



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

FIRST SECTION

CASE OF MALAGIĆ v. CROATIA

(Application no. 29417/17)

JUDGMENT

Art 8 • Positive obligations • Private life • Appropriate measures taken at appropriate times to protect applicant's physical integrity, with due account of recurring nature of domestic violence by her former husband • Domestic courts' decision to lift restraining order in force for over three years not unreasonable or manifestly disproportionate in circumstances • Existence of legal framework allowing applicant to complain about domestic violence and seek authorities' protection

STRASBOURG

17 November 2022

FINAL

03/04/2023

*This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.*

In the case of Malagić v. Croatia,

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

Péter Paczolay, *President*,

Krzysztof Wojtyczek,

Alena Poláčková,

Raffaele Sabato,

Lorraine Schembri Orland,

Ioannis Ktistakis,

Davor Derenčinović, *judges*,

and Liv Tigerstedt, *Deputy Section Registrar*,

Having regard to:

the application (no. 29417/17) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Croatian national, Ms Lenka Malagić (“the applicant”), on 6 April 2017;

the decision to give notice of the application to the Croatian Government (“the Government”);

the parties’ observations;

Having deliberated in private on 30 November 2021, 29 March 2022 and 4 October 2022,

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

INTRODUCTION

1. The case concerns the applicant’s complaints under Articles 2, 3 and 8 of the Convention that the domestic authorities failed to protect her physical integrity in that they terminated precautionary measures imposed on her violent former husband and that she had no possibility of challenging that decision before the domestic courts.

THE FACTS

2. The applicant was born in 1985 and lives in Marčana. She was represented by Mr G. Marjanović, a lawyer practising in Rijeka.

3. The Government were represented by their Agent, Mrs Š. Stažnik.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

A. Background of the case

5. In 2008 the applicant married N.M., a police officer, and they had two children born in April 2008 and December 2009, respectively.

6. On 8 July 2014 the Pula Municipal Court (*Općinski sud u Puli*) dissolved the marriage between the applicant and N.M.

B. Criminal complaints

7. On 2 November 2012 the applicant called the police stating that N.M. was verbally abusing her. Following a police intervention and interviews with a number of witnesses, on 4 March 2013 the Pula Minor Offences Court (*Prekršajni sud u Puli*) found both the applicant and her husband guilty of domestic violence.

8. Meanwhile, on 25 November 2012, the applicant and N.M. each filed a criminal complaint against the other. The applicant reported N.M. for threatening behaviour and bodily injury. The police interviewed the applicant and asked her whether she wanted accommodation in a Safe House, to which she replied that she was not afraid of her husband, that he did not bring his duty weapon home and that he had not threatened to kill her.

9. On 13 January 2013 the applicant lodged another criminal complaint against N.M. accusing him of threatening to kill her. The police interviewed N.M. and, according to the Government, at the applicant's request ordered a precautionary measure (*mjera opreza*) prohibiting him from approaching the applicant and their children for a period of eight days.

10. On 3 April 2013 the applicant gave a detailed statement before the Pula Municipal State Attorney's Office (*Općinsko državno odvjetništvo u Puli*), in which she explained that N.M. had continuously beaten her and forced her to have sexual intercourse, including inserting foreign objects into her vagina. She also stated that N.M. had threatened to take away her children or to kill her if she ever reported him to the police because he did not want to lose his job. The State Attorney's Office sent her statement to the police, pointing out that it contained serious accusations that a number of criminal acts which were to be prosecuted *ex officio* had been committed, including domestic violence, threats and bodily injury. Accordingly, the police were ordered to conduct further inquiries into whether any other criminal offences had been committed against the applicant.

11. On the same day, N.M. was arrested and remanded in custody.

12. On 10 April 2013 the applicant gave a statement before the Pula County State Attorney's Office (*Županijsko državno odvjetništvo u Puli*) explaining in detail that N.M. had beaten and sexually abused her and that she had to satisfy his sexual desires in order for him to give her money for gas, food and other expenses. The applicant added that she had not told anyone about the rapes because she had been both ashamed and afraid of N.M.

13. On 28 June 2013 the Pula County State Attorney's Office ordered an investigation against N.M. in relation to the criminal offences of uttering threats, severe bodily injury, neglect of a child, obstructing the taking of

evidence, unlawful deprivation of liberty and a prolonged criminal offence of rape. The authorities interviewed N.M. and a number of witnesses, searched his place of residence and work, his cell phone and laptop, and obtained a number of expert opinions. A psychiatric and psychological expert opinion dated 22 April 2013 stated that N.M. did not suffer from any psychiatric or psychological problems.

14. On 29 July 2013 the Pula County State Attorney's Office issued an indictment against N.M. for criminal offences of uttering threats (including with use of a firearm), obstructing the taking of evidence, neglect of a child, unlawful deprivation of liberty and rape.

15. At a hearing held on 12 March 2014, the Pula County Court released N.M. from detention and imposed on him precautionary measures (*mjere opreza*) in form of a restraining order under Article 98 of the Code of Criminal Procedure, prohibiting him from approaching the applicant within 50 meters, making or maintaining direct or indirect contact with her and approaching her place of residence within 1 kilometre. The said measure was reviewed by the court on regular basis.

16. On 20 March 2014 the applicant called the police to report that her husband "may not be complying with the restraining order" owing to information she had heard from their child. The police made an official note and instructed the applicant to report directly to the police officer in charge of the supervision of the restraining order anything which made her feel unsafe or scared.

17. On 4 April 2014 the applicant called the police alleging that "for four consecutive nights someone had been turning a wheelbarrow containing wood upside down on her terrace", and she believed that it was N.M., "trying to send her a message that he was nearby". She submitted that she was again afraid and believed that N.M. was trying to intimidate her before the trial.

