



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

SECOND SECTION

CASE OF PULFER v. ALBANIA

(Application no. 31959/13)

JUDGMENT

STRASBOURG

20 November 2018

FINAL

20/02/2019

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

In the case of Pulfer v. Albania,

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

Robert Spano, *President*,
Julia Laffranque,
Ledi Bianku,
Paul Lemmens,
Jon Fridrik Kjølbro,
Stéphanie Mourou-Vikström,
Ivana Jelić, *judges*,

and Hasan Bakırcı, *Deputy Section Registrar*,

Having deliberated in private on 16 October 2018,

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

PROCEDURE

1. The case originated in an application (no. 31959/13) against the Republic of Albania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Albanian national, Ms Violeta Pulfer (“the applicant”), on 19 April 2013.

2. The applicant was represented by Ms A. Kuçani and Mr G. Çela, lawyers practising in Tirana. The Albanian Government (“the Government”) were represented by their Agent, Ms A. Hicka of the State Advocate’s Office.

3. The applicant alleged, in particular, that the authorities’ failure to promptly protect her life had violated Articles 2 and 6 of the Convention. She also complained, under Article 8 of the Convention, of a breach of her right to respect for her home.

4. On 6 October 2014 the case was communicated to the Government.

THE FACTS

5. The applicant, Ms Violeta Pulfer, is an Albanian national who was born in 1967 and lives in Tirana.

I. THE CIRCUMSTANCES OF THE CASE

6. On an unspecified date in 2011 the applicant and her husband moved to Vlora. The applicant agreed to buy a house which had been unlawfully

built by S.N. In the meantime, S.N. had lodged an application for the regularisation of the house's unlawful status.

7. On 19 October 2011 the applicant and S.N. concluded a down-payment agreement (*kontratë kapari*) according to which the applicant deposited just under half of the sale price as a down-payment (*kapar*), the remainder to be paid upon the regularisation of the house's status and the conclusion of the sale agreement.

8. On 8 December 2011 the applicant moved into the house on the basis of the down-payment agreement.

A. Forcible eviction of the applicant from the house

1. First eviction attempt

9. On 12 January 2012 S.N. asked the applicant to vacate the house. The applicant opposed the eviction and reminded S.N. of the obligations arising from the down-payment agreement. It appears that on the same day S.N. also destroyed some of the applicant's movable property.

10. On 1 February 2012 S.N. lodged a civil action, requesting that the down-payment agreement be declared null and that he be allowed to retake possession of the house.

11. On 3 May 2012 the Vlora District Court dismissed the action and found that the down-payment agreement was valid and lawful. It also found that the request for the repossession of the house was not based on law. As no appeal had been lodged against it, the decision became final on 18 May 2012.

12. It would appear that on 10 July 2012 the status of the house was regularised and, consequently, S.N. obtained the ownership deeds. No subsequent sale agreement seems to have been concluded between S.N. and the applicant.

2. Second eviction attempt

13. In the morning of 8 September 2012 S.N. forced his way into the house. According to the applicant, he put a rope around her neck and she was dragged to the ground and knocked against the surrounding walls for around ten minutes.

14. On the same day the applicant sent text messages to the chief of police and the district prosecutor, seeking the authorities' protection against further violence. She submitted screenshots from her mobile telephone of the said text messages to the Registry of the Court as evidence. According to the applicant, the police intervened after one and a half hour.

15. On 9 September 2012 the applicant's husband saw E.N., S.N.'s wife, removing tools and objects from the house's garage. On the same day the

applicant went to the police station to lodge a criminal complaint against S.N. for theft.

16. It would appear that on 10 September 2012 the applicant went to live in her mother's home in Tirana.

17. On 30 October 2012, with police assistance, the applicant entered the house and found that it had been emptied.

B. Criminal investigations and proceedings against S.N.

1. First investigation and set of proceedings

18. On an unspecified date, in January 2012, the applicant had lodged a criminal complaint against S.N. for the offence of "self-administered justice" (*vetëgjyqësia*) under Article 277 of the Criminal Code ("the CC").

19. On 12 January 2012 the prosecutor took statements from S.N. and E.N. about their efforts to evict the applicant from the house.

20. On 14 May 2012 S.N. was charged with the offence of self-administered justice under Article 277 of the CC.

21. On 20 June 2012 the prosecutor committed S.N. for trial. The case file was forwarded to the Vlora District Court in order for it to conduct the proceedings.

22. On 12 December 2012 the Vlora District Court decided to discontinue the proceedings on the basis of Article 387 of the Code of Criminal Procedure ("the CCP") as an amnesty had been granted in respect of that offence pursuant to the General Amnesty Act (Law no. 107 of 8 November 2012 on Amnesty).

