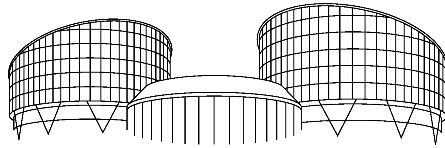

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF FÜRST-PFEIFER v. AUSTRIA

(Applications nos. 33677/10 and 52340/10)

JUDGMENT

STRASBOURG

17 May 2016

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Fürst-Pfeifer v. Austria,

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

András Sajó, *President,*
Boštjan M. Zupančič,
Nona Tsotsoria,
Krzysztof Wojtyczek,
Egidijus Kūris,
Iulia Antoanella Motoc,
Gabriele Kucsko-Stadlmayer, *judges,*
and Marialena Tsirli, *Section Registrar,*

Having deliberated in private on 29 March 2016,

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

PROCEDURE

1. The case originated in two applications (nos. 33677/10 and 52340/10) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Ms Gabriele Fürst-Pfeifer, ("the applicant"), on 17 June 2010 and 9 September 2010 respectively.

2. The applicant was represented by Lansky, Ganzger & Partners, lawyers practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for Europe, Integration and Foreign Affairs.

3. The applicant alleged that the Austrian courts had failed to protect her reputation against defamatory allegations made in a newspaper article.

4. On 9 October 2013 the applications were communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant, Ms Gabriele Fürst-Pfeifer, is an Austrian national who was born in 1964 and lives in Mödling. She is a psychiatrist and has been registered since the year 2000 as a psychological expert for court proceedings in custody and contact-rights-related disputes and decisions on

public care as well as child abuse. Specialised in the psychological examination of children and adolescents, her focus is mainly on custody and contact-rights-related disputes.

6. The online publication "meinbezirk.at" was published and edited by the "Print" Multimedia Company GmbH, a private company which had its registered office in St. Pölten.

7. The regional weekly print publication *Bezirksblatt*, which was sent to every household of the district free, was published and edited by the "Print" Zeitungsverlag GmbH, a private company which had its registered office in Innsbruck.

A. The published article

8. On 23 December 2008 an article was published in "meinbezirk.at" as well as in the print version of *Bezirksblatt,* which stated as follows:

> "The quality of experts in the spotlight (*Gutachterqualität im Visier*)
>
> Disclosed: Court Expert for custody proceedings a case for therapy
>
> (*Aufgedeckt: NÖ Sorgerechts-Sachverständige selbst ein Therapie-Fall*)
>
> Suffering from up-and-down mood swings, panic attacks, suicidal thoughts and hallucinations, together with paranoid ideas – but working as a court-appointed expert. In the last 12 years she has examined over 3.000 married couples in custody-related disputes. Now it seems, it gets rough for [the applicant] as an expert report about her psychological condition has been disclosed ...
>
> A psychological expert report by Dr. M. was commissioned in 1993 in the course of civil proceedings (action because of an alleged breach of promise of marriage) which unearthed the deficiencies of [the applicant] described above. Moreover, Dr. M. came to the conclusion that the applicant's impairments were hereditary, as the history of her family showed an accumulation of these impairments. Three years later, the applicant was introduced to the "expert community" at the Wiener Neustadt Regional Court, and her integrity was beyond reproach for a decade – until now."

9. The passage was followed by comments by a member of the Green Party, who had made a criminal complaint against the applicant with the Public Prosecutor's office, the Youth Advocate at the Regional Government of Lower Austria, and the Vice-President of the Wiener Neustadt Regional Court, who was responsible for managing the list of experts at the court. At the end of the article it was mentioned that the applicant was no longer answering her phone and had withdrawn from all her cases.

10. As a result of the article the applicant was confronted with questions related to it from colleagues and patients, and proceedings were initiated at the Wiener Neustadt Regional Court to clarify whether she was still fit to work as a court-appointed expert. In the course of those proceedings the applicant's mental status was also set to be examined.

B. The proceedings against the "Print" Multimedia Company GmbH concerning the online publication

11. On 14 January 2009 the applicant lodged an action with the St. Pölten Regional Court. She sought damages under section 8a of the Media Act (*Mediengesetz*) and the publication of the judgment claiming that the article and in particular the passages dealing with the psychological expert report on the applicant had violated her intimate personal sphere and compromised her publicly. However, she did not argue that the expert report had been obtained unlawfully.

12. On 3 April 2009 the St. Pölten Regional Court (*Landesgericht St. Pölten*) allowed the applicant's action, ordered the publisher to pay damages in the amount of 5,000 euros (EUR) and the operative part of the judgment to be published. Furthermore, the publisher was to bear the costs of the proceedings. The court found that an average reader would understand the article as putting the expert opinion from 1993 in direct relation to the applicant's work as an expert now, thus questioning the quality of her work. The article, that also featured the applicant's full name and the description of her psychological impairment, touched her intimate personal sphere, since it created a link between her mental state and the quality of her work. However, the information itself did not allow for such a link, especially since the expert opinion dated from 1993 and dealt only with a very specific question in the context of civil proceedings at the time. The incomplete and manipulative content of the article was not able to meet the standards of reporting on matters of fact. Furthermore, the court did not consider that there was a direct link between the contents of the article and the applicant's public position, given that she mainly worked as an expert in custody cases, which were not usually heard in public. Furthermore, it could be assumed that the applicant, a psychiatrist herself and a medical doctor, was managing her illness well and was able to do her work without any impairments.

13. The publisher appealed on points of law and fact, as well as against the sentence (*Berufung wegen Nichtigkeit, Schuld und Strafe*).

14. Thereupon, on 30 November 2009, the Vienna Court of Appeal (*Oberlandesgericht Wien*) heard the appeal, set aside the judgment of the lower court, and dismissed the applicant's action. The Court of Appeal confirmed that the article and the impugned passages giving opinions on the applicant's mental state affected her intimate personal sphere and were capable of compromising her. However, the content of the article was true, as it only repeated true information that had not been disputed by the applicant. Furthermore, the court did not find the article to be incomplete or manipulative, but sufficiently well-balanced and faithful to the different sides of the story in that it also referred to the fact that the applicant's integrity had never been questioned in ten years; the court also asked for

statements from the Vice-President of the Wiener Neustadt Regional Court, a member of the Green Party, and the Youth Advocate of the Regional Government of Lower Austria.

15. The Court of Appeal further found that the publication in issue was directly linked to the applicant's public status. She had been included in the list of experts to be appointed by the courts since the year 2000 and had been appointed in several cases. This regular work as an expert in court proceedings belongs beyond doubt to the public sphere (*"...ist zweifellos dem öffentlichen Leben zuzuordnen..."*) as she took part in association with the State-organised judiciary and held an important position in connection with the decision-making process of judges. Even though the impugned expert opinion dated from 1993 and concerned a period in the applicant's life prior even to that date, the reporting in question touched sufficiently upon the present public activities of the applicant. Considering the importance and sensitivity of the area of custody proceedings and the dominant role of experts in the field, the psychological integrity of an expert assigned to those cases had to be beyond doubt. Any reservation in relation to the mental health of experts – if based on sufficient reasons – had to be met with a thorough investigation in the interest of good conduct of the administration of justice, which was what had happened as the next step in the present case. According to the Court of Appeal, the article took up doubts arising from the neurologist opinion in 1993 without denying the applicant's abilities as an expert in the area. The truthful information in the article and the public interest in the subject matter justified the article's critical questioning of exactly those abilities.

16. That judgment was served on the applicant's representative on 17 December 2009.

C. The proceedings against the "Print" Zeitungsverlag GmbH concerning the printed publication

17. In the meantime the applicant lodged an action with the Innsbruck Regional Court on 7 April 2009. She sought damages under section 8a of the Media Act (*Mediengesetz*) and publication of the judgment claiming that the article, and in particular the passages dealing with the psychological expert report on her, violated her intimate personal sphere and compromised her publicly.

18. On 2 October 2009 the Innsbruck Regional Court (*Landesgericht Innsbruck*) granted the applicant's action, ordered the publisher to pay damages in the amount of 5,000 euros (EUR) and the publication of the operative part of the judgment. Furthermore, costs were awarded against the publisher. The court found that the average reader would understand the article as stating that the applicant was incapable of being an expert in custody proceedings because of her own mental health

impairments in 1993 and that this placed in question the quality of the applicant's work so far. That the applicant's psychological illness was directly linked to the intimate personal sphere was beyond doubt. The present article not only mentioned the applicant's mental health status, but also grossly exaggerated individual symptoms, which was also capable of compromising her. The article was so incomplete and distorted that it could not be considered a report of matters of fact. The Regional Court in particular noted that the article did not mention that the period of examination was even earlier than 1993 and that only certain aspects of the expert opinion had been published, while others had not. Scandalously the article created the impression that the applicant had rendered decisive opinions in custody proceedings for over a decade while herself suffering from the symptoms described above. Furthermore, the publication was not linked in any way to the applicant's public status (*"...steht [...] in keinem unmittelbaren Zusammenhang mit dem öffentlichen Leben der Antragstellerin"*). There was no connection between the applicant's work at present and her mental health status years ago. Her work in the context of custody proceedings was also not conducted in public.

