



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

THIRD SECTION

CASE OF R.B. v. ESTONIA

(Application no. 22597/16)

JUDGMENT

Art 3 (procedural) and Art 8 • Positive obligations • Effective investigation • Failure to advise 4-year old child of her duty to tell the truth and her right not to testify against her father, leading to exclusion of her testimony and father's acquittal of sexual abuse • Significant flaws in procedural response to applicant's allegations, undermining effective prosecution of child sexual abuse • Strict application of procedural rules making no distinction between children and adults • International standards requiring safeguarding of child's testimony both during the pre-trial investigation and trial and to take due account of particular vulnerability and needs of a young child giving evidence

STRASBOURG

22 June 2021

FINAL

22/09/2021

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

In the case of R.B. v. Estonia,

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

Paul Lemmens, *President*,

Georgios A. Serghides,

Dmitry Dedov,

María Elósegui,

Darian Pavli,

Anja Seibert-Fohr,

Peeter Roosma, *judges*,

and Milan Blaško, *Section Registrar*,

Having regard to:

the application (no. 22597/16) against the Republic of Estonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Estonian national, Ms R.B. (“the applicant”), on 19 April 2016;

the decision to give notice to the Estonian Government (“the Government”) of the complaint concerning the lack of an effective investigation into the applicant’s alleged sexual abuse and to declare inadmissible the remainder of the application;

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

the parties’ observations;

Having deliberated in private on 16 March 2021 and on 18 May 2021,

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

INTRODUCTION

1. The case concerns the applicant’s complaint under Articles 3 and 8 of the Convention that the authorities failed to conduct an effective criminal investigation into her allegations of sexual abuse by her father, who was acquitted following a breach of the procedural rules in the collection of evidence.

THE FACTS

2. The applicant was born in 2007. She was represented by Mr H. Kuningas, a lawyer practising in T.

3. The Government were represented by their Agent, Mrs M. Kuurberg, Agent of the Government to the European Court of Human Rights.

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

5. The applicant was born in August 2007. In September 2010 her parents separated. The applicant continued to live with her mother and met

with her father in accordance with an agreement between the parents. As from February 2012 meetings with the child took place pursuant to arrangements fixed by a court (see civil proceedings below).

6. According to statements given by the applicant's mother in the subsequent criminal proceedings, she had become suspicious of the father's behaviour already in 2009 when her daughter had complained of pain in her bottom. In 2011 she had started noticing changes in her daughter's behaviour when she returned from visits with her father. When questioned, her daughter had revealed that she had been sleeping naked with her father, that she had massaged him all over the body, including his genitals, and that he had inserted his fingers in her anus and vagina, causing pain.

I. CRIMINAL PROCEEDINGS

7. On 19 March 2012 the applicant, who at the time was about four and a half years old, made an oral report of a crime to the police. Her statements were video-recorded and transcribed by a female senior investigator from the child protection service in the presence of a psychologist and the applicant's mother. During the interview, the applicant recounted how she and her father had massaged each other, including her stroking his sexual organ, and demonstrated her father's activities on a doll.

8. On the basis of that report, criminal proceedings were instituted against the applicant's father. Later the same day, 19 March 2012, the applicant was questioned as a victim of crime by an investigator in the presence of the same psychologist and the applicant's mother. The interview was also video-recorded.

9. On 3 April 2012 the investigator commissioned a comprehensive psychiatric and psychological assessment of the applicant, which was carried out from 9 to 26 April 2012. According to the expert report of 3 May 2012, the applicant was suffering from separation anxiety, but her psychological development was appropriate to her age and she had no increased tendency to fantasise. However, she was too young to attend court hearings and give statements there.

10. On 16 May 2012 a further video-recorded interview of the applicant took place in the presence of her mother.

11. On 20 June 2012 the applicant's father was questioned as the suspect.

12. On 29 June 2012 an expert conducted a physical examination of the applicant and found no bodily injuries on her person, including in the rectal or genital area.

13. On 27 August 2012 the video-recordings of the applicant's interview were presented to the suspect in the presence of his counsel. It was explained to them that they could submit any questions to the applicant in writing.

14. On 3 September 2012 a second interview with the suspect took place.

15. On 18 February 2013, following a psychiatric assessment of the suspect, the experts found no reason to establish any sexual disorder and concluded that he was mentally healthy.

16. On 27 June 2013 the prosecutor drew up a bill of indictment and submitted it to the County Court. According to the charges, in the period from 2009 to March 2012 the applicant's father had repeatedly engaged in sexual intercourse with his daughter, taking advantage of the child's inability to comprehend, by inserting his finger into the child's vagina and anus. In addition, by ordering his daughter to stroke his sexual organ, he had engaged in a sexual act other than intercourse with a child. Those acts were qualified under the provisions of Articles 141 (rape) and 142 (involvement of a minor in satisfaction of sexual desire) of the Criminal Code, as applicable at the time.

17. The County Court held a preliminary hearing in October 2013. Further *in camera* hearings took place in February, April and October 2014. The victim's statements given during the investigation were disclosed and the court heard several witnesses, including those for the defence, as well as the experts who had prepared written reports.

18. The accused pleaded not guilty. He argued, *inter alia*, that his daughter's testimony was unreliable and contradictory. Her answers during the police interviews had been influenced by the presence of her mother, who had intervened and enticed the child with different promises. The interviews lasting over an hour had been too long for a small child, resulting in tiredness and a desire to please her interrogators, who had used leading questions. The criminal proceedings were a tool used by her mother to limit his access to the child.

19. By a judgment of 4 November 2014, the County Court convicted the applicant's father as charged and sentenced him to imprisonment for a term of six years.

It found that the applicant's testimony had been confirmed by the statements of her mother, witness statements and expert opinions. Having reviewed the video-recordings of the applicant's questioning, the court found no undue influence or pressure on the part of the applicant's mother or the investigator. It considered that the applicant had recounted actual events and found that there was no indication that she had been manipulated or that she was prone to fantasise. The fact that no injuries had been found on her body did not exonerate the accused, as her physical examination had taken place long after the events, and the touching of the accused's sexual organs would not have left any traces. Nor was it important that the accused had not been diagnosed with any sexual disorder.

20. On 12 December 2014 the accused lodged an appeal against the judgment of the County Court. He submitted, *inter alia*, that his conviction

was essentially based on the unreliable testimony of a four and a half year-old child, and reiterated the arguments he had made before the first-instance court concerning the conducting of interviews (see paragraph 18 above).

21. On 18 March 2015 the Court of Appeal, composed of three judges, dismissed the appeal and upheld the judgment of the County Court. While it accepted that the credibility of the applicant's testimony was central to the case, upon reviewing the relevant video-recordings it found no indication of any undue influence on the child victim. It pointed out that the use of leading questions was authorised by the Code of Criminal Procedure in a situation where the age of a witness made it difficult for him or her to understand questions that were not leading. It also found that the presence of the applicant's mother during the interviews had been in compliance with the criminal procedure. It referred to Article 20 of EU Directive 2011/92/EU, which required a Member State to ensure effective protection of the rights of children in criminal proceedings, including the possibility for a child victim to be accompanied by his or her representative during the provision of testimony.

22. One judge of the Court of Appeal dissented, finding issues with both the reliability of the victim's testimony and the way it had been taken. In particular, he considered that the testimony of the child victim had been obtained in breach of two essential requirements of criminal procedure. First, the child had not been informed of her obligation to tell the truth, so that she could understand the consequences of her testimony for her father. Secondly, the child had not been advised of her right not to give evidence against her next of kin. Those two requirements were clearly set out in law and applied also to minors, who should be informed thereof in a manner appropriate to their age. In practice, this had been done in other criminal cases.

23. On 17 April 2015 the accused appealed, emphasising the inconsistency and unreliability of the evidence and arguing that there had been several violations of criminal procedure, including those highlighted by the dissenting judge of the Court of Appeal.