2. Second investigation

23. On 8 September 2012 the applicant lodged another criminal complaint against S.N. for the offence of self-administered justice under Article 277 of the CC. On the same day the prosecutor questioned S.N. as a person against whom an investigation was opened.

24. On 9 September 2012 the applicant made a statement before the prosecutor complaining about the events of 8 and 9 September 2012 (see paragraphs 13-15 above). She also complained about E.N. On the same day E.N. was questioned in that connection as a person against whom an investigation was opened.

25. Following the alleged assault of 8 September 2012, on 9 September 2012 the prosecutor ordered that the applicant undergo a medical examination.

26. On 10 September 2012 a police officer referred the offence of self-administered justice against S.N. and E.N. to the prosecutor.

27. On 10 September 2012 the applicant was examined by a forensic medical expert. The medical report found visible marks on the applicant's

neck resulting from strangulation, and haematomata on the head resulting from impact with a hard object. The above injuries had made the applicant temporarily unfit for work for a period of nine days.

28. It appears from the case file that the applicant's health started to deteriorate as a result of the assault on 8 September 2012. Afterwards, she sought expert medical advice in Greece.

29. On 14 September 2012 the prosecutor opened criminal investigation no. 1473 against S.N. for alleged infliction of bodily harm (*plagosje e lehtë me dashje*) and self-administered justice under Articles 89 and 277 of the CC. An investigation was also opened against E.N. for alleged self-administered justice.

30. On 4 October 2012 the applicant lodged another criminal complaint against S.N. for, *inter alia*, the offences of threat, breaking and entering, insult, theft, destruction of property and malicious use of telephone calls under Articles 84, 112, 119, 134, 150 and 275 of the CC.

31. On 4 October 2012 the prosecutor opened criminal investigation no. 1588 against S.N. for the offence of malicious use of telephone calls under Article 275 of the CC.

32. On 8 October 2012 the prosecutor decided to join the two investigations, nos. 1473 and 1588.

33. On 12 October 2012 S.N. made a statement before the prosecutor.

34. According to a hospital certificate of 27 November 2012 drawn up in Greece, the applicant underwent a serious anterior cervical discectomy (an operation to remove a herniated or degenerative disc in the neck area of the spine) in Greece. She subsequently had to wear a cervical collar for two months.

35. On 6 December 2012, following the applicant's lawyer's statement that her health had deteriorated, and that she had undergone surgery and a magnetic resonance imaging scan of her cervical spine, the prosecutor ordered a new medical examination. The lawyer also submitted a detailed list of the applicant's belongings which had been inside the house in September 2012.

36. On 17 January 2013 the forensic experts confirmed that strangulation marks and haematomata on the head as a result of the events of 8 September 2012 and a suture (as a result of surgery) had been found on the applicant's body. The above injuries had rendered her temporarily unfit for work for a period of over nine days. They further stated that on the basis of the documents in the case file, namely the hospital certificate of 27 November 2012, the magnetic resonance images, and the report of a consultation with a particular neuropsychiatrist, the damage found on the magnetic resonance images was unrelated to the events of 8 September 2012; they had been caused as a result of conditions that had existed before the trauma.

37. On 15 February 2013 the prosecutor's office found that S.N. was suspected of having committed the offences provided for in Articles 89, 275 and 277 of the CC. E.N. was suspected of having committed the offence provided for in Article 277 of the CC. However, it decided to discontinue the investigation, since an amnesty had been granted in respect of the alleged offences pursuant to the General Amnesty Act. The decision also made reference to two forensic examinations of 10 September 2012 and 17 January 2013. The decision, in so far as relevant, reads as follows:

“... on the basis of the forensic examination of 10 September 2012 it was found that the bodily injuries had rendered her temporarily unfit for work for over nine days.

...

[The applicant] alleges that on the day of the accident she suffered serious bodily injuries, as a result of which she had to undergo surgery. On 6 December 2012 she was subjected to a forensic re-examination, which was concluded on 17 January 2013 ..., it was found that the bodily injuries had rendered her temporarily unfit for work for over nine days. The injuries fall to be examined under the offence of bodily harm prescribed in Article 89 of the Criminal Code.

...

On the basis of information obtained during the investigation ..., it appears that from 24 to 27 September 2012, S.N. harassed (*e ka shqetësuar*) Violeta Pulfer by way of telephone calls, and threatened not to allow her to return to the house she had purchased. In these circumstances, it is suspected that S.N. and E.N. have committed the offence laid down in Article 277 of the Criminal Code, whereas S.N. [is] also [suspected of] the offences laid down in Articles 89 and 275 of the Criminal Code

On 28 November 2012 [the General Amnesty Act] entered into force. Section 5 provides for the discontinuation of the criminal prosecution of all offences committed until 30 September 2012 in respect of which the Criminal Code prescribed a sentence of up to two years' imprisonment or a lighter punishment.

...

