



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

FIRST SECTION

CASE OF J.L. v. ITALY

(Application no. 5671/16)

JUDGMENT

Art 8 • Positive obligations • “Secondary victimisation” of victim of sexual violence, judgment’s reasoning containing guilt-inducing, judgmental comments and conveying sexist stereotypes • Respect for applicant’s personal integrity ensured by authorities during investigation and oral proceedings

STRASBOURG

27 May 2021

FINAL

27/08/2021

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

In the case of J.L. v. Italy,

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

Ksenija Turković, *President*,

Krzysztof Wojtyczek,

Alena Poláčeková,

Péter Paczolay,

Gilberto Felici,

Erik Wennerström,

Raffaele Sabato, *judges*,

and Liv Tigerstedt, *Deputy Section Registrar*,

Having regard to:

the application (no. 5671/16) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Italian national, Ms J.L. (“the applicant”), on 19 January 2016;

the decision of the Section President not to have the applicant’s name disclosed;

the parties’ observations;

the decision of 29 January 2018 to give notice to the Italian Government (“the Government”) of the applicant’s complaints and to declare the remainder of the application, namely the complaints made by the applicant’s mother, inadmissible pursuant to Rule 54 § 3 of the Rules of Court;

Having deliberated in private on 8 April 2021,

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

INTRODUCTION

1. The applicant complained that criminal proceedings conducted in response to her allegations of gang rape had breached the national authorities’ positive obligation to protect her effectively from such sexual violence and to guarantee the protection of her right to private life and personal integrity. She asserted that this amounted to a violation of Articles 8 and 14 of the Convention.

THE FACTS

2. The applicant was born in 1986 and lives in Scandicci. She was represented by Ms S. Menichetti and Ms C. Carrano, lawyers practising in Rome.

3. The Government were represented by their former Agent, Ms E. Spatafora, and former co-Agent, Ms M. Aversano.

I. THE APPLICANT'S ALLEGATIONS OF SEXUAL VIOLENCE

4. The applicant, who was an art-history and drama student at the material time, explained that during the night of 25 July 2008, at about midnight, she had joined L.L. and his friends at Fortezza da Basso, a former military fortress in Florence which had been converted into a public entertainment venue.

5. As part of the preliminary investigation (see paragraphs 12-13 and 15 below), the applicant stated in interviews with the police and the public prosecutor's office that she had met L.L. in a drama class two years earlier and that in February 2008 she had acted in a short film he had written and directed, in which she had played a prostitute who was being abused. She had also had casual sexual relations with L.L. on 5 June 2008.

6. According to the applicant, L.L. had invited her to join him at the fortress on 25 July and had promised her a "little gift". She had decided to accept the invitation in the hope of receiving photographs from the short film and collecting the remainder of her pay. Her boyfriend had not accompanied her, because he was ill. Over the course of the evening she had drunk several shots offered by L.L. and his friends, to the point where she had quickly lost control of her actions and had had difficulty walking. She told the investigators that L.L. had known about her low tolerance to alcohol.

7. She stated that at about 1.30 a.m. she had followed D.S. – one of L.L.'s friends whom she had previously met and with whom she had had casual sexual relations some weeks earlier – into the fortress toilets, where he had demanded oral sex. She had been unpleasantly surprised by D.S.'s behaviour but, under the influence of alcohol, she had been unable to refuse him. She and others had subsequently ridden a mechanical bull that had been set up near the bar, and then she and the group of friends had danced on the dance floor. Towards the end of the evening she had drunk cocktails offered in turn by L.L. and his friends and by the barman.

8. The applicant alleged that at about 3 a.m., when the evening was coming to an end and the fortress was about to close, six of L.L.'s friends, including D.S., had accompanied her to the exit and had begun to sexually assault her by stroking her breasts and touching her genitals. L.L., who had been waiting for them at the exit after leaving the group a few minutes earlier to see his girlfriend out, had joined them. The applicant had put up resistance to their advances and had cried out, "What are you doing?" She had then attempted to break free and get to her bicycle, but had been pushed in the opposite direction and led towards L.L.'s car. There, she had been forced to have sexual relations several times with the members of the group.

9. The applicant stated that she clearly remembered that there were seven men in the car, including D.S., who was sitting in the front seat. The men had all raped her in turn, through both vaginal and oral penetration. They had also bitten her breasts and genitals, holding her down by her arms and forcing her legs apart, such that she had subsequently suffered bruising and pain,

particularly in her jaw. The applicant indicated that the men had ejaculated and that there was a strong semen smell in the car. She also stated that she had been in a state of shock and confusion during the incident, and had been unable to react. She had then managed to recover her wits and to get away at about 4 a.m. She further stated that her assailants had appeared “almost surprised” by her sudden reaction. Upon exiting the car, she had realised that it had been moved and had been parked in a place which she had not recognised at the time but which she had subsequently identified as Via Cosseria. Still in shock, she had wandered around aimlessly, then had collected her bicycle (see paragraph 21 below) and returned home, where she had told her boyfriend what had happened.

10. In the afternoon of 26 July 2008 the applicant, accompanied by her boyfriend and a friend, went to the Careggi University Hospital’s anti-violence centre and reported that she had been gang-raped. The centre’s gynaecologists drew up a medical certificate indicating that the applicant had bruising on both of her forearms, a five-centimetre scratch on her right thigh, inflammation on the areola of her left breast and redness around her genitals.

The doctor at the anti-violence centre prepared a report on the events described by the applicant. Once the applicant had signed the report, she requested that one of its passages be amended to state that, after being subjected to the alleged violence, she had walked back to her bicycle rather than being driven back by her assailants, as had been written in the first version of the report (see paragraph 21 below). A copy of the report was sent to the police.

11. In the months following the incident the applicant suffered from psychological trauma and had a panic attack. She was treated by a psychologist at Artemisia – a centre for victims of violence run by a private association and funded by the local authorities – where she had sought support. She was then hospitalised for post-traumatic stress at Careggi Hospital from 21 January to 11 February 2009.

II. THE CRIMINAL PROCEEDINGS

12. On 30 July 2008 the applicant was called in and interviewed by the Florence police, who had received the report from the Careggi anti-violence centre. She lodged a criminal complaint against her alleged assailants on the same day.

13. On 31 July she was called in and interviewed by the police in Ravenna, where she was visiting friends. She gave her version of events again and identified her alleged assailants from photographs taken during the evening in question.

14. On the same day, in Florence, the seven suspects, including D.S., were remanded in custody. The police seized their mobile phones and examined the phone records. They also seized the car in which the assault had allegedly

taken place. The public prosecutor's office commissioned experts to identify any traces of body fluids that might have been left in the car and on the applicant's clothing and to determine any cell towers that might have been pinged by the suspects' and the applicant's phones on the night of the events.

15. The applicant was interviewed by the Florence public prosecutor's office from 6.30 p.m. to 10.10 p.m. on 16 September 2008. She once again described the events of the night of 25 to 26 July and gave further details of her relationship with L.L. and the other suspects before the incident. Following the interview the public prosecutor's office instructed the police to identify and question as witnesses the individuals named by the applicant. It also asked the police's forensic unit to obtain detailed maps of the areas indicated by the applicant in her account, so that the exact location of the events could be determined.

16. On an unspecified date the investigators conducted an on-site inspection with the applicant.

17. On 29 April 2009 the Florence public prosecutor recorded – in the register of suspected perpetrators of aggravated group sexual violence – the names of the seven individuals accused by the applicant.

18. On 11 May 2010 the suspects were committed for trial before the Florence District Court. The applicant and the municipality of Florence joined the proceedings as civil parties.

19. Eighteen public hearings were held between 17 September 2010 and 14 January 2013 as part of the trial proceedings before the Florence District Court. After consulting the parties, the president of that court, pointing to the difficult, sensitive nature of the issue and the need to protect the applicant as much as possible, refused permission for the journalists in the courtroom to film the proceedings.

20. The hearings of 8 February and 13 May 2011 were devoted entirely to taking evidence from the applicant. Her testimony was recorded in a 430-page transcript. The applicant was questioned by the prosecution and the eight defence lawyers. It appears from the transcript of the hearings that the president of the court intervened on numerous occasions to prevent the defendants' various lawyers, in so far as possible, from dwelling on matters which had already been addressed by the victim, had no connection with the case or were of a strictly personal nature. The president of the court also ordered short adjournments to allow the applicant to regain her composure.

21. During the trial, testimony was also heard from the people to whom the applicant had told her story after the events in issue – namely her boyfriend at the relevant time and another friend; several of the applicant's and the alleged perpetrators' friends, including L.L.'s girlfriend; several people who had been at the party that evening; the gynaecologists from the anti-violence centre; the psychologist from the Artemisia centre; and the police and forensics officers who had taken part in the investigation. In particular, the doctor at the anti-violence centre who had treated the applicant

the day after the events stated that she had asked to amend a passage of the report after reading it. She had wished to clarify that, after being subjected to the violence in question, she had walked back to her bicycle rather than being driven back by the members of the group, as initially stated in the report.

22. Three individuals – L.B., S.S. and S.L., who were present when the applicant had left the fortress with the defendants – also gave evidence to the court as witnesses.

In particular, L.B. and S.S. – two employees assigned to security and access control at the fortress – stated that when the applicant had left the fortress she was visibly under the influence of alcohol, was unable to walk by herself and was being supported by two men who were touching her intimate parts, and that other men were surrounding them. L.B. and S.S. indicated that the young woman had not been reacting and had not appeared to be in a position to put up any resistance. That had concerned the two witnesses, who had asked the young men what was going on. The young men had replied, before moving away, “It’s not our fault she’s a nympho”.

23. S.L., for her part, stated that at the end of the evening she had been informed by five friends – who also gave evidence before the court – that a group of men and a young woman had attracted attention during the evening for their uninhibited behaviour and explicit sexual advances. The men had offered the young woman drinks several times. When the young woman had left the fortress, surrounded by the group of men, who were touching and kissing her, she had appeared to be under the influence of alcohol. S.L. and her friends had been hesitant to intervene. Three of them had felt that the young woman had freely chosen to leave with the men, while the other two had considered that she was neither thinking clearly nor able to give her consent. S.L. had been worried about the young woman and so had decided to get closer to the group and follow them for a few minutes. She had heard the applicant ask the men to stop and to leave her alone (“*Ora basta! Lasciatemi stare!*”). S.L. had thus offered her assistance, but the applicant had replied that she did not need to worry, the men accompanying her were friends and were going to take her back to her home. After the group of men had made derogatory comments to S.L. (“Go away! Mind your own business! Who are you, the rape police?”), the young woman had added, “I’m sorry, it’s my fault. I used to be a lesbian and now I’m straight”. According to S.L., although the young woman was amused by the men’s comments, she had appeared absent and not fully aware of what was happening.