19. The publisher appealed on points of law and fact, as well as against the sentence (*Berufung wegen Nichtigkeit, Schuld und Strafe*).

20. Thereupon, on 11 February 2010, the Innsbruck Court of Appeal (*Oberlandesgericht Innsbruck*) granted the appeal, set aside the judgment of the lower court, and dismissed the applicant's action. In contrast to the Regional Court it found that the average reader would understand from the article at issue that in 1993 an expert opinion was rendered in respect of the applicant that showed the above-mentioned psychological impairments. However, the article also stated that the applicant's integrity had not been questioned for over a decade. The article, while focusing on the applicant's work in custody proceedings, gave space to comments from the Youth Advocate of the Regional Government of Lower Austria, a member of the Green Party, and the Vice-President of the Wiener Neustadt Regional Court. The article did not indicate however that the applicant was not competent to exercise her profession as a psychological expert. Furthermore, the published information was true. The fact that only parts of the expert opinion were repeated in the article did not render the article distortive, nor the relevant information untrue.

21. As regards the connection to the public sphere and public interest, the Court of Appeal found that the State administration, together with the administration of justice, belonged to the public sphere. The applicant had been included in the list of court-commissioned experts since the year 2000, and her repeated work as an expert in court proceedings must be considered as belonging to the public sphere. The activity was closely linked to the administration of justice, and had a considerable influence on judges' decision-making processes. The impugned article concerned the applicant's

activity as an expert in custody proceedings. Considering the importance and sensitivity of the area of custody proceedings and the dominant role of experts in the field, the psychological integrity of an expert assigned to those cases had to be beyond doubt. Any reservation in relation to the mental health of experts – if based on sufficient reasons – had to be met with a thorough investigation in the interest of the proper administration of justice, which had happened as a next step in the present case. Insofar, a truthful report linked to a person's public status, which also contained information belonging to the intimate personal sphere must be permitted to be published. The Court of Appeal concluded that the article, by way of an appropriate commentary, critically examined a matter of public interest and therefore exercised its role as a "public watchdog".

22. That judgment was served on the applicant's representative on 11 March 2010.

II. RELEVANT DOMESTIC LAW

23. Section 7 of the Media Act, which has the title "Interference with a person's most intimate personal sphere" (*Verletzung des höchstpersönlichen Lebensbereiches*), reads as follows:

> "(1) If the strictly personal sphere of an individual's life is discussed or portrayed in the media in a way liable to publicly undermine the individual concerned, he or she shall have the right to claim compensation for the damage sustained from the media proprietor (publisher). The amount of compensation may not exceed 20.000 euros ...
>
> (2) The right referred to in paragraph 1 above shall not apply where:
>
> (i) the statements comprise an accurate account of a debate held during a public sitting of the National Council, the Federal Council, the Federal Assembly, a regional parliament or a committee of one of these general representative bodies;
>
> (ii) the statements published are true and are directly related to public life;
>
> (iii) it can be assumed from the circumstances that the person concerned had agreed to publication, or
>
> (iv) the statements were made during a live broadcast, and no employee or representative of the broadcaster failed to exercise proper journalistic care."

24. If the public prosecutor does not file a bill of indictment, the person who claims to be the victim of an interference with his or her intimate personal sphere may request the opening of criminal proceedings. According to Section 8a § 1 of the Media Act, this person has the legal rights and abilities of a private prosecutor (*Privatankläger*).

25. According to the Federal Act on the Certifying and Declaration on Oath of Experts and Interpreters, Federal Law Gazette No. 137/1975 (*Bundesgesetz über die allgemein beeideten und gerichtlich zertifizierten Sachverständigen und Dolmetscher; Sachverständigen- und Dolmetschergesetz*, *BGBl. 137/1975*) authorities shall normally choose an

expert from a register held by the President of the Regional Court. According to section 2 § 2 of this law, to be enlisted as an expert for a specific scientific area, one, *inter alia,* has to be physically and psychologically fit.

THE LAW

I. JOINDER OF THE APPLICATIONS

26. Given that the two applications concern the same press article, once published on the Internet and once in print by two different companies, and that they share a legal basis, the Court decides to join them (Rule 42 § 1 of the Rules of Court).

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

27. The applicant complained that the authorities had failed to protect her rights under Article 8 of the Convention, as they had dismissed her actions with the courts to be compensated for alleged unlawful publication of facts of her private life. Article 8, in so far as relevant, provides as follows:

> "1. Everyone has the right to respect for his private ... life...
>
> 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."

28. The Government contested that argument.

A. Admissibility

29. The Government requested the Court to declare the application inadmissible in accordance with Article 35 of the Convention as the applicant had not lodged a request for retrial under Article 363a of the Code of Criminal Proceedings to redress the alleged breach. Article 363a of the Code of Criminal Proceedings would provide for a retrial in criminal proceedings if the European Court of Human Rights had found a violation of the Convention. The Supreme Court had extended this remedy by analogy, stating that a judgement by the European Court of Human Rights was not a necessary prerequisite for a retrial in criminal proceedings (Supreme Court, judgment of 1 August 2007, no. 13Os135/06m). It was

thus possible to challenge a violation of the rights under the Convention in the context of criminal proceedings at the domestic level by applying for a retrial on the basis of Article 363a of the Code of Criminal Proceedings directly to the Supreme Court.

30. The applicant contested this argument.

31. The Court observes that in the case of *ATV Privatfernseh-GmbH v. Austria* ((dec.) no. 58842/09, 6 October 2015, § 32) it has examined in detail the question whether Article 363a of the Code of Criminal Proceedings was a remedy readily available and sufficient to afford redress in respect of an alleged breach of rights under Article 10 of the Convention in proceedings for compensation under section 7 of the Media Act. It found that a request under Article 363a of the Code of Criminal Proceedings constituted, in the circumstances of the case, an effective and sufficient remedy an applicant would be obliged to use. However, it transpires from the Supreme Court's case-law (quoted in *ATV Privatfernseh-GmbH* (dec.), cited above, § 22), that victims of crimes and private prosecutors, as well as public prosecutors, are not entitled to this remedy. The Government has not provided evidence which would show that the availability of this remedy also extended to this group of persons. It follows that the Government's objection with regard to the non-exhaustion of domestic remedies has to be dismissed.

32. The Court notes that the applications are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that the applications are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

33. The applicant submitted that the Austrian courts had violated their duty to protect her right to private life when dismissing her actions for compensation for the unlawful publication of matters relating to her private life. The content of an expert report about her psyche was part of her private life and not related to any public interest. The Vienna Court of Appeal as well as the Innsbruck Court of Appeal had not taken into account that the publication of a 17-year-old expert report would not fulfil a pressing social need and was of no relevance when assessing her present professional skills. The publication's aim was not to inform the public but only to damage her reputation. Under these circumstances the publishers could not rely on their rights under Article 10 as she was not a public figure. The applicant did not argue that the expert report had been obtained unlawfully.

34. The Government argued that the Austrian courts had struck a fair balance between the competing interests under Articles 8 and 10 of the

Convention within the margin of appreciation granted by the Convention. Information about the mental state of health of a court-certified expert who worked in sensitive proceedings in custody issues was a contribution to a debate of general and public interest. Issues concerning the functioning of the justice system would constitute questions of public interest and it would be the duty of the press to impart information on matters relating to the functioning of the judiciary. Because of the special role of experts in the Austrian judicial system and their influence on the courts' decisions, not only would the activities of judges, public prosecutors or registrars constitute an issue of public life, but so would those of court-certified experts. As regards the contents of the article, its truth remained undisputed. Both Courts of Appeal had reached the conclusion that it was neither incomplete nor manipulative, but rather well-balanced, taking various aspects and views into account. Not only did the article reproduce statements and comments of representatives of public life, it also mentioned the fact that the applicant's professional integrity had not been questioned during ten years of practice.

2. *The court's assessment*

35. The Court reiterates that according to its case-law the right to reputation is an independent right guaranteed by Article 8 of the Convention which the State has a positive obligation to protect (see *Karakó v. Hungary*, no. 39311/05, § 18, 28 April 2009).

36. With regard to cases in which a violation of the rights guaranteed under Article 8 is asserted and the alleged interference with those rights originates in an expression, the Court has already found that the protection granted by the State should be understood as one taking into consideration its obligations under Article 10 of the Convention. It is the latter provision which has been specifically designed by the drafters of the Convention to provide guidance concerning freedom of speech – also a core issue in the present application. Paragraph 2 of Article 10 recognises that freedom of speech may be restricted in order to protect reputation. In other words, the Convention itself announces that restrictions on freedom of expression are to be determined within the framework of Article 10 enshrining freedom of speech (see *Karakó*, cited above, § 20-21).