The offences set out in Articles 89, 277 and 275 of the Criminal Code, in respect of which investigations have been opened, have a maximum term of imprisonment of two years, and were committed prior to 30 September 2012. Under these circumstances, there are grounds which mean that the investigation (*procedimi penal*) cannot continue.”

38. The applicant lodged an appeal against the prosecutor's decision of 15 February 2013 with the General Prosecutor of Albania. She requested that the investigation be continued by the district prosecutor on account of theft in collusion with others, destruction of property, torture and constraint through threat or violence for the acquisition of property under Articles 134, 150, 86, 109/b of the CC respectively. She also complained of a lack of impartiality of the prosecutor.

39. On 25 April 2013 the applicant was awarded full disability status and was recognised as permanently unfit for work.

40. On 11 July 2014 the General Prosecutor sent the file to the Fier district prosecutor's office to proceed with the applicant's complaint concerning the impartiality of the Vlora district prosecutor.

41. On 2 and 3 November 2017, the Government and the applicant, respectively, informed the Court that the applicant had lodged a complaint with the Vlora District Court against the prosecutor's decision of 15 February 2013 under Article 329 of the CCP.

42. On 18 May 2015 the Vlora District Court had dismissed the applicant's complaint. It found that the prosecutor had carried out all the necessary investigative steps and that the proceedings had been duly discontinued pursuant to the General Amnesty Act.

43. On 15 September 2015 the Vlora Court of Appeal dismissed an appeal by the applicant for the same reasons as given by the Vlora District Court. It also noted that the applicant had not claimed before the domestic courts that any investigative actions had been omitted by the prosecutor's office.

44. On 14 July 2016 the Supreme Court upheld the Court of Appeal's decision of 15 September 2015.

3. Third investigation

45. On an unspecified date the applicant made another criminal complaint against S.N. and E.N. for the offence of theft under Article 134 of the CC.

46. On 3 November 2017 the applicant informed the Court of the outcome of the third investigation.

47. On 2 November 2012 the prosecutor opened investigation no. 1762 against S.N. and E.N. for the offence of theft under Article 134 of the CC in relation to the event of 30 October 2012.

48. On 6 December 2012 the applicant made another statement before the prosecutor, complaining of, amongst other things, the theft of her belongings that had occurred on 30 October 2012.

49. On 13 March 2013 the prosecutor's office classified the offence as self-administered justice under Article 277 of the CC.

50. On 10 April 2014 the Vlora District Court discontinued the proceedings on the basis of Article 387 of the CCP since an amnesty had been granted in respect of the offence pursuant to the General Amnesty Act.

4. New information about a fourth investigation and set of proceedings

51. On 3 November 2017 the applicant also informed the Court that, on an unspecified date in 2014 she had lodged with the Tirana prosecutor another complaint against S.N. for the offences of threat, grievous bodily harm (*plagosje e rëndë me dashje*) and insult under Articles 84, 88 and 119 of the Criminal Code. The applicant had also complained that the forensic

medical report of 17 January 2013 had been based on forged documents and that the offence of grievous bodily harm had in fact been committed.

52. On 30 June 2014 the Tirana prosecutor, after having carried out some investigative actions, decided not to send the case for trial on the grounds that there were no elements of a crime. He reasoned that the magnetic resonance images and the neuropsychiatrist consultation, which the forensic medical report had relied on, were not related to the events of 8 September 2012.

53. On 3 December 2014 the Tirana District Court, following an application by the applicant, decided to quash the prosecutor's decision and ordered him to continue the investigation. It decided that the prosecutor should examine the evidence as submitted by the applicant and any other evidence or claim related thereto, carrying out a thorough investigation.

54. On 6 October 2015 the Tirana Court of Appeal, following an appeal by the prosecutor, upheld the District Court's decision of 3 December 2014.

55. In February 2018 the Government informed the Court about the following development. On 6 December 2017, the Tirana prosecutor's office registered the criminal proceedings on account of falsification of documents. On 11 December 2017 the Tirana prosecutor's office declared its lack of competence and transferred the case to the Vlora prosecutor's office, which registered the case no. 9854 on 14 December 2017. It appears that the investigation is still ongoing. However, the Government stated that this set of proceedings had no bearing on the applicant's complaints.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal Code ("the CC")

56. Article 84 provides that the offence of threat is punishable by up to one year's imprisonment.

Article 88 provides that the offence of inflicting grievous bodily harm (*plagosje e rëndë me dashje*) which has caused mutilation, disfigurement or any other permanent damage to someone's health or has caused a risk to life, is punishable by three to ten years' imprisonment.

Article 89 provides that the offence of bodily harm (*plagosje e lehtë me dashje*) which has rendered an individual temporarily unfit for work for more than nine days is punishable by up to two years' imprisonment.