18. On 12 April 2014 the applicant called the Head of the Juvenile Delinquency Police Department and reported that N.M. was refusing her telephone contact with her children, who were staying with him.

19. On 12 December 2014, in disciplinary proceedings against him, N.M. was found not guilty of inappropriate behaviour in and outside the service for allegedly violent behaviour towards the applicant.

20. At a hearing held on 30 April 2015 a psychological and psychiatric expert opinion concerning the applicant was read out. It stated that the applicant did not suffer from any mental disability or addiction. However, she did suffer from post-traumatic stress disorder and personality disorder resulting from previous abuse.

21. On 1 October 2015 another psychological and psychiatric expert opinion concerning the applicant was read out. It stated that the applicant did not suffer from any mental disability or post-traumatic stress, that she was able to give statements before the court and that she had narcissistic, histrionic and dissocial personality traits.

22. On 4 December 2015 the applicant called the police claiming that her husband was again harassing her. She explicitly stated that she was afraid for her life and that the brakes and the clutch on her car had failed to function on four occasions.

23. On 10 December 2015 the police carried out an informal interview with the applicant, who reiterated that N.M. had recently been harassing and provoking her and that she wanted that behaviour to stop.

24. On 14 December 2015 the police carried out an informal interview with an employee of the local social welfare centre, who stated that on 5 November 2015 N.M. had come to report the applicant because she had not allowed their children go with him on an occasion when he was entitled to contacts.

25. On 4 January 2016 the police ordered an inquiry into the applicant's complaint that her husband was harassing her. Inquiries showed that it was not established that N.M. had violated the restraining order imposed on him and that he was behaving adequately towards their children. The reported conduct did thus not constitute a criminal act prosecutable *ex officio* or at the proposal of the victim. The applicant was informed of that conclusion by a letter of the State Attorney's Office dated 9 February 2016.

26. On 14 March 2016 the Pula County Court further prolonged the precautionary measure against N.M. (see paragraph 15 above). It relied on the number and seriousness of the criminal offences he had been charged with, the manner of their committal, including the use of firearms, the length of the incriminating period and the consequent determination he had showed in his illegal behaviour towards the applicant. The court also pointed out that N.M. had allegedly threatened the applicant's life even after their marriage had ended, requesting her to withdraw her criminal complaint and reiterating that nobody would believe her accusations since he was a police officer.

27. N.M. appealed submitting that the evidence put forward so far, including the applicant's psychiatric reports, did not indicate a reasonable doubt against him.

28. On 8 April 2016 the Supreme Court dismissed N.M.'s appeal against the above decision deeming that all the circumstances of the case indicate a real and immediate danger of N.M. repeating the criminal offences, which justified the continuation of the restraining order against him. It stressed that the application of precautionary measures required a different degree of reasonable doubt, which had been confirmed by the indictment, whereas the courts were precluded from further assessing facts or the criminal liability of the accused.

29. On 28 June 2016 the Pula County Court received a third psychiatric and psychological expert report issued by the Rab Psychiatric Hospital concerning the applicant. It stated that the applicant, who had been abused by her father when she was a child, did not suffer from any mental disability, but

suffered from a form of mixed personality disorder of antisocial and histrionic type.

30. At a session held on 8 July 2016, the State Attorney proposed further prolongation of the precautionary measure, whereas N.M.'s lawyer submitted that the accused's cohabitation with the applicant had ceased a long time ago, that N.M. was not violent and that the reasonable suspicion against him had significantly changed. The applicant, as the victim, was neither summoned nor represented at that session. The Pula County Court terminated the restraining order imposed on N.M. with the following reasoning:

“...taking into account the time which N.M. had spent in investigative detention, ... i.e. from 3 April 2013 until 12 March 2014, as well the fact that the restraining order was implemented from 12 March 2014 ... and was last extended by a ruling of 14 March 2016, i.e. that it had been applied for over two years, during which period [N.M.] did not [violate the said order], in view of all of the above ..., it is considered that there is no longer any need to apply [the restraining measures] ...”

31. The applicant lodged an appeal against that decision, which was declared inadmissible by the Pula County Court on 21 July 2016 on the grounds that a victim of a crime had no right of appeal against a decision terminating precautionary measures. That decision was upheld by the Supreme Court (*Vrhovni sud Republike Hrvatske*) on 13 September 2016.

32. The applicant's subsequent constitutional complaint was declared inadmissible on 30 November 2016 on the grounds that the challenged decision was not an individual act amenable to constitutional review.

33. Between 4 December 2015 and 22 March 2019 the applicant filed several criminal complaints against N.M. for threat, abuse of the children and harassment. All of those complaints were dismissed as unsubstantiated.

34. By a judgment dated 14 May 2019, N.M. was acquitted of all charges (see paragraph 14 above). Relying on statements given by numerous witnesses and expert opinions obtained in the case, the court gave detailed reasons why it did not find him guilty under any of the charges.

35. On appeal by the State Attorney, on 17 September 2020 the Supreme Court rejected the accusation in respect of unlawful taking of liberty as being time-barred. It also upheld N.M.'s acquittal in respect of the remaining charges, concluding that there had been insufficient evidence to show that he had actually committed acts of domestic violence or abuse against the applicant or their children.

RELEVANT LEGAL FRAMEWORK

I. DOMESTIC LAW AND MATERIALS

36. Articles 23 and 35 of the Constitution (*Ustav Republike Hrvatske*, Official Gazette no. 56/90 with subsequent amendments) read as follows:

Article 23 § 1

“No one may be subjected to any form of ill-treatment or, without his/her consent, to medical or scientific experiments.”

Article 35

“Respect for and legal protection of each person’s private and family life, dignity, and reputation shall be guaranteed.”