37. In particular, in cases concerning newspaper publications, the Court has previously held that the protection of private life has to be balanced, among other things, against the freedom of expression guaranteed by Article 10 of the Convention (see, with further references, *Węgrzynowski and Smolczewski v. Poland*, no. 33846/07, § 56-58, 16 July 2013).

38. The Court has further found that, as a matter of principle, the rights guaranteed by these provisions deserve equal respect and the outcome of an application should not, in principle, vary according to whether it has been lodged with the Court under Article 10 of the Convention by the publisher

of an offending article or under Article 8 of the Convention by the person who has been the subject of that article. Accordingly, the margin of appreciation should in principle be the same in both (see *Axel Springer AG v. Germany* [GC], no. 39954/08, § 87, 7 February 2012, and *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 106, ECHR-2012).

39. The Court has also observed that the most careful of scrutiny under Article 10 is required where measures or sanctions imposed on the press are capable of discouraging the participation of the press in debates on matters of legitimate public concern. Furthermore, particularly strong reasons must be provided for any measure limiting access to information which the public has the right to receive. The Court has also observed that the press must not overstep certain bounds, particularly as regards the reputation and rights of others (for many examples see *Węgrzynowski and Smolczewski,* cited above*,* § 56-58).

40. Where a 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. In other words, there will usually be a wide margin afforded by the Court if the State is required to strike a balance between competing private interests or competing Convention rights (see, with further references, *Delfi AS v. Estonia* [GC], no. 64569/09, § 139, 16 June 2015).

41. The Court reiterates that, in matters of freedom of expression, its task in exercising its supervisory jurisdiction is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. The Court will look at the interference complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" and whether they were "proportionate to the legitimate aim pursued". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts (see, among many other authorities, *Cojocaru v. Romania*, no. 32104/06, § 21, 10 February 2015).

42. It follows that, notwithstanding the fact that the applicant claims a violation of Article 8 of the Convention, the Court has to determine whether the principles inherent to Article 10 were properly applied by the Austrian courts when deciding the applicant's actions (see for many, *Ruusunen v. Finland*, no. 73579/10, § 43, 14 January 2014; *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 93, 10 November 2015).

43. In previous case-law, the Court has emphasised that information about a person's health is an important element of private life (see, *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 66, ECHR 2008). Both Courts of Appeal noted that the article concerned an important element of the applicant's private life and compromised her in public but dismissed the compensation claims because the published facts were true and had a direct connection to the public sphere. However, the particular information on the applicant's mental health stemmed from the report of a court-appointed expert acting in public proceedings before a civil court. Moreover, as can be seen from the persons quoted in the article at issue and their respective statements (see above paragraph 9), the authors of the article reported that the medical report had already provoked political reactions and thus participated in an ongoing public debate.

44. The Court notes that the article under consideration did not contain a reference to ongoing or recently ended court proceedings but a dispute if the applicant's psychological condition as described by an expert report in 1993 would contravene her appointment as expert. As to the method of obtaining the information employed the Court observes that the applicant had never argued that the medical expert report at issue had been obtained illegally. As to the veracity of the information, the truth of the content of the article under consideration was undisputed in the whole proceedings. Furthermore, the content of the article was balanced, informing on facts and not only intended to satisfy public curiosity. Beside a catchy sub-headline only facts and comments by third persons, clearly distinguished by quotation marks, were included. It was clearly stated that the expert report dated back to court proceedings in 1993 and that the applicant's integrity had not been questioned for more than a decade. These facts were set out without any negative comment by the author.

45. The Court further notes that a serious debate on the mental health status of a psychological expert, evoked by reasoned suspicions, has to be seen as a debate of general interest, as an expert in court proceedings is required to meet standards of physical and psychological fitness. This is all the more important as a court certified psychological expert, such as the applicant, plays an important and sometimes decisive role in the decision making process in child care proceedings and thus strongly influences not only the fate of families but also of individuals in an early and sensitive stage of personal development. In the eyes of the parties to the proceedings and the general public there must not be any doubts as to the mental fitness of such an expert in order to maintain public trust in the judiciary.

46. The Court has already stated that, when it comes to the criticism of their actions, members of the judiciary should not be treated on an equal footing with politicians, as they do not lay themselves open to close scrutiny of their every word and deed to the extent to which the latter do. Nonetheless, civil servants acting in an official capacity may nevertheless

be subject to wider limits of acceptable criticism than ordinary citizens (see with further references, *July and SARL Libération v. France,* no. 20893/03, § 74, ECHR 2008 (extracts)). The Courts of Appeal have based their decisions on the finding that the applicant, as a frequently appointed expert in court proceedings in the very sensitive field of child psychology and fosterage should be treated similarly to civil servants acting in an official capacity when it comes to examining whether a careful balance has been struck between the competing public and private interests. The Court does not see strong reasons to substitute its view for that of the domestic courts in regard to this finding.

47. Nonetheless the Court observes that those who act in an official capacity must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty (see *Janowski v. Poland* [GC], no. 25716/94, § 33, ECHR 1999-I). In the present case however, there is no need to weigh the requirements of such protection against the interests of the freedom of the press or of open discussion of matters of public concern, since the article under consideration did not contain offensive or abusive verbal attacks.

48. On these grounds, the Court is satisfied that the decisions of the Vienna Court of Appeal and of the Innsbruck Court of Appeal struck a fair balance between the competing interests in the present case.

49. Consequently, the Court concludes that there has not been a violation of Article 8 of the Convention.

FOR THESE REASONS, THE COURT

1. *Decides*, unanimously, to join the applications;

2. *Declares*, unanimously, the applications admissible;

3. *Holds*, by four votes to three, that there has been no violation of Article 8 of the Convention;

Done in English, and notified in writing on 17 May 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli
Registrar

András Sajó
President

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

(a) Separate opinion of Judge Zupančič;
(b) Joint opinion of Judges Wojtyczek and Kūris;
(c) Separate opinion of Judge Motoc.

A.S.
M.T.

CONCURRING OPINION OF JUDGE ZUPANČIČ

I agree with the outcome in the present case. However, I consider that the judgment would have greater advisory force were the facts qualified in another manner (*qualification juridique*). Given that the Court is the master of the characterisation to be given in law in its own cases, it could have reclassified the case.

1. In terms of the facts as presented in the judgment, we have a situation in which serious doubts were raised as to the competence of a court-appointed psychological expert (psychiatrist) who had rendered advice before the local courts in thousands of cases concerning child custody issues and similar questions.

2. There can be no doubt, therefore, as to the public relevance of the issue in this case, that is, as to the question of psychological fitness, which was also required by section 2 (2) of the Austrian Federal Act on the Certifying and Declaration on Oath of Experts and Interpreters (see paragraph 25 of the judgment). Indeed, at the origin of this entire problem lies the question of whether the competent Austrian authorities ought to have examined the applicant's "psychological fitness" *ab initio*, while she was under consideration for appointment as a certified court expert. If this had been done, we would not be facing the situation currently before us.

3. The applicant has been registered as a court-appointed psychological expert since 2000; she has provided expert advice in custody, contact-rights and related disputes and on the public care of children, including in cases of alleged child abuse.

4. Seven years before that, in 1993, the applicant was diagnosed as described in the first paragraph of the quoted article (see paragraph 8 of the judgment). Subsequently, according to the same article, the veracity of which has been confirmed, the applicant assessed over 3,000 married couples in custody-related disputes.

5. It is worth mentioning here that all of these cases were dealt with *in camera*; in other words, the public was generally not permitted to be present and the press was generally not allowed to report on these proceedings. As we know, the public functioning of the courts has as its precise purpose to permit anomalies to be made public as soon as they are detected. It is not apparent in how many of the above-mentioned 3,000 cases the psychological expert's intervention was, or was not, dysfunctional. Given the secrecy of these proceedings, the publication of the incriminated article was perhaps the only way to alert the public and the authorities to the potential problem. As we shall see, the aim of the article was "whistleblowing", especially since other possible avenues were apparently not available.

6. What follows is a quote from the case of *Heinisch v. Germany* (no. 28274/08, ECHR 2011 (extracts)) dealing with the question of "whistleblowing":

> "B. Relevant international law and practice
>
> 37. In its Resolution 1729 (2010) on the protection of "whistle-blowers" the Parliamentary Assembly of the Council of Europe stressed the importance of "whistle-blowing" – concerned individuals sounding the alarm in order to stop wrongdoings that place fellow human beings at risk – as an opportunity to strengthen accountability, and bolster the fight against corruption and mismanagement, both in the public and private sectors. It invited all member States to review their legislation concerning the protection of "whistle-blowers", keeping in mind the following guiding principles:
>
> 6.1.1. the definition of protected disclosures shall include all bona fide warnings against various types of unlawful acts, including all serious human rights violations which affect or threaten the life, health, liberty and any other legitimate interests of individuals as subjects of public administration or taxpayers, or as shareholders, employees or customers of private companies;
>
> ...
>
> 6.2.4. Any whistle-blower shall be considered as having acted in good faith provided he or she had reasonable grounds to believe that the information disclosed was true, even if it later turns out that this was not the case, and provided he or she did not pursue any unlawful or unethical objectives." (emphasis added.)"