Article 109/b provides that the offence of constraint through threat or violence for the acquisition of property is punishable by up to eight years' imprisonment.

Article 112 provides that the offence of breaking and entering with the use of force is punishable by up to one year's imprisonment.

Article 119 provides that the offence of insult is punishable by a fine of up to 1 million Albanian leks.

Article 134 § 1 provides that the offence of theft is punishable by up to three years' imprisonment. If committed in collusion with others it is punishable by up to five years' imprisonment (Article 134 § 2). If violence is used, theft is punishable by up to fifteen years' imprisonment (Article 139).

Article 150 provides that the offence of destruction of property is punishable by up to three years' imprisonment.

Article 275 provides that the offence of the malicious use of telephone calls is punishable by up to one year's imprisonment.

Under Article 277, the offence of self-administered justice (*vetëgjyqësia*), which is the exercise of an alleged right by a person to whom it belongs or who believes himself or herself to be vested with such a right, but the right is not recognised by the relevant other person, without addressing the appropriate State authority, is punishable by up to three months' imprisonment.

B. Code of Criminal Procedure (“the CCP”)

57. The relevant provisions of the CCP, as in force at the material time, provided as follows.

58. Under Article 61, a person who had suffered pecuniary damage as a result of the commission of an offence could lodge a civil claim during the criminal proceedings to seek compensation for damage. Under Article 62 § 1, the claim had to be submitted prior to the commencement of the judicial examination. In accordance with Article 62 § 3, a court might decide to sever the civil claim from the criminal proceedings if its examination would delay or complicate the criminal proceedings.

59. Article 284 provided, amongst other things, that the offences of inflicting bodily harm and malicious use of telephone calls set out under Articles 89 and 275 of the Criminal Code were to be investigated by the prosecutor only if a criminal complaint had been brought by the injured party. Even though no specific provision was made in the CC, the provision under Article 284 excluded the remaining offences as set out in paragraph 58 above from being investigated only in the case of a criminal complaint by the injured party. They could therefore be prosecuted by a prosecutor's office of its own motion.

60. Article 328 § f provided for the prosecutor's right to discontinue the criminal investigation where, amongst other situations, it was provided for by law. Article 329 provided for the right to appeal to a district court against a prosecutor's decision to discontinue the investigation. An appeal could be lodged with an appellate court against the district court's decision. Article 387 of the CCP provided that a district court could discontinue a case if the criminal prosecution should not have been commenced or should not have been continued, or if the offence had become time-barred.

C. Civil Code

61. Article 608 of the Civil Code provides that anyone who unlawfully causes damage to another person or to that person's property is obliged to pay compensation for the damage. He or she is not liable if he or she proves that he or she is not at fault. Article 609 provides that the damage should be the result of a person's direct and immediate act or omission. Article 625 provides that a person who suffers non-pecuniary damage is entitled to compensation if: there has been damage to his or her health, physical or mental integrity; his or her honour, personality or reputation have been infringed; or his or her right to respect for private life has been infringed. Under Article 640, pecuniary damage consists of the actual loss suffered and loss of profit. Pursuant to Article 641, a person who causes damage to someone else's health must pay compensation.

D. The General Amnesty Act (Law no. 107/2012 of 8 November 2012 on Amnesty)

62. Pursuant to section 5 of the General Amnesty Act a criminal prosecution could not commence or, if it had done so, had to be discontinued, in respect of offences which had been committed before 30 September 2012 in respect of which the CC prescribed a sentence of up to two years' imprisonment or another lighter punishment.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

63. The applicant complained that the authorities' failure to protect her life, which had been put at serious risk by the violent acts of a private individual, as well as the authorities' failure to continue the criminal investigations and proceedings against S.N., had violated Articles 2 and 6 of the Convention.

64. The Court, which is master of the characterisation to be given in law to the facts of the case, finds that, in the absence of a serious threat to the applicant's life, the above complaints related to her physical integrity fall to be examined under Article 3 of the Convention (see *Valiulienė v. Lithuania*, no. 33234/07, § 42, 26 March 2013 and *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 126-127, 20 March 2018), which reads as follows:

Article 3

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

A. Admissibility

1. The parties' submissions

65. The Government submitted that the criminal proceedings related to the falsification of documents were not related to the applicant's complaints under Articles 3 and 8 of the Convention (see paragraphs 44-48 above).

66. The Government submitted that the treatment to which the applicant had been subjected had not attained the minimum level of severity necessary to fall within the scope of Article 3 of the Convention. As regards the seriousness of the injuries sustained by the applicant and the effects of the treatment to which she had been subjected, the Government noted that the violence had not been premeditated or continuous, and that the fact that the applicant had been involved in a physical confrontation had stripped the situation of any degrading motivation. Furthermore, it had not been proved “beyond reasonable doubt” that the applicant had been subjected to acts in violation of Article 3 of the Convention. The deterioration of her health had been as a result of the applicant's previous health problems and not as a result of the confrontation between the applicant and S.N.