24. On 23 October 2015 the Supreme Court quashed the judgments of the County Court and the Court of Appeal and acquitted the applicant's father. It held that as the accused's conviction was based to a decisive extent on the testimony of the child victim, it was important to follow rigorously the rules concerning the victim's questioning. The lower courts, however, had relied on the statements given by the victim in the pre-trial proceedings, despite the fact that she had not been made aware of the obligation to speak the truth (Article 66 § 3 of the Code of Criminal Procedure) and had not been advised that she could refuse to give testimony against her father (Article 71 § 1 (1) of the same Code). It stressed that while the age of a witness should be taken into consideration when questioning him or her, the obligation to explain the need to tell the truth could not be disregarded, as

this affected the weight of the credibility of the testimony. It further stated that there was no exception for minors from the general rule that one could refuse to give testimony for personal reasons. Should there be a need to depart from the general rules for questioning witnesses because of their age or mental state, it would be for the legislature to determine the situations justifying such departure. Statements obtained from the victim without informing her of her rights and obligations could not be considered lawful evidence, as they had been obtained by materially breaching the procedural law. The failure to provide the information could not be remedied by remitting the case to the lower-instance courts, as the victim had been heard during the pre-trial proceedings and not in court. The exclusion of the decisive evidence inevitably meant that the accused had to be acquitted of the charges against him.

25. The Supreme Court also dealt with other procedural issues, pointing out further deficiencies in the lower-instance courts' judgments. Firstly, the first-instance court and Court of Appeal had, contrary to the domestic procedural law, treated the statements given by a number of witnesses who had not been direct witnesses to any of the alleged offences as independent evidence, rather than hearsay. Secondly, the Court of Appeal had referred in its reasoning to the explanations given by the applicant during preparation of an expert opinion, despite the fact that those could not be used as evidence. Thirdly, the lower-instance courts had erroneously equated the oral report of a criminal offence as recorded by the police with the report of the victim's testimony. This could be done only if the victim had been heard at the same time as the drawing up of the offence report and had then been duly informed of his or her rights and obligations. As this had not been done, relying on such a report as evidence amounted to a violation of procedural law.

26. The Supreme Court found no issue with the presence of the applicant's mother during the interviews. Although that situation was not specifically regulated in domestic law, the right for a child to be accompanied by his or her legal representative derived from Article 20 of EU Directive 2011/92/EU. Furthermore, the use of leading questions was clearly provided for by law.

27. The Supreme Court further noted that although the accused's counsel had no right to be present during the interviews with the victim, he had had the opportunity, which he had not used, to put questions to the victim at both the pre-trial and court proceedings.

28. Lastly, as regards the issue of credibility of the victim's testimony, the Supreme Court found that the lower courts had failed to deal with the course of events prior to the reporting of an offence, including the possible effect of time and psychological consultations on the victim's memory. Consideration should have been given to the terminology used by the victim

and to other circumstances capable of indicating that her statements might have been influenced by other people.

II. CIVIL PROCEEDINGS

29. On 20 February 2012 the County Court fixed the arrangement for the applicant's contact with her parents. On 5 April 2012 the arrangement was amended so as to limit the father's access in view of the criminal proceedings instituted against him on 19 March 2012.

30. On 26 June 2013 the court barred the applicant's father's access to her completely.

31. On 20 November 2013 the civil proceedings were suspended pending the outcome of the criminal case against the applicant's father. Following the Supreme Court decision of 23 October 2015 acquitting the applicant's father, the civil proceedings were resumed on 9 November 2015.

32. On 4 May 2016 the County Court issued a decision on the care of and access to the applicant, which was upheld by the Court of Appeal. However, the decision was quashed by the Supreme Court and the case was remitted to the Court of Appeal for fresh consideration.

33. On 26 June 2017 the Court of Appeal granted sole custody of the applicant to her mother and barred the father's access to her completely until she reached the age of majority. It found it established that he had sexually abused the applicant, thereby endangering her physical, mental and spiritual well-being. The finding was based on the testimony of the child heard before the first-instance court, the statements of her mother and witnesses, as well as on an expert opinion concerning the child's mental development. The Court of Appeal did not agree with the argument of the applicant's father to the effect that since he had been acquitted in the criminal proceedings, it was not open to the civil courts to rely on the allegations of sexual abuse. The Supreme Court's judgment related to his criminal liability, whereas the civil courts had to assess whether his behaviour constituted a danger to the child in the context of a custody-and-contact dispute. In carrying out this assessment, the courts had to take into account all the evidence submitted and decide whether an allegation made by a party had been proven. The Court of Appeal found it important to note that the applicant's father had been acquitted by the Supreme Court on account of a material breach of procedural law, not because of lack of a criminal offence.

34. It appears that no appeal was lodged against the decision of the Court of Appeal.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. Constitution

35. Under Article 22 of the Constitution, no one may be compelled to testify against himself or herself, or against those closest to him or her. Article 25 provides that everyone is entitled to compensation for intangible as well as tangible harm that he or she has suffered as a result of the unlawful actions of any person.

B. Criminal Code

36. The sexual offences included in the Criminal Code include rape (Article 141), and intercourse or other acts of a sexual nature with a child (currently Article 145). In relation to sexual offences, a person is deemed to be incapable of comprehension if he or she is under ten years of age (Article 147).

C. Code of Criminal Procedure

37. The relevant provisions of the Code of Criminal Procedure read as follows:

Article 38. Rights and obligations of victims

“(1) A victim has the right to:

... 3) give or refuse to give testimony in accordance with the provisions of Articles 71 to 73 of this Code.”

Article 66. Witness

“...

(3) A witness is required to give testimony unless there are lawful grounds under Articles 71 to 73 of this Code for refusal to give testimony. When giving testimony, the witness is required to tell the truth.”

Article 70. Specifications concerning hearing of witnesses who are minors

“(1) A body conducting proceedings may involve a child protection official, social worker, teacher or psychologist in the hearing of a witness who is a minor.

(2) If a body conducting proceedings has not received appropriate training, involvement of a child protection official, social worker, teacher or psychologist in the hearing of a minor is mandatory if:

1) the witness is under ten years of age and repeated questioning may have a harmful effect on the minor’s mind;

2) the witness is under fourteen years of age and the questioning is related to domestic violence or sexual abuse;

3) the witness has a speech impairment, sensory or learning disability or a mental disorder.

(3) If necessary, the questioning of minors is video recorded. In the case specified in paragraph (2) of this Article, the questioning of minors is video recorded if the intention is to use the interview as evidence in court proceedings because the minor cannot be heard directly in a court on account of his or her age or mental state.

(4) A suspect has the right to examine during the pre-trial proceedings the video recordings specified in paragraph (3) of this Article. The suspect or his or her counsel has the right to submit questions to witnesses within five days of the examination. A prosecutor's office shall review a request within five days of receipt thereof. Dismissal of a request shall be formalised by a decision, a copy of which shall be communicated to the person who submitted the request. Dismissal of a request shall not prevent re-submission of the request in accordance with the procedure provided for in Article 225 of this Code or in the court proceedings."

Article 71. Refusal to give testimony for personal reasons

"(1) The following persons have the right to refuse to give testimony as witnesses:

1) the descendants and ascendants of the suspect or accused;

..."

Article 287¹. Questioning of witness

"...

(3) Before interviewing a witness, the court shall explain to the witness the legal bases for refusing to give testimony and the obligation to speak the truth in court, and shall obtain the signature of the witness to this effect.

(4) A judge shall warn a witness of fourteen years of age or older that he or she shall be held criminally liable if he or she refuses to give testimony without any legal grounds or if he or she knowingly gives false testimony.

..."

Article 288¹. Leading questions

" ...

(2) For the purpose of facilitating progress in the hearing of a witness, a court may allow leading questions to be posed in other circumstances if:...

2) the question pertains to an established fact or contains a statement which is not contested;

3) the question is necessary for the purpose of introducing the main question;

4) due to the age or state of health of the witness, it is difficult for him or her to understand questions which are not leading;

5) the witness states that he or she does not remember well the circumstances which are the object of the questioning."