37. The relevant provisions of the Code of Criminal Procedure (*Zakon o kaznenom postupku*, Official Gazette nos. 152/08, with subsequent amendments), as in force at the material time, read as follows:

Article 98
Precautionary measures

“(1) [If the conditions set out in Article 123 of this Code have been met for ordering] investigative detention, or detention has already been ordered, the court and the State Attorney shall, if the same purpose may be achieved by any of the precautionary measures, issue a ruling with a statement of reasons to carry out one or more such precautionary measures. The defendant shall be warned that in the case of failure to carry out the ordered precautionary measure it may be replaced by investigative detention.

(2) Precautionary measures are:

...

2) prohibition to visit a certain place or territory;

...

4) prohibition to approach a certain person;

5) prohibition to establish or maintain contacts with a certain person;

...

(3) Precautionary measures may not entail the restriction of a defendant’s right to his own apartment, to unimpeded contacts with members of his household, spouse or common-law spouse, parents, children, adopted child or adoptive parent, except where the proceedings are conducted on account of a criminal offence committed to the detriment of any of these persons...

...

(5) Precautionary measures may be ordered before and during criminal proceedings. Before the indictment, precautionary measures are applied and terminated by the State Attorney. After the indictment is filed and until the judgment becomes final, the measures are applied, prolonged and terminated by the court before which the proceedings are conducted.

(6) Precautionary measures may last as long as they are necessary and at the longest until the judgment [in the criminal proceedings] becomes final. The duration of precautionary measures shall not be limited by the duration of investigative detention. The State Attorney ... or the court conducting the proceedings shall examine every two months *ex officio* whether the need for precautionary measures still exists and issue a ruling prolonging them or terminating them if they are no longer necessary. ...

(7) The parties may appeal against the ruling ordering, prolonging or terminating a precautionary measure, which does not stay the execution of the ruling...”

38. The relevant provisions of the Criminal Code 1997 (*Kazneni zakon*, Official Gazette nos. 110/97 with subsequent amendments), as in force at the material time, read as follows:

Neglect and abuse of a child or a minor
Article 213

“(1) A parent, adopter, guardian or another person who severely neglects his duties in maintaining or educating a child or a juvenile shall be punished by imprisonment between six months and three years.

(2) The same punishment as referred to in paragraph 1 of this Article shall be inflicted on a parent, adopter, guardian or another person who abuses a child or a minor ...”

Domestic violence
Article 215a

“A family member who by his or her violent, abusive or particularly insolent conduct puts another member of the family into a humiliating position shall be punished by imprisonment of between six months and five years.”

39. The relevant provisions of the Criminal Code 2011 (*Kazneni zakon*, Official Gazette nos. 125/11 with subsequent amendments), as in force at the material time, provided:

Threat
Article 139

“(1) Whoever seriously threatens another ... so as to frighten or disturb ... shall be punished by a fine or imprisonment up to one year.

(2) Whoever seriously threatens to kill or to inflict serious bodily injury on another, or to kidnap or deprive a person of his liberty ... shall be punished by a fine or by imprisonment up to three years...

(4) ... criminal act from paragraph 2 of this Article shall be prosecuted following a motion, unless if ... it has been committed ... towards a family member.”

Obstructing the taking of evidence
Article 306

“(1) Whoever uses force, threat or another sort of pressure ... [to another] with the aim of giving a false testimony... shall be punished by imprisonment between one and eight years.”

40. Measures of protection from domestic violence in the minor offence legislation are provided for in the Protection against Domestic Violence Act (*Zakon o zaštiti od nasilja u obitelji*, Official Gazette no. 137/2009, with further amendments). Domestic violence is defined as any form of physical, mental, sexual or economic violence (section 4). The Act provides that proceedings concerning domestic violence must be conducted with urgency

(section 5). It provides for a number of protective measures for the victims and the possibility of the imposition of fines and imprisonment for a period of up to ninety days for acts of domestic violence (sections 10-23).

41. The relevant parts of the 2020 Annual Report of the Ombudswoman for the Equality of Sexes of the Republic of Croatia read as follows:

“The reasons for the aforementioned increase in femicide cases are multifaceted and require expert research and analysis that go beyond the format of this report. However, having analysed our system of prevention of gender-based violence, protection of victims and prosecution of perpetrators, the Ombudsperson determined that the police, courts and state attorneys’ offices are not sufficiently educated for a gender-sensitive approach in the processing of domestic violence, especially individual judges and state attorneys. Individual assessments of victims’ needs and risk assessments for victims are either not carried out at all or are only formal and often do not correspond to the real needs of victim protection. Victim protection measures are rarely imposed, and those imposed are not effectively implemented, especially in cases of domestic violence is qualifies as a criminal offence – the police continue to verify the execution of the measure exclusively through the victims. In some cases, the police are unable to distinguish the primary aggressor from the victim, therefore, in some cases of domestic violence and violence against women, the occurrence of double arrests and double charges still exists.”

II. EUROPEAN UNION LAW

42. The Directive of the European Parliament and of the Council (2012/29/EU) of 25 October 2012 establishes minimum standards on the rights, support and protection of victims of crime. The relevant part of the Directive, which was to be transposed into the national legislations of the European Union Member States by 16 November 2015, provides as follows:

Article 18 Right to protection

“Without prejudice to the rights of the defence, Member States shall ensure that measures are available to protect victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation, including against the risk of emotional or psychological harm, and to protect the dignity of victims during questioning and when testifying. When necessary, such measures shall also include procedures established under national law for the physical protection of victims and their family members.”

III. INTERNATIONAL LAW

43. The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (“Istanbul Convention”), which came into force in respect of Croatia on 1 October 2018, insofar as relevant, provides as follows:

Chapter IV – Protection and support

Article 18 – General obligations

“1. Parties shall take the necessary legislative or other measures to protect all victims from any further acts of violence.