24. While giving evidence in court the applicant stated that she did not remember S.L. She was also questioned by the defendants’ lawyers about her family situation, her relationship status and her sexual history. In addition, she gave evidence regarding her decision to follow a friend to Serbia twenty days after the events in question, from 15 to 25 August 2008, and to take part in an artists’ workshop entitled “Sex in Transition”. She explained that she had decided to leave Florence to avoid seeing her assailants, but had been

forced to return earlier than planned because she had had a serious panic attack, which had required her to be hospitalised.

25. At hearings held on 28 and 29 February 2012 the court took evidence from the seven defendants, all of whom, including D.S. himself, stated that D.S. had not been present either at the fortress exit or in the car.

According to the version of events given by the defendants (excluding D.S.), the applicant had been acting provocatively the entire evening, in terms both of how she was dressed and of her sultry, lewd behaviour. No one had forced her to drink. She had, moreover, performed oral sex on D.S. in the fortress toilets, a fact that had immediately been revealed to the entire group of friends. L.L. stated that the applicant had always been physically attracted to him, which he claimed was proved by their sexual relations on 5 June 2008, and that she had lied when saying that she had gone to the fortress on 25 July in order to collect the remainder of her pay for the short film in which she had acted, because she had in fact already been paid.

26. The defendants stated that the applicant had displayed her red underwear while riding the mechanical bull and had danced lasciviously and uninhibitedly with each of them. At the end of the evening she had incited them to have group sex by saying, “And now I want you all to screw me”, and when L.L. had moved away with his girlfriend, she had called out to him to come back. They said that the group was euphoric and in a festive (*goliardico*) mood, but that no one was incapacitated by alcohol. The applicant had been walking without difficulty and had appeared sure of herself, teasing them and encouraging them to have sexual relations. When S.L. had called out to them at the fortress exit, the applicant had reacted by reassuring her and asserting her freedom to do as she saw fit in terms of sex.

27. The applicant’s sexual advances had subsequently become more insistent, and the group had decided to drive to a more remote area less exposed to public view. They had chosen the car park of a kiosk on Via Mariti. There, the applicant had had sexual intercourse with two of the men and had performed oral sex on the others, who had been unable to achieve an erection or to ejaculate, resulting in mockery and disappointment from the applicant. The six men had then offered to take her back to her home but, following her refusal, they had driven her back to her bicycle near the fortress. One of the defendants, D.A., submitted that the seminal fluid matching his DNA found on the applicant’s T-shirt (see paragraph 32 below) could be explained by the touching that had taken place during the drive to the kiosk.

III. THE JUDICIAL DECISIONS

28. In a judgment of 14 January 2013 the Florence District Court convicted six of the seven defendants of having induced an individual in a state of physical and mental impairment to perform or submit to acts of a

sexual nature – an offence punishable under Article 609 *bis* § 2 in conjunction with Article 609 *octies* of the Criminal Code. It acquitted them, however, on the charges of sexual violence committed with the use of force, for the purposes of Article 609 *bis* § 1. The seventh defendant, D.S., was acquitted because the investigation had found that, although he had been present during the evening in issue, he had not left the fortress with the others and had not taken part in the rape.

29. In its judgment, the trial court first noted that the parties' accounts were in agreement in that group sexual relations had taken place, but that they differed substantially on the question of consent. It then observed that the applicant's version of events contained inconsistencies and did not seem logical in several regards, especially concerning the initial circumstances. In particular, it attached little credibility to the applicant's explanations as to why she had accepted L.L.'s invitation to join him at the fortress, and then had remained there despite the fact that no gift had been given to her and that the group of friends' behaviour towards her had seemed inappropriate.

30. The court did, however, consider that the victim's statements as to how the events had unfolded at the specific time when the group had left the fortress were fully corroborated by the first-hand witness testimony of S.L., L.B. and S.S. It therefore concluded that the applicant could be regarded as credible in so far as the reconstruction of that part of the evening was concerned – except as to whether D.S. was present – but that she lacked credibility in her account of the first and last parts of the evening. In that connection, it indicated that there was case-law authority from the Court of Cassation in support of evaluating a victim's credibility by means of a "fragmented assessment" of his or her statements – provided that there were no factual or logical contradictions between the various parts of his or her version of events.

31. Regarding the course of events after the group had left the fortress, the court noted that any involvement by D.S. in the acts in dispute had been ruled out in the investigation, which had established that D.S. had not left the fortress with the group, contrary to what the applicant had stated. It further observed that the parties' phone records and an analysis of the cell towers pinged by their phones disproved the applicant's account of where the car had been parked during the acts complained of, and thus corroborated the defendants' statements in that regard. The investigators had also performed simulations demonstrating that it would have been impossible for the applicant to walk back to her bicycle from the location in question, thereby further undermining her statements.

32. In addition, the court considered that the injuries observed by the doctor at the anti-violence centre twelve hours after the incident (see paragraph 10 above) were incompatible with the degree of force alleged by the applicant and could have been the result of merely engaging in a sexual act in a car – this not having been contested by the defendants. Furthermore,

no trace of seminal fluid had been found either in the vaginal and oral swabs taken from the victim or in the car, which contradicted the applicant's claim of a "strong semen smell" and corroborated the defendants' statements to the effect that none of them had ejaculated in the vehicle. Moreover, an analysis of the biological traces found on the applicant's clothing, in particular on the back of her T-shirt, had identified the DNA of only one defendant, namely D.A.

33. The court then considered that it was not just speculation to assume that the defendants had at the very least been hoping for an evening of underhand pursuits, making use of the applicant to play erotic games. It saw evidence for that in text messages exchanged by the defendants on the afternoon of 25 July, making reference to the fact that the applicant would be at the fortress that evening. It also expressed concern over an obscene piece of writing by L.L., which had been found in his car and which appeared to suggest an unhealthy relationship with the applicant.

34. In any event, the court considered that, contrary to all the defendants' statements, the situation described by S.L., L.B. and S.S. could be characterised as neither "euphoric" nor "festive". The corroborative evidence of those witnesses had irrefutably shown that the applicant was under the influence of alcohol when she had left the fortress with the six defendants. Although it had not been proved that she had been in such state because the defendants had incited her to drink alcohol with a view to sexually assaulting her, there was nevertheless evidence that she was drunk, that she was having difficulty walking and that her ability to consent to sexual relations was visibly impaired.

35. The court considered that, at the time the applicant had been observed by the witnesses and for a period which was impossible to determine precisely, her state had to be characterised as one of both physical and mental "impairment". In the context of sexual violence, the concept of impairment was not necessarily linked to mental illness in the victim but could be derived from various factors, provided that their severity (*incisività*) was capable of at least vitiating (*viziare*) consent. Impairment did not, moreover, require absolute submission from the victim, but was compatible with a certain degree of resistance on his or her part.

36. The court pointed out that the offence of sexual violence committed by taking advantage of an individual's state of impairment, which was punishable under Article 609 *bis* § 2 (i) of the Criminal Code, could be characterised by the act of inducing an individual, whose state of impairment made it impossible for him or her to refuse, to become an object of sexual gratification, without necessarily using force or intimidation. As to the mental element of the offence, it included both awareness of the victim's state of impairment – which in the court's view was undoubtedly present in the instant case – and the fact of acting for sexual purposes. The state of

impairment did not necessarily have to be caused by the assailant but could be the result of external environmental factors.

37. The six convicted men lodged an appeal. They submitted that the applicant had lied at least twenty-nine times and that those many untrue statements proved her total lack of credibility. Arguing that her version of events was doubtful on the whole, they asserted that the trial court's "fragmented assessment" of her statements was contradictory and erroneous in the light of the relevant case-law. They argued that the applicant's lies, which had been acknowledged by the court, were a sign of her remorse about the group sexual experience to which she had nevertheless consented. They averred that the state of physical impairment which had allegedly vitiated the applicant's consent had not been proved and that her state of mental impairment had been contradicted by the testimony of the various witnesses heard by the court. They further submitted that they could not in any event have been aware of any impairment in the applicant, since they had all been under the influence of alcohol themselves.

38. In a judgment of 4 March 2015, deposited in the registry on 3 June 2015, the Florence Court of Appeal acquitted the six accused who had been convicted at first instance (see paragraph 28 above). It considered at the outset that the part of the first-instance judgment concerning the acquittal of the accused on the charge of rape committed with the use of force or threats (under Article 609 *bis* § 1 of the Criminal Code) had become final, since the public prosecutor had not appealed against it. Its task was thus confined to examining whether the victim's alleged state of impairment had been taken advantage of (under Article 609 *bis* § 2 of the Criminal Code). That first required it to analyse in what state the applicant had actually been at the material time.

39. The Court of Appeal found that the numerous inconsistencies noted by the trial court in the applicant's version of events (see paragraphs 29 and 31 above) undermined her credibility in its entirety. It considered that the trial court had been wrong to carry out a "fragmented assessment" of the applicant's various statements and to accept her credibility with regard to part of the facts. In that connection, it pointed out that, according to the Court of Cassation's case-law on the matter, a "fragmented assessment" of the statements of a victim of sexual violence was possible only in cases where the statements in question referred to different, independent events, such as separate assaults substantiated to varying degrees. Given that the case concerned one single assault, the victim's credibility could not be determined using a "fragmented assessment". It had to be assessed in the light of her statements taken as a whole.

40. The Court of Appeal further found that the applicant's statements had not been corroborated by any other evidence but had in fact been contradicted by the gynaecologist's report, which noted injuries that were incompatible with her allegations, and by the results of the tests for body-fluid traces in the

car, on the applicant's clothing and on her person. Lastly, it found that the applicant's reply to S.L., far from being a cry for help, had been more akin to an affirmation of her sexual choices, which had previously been homosexual and then been heterosexual.

41. As regards the applicant's alleged state of impairment, the Court of Appeal first considered that any psychological deficiency which might have affected her ability to give her consent should be ruled out. Although she had been going through difficult times in terms of her family and her romantic relationships – her mother was seriously ill, her father was absent and she herself had recently experienced a break-up and had begun a new relationship with a man she had just met – the applicant was a young woman who was “admittedly fragile but also creative and uninhibited”, “capable of dealing with her (bi)sexuality and of having casual sexual relations even when she was not entirely sure she wanted to”. As examples of such relations, it cited those she had had with L.L. in the street and with D.S., in both cases a few days before the events in question, and the oral sex she had performed on D.S. in the fortress toilets, after which she had danced and had played on a mechanical bull.

