she had had nothing to do with the headline on the front page, which she in fact had not seen until the paper was published. However, whilst it contained perhaps a degree of exaggeration or provocation, this was covered by journalistic freedom.

42. In the applicant's view, the restriction imposed on her could not be regarded either as corresponding to a pressing social need or as necessary in a democratic society. It followed from the Supreme Court's conclusion that the media were not allowed to cover criminal trials or cite facts from criminal proceedings unless a judgment had been passed and guilt established. In this context, she emphasised that the impugned statement from the newspaper article had been a verbatim quote from an official document - the indictment - and that it now appeared in the final judgment in the case, which had been posted on the internet.

43. The applicant further stressed that she had acted in good faith and on an accurate factual basis. When reading the article as a whole, no one could be in doubt that the subject matter was ongoing criminal proceedings. The article had begun by stating that Mr A was facing a sentence of seven to eight years' imprisonment on the charge of importing cocaine. It closed by stating that he had been placed in pre-trial detention until 13 July 2007, and that a judgment was expected before that date. She had relied on an official document - the indictment - and the article had contained no exaggerations or provocations. She referred to Bladet Tromsø *and Stensaas v. Norway* ([GC] no. 21980/93, ECHR 1999-III); *Colombani and Others v. France* (no. 51279/99, ECHR 2002-V); and, in particular, *Thoma v. Luxembourg* (no. 38432/97, ECHR 2001-III), in which the Court had found that a journalist could rely on the contents of official and public documents without having to undertake independent research. It seemed that her main error had been not to distance herself from the impugned sentence which was quoted from the indictment. However, she referred again to *Thoma*, cited above, in which the Court had held that such a requirement was not reconcilable with the role of the press in providing information on current events, opinions and ideas. Moreover, relying on *Verlagsgruppe News GmbH v. Austria* (no. 76918/01, 14 December 2006) she argued that such a requirement would be too formalistic to be regarded as proportionate.

44. The applicant also argued, relying on *Perna v. Italy* ([GC] no. 48898/99, ECHR 2003-V), that the Supreme Court had been under a duty to guard the principles of freedom of expression by viewing the entire article as a whole, and not punishing the applicant for defamation for only a fraction of the statements made.

45. In the light of the above, the applicant maintained that Mr A´s interest in protecting his reputation could not be considered sufficient to

outweigh the vital public interest in imparting information about the criminal proceedings.

46. Furthermore, the applicant submitted that the amount which she had been ordered to pay with interest had not been particularly modest, seen in the light of the relatively low wages journalists earned in Iceland, and that she had to pay default interest as well as her legal costs in addition. In any event, as the Court had affirmed in *Jersild v. Denmark* (judgment of 23 September 1994, Series A no. 298), the limited nature of a fine was not relevant; what mattered was the fact that the journalist had been convicted.

47. The judgment in the present case therefore threatened free and open discussion and the fundamental role of the media, which was to impart information and ideas on important matters which had relevance to the public. It followed that the conclusion of the Supreme Court entailed a violation of Article 10 of the Convention.

(b) The Government

48. The Government emphasised at the outset that the Convention was incorporated into Icelandic law, and that a recognised method of interpretation in Icelandic legal practice was to interpret the provisions of the Icelandic Constitution in accordance with the provisions of the Convention as well as the Court's case-law.

49. The Icelandic courts had repeatedly confirmed that the role of the media in a democratic society and the rights and obligations of journalists were of great importance when assessing whether or not a journalist should be held accountable for his or her published comments. However, the Court had acknowledged that journalists also bore certain responsibilities, such as to act "in good faith and on an accurate factual basis, and provide "reliable and precise" information in accordance with the ethics of journalism" (they referred, as examples, to Bladet Tromsø *and Stensaas*, cited above, § 65, and *Godlevskiy v. Russia* no. 14888/03, § 42, 23 October 2008),

50. The Government also referred to *Ruokanen and Others v. Finland* (no. 45130/06, 6 April 2010), and *News Verlags GmbH & Co.KG v. Austria* (no. 31457/96, § 56, ECHR 2000-I). In the latter judgment the Court had stated that the limits of permissible comment on pending criminal proceedings might not extend to statements which were likely to prejudice the chances of a person receiving a fair trial, or which could undermine public confidence in the role of the courts in the administration of justice. In the Government´s view, each individual case had to be scrutinised in the light of these principles when assessing the rights and duties of journalists.

