



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

FIFTH SECTION

CASE OF Z v. BULGARIA

(Application no. 39257/17)

JUDGMENT

Art 3 and 8 (procedural) • Positive obligations • Case prosecuted for sexual intercourse with a person under the age of fourteen despite the applicant's request and the initial recommendation of the lower prosecutor that it be prosecuted for rape • Prosecutor's failure to examine whether the applicant's actions and the overall context indicated a lack of consent on her part and whether the perpetrator's actions could thus be qualified as rape • Case calling for an investigation and a consideration of bringing rape charges • Failure to engage in any meaningful examination of the evidence signifying lack of consent • Circumstances of the case not analysed from a child-sensitive stand-point • Little weight attached to the particular vulnerability of the applicant as a very young person, and the special psychological factors involved in cases concerning rape

STRASBOURG

28 May 2020

FINAL

12/10/2020

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

In the case of Z v. Bulgaria,

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

Síofra O’Leary, *President*,
Gabriele Kucsko-Stadlmayer,
André Potocki,
Yonko Grozev,
Mārtiņš Mits,
Lətif Hüseynov,
Lado Chanturia, *judges*,

and Victor Soloveytschik, *Deputy Section Registrar*,

Having regard to:

the application against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a British national, Ms Z (“the applicant”), on 20 May 2017;

the decision to give notice to the Bulgarian Government (“the Government”) of the complaint concerning lack of effective investigation into the applicant’s complaint that she had been raped and to declare inadmissible the remainder of the application;

the fact that the United Kingdom Government did not avail themselves of the possibility to submit written comments in view of the applicant’s British nationality;

the decision not to have the applicant’s name disclosed;

the observations submitted by the respondent Government and the observations in reply submitted by the applicant;

the comments submitted by the Animus Association Foundation, who were granted leave to intervene by the President of the Section;

Having deliberated in private on 5 May 2020,

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

INTRODUCTION

1. The case concerns a complaint, under Articles 3 and 8 of the Convention, about an ineffective investigation and prosecution following the applicant’s allegation that she had been raped, and about an inadequate punishment of the offender.

THE FACTS

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

I. THE EVENTS ON THE NIGHT OF 25 TO 26 FEBRUARY 2015

3. The applicant, Ms Z, was born in 2001 and lives in a small village in Yambol region.

4. On 25 February 2015 the applicant, aged 13 years and 4 months, accepted an invitation from a friend, S., a British girl, to spend the night at the latter's family home. At the time S. was 16 years old and lived with her family in a nearby village. Her 23-year-old boyfriend, G.S., was also invited to spend the night at the house. In addition, S.'s parents would be sleeping in the house that night too. The applicant knew both S. and G.S. well, having often spent time with them as a couple.

5. On the evening of 25 February 2015, discussing the sleeping arrangements, S. suggested that the applicant take the single bed in her bedroom and that she and G.S. sleep on the floor in the same room. G.S. refused to sleep on the floor and instead went into a room next door; S. refused to follow him. The applicant and S. remained in the same bedroom, where the applicant went to sleep in the bed and S. slept on the floor.

6. At about 4 a.m. in the morning of 26 February 2015 the applicant felt someone climb into her bed. She saw it was G.S. and turned to face the wall, intending to go back to sleep. G.S. then held her and started to grope her body with his hands. The applicant moved away from him and closer to the wall, and pushed his hands away from her, but he did not stop. She thought that if she pretended to be asleep, he would leave her alone. Instead, G.S. pulled her underwear to her ankles. The applicant was shocked and scared. She was unable to react and did not know what to do.

7. G.S. climbed on top of her and separated her legs, which she held tight together, by pushing a knee between them. He then penetrated her and continued with the intercourse. The applicant felt pain and revulsion. She told him to get off her. He did that but before she could pull her underwear back on, he got on top of her again. The applicant repeated that he should leave her alone. He asked if she would tell anyone about it. When she said that she would not, he joined his girlfriend on the floor.

8. On the morning of 26 February 2015, when the applicant went to school, a friend noticed that she was distraught and asked her for the reason. The applicant remained silent at first but soon afterwards confided in her friend that a man had had sexual intercourse with her against her will. The friend advised the applicant to report it. The applicant first told S., the friend in whose house the incident had taken place, about what had happened. The two of them decided to tell the school's principal. On their way to the principal, they came across the school's porter and told him and a teacher why they were looking for the principal. Another teacher who happened to be nearby also heard the applicant's story.

II. THE INVESTIGATION

9. Later that day the applicant reported the incident to the police and a criminal investigation was immediately opened by the local district prosecution service. Both she and G.S. were interviewed the same day and informed of their rights in the criminal process. In his statement G.S. claimed that the applicant had not objected to his holding her and that when he had suggested that she take off her underwear, she had done so willingly. He then stated that he had penetrated her “for two minutes” and had interrupted the intercourse as she had told him that it hurt. He added that the motivation for his actions was that he had heard that she was not a virgin.