42. The Court of Appeal further noted that several witnesses had testified that the applicant's behaviour had been extremely provocative and lewd, that she had danced lasciviously with her arms around some of the accused and that after having sexual relations with D.S. in the toilets – a fact that had immediately been revealed to the group of friends – she had displayed her red underwear while riding a mechanical bull. The Court of Appeal also noted that the witnesses L.B. and S.S., for their part, had merely stated that the applicant had appeared to be under the influence of alcohol and had had difficulty walking when she had left the park. Lastly, the Court of Appeal considered that S.L.'s testimony, concerning how the applicant had reacted when S.L. had intervened to defend her, suggested that she was not a victim of violence, but rather that she was capable of defending herself and even of finding amusement in the group of friends' comments about her new sexual orientation. In the light of those factors, the Court of Appeal found that the applicant's judgment had not been impaired by alcohol.

43. Having ruled out the existence even of a latent state of impairment in the applicant, the Court of Appeal considered that it had only to examine the issue of her “withdrawal of her initial consent” which the accused had – rightly or wrongly – believed she had given during the evening, in the light also of the oral sex D.S. had previously “obtained” from the applicant in the toilets. Prior to leaving the fortress, the applicant had not been bothered by the fact that the group of friends had been touching and fondling her on the dance floor, and had allowed herself to be accompanied to the car, where she had remained motionless during the sexual acts, such that the members of the group of friends had appeared “almost surprised” when she had decided to leave. The Court of Appeal found that, in the light of those factors, the

accused could be regarded as having considered that the applicant had consented to group sexual relations, which had ultimately satisfied no one.

The Court of Appeal further noted that there had been no meaningful break (*cesura*) on the applicant's part between her initial consent and her alleged subsequent refusal (*dissenso*), since she had acknowledged remaining motionless and at the mercy of the group during the sexual relations.

44. The Court of Appeal found that its assessment, which was based on an in-depth examination of all the above-mentioned elements established in the trial, was supported by subsequent considerations, such as the lack of scratch marks or other signs of a struggle on the bodies of the accused, who had been arrested immediately after the events, and the fact that the applicant had ridden for ten minutes on her bicycle after allegedly suffering serious violence. According to the Court of Appeal, those details were incompatible with the serious violence and abuse to which the applicant claimed to have been subjected for two hours (see paragraphs 9 and 40 above).

45. Accordingly, the Court of Appeal considered that it had not been proved that the applicant had been in a state of alcohol-induced impairment (*alterazione alcolica*). While the small group had been euphoric after drinking a relatively small amount of alcohol, the applicant's behaviour – when she had ridden the mechanical bull, when she had tried to phone L.L. as he was accompanying his girlfriend out, and when she had curtly replied to S.L. – had in any event suggested that she was sufficiently clear-headed. The Court of Appeal pointed out that, according to the Italian Court of Cassation, the physical element of the offence of sexual violence committed against an individual who was in a state of impairment was made out where one person, through devious, insidious conduct, induced another person to engage in acts of a sexual nature by taking advantage of his or her state of alcohol-induced impairment.

46. The Court of Appeal considered that by reporting the events to the anti-violence centre and visiting the Artemisia centre, the applicant had sought to “stigmatise” the fact that she had not hindered the group sexual experience. In doing so, she had attempted to repudiate what she realised was a moment of fragility and weakness and thereby erase it from her non-linear life. The Court of Appeal found that the applicant's behaviour and activities before and after the events showed that she had an ambivalent attitude towards sex. This led her to make choices for which she did not take full responsibility and which she experienced in contradictory and traumatic ways. Such choices included acting in L.L.'s short film without showing any reluctance as to its sex scenes and violence, and taking part in a workshop entitled “Sex in Transition” in Belgrade a few days after the alleged assault.

47. The Court of Appeal concluded that the acts complained of, although regrettable, were not criminal offences and that the accused were to be acquitted, on the ground that the physical element of the offence of sexual

violence committed by abuse of the victim's state of impairment had not been made out (*perché il fatto non sussiste*).

48. On 13 July 2015 the applicant sent the public prosecutor's office a statement of grounds of appeal against the Court of Appeal's judgment, challenging its reasoning and requesting that an appeal on points of law be lodged.

49. The public prosecutor's office did not lodge an appeal on points of law. The Florence Court of Appeal's judgment thus became final on 20 July 2015.

50. The case and trial attracted significant media attention. The applicant commented on the events in issue on social media and created a blog to promote gender equality and the fight against gender-based violence.

51. On 5 August 2015 a parliamentary question was addressed to the Prime Minister and to the Minister of Justice concerning the reasoning in the Florence Court of Appeal's judgment and its compatibility with the provisions of national and international legislation on the protection of the rights of sexual abuse victims and on the fight against violence against women. It was not examined.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT DOMESTIC LAW

A. Criminal Code

52. Article 609 *bis* of the Italian Criminal Code concerns the offence of "sexual violence" (*violenza sessuale*). It reads:

"1. Anyone who, through the use of force, threats or abuse of authority, coerces someone into engaging in acts of a sexual nature shall be punished by imprisonment of between five and ten years.

2. The same punishment shall apply to anyone who induces (*induce*) someone to perform or submit to acts of a sexual nature (i) by taking advantage of that individual's state of physical or mental impairment at the time of the events; or (ii) by misleading that individual by pretending to be someone else.

3. In less serious cases, the prison sentence shall be reduced by no more than two-thirds."

53. Article 609 *ter*, in so far as relevant, provides:

"The prison sentence may be increased to between six and twelve years if the offences punishable under Article 609 *bis* are committed:

...

(2) with the use of weapons, alcohol, sedatives, narcotics or other means or substances which may seriously harm the health of the victim.

..."

54. Under Article 609 *octies* of the Criminal Code, “group sexual violence” is defined as the act of several individuals together taking part in sexual violence as provided for in Article 609 *bis*. It is punishable by imprisonment of between six and twelve years.

B. Code of Criminal Procedure

55. Article 392 of the Code of Criminal Procedure provides that, in proceedings concerning, *inter alia*, offences punishable under Articles 609 *bis* and 609 *octies* of that Code, the public prosecutor’s office – at the request of the victim, where appropriate – or the defendant may apply to have the preliminary investigations judge take evidence from a minor or the complainant, if an adult, at an *ad hoc* pre-trial evidential hearing (*incidente probatorio*).

56. Legislative Decree no. 212 of 15 December 2015, which transposes the provisions of Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime, amended Article 392 of the Code of Criminal Procedure with the addition of the following provision:

“During the preliminary investigation, should the victim be particularly vulnerable, the public prosecutor’s office – at the request of the victim, where appropriate – or the defendant may apply to have evidence taken from the victim at an *ad hoc* pre-trial evidential hearing (*incidente probatorio*).”

57. Under Article 472 § 3 *bis* of the Code of Criminal Procedure, hearings concerning sexual offences are public unless the victim requests that they be held in private or the victim is a minor. In such proceedings, questions relating to the victim’s private and sex life are allowed only if they are necessary for the reconstruction of the events.

C. Possibility for the civil party to appeal against an acquittal

58. Article 572 of the Code of Criminal Procedure provides:

“The civil party and the victim ... may, by means of a reasoned application, request that the public prosecutor’s office lodge an appeal.

Where the public prosecutor’s office does not grant such request, it shall give reasons for its decision and notify the applicant thereof.”

59. Article 576 of the Code of Criminal Procedure provides:

“The civil party may appeal against a judgment of conviction in so far as it relates to the civil action; it may appeal against a judgment of acquittal only for the purposes of establishing the civil liability [of the perpetrator] ...”

D. Domestic legislative framework on violence against women

60. Law no. 119 of 15 October 2013, known as the Femicide Act or the Special Action Plan to Combat Violence against Women, introduced measures to strengthen the procedural rights of victims of domestic violence, sexual abuse, sexual exploitation and harassment. Under the new provisions, the public prosecutor and the police have a legal obligation to inform victims of their right to be represented by a lawyer in the criminal proceedings and to request a private hearing through their lawyers. They must also inform victims of their right to legal assistance and how to obtain it. In addition, the Act provides that investigations into alleged offences must be carried out within one year of their being reported to the police and that residence permits for foreign victims of violence, including migrants without identity documents, must be extended. The Act also provides for the systematic collection and regular update of data on the issue, in particular through the coordination of existing databases.

61. Law no. 69 of 19 July 2019, known as the “Red Code”, introduced new offences such as forced marriage, disfigurement of a victim by inflicting permanent facial injuries, and unlawful dissemination of sexually explicit photos or videos. It also increased the sanctions for the offences of harassment, sexual violence and domestic violence. Proceedings concerning those offences are given priority treatment.

E. Judicial Code of Ethics

62. The Judicial Code of Ethics was amended in 2010. The third paragraph of Article 12 of the amended Code provides:

“In giving reasons for decisions and conducting hearings, judges should examine the facts and the parties’ arguments and avoid commenting on irrelevant facts or individuals and making judgments or observations on the professional abilities of other judges, prosecutors and defence lawyers and – unless so required for the purposes of the decision – on the parties to the proceedings.”

II. RELEVANT INTERNATIONAL LAW

A. United Nations

63. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the United Nations General Assembly in Resolution 40/34 of 29 November 1985, provides that victims should be treated with compassion and respect for their dignity (see the Annex to the Resolution, paragraph 4). The responsiveness of judicial and administrative processes to the needs of victims should be facilitated, in particular by taking measures to minimise inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and

witnesses on their behalf, from intimidation and retaliation (ibid., paragraph 6 (d)).

64. The United Nations Committee on the Elimination of Discrimination against Women, in its “Concluding Observations on the Seventh Periodic Report of Italy” of 24 July 2017 (CEDAW/C/ITA/CO/7), stated, *inter alia*:

“Stereotypes

25. The Committee notes the State party’s efforts to combat discriminatory gender stereotypes by promoting the sharing of household duties and parenting responsibilities and to address the stereotyped portrayal of women in the media by strengthening the role of the Advertising Self-Regulation Institute. Nevertheless, it notes with concern:

(a) The entrenched stereotypes concerning the roles and responsibilities of women and men in the family and in society, perpetuating traditional roles of women as mothers and housewives and undermining their social status and educational and career prospects;

...