51. In the present case, the Supreme Court had emphasised the duty of the media to report on proceedings in serious criminal cases, and the applicant´s article had, for the most part, been seen to be in line with the accepted norm for such reporting. However, the assertions presented in the article and on the front page which presupposed Mr A´s guilt as a fact had

been of special concern to the Supreme Court, which had pointed out that it was the role of the courts, not the media, to determine questions of guilt.

52. Moreover, the applicant´s assertion of Mr A´s guilt had by no means been a necessary contribution to the reporting of the criminal proceedings. Therefore, declaring these isolated statements null and void did not hamper the paramount right and duty of the media to report news to the public on criminal proceedings in a reliable and precise manner.

53. The Supreme Court had made a distinction between value judgments and statements of fact. It had found the impugned statement in the article and the last words of the headline ("cocaine smugglers") on the front page to constitute statements of fact rather than value judgments. It had further distinguished between statements given by Mr A and his co-accused in the court proceedings and other statements which had been written by the applicant in the article. Those statements had presupposed Mr A´s guilt without any reservations to the effect that they were based on an indictment being contested before the trial court. On the other hand, the word "Scared" on the front page had been found to amount to a value judgment which, moreover, was supported by the statements made during the criminal proceedings, and therefore the Supreme Court did not declare it null and void. However, the assertion that Mr A had taken possession of the car "believing that the cocaine was still in the vehicle" was considered to contain an insinuation against him, which *was* declared null and void.

54. The Government further pointed out that the nature and severity of the sanctions imposed on the applicant were factors which had to be taken into account when assessing the proportionality of the interference. In the present case, the sanctions did not involve a criminal penalty. Moreover, the amount of the non-pecuniary damages was modest in comparison to those normally awarded in Icelandic defamation cases, and it did not involve censorship intended to discourage the press from expressing criticism on issues that were of public concern.

55. In the Government´s view, the impugned restriction on the applicant´s freedom of expression had corresponded to a pressing social need, namely the rights of an individual accused of a criminal offence, his personal privacy and reputation. The State was under a positive obligation to protect those rights. The reasons on which the Supreme Court had based its conclusion had been relevant and sufficient, and, in the light of the modest sanction, proportionate to the legitimate aim pursued.

2. Assessment by the Court

(a) General principles

56. The test of "necessity in a democratic society" requires the Court to determine whether the interference complained of corresponded to a "pressing social need". The Contracting States have a certain margin of

appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see, among many other authorities, *Association Ekin v. France*, no. 39288/98, § 56, ECHR 2001-VIII; *Perna*, cited above, § 39; and *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 68, ECHR 2004-XI).

57. However, the Court's task is not to take the place of the domestic courts but rather to review under Article 10 the decisions they have taken (see *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I, and *Pedersen and Baadsgaard,* cited above, § 69). This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully or in good faith. The Court has to look at the interference complained of in the light of the case as a whole, including the content of the comments held against the applicants and the context in which they made them (see *News Verlags GmbH & Co. KG*, § 52, and *Pedersen and Baadsgaard,* § 69, both cited above).

58. In particular, the Court determines whether the national authorities relied on reasons which were "relevant and sufficient" in justifying the interference and whether the measure taken was "proportionate to the legitimate aims pursued" (see *Chauvy and Others v. France,* no. 64915/01, § 70, ECHR 2004-VI, and *Pedersen and Baadsgaard,* cited above, § 70). The Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10 (see, among many other authorities, *Zana v. Turkey,* 25 November 1997, § 51, *Reports* 1997-VII, and *Pedersen and Baadsgaard,* cited above, § 70)."

59. In assessing the relevance and sufficiency of the national courts' findings, the Court, in accordance with the principle of subsidiarity, thus takes into account the extent to which the former balanced the conflicting rights implicated in the case, in the light of the Court's established case-law in this area. If the reasoning of the national court demonstrates a lack of sufficient engagement with the general principles under Article 10 of the Convention, the degree of the margin of appreciation afforded to the authorities will necessarily be narrower. Indeed, as the Court has previously held in the Article 10 context, "the quality of ... judicial review of the necessity of the measure is of particular importance in this respect, including the operation of the relevant margin of appreciation" (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 108, ECHR 2013 (extracts)).