7. Austria does not have specific legislation concerning "whistle-blowers". Nonetheless, the situation in the case at hand is perfectly subsumable to the following provision in the above-cited soft-law recommendations:

> "6.2.3. Where internal channels either do not exist, have not functioned properly or could reasonably be expected not to function properly given the nature of the problem raised by the whistle-blower, external whistle-blowing, including through the media, should likewise be protected."

8. For analogous reasons, section 7 (2) (ii) of the Media Act provides that a plaintiff's claim for compensation for the damage sustained from the actions of a media proprietor (publisher) cannot be granted where "the statements published are true and are directly related to public life..."

9. This is the well-known exception where a defendant may show, through the test of veracity, that what he or she was publishing is related to public life and that it is true. Yet the purpose of this provision, as pointed out above, is exactly the same as the proviso excepting "whistle-blowers" from various sanctions – on the ground of undisputed public interest. Again, since "whistle-blower" legislation does not exist in Austria, the above citation from section 7 of the Media Act provides a direct path to a similar outcome. The application of this section 7 (2) (ii) Media Act test is therefore acceptable.

10. The next question refers to the applicant's affirmation that the publication of a 17-year-old expert report on her mental health was outdated and of no relevance in assessing her current professional skills. Consequently, the aim of the publication was not to inform the public but only to damage her reputation. Moreover, she claimed that, for these reasons, the publishers could not rely on their rights under Article 10, given that she was not a public figure.

11. To be a court-appointed expert is obviously to be a public figure. Further, in view of the well-balanced text in question, the aim of publication was certainly not to damage the applicant's reputation. Moreover, in the Continental legal systems experts are appointed by the court: in other words, they are not chosen by the parties. Where a judge does not have the requisite specialised knowledge, in this case psychological knowledge concerning, *inter alia*, custody cases, he or she will appoint an expert from the roster. An expert witness does not testify only to the facts, as is the case with ordinary witnesses. He or she testifies about the facts, as he or she has established them, and is also bound to give his or her opinion on the same facts. Given that those facts and that opinion overlap to the point of being consubstantial, a judge is rarely in a position to question the expertise of the court-appointed expert. Consequently, a case will often depend primarily on the expert's opinion.

12. The remaining issue in this context is whether or not a 17-year-old expert report is relevant. In the case of *Scozzari and Giunta v. Italy* ([GC], nos. 39221/98 and 41963/98, ECHR 2000-VIII) the Court took the position that the children should not have been entrusted to foster care in the "Fortetto" home near Florence on account of the fact that one of the managers of that foster home had previously been diagnosed as a paedophile. The whole case hinged on this established fact, yet the diagnosis of paedophilia was at that time already 20 years old. For this reason, one cannot *a priori* maintain that a long-standing psychiatric diagnosis was not relevant. Of course, much depends on the nature of the underlying psychiatric disorder, and we do not maintain that the situation is different here, where the diagnosis referred to mood swings, panic attacks, suicidal thoughts and visual hallucinations, as well as paranoid ideas. The way to invalidate the former diagnosis would have been for the applicant to submit to another *bona fide* psychiatric evaluation. This might have disproved the previous opinion.

13. The Vienna Court of Appeal confirmed that the publication in question was directly linked to the applicant's public status. As stated, she was appointed as a court expert in 2000 and had subsequently been assigned to numerous cases. We agree with the Court of Appeal that the importance and sensitivity of custody proceedings, and the dominant role of experts in such a field, requires that the psychological integrity of an expert assigned to such cases must be beyond doubt. Any reservations on this point ought to

have been responded to by means of a thorough investigation, in the interests of the proper administration of justice. This assessment goes back to the issue of whether the applicant, in defence of her status, ought to have submitted to another psychiatric examination.

14. There is a commonsensical addendum to this, to the effect that candidates for any important public function must be beyond reproach. If the function is important, even the slightest doubt as to their psychological fitness must result in removal from the candidacy for such a function. Here we would reiterate that such functions, including that of a court-appointed expert, are subject to privilege, i.e., they are not rights. This has repercussions for the appointment process, because – given that the appointment is a privilege and not a right – the appointing body need not even give reasons for its decision. For the same reason, no appeal lies against such a decision.[1]

15. This case also concerns the applicant's personality rights (*droit de personnalité, Persönlichkeitsrecht*), her right to privacy.

Article 8 of the Convention juxtaposes this right with the "protection of the rights and freedoms of others". In two recent cases (*Dungveckis v. Lithuania*, no. 32106/08, 12 April 2016, and *Pinto Coelho v. Portugal (no. 2)*, no. 48718/11, 22 March 2016), and for a long time before that (*Von Hannover v. Germany*, no. 59320/00, ECHR 2004-VI; *Ernst August von Hannover v. Germany*, no. 53649/09, 19 February 2015*;* and *Bohlen v. Germany*, no. 53495/09, 19 February 2015), I have been a staunch supporter of personality rights. I consider that personality rights have, since Roman law, been the private-law equivalent of human rights.

The ostensibly secondary social values mentioned in the second paragraphs of Articles 8, 9, 10, and 11 are, at least, equipoised (see *Dungveckis*) when compared to the nominally primary human rights promulgated in the first paragraphs of these Articles of the Convention. Consequently, this calls for value-balancing (assessment of proportionality).

16. In cases where the starting point is, for example, freedom of expression (freedom of the press), the ostensibly secondary personality right of the applicant might nevertheless predominate. Likewise, in the present case the secondary value (protection of the rights and freedoms of others) prevails over the primary value, namely "respect for [the applicant's] right to her private life", that is, privacy (see paragraphs 40–46 of the judgment), except that here it is the applicant's personality rights that are being prevailed over.

Again, this goes to show that the secondary considerations are no less important than the primary human rights. This is especially true in cases where the freedom of the press (of expression, Article 10 of the Convention)

---

[1] See B.M. Zupančič, *On Rights and On Privileges*, Boston University International Law Journal (to appear in 2016).

as a primary consideration collides with another primary value, the right to privacy. Here, in contrast to the other cases cited above, the balancing exercise is conducted between two explicit prescriptive (primary) rules of the Convention.

17. This is one of those rare cases where it is undeniably clear that the public interest of the multiplicity of family-law cases in question, and the consequent freedom of the press, must prevail over the applicant's right to privacy.

JOINT DISSENTING OPINION OF JUDGES WOJTYCZEK AND KŪRIS

1. This judgment has several major flaws. Firstly, the assurance that "the rights guaranteed by [the] provisions [of Articles 8 and 10 of the Convention] deserve equal respect" (see paragraph 38 of the judgment), seems to be but a dead letter. The judgment is structured and reasoned in such a way that Article 10 is given pre-eminence over Article 8. Secondly, the Court's case-law is applied selectively and offhandedly. Important elements thereof, pertaining to the heart of respect for privacy, are suppressed, whereas those related to the freedom of the media are emphasised. Thirdly, the reasoning is based on misrepresentation and misinterpretation of the facts. Some pertinent facts are passed over in silence, and certain important factual questions are not raised at all. Had they been raised explicitly and objectively, the overall finding could scarcely have been the same.

Combined together, these flaws have produced the most regrettable result – a one-sided, unbalanced and, it appears, fundamentally unjust judgment.

I

2. As time goes by, there must be growing awareness of the increasingly pressing need to ensure more effective protection for personality rights, in particular privacy rights, *vis-à-vis* a progressively all-powerful media, acting under the aegis of "public interest" (often a simulated one), as well as *vis-à-vis* the impingement on individuals' privacy rights by those seeking to use the media as a tool for pursuing, to the detriment of privacy rights, whatever interests they may have. The Court should always be mindful of its mission to be at the forefront of raising and maintaining, through its case-law, this awareness. It should not depart from that task by becoming an uncritical protector of the "freedom to ... impart information" (Article 10), where the latter is defended as some "trump" freedom, to which many of the other rights and freedoms of men and women must give way.

3. Very much in line with this mission of the Court is the recent Grand Chamber judgment in the landmark case *Bédat v. Switzerland* ([GC], no. 26925/08, 29 March 2016). It outlines and follows the Court's earlier case-law (ibid., §§ 72 and 73). The judgment in *Bédat* was delivered only a few hours after the present case was deliberated in private by the Chamber; however, it was adopted more than two months prior to the deliberations in the present case (ibid., introductory section) and, as a Grand Chamber judgment in a resonant case, its contents were not unknown "inside" the Court at the time of these latter deliberations. Yet its findings were ignored.