...

3. Parties shall ensure that measures taken pursuant to this chapter shall:

- be based on a gendered understanding of violence against women and domestic violence and shall focus on the human rights and safety of the victim;
- be based on an integrated approach which takes into account the relationship between victims, perpetrators, children and their wider social environment;
- aim at avoiding secondary victimisation...”

Chapter VI – Investigation, prosecution, procedural law and protective measures

Article 49 – General obligations

“1. Parties shall take the necessary legislative or other measures to ensure that investigations and judicial proceedings in relation to all forms of violence covered by the scope of this Convention are carried out without undue delay while taking into consideration the rights of the victim during all stages of the criminal proceedings.”

Article 50 – Immediate response, prevention and protection

“1. Parties shall take the necessary legislative or other measures to ensure that the responsible law enforcement agencies respond to all forms of violence covered by the scope of this Convention promptly and appropriately by offering adequate and immediate protection to victims.”

Article 51 - Risk assessment and risk management

“1. Parties shall take the necessary legislative or other measures to ensure that an assessment of the lethality risk, the seriousness of the situation and the risk of repeated violence is carried out by all relevant authorities in order to manage the risk and if necessary to provide co-ordinated safety and support.

2. Parties shall take the necessary legislative or other measures to ensure that the assessment referred to in paragraph 1 duly takes into account, at all stages of the investigation and application of protective measures, the fact that perpetrators of acts of violence covered by the scope of this Convention possess or have access to firearms.”

Article 52 – Emergency barring orders

“Parties shall take the necessary legislative or other measures to ensure that the competent authorities are granted the power to order, in situations of immediate danger, a perpetrator of domestic violence to vacate the residence of the victim or person at risk for a sufficient period of time and to prohibit the perpetrator from entering the residence of or contacting the victim or person at risk. Measures taken pursuant to this article shall give priority to the safety of victims or persons at risk. “

Article 56 – Measures of protection

“1. Parties shall take the necessary legislative or other measures to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and judicial proceedings, in particular by:

a. providing for their protection, as well as that of their families and witnesses, from intimidation, retaliation and repeat victimisation...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

44. The applicant complained that the national courts had failed to protect her physical integrity by terminating the restraining order imposed on N.M. without assessing whether he still posed a danger to her and their children. She relied on Articles 2, 3 and 8 of the Convention. The Court, as the master of the characterisation to be given in law to the facts of the case (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 114, 20 March 2018), considers that the case falls to be examined under Article 8 of the Convention (see *A. v. Croatia*, no. 55164/08, § 57, 14 October 2010), which reads as follows:

“1. Everyone has the right to respect for his private and family life...”

A. Admissibility

45. The Government argued that the applicant had failed to exhaust the available domestic remedies. If she had considered that, after the termination of the precautionary measures, she or her children had still been in danger, she could have brought renewed minor-offence proceedings against N.M. for domestic violence in the form of stalking or harassment. In such proceedings, the competent court would have been able to establish the existence of such forms of violence and to order appropriate protective measures. Alternatively, she could have lodged a fresh criminal complaint.

46. The applicant disagreed.

47. The Court reiterates that under Article 35 § 1 of the Convention, it may only deal with an application after all domestic remedies have been exhausted. The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, for example, *Mifsud v. France* (dec.) [GC], no. 57220/00, § 15, ECHR 2002-VIII). The obligation to exhaust domestic remedies requires an applicant to make normal use of remedies which are effective, sufficient and accessible in respect of his Convention grievances. To be effective, a remedy must be capable of resolving directly the impugned state of affairs (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004).

48. The rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism. At the same time, it requires in principle that the complaints intended to be made subsequently at international level should have been aired before domestic authorities, at least in substance and in compliance with the formal requirements laid down in domestic law (see *Pajić v. Croatia*, no. 68453/13, § 42, 23 February 2016, and cases referred to therein).

49. The Court notes that the applicant's complaint primarily concerns the State's failure to protect her from N.M.'s threats and other forms of domestic violence, in particular as a result of the decision to terminate the preventive measures issued to protect her. In that connection, the Court notes that the applicant already filed criminal complaints against N.M. (see paragraphs 8 and 9 above) and that the criminal proceedings against him were still pending at the material time, when the restraining order had been terminated (see paragraph 30 above). She had thus already made a sustained effort to bring the behaviour complained of to the attention of the competent domestic authorities. Moreover, the applicant informed the police about a number of subsequent incidents of stalking and harassment by N.M. (see paragraphs 22 and 33 above) but without success (see paragraph 25 above). In such circumstances the Court does not see how filing another criminal complaint or instituting another set of minor-offence proceedings would have constituted an effective remedy worth pursuing for the applicant. Consequently, the Government's objection must be dismissed.

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

B. Merits

1. The parties' arguments

(a) The applicant

51. The applicant maintained that her physical integrity had been endangered by the termination of the restraining order against her violent husband before the end of the criminal proceedings against him. She had been denied an effective legal remedy against the decision on terminating the restraining order issued in respect of N.M. in order to prevent the repeated commission of unlawful offences against her, in a situation where the competent State Attorney had failed to appeal against that decision, although he had been legally authorised to do so. The applicant should not have been deprived of her right to secure the re-examination of a decision which was decisive for her personal safety merely due to the fact that the authorised body had not acted in accordance with the principle of protecting the safety and rights of victims.

52. The applicant alleged that she had been the victim of multiple rapes, violence, threats and unlawful deprivation of liberty in a particularly cruel and humiliating manner over an extended period of time. N.M. had threatened to kill her if she refused to withdraw her criminal complaint against him. Being a police officer, he had also used various measures to avoid prosecution. All of the above indicated the danger of recidivism which had not changed since the precautionary measures had been last extended, and the existence of which the trial court should have examined when deciding on the extension of that measure.