Article 290¹. Specific requirements for testimony given in pre-trial proceedings by witnesses who are minors

“(1) A court may not summon a minor at the request of a party to the court proceedings or admit as evidence testimony given by the minor in pre-trial proceedings, provided that the testimony was video-recorded and counsel has had the opportunity to pose questions to the witness in the pre-trial proceedings about the facts relating to the subject of proof, if:

1) the witness is under ten years of age and repeated questioning may have a harmful effect on his or her mental state;

2) the witness is under fourteen years of age and the hearing is related to domestic violence or sexual abuse;...

(2) If after examination of the evidence specified in paragraph (1) of this Article the court finds that it is necessary to question the minor about additional circumstances, it may question the witness on its own initiative or on the basis of written questions prepared by the parties to the court proceedings.”

D. Guidelines on the special treatment of minors in criminal proceedings, issued by the Prosecutor General on 29 June 2007

38. The Guidelines state that the right to refuse to give testimony must be explained to a minor thoroughly in a manner which he or she is capable of understanding. It is recommended to use the assistance of a specialist in explaining to a minor his or her rights. Interviewing a suspect who is a minor does not differ from interviewing an adult suspect. However, procedural measures taken in respect of minors must take into account their age and the interests of the child. If possible, a witness under the age of ten should not be questioned at trial in order to avoid harmful consequences for the child (points 8-10 of the Guidelines).

E. Act on Compensation for Damage Caused in Criminal Proceedings

39. The relevant provisions of the Act, which entered into force on 1 May 2015, read as follows:

Section 7. Compensation for damage regardless of final outcome of criminal proceedings

“(1) If a body conducting proceedings has violated procedural law and thereby caused damage to a person, the person has the right to claim compensation for such damage, regardless of the final outcome of the criminal proceedings by which the damage was caused to the person.

(2) A body conducting proceedings is exonerated from liability if it proves that it is not at fault in causing the damage.

(3) If the damage specified in subsection (1) of this section is caused by a court, the state is liable under the State Liability Act.

...”

Section 11. Compensation for non-pecuniary damage

“...

(2) A natural person shall be compensated for non-pecuniary damage under section 7 of this Act only if the person was deprived of liberty; he or she was tortured or treated inhumanly or degradingly; damage was caused to his or her health, the inviolability of his or her home or right to respect for private life; the confidentiality of his or her messages was breached or his or her honour or good name was tarnished in the criminal proceedings. Fault on the part of a body conducting proceedings does not constitute a prerequisite for compensation for non-pecuniary damage if the person was tortured or treated inhumanly or degradingly in violation of procedural law.

...”

Section 21. Lodging of claim after county court proceedings

“...

(4) If a person has failed, with good reason, to lodge a claim for compensation with a circuit court or if the existence of the basis for the claim for compensation for damage became evident only in cassation proceedings and the person has failed, with good reason, to lodge a compensation claim with the Supreme Court, the claim may be lodged with a prosecutor's office or a body conducting extra-judicial proceedings. The claim shall be lodged within six months of the entry into force of the decision of the circuit court or Supreme Court. The adjudication of the claim shall comply with the provisions under part 2 of Chapter 4 of this Act.”

F. Domestic case-law

1. Criminal proceedings

40. In its judgment of 20 March 2002 in case no. 3-1-1-25-02 the Supreme Court found that a failure to inform a suspect or witness of their right not to incriminate themselves or their next of kin constituted a material breach of criminal procedural law, resulting in the inadmissibility of the evidence so obtained. It was impermissible to consider that duty as a formality by simply having a person sign or read the list of the relevant articles of the Code of Criminal Procedure. The investigator had to orally disclose and explain the relevant provisions to the witness.

41. On 18 April 2005, in case no. 3-1-1-19-05, the Supreme Court considered that in assessing the effect of a breach of a procedural rule on the admissibility of the evidence, it was necessary to have regard to the purpose of the rule and whether the evidence could have been obtained without breaching it.

42. In a judgment of 2 May 2007 in case no. 3-1-1-6-07, the Supreme Court held that not every violation of procedural law in the process of

collecting evidence necessarily meant that the evidence was inadmissible. However, it was inexcusable for an investigator to knowingly violate procedural law by considering that a particular breach was not significant. Isolated violations may amount to a material breach of procedural law if the investigator committed them intentionally.

43. On 6 October 2007 in case no 1-15-10967, the Supreme Court held that where a conviction was based on a single piece of evidence, such as testimony given by the victim, it was particularly important for the court to examine comprehensively and impartially all possible doubts that may have arisen in the assessment of that sole piece of incriminating evidence and to dispel those doubts convincingly and in a manner comprehensible to the reader.

44. In case no. 3-1-1-72-07, dated 20 November 2007, the Supreme Court emphasised that only lawfully collected evidence could serve as a basis for punishing a person in criminal proceedings. Statements given by witnesses who had not been properly advised of their rights and duties could not constitute lawful evidence, as they had been obtained in material breach of procedural law.

2. Compensation for damage

45. On 13 June 2016 in case no. 3-1-1-34-16, the Supreme Court examined a compensation claim in respect of damage caused to the claimant by unlawful surveillance activities in the framework of criminal proceedings. It considered that since the surveillance activities in question had already been declared unlawful by a judgment of the criminal court, the damage caused fell within the scope of section 7(1) of the Act on Compensation for Damage Caused in Criminal Proceedings. The Supreme Court reiterated that it was only in exceptional circumstances, where a person had not had the opportunity to ask for the lawfulness of procedural measures to be assessed in the so-called main proceedings, that a court adjudicating on the compensation claim was competent to assess the lawfulness of actions taken or orders given in criminal proceedings.

46. By a judgment of 22 December 2017 in case no. 1-16-2675 the Supreme Court awarded compensation to a convicted person in respect of non-pecuniary damage caused by unlawful court decisions relating to his pre-trial detention.

II. EUROPEAN UNION LAW

47. The relevant part of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography provides as follows:

Article 20

Protection of child victims in criminal investigations and proceedings

“...

3. Without prejudice to the rights of the defence, Member States shall take the necessary measures to ensure that in criminal investigations relating to any of the offences referred to in Articles 3 to 7:

(a) interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities;

(b) interviews with the child victim take place, where necessary, in premises designed or adapted for this purpose;

(c) interviews with the child victim are carried out by or through professionals trained for this purpose;

(d) the same persons, if possible and where appropriate, conduct all interviews with the child victim;

(e) the number of interviews is as limited as possible and interviews are carried out only where strictly necessary for the purpose of criminal investigations and proceedings;

(f) the child victim may be accompanied by his or her legal representative or, where appropriate, by an adult of his or her choice, unless a reasoned decision has been made to the contrary in respect of that person.

4. Member States shall take the necessary measures to ensure that in criminal investigations of any of the offences referred to in Articles 3 to 7 all interviews with the child victim or, where appropriate, with a child witness, may be audio-visually recorded and that such audio-visually recorded interviews may be used as evidence in criminal court proceedings, in accordance with the rules under their national law.”

48. Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishes minimum standards on the rights, support and protection of victims of crime. The relevant part of the Directive reads as follows:

Article 20

Right to protection of victims during criminal investigations

“Without prejudice to the rights of the defence and in accordance with rules of judicial discretion, Member States shall ensure that during criminal investigations:

(a) interviews of victims are conducted without unjustified delay after the complaint with regard to a criminal offence has been made to the competent authority;

(b) the number of interviews of victims is kept to a minimum and interviews are carried out only where strictly necessary for the purposes of the criminal investigation;

(c) victims may be accompanied by their legal representative and a person of their choice, unless a reasoned decision has been made to the contrary;

(d) medical examinations are kept to a minimum and are carried out only where strictly necessary for the purposes of the criminal proceedings.”

Article 22

Individual assessment of victims to identify specific protection needs

“...

4. For the purposes of this Directive, child victims shall be presumed to have specific protection needs due to their vulnerability to secondary and repeat victimisation, to intimidation and to retaliation. To determine whether and to what extent they would benefit from special measures as provided for under Articles 23 and 24, child victims shall be subject to an individual assessment as provided for in paragraph 1 of this Article.”

