5 As 101/2020 - 29 CZECH REPUBLIC DIFFERENT COURTS OF THE M R E P U B L I K Y The Supreme Administrative Court decided in a panel composed of the chairman JUDr. Viktor Kučera and judges JUDr. Lenka Matyášová and JUDr. Jakub Camrdy in the legal matter of the plaintiff: FTV Prima, spol. s r. o., with registered office at Vinohradská 3217/167, Prague, ext. M.Sc. Ludmila Kutějová, attorney with registered office at Politických věňů 935/13, Prague, against the defendant: Office for the Protection of Personal Data, with registered office in pl. Sochora 727/27, Prague, on the plaintiff's cassation appeal against the judgment of the Municipal Court in Prague dated 2/26/2020, No. 14 A 181/2018 - 36, as follows: I. The appeal is dismissed. II. The defendant is not awarded compensation for the costs of the cassation appeal. Reasoning: I. Definition of the case [1] With the cassation complaint, the plaintiff (hereinafter referred to as the "complainant") sought the annulment of the judgment of the Municipal Court in Prague (hereinafter referred to as the "municipal court") in the header, which rejected her lawsuit against the decision of the defendant's chairman dated 12/06/2018, no. UOOU-12027/17-24. [2] With this decision, the chairman of the defendant rejected the complainant's motion and confirmed the defendant's decision of 27/03/2018, no. UOOU-12027/17-14, by which the complainant was fined CZK 20,000 for committing an offense under § 45 paragraph 1 letter e) of Act No. 101/2000 Coll., on the protection of personal data and on the amendment of certain laws, as amended until 23 April 2019 (hereinafter referred to as the "Act on the Protection of Personal Data"), which it committed by, on 20 On 11 November 2017 at 19:25 in the Krimi news program, it published information on the state of health of a witness and victim in criminal proceedings (data subject) together with his name (including information that it is a newly changed name) and information about his previous conviction, whereby it processed sensitive data without the consent of the data subject, while it was not one of the cases according to § 9 letter b) to i) of the Personal Data Protection Act, in which the consent of the data subject would not be necessary. 5 As 101/2020 [3] On the said day, the applicant broadcast a report situated in the building of the Criminal Court of Appeal, which related to the crime of spreading a contagious human disease (AIDS). The Court of Appeal acquitted the defendant, according to the report, because the victim and the witness (data subject) were found to be unreliable. According to his testimony, he should have contracted the HIV virus from the defendant. The complainant specifically stated in the report: “[…] One of these partners is said to have not been infected by coincidence, but the other is said to have been and is currently already suffering from AIDS. However, S. (accused; court's note) strongly denies that he ever had sexual intercourse with this man. And an expert from the field of psychology also gave S. the truth today. He called the Crown witness, who by the way had recently changed his name to J.D., unreliable. In layman's terms, he was not telling the truth

about what happened. By the way, this is also evidenced by his criminal record, when he was punished fourteen times for property crimes. " [4] After the above-mentioned reportage was broadcast, the Czech Society AIDS pomoc, z. s. filed a motion against the defendant to initiate criminal proceedings. The defendant imposed a fine of CZK 20,000 on the complainant, because the complainant published data on the data subject's state of health and previous convictions (i.e. sensitive data), while stating the name of the data subject together with the information that it is a newly used name without having his consent. The complainant filed an appeal against the first-instance decision of the defendant, which the chairman of the defendant rejected and confirmed the first-instance decision (see above). II. Decision of the municipal court [5] The complainant filed a lawsuit against the decision of the defendant's chairman. She objected that she published information about the data subject in the public interest, as part of a report on a criminal proceeding in which the data subject appeared as a victim and a witness. The report concerned the criminal offense of spreading a contagious human disease (AIDS), and in the proceedings at the Court of Appeal it became clear that the data subject actually suffers from this disease, but was found by the court to be implausible. Although the data subject initially initiated the criminal proceedings himself, it turned out that it was probably a fictitious accusation, therefore the complainant had to give the viewers information so that they could make their own judgment about the whole case. She therefore had to explain why the court's verdict (compared to the original convict) was acquittal, because as a television broadcaster, it informs the public about socially significant events, which undoubtedly also includes criminal activity. In the contested decision, the defendant did not perform the proportionality test and unjustifiably prioritized the right to privacy over the right to freedom of expression. The complainant also emphasized that the data subject published information about his health and previous convictions himself, as he stated them during the hearing before the court, which was also attended by the public, incl. of the complainant, who filmed the proceedings in court. In conclusion, she also stated that the means of private law protection were fully sufficient for the data subject, therefore there was no need to initiate criminal proceedings. [6] In the contested judgment, the municipal court emphasized that the applicant published sensitive data (data on health status and previous convictions) about the data subject in violation of § 9 of the Personal Data Protection Act, as she did not have his consent and none of the exceptions applied to the publication referred to in § 9 letter b) to i) of the same law. She clearly mentioned his name, including the information that it was a newly used name. The viewer could easily associate the information in question with a specific person, so the impact of its publication on the privacy of the data subject was considerable. The municipal court added that for the complainant's declared goal of the report (informing the public) it