60. In its judgment in *Axel Springer AG v. Germany* ([GC], no. 39954/08, § 83, 7 February 2012), the Court reiterated that the right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life (see *Chauvy*

and Others, cited above, § 70; *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 91, ECHR 2004-XI; *Pfeifer v. Austria*, no. 12556/03, § 35, 15 November 2007; and *Polanco Torres and Movilla Polanco v. Spain*, no. 34147/06, § 40, 21 September 2010). However, as the Court also pointed out in that judgment, in order for Article 8 to come into play an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life (see also *A. v. Norway*, no. 28070/06, § 64, 9 April 2009, and *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, § 49, ECHR 2004-VIII).

61. In *Axel Springer AG* (cited above), the Court further summarised the criteria which are relevant when the right to freedom of expression is being balanced against the right to respect for private life, notably the contribution to a debate of general interest; how well known is the person concerned and what is the subject of the report; his or her prior conduct; the method of obtaining the information and its veracity; the content, form and consequences of the publication; and the severity of the sanction imposed (see §§ 89 to 95; see also *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, §§ 108 to 113, ECHR 2012).

62. A central factor for the Court's determination in the present case is the essential function the press fulfils in a democratic society. Although the press must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart, in a manner consistent with its obligations and responsibilities, information and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas, but the public also has a right to receive them. In addition, the Court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation. In cases such as the present one the national margin of appreciation is circumscribed by the interest of a democratic society in enabling the press to exercise its vital role of "public watchdog" in imparting information of serious public concern (see Bladet Tromsø *and Stensaas*, cited above, §§ 59 and 62, and *Tønsbergs Blad A.S. and Haukom v. Norway*, no. 510/04, § 82, 1 March 2007, with further references).

63. However, Article 10 of the Convention does not guarantee unrestricted freedom of expression even with respect to press coverage of matters of serious public concern. The exercise of this freedom carries with it "duties and responsibilities", as stated in the second paragraph, which also apply to the press. These "duties and responsibilities" become significant when, as in the present case, there is question of attacking the reputation of private individuals and undermining the "rights of others". Thus, special grounds are required before the media can be dispensed from their ordinary

obligation to verify factual statements that are defamatory of private individuals. Such a ground may exist where the statement at issue does not emanate from the newspaper itself but is based on or is directly quoting from an official document, but this depends in particular on the nature and degree of the defamation in question and the extent to which the media can reasonably regard their sources as reliable with respect to the allegations (see, among other authorities, Bladet Tromsø *and Stensaas*, cited above, §§ 65-66; *Pedersen and Baadsgaard*, cited above, § 78; *McVicar v. the United Kingdom*, no. 46311/99, § 84, ECHR 2002-III; *Campos Dâmaso v. Portugal*, no. 17107/05, §§ 35-38, 24 April 2008; *Björk Eiðsdóttir v. Iceland*, no. 46443/09, § 70, 10 July 2012).

64. Also of relevance for the balancing of competing interests which the Court must carry out is the fact that under Article 6 § 2 of the Convention Mr A had a right to be presumed innocent of any criminal offence until proved guilty. By reason of the "duties and responsibilities" inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see *Goodwin v. the United Kingdom*, 27 March 1996, § 39, *Reports* 1996-II; *Fressoz and Roire*, cited above, § 54; and Bladet Tromsø *and Stensaas*, cited above, § 65).

65. In the judgment of *Kyprianou v. Cyprus* ([GC], no. 73797/01, ECHR 2005-XIII) the Court stated that the phrase "authority of the judiciary" included the notion that the courts are the proper forum for the settlement of legal disputes and for the determination of a person's guilt or innocence on a criminal charge (see also *Worm v. Austria*, judgment of 29 August 1997, § 40, *Reports* 1997-V). What is at stake as regards protection of the authority of the judiciary is the confidence which the courts in a democratic society must inspire in the accused, as far as criminal proceedings are concerned, and also in the public at large (see *Kyprianou*, cited above, § 172, and, *mutatis mutandis*, among other authorities, *Fey v. Austria*, judgment of 24 February 1993, § 30, Series A no. 255-A)."

(b) Application of those principles to the present case

66. The Court observes from the outset that the defamation in respect of which the applicant was held liable was based on a part of the statement which appeared in the article at page 2 of the newspaper and was taken verbatim from the indictment (hereinafter referred to as item 1):

> "... believing that the cocaine was still in the vehicle ..."