Gender-based violence against women

27. The Committee welcomes the measures taken to combat gender-based violence against women, including the adoption and implementation of Act No. 119/2013 on urgent provisions on safety and to combat gender-based violence, and the establishment of a national observatory on violence and a national database on gender-based violence. The Committee remains concerned, however, about:

(a) The high prevalence of gender-based violence against women and girls in the State party;

(b) The underreporting of gender-based violence against women and the low prosecution and conviction rates, resulting in impunity for perpetrators;

(c) The limited access to civil courts for women who are victims of domestic violence who seek restraining orders;

(d) The fact that, although these procedures are not mandatory, courts continue to refer victims to alternative dispute resolution, such as mediation and conciliation, in cases of gender-based violence against women, as well as the emerging usage of restorative justice mechanisms for less severe cases of stalking, which might be expanded to apply in other forms of gender-based violence against women;

(e) The cumulative impact and intersection of racist, xenophobic and sexist acts against women;

(f) The lack of studies addressing the structural causes of gender-based violence against women and the lack of measures intended to empower women;

(g) The regional and local disparities in the availability and quality of assistance and protection services, including shelters, for women who are victims of violence, as well as the intersecting forms of discrimination against women from minority groups who are victims of violence.

28. Recalling the provisions of the Convention and its general recommendations No. 19 (1992) on violence against women and No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19, the Committee recommends that the State party:

- (a) Expedite the adoption of a comprehensive law to prevent, combat and punish all forms of violence against women, as well as of the new national action plan against gender-based violence, and ensure that adequate human, technical and financial resources are allocated for their systematic and effective implementation, monitoring and assessment;
- (b) Evaluate the response of the police and the judiciary to complaints of sexual crimes and introduce mandatory capacity-building for judges, prosecutors, police officers and other law enforcement officers on the strict application of criminal law provisions on gender-based violence against women and on gender-sensitive procedures for interviewing women who are victims of violence;
- (c) Encourage women to report incidents of domestic and sexual violence to law enforcement bodies by destigmatizing victims, sensitizing the police and the judiciary and raising awareness about the criminal nature of such acts and ensure that women have effective access to civil courts to obtain restraining orders against abusive partners;
- (d) Ensure that alternative dispute resolution mechanisms, such as mediation, conciliation and restorative justice, are not utilized by courts for cases of gender-based violence so that these do not constitute an obstacle to women's access to formal justice, and harmonize all relevant national legislation with the Istanbul Convention;
- (e) Ensure that racist, xenophobic and sexist acts against women are thoroughly investigated, the perpetrators prosecuted and the sentences imposed commensurate with the gravity of the crime;
- (f) Reinforce the protection and assistance provided to women who are victims of violence, including by strengthening the capacity of shelters and ensuring that they meet the needs of victims and cover the entire territory of the State party, allocating adequate human, technical and financial resources and enhancing State cooperation with non-governmental organizations providing shelter and rehabilitation to victims;
- (g) Collect statistical data on domestic and sexual violence disaggregated by sex, age, nationality and relationship between the victim and the perpetrator."

B. Council of Europe

65. The Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) was adopted by the Committee of Ministers of the Council of Europe on 7 April 2011. It was ratified by Italy on 10 September 2013 and came into force on 1 August 2014. The relevant provisions of the Istanbul Convention read:

Article 3 – Definitions

"For the purpose of this Convention:

- (a) 'violence against women' is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life;
- ..."

Article 15 – Training of professionals

“1. Parties shall provide or strengthen appropriate training for the relevant professionals dealing with victims or perpetrators of all acts of violence covered by the scope of this Convention, on the prevention and detection of such violence, equality between women and men, the needs and rights of victims, as well as on how to prevent secondary victimisation.

...”

Article 36 – Sexual violence, including rape

“1. Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised:

(a) engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object;

(b) engaging in other non-consensual acts of a sexual nature with a person;

(c) causing another person to engage in non-consensual acts of a sexual nature with a third person.

2. Consent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances.

3. Parties shall take the necessary legislative or other measures to ensure that the provisions of paragraph 1 also apply to acts committed against former or current spouses or partners as recognised by internal law.”

Article 54 – Investigations and evidence

“Parties shall take the necessary legislative or other measures to ensure that, in any civil or criminal proceedings, evidence relating to the sexual history and conduct of the victim shall be permitted only when it is relevant and necessary.”

Article 56 – Measures of protection

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

(a) providing for their protection, as well as that of their families and witnesses, from intimidation, retaliation and repeat victimisation;

(b) ensuring that victims are informed, at least in cases where the victims and the family might be in danger, when the perpetrator escapes or is released temporarily or definitively;

(c) informing them, under the conditions provided for by internal law, of their rights and the services at their disposal and the follow-up given to their complaint, the charges, the general progress of the investigation or proceedings, and their role therein, as well as the outcome of their case;

(d) enabling victims, in a manner consistent with the procedural rules of internal law, to be heard, to supply evidence and have their views, needs and concerns presented, directly or through an intermediary, and considered;

- (e) providing victims with appropriate support services so that their rights and interests are duly presented and taken into account;
- (f) ensuring that measures may be adopted to protect the privacy and the image of the victim;
- (g) ensuring that contact between victims and perpetrators within court and law enforcement agency premises is avoided where possible;
- (h) providing victims with independent and competent interpreters when victims are parties to proceedings or when they are supplying evidence;
- (i) enabling victims to testify, according to the rules provided by their internal law, in the courtroom without being present or at least without the presence of the alleged perpetrator, notably through the use of appropriate communication technologies, where available.”

66. On 13 January 2020 the Council of Europe Expert Group on Action against Violence against Women and Domestic Violence (GREVIO) published its first baseline evaluation report on Italy, stating in particular:

“While acknowledging progress made to promote gender equality and further women’s rights, the report finds that the cause of gender equality is facing resistance in Italy. GREVIO voices its concern about the emerging signs of a tendency to reinterpret and refocus gender-equality policies in terms of family and motherhood policies. To overcome these difficulties, GREVIO considers that it is essential that the authorities continue to devise and effectively implement policies of equality between women and men and the empowerment of women which clearly acknowledge the structural nature of violence against women as a manifestation of historically unequal power relations between women and men.”

67. On the basis of data provided by the Italian National Institute of Statistics (ISTAT), the GREVIO report notes, among other things, that both reporting rates and conviction rates for sexual violence are relatively low and are declining: the number of reports of sexual violence fell from 4,617 in 2011 to 4,046 in 2016 (with an incidence rate of women as victims and men as perpetrators in over 90% of cases), and the number of perpetrators convicted dropped from 1,703 to 1,419 in the same period. The report further states:

“225. GREVIO strongly encourages the Italian authorities to:

- (a) pursue their efforts aimed at enabling an expeditious handling of investigations and criminal proceedings into cases of gender-based violence, while ensuring that measures taken to this end are supported by adequately [*sic*] funding;
- (b) uphold perpetrators’ accountability and to ensure criminal justice for all forms of violence covered by the Istanbul Convention;
- (c) ensure that sentencing in cases of violence against women, including domestic violence, is commensurate to the gravity of the offence and preserves the dissuasive function of penalties.

Progress in this field should be measured by appropriate data and supported by relevant analyses of the handling of criminal cases by law-enforcement agencies, prosecutorial offices and courts in order to verify where attrition occurs and to identify possible gaps in the institutional response to violence against women.”

68. Opinion No. 11 (2008) of the Consultative Council of European Judges (CCJE) on the quality of judicial decisions includes the following passage:

“38. ... The reasoning [of a judicial decision] must be free of any insulting or unflattering remarks about the parties.”

C. European Union

69. Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, was adopted on 25 October 2012 for transposition by 16 November 2015. It was transposed into Italian law by Legislative Decree no. 212 of 15 December 2015. The relevant provisions of the Directive read:

Recital 17

“Violence that is directed against a person because of that person’s gender, gender identity or gender expression or that affects persons of a particular gender disproportionately, is understood as gender-based violence. It may result in physical, sexual, emotional or psychological harm, or economic loss, to the victim. Gender-based violence is understood to be a form of discrimination and a violation of the fundamental freedoms of the victim and includes violence in close relationships, sexual violence (including rape, sexual assault and harassment), trafficking in human beings, slavery, and different forms of harmful practices, such as forced marriages, female genital mutilation and so-called ‘honour crimes’. Women victims of gender-based violence and their children often require special support and protection because of the high risk of secondary and repeat victimisation, of intimidation and of retaliation connected with such violence.”

Article 18 – Right to protection

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

Article 19 – Right to avoid contact between victim and offender

“1. Member States shall establish the necessary conditions to enable avoidance of contact between victims and their family members, where necessary, and the offender within premises where criminal proceedings are conducted, unless the criminal proceedings require such contact.

2. Member States shall ensure that new court premises have separate waiting areas for victims.”

Article 21 – Right to protection of privacy

“1. Member States shall ensure that competent authorities may take during the criminal proceedings appropriate measures to protect the privacy, including personal characteristics of the victim taken into account in the individual assessment provided for under Article 22, and images of victims and of their family members. Furthermore, Member States shall ensure that competent authorities may take all lawful measures to prevent public dissemination of any information that could lead to the identification of a child victim.

2. In order to protect the privacy, personal integrity and personal data of victims, Member States shall, with respect for freedom of expression and information and freedom and pluralism of the media, encourage the media to take self-regulatory measures.”

Article 22 – Individual assessment of victims to identify specific protection needs

“1. Member States shall ensure that victims receive a timely and individual assessment, in accordance with national procedures, to identify specific protection needs and to determine whether and to what extent they would benefit from special measures in the course of criminal proceedings, as provided for under Articles 23 and 24, due to their particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation.

2. The individual assessment shall, in particular, take into account:

- (a) the personal characteristics of the victim;
- (b) the type or nature of the crime; and
- (c) the circumstances of the crime.

3. In the context of the individual assessment, particular attention shall be paid to victims who have suffered considerable harm due to the severity of the crime; victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics; victims whose relationship to and dependence on the offender make them particularly vulnerable. In this regard, victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime, and victims with disabilities shall be duly considered.”

Article 23 – Right to protection of victims with specific protection needs during criminal proceedings

“1. Without prejudice to the rights of the defence and in accordance with rules of judicial discretion, Member States shall ensure that victims with specific protection needs who benefit from special measures identified as a result of an individual assessment provided for in Article 22(1), may benefit from the measures provided for in paragraphs 2 and 3 of this Article. A special measure envisaged following the individual assessment shall not be made available if operational or practical constraints make this impossible, or where there is an *[sic]* urgent need to interview the victim and failure to do so could harm the victim or another person or could prejudice the course of the proceedings.