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 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):

- (a) interviews with the victim being carried out in premises designed or adapted for that purpose;
- (b) interviews with the victim being carried out by or through professionals trained for that purpose;
- (c) all interviews with the victim being conducted by the same persons unless this is contrary to the good administration of justice;
- (d) all interviews with victims of sexual violence, gender-based violence or violence in close relationships, unless conducted by a prosecutor or a judge, being conducted by a person of the same sex as the victim, if the victim so wishes, provided that the course of the criminal proceedings will not be prejudiced.”

Article 24

Right to protection of child victims during criminal proceedings

“1. In addition to the measures provided for in Article 23, Member States shall ensure that where the victim is a child:

- (a) in criminal investigations, all interviews with the child victim may be audiovisually recorded and such recorded interviews may be used as evidence in criminal proceedings;
- (b) in criminal investigations and proceedings, in accordance with the role of victims in the relevant criminal justice system, competent authorities appoint a special representative for child victims where, according to national law, the holders of parental responsibility are precluded from representing the child victim as a result of a

conflict of interest between them and the child victim, or where the child victim is unaccompanied or separated from the family;

(c) where the child victim has the right to a lawyer, he or she has the right to legal advice and representation, in his or her own name, in proceedings where there is, or there could be, a conflict of interest between the child victim and the holders of parental responsibility.

The procedural rules for the audiovisual recordings referred to in point (a) of the first subparagraph and the use thereof shall be determined by national law.”

III. INTERNATIONAL MATERIAL

A. United Nations Convention on the Rights of the Child

49. The relevant provisions of the Convention, which came into force in respect of Estonia on 20 November 1991, read as follows:

Article 3

“1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

...

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

...

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

...”

B. Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (“the Lanzarote Convention”)

50. The Convention was adopted in Lanzarote on 25 October 2007 and entered into force on 1 July 2010. It was ratified by Estonia on 22 November 2016 and came into force on 1 March 2017. Its relevant parts provide as follows:

Article 4 – Principles

“Each Party shall take the necessary legislative or other measures to prevent all forms of sexual exploitation and sexual abuse of children and to protect children.”

Chapter VI – Substantive criminal law

Article 18 – Sexual abuse

“1. Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct is criminalised:

a. engaging in sexual activities with a child who, according to the relevant provisions of national law, has not reached the legal age for sexual activities;

b. engaging in sexual activities with a child where:

– use is made of coercion, force or threats; or

– abuse is made of a recognised position of trust, authority or influence over the child, including within the family; or

– abuse is made of a particularly vulnerable situation of the child, notably because of a mental or physical disability or a situation of dependence.”

Chapter VII – Investigation, prosecution and procedural law

Article 30 – Principles

“1. Each Party shall take the necessary legislative or other measures to ensure that investigations and criminal proceedings are carried out in the best interests and respecting the rights of the child.

2. Each Party shall adopt a protective approach towards victims, ensuring that the investigations and criminal proceedings do not aggravate the trauma experienced by the child and that the criminal justice response is followed by assistance, where appropriate.

3. Each Party shall ensure that the investigations and criminal proceedings are treated as priority and carried out without any unjustified delay.

4 Each Party shall ensure that the measures applicable under the current chapter are not prejudicial to the rights of the defence and the requirements of a fair and impartial trial, in conformity with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.”

Article 31 – General measures of protection

“1. Each Party 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 criminal proceedings, in particular by:

a. informing them of their rights and the services at their disposal and, unless they do not wish to receive such information, 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 cases;

...

c. enabling them, in a manner consistent with the procedural rules of internal law, to be heard, to supply evidence and to choose the means of having their views, needs and concerns presented, directly or through an intermediary, and considered;

...”

Article 34 – Investigations

“1. Each Party shall adopt such measures as may be necessary to ensure that persons, units or services in charge of investigations are specialised in the field of combating sexual exploitation and sexual abuse of children or that persons are trained for this purpose. Such units or services shall have adequate financial resources.

...”

Article 35 – Interviews with the child

“1. Each Party shall take the necessary legislative or other measures to ensure that:

a. interviews with the child take place without unjustified delay after the facts have been reported to the competent authorities;

b. interviews with the child take place, where necessary, in premises designed or adapted for this purpose;

c. interviews with the child are carried out by professionals trained for this purpose;

d. the same persons, if possible and where appropriate, conduct all interviews with the child;

e. the number of interviews is as limited as possible and in so far as strictly necessary for the purpose of criminal proceedings;

f. the child may be accompanied by his or her legal representative or, where appropriate, an adult of his or her choice, unless a reasoned decision has been made to the contrary in respect of that person.

2. Each Party shall take the necessary legislative or other measures to ensure that all interviews with the victim or, where appropriate, those with a child witness, may be videotaped and that these videotaped interviews may be accepted as evidence during the court proceedings, according to the rules provided by its internal law.

...”

51. The relevant part of the Explanatory Report to the Lanzarote Convention reads as follows:

Article 30 – Principles

“211. Existing international legal instruments on the protection of children give only an indication of the need for a special judicial procedure adapted to the child victim. Recommendation Rec (2001) 16, which is certainly the most detailed such instrument, recalls in particular the need to safeguard child victims’ rights without violating the rights of suspects, the need to respect child victims’ private life and to provide special conditions for hearings with children. ...

212. Beyond these objectives, the definition and implementation of rules of procedure adapted to child victims are left to the discretion and initiative of each State. Recent analyses, including REACT, highlight the differences and discrepancies in the area.

213. The negotiators considered that a number of provisions should be made to implement a child-friendly and protective procedure for child victims in criminal proceedings. However, paragraph 4 underlines that these measures should not violate the rights of the defence and the principles of a fair trial as set out in Article 6 ECHR.

214. The central issue has to do with the child’s testimony which constitutes a major challenge in the procedures of numerous States, as witnessed by a number of cases that have received intensive media coverage and the changes that criminal procedure systems have undergone in the last decades. In this context, it has become urgently important for States to adopt procedural rules guaranteeing and safeguarding children’s testimony.

215. This is why paragraphs 1 and 2 establish two general principles to the effect that investigations and judicial proceedings concerning acts of sexual exploitation and sexual abuse of children must always be conducted in a manner which protects the best interests and rights of children, and must aim to avoid exacerbating the trauma which they have already suffered.

...”

C. Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice

52. The Guidelines on child-friendly justice were adopted by the Council of Europe Committee of Ministers on 17 November 2010. They include the following provisions:

Evidence/statements by children

“64. Interviews of and the gathering of statements from children should, as far as possible, be carried out by trained professionals. Every effort should be made for children to give evidence in the most favourable settings and under the most suitable conditions, having regard to their age, maturity and level of understanding and any communication difficulties they may have.

65. Audiovisual statements from children who are victims or witnesses should be encouraged, while respecting the right of other parties to contest the content of such statements.

66. When more than one interview is necessary, they should preferably be carried out by the same person, in order to ensure coherence of approach in the best interests of the child.

67. The number of interviews should be as limited as possible and their length should be adapted to the child's age and attention span.

68. Direct contact, confrontation or interaction between a child victim or witness with alleged perpetrators should, as far as possible, be avoided unless at the request of the child victim.

69. Children should have the opportunity to give evidence in criminal cases without the presence of the alleged perpetrator.

70. The existence of less strict rules on giving evidence such as absence of the requirement for oath or other similar declarations, or other child-friendly procedural measures, should not in itself diminish the value given to a child's testimony or evidence.

71. Interview protocols that take into account different stages of the child's development should be designed and implemented to underpin the validity of children's evidence. These should avoid leading questions and thereby enhance reliability.

72. With regard to the best interests and well-being of children, it should be possible for a judge to allow a child not to testify.

73. A child's statements and evidence should never be presumed invalid or untrustworthy by reason only of the child's age."