would be sufficient to indicate the facts on the basis of which the acquittal was issued and it was sufficient to refer to the subject of the data as a witness and a victim without mentioning his name. Although the defendant did not perform the proportionality test, the fact that he explicitly dealt with their conflict is essential, according to the municipal court. Both the right to privacy and the right to freedom of expression are subject to certain limitations (they are not absolute). Since it was sensitive data related to health status and previous convictions, there was no 5 As 101/2020 - -30 continued public interest in the complainant publishing these data in connection with the specific name of the data subject. It did not change the fact that the data subject was probably a person who falsely accused another of spreading a contagious human disease. In the opinion of the municipal court, the statement made before the court cannot be considered as voluntary disclosure of information to the general public, i.e. the publication of information by the data subject himself in the sense of § 9 letter g) the Act on the Protection of Personal Data, since the data subject acted as a witness, who in criminal proceedings has the obligation to tell the truth and not to withhold anything; therefore, it was a matter of fulfilling the obligations established by law. Regarding the possibilities of protection through civil law means, the city court stated that the protection of privacy is carried out both in the form of private law and public law, but the objects of this protection cannot be equated. The application of public law protection cannot be conditioned by the prior use of private law means of protection. Therefore, the municipal court rejected the lawsuit as unfounded in accordance with Section 78, paragraph 7 of Act No. 150/2002 Coll., Administrative Code of Court, as amended (hereinafter referred to as "the Administrative Code"). III. Cassation complaint, the defendant's statement and the complainant's reply [7] The complainant contested the decision of the municipal court with a cassation complaint for the reason stated in § 103 paragraph 1 letter a) s. ř. s. She emphasized that both rights (the right to freedom of expression and the right to privacy) are equivalent. Therefore, one cannot simply refer to the Personal Data Protection Act and effectively prioritize the right to privacy over the right to freedom of expression. To this end, she referred to the judgment of the Supreme Court of 3 September 2019, No. 25 Cdo 3988/2018 - 274, regarding the protection of personality and the right to information. She again objected that the administrative authorities did not perform the proportionality test, which is used to resolve the conflict between two constitutionally guaranteed rights. According to the complainant, the data subject disclosed the data during a public court hearing, while he also initiated the criminal proceedings himself. If he had not done so, no personal data would have been published. The data subject did not even care about the exercise of his rights, he did not claim compensation for the damage caused, he did not defend himself with a civil lawsuit and he was not stigmatized. The data subject did not initiate

the initiation of misdemeanor proceedings, but the Česká společnost AIDS pomoc, z. s. therefore did not consider the municipal court's reasoning that it was a matter of fulfilling obligations towards the criminal court to be sufficient. [8] Furthermore, in the cassation complaint, she objected that, as part of her business activity, she creates news programs that are covered by a news license pursuant to § 89 of Act No. 89/2012 Coll., Civil Code, as amended (hereinafter referred to as "Civil Code "). She stated that it is not actually possible to obtain individual consent from each data subject within the framework of daily reporting, as this would not take into account the special nature of rapid information to the public and would be a limitation of the reporting activity. The applicant had to explain to the audience why the court of second instance changed the legal assessment of the case so that the company's trust in judicial decision-making was not disturbed. She therefore proposed that the Supreme Administrative Court cancel the judgment of the municipal court and at the same time, in accordance with § 110 para. 2 letter a) also annulled the decision of the administrative body. [9] In his statement to the cassation complaint, the defendant stated that the Act on the Protection of Personal Data established the degree of admissibility of interference with a person's privacy. The complainant processed personal data without having a proper legal title to do so. Although not every publication of personal data constitutes an invasion of privacy, in the given case it was an unauthorized invasion. The provisions of § 89 of the Civil Code make it possible to take a likeness, audio or video recording without a person's permission for press, radio, television or similar news, in a reasonable manner. In the given case, however, the complainant published data on the health status and previous convictions of a specific person. In order to understand the report, it was not necessary to mention a specific name. In addition, the defendant stated that the publication of this data would not stand even in the light of the current legislation. He therefore proposed that the Supreme Administrative Court reject the cassation complaint as unfounded. 