She was in addition held liable jointly and severally to pay compensation along with the editor who was found liable in defamation for a part of the

headline (hereinafter referred to as item 2), "cocaine smugglers" (*kókaínsmyglarar*), which appeared on the front page of the newspaper.

67. In its judgment of 11 March 2010, the Supreme Court noted that the subject matter of the above-mentioned article had been the ongoing criminal proceedings, as clearly stated in the article. The Court sees no reason to disagree with its findings to the effect that each of the two items referred to above contained an insinuation that Mr A was guilty of the offence in question. It was not stated directly that they were based on the indictment being contested in the said proceedings. Nor does the Court see any grounds for calling into doubt the Supreme Court's assessment and that the reasons relied on by the latter were relevant to the legitimate aim of protecting the rights and reputation of Mr. A.

68. As regards the further question, that of whether those reasons were sufficient for the purposes of Article 10, the Court must take into account the overall background against which the statements were published. It observes, as noted by the applicant, that due to the quantity of the drugs confiscated the criminal case against Mr A had been one of the largest cocaine cases in Iceland, and that the offence for which he had been indicted was a serious one. The Court thus agrees with the applicant that the general public had a legitimate interest in being informed of the serious criminal proceedings that were ongoing at the time the article was published.

69. The most careful scrutiny on the part of the Court is called for when, as in the present case, the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern (see *Björk Eiðsdóttir*, cited above, § 69; see also *Jersild*, cited above, § 35; Bergens Tidende *and Others v. Norway*, no. 26132/95, § 52, ECHR 2000-IV; *Tønsbergs Blad A.S. and Haukom*, cited above, § 88; compare *MGN Limited v. the United Kingdom*, no. 39401/04, §§ 150 and 155; 18 January 2011; *Von Hannover*, cited above, §§ 106-107; and *Axel Springer AG*, cited above, §§ 87-88, 7 February 2012).

70. Thus the Court will consider the impugned article as a whole and have particular regard to the words used in the disputed part of the article and the context in which it was published, as well as the manner in which it was prepared (see *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 62, ECHR 1999-IV).

71. In the Court's view, a journalist's good faith should be assessed on the basis of the knowledge and information which was available to him or her at the time of writing the item(s) in question. Thus it is not decisive for the purpose of the present case that Mr A was later acquitted of the charges brought against him by the Director of Public Prosecutions. In accordance with its case-law (see paragraph 67 above), the Court also fully agrees with the Supreme Court that it is for the courts, not the media, to determine whether an accused is guilty of an offence (see paragraph 14 above).

72. As regards item 1 ("believing that the cocaine was still in the vehicle ...") it is significant for the purposes of Article 10 of the Convention that the object of the article appearing inside the newspaper and of which the applicant was the author, was to report on the trial against Mr A and his co-accused before the Reykjavik District Court. It was clear from the article that the proceedings were pending and had not been concluded.

73. Furthermore, item 1 was – as already mentioned – a verbatim rendering of the indictment, but without any specific reference being made to the indictment in that particular passage of the article (see paragraph 9 above). It is not contended, nor is there anything to suggest, that the indictment, in the situation as it presented itself to the applicant at the time of publication, was not a source on which she could rely without having to undertake independent research. Indeed, the rendering of an indictment in a media coverage after it has been read out at a trial hearing is a kind of situation where there may be special grounds for dispensing the press from its ordinary obligation to verify factual statements that are defamatory of private individuals (see *Worm*, cited above, § 55; Bladet Tromsø *and Stensaas*, cited above, §§ 66 and 68; *Colombani and Others*, cited above, § 65; and *Cumpănă and Mazăre*, cited above, § 108), provided that the source has been clearly identified (*Worm*, cited above, § 55; see also *McVicar* cited above, § 84; *Thoma*, cited above, § 64; *Verdens Gang and Aase v. Norway* (dec.), no. 45710/99, ECHR 2001-X; *Tønsbergs Blad A.S. and Haukom*, cited above, § 95).

74. Moreover, with specific reference to the indictment, the preceding passage of the article reported the objective description of the offence and the sentence requested by the Director of Public Prosecutions. When read in immediate connection with this information and in the light of the article as a whole and also the context of the publication, the impugned affirmation contained in the ensuing passage could in the Court's view reasonably be understood by an ordinary reader as a continuation of the article's rendering of the indictment (see paragraph 8 above). The Court is not convinced that the omission to take the extra precaution of reminding the reader, that the belief thus imputed to Mr A merely consisted in a further rendering of the indictment, would lead the reader to understand the disputed statement as the applicant's and the newspaper's own opinion as to Mr A's guilt (compare *Worm*, cited above, §§ 51 to 53) or their own version of events (compare *Thoma*, cited above, § 64; and contrast *Verdens Gang and Aase*, cited above).