10. G.S. was charged the next day with having sexual intercourse with a person under the age of fourteen, a statutory offence under Article 151 § 1 of the Criminal Code (see paragraph 38 below). The police interviewed G.S. again a day later, this time in his capacity as an accused, at the police station and in the presence of his lawyer. He then stated that at around 5 a.m. on the night in question the applicant had woken him by stroking his stomach and penis. He had been very surprised and had told her to stop as his girlfriend was in the room. The applicant had replied that she did not care and had told him that if he did not agree to have intercourse with her she would accuse him of rape. He had refused but she had undressed herself saying “Let’s have sex”. He had then refused again and had not had intercourse with the applicant.

11. On 6 March 2015 G.S. was placed in detention by decision of the relevant District Court. On 11 March 2015 the Higher Court placed him under house arrest.

12. On 11 April 2015 the applicant’s mother informed the investigating authorities in writing that the applicant was self-harming by cutting her arms and legs. In a subsequent letter of 21 August 2015 the mother reported that she had found a note among her daughter’s belongings which read “Shall I kill myself, yes or no. Yes, because it’s not worth it”. The applicant’s mother also expressed her own concern about her daughter’s well-being and the effects of the incident on her mental state.

13. A number of investigative steps were carried out in the course of the investigation. Those included witness questioning (on the day after the events and shortly thereafter), inspection of the crime scene (on 26 February 2015), a psychological-psychiatric examination of the applicant (on 28 April 2015) and a forensic medical examination of the applicant and G.S. (on 26 February 2015). In particular, the following witnesses were questioned: the mother of Z; S. in whose house Z had spent the night of 25 to 26 February 2015; the mother of S. and her husband; the friend in whom Z had confided on the morning of 26 February 2015 at school; Bulgarian and British acquaintances of the families of Z and S.; a police officer who,

following an oral complaint by Z's mother on 27 February 2015, had gone the same day to G.S.'s home to warn him against approaching the victim.

14. The psychological-psychiatric examination found that the applicant had been conscious during the offence and remembered it well. She had experienced intense fear and dread, which were capable of temporarily blocking her reactions, yet, thereafter she had been capable of opposing what had been happening to her. She could have made a choice but had had insufficient discernment. She had chosen to be silent as her feelings of fright and shame had been dominant at the time of the events.

15. The forensic medical examination established that it was fully possible that the applicant had been subjected to the treatment she had described, despite the absence of traumatic damage to her genitals at the time of examination. Furthermore, the report concluded that she did not yet have a full grasp of the issues related to sex and its manifestation.

(a) Proposal to prosecute for rape

16. On 26 August 2015 the district prosecutor concluded that the evidence collected in the case showed that the offence of rape had been committed, punishable under Article 152 of the Criminal Code (see paragraph 39 below). He sent the file to the competent higher authority, the Yambol regional prosecution service, in order for it to proceed with the investigation.

(b) Refusal to prosecute for rape

17. On 4 September 2015 the Yambol regional prosecutor assigned to the case refused to take over the case and follow the recommendation to prosecute for rape. He found that the investigation materials, including in particular the victim's own statement, did not contain any evidence meeting the legal requirements for the crime of rape. In particular, the prosecutor observed that none of the three hypotheses listed in Article 152 of the Criminal Code had been observed: the victim had not been deprived of a possibility to protect herself; no force or threats had been used against her; and she had not been "brought to a helpless state" before the incident.

18. The case was returned to the district prosecution service and proceeded on a charge for the crime of sexual intercourse with a person under the age of fourteen, under Article 151 of the Criminal Code.

19. The investigation was completed and all the materials collected were presented to the applicant's mother and her lawyer on 12 October 2015. Having acquainted themselves with the materials, they asked that additional investigative steps be carried out, including an examination of the applicant's right arm for traces of frequent and intense self-harming, and the collection of witness statements referring to the character of the accused and

the state of the applicant on the morning after the incident when she had gone to school.

20. The applicant's mother and lawyer also explicitly requested that the case be prosecuted on charges of rape under Article 152 § 1 of the Criminal Code. The applicant's lawyer emphasised the circumstances in which the incident had taken place and the audacity of G.S.'s actions, which had shocked the applicant. As a result, she had felt helpless, betrayed and ashamed, all of which had rendered her temporarily incapable of sufficiently protecting herself.

21. On 27 October 2015 the above-mentioned requests were refused by the prosecution. The investigation file was presented to the applicant for a second time on 21 December 2015 and the investigation was thus finalised.

(c) Indictment

22. The indictment was completed on 29 January 2016. It contained the following facts accepted by the prosecution. The applicant had fallen asleep alone in a bed in her friend's bedroom. In the early hours of the morning she had awoken and seen G.S. in the bed next to her. Given that G.S. was the boyfriend of her friend S. and the three of them had frequently spent time together, the applicant had not thought that he would do anything to her and had turned back towards the wall. Then G.S. had held her in his arms. The applicant had pulled herself away but G.S. had moved closer to her and had started groping her body. Despite her attempts to obstruct his actions, first by pretending to be asleep and then by pushing his hands away from her body, he had not stopped but instead had carried on sexually touching her. He had then pulled down her underwear, had climbed on top of her, had separated with one of his legs her legs which she had been clutching together and had penetrated her. The intercourse had been interrupted by the applicant, who had felt pain. G.S. had tried to resume it but the applicant had refused, following which G.S. had joined his girlfriend on the floor. When questioned after the incident, the applicant had stated that she had not called for her friend S. as she had been afraid of G.S.