In *Bédat* the Court defended, against the media, the personality rights of an individual who had allegedly not only committed an unlawful act which

entailed serious consequences (including the loss of human life) and of which that person was accused in criminal proceedings, but who, at the time that act was committed, allegedly suffered mental-health problems which were aired to the public by a magazine. The distressing incident in which that person was involved had legitimately become the topic of a heated public debate even before an article which infringed upon the perpetrator's privacy was published. In the present case, however, the applicant's story was gratuitously trumpeted about in an article which implied that certain mental-health problems from which she had reportedly suffered in the distant past impeded her professional skills. As will be shown, there was no public debate at the material time regarding any decision which the applicant might have taken in her professional capacity or any other circumstance of her life, let alone any criminal investigation against her. In the *Bédat* case, Switzerland, by safeguarding the defendant's rights under Article 8, had not violated the freedom of the media under Article 10. The present judgment is based on the idea that whatever rights the applicant might have had under Article 8 (related to her mental suffering when going through a difficult period of her life related to the alleged breach of promise of marriage) were superseded by the freedom of the media under Article 10, and that therefore the non-sanctioning of the latter by the Austrian courts was in line with Article 8. Thus, the Court's attitude in the present case is in shockingly downright opposition to that in *Bédat*.

4. How can the Court be so flagrantly ambiguous and simultaneously employ two competing axiologies and two incompatible lines of reasoning? This ambiguity is not a result of a gradual development of the Court's case-law, by which the Court reinterprets its case-law so that it is able to meet new challenges. It points to a much deeper problem, the task of looking into which (and of rectifying what is rectifiable) lies with the Grand Chamber.

5. The present judgment is in stark opposition not only to *Bédat* (and the Court's case-law upon which *Bédat* is built) but also to what is increasingly in the air, in the face of an unprecedented escalation of all-permeating non-scrupulous information about individuals' private lives. True, it is not for the courts to solve this multi-faceted social and cultural problem. But if a court turns a blind eye to it when dealing with a specific controversy, one can reasonably ask whether that court is performing a social function apart of that of formally settling the dispute at hand.

6. One of the responses by this Court to the challenge mentioned above has increasingly become the concept of responsible journalism (see *Bédat v. Switzerland* [GC], cited above, § 50, and the case-law cited therein). One does not have to consult dictionaries to ascertain that the word "responsible" encompasses much more than a merely formalistic legal liability for violations of human rights by the media. This capacious notion relates to the media's overall *mission*, on account of which it enjoys an exceptionally

high degree of protection. The minimum level of this broader responsibility is somewhat similar to Hippocrates's "thou shall do no harm" commandment to the medical profession: the media shall do no harm to the community's general interest, as well as no gratuitous harm to the persons about whom it imparts information. Whereas at times it is not obvious how the first part of this commandment is to be fulfilled (because the general interest may not be understood by all in the same way), the second part is less contradictory: in ethical journalism it is undisputed that what the media publishes or broadcasts may be hurtful, and therefore it should constantly be aware of the impact of its words and images on the lives of others. If this precept is not respected, responsible journalism is an empty phrase. If it is ignored by the Court when examining a case where the freedom of the media comes up against personality rights, then responsible journalism, although often referred to in its case-law, is to be considered not as a principle of the law of the Convention, but a mere decoration. Surprisingly, the notion of responsible journalism *is not mentioned at all* in the present judgment.

7. In the face of the ever-growing possibilities available to the (commercial, but at times also non-commercial) media to mushroom its intrusions into individuals' privacy, many international and national courts have developed such concepts as, for example, the long-known "right to be left alone" or the more recent "right to be forgotten" (whatever the context and scope thereof). The present judgment, on the contrary, displays the attitude that the freedom of the media would be infringed upon almost every time that details of even the most intimate of an individual's experiences are not allowed to be publicly known.

II

8. The applicant complained about the violation of her privacy rights under Article 8. She claimed that the expert report regarding her private life was not related to her current professional skills and, thus, to any public interest, and that the only aim of the article reporting on her story was to damage her reputation. She did not deny that the media had a guaranteed right under Article 10 to discuss the performance of her professional duties or her personality, but maintained that the media and the Austrian courts which examined her case could not justify *the publication in question* by reliance on Article 10. In the Strasbourg *argot*, her case is an "Article 8 case".

9. A case wherein an individual's rights under Article 8 have to be balanced against the freedom of the media under Article 10 cannot be *only* an "Article 8 case". In paragraph 38 of the present judgment, the Chamber, referring to *Axel Springer AG v. Germany* ([GC], no. 39954/08, § 87, 7 February 2012) and *Von Hannover v. Germany (no. 2)* ([GC],

nos. 40660/08 and 60641/08, § 106, ECHR 2012), rightly reiterates that "the outcome of an application should not, in principle, vary according to whether it has been lodged ... under Article 10 ... by the publisher of an offending article or under Article 8 ... by the person who has been the subject of that article".

Nonetheless, the fact that issues under Articles 8 and 10 are intertwined is not an excuse for transforming an "Article 8 case" into an "Article 10 case" in such a way that the rights under Article 8 have only "secondary" significance. Yet this is precisely what we have at hand.

10. Although the applicant complains that the State has failed to fulfil its positive obligations under Article 8, in the Court's assessment of the merits of the case (see paragraphs 35-49) only paragraph 35 deals with Article 8 proper and a "positive obligation" is mentioned in that paragraph only once. The judgment does not follow the Court's approach in privacy cases (see, for example, *Von Hannover v. Germany*, no. 59320/00, §§ 57, ECHR 2004-VI; *Von Hannover (no. 2)*, cited above, §§ 98; and *Söderman v. Sweden* [GC], no. 5786/08, §§ 78 *et seq.*, ECHR 2013). Moreover, Article 8 is *not* analysed almost anywhere else in the reasoning on the merits. Instead, the majority turns its attention to Article 10 immediately, stating that "[w]ith regard to cases in which a violation of the rights guaranteed under Article 8 is asserted and the alleged interference with those rights originates in an expression, ... the protection granted by the State should be understood as one taking into consideration its obligations under Article 10", and that "the protection of private life has to be balanced, among other things, against the freedom of expression guaranteed by Article 10" (see paragraphs 36 and 37 respectively).

Having thus paved the way for an examination under Article 10, the majority seems to ignore Article 8 as its own starting point. It goes on to deal with *why* this case, lodged as a "privacy case", is primarily a "freedom of the media case". An individual's reputation, as something which is protected by the Convention, is mentioned twice in the judgment (in paragraphs 36 and 39), but not, however, as an autonomous value under Article 8 (compare, for example, *Delfi AS v. Estonia* [GC], no. 64569/09, § 137, ECHR 2015, and the case-law cited therein), but rather within the context of the second paragraph of Article 10. Thus, the reputation of the individual concerned is treated as something for which the media could not care less, unless there is (most likely *ex ante*) "iron" evidence that an individual's reputation will be unwarrantably damaged by a publication.

This reasoning culminates in the conclusion that, "notwithstanding the fact that the applicant claims a violation of Article 8 of the Convention, the Court has to determine whether the principles inherent to Article 10 were properly applied by the Austrian courts when deciding the applicant's actions" (see paragraph 42). Paradoxically enough, the majority does *not* state that it sees the Court's role *also* in determining whether the Austrian

courts properly applied the principles inherent to Article 8, although even the cases referred to in paragraph 42 imply this (see *Ruusunen v. Finland*, no. 73579/10, § 43, 14 January 2014, and *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 93, ECHR 2015).

In a similar fashion, it is emphasised that “the most careful of scrutiny under Article 10 is required where measures or sanctions imposed on the press are capable of discouraging the participation of the press in debates on matters of legitimate public concern” and that “particularly strong reasons must be provided for any measure limiting access to information which the public has the right to receive” (see paragraph 39). *Nowhere* in the judgment will one find it affirmed that “the most careful of scrutiny” is required *also* in examining whether an individual’s privacy was infringed upon or that “particularly strong reasons” must be provided for interference with it. As to the first tenet, it is redundant to some extent, because in this case no sanction was imposed on the media.

Thus, the majority is of the view that the circumstances of this case call for engagement in one-sided scrutiny. Such is the methodological basis of the finding of no violation of Article 8.

11. The Court has an abundant case-law requiring that examination of whether a given State complied with its positive obligation under Article 8 to protect an individual’s privacy receives *the same* diligence as that given to assessing whether freedom of expression under Article 10 allowed for a publication interfering with an individual’s reputation (see, for example, *Ruusunen v. Finland*, cited above, § 43, and *Bédat v. Switzerland* [GC], cited above, §§ 73 and 74, and the case-law cited therein). However, one does not need to search for this case-law in order to state that such equal diligence is indispensable, because its obviousness commands no special argumentation. No balance between the rights protected under Article 8 and those protected under Article 10 is possible if only the latter are scrutinised and if only interference with the latter must be justified by “particularly strong reasons”, while the former are examined with less attention. There can be no fair balancing exercise if all the weight is placed on one side of the scales while the other is left almost unloaded, especially when the existing case-law contains many arguments in the latter’s favour.

III

12. The balancing of rights under Article 8 against those under Article 10 necessarily involves the application of the so-called *Von Hannover* criteria (see, *inter alia*, *Von Hannover (no. 2)* [GC], cited above, §§ 109-13; *Axel Springer AG v. Germany* [GC], cited above, §§ 90-95; and *Couderc and Hachette Filipacchi Associés v. France* [GC], cited above, §§ 90-93). These criteria are: contribution to a debate of public interest; the degree of notoriety of the person affected; the subject of the

news report; the prior conduct of the person concerned; the content, form and consequences of the publication; and, where appropriate, the circumstances in which the photographs were taken (in the instant case this criterion is not relevant).