67. The Government further submitted that the applicant had not used the available domestic remedies. She could have appealed against the prosecutor's decision to discontinue the case to the domestic courts. The applicant moreover should have made use of domestic civil remedies; relying on some domestic case-law they submitted that the applicant could have lodged a claim for damages under Articles 608, 625 and 640 of the Civil Code, as well as the unifying decision of the Supreme Court of 14 September 2007, or a civil claim in the course of the criminal proceedings under Article 61 of the CCP.

68. The applicant submitted that the documents in the case file showed that force had been used against her and that the deterioration of her health had been as a result of the violent acts by S.N.

69. The applicant further submitted that she had already used the possible domestic remedies. Therefore, she should not have been expected to make use of any other domestic remedy. Her case was different from the domestic case-law submitted by the Government. Furthermore, she had not addressed the Court with a direct application for compensation; instead her complaint was focused on the Government's inability to protect her life and health.

2. *The Court's assessment*

(a) Regarding the exhaustion of domestic remedies

70. As regards the Government's objection concerning the non-exhaustion of domestic remedies, the Court notes that at least five criminal investigations were opened into the alleged crimes committed by S.N. and E.N. The first and fourth ones were discontinued by a court decision (first and third investigations), the two others (joined in the second investigation) by a prosecutor's decision. All decisions were taken pursuant to the application of a general amnesty. The Court further notes that the applicant appealed against the prosecutor's decision of 15 February 2013 (second investigation, which was the one directly relevant to her complaint relating to physical assault) to the domestic courts but to no avail. She furthermore complained to the General Prosecutor. As regards the fifth investigation (fourth set of proceedings) the Court notes that, following an appeal by the applicant lodged with the domestic courts against the prosecutor's decision not to send the case for trial, the investigation is still pending before the prosecutor. Therefore, the Court considers that the applicant had already made use of sufficient remedies relating to the criminal proceedings as provided for under domestic law and it accordingly rejects the Government's objection in this regard.

71. Furthermore, the Court reiterates that effective deterrence against serious acts such as intentional attacks on the physical integrity of a person, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions. The civil remedies relied on by the Government cannot be regarded as sufficient for the fulfilment of a Contracting State's obligations under Article 3 of the Convention in cases such as the present one, as they are aimed at awarding damages rather than identifying and punishing those responsible (see *Sandra Janković v. Croatia*, no. 38478/05, § 36, 5 March 2009; *Beganović v. Croatia*, no. 46423/06, § 56, 25 June 2009; and *Remetin v. Croatia*, no. 29525/10, § 76, 11 December 2012).

72. The Court therefore rejects the Government's objection in this regard.

(b) Whether the applicant was subjected to acts contrary to Article 3 of the Convention

73. The Court considers that the issue of applicability of Article 3 is an issue of the Court's jurisdiction *ratione materiae*, therefore the general rule of dealing with applications should be respected and the relevant analysis should be carried out at the admissibility stage unless there is a particular reason to join this question to the merits. No such particular reason exists in the present case and the issue of the applicability of Article 3 falls to be

examined at the admissibility stage of the Convention (see *Denisov v. Ukraine* [GC], no. 76639/11, § 93, 25 September 2018).

74. The Court reiterates that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim. Regard must also be had to the context in which the ill-treatment was inflicted, such as an atmosphere of heightened tension and emotions. Treatment has been held by the Court to be “inhuman” because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering (see *Valiulienė*, cited above, §§ 65-66, and the references cited therein).

75. Turning to the circumstances of the present case, the Court notes that the applicant was subjected to violence. The Court first notes the physical violence suffered by the applicant. As confirmed by the forensic reports’ findings, as a result of the assault, strangulation marks around the applicant’s neck and haematomata on the head were visible. The applicant was unfit to work for over nine days. The Court further considers that the assault must have, by its very nature, given rise to feelings of insecurity, anguish and stress on the part of the applicant since she was afraid to return to the house she had been living in for the previous few months. For all the above considerations, the Court concludes that the ill-treatment combined with the applicant’s feelings of fear and helplessness was sufficiently serious to reach the level of severity under Article 3 of the Convention, and thus gives rise to the Government’s positive obligation under this provision (*ibid.*, § 70).

(c) Conclusion

76. The Court finds that the complaint under Article 3 of the Convention is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further finds that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties’ submissions

77. In her application form the applicant submitted that the prosecutor had commenced criminal investigations against S.N. in respect only of inflicting bodily harm, self-administered justice and malicious use of telephone calls, even though she had submitted criminal complaints in respect of attempted murder, theft with the use of violence, breaking and entering and destruction of property under Articles 76, 139, 112 and 150 of

the Criminal Code. In her initial submissions and additional submissions of 3 November 2017 the applicant maintained that she had instituted proceedings in respect of the veracity of the forensic report of 17 January 2013 on the grounds that more serious offences than inflicting bodily harm had been committed against her. She had been awarded full disability status, and the deterioration of the health had been a result of the violence S.N. had used against her.