53. Finally, the applicant argued that the decision to terminate the precautionary measure had been contrary to European Union law safeguarding the rights, support and protection of victims of crime, according to which Member States were to ensure the availability of measures to protect victims and members of their families from secondary and repeated victimisation, intimidation and retaliation.

(b) The Government

54. The Government argued that the competent authorities had fulfilled their positive obligations under the Convention by reacting promptly and professionally to each report of violent behaviour and threats to the applicant. The police had taken the case particularly seriously, bearing in mind that N.M. was a police officer. N.M. had been initially detained for a period of eleven months, and afterwards had been subject to appropriate precautionary measures for a period of two-and-a-half years. Those measures had been fully supervised by the police and had at no point been found to be violated. In sum, the applicant's physical integrity had been protected by the measures ordered by the competent national authorities for a period of almost four years.

55. The Government further stressed that the authorities could not be held responsible for the fact that the applicant had rejected some of the measures offered to her (such as sheltered accommodation) or for the fact that she had subsequently revised her statement before the competent court regarding certain events. Nor could it be concluded that the measures implemented by the competent authorities were ineffective, since N.M. had ceased his alleged violent behaviour against the applicant as soon as she had filed the first criminal complaint. After the termination of the restraining order issued against N.M., not a single fact suggested that any of the applicant's rights had been jeopardised or that N.M. had posed a threat to her safety or life.

2. The Court's assessment

(a) General principles

56. The Court has already held, in various contexts, that the concept of private life within the meaning of Article 8 of the Convention includes a

person's physical and psychological integrity (see, for example, *A and B v. Croatia*, no. 7144/15, § 106, 20 June 2019).

57. The Court has found that the States' positive obligations – in some cases under Articles 2 or 3 and in other instances under Article 8 taken alone or in combination with Article 3 of the Convention – comprise: (a) the obligation to establish and apply in practice an adequate legal framework affording protection against violence by private individuals; (b) the obligation to take the reasonable measures in order to avert a real and immediate risk of recurrent violence of which the authorities knew or ought to have known, and (c) the obligation to conduct an effective investigation into the acts of violence (see, most recently, *X and Others v. Bulgaria* [GC], no. 22457/16, § 178, 2 February 2021; *Kurt v. Austria* [GC], no. 62903/15, § 164, 15 June 2021; and also *Volodina v. Russia (no. 2)*, no. 40419/19, § 49, 14 September 2021, and cases cited therein).

58. The Court has also stressed on numerous occasions that States have a positive obligation to establish and apply effectively a system punishing all forms of domestic violence and to provide sufficient safeguards for the victims (see *Opuz v. Turkey*, no. 33401/02, § 145, ECHR 2009, and *Bălşan v. Romania*, no. 49645/09, § 57, 23 May 2017). There was a common understanding in the relevant international material that comprehensive legal and other measures were necessary to provide victims of domestic violence with effective protection and safeguards (see *Kurt*, cited above, § 161, with further references).

59. In the context of the right to life, the Court has held that the authorities must establish whether there exists a real and immediate risk to the life of one or more identified victims of domestic violence by carrying out an autonomous, proactive and comprehensive risk assessment, taking due account of the particular context of domestic violence (see *Kurt*, cited above, § 190). In such a situation it is above all a question of taking account of the recurrence of successive episodes of violence within the family unit (see *Kurt*, cited above, § 164, with further references).

60. The Court accordingly needs to be satisfied that, from a general point of view, the domestic legal framework is adequate to afford protection against acts of violence by private individuals in each particular case. In other words, the toolbox of legal and operational measures available must give the authorities involved a range of sufficient measures to choose from, which are adequate and proportionate to the level of risk that has been assessed in the circumstances of the case (*ibid.*, § 179).

(b) Application of the general principles to the present case

61. At the outset, the Court considers that the circumstances of the present case, in particular the threat to the applicant's physical and mental welfare, as well as her vulnerability as an alleged victim of domestic violence, including rape, bring the situation in her case within the notion of private life

protected under Article 8 of Convention (see *Hajduová v. Slovakia*, no. 2660/03, § 49, 30 November 2010; *A v. Croatia*, cited above, § 58; *B. v. the Republic of Moldova*, no. 61382/09, § 71, 16 July 2013; and *Bevacqua and S. v. Bulgaria*, no. 71127/01, § 79, 12 June 2008).

62. The Court's task in the present case is not to substitute itself for the competent domestic authorities in determining the most appropriate methods for protecting individuals from attacks on their personal integrity, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their powers. The Court will therefore examine, as it has done in a number of domestic violence cases, whether the national authorities, especially the courts, in handling the applicant's case, have breached their positive obligation under Article 8 of the Convention (see *Hajduová*, cited above, §§ 46-47; *Sandra Janković v. Croatia*, no. 38478/05, § 46, 5 March 2009; and *B. v. the Republic of Moldova*, cited above, § 73).

63. The criminal law in force at the relevant time in Croatia punished threat, rape, abuse of a child and obstruction from taking evidence. For some of those crimes, such as uttering threat, it also provided for a harsher sentence if committed against close persons, such as family members. Criminal investigations in such cases were to be opened of the authorities' own motion (see paragraph 39 above). In addition, the Protection against Domestic Violence Act contained further regulations to ensure a minimum of protection for victims of domestic violence (see paragraph 40 above). The Court therefore considers that the applicant had at her disposal a legal framework allowing her to complain about domestic violence and to seek the authorities' protection (see *Ž.B. v. Croatia*, no. 47666/13, § 58, 11 July 2017).