23. The indictment further stated that, according to the psychological-psychiatric examination of the applicant, she had been capable of realising her actions at the time of the incident, and of judging the situation correctly. It concluded that, on the basis of the facts as established above, G.S. had committed the offence of having sexual intercourse with a minor, under Article 151 of the Criminal Code. G.S., who had been sentenced in the past for a criminal offence, had acted with intent, conscious of the serious antisocial character of his actions. Although he had denied his guilt during the investigation, the evidence collected – witness statements, inspection of the crime scene, forensic medical and psychological-psychiatric expert reports, and other material – pointed to his guilt.

III. OTHER DEVELOPMENTS

24. In February 2016 the police turned up at the applicant's family house, looking for drugs in the context of another case unrelated to the assault on the applicant of the previous year. In the absence of a warrant, the applicant's mother refused to let the police in. They remained outside the house until the prosecutor instructed them to leave some time later. The applicant and her eight-year-old sister were both at home at the time.

25. The next day the applicant was called to the local police station where she was asked whether she sold or bought drugs from the suspect, a third party, both of which she denied.

26. Shortly thereafter the applicant showed her mother excerpts from social media in which a 26-year-old man, a friend of the accused by his own admission, had abused her verbally and threatened her in connection with her having reported the incident of February 2015 and, finally, asked if she used marijuana.

IV. JUDICIAL PROCEEDINGS

27. After the institution of proceedings before the Yambol District Court, on 23 March 2016 the judge decided to examine the case in camera and set a hearing date for 16 May 2016.

28. On 8 April 2016 the applicant's lawyer asked the court to have the applicant interviewed for the purposes of the court proceedings in a "blue room" – a special facility where child victims of or witnesses to abuse can be interviewed in a protected environment by specifically trained professionals out of sight of the suspected perpetrator.

29. On 13 April 2016 the judge ordered that the applicant's lawyer be informed of the examination of the case in camera. By the same order the judge adjourned the examination of the applicant's request of 8 April 2016 until the hearing on the merits.

30. On 9 May 2016 the applicant's lawyer asked the court to allow the applicant not to attend the court hearing until her request to be interviewed in a "blue room" had been examined, as she wished to avoid any contact with G.S. On 11 May 2016 the court granted that request.

31. On 16 May 2016 the court held a hearing in the case. The applicant did not attend it but was represented by a lawyer. The applicant's mother was also present, in her capacity as a witness. At the beginning of the hearing the lawyer submitted an application, signed by the applicant's mother, asking the court to allow the applicant to take part in the proceedings as a civil claimant. The application was made by the mother in her capacity as the applicant's legal representative. According to the record of the hearing, the court found that the applicant's mother did not have legal standing to lodge a civil claim on behalf of her daughter, because at the time

of the hearing the applicant had reached fourteen years of age. Accordingly, any civil claim had to be lodged by the applicant, with the consent of her mother.

32. The applicant did not seek to participate in the proceedings as a private prosecutor. Since she was no longer a party to the proceedings, as her mother's request for her to participate as a civil claimant had been refused, her lawyer was dismissed from the court hearing.

33. During the same hearing and following a request to that effect by the accused, the court decided to conduct a summary judicial investigation (*съкратено съдебно следствие*) under Articles 370 to 374 of the Criminal Procedure Code ("the CPC"). Under that procedure, no evidence is collected during the judicial phase and the court relies only on evidence gathered at the pre-trial stage.

34. G.S. confessed entirely to the facts as presented in the indictment. The court concluded that the statement of the accused was supported by the evidence gathered at the pre-trial stage and decided not to collect further evidence. For that reason, the court considered that it was no longer necessary to examine the applicant's request to be interviewed in a "blue room" (see paragraph 28 above).

35. On the same day, 16 May 2016, the court found G.S. guilty of having had sexual intercourse with a minor, under Article 151 § 1 of the Criminal Code. In terms of sentencing, the court observed that the offence carried a sentence of between two and six years' imprisonment. However, given that the case had followed a summary judicial investigation, the court reduced the sentence by one third (see paragraph 44 below) and sentenced him to one year and four months' imprisonment. The court further suspended that sentence for a period of three years (see paragraph 45 below). The reasoning of the judgment was announced on 27 May 2016. The court also ordered that the material evidence – a black tracksuit and underwear – be returned to its owner, the applicant.

36. Notwithstanding his confession during the first-instance judicial proceedings, G.S. appealed against that judgment. On 6 July 2016 the Yambol Regional Court upheld the sentence imposed by the lower court. Irrespective of the absence of legal standing in the judicial proceedings, the applicant submitted a victim's statement before the second-instance court, in which she described her experience as a victim of rape. She also expressed her disappointment with the inadequacy of the prosecution of the crime against her and the sentencing, and asked the court to take her statement into account when making a decision. The judgment was not amenable to appeal and became final on the same day.