78. The Government submitted that the legal framework at the domestic level had provided a sufficient regulatory framework to criminally pursue the violent acts alleged by the applicant. The authorities had acted with due diligence. The investigations and the ensuing criminal proceedings had been sufficiently effective, expeditious and successful. The use of criminal-law remedies by the applicant had failed for reasons that had not depended on the authorities' behaviour.

2. The Court's assessment

(a) General principles on the positive obligations of the State applicable to the present case

79. The Court observes that effective measures of deterrence against grave acts such as those in issue in the present case, can only be achieved by the existence of effective criminal-law provisions backed up by law-enforcement machinery (*X and Y v. the Netherlands*, 26 March 1985, § 27 Series A no. 91, *Beganović*, cited above, § 71, *Mahmut Kaya v. Turkey*, no. 22535/93, § 115, ECHR 2000-III and *M.C. v. Bulgaria*, no. 39272/98, § 150, ECHR 2003-XII).

80. Furthermore, it goes without saying that the obligation on the State under Article 1 of the Convention cannot be interpreted as requiring the State to guarantee through its legal system that inhuman or degrading treatment is never inflicted by one individual on another or that if it is, criminal proceedings should necessarily lead to a particular sanction. In order that a State may be held responsible it must, in the view of the Court, be shown that the domestic legal system, and in particular the criminal law applicable in the circumstances of the case, failed to provide practical and effective protection of the rights guaranteed by Article 3 (see *Beganović*, cited above, § 71, and *Valiulienė*, cited above, § 75).

81. It must be stated at this juncture that it is not the Court's task to verify whether the prosecutors and the domestic courts correctly applied domestic criminal law; what is in issue in the present case is not individual criminal-law liability, but the State's responsibility under the Convention. The Court 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 seriousness of the act and the results obtained at the domestic

level (see, *mutatis mutandis*, *Nikolova and Velichkova v. Bulgaria*, no. 7888/03, § 62, 20 December 2007; *Atalay v. Turkey*, no. 1249/03, § 40, 18 September 2008; and *Valiulienė*, cited above, § 76).

82. Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection (see, *mutatis mutandis* *H.L.R. v. France*, 29 April 1997, § 40, *Reports of Judgments and Decisions* 1997-III).

83. Furthermore, an amnesty or a pardon is not compatible with the duty incumbent on the States to investigate acts of ill-treatment and to combat impunity (see, *mutatis mutandis*, *Abdülşamet Yaman v. Turkey*, no. 32446/96, § 55, 2 November 2004; and *Ateşoğlu v. Turkey*, no. 53645/10, § 25, 20 January 2015). The Court considers that this principle applies to acts between private individuals in so far as the treatment reaches the threshold under Article 3 of the Convention.

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

84. The Court notes at the outset that, as regards the criminal-law mechanisms provided by the Albanian legal system in connection with the State's obligations under Article 3 of the Convention, the Criminal Code defines as specific offences inflicting grievous bodily harm and bodily harm. The offence of inflicting bodily harm under Article 89 of the CC is investigated by a prosecutor only after a complaint by the injured party, whereas for the offence of inflicting grievous bodily harm under Article 88 of the CC the prosecutor's office retains the right to open a criminal investigation of its own motion. Furthermore, the Court notes that other offences attributed by the applicant to S.N., such as malicious use of telephone calls, threat, self-administered justice and so on are also defined as specific offences under the Criminal Code. The Court is thus satisfied that Albanian law provided a sufficient regulatory framework to criminally pursue the crimes attributed by the applicant to S.N.

85. However, under the principle that the Convention is intended to guarantee not theoretical or illusory but practical and effective rights, the Court has to ensure that a State's obligation to protect the rights of those under its jurisdiction is adequately discharged in practice (see *Ž.B. v. Croatia*, no. 47666/13, § 59, 11 July 2017). Therefore, the Court will now examine whether 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 obligations under Article 3 of the Convention (see *Valiulienė*, cited above, § 79, and, *mutatis mutandis*, *Bălşan*, cited above, § 64).

86. The Court notes that during the first, second and third investigations the prosecutor opened a criminal investigation and took various procedural actions. However, those investigations and related proceedings were discontinued in application of a general amnesty. Subsequently, the perpetrator(s) of the alleged crimes were not tried.