64. The Court will now examine whether or not the domestic authorities' compliance with the relevant procedural rules, as well as the manner in which the criminal-law mechanisms were implemented in the instant case, were defective to the point of constituting a violation of the respondent State's positive obligations under Article 8 of the Convention, as alleged by the applicant.

65. In that connection, the Court will have regard to the fact that the domestic authorities were under a duty to protect the applicant as the alleged victim of serious violent offences from a real and immediate threat of further violence and in that sense to conduct a risk assessment at regular intervals as an integral part of their positive obligations under Article 8 of the Convention (see, in the context of Article 2 and the lethality risk assessment, *Kurt*, cited above, § 190), taking due account of the particular context of domestic violence (see *Volodina*, cited above, § 86) and its recurring nature. Indeed, the Court has stressed that the dynamics of domestic violence must duly be taken into account by the authorities when they assess the risk of a further escalation of violence, even after the issuance of a barring and protection order (see *Kurt*, cited above, § 175).

66. The Court observes in that connection that as soon as the authorities became aware of the nature and gravity of the accusations against N.M., the national courts had placed him in pre-trial detention for a period of some eleven months (see paragraph 11 above). That measure was subsequently replaced with a restraining order aimed at protecting the physical integrity of the applicant and her children (see paragraph 15 above). The Court is satisfied that the authorities have thus initially taken adequate steps in order to protect the applicant from further threats and violence by N.M. without any delays (compare *Kurt*, cited above, §§ 191-94).

67. The Court notes that the restraining order was issued in the framework of ongoing criminal proceedings against N.M. and that under domestic law such a precautionary measure could be applied as long as necessary and at the latest until the judgment in the criminal proceedings became final (see paragraph 37 above). It was for the court to assess on a regular basis whether the need to apply the precautionary measure persisted (*ibid.*).

68. The Court further notes that the domestic court indeed regularly assessed the need to prolong the precautionary measure relying on several determinant factors why N.M. still posed a threat to the applicant's safety and why the measure should be extended (see paragraph 26 above).

69. However, the Court cannot but note that each time the courts prolonged the said restraining order, they used the same stereotypical reasoning (see in the context of Article 5, *Merabishvili v. Georgia* [GC], no. 72508/13, § 222, 28 November 2017).

70. In contrast, when assessing the necessity of maintaining the restraining order imposed on N.M. on 8 July 2016, the competent court after a long time performed a fresh assessment of the risk to the applicant's physical integrity in light of the passage of time. It noted that N.M. had been complying with the said precautionary measure throughout the period it had been imposed (see paragraph 30 above), which was about two and a half years. While it would have been desirable for the domestic court to have given further reasons for its decision, this does not mean that its assessment of risk of potential further violence had not been autonomous, proactive or comprehensive, or that it failed to take into consideration the specific dynamics of domestic violence or the risk of a further escalation of violence (see *Kurt*, cited above, § 175).

71. In that connection, the Court notes that at the material time there had been no further proven acts of violence of N.M. towards the applicant for about three and a half years. Moreover, all of the applicant's allegations concerning any further threats and intimidations had been timely followed up and ultimately dismissed by the relevant authorities (see paragraph 25 above; see also paragraph 33 above).

72. In assessing the decision not to prolong the restraining order against N.M., the Court must also take into account whether the said ruling achieved a fair balance between the competing interests at stake (see, *mutatis mutandis*,

Levchuk v. Ukraine, no. 17496/19, § 83, 3 September 2020; see also *Kurt*, cited above, § 182), in the circumstances the applicant's right to her personal integrity on the one hand, and N.M.'s rights to respect for his private life and his freedom of movement on the other.

73. At this juncture, the Court reiterates that it is primarily for the national courts to resolve problems of interpretation of domestic legislation, and the Court is not in a position to take their place in this matter (see *Söderman v. Sweden* [GC], no. 5786/08, § 102, ECHR 2013, and *Bălşan*, cited above, § 67). The Court further stresses that it must grant substantial deference to the national courts in the choice of appropriate measures, while also maintaining a certain power of review and the power to intervene in cases of manifest disproportion between the competing interests at stake (see, *mutatis mutandis*, *Valiulienė v. Lithuania*, no. 33234/07, § 76, 26 March 2013).

74. In the present case, given that N.M. had been either in detention or restricted from approaching the applicant for a total of about three and a half years, during which he did not disobey that prohibition, the Court does not find the domestic court's decision to lift the restraining order when it did unreasonable or manifestly disproportionate in the circumstances.

75. Finally, the applicant expressly complained about the fact that under domestic law, it was not open to her, as the victim in a pending criminal case, to challenge the court's decision to terminate the restraining order against N.M. in order to protect her rights under Article 8 of the Convention.

76. In this connection, the Court notes that the right to appeal of victims against restraining orders is by no means an absolute requirement under the relevant international standards nor is it provided in many domestic laws of Council of Europe Member States. Although the provisions of both the Victims' Rights Directive and the Istanbul Convention impose the general obligation to protect the victims of crime, and in particular of domestic violence, from repeat victimisation, intimidation and retaliation, as well as to take into consideration the rights of the victims at all stages of the criminal proceedings (see paragraphs 42-43 above), they do not go so far as to require the specific right of appeal of victims in matters such as restraining orders or detention imposed against the alleged perpetrator.

77. In light of the above, the Court does not discern any failure on the part of the relevant authorities to fulfill their positive obligation to protect the applicant's physical integrity. In particular, they were aware of serious accusations against N.M. and took various types of appropriate measures at the appropriate times to protect the applicant's physical integrity (compare *N.P. and N.I. v. Bulgaria* (dec.), no. 72226/11, § 87, 3 May 2016), taking due account of the recurring nature of domestic violence.