5 As 101/2020 [10] The complainant responded to the defendant's statement with a reply, in which she repeated her objections stated in the cassation complaint. She stated again that she had the legal title to publish the data, as it was data that the data subject himself had previously published. She also reiterated that the data subject did not file the initiative to initiate criminal proceedings. Moreover, the social harmfulness of the offense was not given at all, as the data subject did not testify truthfully in the criminal proceedings. IV. Assessment of the matter by the Supreme Administrative Court [11] The Supreme Administrative Court first assessed the formal requirements of the cassation complaint and found that the cassation complaint was filed in time, it goes against the decision against which the filing of the cassation complaint is admissible, and the complainant is properly represented (Section 105 par. 2 s. r. s.). He then reviewed the contested judgment

of the municipal court within the scope of the cassation complaint and within the grounds applied, verified whether it does not suffer from defects that he would have to take into account as an official duty (§ 109 par. 3 and 4 s. ř. s.), and came to the conclusion to the following conclusion. [12] The cassation complaint is unfounded. [13] The essence of the matter is the fulfillment of the facts of the offense according to § 45 paragraph 1 letter e) of the Act on the Protection of Personal Data, according to which a legal entity as administrator or processor commits an offense by "processing personal data without the consent of the data subject outside of the cases specified in the Act (Section 5(2) and Section 9). "The complainant contradicted the fulfillment of this fact by first arguing that the right to the protection of personal data was unjustifiably prioritized over freedom of expression. The Supreme Administrative Court states the following about this. [14] The Charter of Fundamental Rights and Freedoms guarantees in Article 10 paragraph 1 to everyone the right to preserve his human dignity, personal honor, good reputation and protect his name. According to the second paragraph, everyone has the right to be protected from unauthorized interference in private and family life. The third paragraph enshrines everyone's right to protection against unauthorized collection, publication or other misuse of personal data. Freedom of expression is guaranteed in Article 17 of the Charter of Fundamental Rights and Freedoms. However, according to Article 17, paragraph 4 of the Charter, freedom of expression and the right to seek and disseminate information can be limited by law if it is a measure in a democratic society necessary for the protection of the rights and freedoms of others, the security of the state, public safety, the protection of public health and morals (emphasis added by the Supreme Administrative Court). [15] The Charter of Fundamental Rights and Freedoms in its Article 17, paragraph 4 already provides for the restriction of freedom of expression for the purpose of protecting the rights and freedoms of others, i.e. in the interest of the right to protection against unauthorized collection and publication of personal data. The protection of personal data, as an integral part of the right to privacy, thus represents a legitimate restriction of freedom of expression. This restriction can be both private law and public law in nature. Private law means of protecting privacy and personality are contained in particular in the Civil Code. At the time when the complainant broadcast the report, the public law restriction of freedom of expression was precisely the Act on the Protection of Personal Data. At the same time, this regulation does not replace private law institutes for the protection of personality according to the Civil Code, nor does it exclude their use. The existence of private and public law restrictions on freedom of speech, or the anchoring of private and public law means of personal data protection emphasizes the fact that this protection has a societal significance and is therefore, within the scope defined by law, also under the control of the state, which can enforce the

fulfillment of the obligations of the addressees of the standards and sanction their violations. The Personal Data Protection Act thus sets the conditions under which personal data can be processed. [16] In accordance with § 4 letter e) of the Personal Data Protection Act, personal data processing means any operation or set of operations that the administrator or processor 5 As 101/2020 - -31 continued systematically carries out with personal data, automatically or by other means. In particular, it concerns the collection, storage on information carriers, making available, modification or alteration, search, use, transfer, dissemination, publication, storage, exchange, sorting or combining, blocking and disposal. There is no dispute in the present case that the complainant processed the data. Nor is the question of whether the complainant fulfills the definition of a personal data administrator - the complainant is an entity that determines the purpose and means of personal data processing, carries out the processing and is responsible for it [cf. § 4 letter j) of this Act]. However, the question of whether it carried out the processing legitimately, i.e. within the limits established by law, is in dispute. [17] Data on the infection of a specific person with the HIV virus is, according to § 4 