37. As the applicant was not a party to the judicial proceedings, the authorities were not under any duty to inform her of the final judgment. As a result, the court did not notify her lawyer of the final verdict. However, in execution of the court order for the return of her belongings, the court sent

five notifications to the applicant informing her that a final judgment had been rendered and inviting her to the Registry to collect her belongings. On 21 November 2016 she was apprised of one of those notifications, apparently by the mayor's office, a representative of which telephoned her family and informed them about it. Since she did not appear before the court to recover her belongings, the court ordered their destruction in August 2017.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

38. Under Article 151 § 1 of the Criminal Code ("the CC"), sexual intercourse with a person under 14 years of age is an offence punishable by between two and six years' imprisonment. Consent is not a valid defence in such cases.

39. Article 152 § 1 of the CC defines rape as:

"sexual intercourse with a woman

(1) incapable of defending herself, where she did not consent;

(2) who was compelled by the use of force or threats;

(3) who was brought to a state of helplessness by the perpetrator."

Although lack of consent is mentioned explicitly only in the first subparagraph, the Supreme Court has held that it is an element inherent in the whole provision.

40. Under Article 152 § 4(1) of the CC, the punishment for rape ranges between ten and twenty years' imprisonment if the victim is under fourteen years of age. Attempted suicide by the victim following the rape, irrespective of the victim's age, is considered an aggravating circumstance and the offence is punishable by between five and fifteen years of imprisonment.

41. The relevant District Court is competent to hear cases for offences under Article 151 § 1 of the CC (Article 35 § 1, CPC), and the relevant Regional Court at first instance is competent to hear cases for offences under Article 152 § 4(1) of the CC (Article 35 § 2, CPC).

42. Once a case has been brought before the first-instance court, the judge rapporteur should check, among other things, whether there have been at the pre-trial stage breaches of procedural rules leading to a restriction of the procedural rights of the accused or the victim (Article 248, CPC, as worded at the relevant time). If so, the judge should discontinue the judicial proceedings before the court and send the case back to the prosecutor to eliminate the breaches identified (Article 249, CPC, as worded at the relevant time).

43. The first-instance court returns a case to the respective prosecutor, in accordance with Article 288, CPC, if a breach of procedural rules at the pre-trial stage resulted in limitation of the procedural rights of the accused, or if it is established during the court hearing that the incriminated act corresponds to an offence for which competent is a higher court (see опр. № 2330 от 17.11.2014 г. на РС-Варна по н.ч.х.д. № 2500/ 2014г. and опр. № 164 от 2.02.2018 г. на РС-Пловдив по н.о.х.д. № 3502/ 2017г.). The courts apply this provision when they find that the factual description of the offence does not correspond to the legal qualification given, considering that this negatively affected the procedural rights of the accused (опр. 137 от 28.04.2010 г. на РС-Велинград по н.о.х.д. № 176/ 2010г.).

44. It is a principle of criminal procedural law that during the trial the court collects evidence anew. A summary judicial investigation, as provided for by Articles 370 to 374 of the CPC, constitutes an exception to that rule. It can be initiated by the accused at the first court hearing or by the court of its own motion, and it may unfold as follows. All parties to the court proceedings can agree that the court need not question certain witnesses or experts. This means that the court must use the records of their interviews from the pre-trial stage (Article 371 § 1 and Article 373 § 1, CPC). The accused may confess to all facts as described in the indictment and agree that no additional evidence be collected (Article 371 § 2, CPC). In this latter scenario, the court must verify that the confession is supported by the evidence collected at the pre-trial stage and accept the facts in the indictment as proven, without conducting any interviews (Article 373 §§ 2 and 3, CPC). Pursuant to Article 373 § 2 of the CPC, in that situation the court reduces the punishment by one third, in accordance with Article 58a of the CC.

45. When the court hands down a prison sentence of up to three years, it can suspend its implementation for a period of between three and five years if the person has no prior convictions and if the court considers that his or her actual serving of the sentence is not mandatory in order for the convicted individual to reform (Article 66, CC).

46. Where during the judicial proceedings before the first-instance court the prosecutor finds grounds for amending the circumstances relevant for the indictment, or for applying a law for an offence that carries a more severe punishment, he or she must change the charge accordingly (Article 287 § 1, CPC). The court must discontinue the judicial proceedings and send the case back to the respective prosecutor if the new charge is for an offence falling within the jurisdiction of a higher court, a military court, or the specialised criminal court (Article 287 § 2, CPC). Otherwise, the court must adjourn the hearing if the parties require more time to prepare for the new charge.

47. The second-instance court carries out a thorough review of the first-instance court verdict, irrespective of the grounds of appeal

(Article 314 § 1, CCP). The second-instance court can establish new factual circumstances (Article 316, CPC) and collect all types of evidence (Article 315, CPC). It can use all available means for the collection of evidence (Article 332, CPC). That court can also hear the witnesses heard at first instance if it considers it necessary, or allow new witnesses if it finds their testimony essential for the proper examination of the case (Article 327, CPC). The second-instance court can: quash the sentence and return the case to the prosecution or to the first-instance court for a new examination; quash the sentence and deliver a new one (when it applies a law in respect of an offence carrying a harsher punishment, if an indictment for that offence had been made at first-instance and if the public or private prosecutors had requested it); amend the sentence; or uphold the sentence imposed by the first-instance court (Article 334, CPC as worded at the relevant time; and Article 336, CPC).