78. Accordingly, there has been no violation of Article 8 of the Convention in the present case.

II. ALLEGED VIOLATION OF ARTICLES 6 AND 13 OF THE CONVENTION

79. The applicant further complained that the decision to terminate the restraining order against N.M. had not been properly reasoned, in breach of Article 6 of the Convention. She also complained that she had no effective remedy against that decision, contrary to Article 13 of the Convention.

80. The Government argued that Article 6 of the Convention was not applicable to the proceedings concerning precautionary measures and that, in any event, the applicant had had a number of protective mechanisms at her disposal in order to protect her physical integrity, which she had failed to use.

81. In view of the reasons adduced and the conclusion reached in respect of Article 8 of the Convention (see paragraphs 61-78 above), the Court does not consider it necessary to examine separately the admissibility or merits of the applicant's complaints under Articles 6 and 13 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaint under Article 8 admissible;
2. *Holds*, by four votes to three, that there has been no violation of Article 8 of the Convention;
3. *Holds*, unanimously, that there is no need to examine separately the admissibility and merits of the complaints under Articles 6 and 13 of the Convention.

Done in English, and notified in writing on 17 November 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Liv Tigerstedt
Deputy Registrar

Péter Paczolay
President

MALAGIĆ v. CROATIA JUDGMENT

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Schembri Orland, Ktistakis and Derenčinović is annexed to this judgment.

P.P.C.
L.T.

JOINT DISSENTING OPINION OF JUDGES SCHEMBRI
ORLAND, KTISTAKIS AND DERENČINOVIĆ

1. This case concerns the revocation of a precautionary restraining order (RO) within the context of criminal proceedings which were still ongoing for multiple serious criminal offences of domestic violence. The applicant, the alleged victim of the spousal abuse, complained that the termination of the restraining order was in breach of her right, *inter alia*, to the protection of her personal (physical) integrity as guaranteed by Article 8 of the Convention. She further complained that it was not possible for her, as a victim, to challenge the termination of the RO before the domestic courts.

2. We are regrettably unable to share the reasoning and analysis of the majority in this case, as we are of the opinion that the facts merited a finding of a violation of Article 8 of the Convention.

3. It seems that, in general, the risk assessment standards established by the Court were not followed by the domestic courts either in granting (and extending) the RO or in the decision on its termination. In the context of the positive obligation to protect the victims of domestic violence, the failure of the authorities to conduct an autonomous, proactive and comprehensive risk assessment prior to the termination of the RO resulted in the victim being placed at imminent risk of recurring violence by the defendant.

4. The fact that the accused husband was ultimately acquitted of the charges (some of the charges became time-barred) should not detract from the rigorous scrutiny which the State authorities are obliged to conduct, taking due account of the particular context of domestic violence, of the risk of a recurrence of violence for the alleged victim in real time. The outcome of the proceedings and the acquittal of the defendant are of no relevance here because risk assessment as an element of the obligation to protect is not an obligation of result but one of means (see, for instance, *Volodina v. Russia* (no. 2), no. 40419/19, 14 September 2021).

5. The circumstances of this particular case point to the applicant's particular vulnerability as an alleged victim of domestic violence, including marital rape, sexual abuse and threats with the use of a firearm, by her husband who was also a policeman. The RO was issued consequent to the filing of an indictment against N.M. and after he had been in detention for eleven months. N.M. was prohibited from approaching the applicant within fifty metres and from making or maintaining direct or indirect contact with her, and from approaching her place of residence within one kilometre. The RO did not represent, in itself, an extreme measure that would seriously interfere with the defendant's freedom of movement.

6. In terms of Croatian law, the charges were serious enough to merit prosecution under the Criminal Code for several serious criminal offences, rather than under the Domestic Violence Act, which concerns misdemeanours. Furthermore, the Code of Criminal Procedure provides that

precautionary measures may be kept in place for as long as they are necessary and until the judgment (in criminal proceedings) becomes final or until the final judgment becomes enforceable (this applies to the restraining order). This is not to say that the termination of a precautionary measure may not be justified prior to conclusion of the proceedings, provided that a proper risk assessment is carried out, involving a comprehensive weighing of the interests of the victim and the accused. Moreover, the Supreme Court, in its decision extending the RO, emphasised that the application of precautionary measures required a different degree of reasonable doubt, which had been confirmed by the indictment, whereas the courts were precluded from further assessing the facts or the criminal liability of the accused.

7. The final extension of the RO was ordered on 14 March 2016 and upheld by the Supreme Court on 8 April 2016. The County Court relied on the number and seriousness of the criminal offences with which N.M. had been charged, the manner of their committal, including the use of firearms, the duration of the offending conduct and the consequent determination N.M. had shown in his violent behaviour towards the applicant. The court also pointed out that N.M. had allegedly threatened the applicant's life even after their marriage had ended, requesting her to withdraw her criminal complaint and reiterating that nobody would believe her accusations since he was a police officer.

8. Three months later, on 8 July 2016, the Pula County Court terminated the restraining order imposed on N.M., employing the following stereotypical reasoning (see paragraph 30 of the judgment):

“... taking into account the time which N.M. had spent in investigative detention, ... i.e. from 3 April 2013 until 12 March 2014, as well [as] the fact that the restraining order was implemented from 12 March 2014 ... and was last extended by a ruling of 14 March 2016, i.e. that it had been applied for over two years, during which period [N.M.] did not [violate the said order], in view of all of the above ..., it is considered that there is no longer any need to apply [the restraining measures] ...”

9. The Court noted that each time the courts had prolonged the restraining order they had used the same stereotypical reasoning, whereas in contrast, when assessing the necessity of maintaining the restraining order imposed on N.M. the competent court, after a long time, had performed a fresh assessment of the risk to the applicant's physical integrity, taking into account solely the passage of time. Furthermore, at the material time there had been no further proven acts of violence by N.M. towards the applicant for about three and a half years. Moreover, all of the applicant's allegations concerning any further threats and intimidation had been followed up in a timely manner and ultimately dismissed by the relevant authorities.