53. The relevant part of the Explanatory Memorandum to the above guidelines reads as follows:

"126. The issue of collecting evidence/statements from children is far from being simple. As standards are rare in this area (such as the United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime), the need was felt to address these issues, as the conduct of such interviews with regard to evidence/statements requires practical guidance.

...

129. Member states' procedural laws and legislation in this domain vary considerably, and there might be less strict rules on giving evidence by the children. In any case, member states should give priority to the child's best interests in the application of legislation regarding evidence. Examples provided by Guideline 70 include the absence of the requirement for the child to take an oath or other similar declarations. These guidelines do not intend to affect the guarantees of the right to a defence in the different legal systems; however, they do invite member states to adapt, where necessary, some elements of the rules on evidence so as to avoid additional trauma for children. In the end, it will always be the judge who will consider the seriousness and validity of any given testimony or evidence.

130. Guideline 70 also indicates that these adaptations for children should not in themselves diminish the value of a given testimony. However, preparing a child witness to testify should be avoided because of the risk of influencing the child too much. Establishing model interview protocols (Guideline 71) should not necessarily be the task of the judges, but more that of national judicial authorities."

THE LAW

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

54. The applicant complained that the authorities had failed to conduct an effective criminal investigation into her allegations of sexual abuse by her father. In particular, the authorities had failed to collect the evidence in compliance with the procedural rules, which had led to its exclusion at trial and the acquittal of the alleged perpetrator. By leaving her without effective legal protection against sexual abuse, the State had breached its positive obligations under Articles 3 and 8 of the Convention. The relevant parts of those provisions read as follows:

Article 3

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

Article 8 § 1

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

A. Admissibility

1. Abuse of the right of application

55. The Government invited the Court to reject the application as being an abuse of the right of application. They argued that the applicant had failed to inform the Court in a timely manner about the developments in the civil proceedings, notably the decision of the Court of Appeal of 26 June 2017 (see paragraph 33 above). Although that decision had been rendered after the lodging of the application on 19 April 2016, it had been the applicant’s duty to submit it to the Court immediately, rather than in her reply to the Government’s observations following notification of the application. The decision of the Court of Appeal of 26 June 2017 constituted relevant new information demonstrating that the applicant’s grievances had been remedied and that she had lost her victim status.

56. The Court reiterates that the submission of incomplete and thus misleading information may amount to an abuse of the right of application, especially if the information concerns the very core of the case and no sufficient explanation has been provided for the failure to disclose that information. The same applies if important new developments have occurred during the proceedings before the Court and where, despite being expressly required to do so by Rule 47 § 7 of the Rules of Court, the applicant has failed to disclose that information to the Court, thereby preventing it from ruling on the case in full knowledge of the facts.

However, even in such cases, the applicant's intention to mislead the Court must always be established with sufficient certainty (see *Gross v. Switzerland* [GC], no. 67810, § 28, ECHR 2014, with further references).

57. In the present case, the Court notes that the applicant's complaint before it concerns specifically the criminal proceedings relating to her alleged ill-treatment which, at the time the application was lodged, had ended with a final judgment of the Supreme Court. The ongoing civil proceedings were not the subject matter of the application and pursued a different objective – that of solving a custody and contact dispute between the applicant's parents. Even so, the applicant did inform the Court of the civil court judgment in question, allowing the Government to make further submissions on that basis. Given the nature of the applicant's complaint, the impugned delay in submitting the information cannot be seen as an attempt on the part of the applicant to conceal from the Court any essential information that would be relevant for its decision.

58. The Court therefore rejects the Government's objection that there has been an abuse of the right of application.

2. *Victim status*

59. The Government submitted that the applicant had lost her victim status by having obtained a ruling in her favour in the subsequent civil proceedings concerning custody and contact rights. They pointed out that in its ruling of 26 June 2017 the Court of Appeal, having conducted an assessment of all the evidence independently of the criminal courts, found it established that the applicant had been sexually abused by her father and barred any contact with her until she reached the age of eighteen.

60. The applicant argued that the civil proceedings had not been sufficient in the circumstances of her case, which required effective prosecution of the perpetrator and condemnation by the State.

61. The Court reiterates that effective protection against rape and sexual abuse of children, where fundamental values and essential aspects of private life are at stake, requires measures of a criminal-law nature (see *Söderman v. Sweden* [GC], no. 5786/08, § 82, ECHR 2013). The protection afforded by civil proceedings is insufficient (see *A and B v. Croatia*, no. 7144/15, § 92, 20 June 2019). In the present case, the applicant's allegations were serious enough to warrant a criminal investigation, the effectiveness of which is the object of her complaint before this Court. The fact that the alleged sexual abuse was examined also by the civil courts in the context of the custody and contact proceedings does not detract from the State's positive obligation to apply criminal-law provisions through the conduct of an effective investigation. It follows that the Government's objection formulated as the lack of victim status must be rejected (see also *A, B and C v. Latvia*, no. 30808/11, §§ 163-64, 31 March 2016).

3. *Non-exhaustion of domestic remedies*

62. The Government argued that the applicant had failed to exhaust all available domestic remedies. In particular, it had been open to her to lodge a claim for damages against the State under the Act on Compensation for Damage Caused in Criminal Proceedings (see paragraph 39 above). Under sections 7 and 11(2), a person who had suffered damage as a result of a breach of procedural law was entitled to compensation for non-pecuniary damage sustained in certain situations, including when the person had been tortured or subjected to inhuman or degrading treatment or when respect for his or her private life had been infringed. The Government cited cases where the domestic courts had awarded compensation in connection with unlawful surveillance activities and unlawful pre-trial detention (see paragraphs 45-46 above). Although there had been no cases where a breach of criminal procedure was alleged to have contravened the State's positive obligations under Articles 3 and 8 of the Convention, the case-law was still developing and the national courts were required to take into account the Convention principles. Furthermore, if the applicant considered that the legislation was too restrictive or contained lacunae, she could base her compensation claim directly on Article 25 of the Constitution (see paragraph 35 above). In conclusion, the Government considered that the applicant should have given the authorities the opportunity to assess the alleged violation of her Convention rights by lodging a compensation claim.

63. The applicant contended that following the Supreme Court's final decision in the criminal case, she had had no further avenues of redress available to her.

64. The Court reiterates that the obligation to exhaust domestic remedies requires applicants to make normal use of remedies which are available and sufficient in respect of their Convention grievances. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. To be effective, a remedy must be capable of remedying directly the impugned state of affairs and must offer reasonable prospects of success. However, there is no obligation to have recourse to remedies which are inadequate or ineffective (see *Gherghina v. Romania* [GC] (dec.), no. 42219/07, §§ 85-86, 9 July 2015, and the references therein).

65. Turning to the present case, the Court notes that the criminal proceedings concerning the alleged sexual abuse of the applicant concluded with the final judgment of the Supreme Court. The applicant thus made full use of the criminal-law avenue available to her before turning to the Court. It observes that the civil remedy relied on by the Government could only lead to the payment of damages by the State rather than to the identification and punishment, if appropriate, of the offender, which could only be achieved within the framework of criminal proceedings. According to the Court's established case-law, a compensatory remedy cannot be regarded as

adequate for the fulfilment of a State's obligations under Articles 3 and 8 of the Convention to provide effective protection against serious attacks on the physical integrity of a person in cases such as the present one (see, for example, *Remetin v. Croatia*, no. 29525/10, § 76, 11 December 2012, and *Pulfer v. Albania*, no. 31959/13, § 71, 20 November 2018). The Court therefore finds that following the conclusion of the criminal proceedings, which was the appropriate channel of redress for the applicant's allegations of sexual abuse, she was not required to resort further to the compensatory remedy advanced by the Government, as it was in any event incapable of providing direct and adequate redress for her complaint.

66. In the light of the above considerations, the Government's objection must be rejected.

4. Conclusion

67. The Court notes that the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

68. The applicant submitted that the criminal investigation into her allegations of ill-treatment had not been effective, as the authorities had failed to collect the evidence in compliance with the procedural rules, making its use impossible at the trial. That omission had had a direct effect on the outcome of the criminal proceedings, leading to the acquittal of the alleged perpetrator.