letter b) of the Act on the Protection of Personal Data, sensitive data, as it indicates the state of health. In the same way, information indicating a conviction for a criminal offense is considered sensitive. The processing of sensitive data was regulated in accordance with the legislation applicable to the case under discussion, § 9 of the Personal Data Protection Act. It contains a list of legal titles that allow the administrator to process (i.e. also publish) this data. The basic rule according to this provision is the existence of the express consent of the data subject - the natural person to whom the data relate [see § 9 letter a) of the said Act], whereby the administrator must be able to demonstrate the existence of consent throughout the processing period. If the administrator does not have the express consent of the data subject, he may still process sensitive data if one of the hypotheses of § 9 letter b) to i) of the Personal Data Protection Act. [18] According to § 9 letter g) of this Act, it is possible to process sensitive data if "the processing concerns personal data published by the data subject. At the same time, the complainant objected that this was the case, as the data subject provided sensitive information during his interrogation during the proceedings at the criminal court, where the complainant filmed the entire report. The Supreme Administrative Court does not agree with this argument. [19] Provisions § 9 letter g) of the Personal Data Protection Act is aimed at situations in which the data subject himself has published sensitive information about himself. This regulation is based on the assumption that if the data subject explicitly waives the protection provided by law by publishing his own sensitive data, it is not reasonable to require his express consent for their further processing by other entities. For the disclosure of sensitive data by the data subject himself within the meaning of § 9 letter g) of the Act on the Protection of

Personal Data, however, cannot be considered the provision of this data during the submission of a witness statement in criminal proceedings, as the municipal court quite rightly concluded, even if the public participated in its interrogation, see below. [20] According to § 97 of Act No. 141/1961 Coll., on criminal court proceedings (penal code), as amended, everyone is obliged to appear at the summons and testify as a witness about what he knows about the crime and about the perpetrator or about circumstances important for criminal proceedings. During his interrogation, a witness in criminal proceedings (unlike the accused) has an obligation to tell the complete truth and not to withhold anything, about which he must also be properly instructed (Section 101(1) of the Criminal Code). He has the right to refuse notice only in cases precisely defined by law - see § 100 of the Criminal Code. The law punishes false statements about circumstances that are of substantial importance for the decision, or their concealment, as the crime of false testimony - cf. § 346 paragraph 2 of Act No. 40/2009 Coll., Criminal Code, as amended (hereinafter referred to as "Criminal Code"). The filing of a witness statement in criminal proceedings can therefore be described as the fulfillment of an obligation established by law. [21] In the present case, according to the report broadcast by the complainant, the data subject testified as a witness (and at the same time the injured party) about facts related to the crime of spreading a contagious human disease (AIDS). His testimony should have revealed that he contracted the HIV virus from the defendant and is suffering from AIDS. It can therefore be stated that with respect to the criminal proceedings in question (the defendant was prosecuted precisely for the spread of the AIDS disease), this was a circumstance that was of substantial importance for the decision, as envisaged by § 346 of the Criminal Code. Therefore, the data subject was 5 As 101/2020 obliged to disclose these facts to the court during his interrogation. For this reason alone, the interpretation put forward by the complainant that it was a voluntary disclosure cannot be accepted. Disclosure of sensitive data by the entity itself within the meaning of § 9 letter g) of the Personal Data Protection Act, in this context, it is necessary to interpret it restrictively. The fact that the court ruling in the criminal case did not decide on the exclusion of the public does not change this, as the public is one of the basic principles on which the judiciary is generally based. However, this in no way means that persons participating in a public main trial can freely publish and disseminate sensitive information that will be heard during the main trial. Otherwise, the disclosure of sensitive data would be conditional on the conclusion of the criminal court that the reasons for excluding the public are not given, not on the voluntary decision of the data subject to whom the sensitive data provided to the court during the interrogation relate. [22] The outlined interpretation is also supported by the wording of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of natural persons in