48. According to Article 335 § 4 of the CPC, in the absence of an appeal by the public prosecutor or by the private prosecutor, the second-instance court cannot (1) quash a verdict delivered in proceedings brought by a private party for a publicly-prosecutable offence, or (2) quash an acquittal delivered by a first-instance court.

II. INTERNATIONAL STANDARDS

49. The relevant international legal provisions have been set out in the recent case of *A and B v. Croatia*, no. 7144/15, §§ 76-83, 20 June 2019.

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 3 AND 8 OF THE CONVENTION

50. The applicant complained, relying on Articles 3 and 8 of the Convention, that the authorities had failed to conduct an effective investigation into her complaint that she had been raped, including by omitting to carry out certain investigative steps (see paragraphs 19 and 20 above), as well as to prosecute the perpetrator on charges of rape. In particular, by bringing charges for sexual intercourse with a minor and not for rape, the prosecution had been directly responsible for the resulting ineffective punishment meted out by the courts. The applicant also complained that she had been unable to participate in the court proceedings in a capacity other than that of a witness and that her involvement as a victim had not been facilitated by the authorities.

51. The Court finds that the above complaints fall to be examined under Articles 3 and 8 of the Convention, the relevant parts of which read respectively as follows:

Article 3

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

Article 8 § 1

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

A. Admissibility

1. Submissions by the parties

52. The Government submitted in the first place that the applicant had omitted to comply with the six-month rule, given that the time-limit had started to run from the date on which the judgment against the perpetrator had become final. The applicant had not applied to the Court until May 2017, which was more than six months later.

53. Secondly, the Government stated that the applicant had failed to exhaust the available and effective domestic remedies. In particular, she had not asked the first-instance court to name her as a private prosecutor, even though she had been represented by counsel. If she had taken part in the proceedings as a private prosecutor, she could have brought her complaints about the alleged deficiencies of the investigation and prosecution before the domestic court, appealed against the verdict and demanded a harsher punishment. She had also failed to apply correctly to take part as a civil claimant in the criminal proceedings against G.S.

54. The applicant's failure to use the available domestic legal paths had led to her inability to influence the court in the judicial proceedings against G.S. Bulgarian law provided her with sufficient possibilities to effectively participate as a victim in the proceedings against the perpetrator and she could not hold the authorities responsible for her related omissions.

55. The applicant disagreed. Regarding the six-month rule, she pointed out that her family had only learned about the final judgment after an official in the mayor's office had telephoned them and informed them that the notification had been waiting for her at that office (see paragraph 37 above).

56. As regards her inability to stand as a civil claimant, the applicant pointed out that under Article 15 §§ 2 and 3 of the CPC, the judge had the duty not only to explain to the participants in the proceedings their rights, but also to ensure the effective exercise of those rights. As the applicant had been unable effectively to exercise her rights in the proceedings, she had been deprived of a number of other legal options and benefits which were normally afforded to the parties in a case. Regarding the Government's objection as to her failure to join the judicial proceedings as a private prosecutor, the applicant pointed out that, as a minor, she could not be expected to succeed by acting as a private prosecutor in a case involving a

crime which imposed an obligation on the authorities to prosecute effectively, and where the State itself had been unable to obtain an effective conviction.

2. The Court's assessment

57. As regards the Government's argument that the applicant omitted to comply with the six-month period, the Court observes the following. Apart from her initial participation in the investigation before the case had been sent to trial, the applicant was not a party to the judicial proceedings which ended with the final resolution of the case. As the Government pointed out, neither she nor her lawyer were therefore entitled under Bulgarian law to be informed about the progress in the proceedings.

58. Consequently, the rules about calculating the six months as relevant to situations where applicants (or their lawyers) were entitled to be served with the final decision (see *Worm v. Austria*, 29 August 1997, § 33, *Reports of Judgments and Decisions* 1997-V), or where parties had to show diligence in checking with the court's registry about the final decision (see *Papachelas v. Greece* [GC], no. 31423/96, § 30, ECHR 1999-II), are not applicable in the present case, since the applicant had not been a party to those proceedings.

59. Accordingly, the six-month period started running, as the Court has found in exceptional cases, from the date on which the applicant or her representative had sufficient knowledge of the final domestic decision (see, *mutatis mutandis*, *Koç and Tosun v. Turkey* (dec.), no. 23852/04, 13 November 2008, and *Belozorov v. Russia and Ukraine*, no. 43611/02, § 93, 15 October 2015). In such cases, the Court considered that it is for the State which relies on the failure to comply with the six-month time-limit to establish the date when the applicant became aware of the final domestic decision (see *Şahmo v. Turkey* (dec.), no. 37415/97, 1 April 2003, and *Belozorov*, cited above, § 97). In the present case, in the absence of a different explanation by the Government to the one submitted by the applicant concerning the date on which she first became aware that there was a final judgment against the perpetrator, the Court has no choice but to accept that this was 21 November 2016. No issue therefore arises in respect of the six-months period.