69. The applicant further argued that as a minor, she could not be subjected to the same procedural rules as an adult witness. However, as recognised by the Supreme Court, there were no separate rules in Estonia for the pre-trial questioning of child witnesses when it came to advising them of their rights and obligations. It was nevertheless essential to treat child witnesses differently from adult witnesses, in the light of the duty of the States to take into account the child's best interests as set out in, *inter alia*, the UN Convention on the Rights of the Child, the Lanzarote Convention and the relevant EU directives (see paragraphs 47-50 above).

70. The applicant questioned the relevance of explaining both the duty to tell the truth and the possibility to refuse to testify against her father, given her young age and limited understanding. Even if the explanation had been given, it was doubtful whether it would have had any effect on the content and quality of her testimony. She also pointed out that under Estonian law

minors under the age of ten were deemed to be incapable of comprehension when it came to sexual offences. Furthermore, it was argued that the right to refuse to give statements against a family member, which was designed to protect family relationships, should have no application in the present case where a parent is alleged to have committed sexual abuse against his child. In any case, the failure to provide her with the above information should not have served as grounds to exclude her testimony completely.

71. In sum, the applicant considered that by applying the procedural rules in a manner which did not sufficiently take into account the special needs and interests of a child victim, the authorities had left her without effective protection against ill-treatment.

(b) The Government

72. The Government were of the view that the State authorities had complied with their positive obligations under Articles 3 and 8 of the Convention. The alleged acts of sexual abuse were punishable under criminal law and there was no issue with regard to its application in practice. The pre-trial investigation and the subsequent court proceedings had also complied with the requirements of the Convention, giving due consideration to the rights of the victim and those of the accused, ensuring a fair trial overall.

73. In particular, the criminal proceedings had been instituted immediately after the filing of a crime report on 19 March 2012. The investigators had collected all the evidence that could be collected, including interviewing the applicant in the presence of a psychologist and her mother, and commissioning an expert assessment of her psychological state and a physical examination. The investigation had concluded with the bringing of charges on 27 June 2013, following which the case had been considered at three levels of jurisdiction, culminating in the Supreme Court decision on 23 October 2015. The total length of the proceedings, amounting to about three years and seven months, could not be considered unreasonable. The applicant had participated in the proceedings with the assistance of her legal representative and counsel, both of whom had attended the court hearings in her absence. At no point during the proceedings had those representatives expressed any criticism of the conduct of the investigation.

74. As regards the shortcomings identified by the Supreme Court leading to the exclusion of the applicant's testimony, the Government submitted that the obligation to tell the truth was one of the most important duties of a witness under the Code of Criminal Procedure, which applied regardless of a witness's age. A failure to inform a witness of that obligation, however, did not automatically result in the exclusion of his or her testimony. Such exclusion was possible in the circumstances of a case, particularly where the testimony was the only evidence supporting an

accused's conviction. In the present case, compliance with the requirement to inform the applicant of that duty had assumed special importance, since her testimony had carried decisive weight in the criminal case and she could not be directly questioned by the defence at the trial. Equally important had been the duty to inform the witness about her right not to testify against her next of kin, a duty which had moreover been specifically set out in the guidelines of the Prosecutor General on the special treatment of minors in criminal proceedings. The applicant should have been made aware of that right so that she could understand the consequences of testifying against her father.

75. The Government pointed out that the rules of international instruments dealing with the protection of the rights of children in criminal proceedings also emphasised the obligation to ensure the rights of the defence and the requirements of a fair trial. As the procedural obligations laid down in domestic law were not contrary to the Convention or any other international or European regulation, it had fallen within the domestic courts' margin of appreciation to decide what weight to attribute to the investigators' omission, having regard to the rights of the accused.

76. In the circumstances of the present case, the strict approach adopted by the Supreme Court to the admissibility of the evidence obtained in material breach of the procedural rules had been justified.

77. In the Government's submission, the breach of the important procedural requirements had not rendered the criminal investigation ineffective. The shortcomings had concerned isolated omissions in the investigation, rather than any significant flaws or systemic defects in the legislation or practice. The effect of the investigators' failure to advise the applicant of her rights and duties on the admissibility of her testimony had not been immediately apparent, as that failure had become an issue in the context of assessing the credibility of the testimony. Moreover, in acquitting the alleged perpetrator, the Supreme Court had pointed also to other shortcomings in the proceedings before the lower-instance courts, criticising notably their approach to the evidence. Considering that there was no right under the Convention to obtain a criminal conviction and that the assessment of the evidence fell primarily within the competence of the domestic courts, the Government concluded that in the present case there had been no violation of Articles 3 and 8 of the Convention.

2. *The Court's assessment*

(a) **General principles**

78. The Court reiterates that both Articles 3 and 8 of the Convention entail an obligation on the State to safeguard the physical and psychological integrity of a person (see, among other authorities, *M. and C. v. Romania*, no. 29032/04, §§ 107-11, 27 September 2011, and *M.P. and Others*

v. Bulgaria, no. 22457/08, § 108, 15 November 2011). It has previously held that the authorities' positive obligations in this context may include a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals (see *Söderman*, cited above, § 80, with further references). Children and other vulnerable individuals, in particular, are entitled to effective protection (see *M.C. v. Bulgaria*, no. 39272/98, § 150, ECHR 2003-XII).

79. Regarding, more specifically, serious acts such as rape and other forms of sexual abuse of children, where fundamental values and essential aspects of private life are at stake, it falls upon the member States to ensure that efficient criminal-law provisions are in place (see *X and Others v. Bulgaria* [GC], no. 22457/16, 2 February 2021). In such cases the State's positive obligations also include requirements related to the effectiveness of the criminal investigation (see *Söderman*, cited above, §§ 82-83, with further references).

80. The Court has held that an effective investigation should in principle be capable of leading to the establishment of the facts of the case and to the identification and, if appropriate, punishment of those responsible. This is not an obligation of result, but one of means. The authorities must take the reasonable steps available to them to secure the evidence concerning the incident, such as witness testimony and forensic evidence (see *Z. v. Bulgaria*, no. 39257/17, § 65, 28 May 2020).

81. Moreover, in so far as the investigation leads to charges being brought before the national courts, the procedural obligations in relation to the alleged ill-treatment extend to the trial stage of the proceedings. In such cases the proceedings as a whole, including the trial stage, must satisfy the requirements of the prohibition of ill-treatment (*ibid.*, § 66). The Court has already held that, regardless of the final outcome of the proceedings, the protection mechanisms available under domestic law should operate in practice in a manner allowing for the examination of the merits of a particular case within a reasonable time (see *W. v. Slovenia*, no. 24125/06, § 65, 23 January 2014).

82. However, there is no absolute right to obtain the prosecution or conviction of any particular person where there were no culpable failures in seeking to hold perpetrators of criminal offences accountable (see *Söderman*, cited above, § 83).

83. The Court reiterates that the obligations incurred by the State under Articles 3 and 8 of the Convention in cases of alleged sexual abuse of children require respect for the best interests of the child. The right to human dignity and psychological integrity requires particular attention where a child is the victim of violence (see *M.M.B. v. Slovakia*, no. 6318/17, § 61, 26 November 2019, and *C.A.S. and C.S. v. Romania*, no. 26692/05, § 82, 20 March 2012). The Court has also emphasised that it was incumbent on the States to adopt procedural rules guaranteeing and safeguarding

children's testimony (see *G.U. v. Turkey*, no. 16143/10, § 73, 18 October 2016).

84. In view of the above, States are required under Articles 3 and 8 to enact provisions criminalising the sexual abuse of children and to apply them in practice through effective investigation and prosecution, bearing in mind the particular vulnerability of children, their dignity and their rights as children and as victims (see *Z v. Bulgaria*, § 70, and *A and B v. Croatia*, § 112, both cited above). These obligations also stem from other international instruments, such as, *inter alia*, the UN Convention on the Rights of the Child and the Lanzarote Convention (see paragraphs 49-50 above). In interpreting the State's obligations mentioned above, the Court will have regard to the relevant rules and principles of international law, as well as to non-binding instruments of Council of Europe organs (see *Demir and Baykara v. Turkey* [GC], no. 34503/97, §§ 69 and 74, ECHR 2008, and *X and Others v. Bulgaria*, cited above, §§ 179 and 192).