10. The Court therefore concluded that in the present case, given that N.M. had been either in detention or prohibited from approaching the applicant for a total of about three and a half years, during which he had not breached that prohibition, the domestic court's decision to lift the restraining

order when it did was not unreasonable or manifestly disproportionate in the circumstances.

11. Basically, therefore, the Court considered that the termination of the RO was justified on the basis that the decisions prolonging it had been repetitive, the accused had demonstrated good behaviour whilst in detention and whilst the RO was in effect, and the passage of time constituted evidence of a proper risk assessment that weighed up adequately the interests of the accused and of the victim.

12. Even a cursory appraisal of the basis of the termination decision would demonstrate that not only was the revocation of the order based on irrelevant considerations, but that the interests of the victim were not taken into account, let alone formed part of the balancing exercise that the courts were obliged to undertake.

13. Good behaviour, as in not breaching an effective protection order in relation to the victim whilst that order is in place or whilst in detention, is not relevant in itself when assessing the risk of future danger. A breach of a protection order entails sanctions, and no further investigation was undertaken to determine whether the accused might foreseeably present a risk once the protection order was no longer in place. Furthermore, it is reasonable to assume that the “good behaviour” of the defendant was the logical consequence of the application of the RO.

14. As for the passage of time, a protective measure cannot be subject to revocation merely because of the duration of the principal (criminal proceedings). This is as dangerous for the victim as it is illogical. Really, why should the victim have to suffer as a result of the inefficiency of the criminal justice system and why should the defendant, regardless of the presumption of innocence, benefit from it? We note with concern that in this case some of the charges were dismissed owing to the expiry of the statute of limitations: the length of the proceedings in the present case is in contravention of the obligation to investigate and adjudicate in cases of domestic violence without unnecessary delays. It is paradoxical that in a case which concerns the obligation to protect, the domestic authorities were more focused on the psychological and psychiatric assessment of the victim than of the defendant.

15. In particular, while we do not wish to call into question the possibility of terminating precautionary measures owing to the passage of time or on account of the good behaviour of the person on whom they were imposed, in our view this was insufficient in the present case. The decision by the authorities as to which operational measures to take in a particular case inevitably requires a careful weighing of the competing rights at stake (see *Kurt v. Austria* [GC], no. 62903/15, § 182, 15 June 2021), yet no such weighing had been done by the domestic court. Moreover, bearing in mind that the aim of precautionary measures is to forestall the recurrence of domestic violence (see *Volodina*, cited above), a mere finding that the accused had obeyed the law for a certain period of time, without a

comprehensive analysis of the risks the alleged victim continued to live with, was incompatible with the States' duty to take into consideration the vulnerability of the victims of domestic violence when discharging their positive obligations under Article 8 of the Convention (see, *mutatis mutandis*, *Levchuk v. Ukraine*, no. 17496/19, § 87, 3 September 2020).

16. This was not therefore – contrary to what is asserted in the judgment – “an assessment of risk that was autonomous, proactive and comprehensive”. Indeed, the competent court only weighed the interests of the accused and gave no consideration to relevant factors such as the gravity of the charges or the circumstances of the alleged offences and their repetition. The passage of time and good behaviour do not absolve a reviewing court from a proper reassessment addressing the issue why the reasons previously adduced are no longer existent. Neither was any consideration given to the fact that the criminal proceedings were still ongoing and still at the evidentiary stage. In essence, no investigation, assessment or reasoning was undertaken as to why the lethality factors which had justified maintaining the order no longer applied. In a nutshell, the domestic court gave no convincing argument as to why, if at all, it considered that the danger to the applicant had ceased to exist in the context of the specific dynamics of a domestic violence situation.

17. Moreover, nothing in the case file indicates that the authorities heard any relevant witnesses, such as for instance any social workers who may have been involved in the case, or sought to obtain any other evidence so as to explain how the relevant situation had changed between March 2016, when the precautionary measure had last been prolonged for very serious reasons, and 8 July 2016, when it was terminated on the sole ground that N.M. had complied with the measure for a certain amount of time. In fact, the only evidence adduced in the parallel criminal proceedings during that period was an expert opinion concerning the applicant finding that she suffered from an unspecified type of personality disorder (see paragraph 29 of the judgment). The Court did not see, nor did the domestic court explain, whether and how such a report could have had any bearing on the latter's decision on the precautionary measure.

18. Finally, in cases of domestic violence, which because of their sensitivity are examined by the national courts under special judicial procedures, the Contracting States are obliged to provide a coherent national mechanism for the judicial review of restraining orders. This obligation on the State was not observed in the present case: the Supreme Court upheld the RO on 8 April 2016 and the lower court decided, only three months later, to terminate it on the basis of stereotypical reasoning, without new facts, as set out above.

19. In conclusion, we consider that in view of the evidence that was, or should have been, available to the domestic authorities at the material time a number of significant lethality factors were sufficiently discernible which were considered when the RO was granted and extended but ignored when

the protective measure was lifted. Such a conclusion begs the question whether a seriously flawed risk assessment can nevertheless lead to adequate protective measures in some factual scenarios.

20. The failure of the authorities to conduct an autonomous, proactive and comprehensive risk analysis in this case points to a deeper structural problem. In this regard, we refer to the cases concerning Croatia, in which similar issues (the obligation to protect a victim of domestic violence) were assessed by the Court. Notwithstanding the fact that the awareness of the relevant actors within the system as to the importance of the risk assessment has improved over the years, there still seems to be room for substantial improvement of the system for the prevention and punishment of domestic violence in Croatia.