connection with the processing of personal data and on the free movement of such data, of which § 9 letter g) of the Act on the Protection of Personal Data was based (cf. explanatory report to Act No. 439/2000 Coll. amending the Act on the Protection of Personal Data, parliamentary press No. 508/0, 4th parliamentary term, 2002-2006, digital the repository of the Chamber of Deputies of the Parliament of the Czech Republic) and to which the municipal court also referred, if necessary. According to Article 8 paragraph 2 letter e) of the said directive, the ban on the processing of data concerning, among other things, health and sex life does not apply if the processing "relates to data obviously published by the data subject;" emphasis added by the Supreme Administrative Court. However, disclosure of data to a criminal court during a witness interview cannot be evaluated as an obvious disclosure of personal data, but only as the fulfillment of a statutory obligation. [23] The Supreme Administrative Court therefore concludes that the complainant was not authorized to publish, as part of a report on the Krimi news program, data relating to the state of health and previous convictions of the data subject, including his name, including the information that this is a newly used name, i.e. .disclose sensitive data in relation to a specifically identified person. The subject of the data did not give express consent to their publication and did not previously publish this data in accordance with § 9 letter g) of the Personal Data Protection Act. By broadcasting the report, it impermissibly interfered with the right to protection of personal data of the person concerned (data subject), as a result of which it committed an offense under § 45 paragraph 1 letter e) of the Personal Data Protection Act. [24] One cannot then agree with the claim of the complainant that the social harmfulness of the offense was not given at all, because the data subject did not testify truthfully in the criminal proceedings. Intrusion into the right to the protection of personal data is the unauthorized publication of information about a health condition (as well as a conviction), regardless of whether the information is true or not. In both cases, this is an unacceptable interference with the right to the protection of personal data, because being accused of being infected with the HIV virus evokes strong emotions in society due to widespread awareness of its incurability and easy spread, which contributes to the isolation and social exclusion of the sick (see the judgment of the local court dated 20 August 2014, No. 6 As 144/2013 - 34). Communication of information about the data subject's previous conviction can also have an equally negative effect. What is essential in the matter is that the complainant did not have any of the titles according to § 9 of the Personal Data Protection Act, which would have allowed her to publish this information together with the name of the data subject (regardless of their veracity). The fact that the data subject himself did not use private law means of protection cannot change that. [25] Regarding the proportionality test emphasized by the complainant, the Supreme Administrative Court recalls that the complainant herself saw the justification of

her procedure in the fact that the data subject had previously published the sensitive data himself. However, as explained above, witness questioning in criminal proceedings for disclosure of personal data in the sense of § 9 letter g) of the Personal Data Protection Act cannot be considered. Therefore, it is not clear to the Supreme Administrative Court on what basis the complainant brings 5 As 101/2020 - -32 the continuation of the automatic prioritization of the right to the protection of personal data over freedom of expression. In the given case, the reason (title) that would allow the complainant to publish sensitive data about a specific person (previous publication) was not given. Failure to carry out the proportionality test cannot be considered a defect in the contested decision in view of the specific circumstances of the case. The complainant did not claim that she would publish the information, for example, for the reason stated in § 9 letter b) of the Act on the Protection of Personal Data, i.e. due to an interest in preserving the life or health of another person, for which it would be appropriate to measure this interest against any interference with the rights of the data subject. Nor did she claim why the right to seek and disseminate information should prevail over the protection of personal data. The general effort to inform the public about criminal activities committed by private (not public) persons and simple references to the implementation of the constitutionally guaranteed freedom of expression could not justify the publication of sensitive data together with the name of the data subject in the form chosen by the complainant. In her report, she combined sensitive data with a specific name (including information that it is a newly used name), which represents an unacceptable interference with the data subject's right to personal data protection, as already mentioned above. [26] And with regard to the applicant's reference to the so-called intelligence license and § 89 of the Civil Code, the Supreme Administrative Court notes that this objection represents an inadmissible legal innovation in the sense of § 104, paragraph 4 of the Civil Code. The Supreme Administrative Court verified , that the complainant did not apply this objection in the filed lawsuit, although nothing prevented her from applying it. Therefore, the court here did not deal with this objection in more detail. V. Conclusion and costs of the proceedings [27] The Supreme Administrative Court concludes that it did not find the cassation complaint justified, and therefore dismissed it pursuant to Section 110, paragraph 1 in fine of the Civil Code. [28] The ruling on the costs of the proceedings is based on § 60, paragraph 1 in conjunction with § 120 s. s. s. The procedurally successful defendant in the cassation complaint proceedings did not incur any costs beyond the scope of normal official activities, therefore the Supreme Administrative Court did not award him their compensation. Lesson learned: Remedies are not admissible against this judgment (Section 53 paragraph 3, Section 120 s. ř. s.). In Brno on March 26, 2021, JUDr. Viktor Kučera, chairman of the senate