In the present judgment, these criteria have either not been applied (the degree of notoriety of the applicant; her prior conduct; the consequences of the publication) or been applied one-sidedly and superficially (the subject of the news report; the content and the form of the publication), thus limiting the Court's scrutiny, in essence, to general considerations as to the analogy between the applicant, who at the material time was (and still is) a "psychological expert for court proceedings" (see paragraph 5), and "members of the judiciary" or "civil servants acting in an official capacity" (see paragraph 46).

13. The Court has also stated that "where it examines an application lodged under Article 10, it will also examine the way in which the information was obtained and its veracity, and the gravity of the penalty imposed on the journalists or publishers" (see *Couderc and Hachette Filipacchi Associés v. France* [GC], cited above, § 93).

It appears that the transformation of the present case from an "Article 8 case" into an "Article 10 case" allowed the majority to attach special weight to "the way in which the information was obtained and its veracity" (although the quoted excerpt from *Couderc and Hachette Filipacchi Associés* is not reproduced verbatim in the judgment). However, in the present case the scrutiny of "the way in which the information was obtained" is limited to ascertaining whether that information was obtained lawfully. The related question as to *why* it surfaced at all is not raised (see also §§ 20, 22-24 below).

Thus, the majority has given particular prominence to the fact that "the particular information on the applicant's mental health stemmed from the report of a court-appointed expert acting in public proceedings before a civil court" and that "the published facts were true" (see paragraph 43), as well to the fact that "the applicant had never argued that the medical expert report at issue had been obtained illegally" and that "the truth of the content of the article ... was undisputed [by her] in the whole proceedings" (see paragraph 44; see also paragraph 33). But the applicant did not complain that the report cited in the article was untrue. Nor did she complain about the way in which the information was obtained. What she complained about was that the Austrian courts did not secure her right of privacy, which had been breached by the publication of the relevant report in an article which suggested that her mental suffering during a difficult period of her life (which, at the time of publication was already 15 years in the past, at the time of the last domestic court judgment – 17 years in the past and today – 23 years in the past) impeded her professional skills and which was aimed at damaging her reputation. This case is not about the "truth" but about the

consequences entailed by reporting of that “truth”. In such circumstances *exceptio veritatis* appears of little, if any, relevance for the assessment of whether a fair balance has been struck between the rights protected under Articles 8 and 10.

14. The majority has also attached particular weight to another criterion in balancing Article 10 rights against those protected under Article 8. It is not a *Von Hanover* criterion proper, but is an important one in cases where the impugned publication allegedly includes offensive and abusive attacks against the person concerned, such as hate speech or incitement to violence. However, this criterion is discussed in the context of the case-law dealing with criticism of politicians, civil servants and other persons “acting in their official capacity”, who are “subject to the wider limits of acceptable criticism”. The Chamber refers (in paragraph 46) to *July and SARL Libération v. France* (no. 20893/03, § 74, ECHR 2008 (extracts)) and (in paragraph 47) to *Janowski v. Poland* ([GC], no. 25716/94, § 33, ECHR 1999-I). Having done so, it concludes that “[i]n the present case ... there is no need to weigh the requirements of ... protection [of the applicant, who acted in an official capacity, from offensive and abusive verbal attacks] against the interests of the freedom of the press or of open discussion of matters of public concern, since the article under consideration did not contain offensive or abusive verbal attacks” (see paragraph 47).

This reasoning is not supported either by the case-law cited or by any other part of the Court’s case-law. Nowhere in *Janowski* or *July and SARL Libération*, and nowhere else in the Court’s case-law, is it suggested that those “acting in their official capacity” are protected against infringement of their right of privacy only if the criticism of their activities or personalities involves “offensive or abusive verbal attacks”. *Nowhere*. Were such a case-law in place, it would be most reprehensible. But no case-law exists which would allow one to conclude from the statement that those “acting in their official capacity” are “subject to the wider limits of acceptable criticism” that they are accordingly subject to *any sort* of “criticism”, provided that that criticism does not resort to “offensive or abusive verbal attacks” and thus becomes “non-acceptable”, and then to apply this tenet indiscriminately to every situation where an individual claims that his or her privacy has been infringed upon.

With regard to those “acting in their official capacity”, as with regard to all other persons, Article 8 requires *much more* than merely their protection against “offensive and abusive verbal attacks”. In a democracy, those “acting in their official capacity” are entrusted, under the law, with that “capacity” because the community believes that they can do more for the common good than those who are not entrusted with it. There are no grounds to assert that many of them in fact do not do more than the other members of the community. Maintaining that those *not acting* in any “official capacity” enjoy full-fledged protection of privacy under the

Convention, whereas the privacy of those who "act in their official capacity" can be intruded upon by virtually anyone and in virtually any circumstances, provided that this intrusion is executed without "offensive and abusive verbal attacks", is an awry interpretation of the very core of the idea of democratic government. Such an interpretation has no basis in the undisputed democratic requirement of citizens' supervision of politicians and other officials. Indeed, it turns things inside out: the idea that those whom the community has entrusted with an official function should not be *rewarded* with privacy incommensurable with the attention which the public may legitimately pay to their activities and their persons is distorted and downgraded to a belief that persons in an "official capacity" must be subject to a form of *retribution* for taking up that function whereby they enjoy virtually no privacy at all, so long as they are not verbally attacked in an "offensive and abusive" manner. By reducing the protection of the applicant's privacy (and, if this judgment is followed in hypothetical future cases, that of other applicants "acting in their official capacity") from interference by the media to mere protection against "offensive or abusive verbal attacks", this judgment does a major disservice to the interpretation of Article 8, and to the methodology of interpretation of the Convention in general.

15. Paragraph 43 makes brief reference to the fact that the information in question concerned the applicant's health, which is "an important element of private life" (the Chamber refers to *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 66, ECHR 2008). Then, in paragraph 45, it is stated that "a serious debate on the mental health status of a psychological expert, evoked by reasoned suspicions, has to be seen as a debate of general interest, as an expert in court proceedings is required to meet standards of physical and psychological fitness", and that "a court-certified psychological expert, such as the applicant, plays an important and sometimes decisive role in the decision-making process in child-care proceedings and thus strongly influences not only the fate of families but also of individuals in an early and sensitive stage of personal development"; consequently, "[i]n the eyes of the parties to the proceedings and the general public there must not be any doubts as to the mental fitness of such an expert in order to maintain public trust in the judiciary".

Here, the selectivity and off-handedness of the majority's employment of the Court's case-law manifests itself again – with the direst results for the applicant in this case, but also for many applicants in future cases. Such reasoning raises two open questions: (i) *what information* about the health of an individual who is a "psychological expert" or acts in some other "official capacity" can be disclosed by the media to the public? (ii) *what are the "official capacities"* whose holders do not (fully) enjoy, under the Convention, protection against disclosure by the media of information about their health? It appears that, in determining what information about an

individual's health can be lawfully disclosed, the Member States enjoy such a wide margin of appreciation that *virtually any information about anything related to the health of a person in an "official capacity"* can be made public by the media, provided that that information was not obtained illegally.

However, the Court was not so lenient in earlier cases. For example, in cases which involved HIV-infected persons it has held that "the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8"; that "[r]especting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties"; that "[i]t is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general"; that "[w]ithout such protection, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health and, in the case of transmissible diseases, that of the community"; and that "[t]he domestic law must therefore afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8" (see *Z. v. Finland*, no. 22009/93, § 95, Reports 1997-I; also see *Armonienė v. Lithuania*, no. 36919/02, § 40, 25 November 2008). One can hardly discern anything in these doctrinal statements which would allow them to be read as applicable only to persons *not acting* "in their official capacity".

The Court has also held that "[t]he above considerations are especially valid as regards protection of the confidentiality of information about a person's HIV infection"; that "[t]he disclosure of such data may dramatically affect his or her private and family life, as well as social and employment situation, by exposing him or her to opprobrium and the risk of ostracism"; that "it may also discourage persons from seeking diagnosis or treatment and thus undermine any preventive efforts by the community to contain the pandemic"; that "[t]he interests in protecting the confidentiality of such information will therefore weigh heavily in the balance in determining whether the interference was proportionate to the legitimate aim pursued"; and that "[s]uch interference cannot be compatible with Article 8 ... unless it is justified by an overriding requirement in the public interest" (see *Z. v. Finland*, cited above, § 96). Save the hint of the menace of a pandemic, the remainder of the cited considerations (and others not cited here) *do not apply only* to persons suffering from HIV or other contagious diseases, whereas the considerations as to the "affect[ing one's] private and family life, as well as social and employment situation" and the "expos[ure of a person concerned] to opprobrium and the risk of ostracism"

are equally applicable *to those who have a history of mental-health problems*.