60. The Court considers further that the question of exhaustion of domestic remedies is closely linked to the merits of the applicant's complaint concerning the procedural aspect of Article 3 of the Convention (see, for a similar approach, *Mogilat v. Russia*, no. 8461/03, § 45 with further reference, 13 March 2012). Thus, it finds that this matter falls to be examined below under the substantive provision of the Convention.

61. The Court finally 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. Submissions by the parties

62. The applicant stated in particular that effective prosecution and a preceding effective investigation were not possible when sexual violence was processed under Article 151 (1) of the CC, especially when cases of rape were disposed of by means of “statutory rape”. In her case, the investigation and prosecution were ineffective because they failed to investigate and prosecute for rape, and the excessively mitigated sentence meted out to the offender for a lesser crime did not ensure effective punishment of sexual crimes.

63. The Government submitted that the authorities had not shown any passivity, negative attitude or bias towards the applicant. On the contrary, they had handled the case expeditiously and had provided the applicant with protection while taking into account the severity of the situation. The Government invited the Court to declare the applicant’s complaints in this respect to be manifestly ill-founded or to accept that they did not reveal any violation of the Convention.

2. The Court’s assessment

(a) General principles

64. The relevant principles concerning the State’s obligation inherent in Article 3 of the Convention to investigate cases of ill-treatment, and in particular sexual abuse committed by private individuals, are set out in *M.C. v. Bulgaria* (no. 39272/98, §§ 149, 151 and 153, ECHR 2003-XII).

65. As regards the Convention requirements relating to the effectiveness of an investigation, the Court has held that any investigation should in principle be capable of leading to the establishment of the facts of the case and to the identification and, if appropriate, punishment of those responsible for an offence. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident (see, among many others, *Denis Vasilyev v. Russia*, no. 32704/04, § 100, 17 December 2009, with further references).

66. Moreover, in so far as the investigation leads to charges being brought before the national courts, the positive obligations under Article 3 of the Convention extend to the trial stage of the proceedings. In such cases the proceedings as a whole, including the trial stage, must meet the requirements of the prohibition enshrined in Article 3 (see *Okkalı v. Turkey*, no. 52067/99, § 65, ECHR 2006-XII (extracts)). This means that the domestic judicial authorities must on no account be prepared to let the

physical or psychological suffering inflicted go unpunished (see *Çelik v. Turkey* (no. 2), no. 39326/02, § 34, 27 May 2010).

67. In addition, in accordance with contemporary standards and trends in the area, the Contracting States' positive obligations under Articles 3 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim (see *I.C. v. Romania*, no. 36934/08, § 52, 24 May 2016). Further, the Court has not excluded the possibility that the State's positive obligation under Article 8 to safeguard the individual's physical integrity may extend to questions relating to the effectiveness of a criminal investigation (see *M.C.*, cited above, § 152 with further reference; see also, *mutatis mutandis*, *Khadija Ismayilova v. Azerbaijan*, nos. 65286/13 and 57270/14, § 117, 10 January 2019).

68. The Court has previously noted that the evolving understanding of the manner in which rape is experienced by the victim has shown that victims of sexual abuse – in particular, girls below the age of majority – often provide no physical resistance because of a variety of psychological factors or because they fear violence on the part of the perpetrator (see *M.C. v. Bulgaria*, cited above, § 164). Moreover, the development of law and practice in that area reflects the evolution of societies towards effective equality and respect for each individual's sexual autonomy (*ibid.*, § 165).

69. The Court has also repeatedly held that in cases of sexual abuse children are particularly vulnerable (see *A and B*, cited above, § 111; *M.C.*, cited above, §§ 150 and 183, and *M.G.C. v. Romania*, no. 61495/11, § 56, 15 March 2016). The right to human dignity and psychological integrity requires particular attention where a child is the victim of violence (see *C.A.S. and C.S. v. Romania*, no. 26692/05, § 82, 20 March 2012). The obligations incurred by the State under Articles 3 and 8 of the Convention in cases involving and affecting a child, allegedly victim of sexual abuse, require the effective implementation of children's right to have their best interests as a primary consideration (see, in various contexts, the cases of *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 134, ECHR 2010; *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 169, ECHR 2000-VIII, and *Blokhin v. Russia* [GC], no. 47152/06, § 138, ECHR 2016) and to have the child's particular vulnerability and corresponding needs adequately addressed by the domestic authorities (see, *mutatis mutandis*, *O'Keeffe v. Ireland* [GC], no. 35810/09, § 146, ECHR 2014 (extracts), and *M.G.C.*, cited above, § 73).

70. The Court has likewise held that States are required under Articles 3 and 8 of the Convention to enact provisions criminalising the sexual abuse of children and to apply them in practice through effective investigation and prosecution (see *X and Y v. the Netherlands*, 26 March 1985, § 27, Series A no. 91; *Söderman v. Sweden* [GC], no. 5786/08, §§ 82-83, ECHR 2013, and *M.G.C.*, cited above, §§ 57-58), being thereby mindful of the particular

vulnerability of children, their dignity and their rights as children and as victims. These obligations also stem from other international instruments, such as, *inter alia*, the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.