2. The following measures shall be available during criminal investigations to victims with specific protection needs identified in accordance with Article 22(1):

...

(b) interviews with the victim being carried out by or through professionals trained for that purpose;

...

3. The following measures shall be available for victims with specific protection needs identified in accordance with Article 22(1) during court proceedings:

(a) measures to avoid visual contact between victims and offenders including during the giving of evidence, by appropriate means including the use of communication technology;

(b) measures to ensure that the victim may be heard in the courtroom without being present, in particular through the use of appropriate communication technology;

(c) measures to avoid unnecessary questioning concerning the victim's private life not related to the criminal offence; and

(d) measures allowing a hearing to take place without the presence of the public."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

70. The applicant complained that the domestic authorities had failed to protect her right to respect for her private life and personal integrity in the criminal proceedings in the present case. She relied on Article 8 of the Convention, which provides:

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

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. *Six-month rule*

71. The Government submitted that the applicant had not lodged her application within six months from the date of the final decision in the process of exhaustion of domestic remedies, namely 20 July 2015. In that connection, they pointed out that the Court had not received the application until 25 January 2016.

72. The applicant asserted that she had posted her application within the six-month time-limit, namely on 19 January 2016.

73. The Court observes that the judgment of the Florence Court of Appeal became final on 20 July 2015. The applicant's six-month time-limit for lodging her application with the Court under Article 35 §§ 1 and 4 of the Convention therefore expired on 20 January 2016. According to the date of

the postmark, the envelope containing the application was posted from Italy on 19 January 2016.

74. The Court considers the postmark to be the date on which the application was lodged (see *Vasiliauskas v. Lithuania* [GC], no. 35343/05, § 117, ECHR 2015). Accordingly, the Government's objection must be dismissed.

2. *Exhaustion of domestic remedies*

75. The Government submitted that the applicant had not exhausted domestic remedies, because she had not appealed on points of law against the judgment of the Florence Court of Appeal or appealed against the first-instance judgment. Article 576 of the Code of Criminal Procedure provided an effective remedy which civil parties could use – even in the absence of an appeal by the public prosecutor's office – to obtain recognition of a causal link between the perpetrator's conduct and the infringement of the victim's civil rights.

76. Evidence of that remedy's effectiveness could be seen in the fact that, in several judgments, the Italian Court of Cassation had quashed an acquittal decision and referred the case back to the civil courts for adjudication on the civil party's claim for compensation. In those circumstances, the civil courts were required to apply the rules specific to criminal law, in particular as regards the burden of proof, in order to determine the perpetrator's liability (the Government referred to Court of Cassation judgments nos. 42995 of 2015 and 27045 of 2016).

77. The Government argued that the applicant had thus waived her right under domestic law to avail herself of such a remedy as would have enabled her to reaffirm her version of events before a court and to challenge both the defendants' acquittal and the reasons on which it was based, including those relating to her private life.

78. The Government further submitted that, in choosing not to appeal against the defendants' acquittal at first instance for the offence of rape committed with the use of force, the applicant had implicitly accepted the court's reconstruction of the events. As to the applicant's request that the public prosecutor lodge an appeal on points of law (see paragraph 48 above), it had not been submitted in accordance with the formal requirements of Article 572 of the Code of Criminal Procedure. In any event, the decision to lodge an appeal or not ultimately lay with the public prosecutor.

79. The applicant, for her part, submitted that only the public prosecutor's office could lodge an appeal against an acquittal decision delivered at first instance or on appeal, and that the only option available to civil parties under Article 572 of the Code of Criminal Procedure was to request the public prosecutor to lodge such an appeal. When on 13 July 2015 she had sent the public prosecutor's office her statement of grounds of appeal – which had

gone unheeded – she had thus made use of the last avenue under domestic law for having her assailants found criminally liable.

80. She asserted that an appeal on points of law lodged under Article 576 of the Code of Criminal Procedure would only have enabled any aspects of civil liability to be recognised, and would have had no effect on the defendants' acquittal of the offence of which she claimed to be the victim, since the court could not under any circumstances rule on the criminal aspects of the impugned decision unless an appeal had been lodged by the public prosecutor's office. In that connection, the applicant produced judgments by the Court of Cassation (namely Court of Cassation judgments nos. 41479 of 2011 and 23155 of 2012), on the basis of which she concluded that an appeal lodged by a civil party against an acquittal could concern only the civil liability of the respondent – that is, only claims for compensation from that person. Any appeal seeking to have the respondent's criminal liability recognised would thus be inadmissible as being contrary to the principle of the authority of *res judicata* in criminal matters (*intangibilità del giudicato penale*).

81. The applicant further submitted that the decision of the public prosecutor's office not to appeal on points of law against the judgment of the Florence Court of Appeal had deprived her of all possibility of having her assailants found criminally liable and, in consequence, of obtaining appropriate redress for her complaint.

82. The Court reiterates that the requirement to exhaust domestic remedies under Article 35 § 1 of the Convention concerns avenues which are accessible to the applicant and are capable of providing redress for the situation complained of. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness: it falls to the respondent State to establish that these conditions are satisfied (see, among other authorities, *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 69-77, 25 March 2014).

83. In ruling on the issue of whether the applicant has met the criterion of exhaustion of domestic remedies having regard to the specific circumstances of her case, the Court must first identify the act or omission of the respondent State's authorities complained of by the applicant (see, among other authorities, *Ciobanu v. Romania* (dec.), no. 29053/95, 20 April 1999). The Court observes in this connection that the applicant's complaint is essentially that the authorities failed to ensure the effective protection of her sexual autonomy and did not do enough to protect her right to private life and her personal integrity in the criminal proceedings in the present case.

84. The Court is not persuaded by the Government's argument that the applicant could have obtained appropriate redress for her complaint by lodging an ordinary appeal – and a subsequent appeal on points of law –

under Article 576 of the Code of Criminal Procedure in order to have the civil liability of her alleged assailants recognised.

85. It reiterates that the member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the criminalisation and effective punishment, by measures of a criminal-law nature, of any non-consensual sexual act (see, among other authorities, *M.C. v. Bulgaria*, no. 39272/98, § 166, ECHR 2003-XII, and *Y v. Bulgaria*, no. 41990/18, § 95, 20 February 2020).

86. The Court observes, however, that the applicant, in her capacity as a civil party, could have appealed against the first-instance judgment only in so far as it concerned the civil aspects. In addition, since the public prosecutor did not appeal on points of law against the judgment of the Florence Court of Appeal, the acquittal of the accused became final and therefore could not be challenged owing to the principle of the authority of *res judicata* in criminal matters.

87. It followed that any actions brought by the applicant as a civil party under the domestic legislation would not have had the requisite effectiveness. The Government's objection that the applicant failed to exhaust domestic remedies must, therefore, be dismissed.

3. *The applicant's victim status*

88. The Government submitted that the applicant did not have victim status. First, the applicant could not complain of a breach of the rights of victims of sexual abuse, since the domestic courts had ruled out the existence of any sexual violence against her in a decision which had become final. Furthermore, the Italian authorities were not responsible *vis-à-vis* the applicant for any breach of their positive obligations under the Convention to protect the right to private life. In that connection, the Government referred the Court to their submissions on the merits of the application.

89. The applicant submitted in reply that the fact that the accused had not been convicted, following a trial in which she considered that her rights under Articles 8 and 14 of the Convention had been infringed, could have no bearing on the concept of victim within the meaning of Article 34 of the Convention.

90. The Court notes that the Government's objection alleging the applicant's lack of victim status concerns, in substance, the question whether or not there was a violation of her personal integrity and her right to respect for her private life. It will therefore examine this objection together with the merits of the complaints.

4. Conclusion

91. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

92. The applicant submitted that her rights as a presumed victim had not been adequately protected in the rape proceedings brought against her alleged assailants. The proceedings as a whole had been lengthy and distressing. She had suffered continual, unjustified interferences with her private life on the part of the authorities, whom she argued were supposed to protect her as a female victim of sexual violence and therefore as a vulnerable person. In her view, that amounted to a violation by the respondent State of the positive obligations inherent in Article 8 of the Convention.

93. She argued that the Italian State had failed on a number of counts to ensure an adequate investigation and prosecution. She had been subjected to several hours of questioning in the offices of the police and the public prosecutor, and had then given testimony at the public hearings, during which she had been called upon to provide details of her sex life, family life and personal life, thereby exposing herself to the moral judgment of others. Her alleged assailants had not been subjected to the same treatment.

94. She further contended that the Court of Appeal's decision to acquit the accused had been based on a subjective assessment of her sexual habits and intimate, personal choices, and under no circumstances on objective evidence. She referred to the testimony of S.L., L.B. and S.S., which the judges at first instance had considered irrefutable evidence of her state of physical and mental impairment at the material time, and which had nonetheless been ignored by the Court of Appeal in favour of their statements. In the applicant's view, the judgment of the Court of Appeal had perpetuated a restrictive and outdated conception of sexual violence, in breach of the principles established by the Court in the *M.C. v. Bulgaria* judgment (cited above).

95. The applicant also complained that the public prosecutor's office had rejected her request to appeal on points of law before the Court of Cassation, thus depriving her of her last chance for effective prosecution, and that the parliamentary question addressed to members of the government in 2015 had gone unanswered.

96. In addition, she alleged that she had been questioned on several occasions about aspects of her private life and sex life which were wholly unrelated to the assault. These had included her artistic performances, her

sexual relations – which she had been asked to describe in minute detail –, her choice of a vegan diet, and even the meaning of pseudonyms used on social media to refer to her. In her view, the aim of those questions was not to clarify the events but to demonstrate that her lifestyle and sexual orientation were “abnormal”. The value judgments thus made about her private life had undoubtedly influenced the outcome of the trial, and the judges had chosen to condemn her private life rather than to try her assailants.

97. During the trial, moreover, the president of the court had had to intervene on numerous occasions in order to prevent prurient questions from being asked and to enable her to regain her composure. Such action, she submitted, was evidence more of the distressing nature of her questioning than of the authorities’ benevolence towards her.

98. She also complained that the national authorities had not taken into account her claims of great suffering, had not provided her with psychological support and had not taken appropriate measures to ensure the protection of her personal integrity. The only psychological counselling she had been able to receive had been provided by the Artemisia centre, a support service for female victims of violence, which she had visited on her own initiative after the events.

99. The applicant referred to the Court’s case-law concerning measures of protection for victims of sexual violence, and to the provisions of the Istanbul Convention, which condemned all forms of intimidation and secondary victimisation of victims.