16. In such a doctrinal framework, it has been rather too easy to "prove" that the applicant's rights were "not violated", either by the media or by the courts which stood up for the defence of that media's freedom. But this is not the correct framework. It is clearly not in line with the Court's case-law.

17. Most importantly, such reasoning allows for the *stigmatisation* of individuals with a history of mental-health problems – something that this Court should prevent and never encourage. Through this judgment, *the Court itself has placed a stigma* on people with a history of mental-health problems. It also has expressed its belief that mental-health problems, whatever they may have been, are there forever. Incurable. *The judgment panders to prejudice.*

18. To sum up, the balancing exercise in this case has been limited to "proving" that: (i) issues raised by the applicant under Article 8 are to be examined from the standpoint of Article 10; (ii) an individual's reputation has little autonomous value and is relevant only to the extent that the possibility of damaging it may not allow, under Article 10, certain information to be imparted; (iii) the Member States enjoy a wide margin of appreciation in determining what information about the health of a person who acts in an "official capacity" can be disclosed to the public by the media; (iv) given that the applicant was a "psychological expert", disclosure of her mental-health history, by the very virtue of her occupation, contributes to a "debate of general interest" and is, therefore, protected by Article 10.

We cannot agree with such reasoning and the finding based thereon.

19. None of the above arguments should be read as denying that under *certain* conditions *certain* information about the health of *certain* persons in an "official capacity" *may be* publicly disclosed by the media (and even by other sources). Moreover, there may be circumstances when such information *has* to be disclosed under the domestic legislation or even a Constitution (as, for example, in cases involving the health condition of a head of state or certain other senior officials), and the Convention erects no barrier against such disclosure. But if the indiscriminate, inflexible and non-nuanced approach such as that upon which the present judgment is based prevails, any discussion of these sophisticated, non-clear-cut distinctions between different situations becomes pointless.

IV

20. As already mentioned, the Chamber has addressed the issue of "the way in which the information was obtained" by the media in a somewhat limited way, because "the applicant had never argued that the medical expert report at issue had been obtained illegally" (see paragraph 44 of the

judgment and § 13 above). In all probability, it was indeed not obtained illegally. Turning to the misrepresentation and misinterpretation of facts in this case, one cannot but note that the Government argued that the "[i]nformation about the mental state of health of a court-certified expert who worked in sensitive proceedings in custody issues was a contribution to a debate of general and public interest" (see paragraph 34). The Chamber went further: it concluded that "as can be seen from the persons quoted in the article at issue and their respective statements ..., the authors of the article reported that the medical report had already provoked political reactions and thus participated in an ongoing public debate" and that "a serious debate on the mental-health status of a psychological expert, evoked by reasoned suspicions, has to be seen as a debate of general interest" (see paragraphs 43 and 45 respectively).

This is not true. It is as plain and simple as that. At the time of publication *there was no public debate* on the issue. The article *did not contribute* to an "ongoing" debate, because nothing of the sort was "ongoing" at the relevant time. On the contrary, it was intended to *initiate* a debate – not on the topic of "general and public interest" but, as will be shown, on the applicant's personality.

That there was no "ongoing public debate" is obvious from the *explicit* statement in the article in question that "the integrity of the applicant was not debated upon for more than a decade – until now" (*Ihre integrität stand über eine Dekade nicht zur Debatte – bis jetzt*). This fragment has been omitted in paragraph 8, where the excerpt from the article is provided, but – speaking on its own behalf – the Chamber refers to it in paragraph 44: "[i]t was clearly stated that ... that the applicant's integrity had not been questioned for more than a decade". For the presumption of an "ongoing debate", the words "not questioned" are far more comfortable than the words "not debated upon". But they are not correct.

21. The "member of the Green Party" quoted in the article (and referred to in paragraph 9) had acknowledged that the information about the expert report was provided to him "a few days ago" (*Mir wurde Fürst-Pfeifers Gutachten vor wenigen Tagen zugespielt*), and that he immediately (*sofort*) filed a criminal complaint against the applicant. The Austrian courts did not bother at all to establish who had "provided" the information. Nor has the Chamber.

In such circumstances it is not unreasonable to presume that the "member of the Green Party" received the information from the journalists or publishers – in the same way as the information seems to have been provided by the latter to other persons (also mentioned in paragraph 9) who were asked to give their comments on the matter. This is only one version, a guess, but it is no less plausible than its alternatives: had the "member of the Green Party" received the information from other sources and shared it with the media, this would most probably have been mentioned in the article.

22. Furthermore, there is no evidence that the applicant had herself provoked or otherwise attracted the attention of the media in any way. Although she has reportedly "examined over 3,000 married couples in custody-related disputes" (see paragraph 8), no information was provided to the Court to the effect that any one of those examinations was challenged, let alone that it gave rise to a "public debate", to say nothing of a "serious" one. Even if some people discussed or otherwise exchanged opinions about the expert decisions made by the applicant (which would not be in the least surprising, given that over 3,000 married couples in custody-related disputes were concerned by these decisions, not to mention the professional community which may also have had an interest in these decisions), this does not amount to an "ongoing public debate".

The judgment also speculates that "a court-certified psychological expert, such as the applicant, plays an important and sometimes decisive role in the decision-making process in child-care proceedings and thus strongly influences not only the fate of families but also of individuals in an early and sensitive stage of personal development", and therefore, "[i]n the eyes of the parties to the proceedings and the general public there must not be any doubts as to the mental fitness of such an expert in order to maintain public trust in the judiciary" (see paragraph 45). But there is no indication that any of the decisions in which the applicant could have played a "decisive role" ever prompted any of the "parties to the proceedings [or] the general public [to express doubt] as to [her] mental fitness".

23. Another telling fact is that neither the name of the court where the applicant was certified as an expert nor the name of the individual about whom the article was published was anonymised. It is not the person concerned but *the author of the article* whose name was withheld (see also § 25 below). Had the article been intended to trigger a public discussion on a broader problem, such as what criteria of "mental fitness" must be applied to courts' "psychological experts" or as to whether this function can be entrusted to someone who has had mental-health problems in the past, anonymising the person concerned would not have impaired a "general" debate.

24. No less telling is the fact that the article appeared not only on the Internet but also in the weekly newspaper "which was sent to every household of the district free" (see paragraph 7). The Mölding district, where the applicant lives (see paragraph 5) and practices her profession (as her own webpage indicates), has twenty thousand inhabitants. This does not seem a very large market for someone who is probably not the only psychologist in the area.

25. The Chamber is satisfied that "[b]eside a catchy sub-headline only facts and comments by third persons, clearly distinguished by quotation marks, were included" in the article and that "[t]hese facts were set out without any negative comment by the author" (see paragraph 44).

We respectfully disagree. First of all, the "author" of the article (at least in its Internet version) was not indicated. In this respect it was an editorial. Further, direct negative comments (such as "offensive and abusive verbal attacks") were not required in order to do damage to the applicant's reputation, because *all* of the information provided in the article about the applicant was negative. *Nothing positive* was written about her. The "catchy" headline invited the reader to a totality of information which depicted the applicant *exclusively in negative terms*. Had the "author" of the publication been guided by a more *humane* aim than *stigmatising* the applicant, an objective article would have included at least faint consideration of the possibility that the mental condition of a court-certified expert whose professional performance and integrity had not been "debated upon for more than a decade" may be not the same as it was fifteen years previously, when she was going through a difficult period in her life. Equally, the argument that the facts "were set out without any negative comment by the author" proves nothing: such comments *were indeed there*, uttered not "by the author" but by the other persons who had been asked to comment on the matter. Thus, the "member of the Green Party" rhetorically ratiocinated (this comment too has been omitted in paragraph 8): "In what country do we live, where people with a clearly dubious personality structure can decide the fate of thousands of parents and children" (*In welchem Land leben wir, wenn Menschen mit einem offenbar zweifelhaftem Persönlichkeitsbild über die Schicksale von zigtausend Eltern und Kinder entscheiden können*). It makes no difference that this comment was not provided "by the author".

26. In the judgment, some factual information is nipped in the bud, after it has served to create a context unfavourable to the applicant. Here are few examples of such half-truths.

It is mentioned that the "member of the Green Party" had filed a criminal complaint against the applicant (see paragraph 9). What was the outcome of this initiative? It appears that it was nil, as both the applicant's own webpage and that of the professional association of court experts continue to indicate her as a court-certified expert.

It is mentioned that "proceedings were initiated at the [regional court] to clarify whether the applicant was still fit to work as a court-appointed expert", and that her "mental status was also set to be examined" (see paragraph 10). What were the results of these procedures? Again, nil.

And what about the "serious" public debate on the "general and public interest" to which the article had "contributed"? Has it brought about any tangible results? Have any changes been introduced in the courts' certification procedure for psychological experts? Do candidates for certification now have to "confess" their medical history (which was not the case when the applicant was certified), and if so, how much of it? The Government have not provided information on this matter. This proves,

albeit indirectly, that the positive value of the media's "contribution" to the alleged "serious debate" was zilch.