75. Against this background, the Court finds that the applicant could not be reproached for having failed to specify the official source – i.e. the indictment – of item 1 or that it was otherwise justified to hold her accountable in the same way as if the accusation had been hers.

76. Quite a different matter is item 2 – the impugned words "cocaine smugglers", which appeared in a large headline at a prominent place on the

front page. The Government invited the Court to take them into account in its assessment of the applicant's Article 10 complaint (see paragraphs 51 and 53 above). In the Court's view, those words were not sufficiently connected to the above-mentioned passage of the article inside the paper to enable the reader to understand that it was based on the indictment. However, and very importantly, the affirmation in question was, as was undisputed, attributed, not to the applicant, but to the editor who was deemed to have defamed Mr A thereby. The Court is therefore unable to agree, for the purposes of Article 10 of the Convention, with the Supreme Court's finding that the two items were linked to such a degree that it was justified to make also the applicant responsible – albeit only financially and jointly and severally with the editor – for paying compensation to Mr A and, by implication, to restrict her freedom of expression in this manner.

77. In the light of these considerations, the Court finds that the respondent State failed to sufficiently show that the applicant acted in bad faith or otherwise inconsistently with the diligence expected of a responsible journalist reporting on a matter of public interest (see *Erla Hlynsdottir v. Iceland (no. 2)*, no. 54125/10, § 75, 21 October 2014).

78. The applicant was adversely affected in that the defamation proceedings brought by Mr A ended in an order by the Supreme Court declaring null and void the statement (item 1) attributed to her. Moreover, she was ordered jointly and severally with the editor to pay ISK 100,000 in compensation to Mr A in respect of item 1 and also item 2 attributed to the editor, and to cover the 50,000 in costs for publication of the Supreme Court's conclusion.

79. In these circumstances, the reasons relied on by the respondent State, although relevant, are not sufficient to show that the interference complained of was "necessary in a democratic society". The Court considers that there was no reasonable relationship of proportionality between the restrictions resulting from the measures applied by the Supreme Court on the applicant's right to freedom of expression and the legitimate aims pursued.

There has accordingly been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

80. 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."

A. Pecuniary damage

81. The applicant sought compensation for pecuniary damage, corresponding to half of the amounts that she was ordered (jointly and severally with the editor) to pay by the Supreme Court (see paragraph 14 above). In addition she requested certain default interests (see paragraph 90 below).

82. The Government did not object to the reimbursement of the amounts which the applicant had paid to Mr A in compensation and for the publication of the Supreme Court's judgment, but pointed out that the amount in euros ought to be calculated according to the exchange rate applicable on the date of payment, a piece of information which had not been submitted. As the editor seemed to have paid half of the amounts of 100,000 Icelandic krónur (ISK) and ISK 50,000, the applicant could only claim reimbursement of the remaining half, respectively ISK 50,000 (approximately 320 euros (EUR)) and ISK 25,000 (approximately EUR 160).

83. The Court, being satisfied that there was a causal link between the violation found and the pecuniary damage alleged and bearing in mind the uncertainty as to the date of payment, awards the applicant EUR 450.

B. Non-pecuniary damage

84. The applicant further claimed EUR 5,500 in compensation for non-pecuniary damage she had suffered as a result of the violation of the Convention entailed by the Supreme Court's judgment of 11 March 2010. The proceedings against her had subjected her to a heavy burden as a journalist living on a modest income. She had been referred to as "a convicted journalist" and her honour and reputation had suffered. Moreover, the matter had caused her and her family emotional and psychological pain and suffering. In addition, she requested an award of default interests (see paragraph 90 below).

85. The Government disputed the above claim, considering that a finding of violation by the Court would constitute adequate just satisfaction. In any event, should the Court be minded to make a pecuniary award, the amount requested was excessive and beyond what the Court usually decided

in similar cases. EUR 2,000 would be a more appropriate amount in light of the Court's case-law.

86. The Court accepts that the applicant suffered distress and frustration as a result of the violation of the Convention which cannot be adequately compensated for by the finding of a violation. Making an assessment on an equitable basis, and in light of the applicant's claim, the Court awards the applicant EUR 4,000 under this head.