(b) Application of these principles to the present case

85. There is no doubt in the present case that the alleged sexual abuse of the applicant falls within the scope of Articles 3 and 8 of the Convention, triggering the State's positive obligations to enact criminal-law provisions punishing effectively the sexual abuse of children and to apply them in practice through effective investigation and prosecution.

86. Nor is it disputed that the criminal law prohibited the sexual abuse alleged by the applicant and provided for criminal prosecution of those responsible. Indeed, the applicant's allegations gave rise to the opening of a criminal investigation under the relevant provisions of the Criminal Code and the prosecution and trial of the alleged offender.

87. The Court must thus examine whether the application of the criminal-law provisions in practice, through the criminal investigation and prosecution, was defective to the point of constituting a violation of the respondent State's positive obligations under Articles 3 and 8 of the Convention. It considers that the criminal-law mechanisms should be implemented so as to address the particular vulnerability of the applicant as a young child who had allegedly been a victim of sexual abuse by her father, taking as a primary consideration the child's best interests, and in this connection so as to afford protection to her rights as a victim (see *A and B v. Croatia*, cited above, § 121).

88. In addressing the question, the Court will take into account the criteria laid down in international instruments. In particular, it notes that the Lanzarote Convention, the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and the relevant EU directives lay down a number of requirements relating to the collection and preservation of evidence from children (see paragraphs 47, 48, 50 and 52 above). Although the Lanzarote Convention entered into force in respect of

Estonia subsequent to the facts of the present case, the other relevant instruments contain provisions similar to those of that Convention.

89. The Court is not concerned with allegations of errors or isolated omissions but only significant shortcomings in the proceedings and the relevant decision-making process, namely those that are capable of undermining the authorities' capability of establishing the circumstances of the case or the person responsible (see *S.M. v. Croatia* [GC], no. 60561/14, § 320, 25 June 2020). It cannot replace the domestic authorities in the assessment of the facts of the case, nor can it decide on the alleged perpetrator's criminal responsibility (see *X and Others v. Bulgaria*, cited above, § 186).

90. In the present case, the applicant's complaint concerns procedural deficiencies in the criminal proceedings as a whole, including the failure of the investigator to inform her of her procedural rights and duties, and the reaction of the Supreme Court to that failure resulting in the exclusion of her testimony and the acquittal of the alleged perpetrator on procedural grounds.

91. The Court notes that following receipt of the allegations of sexual abuse on 19 March 2012, the authorities immediately instituted criminal proceedings. The applicant was interviewed on the same day as a victim. A further interview took place on 16 May 2012. The interviews were carried out by a specialist investigator of the same sex in the presence of a psychologist. The applicant was accompanied by her mother as her legal representative. The interviews were video recorded in order to safeguard the applicant's testimony for its possible use in subsequent court proceedings and to ensure respect for the rights of the accused, who would not be allowed to confront her directly.

92. However, in neither of these interviews was the applicant advised by the investigator of her right not to testify against a member of her family and of her duty to tell the truth, such instructions being required by the rules of criminal procedure.

93. The investigative authorities twice questioned the alleged perpetrator, who denied any sexual abuse of his daughter, and had a psychiatric assessment of him performed. He and his counsel were presented with the video-recorded statements of the applicant and given an opportunity, which they did not use, to put questions to her in writing.

94. The evidence collected during the investigation was considered sufficient to charge the applicant's father with acts of sexual abuse in June 2013 and to send the case for trial.

95. Given her young age, the applicant was not called to testify in court, as had been suggested by experts. The applicant's video-recorded statements given at the pre-trial stage were disclosed at the hearings and viewed by both the first-instance and appellate courts. The defence was also able to observe the witness's demeanour under questioning and cast doubt

on the reliability of her statements, arguing, *inter alia*, that they had been unduly influenced by her mother, who had been present during the interviews.

96. Based on the evidence gathered, including the testimony of experts and other witnesses, the first-instance court found the applicant's allegations of sexual abuse proven and convicted her father as charged. Although the Court of Appeal upheld the judgment, its decision was not unanimous. The dissenting judge questioned the reliability of the victim's testimony on which the conviction had been based and found that the testimony had been obtained in breach of procedural requirements to inform the witness of the duty to tell the truth and of the right not to testify against her next of kin.

97. Subsequently, in examining an appeal by the accused contesting his conviction, the Supreme Court considered that the failure to advise the applicant before her interviews of her obligation to tell the truth and her right to refuse to testify against her father was of such importance as to render inadmissible her testimony, which was decisive evidence in the case. As the omission at issue could not be remedied by remitting the case to the lower-instance courts where the child victim could not be heard, the exclusion of the main evidence resulted in the acquittal of the accused.

98. The Court notes that in Estonia the general rules set out in the law for questioning witnesses are also applicable to child witnesses (see paragraph 24 above). Nevertheless, in practice it has been recognised that when questioning child witnesses and advising them of their rights and duties, account must be taken of their age and level of understanding (see paragraphs 22 and 38 above).

99. In this connection, the Court observes that under the relevant international instruments, investigations and criminal proceedings should be carried out in a manner which protects the best interests and rights of children, such protection requiring the adoption of child-friendly and protective measures for child victims in criminal proceedings (see, for example, Article 30 of the Lanzarote Convention and the Explanatory Report thereto, paragraphs 50-51 above). In this context, it is important that the States have in place procedural rules guaranteeing and safeguarding children's testimony (see *G.U. v. Turkey*, cited above, § 73).

100. In the present case, it is undisputed that the investigator did not give in any form or manner the required instructions to the applicant when interviewing her as a child witness following the institution of the criminal proceedings. The Court notes that the whole criminal case rested essentially on the credibility of the applicant's testimony. However, the Supreme Court excluded that testimony entirely from the body of evidence on procedural grounds relating to the investigator's failure to provide the required warnings. Although it also pointed to other procedural shortcomings, notably in the judgments of the lower-instance courts, the identified failure of the investigative bodies was sufficient, in itself, to acquit the accused.

The Court reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see, among other authorities, *Selahattin Demirtaş v. Turkey (no. 2) v. Turkey* [GC], no. 14305/17, § 249, 22 December 2020).

101. In the instant case, the failure to give the applicant, a 4-year old child, the warnings generally required by law for any witness statement, and the consequences flowing from that failure as determined by the Supreme Court, resulted in the applicant's testimony becoming unusable for the determination of the criminal charge against the accused. Since the latter's conviction was to a decisive extent based on the testimony of the applicant and since there was no way of remedying the failure associated with it, the accused had to be acquitted. Aside from the question whether such warnings could be considered appropriate at all in a case such as the present, the Supreme Court's decision, combined with the investigator's omission, undermined the effective prosecution of the alleged offences. This is because, having regard to the impossibility to re-examine the case in the lower-instance courts, it was ultimately incapable of establishing the facts of the case and determining the question of culpability of the alleged offender on the merits

102. The Court considers that for the effective protection of children's rights in line with international standards, it is essential to safeguard their testimony both during the pre-trial investigation and trial. Estonian law, as regards the warnings to be given to witnesses, does not make a distinction between witnesses according to their age, and thus does not provide for exceptions or adaptations for child witnesses. The Court notes in this connection that, according to the Council of Europe Committee of Ministers' Guidelines on child-friendly justice, where less strict rules on giving evidence or other child-friendly measures apply, such measures should not in themselves diminish the value given to a child's testimony or evidence, without prejudice to the rights of the defence (see paragraphs 52 and 53 above). However, in the present case the applicant's testimony was found to be inadmissible precisely because of the strict application of procedural rules which made no distinction between adults and children. The Court reiterates that it is not concerned with the responsibility of any particular national authority, since what is at issue in all cases before it is the international responsibility of the State (see, among other authorities, *Tarariyeva v. Russia*, no. 4353/03, § 85, ECHR 2006-XV (extracts)).