100. She alleged that the judges who had ruled on her case had stigmatised her personal life, family life and sex life in order to provide the basis for their first-instance and especially second-instance decisions. In so doing, they had contravened domestic law, specifically Article 472 § 3 *bis* of the Code of Criminal Procedure, which prohibited any unjustified questions about the private and sex life of victims of sexual violence. Furthermore, her right to the confidentiality of her personal data had been breached in the context of the trial, which had been held in public and had received extensive media coverage. As to the Government’s claim that she could have relied on Article 392 of the Code of Criminal Procedure, she submitted that vulnerable victims had not been granted the option of giving evidence at an *ad hoc* pre-trial evidential hearing (*incidente probatorio*) until the entry into force, after the proceedings in issue, of Legislative Decree no. 212 of 15 December 2015.

101. In general, she complained of the legal and institutional framework implemented in Italy to protect women against gender-based violence, alleging that it was inadequate on several counts and not compliant with obligations under the relevant international instruments.

(b) The Government

102. The Government submitted that the proceedings conducted by the national authorities had been effective and that their length had not been

excessive in view of the complexity of the case. The investigation procedure, which had lasted nine months, had been initiated promptly and had been carried out with great diligence. There had been no unjustifiable delays in the court proceedings either, given that a number of people had testified as defendants or witnesses and a large body of evidence had been examined during the trial.

103. In the Government's view, the very fact that the investigation had ended with a decision to commit the suspects for trial and had been followed by a conviction at first instance was proof of the effectiveness of the proceedings. The subsequent acquittal by the Court of Appeal had been merely the result of a different analysis of the liability of the accused, conducted in the light of all the findings of the investigation and in accordance with the Court of Cassation's case-law on "fragmented assessments" of witness credibility in proceedings concerning sexual violence.

104. In those circumstances, the Government contended that the applicant's complaint about the delays in the proceedings was generic and unspecific. In addition, the applicant had not substantiated her allegations that the manner in which the investigation and trial had been conducted amounted to a violation of her right to private life.

105. First, they disputed all the applicant's references to legal provisions on the protection of victims of gender-based violence and sexual violence, such as the Istanbul Convention and other international instruments, as irrelevant to the present case. The competent judicial authorities had not recognised the applicant as a victim of sexual violence and, moreover, the possibility that force had been used against her had been definitively ruled out at first instance.

106. Second, the Government submitted that the questions put to the applicant during the investigation and at the trial could not be regarded as a disproportionate or unjustified interference with her private life. The investigators had simply responded to her wish to lodge a criminal complaint and had asked the necessary questions in order to reconstruct her version of the alleged events. The authorities had not stepped out of their role as impartial investigators during the interviews of 31 July and 16 September 2008 and had never pried into the applicant's private life, confining themselves to investigating the incident and avoiding any moral judgment.

107. Third, they asserted that the public prosecutor and the president of the court had been respectful during the proceedings at first instance, giving due consideration to the applicant's sensitive state, and had shown constant concern for her well-being, including throughout cross-examination by the defence lawyers, during which the president had intervened on several occasions in order to prevent any prurient questions and to enable the applicant to regain her composure. Unlike in the case of *Y. v. Slovenia* (no. 41107/10, ECHR 2015 (extracts)), cross-examination in the present case

had been conducted by the defence lawyers, and the defendants themselves had never asked any questions directly.

108. In any event, the Government maintained that the applicant could have applied to give evidence at an *ad hoc* evidential hearing (*incidente probatorio*) during the preliminary investigation, in accordance with Article 392 of the Code of Criminal Procedure, thereby avoiding cross-examination during the trial.

109. As to the reasoning in the Court of Appeal's judgment, the Government submitted that it was in compliance with the law and based on an assessment of all the evidence adduced in the proceedings. All aspects relating to the applicant's private life, such as her previous relations with L.L., her bisexuality and the description of the underwear she had been wearing at the material time, had been cited by the Court of Appeal for the sole purpose of providing the most exhaustive description possible of the sequence of events in the evening of 25 July 2008 and, at the same time, of highlighting any inconsistencies in the applicant's version of the facts, thus enabling an assessment of her credibility. Moreover, in its judgment acquitting the defendants on the main charge, namely rape committed with the use of force, the trial court had already noted those inconsistencies. By not appealing against that part of the judgment, the applicant had thus waived her right to challenge its findings as to the reliability of her version of events and had implicitly accepted the defendants' presentation of the facts.

110. The Government submitted that the Court of Appeal had found that the applicant lacked credibility on the basis of several objective factors, such as the results of the forensic tests carried out in the car and on the clothing of the various protagonists, trace-DNA detection, the gynaecologist's report, the examination of phone records, and the analysis of which cell towers had been pinged. It had done so after ruling out the possibility of a "fragmented assessment" of her statements in the light of the relevant case-law. In those circumstances, the references to the applicant's complex, uninhibited and creative personality had been intended to contextualise the prosecution's arguments rigorously, without making any moral judgment, and did not amount to an unjustified interference with her private life.

111. They averred that, given the context of the case, the public prosecutor had been right not to appeal on points of law against the Court of Appeal's judgment, because such action would have had no legal basis and no prospect of success.

112. Furthermore, the Government rejected any allegation that the judicial authorities had subjected the applicant to "secondary victimisation" during the trial. It could be seen merely from reading the record of the hearings that the public prosecutor and the president of the court had acted with sensitivity throughout her questioning and that she had not had to suffer any unnecessary humiliation. In that connection, it was significant that the

applicant had been unable to substantiate her allegations of loss of quality of life and/or bodily harm, before either the trial court or the Court of Appeal.

113. The Government further stated that the judicial authorities had been called upon to try individuals charged with a serious offence and had therefore been required to conduct a rigorous assessment of all factors relating to the applicant's credibility and to her alleged state of physical and mental impairment at the relevant time. That rigour had been especially necessary for the Court of Appeal because the trial court, in its final acquittal of the defendants on the charge of rape committed with the use of force – and D.S. on all charges –, had emphasised the inconsistencies in the applicant's version of events and had found that they cast doubt on her credibility.

114. In that regard, the Government referred to the obligation to protect the rights of the accused under Article 6 of the Convention. Under domestic law, the personality of a witness or of a victim of sexual violence could be evaluated where such an approach was needed to assess his or her credibility and version of events.

115. Lastly, they pointed out that the applicant could have avoided public proceedings had she requested that the trial court hear the matter in private, as provided for in Article 472 § 3 *bis* of the Code of Criminal Procedure. They also maintained that the applicant had received appropriate psychological counselling throughout the proceedings.

116. In conclusion, the Government submitted that no criticism could be levelled at the authorities with regard to the conduct of the proceedings as a whole or to compliance with their positive obligations under Article 8 of the Convention.

2. *The Court's assessment*

117. The Court observes that Article 8, like Article 3, imposes a positive obligation on States to enact criminal-law provisions criminalising and effectively punishing any non-consensual sexual act, including in the absence of physical resistance by the victim, and to apply those provisions in practice through effective investigation and prosecution (see *M.C. v. Bulgaria*, cited above, §§ 153 and 166).

118. The Court also reiterates that, in matters as serious as rape, the States' positive obligation under Article 8 to safeguard the individual's physical integrity requires effective criminal-law provisions and, in consequence, may also extend to questions relating to the effectiveness of the criminal investigation conducted for the purpose of implementing those provisions (see *M.N. v. Bulgaria*, no. 3832/06, § 40, 27 November 2012). The Court further observes that the obligation to carry out an effective investigation is not one of result, but one of means. While this requirement does not impose an obligation for all prosecutions to result in conviction, or indeed in a particular sentence, the national courts must not, under any circumstances, be prepared to allow physical or psychological suffering to go

unpunished, for the sake of maintaining public confidence in their adherence to the rule of law and to prevent any appearance of collusion in or tolerance of unlawful acts. A requirement of promptness and reasonable expedition is also implicit in this context. Regardless of the final outcome of the proceedings, the protection machinery provided for in domestic law must operate in practice such as to ensure the conclusion, within a reasonable time, of the examination on the merits of specific cases submitted to the authorities (see, among other authorities, *M.N. v. Bulgaria*, cited above, §§ 46-49, and *N.Ç. v. Turkey*, no. 40591/11, § 96, 9 February 2021).

119. In addition, the Court has previously stated that the rights of victims of crime in the context of criminal proceedings come generally within the ambit of Article 8 of the Convention. In this connection, the Court reiterates that the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities. However, this provision does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there are positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see *X and Y v. the Netherlands*, 26 March 1985, § 23, Series A no. 91). It follows that the Contracting States must organise criminal proceedings in such a way as not to unjustifiably imperil the life, liberty or security of witnesses, and in particular those of victims called upon to testify. The interests of the defence are therefore to be balanced against those of witnesses or victims called upon to testify (see *Doorson v. the Netherlands*, 26 March 1996, § 70, *Reports of Judgments and Decisions* 1996-II). In addition, criminal proceedings concerning sexual offences are often perceived as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant and in cases involving minors (see *S.N. v. Sweden*, no. 34209/96, § 47, ECHR 2002-V, and *Aigner v. Austria*, no. 28328/03, § 35, 10 May 2012). Therefore, in such proceedings special measures of protection may be taken for the purpose of protecting the victims (see *Y. v. Slovenia*, cited above, §§ 103-04). The applicable provisions imply that the victim should be treated with suitable care throughout the criminal proceedings, so as to protect him or her against secondary victimisation (see *Y. v. Slovenia*, cited above, §§ 97 and 101; *A and B v. Croatia*, no. 7144/15, § 121, 20 June 2019; and *N.Ç. v. Turkey*, cited above, § 95).

120. The Court observes that all these positive obligations also arise under other international instruments (see paragraphs 63, 64, 65 and 69 above). In particular, the Court would point out that the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence requires the Contracting Parties to take the necessary legislative or other measures to protect the rights and interests of victims. Such measures include protecting them from intimidation and repeat victimisation; allowing

them to be heard and to have their views, needs and concerns presented and considered; and enabling them, if permitted by applicable domestic law, to testify without the presence of the alleged perpetrator. In addition, the European Union Directive of 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime, provides that victims of gender-based violence benefit from special protection measures owing to their particular vulnerability to secondary victimisation, to intimidation and to retaliation.

121. Turning to the circumstances of the present case, the Court first observes that Italian law imposes criminal sanctions on rape, whether it be committed through the use of force, threats, abuse of authority, exploitation of the victim's state of impairment or deceit. Furthermore, the Criminal Code provides for the separate offence of group sexual violence, which is more severely punished (see paragraphs 52-54 above). The Italian State cannot therefore be criticised for not having a legislative framework to protect the rights of victims of sexual violence.