C. Costs and expenses

87. The applicant sought the reimbursement of legal costs and expenses in respect of the following items:

(a) ISK 1,452,425 (approximately EUR 8,500) incurred for her own legal costs before the domestic courts; and

(b) EUR 12,500 for her lawyers' work in the proceedings before the Court.

In addition the applicant claimed default interests (see paragraph 90 below).

88. The Government considered the claim to be excessive. As to item (a) it noted that there were no documents in the case file to show that the applicant had paid the costs in question. Item (b) was in their opinion excessive and they asked the Court to reduce it.

89. 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 have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the above criteria, the lack of adequate documentation, in particular the fact that none of the claims above were supported by vouchers submitted within the time-limits fixed for these purposes, the Court rejects the applicant's claim under this head.

D. Default interest

90. The Court has taken note of the applicant's invitation to apply a default interest to its Article 41 award "equal to the monthly applicable interest rate published by the Central Bank of Iceland".

91. However, the Court is of the view that the applicant's interest in the value of the present award being preserved has been sufficiently taken into account in its assessment above and in point 4 (b) of the operative part below. In accordance with its standard practice, 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,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *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, to be converted into Icelandic *krónur* at the rate applicable at the date of settlement:
      (i) EUR 450 (four hundred and fifty euros), plus any tax that may be chargeable, in respect of pecuniary damage;
      (ii) EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (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;

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

Done in English, and notified in writing on 2 June 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	András Sajó
Registrar	President

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

A.S.
S.H.N.

CONCURRING OPINION OF JUDGE SAJÓ

I fully agree with my colleagues that Article 10 was violated in this case for the reasons expressed in the judgment. I would like to add only an explanatory note on the meaning of paragraph 59 of the judgment. I voted a few months ago for this text, but, in view of possible misunderstandings, I find it necessary to explain the meaning of the wording so that it conforms unequivocally to the Court's case-law.

The paragraph in question reads as follows:

> "In assessing the relevance and sufficiency of the national courts' findings, the Court, in accordance with the principle of subsidiarity, thus takes into account the extent to which the former balanced the conflicting rights implicated in the case, in the light of the Court's established case-law in this area. If the reasoning of the national court demonstrates a lack of sufficient engagement with the general principles of the Court under Article 10 of the Convention, the degree of the margin of appreciation afforded to the authorities will necessarily be narrower. Indeed, as the Court has previously held in the Article 10 context, 'the quality of ... judicial review of the necessity of the measure is of particular importance in this respect, including the operation of the relevant margin of appreciation' (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 108, ECHR 2013 (extracts))."[1]

To my knowledge (based on a HUDOC search), there is only one other instance (in another case brought by the same applicant) where the word "subsidiarity" is mentioned at all among general principles in the Court's Article 10 case-law.[2] On the other hand, reference to subsidiarity is a rather standard or preferred argument of some Governments. For example, in *Rubins v. Lithuania* (no. 79040/12, § 66, 13 January 2015) the Latvian Government referred to the principle of subsidiarity allegedly reiterated in

[1] Only the last sentence of the paragraph comes directly from *Animal Defenders International.* Moreover, the citation is not complete, and this too might be a source of misunderstanding. In *Animal Defenders*, a case about a general measure (which happens to be, in my view, a blanket ban), the judiciary was working *together* with legislation in the determination of proportionality; this broader process was considered for the purposes of satisfying the *Hatton* criteria, which were originally limited to the review of parliamentary debate (see *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 104, ECHR 2003-VIII). In *Animal* Defenders the proportionality analysis undertaken by the domestic courts was considered in addition to the legislative debate, in which, perhaps, the issue of proportionality was not thoroughly considered.
It is perhaps time for the Court to revert to first principles. Legislation is not immune from our review. This was clearly stated a long time ago: the Court's "supervision concerns both the aim of the measure challenged and its 'necessity'; it covers not only the basic legislation but also the decision applying it, even one given by an independent court" (see *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24).
This position has never been openly rebutted.