87. Turning to the question of the State's responsibility under Article 3 of the Convention, the Court firstly reiterates that, within the limits of the Convention, the choice of the means to secure compliance with Article 3 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the domestic authorities' margin of appreciation, provided that criminal-law mechanisms are available to the victim (see *Beganović*, cited above, § 86). Thus, and in as much as it concerns the circumstances of the instant case, it is not for the Court to speculate whether the prosecutor should have pursued the criminal investigations under other articles of the Criminal Code as suggested by the applicant (see paragraphs 31 and 77 above, and *Valiulienė*, cited above, § 85). Be that as it may, the fact remains that the circumstances of the present case were never established by a competent court of law. In this connection the Court notes that one of the purposes of imposing criminal sanctions is to restrain and deter the offender from causing further harm. Further, the Court has held that in cases concerning torture or ill-treatment, amnesties and pardons should not be tolerated (see *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, § 326, ECHR 2014 (extracts)). In that sense the Court concludes that although the legal framework in place may have had a sufficiently deterrent effect, the latter was erased by the subsequent amnesty law.

88. The Court notes that the applicant attempted to remedy the adverse effects resulting from the granting of the general amnesty by lodging another complaint against S.N. in 2014 for, amongst other offences, threat and inflicting grievous bodily harm, the latter being punishable by up to ten years' imprisonment. The Court notes that the prosecutor took immediate steps to bring S.N. to justice. However, given the lack of evidence he decided not to bring the case to trial. Following persistent appeals by the applicant, the domestic courts annulled the prosecutor's decision for lack of thoroughness (see paragraphs 51-55 above). The Court also takes note that only minor offences were prosecuted.

89. The Court further notes that, once the domestic courts had decided to send the case back to the prosecutor for further investigation, the latter has not yet taken any decision.

90. In the Court's view, the manner in which the criminal-law mechanisms were implemented in the instant case, specifically the application of the general amnesty, which resulted in the discontinuation of the first three criminal investigations against the alleged assailant, were defective to the point of constituting a breach of the respondent State's

positive obligations under the Convention concerning the applicant's allegations of assault. Therefore, the Court finds that there has been a violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

91. The applicant also complained of a breach of her right to respect for her home, life and property under Article 8 of the Convention, which in so far as relevant provides as follows:

Article 8

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

92. In her submissions the applicant maintained that the authorities had failed to protect her health, life and property under Article 8. To date, the applicant has not informed the Court whether she gained access to the house.

93. The Court, which is the master of the characterisation to be given in law to the facts of the case, finds that this complaint is related to the applicant's physical and psychological integrity covered by the concept of private life under Article 8 of the Convention (see *Remetin*, cited above, § 90).

94. The Court considers that, since the applicant's complaint under Article 8 of the Convention is based on the same facts, it must also be declared admissible.

95. Having regard to the conclusion found by the Court on account of a breach of Article 3 of the Convention and to the fact that the applicant failed to elaborate her complaints under Article 8 of the Convention even after the communication of the case to the Government, the Court finds that it is not necessary to examine the complaint separately under Article 8 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

96. Article 41 of the Convention provides:

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

97. The applicant did not submit a claim for just satisfaction. The Court considers that there is no call to address the matter of its own motion.

FOR THESE REASONS, THE COURT,

1. *Declares* the application admissible;
2. *Holds*, unanimously, that there has been a violation of Article 3 of the Convention;
3. *Holds*, by six votes to one that there is no need to examine the complaint under Article 8 of the Convention;

Done in English, and notified in writing on 20 November 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı
Deputy Registrar

Robert Spano
President

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

R.S.
H.B.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE LEMMENS

1. I am happy to agree with the finding that there has been a violation of Article 3 of the Convention. However, while the majority emphasise the effects of the General Amnesty Act of 2012 on the criminal proceedings against the perpetrators of the acts complained of by the applicant, I believe that more attention should have been paid to the role played by the prosecutor in this case.

As to the various complaints made under Article 8, to my regret I am unable to agree with the majority's view that they relate only to the applicant's physical and psychological integrity. Accordingly, I disagree with the majority's conclusion that these complaints are not worthy of separate examination.

Procedural limb of Article 3

2. With respect to the procedural limb of Article 3, I agree with the assessment of the criminal-law framework as having a sufficient deterrent effect (see paragraph 84 of the judgment). The problem in the present case lies with the implementation of that framework.