122. The Court's task is thus to determine whether the applicant was afforded effective protection of her rights as a presumed victim and whether the machinery provided for in Italian criminal law had, in the present case, such significant flaws as to amount to a breach of the respondent State's positive obligations. The issue before the Court is limited to the above. The Court is not concerned with allegations of errors or isolated omissions in the investigation; it cannot replace the domestic authorities in the assessment of the facts of the case; nor can it decide on the alleged perpetrators' criminal liability (see *M.C. v. Bulgaria*, cited above, § 168).

123. With regard to the effectiveness of the investigation, the Court notes at the outset that the authorities – in response to the report by the Careggi anti-violence centre, to which the applicant had turned – initiated an investigation of their own motion four days after the events. The applicant was interviewed without delay and the seven men implicated in her statements were immediately remanded in custody, including D.S., whose involvement was subsequently ruled out. After an investigation stage lasting nine months, the suspects were committed for trial. In particular, the investigators organised a procedure to identify the suspects and performed several forensic assessments, in particular to find biological traces in the car and on the applicant's clothing and to reconstruct her movements and those of the suspects by means, *inter alia*, of an examination of their phone records and of the cell towers pinged by their phones (see paragraphs 14 and 15 above). Then, during the hearings, evidence was heard from numerous witnesses called by the parties, as well as from experts, the seven defendants and the applicant herself. In all, the criminal proceedings lasted approximately seven years, spanning two levels of jurisdiction.

124. Regard being had to the proceedings as a whole, the Court cannot consider that the authorities were passive or failed to show the requisite

diligence and promptness in assessing all the circumstances of the case (contrast, among other authorities, *M.N. v. Bulgaria*, cited above, § 49). In this connection, the Court reiterates that compliance with the procedural obligation must be assessed on the basis of several essential parameters, such as the fact that an investigation was opened as soon as the matter was brought to the attention of the authorities, and whether that investigation was capable of providing a thorough, objective and impartial analysis of all relevant elements, of leading to the establishment of the facts, and of identifying and – if appropriate – punishing those responsible. These elements are interrelated and each of them, taken separately, does not amount to an end in itself. They are criteria which, taken jointly, enable the degree of effectiveness of the investigation to be assessed (see *S.M. v. Croatia* [GC], no. 60561/14, §§ 312-20, 25 June 2020, and *N.Ç. v. Turkey*, cited above, § 97).

125. Moreover, the Court observes that the applicant did not allege that the conduct of the investigation had been characterised by shortcomings and manifest delays or that the authorities had failed to carry out measures of judicial investigation. What she submitted was that the manner in which the investigation and the trial had been conducted had been traumatising for her and that the authorities' attitude towards her had violated her personal integrity. In particular, she complained about the conditions in which she had been questioned throughout the criminal proceedings and challenged the arguments on which the courts had based their decisions in the present case.

(a) The applicant's questioning

126. With regard to the various occasions on which the applicant was questioned during the proceedings, the Court observes at the outset that the judicial authorities were confronted with two contradictory versions of the events and that the direct evidence available to them consisted essentially in the applicant's witness statements. In addition, the gynaecologist's report and the findings of all the many forensic assessments conducted by the investigators had brought to light several contradictions in the account of events given by the applicant as principal witness (see paragraphs 31-32 above).

127. In these circumstances, the Court would consider that the interests of a fair trial required the defence to be given the opportunity to cross-examine the applicant as the principal prosecution witness, since she was not a minor and was not in a situation of particular vulnerability which would have called for additional protection measures (see, *mutatis mutandis*, *B. v. Romania*, no. 42390/07, §§ 50 and 57, 10 January 2012). In this connection, it reiterates that the presence of two irreconcilable versions of the facts obviously calls for a context-sensitive assessment of the credibility of the statements made by the various parties and for verification of all the surrounding circumstances (see, *mutatis mutandis*, *M.C. v. Bulgaria*, cited above, § 177).

128. The Court must nevertheless establish whether the domestic authorities succeeded in striking a fair balance between the competing interests of the defence, especially the right of the accused set out in Article 6 § 3 to call and examine witnesses, and the rights of the presumed victim under Article 8. The manner in which a presumed victim of sexual offences is questioned has to enable a fair balance to be struck between his or her personal integrity and dignity, on the one hand, and the defence rights, on the other. While the accused have to be allowed to defend themselves by challenging the credibility of the presumed victim and by revealing possible inconsistencies in his or her statement, cross-examination should not be used as a means of intimidating or humiliating him or her (see *Y. v. Slovenia*, cited above, § 108).

129. The Court first observes that at no stage, during either the preliminary investigation or the trial, was there a direct confrontation between the applicant and her alleged assailants. As regards the applicant's questioning during the preliminary investigation, the Court notes that she was interviewed by the police on two occasions, namely on 30 July 2008 in Florence, when the police took her initial statements and registered her complaint, and on 31 July 2008 in Ravenna – where the applicant was on holiday –, when the police had her identify the suspects by means of photographs. In addition, on 16 September 2008 the applicant was summoned by the public prosecutor's office, where she was questioned and additional investigative measures were subsequently ordered.

130. Having read the interview reports, the Court finds no evidence of a disrespectful or intimidating attitude on the part of the investigating authorities, or of actions to discourage the applicant or to steer the investigation in a particular direction. It considers that the questions put to the applicant were relevant and were aimed at reconstructing the events while taking account of her arguments and views and allowing for the preparation of a thorough investigation file for the purpose of continuing the judicial proceedings. Although, given the circumstances, it was undoubtedly a difficult experience for the applicant, it cannot be considered that the manner in which the interviews were conducted during the investigation exposed her to unjustified trauma or a disproportionate interference with her intimate and private life.

131. With regard to the trial, the applicant was questioned at the hearings of 8 February and 13 May 2011. The Court notes in this connection that she could have relied on Article 392 of the Code of Criminal Procedure as in force at the material time and applied to give evidence at an *ad hoc* evidential hearing held in camera (*incidente probatorio*) (see paragraph 55 above). On the other hand, since she was not a minor and did not request that the trial be held in private under Article 472 of the Code of Criminal Procedure, the hearings took place in public. Nonetheless, the president of the court decided to prohibit the journalists present in the courtroom from filming the

proceedings, for the particular purpose of protecting the applicant's privacy. In addition, he intervened on several occasions during her cross-examination, interrupting the defence lawyers when they asked redundant or personal questions or when they raised matters that were unrelated to the facts. He also ordered short recesses so that she could regain her composure.

132. The Court has no doubt that the proceedings as a whole were a particularly distressing experience for the applicant, especially since she was required to repeat her testimony on numerous occasions – over a period of more than two years, moreover – in order to answer the questions put, successively, by the investigators, the public prosecutor's office and the eight defence lawyers. Furthermore, those defence lawyers did not hesitate, in seeking to undermine the applicant's credibility, to put personal questions to her concerning her family life, her sexual orientation and her intimate choices. These questions were sometimes unrelated to the facts, which is firmly contrary not only to the principles of international law with regard to the protection of the rights of victims of sexual violence, but also to Italian criminal law (see paragraph 57 above).

133. Nonetheless, given the attitude adopted by the public prosecutor and the president of the court, along with the measures taken by the latter to protect the applicant's privacy with a view to preventing the defence lawyers from disparaging or unnecessarily upsetting her during cross-examination, the Court cannot attribute responsibility to the public authorities in charge of the proceedings for the applicant's particularly distressing experience, or consider that they failed to ensure that respect for her personal integrity was adequately protected at the trial (contrast *Y. v. Slovenia*, cited above, § 109).

(b) Content of the judicial decisions

134. The Court must now ascertain whether the content of the judicial decisions which were made as part of the proceedings concerning the applicant and the reasoning given for the acquittal of the accused undermined her right to respect for her private life and to her sexual freedom and whether they exposed her to secondary victimisation.

135. With regard to the reasoning of judicial decisions, the Court reiterates once again that its role is not to rule on allegations of isolated errors committed by the authorities, or to decide on the alleged perpetrators' criminal liability. It will not, therefore, substitute its own assessment of the facts of the case for that of the domestic authorities. The issue which does, however, have to be determined is whether or not the domestic courts' reasoning and the arguments they used led to an interference with the applicant's right to respect for her private life and personal integrity, and whether there was a resulting violation of the positive obligations inherent in Article 8 of the Convention (see, *mutatis mutandis*, *Sanchez Cardenas v. Norway*, no. 12148/03, §§ 33-39, 4 October 2007, and *Carvalho Pinto de Sousa Morais v. Portugal*, no. 17484/15, §§ 33-36, 25 July 2017).

136. The Court has noted several passages in the judgment of the Florence Court of Appeal which refer to the applicant's personal and intimate life and which infringe her rights under Article 8. In particular, it considers the Court of Appeal's references to the red underwear "displayed" by the applicant during the evening to be unjustified, as are the comments on her bisexuality, romantic relationships and casual sexual relations prior to the events in question (see paragraphs 41 and 42 above). Equally, the Court finds inappropriate the considerations concerning the applicant's "ambivalent attitude towards sex", which the Court of Appeal inferred from such details as her artistic choices. Among those questionable choices, the Court of Appeal thus cited her agreement to take part in L.L.'s short film despite its violent and explicitly sexual nature (see paragraph 46 above). However, it did not – and rightly so – make any comment on the fact that L.L. had written and directed that short film, or find that it might be indicative of his own attitude to sex. Furthermore, the Court considers that the assessment of the applicant's decision to report the events, which the Court of Appeal found to have resulted from a wish to "stigmatise" and to repudiate a "questionable moment of fragility and weakness", is regrettable and irrelevant, as is the reference to the applicant's "non-linear life" (*ibid.*).

137. In contrast to the Government, the Court considers that the Court of Appeal's above-mentioned arguments and considerations were neither relevant in assessing the applicant's credibility – a matter which could have been examined in the light of the numerous objective findings of the procedure – nor decisive in resolving the case (see, *mutatis mutandis*, *Sanchez Cardenas*, cited above, § 37).

138. The Court acknowledges that in the present case the issue of the applicant's credibility was particularly crucial, and it is prepared to accept that it may have been justified to refer to her previous relationships with one or other of the accused or to aspects of her conduct during the evening in question. However, it does not see how the applicant's family situation, her romantic relationships, her sexual orientation or her clothing choices, or the subject matter of her artistic and cultural activities, could be relevant for assessing her credibility and the criminal liability of the accused. Thus, it cannot be considered that such interference with the applicant's private life and image was justified by the need to ensure that they could enjoy their defence rights.