[2] *Erla Hlynsdottir v. Iceland (no. 2)*, no. 54125/10, 21 October 2014.

the *Palomo Sánchez* judgment.[1] On that authority the Government maintained that the domestic court "had thoroughly analysed the evidence brought before it, thus rendering the sanction proportionate to the legitimate aim of protecting ... reputation and dignity" (§ 66).[2]

While subsidiarity is not mentioned in the determination of the necessity of a limitation of rights, the Court should give due consideration to the role of domestic courts in matters of balancing Convention rights. It is for this reason that a "certain" (as opposed to wide!) margin is granted to the States. It is also clear that where the Court has to decide a matter of conflicting Convention rights (as is the case here), this is discussed in terms of the margin of appreciation.[3] In such circumstances the Court requires that the domestic authorities strike a *fair* (that is, not a specifically correct, optimal, etc.) balance (see *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, § 66, ECHR 2012, citing additional case-law). In consequence, "[w]here the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts" (see *Axel Springer AG v. Germany* [GC], no. 39954/08, § 88, 7 February 2012).

It was probably unfortunate to introduce the term "subsidiarity" in paragraph 59 of the judgment in the present case, as it may give support to a misunderstanding among legal writers or even a departure from the case-law of the Grand Chamber. Subsidiarity cannot change the margin of appreciation. Subsidiarity is present in all cases; it is a structural feature of the human rights protection system under the Convention. The two concepts will perhaps move towards "parallel concepts" once Protocol No. 15 is accepted.[4] But they remain distinct even in that Protocol.

At the end of the day, the applicable standard is articulated in *Palomo Sánchez* (cited above, § 57): "If the reasoning of the domestic courts' decisions concerning the limits of freedom of expression in cases involving a person's reputation is sufficient and consistent with the criteria

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[1] *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, ECHR 2011 (however, the term "subsidiarity" does not appear in this judgment).

[2] Another Government argument of this kind can be found in *Stoll v. Switzerland* [GC], no. 69698/01, § 77, ECHR 2007-V. It was duly rebutted.

[3] "Because of their direct, continuous contact with the realities of the country, a State's courts are in a better position than an international court to determine how, at a given time, the right balance can be struck. For this reason, in matters under Article 10 of the Convention, the Contracting States have a certain margin of appreciation in assessing the necessity and scope of any interference in the freedom of expression protected by that Article" (see *Palomo Sánchez*, cited above, § 54). This principle goes back to *Handyside* (cited above, § 48).
It is clear that the use of the overburdened and highly criticised term "margin of appreciation" in this context has created additional problems in terms of legal doctrine.

[4] See also a reference along these lines by President Spielmann, http://www.echr.coe.int/Documents/Speech_20140320_London_ENG.pdf

established by the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts." The fact that this standard was not cited in the judgment does not disclose any intention to depart from it.[1]

I have to admit, however, that it would have been more felicitous to follow the language used in Grand Chamber judgments,[2] in particular, as regards the second sentence of the impugned paragraph 59, the wording of *Aksu* (cited above, § 67):

> "If the balance struck by the national judicial authorities is unsatisfactory, in particular because the importance or the scope of one of the fundamental rights at stake was not duly considered, the margin of appreciation accorded to the decisions of the national courts will be a narrow one. However, if the assessment was made in the light of the principles resulting from its well-established case-law, the Court would require strong reasons to substitute its own view for that of the domestic courts, which consequently will enjoy a wider margin of appreciation (see *MGN Limited v. the United Kingdom*, no. 39401/04, §§ 150 and 155, 18 January 2011, and *Von Hannover v. Germany (no. 2) [GC]*, nos. 40660/08 and 60641/08, § 107, ECHR 2012)."

[1] It is a matter of consideration to what extent the "the national courts explicitly took account of the Court's relevant case-law" (see *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 125, ECHR 2012). But the fact that the criteria were considered must not be understood as rendering the Court's supervisory role futile. In *Axel Springer* five dissenting judges took the view that only where the domestic courts applied the relevant criteria in a manifestly unreasonable way, or failed to duly assess the presence of some important factor, should the Court undertake its supervision (see *Axel Springer AG*, cited above, dissenting opinion of Judge López Guerra joined by Judges Jungwiert, Jaeger, Villiger and Poalelungi). This was not the path taken by a substantial majority.

[2] It has to be admitted that there is a little inconsistency in the wording used in Grand Chamber cases, and the quoted paragraph from *Aksu* differs slightly from the language used in *Von Hannover* and *Axel Springer*, delivered six weeks earlier. I regret that I did not notice this earlier, trusting the authority of *Animal Defenders International* (cited above, § 108). As mentioned, *Palomo Sánchez* and its progeny settle the matter with some clarity.