27. In the face of these factual circumstances, the impugned article has to be seen not as a "contribution to a debate of general and public interest" but as a gratuitous attack on the reputation of the applicant.

28. Even so, this would not necessarily have amounted to a violation of the applicant's rights under Article 8 had there been a *pressing social need* to raise publicly the issue of her professional skills. But the absence of any "ongoing public debate" regarding the applicant, as well as of any complaint against her which could legitimately call for the media's attention towards her (see §§ 20 and 22 above respectively), argue for the contrary conclusion.

29. Judges should not speculate as to what really prompted the media to delve into the archives for materials on a civil case about a matter which occurred fifteen years previously and was not destined to be reopened. Still, given that the Austrian courts did not look into this matter, there remain grounds for conspiracy theories (professional market competition? personal revenge? creating a basis for re-examining one of the 3,000 cases? etc.) which cannot be rejected outright.

* * *

30. In the Court's case-law the media is often described as a "public watchdog". This judgment blurs the difference between a watchdog and a hound dog.

For a court of *human* rights, the prey should also matter.

DISSENTING OPINION OF JUDGE MOTOC

To my regret, I am unable to follow the opinion of the majority. I consider that there has been a breach of Article 8, and that this case raises concerns about the protection of health, especially where a balancing exercise must be carried out with regard to Article 10 of the Convention. Even if I acknowledge the difficulty of this balancing act between Articles 8 and 10, sometimes described as squaring the circle, my assessment is that the basic principles of Article 8 – and ultimately human dignity – tend to be forgotten in the process. In my opinion, the Court has also missed an opportunity to clarify the sensitive issue of the right to reputation in its case-law.

To summarize the case: the medical data concerning the applicant was published in a newspaper, and originated in an expert report that had been requested 15 years previously. The expert report in question was ordered in a civil case that had a public character. The impugned article went so far as to mention that the relevant Austrian authorities were aware of the problem and that they were in the process of analysing the medical report. The article also mentioned that there was nothing in the expert's behaviour over a decade of professional activity that could call into question her excellent reputation.

Article 8 of the Convention protects the confidentiality of medical data as a fundamental part of the intimacy of a human being (see the Court's leading judgments in the cases of *Z. v. Finland*, 25 February 1997, *Reports of Judgments and Decisions* 1997-I, and *M. S. v. Sweden*, 27 August 1997*, Reports,* 1997-IV; see also the leading ECJ judgment of 5 October 1994, *X. v. Commission*, Case C-404/92 P). In *S. and Marper v. the United Kingdom* ([GC], nos. 30562/04 and 30566/04, ECHR 2008), the Court referred to the importance of the protection of personal data, including as they concern matters of health.

The Court has stated that Article 8 only admits the disclosure of confidential medical data in exceptional cases, either on the basis of the patient's free and informed consent or of a decision taken by the legally competent authority, when such a decision is proportionate and necessary in a democratic society. In *Panteleyenko v. Ukraine* (no. 11901/02, 29 June 2006) the Court found unacceptable the unnecessary disclosure at a court hearing of confidential information regarding the applicant's mental state and psychiatric treatment (§ 61):

> "[T]he Court notes that the details in issue being incapable of affecting the outcome of the litigation (i.e. the establishment of whether the alleged statement was made and the assessment whether it was libellous; compare and contrast, *Z v. Finland*, cited above, §§t102 and 109), the [domestic] court's request for information was redundant, as the information was not 'important for an inquiry, pre-trial investigation or trial'."

In the present case the Court has also decided in contrast with *United States v. Squillacote* [2001]), where the U.S. Court of Appeals for the Fourth Circuit upheld Sqillacote's convictions. The appeal court agreed that the intercepted telephone conversations with Squillacote's psychotherapist were privileged under the U.S. Supreme Court's 1996 decision in *Jaffee v. Redmond* (518 U.S. 1). In *Jaffee*, the Supreme Court held that "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure".

The special character of health data is not sufficiently taken into account in this case. The Court failed to decide which safeguards should apply to mental-health data and if the protection of the 'public interest' and, more specifically, the interest of the children under the applicant's expertise could have been protected in different way. It is not enough that a complaint was made (even a criminal one: a complaint against the applicant was lodged with the Public Prosecutor's office, the Youth Advocate at the Regional Government of Lower Austria, and the Vice-President of the Wiener Neustadt Regional Court, who was responsible for managing the list of experts at the court).

In a sense, a similar psychological portrait as for *Squillacote* is admitted by the Court in this case, but with the difference that in our case, at least in the opinion of the majority, no harm was done, on the contrary.

On 7 February 2012 the Grand Chamber of the Court handed down its opinion in *Von Hannover v. Germany (no. 2)* ([GC], nos. 40660/08 and 60641/08, ECHR 2012). It sets out the essential criteria for balancing the right to privacy versus the right to freedom of expression. The first essential criterion is the publication's contribution to a public debate. Truth is normally irrelevant in this respect. Truth is a defence in libel, irrespective of the existence of a supporting public interest. The Court has criticized the domestic authorities for ignoring the public interest of a publication in *Someşan and Butiuc v. Romania* (no. 45543/04, 19 November 2013). The *Van Hannover* criteria were recently reiterated by the Grand Chamber in *Couderc and Hachette Filipacchi Associés v. France* ([GC], no. 40454/07, ECHR 2015 (extracts)) and *Bédat v. Switzerland* ([GC], no. 56925/08, 29 March 2016).

The Court has stated in the present judgment that a serious debate on the mental-health status of a psychological expert, evoked by reasoned suspicions, has to be considered as a debate of general interest, since an expert in court proceedings is required to meet standards of physical and psychological fitness.

Even if we agree with this affirmation, it is very difficult for us to understand how the disclosure of a medical condition, assessed 15 years previously, can contribute to any public debate. It is also in clear contradiction with the fact that nothing in the expert's current behaviour

required such a debate, because her "integrity was beyond reproach over a decade" (see paragraph 8 of the judgment); In fact, the contested article itself states that her integrity was beyond reproach "**until now"** (emphasis added).

The Court has let pass an opportunity to clarify the right to the protection of reputation under the Convention.

The Court links back to the arguments raised by the Chamber in *Karakó v. Hungary* (no. 39311/05, 28 April 2009), basing itself on that judgment's finding (in § 22) that:

> "Concerning the question whether or not the notion of 'private life' should be extended to include reputation as well, the Court notes that the references to personal integrity in the *Von Hannover* judgment reflect a clear distinction, ubiquitous in the private and constitutional law of several Member States, between personal integrity and reputation, the two being protected in different legal ways."

If one takes *Karakó* and *Polanco Torres and Movilla Polanco v. Spain* (no. 34147/06, 21 September 2010) as an indication of the direction in which the Court is heading with regard to the right to reputation – which is far from obvious – the questions raised at the beginning of the above citation should be answered as follows: a right to reputation exists, but not in all circumstances. Only when the publication in question compromises the personal integrity of the person concerned. When exactly the latter threshold is met will have to be revealed in subsequent case-law. (See George Letsas, E. Brems, J. Gerards, *Shaping Rights in the ECHR, The Role of the ECHR in Determining the Scope of Human Rights*, CUP, 2014, and S. Smet's writings on the right to reputation under the Convention).

In *Karakó v. Hungary* (cited above, §§ 23 and 17), the Court established that:

> "[R]eputation has only been deemed to be an independent right sporadically and mostly when the factual allegations were of such a seriously offensive nature that their publication had an inevitable direct effect on the applicant's private life" [and that] "the purported conflict between Articles 8 and 10 of the Convention, as argued by the applicant, in matters of protection of reputation, is one of appearance only. To hold otherwise would result in a situation where – if both reputation and freedom of expression are at stake – the outcome of the Court's scrutiny would be determined by whichever of the supposedly competing provisions was invoked by an applicant."

However *Polanco Torres*, which was decided by a different Chamber than *Karakó*, attempts to connect the judgments in *Chauvy and Others v. France* (no. 64915/01, ECHR 2004-VI), *Pfeifer v. Austria* (no. 12556/03, 15 November 2007) and *Karakó* in a logical manner. Nonetheless, it then makes the bridge to *Karakó* by stating (in § 40):

> "However, the factual allegations must be sufficiently serious and their publication must directly affect the private life of the person concerned. In order for Article 8 to be engaged, a publication liable to tarnish a person's reputation must constitute an interference with that individual's private life of such gravity that his or her personal integrity is compromised."

The Court here introduces a threshold requirement for Article 8 to actually apply: Article 8 only comes into play if the publication constitutes a direct attack on a person's private life of such gravity as to compromise his or her personal integrity. The crucial element here is the reference to personal integrity. In our opinion, it is clear that even by the lower criteria of personal integrity, the applicant's right of reputation was not respected. In an era when the shift of medical records from paper to electronic formats has increased the potential for individuals to access, use, and disclose sensitive personal health data, it is important that the Court establish safeguards regarding the right to privacy. In this particular case it is clear to us that there was a disproportionate interference with the applicant's right to privacy and, therefore, a violation of Article 8.