(b) Application of these principles to the present situation

71. The present case concerns a complaint that the authorities did not effectively investigate following the applicant's allegations that she had been raped and, having prosecuted for a lesser offence instead of for rape, inadequately punished the offender. The Court's task in the instant case is therefore to examine whether the proceedings as a whole had such significant flaws as to amount to a breach of the respondent State's positive obligations under Article 3 (see, similarly, *Çelik v. Turkey* (no. 2), no. 39326/02, § 34, 27 May 2010). The Court cannot, however, replace the domestic authorities in the assessment of the facts of the case, or in the legal qualification to be given to those facts. Nor can it decide on the alleged perpetrator's criminal responsibility (see, similarly, *M.G.C.*, cited above, § 61).

72. As regards the core of the complaint, namely that the allegation about having been raped was not properly investigated and no prosecution for rape was undertaken, the Court observes that Article 152 of the Bulgarian CC and its interpretation by the domestic courts has made lack of consent on the part of the alleged victim an element of the crime of rape and there is no requirement of physical resistance by the victim. Thus, domestic law defines rape in a manner which does not differ significantly from the wording found in statutes of other Contracting States as the Court described them in *M.C. v. Bulgaria* (cited above, §§ 74 and 88-100). What is decisive, therefore, is the meaning given by the investigative authorities and the courts to words found in that legal provision, such as "compelled" and the victim's being "incapable of defending herself" or "brought to a state of helplessness" (see, similarly, *M.G.C.*, cited above, §§ 63-64).

73. The Court notes that in the present case a criminal investigation was initiated immediately into the applicant's complaint, and a number of investigative measures were carried out promptly (see paragraph 13 above). However, a number of further investigative measures were requested by the applicant's lawyer but were not carried out (see paragraphs 19 and 20 above). Among those, important in the Court's view was the request that an expert examination of the applicant be ordered for traces of self-harming after the incident and their significance in interpreting the applicant's consent to the sexual act (see paragraph 19 above). That request was made after the applicant's mother had alerted the investigators to the existence of a suicide note written by her daughter, who had also appears to have started

to self-harm as a result of the trauma she had experienced (see paragraph 12 above).

74. In similar cases, the Court has expressed the opinion that it was for the authorities to explore all the facts and decide on the basis of an assessment of all the surrounding circumstances (see *C.A.S. and C.S.*, cited above, § 77). Notwithstanding its subsidiary role in the matter, the Court has been particularly critical in rape allegation cases where the investigating authorities did not make a consistent effort to establish all the surrounding circumstances and engage in a context-sensitive assessment of the consent of the alleged victim (see, *mutatis mutandis*, *M.C.*, cited above, §§ 177-78).

75. At the end of the investigation, despite an earlier conclusion by the district prosecutor that, on the face of the evidence, rape had been committed (see paragraph 16 above), an indictment was drawn up against the accused for the crime of sexual intercourse with a person under the age of fourteen, which was a statutory offence punishable irrespective of whether the victim had consented or not. The prosecutor found and recorded in the indictment that, immediately before the intercourse, the victim (the applicant) had “pulled herself away”, “pretended to be asleep”, “pushed the perpetrator’s hands away” and “clutched her legs together” (see paragraph 22 above). The Court has already underlined the importance of interpreting domestic definitions of rape in such a manner that they would encompass any non-consensual sexual act (see *M.C.*, cited above, § 171) and that “the investigation and its conclusions must be centred on the issue of non-consent” (see *M.G.C.*, cited above, § 72 with further reference).

76. In the present case, however, the prosecutor failed to examine whether those actions of the applicant, pulling herself away, pretending to be asleep, pushing the perpetrator away and clutching her legs together, had had any significance in the particular circumstances for the charges that had been brought. Similarly, he failed to examine the applicant’s mental state at the time of the assault in light of the psychological report (see paragraph 14 above), which had concluded that she had experienced intense fear and dread, which were capable of temporarily blocking her reactions and that she had chosen to be silent as her feelings of fright and shame had been dominant at the time of the events (compare with *M.C.*, cited above, § 70). Furthermore, the prosecutor failed to assess the overall context, the fact that the applicant was a girl aged less than fourteen, a guest in the home of a close friend who was also the intimate friend of the perpetrator, that she had been sleeping before the perpetrator initiated the sexual intercourse and that she had never had any relation with him prior to that.

77. Thus, the prosecutor failed to examine, in particular, whether the applicant’s actions and the overall context indicated a lack of consent by her and whether the perpetrator’s actions could thus be qualified as rape. This failure is particularly striking in view of the submissions made by the applicant’s lawyer explicitly prompting the authorities to prosecute the

perpetrator for rape (see paragraph 20 above), and the initial recommendation of the lower prosecutor (see paragraph 16 above).

78. The elements mentioned in the preceding paragraphs are sufficient, in the Court's view, to suggest, at least on an arguable basis, that the applicant did not consent to the intercourse and that the case called for an investigation and a consideration of bringing rape charges.

79. When refusing to prosecute for rape, the higher prosecutor only briefly noted that none of the three hypotheses under Article 152 of the CC had been supported by the facts, and in particular by the testimony of the victim herself (see paragraph 17 above). The prosecution, however, failed to engage in any meaningful examination of the evidence signifying lack of consent, namely the age of the applicant, the specific circumstances under which the intercourse had taken place, the lack of prior relationship between the applicant and G.S., the behaviour of the applicant during the intercourse and her behaviour after the incident.