139. The Court considers that the positive obligations to protect presumed victims of gender-based violence also impose a duty to protect their image, dignity and private life, including through the non-disclosure of personal data and information that are unrelated to the facts. This duty is, moreover, inherent in the judicial function and arises from national law (see paragraphs 57 and 62 above) as well as from various international instruments (see paragraphs 65, 68 and 69 above). Accordingly, the right of judges to express themselves freely in decisions, which is a manifestation of

the judiciary's discretionary powers and of the principle of judicial independence, is limited by the obligation to protect the image and private life of individuals from any unjustified interference.

140. The Court further observes that the "Concluding Observations on the Seventh Periodic Report of Italy" by the United Nations Committee on the Elimination of Discrimination against Women and the GREVIO report note that stereotypes regarding the role of women persist and that there is resistance in Italian society to the cause of gender equality. Moreover, both that UN Committee and GREVIO have pointed out the low rate of criminal prosecutions and convictions in Italy, which is simultaneously the cause of victims' lack of confidence in the criminal justice system and the reason for the low rates of reporting of such offences in that country (see paragraphs 64-66 above). The Court considers that the language and arguments used by the Court of Appeal convey prejudices existing in Italian society regarding the role of women and are likely to be an obstacle to the effective protection of the rights of victims of gender-based violence, in spite of a satisfactory legislative framework (see, *mutatis mutandis*, *Carvalho Pinto de Sousa Morais*, cited above, § 54).

141. The Court is convinced that prosecution and criminal sanctions play a crucial role in the institutional response to gender-based violence and in the fight against gender inequality. It is therefore essential that judicial authorities do not reproduce sexist stereotypes in court decisions, do not play down gender-based violence and do not expose women to secondary victimisation by making guilt-inducing and judgmental comments that are capable of undermining victims' trust in the justice system.

142. In consequence, while acknowledging that the national authorities sought to ensure in the present case that the investigation and oral proceedings were conducted in a manner compatible with their positive obligations under Article 8 of the Convention, the Court is of the view that the applicant's rights and interests under Article 8 were not adequately protected, given the content of the judgment delivered by the Florence Court of Appeal. It follows that the national authorities did not protect the applicant from secondary victimisation throughout the proceedings, in which the wording of that judgment played a very important role, especially in view of its public character.

143. Accordingly, the Court dismisses the Government's objection as to the applicant's lack of victim status and finds that in the present case there has been a violation of the positive obligations under Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

144. The applicant also complained of discrimination on grounds of sex, alleging that the acquittal of her assailants and the negative attitude of the national authorities during the criminal proceedings could be attributed to

sexist bias. She relied on Article 14 of the Convention in conjunction with Article 8.

Article 14 reads:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

145. The Government, pointing in particular to the competent authorities’ prompt and thorough response to the applicant’s complaint of rape, submitted that she had not suffered any discriminatory treatment.

146. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

147. In view of the conclusion it has reached in respect of the applicant’s complaint under Article 8 and to the reasoning underlying that finding (see paragraphs 135-143 above), the Court considers that it is not necessary to examine whether there has also been a violation of Article 14 in the present case (see, among other authorities, *M.C. v. Bulgaria*, cited above).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

148. 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

149. The applicant claimed 80,000 euros (EUR) in respect of non-pecuniary damage and a further EUR 30,000 in respect of pecuniary damage. In particular, she sought the reimbursement of the medical expenses and transport costs incurred for the treatment of her psychological trauma that had allegedly stemmed from the events in question; the tuition fees she had had to cover when she had allegedly stopped receiving a scholarship on account of her psychological issues; and the removal costs she had paid to distance herself from her assailants.

150. The Government contested the applicant’s claims.

151. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. It does, however, consider that the applicant must have suffered distress and psychological trauma owing – at least partly – to the authorities’ shortcomings in implementing measures to protect her rights as a presumed victim of sexual violence. Making its assessment on an equitable basis, it awards her EUR 12,000 in respect of non-pecuniary damage.

B. Costs and expenses

152. The applicant also claimed EUR 25,600 for the costs and expenses incurred before the Court.

153. The Government submitted that the applicant had not proved that she had actually incurred the costs in question.

154. 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 to the above criteria, the Court considers it reasonable to award the sum of EUR 1,600 to the applicant for the proceedings before it.

C. Default interest

155. The Court considers it appropriate that the default interest 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

1. *Joins to the merits*, unanimously, the Government's preliminary objection as to the applicant's victim status, and *dismisses* it;
2. *Declares*, unanimously, the application admissible;
3. *Holds*, by six votes to one, that there has been a violation of Article 8 of the Convention;
4. *Holds*, unanimously, that there is no need to examine the complaint under Article 14 of the Convention;
5. *Holds*, by six votes to one,
 - (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:
 - (i) EUR 12,000 (twelve thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 1,600 (one thousand six 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;

6. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 27 May 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Liv Tigerstedt
Deputy Registrar

Ksenija Turković
President

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

K.T.U.
L.T.

DISSENTING OPINION OF JUDGE WOJTYCZEK

(Translation)

1. I am unable to agree with the majority's view that there has been a violation of Article 8 of the Convention in the present case.

2. The applicant particularly complained about the content of the decisions made in the case by the national courts. The majority formulate this issue as follows in paragraph 134 of the judgment:

“The Court must now ascertain whether the content of the judicial decisions which were made as part of the applicant's trial and the reasoning given for the acquittal of the accused undermined her right to respect for her private life and to her sexual freedom and whether they exposed her to secondary victimisation.”

It can be seen from the present judgment's reasoning (see paragraphs 135-141) that the content of the judicial decisions has been perceived – and rightly so – as an interference with the private life of the applicant as protected under Article 8 of the Convention. Logically, the violation established by the majority should have been a violation of the State's negative obligations under Article 8 of the Convention. However, in paragraph 143 the majority conclude “that in the present case there has been a *violation of the positive obligations* under Article 8 of the Convention” (emphasis added). It is difficult to subscribe to such an approach.

3. The majority express the following view in paragraph 142:

“In consequence, while acknowledging that the national authorities sought to ensure in the present case that the investigation and oral proceedings were conducted in a manner compatible with their positive obligations under Article 8 of the Convention, the Court is of the view that the applicant's rights and interests under Article 8 were not adequately protected, given the content of the judgment delivered by the Florence Court of Appeal. It follows that the national authorities did not protect the applicant from secondary victimisation throughout the proceedings, in which the wording of that judgment played a very important role, especially in view of its public character.”

I would note that the second sentence of this paragraph, which affirms that the national authorities did not protect the applicant from secondary victimisation *throughout the proceedings*, is in logical contradiction with the first sentence, which declares that the national authorities sought in the present case to ensure that the investigation *and oral proceedings were conducted in a manner compatible with their positive obligations* under Article 8 of the Convention.

4. The present case, by its very nature, concerns the most private sphere of the life of the applicant and the accused. The national courts had to establish the extremely complex factual circumstances, which by definition fell within the realm of private life, and to assess the issue of the alleged victim's consent. They also had to, first and foremost, define the “boundary” of the relevant circumstances. Exercising its jurisdiction in the matter, the

Court of Appeal of Florence considered that in order to examine the criminal case it was necessary to establish some factual elements pertaining to the wider context, covering the events that preceded or followed the acts at issue, as included in the charges. Additionally, the Court of Appeal was obliged – *volens nolens* – to assess the facts of the matter in their specific cultural context, that of contemporary Italian society.

It should be noted that the Court of Appeal of Florence, in the reasoning of its judgment, began the examination of the legal questions raised in the appeal by the following explanation:

“The case should be removed above all from its context, which diverts one’s attention, contaminated as it is by its emotional and newsworthy impact which obviously coloured the facts at the time, for in the present case it is appropriate to set aside moralising judgments or ethical prejudices and to solely focus one’s attention – in accordance with the strict approach of the decision under appeal – on the offence in question and on the existence of its constitutive elements, subjective and objective.”

The national courts’ approach does not appear to be devoid of arbitrariness. The offending remarks should be read in the context of all the arguments on which the acquittal’s reasoning is based. The approach adopted by the majority may have the effect of undermining the rights of the defence, which may well have a legitimate interest, with a view to a favourable court judgment, in establishing in the proceedings some very sensitive factual elements relating to private life, and in having them confirmed in the reasoning of the judgment.

5. The majority level the following accusation at the Italian courts (see paragraph 140 of the judgment): “the language and arguments used by the Court of Appeal convey prejudices existing in Italian society regarding the role of women”. However, this accusation is not supported by any argument. In particular, it is not explained which prejudices regarding the role of women have been conveyed by the Court of Appeal. Moreover, I see that in the present case the Court of Appeal of Florence adjudicated in a formation of three judges which satisfied the criterion of gender balance (two women, including the reporting judge, and a man).

6. The majority criticise in paragraph 141 “guilt-inducing and judgmental comments that are capable of undermining victims’ trust in the justice system”. This accusation gives rise to two observations. Firstly, the impugned statements (cited in paragraph 136, but taken out of context) are factual propositions and not value judgments. The majority do not explain the reasons why these factual propositions are labelled as “guilt-inducing and judgmental comments”. Secondly, the expressions used by the Court are in themselves “guilt-inducing and judgmental”, addressed this time to the Italian courts. Furthermore, they do little to foster trust in the justice system.

7. The majority express in paragraph 141, in their *obiter dicta*, the following view (emphasis added):

“The Court is convinced that prosecution and criminal sanctions play a crucial role in the institutional response to gender-based violence and in *the fight against gender inequality*.”

In a liberal democracy, criminal law should be the *ultima ratio Rei Publicae* (see my joint dissenting opinion annexed to the judgment in *L.R. v. North Macedonia*, no. 38067/15, 23 January 2020). While criminal law is a key instrument in the fight against violence, its role in the fight against inequality should not be overestimated. In the present case, the Court continues to express its choice in favour of a culture of punishment as the main instrument in the *fight* against various violations of human rights (compare also paragraph 20 of the partly dissenting, partly concurring opinion of Judge Koskelo, joined by Judges Wojtyczek and Sabato, annexed to the judgment in *Penati v. Italy*, no. 44166/15, 11 May 2021). The approach adopted here amplifies “the illiberal wind blowing in Strasbourg”, to quote Judge Pinto de Albuquerque’s eloquent reproach in his separate opinion in *Chernega and Others v. Ukraine* (no. 74768/10, 18 June 2019).