3. As regards the first three investigations, it strikes me how the prosecutor dealt with the applicant's complaints. Where he had a choice, he systematically opted for the offences with the lowest penalties. As a result, the proceedings were all discontinued as falling within the scope of the General Amnesty Act (which applied to offences for which the sentence was two years' imprisonment or a lighter penalty):

(a) first investigation: complaint based (only) on the offence of self-administered justice (maximum sentence: three months' imprisonment) – charge based on that offence (no recharacterisation by the prosecutor as a more serious offence!) – proceedings accordingly discontinued because of the general amnesty (see paragraphs 18-22 of the judgment);

(b) second investigation: one complaint based on the offence of self-administered justice, after which the prosecutor opened a criminal investigation for the offences of infliction of bodily harm (maximum sentence: two years' imprisonment) and self-administered justice (see above) – another complaint based on, *inter alia*, the offences of threat (maximum sentence: one year's imprisonment), breaking and entering (maximum sentence: one year's imprisonment), insult (maximum sentence: a fine), theft (maximum sentence: three years' imprisonment), destruction of property (maximum sentence: three years' imprisonment) and malicious use of telephone calls (maximum sentence: one year's imprisonment), after which the prosecutor opened another criminal investigation for malicious use of telephone calls – after the two investigations had been joined, the

prosecutor concluded that S.N. and E.N. had committed the offences of bodily harm, self-administered justice and threat – proceedings accordingly discontinued because of the general amnesty – appeals by the applicant, who complained that the prosecutor had failed to continue the investigation based on the offences of theft in collusion with others (maximum sentence: five years' imprisonment), destruction of property (see above), torture (maximum sentence: ten years' imprisonment) and constraint through threat or violence for the acquisition of property (see above) – decision to discontinue upheld by the courts (see paragraphs 23-44 of the judgment);

(c) third investigation: complaint based on theft (see above) – investigation based on that offence, but the offence later recharacterised and the charge based on the offence of self-administered justice (see above) – proceedings accordingly discontinued because of the general amnesty (see paragraphs 45-50 of the judgment).

The majority consider that “it is not for the Court to speculate whether the prosecutor should have pursued the criminal investigations under other articles of the Criminal Code” (see paragraph 87 of the judgment). I find this an unsatisfactory position in the circumstances of the case. The Court should have gone further and analysed the reasons, if any, why the prosecutor did not even try to bring charges for offences to which the General Amnesty Act would not apply.

4. Then comes the fourth investigation. As the majority note, “the applicant attempted to remedy the adverse effects resulting from the granting of the general amnesty by lodging another complaint against S.N. in 2014 for, amongst other offences, threat and inflicting grievous bodily harm, the latter being punishable by up to ten years' imprisonment” (see paragraph 88 of the judgment).

However, rather than seizing the new opportunity to investigate the matter, the prosecutor decided not to bring the case to trial “given the lack of evidence” (*ibid.*). This time, the courts disagreed. They annulled the prosecutor's decision. Since then, no progress has been made (see paragraphs 51-55 of the judgment).

5. I thus find that there has been a disturbing pattern of downplaying the importance of the facts, so that only minor offences were prosecuted and the more important offences, the relevance of which seems obvious to me, still remain unprosecuted. It is not merely the General Amnesty Act that should be criticised, but also, and more importantly, the characterisation of the criminal acts by the prosecutor in such a way that they would fit within the scope of that Act. The case is a clear example of how the deterrent effect of the criminal-law framework has been completely destroyed.

Article 8

6. With regard to the complaint brought by the applicant under Article 8, the majority note that it concerns an alleged lack of respect for her “home, life and property” (see paragraph 91 of the judgment) and that in her submissions the applicant specifically complained about a failure “to protect her health, life and property” (see paragraph 92 of the judgment). The majority consider that the complaint is “related to the applicant’s physical and psychological integrity”, which is covered by the concept of private life under Article 8 (see paragraph 93 of the judgment). Noting further that the Court already found a violation under Article 3, the majority find that it is not necessary to examine the complaint separately under Article 8.

7. I respectfully disagree.

For an examination of the complaints, the application as formulated in the application form should be the starting-point (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 122, 20 March 2018). The applicant complained about the failure of the authorities to protect her life and her health as well as her property. Apart from the complaints relating to her physical and psychological integrity, which the Court unanimously decided to examine under Article 3, there were also complaints about the inability of the authorities to assist her in securing enforcement of the judgment of the Vlora District Court dismissing S.N.’s claim for the repossession of the house (see paragraph 11 of the judgment), and thus to let her live in her home, and about the failure to protect her against the alleged removal by S.N. and E.N. of all her objects in the house (see paragraphs 15 and 17 of the judgment).

In my opinion, these other complaints concern the right to a court (Article 6 § 1), the right to respect for the applicant’s home (Article 8), and the right to respect for her property (Article 1 of Protocol No. 1).

The finding of a violation of Article 3 cannot be considered to cover these complaints.

I regret that these complaints, recharacterised under the said provisions of the Convention, were not communicated to the Government. Obviously, the applicant was not in a position to elaborate on the above-mentioned complaints “even after the communication of the case to the Government” (as indicated by the majority in paragraph 95 of the judgment), since the parties were simply not asked to submit observations on them.

For these reasons, I consider that the complaints concerning the right to a court, the right to respect for the applicant’s home and the right to respect for her property should have been examined separately, if necessary after communication of this part of the application to the Government.