103. In view of the above, the Court finds that there were significant flaws in the domestic authorities' procedural response to the applicant's allegation of rape and sexual abuse by her father, which did not sufficiently take into account her particular vulnerability and corresponding needs as a young child so as to afford her effective protection as the alleged victim of

sexual crimes. Accordingly, the Court, without expressing an opinion on the guilt of the accused, concludes that the manner in which the criminal-law mechanisms as a whole were implemented in the present case, resulting in the disposal of the case on procedural grounds, was defective to the point of constituting a violation of the respondent State's positive obligations under Articles 3 and 8 of the Convention.

104. There has therefore been a violation of Articles 3 and 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

105. 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

106. The applicant submitted that she had suffered non-pecuniary damage but left the determination of the amount of compensation to the Court. The Government considered that the finding of a violation would constitute sufficient just satisfaction.

107. The Court accepts that the applicant has suffered non-pecuniary damage as a result of the defective criminal proceedings which cannot be compensated solely by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant EUR 16,300 in respect of non-pecuniary damage.

B. Costs and expenses

108. The applicant also claimed EUR 7,140 for the costs and expenses incurred before the domestic courts.

109. The Government considered that the amount claimed was excessive.

110. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant the sum claimed in full.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning the lack of an effective investigation into the applicant's alleged sexual abuse admissible;
2. *Holds* that there has been a violation of Articles 3 and 8 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 16,300 (sixteen thousand three hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 7,140 (seven thousand one hundred and forty 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.

Done in English, and notified in writing on 22 June 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Registrar

Paul Lemmens
President

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

P.L.
M.B.

CONCURRING OPINION OF JUDGE SEIBERT-FOHR

While I agree with the Court's conclusions, I am writing separately with respect to the exhaustion of local remedies in order to submit a different reasoning. To my mind, in the present case the Court should have engaged with the effectiveness of the State liability proceedings. This is not just a formality, but it is relevant to the subsidiary nature of the Convention machinery more generally (see *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V; *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI; and *Andrášik and Others v. Slovakia* (dec.), nos. 57984/00 and 6 others, ECHR 2002-IX). The rationale for the exhaustion rule is to afford the national authorities, primarily the courts, the opportunity to put right, to the extent possible, the alleged violations of the Convention (see the summary of the principles in *Gherghina v. Romania* (dec.) [GC], no. 42219/07, §§ 84-89, 9 July 2015; *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, §§ 221 and seq., ECHR 2014 (extracts); and *Vučković and Others v. Serbia* (preliminary objection) [GC], no. 17153/11 and 29 others, §§ 69-77, 25 March 2014). This should function as an incentive for Contracting States to increase the availability and effectiveness of their domestic remedies, including State liability proceedings. For this purpose the Court should engage with the effectiveness of such proceedings rather than unreservedly dismissing them as not having to be used for purposes of exhaustion.

In the present case, the applicant claimed that the criminal proceedings against her father had been flawed. Therefore the question to be determined for the purpose of Article 35 § 1 was which remedies had been available to the applicant to enable her to challenge these flaws. The Government argued that the applicant had failed to exhaust all available domestic remedies because it had been open to her to lodge a claim for damages against the State under the Act on Compensation for Damage Caused in Criminal Proceedings. The majority reject this claim, arguing that the applicant made full use of the criminal-law avenue available to her (see paragraph 65). To my regret, I cannot subscribe to this reasoning as it overlooks the fact that the criminal proceedings did not constitute a remedy for the violation of the respondent State's positive obligations under Articles 3 and 8 of the Convention. The applicant had alleged abuse committed by a private individual, not by a State official. State responsibility only came into the picture when the criminal proceedings against her father failed to be effective. While the criminal proceedings constituted the appropriate channel for the applicant's allegations of sexual abuse against her father, they were not the appropriate avenue of redress for the subsequent Convention grievance that the applicant submitted before the Court, namely

the violation of the respondent State's positive obligations during the criminal proceedings. It was only when the Supreme Court acquitted the accused as a result of the previous breach of procedural rules in the collection of evidence that the domestic authorities' procedural response to her allegation of rape and sexual abuse by her father proved to be flawed (see paragraph 101). Only then could the applicant turn to the available domestic remedies in order to have the violation of her procedural rights established.

The majority disagree and refer to *Remetin v. Croatia* (no. 29525/10, § 76, 11 December 2012) and *Pulfer v. Albania* (no. 31959/13, § 71, 20 November 2018) to support the holding that it was not necessary to have recourse to proceedings under the Act on Compensation for Damage Caused in Criminal Proceedings. However, those cases were different from the present one, as the Governments had argued there that the applicants should have brought civil damages claims against the perpetrator (not the respondent State). In cases where the authorities fail in their obligation to conduct an investigation capable of holding a perpetrator of serious abuse responsible, the victim cannot be directed to bring civil proceedings against the individual perpetrator since such proceedings are insufficient to protect the applicant's procedural rights under Article 3. This is not, however, at issue in the present case. The Government did not submit that the applicant should have brought civil proceedings against her father, but rather the relevant proceedings to establish State liability for damage caused in criminal proceedings. If such proceedings are capable of establishing that the criminal-law mechanisms were defective and provide the applicant with adequate compensation, they constitute an effective remedy which applicants need to use pursuant to Article 35 § 1 of the Convention (see, *mutatis mutandis*, *Januškevičienė v. Lithuania*, no. 69717/14, §§ 58-62, 3 September 2019); all the more so, as the Court does not go beyond such a solution in the present case. It finds a violation of the respondent State's positive obligation and orders the respondent State to make an award to the applicant in respect of non-pecuniary damage. I doubt that the Court can dismiss domestic remedies capable of leading to the same outcome as ineffective. To hold otherwise would essentially call into question the effectiveness of the application procedure under the Convention.

Therefore, the majority should have considered whether a claim for damages against the State under the Act on Compensation for Damage Caused in Criminal Proceedings would have offered the applicant an effective remedy for her insufficient procedural protection during the criminal proceedings against her father. According to the Court's established jurisprudence, the Government bear the burden of proving that a remedy is both effective and available (see *Molla Sali v. Greece* [GC],

no. 20452/14, § 89, 19 December 2018; *Mocanu and Others*, cited above, § 225; *Dalia v. France*, 19 February 1998, § 38, *Reports of Judgments and Decisions* 1998-I; *McFarlane v. Ireland* [GC], no. 31333/06, § 107, 10 September 2010; and *Vučković and Others*, cited above, § 77). The Government should be able to illustrate the practical effectiveness of a remedy with examples of domestic case-law. In particular, where the Government argue that the applicant could have relied directly on the Convention before the national courts, the degree of certainty of such a remedy will need to be demonstrated by concrete examples (see *Slavgorodski v. Estonia* (dec.), no. 37043/97, ECHR 1999-II).

In the present case, the Government have failed to demonstrate the effectiveness of the procedure under the Act on Compensation for Damage Caused in Criminal Proceedings for alleged breaches of the State's positive obligations under Articles 3 and 8 of the Convention. Section 7(1) of the Act provides that if a body conducting proceedings has violated procedural law and thereby caused damage to a person, the person has the right to claim compensation for such damage. It is unclear whether this provision also applies to violations of the Convention. Though the Government argued that national courts were required to take into account the Convention principles, they conceded that there had been no cases where a breach of criminal procedure was alleged to have contravened the State's positive obligations under Articles 3 and 8 of the Convention. Therefore, the Government have not discharged their burden of proving that there was an appropriate and effective remedy available to the applicant in the present case. The majority could have reasoned their holding accordingly. Such a holding would be an incentive for the respondent State to expand its domestic remedies for cases in which violations of positive rights are alleged, and would thus reinforce subsidiarity as a fundamental principle of the Convention system.