80. Neither was this failure - to examine the relevant circumstances in their overall context and to interpret domestic law in a manner defining rape as any non-consensual sexual intercourse - addressed and corrected by the first-instance court to which the case was referred for trial. The judge rapporteur was empowered by law to discontinue the judicial proceedings and to send the case to the prosecutor, had he or she identified breaches at the pre-trial stage of the victim's procedural rights (see paragraph 42 above). The first-instance court was also fully aware of the explicit request made by the applicant's lawyer that the perpetrator be prosecuted for rape (see paragraph 20 above).

81. In view of the above, the Court accepts that the applicant had raised her grievances sufficiently before the relevant national authorities and, in particular, her requests that the case be prosecuted for rape. The Court reaches this conclusion having particular regard to the requirements for a child-friendly justice in cases of sexual assault (see paragraph 69 above). While the proceedings as a whole, as noted above, should have complied with the requirement to conduct an effective investigation and prosecution into such complaints, neither the prosecution nor the court analysed the circumstances of the case from a child-sensitive stand-point. Due regard should be had, in such cases, to the principle of the best interest of the child and ensuring that an effective investigation and prosecution is carried out, without aggravating the trauma experienced by the child. In these particular circumstances, the Court accepts that the present complaint cannot be rejected on account of the applicant's failure to pursue the procedural route under domestic law for joining the domestic proceedings, namely as a private prosecutor. Thus, the Government's argument concerning non-exhaustion of domestic remedies should be dismissed.

82. In view of all of the above, the Court finds that, like in the similar case of *M.G.C.*, cited above, § 73, the failure to take into account the

surrounding specific circumstances of the present case by the prosecutorial and judicial authorities alike was the result of their having attached little or no weight to the particular vulnerability of the applicant as a very young person, and the special psychological factors involved in cases concerning rape. Thus, the relevant national authorities did not carry out the careful scrutiny required for them to properly discharge their positive obligations under the Convention.

83. The foregoing considerations are sufficient to enable the Court to conclude, without expressing a position on the guilt of the perpetrator, that there has accordingly been a procedural violation of Articles 3 and 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

84. Article 41 of the Convention provides:

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

A. Damage

85. The applicant claimed 12,700 euros (EUR) in respect of non-pecuniary damage. In support of her request she referred to her mental and emotional state after the attack, her self-harming, and an electronic communication by the applicant’s mother to her lawyer asking for recommendations of psychological help for the applicant.

86. The Government contested the applicant’s claim considering it to be unjustified and excessive.

87. They further emphasised that the applicant had never availed herself of the opportunity to lodge a claim before the civil courts after the conclusion of the criminal proceedings. A tort claim, irrespective of whether it were considered together with the criminal proceedings or separately, was the classic way for claiming damages from non-State parties in Bulgaria.

88. They also pointed out that in cases where the Court had earlier found a violation of the State’s obligation to effectively investigate allegations of rape, the compensation awarded for non-pecuniary damage had been lower.

89. The Court has already held that, as a rule, the requirement that domestic remedies should be exhausted does not apply to just satisfaction claims submitted to the Court under Article 41 (see, for instance, *Barberà, Messegue and Jabardo v. Spain* (Article 50), 13 June 1994, § 17, Series A no. 285 C; *Jalloh v. Germany* [GC], no. 54810/00, § 129, ECHR 2006-IX; and *Diena and Ozoliņš v. Latvia*, no. 16657/03, § 93, 12 July 2007).

90. Furthermore, the Court observes that the tort claim to which the Government referred concerns potential compensation from the perpetrator in relation to what he had been convicted of domestically. However, the violation found by the Court in the present case was as a result of the State's non-compliance with its procedural obligation to investigate effectively under Articles 3 and 8 of the Convention. Accordingly, the proceedings pointed out by the Government cannot provide redress for the breach of the Convention found.

91. The Court considers that the applicant must have suffered distress resulting at least partly from the shortcomings in the authorities' approach found in the present case. The Court awards her accordingly EUR 12,700 in respect of non-pecuniary damage.

B. Costs and expenses

92. The applicant also claimed EUR 1,780 for the costs and expenses incurred before the Court in legal fees and EUR 90 for the lawyer's fees in connection with the domestic proceedings.

93. The Government objected to the lawyer's fees and claimed it had been excessive.

94. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,500 covering costs and expenses in the proceedings before the Court, plus any tax that may be chargeable to the applicant.

C. Default interest

95. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY,

1. *Joins* to the merits the Government's objection concerning the non-exhaustion of domestic remedies in respect of the applicant's complaint under Articles 3 and 8 of the Convention;
2. *Declares* the application admissible;
3. *Dismisses* the Government's objection of non-exhaustion and *holds* that there has been a violation of Articles 3 and 8 of the Convention as a

result of the lack of effective investigation into the applicant's complaint of rape;

4. *Holds*

- (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Bulgarian levs at the rate applicable at the date of settlement:
 - (i) EUR 12,700 (twelve thousand seven hundred euros) , plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
- (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 28 May 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytkhik
Deputy Section Registrar

Síofra O'Leary
President