



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

SECOND SECTION

CASE OF İ.G. v. TÜRKİYE

(Application no. 32887/19)

JUDGMENT

Art 3 (procedural) • Positive obligation • Ineffective investigation into acts of rape and violence perpetrated against the applicant, who suffers from intellectual and physical disabilities • Criminal proceedings time-barred due to failure of prosecuting authorities and domestic courts to establish facts in a timely manner • Unjustified protraction of criminal proceedings lasting for thirteen years • Art 34 • Victim • Albeit Constitutional Court's acknowledgment of a violation of Art 3, compensation awarded did not constitute sufficient redress in specific case-circumstances and in view of Court's awards in similar cases

Prepared by the Registry. Does not bind the Court.

STRASBOURG

27 August 2024

FINAL

16/12/2024

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

In the case of İ.G. v. Türkiye,

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

Arnfinn Bårdsen, *President*,

Jovan Ilievski,

Pauliine Koskelo,

Saadet Yüksel,

Diana Sârcu,

Davor Derenčinović,

Gediminas Sagatys, *judges*,

and Hasan Bakırcı, *Section Registrar*,

Having regard to:

the application (no. 32887/19) against the Republic of Türkiye lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mr İ.G. (“the applicant”), on 29 May 2019;

the decision to give notice to the Turkish Government (“the Government”) of the complaints under Articles 3 and 13 of the Convention and to declare the remainder of the application inadmissible;

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

the parties’ observations;

Having deliberated in private on 9 July 2024,

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

INTRODUCTION

1. The case concerns the respondent State’s positive obligation to provide effective legal protection against rape. The applicant complained under Articles 3 and 13 of the Convention that the criminal proceedings brought against his attackers had been ineffective as they had become time-barred and had resulted in his attackers’ impunity. He also complained that the remedy of an individual application to the Constitutional Court did not provide effective redress in respect of his Convention complaints.

THE FACTS

2. The applicant was born in 1984 and lives in Bursa. He was granted legal aid and was represented by Ms R. Doğan, a lawyer practising in İzmir.

3. The Government were represented by their Agent, Mr Hacı Ali Açıkgül, Head of the Department of Human Rights of the Ministry of Justice of the Republic of Türkiye.

4. The facts of the case may be summarised as follows.

5. The applicant suffers from intellectual and physical disabilities.

6. On 15 and 18 May 2002 he was taken to a construction site by four children, one of whom was under 12 years old, two of whom were under 13 years old and the other who was just under 17 years old at the time. According to the applicant's statement, drawn up by a public prosecutor on 24 May 2002, on the first occasion one of the children had put a knife up against his throat and the other two had held him and pulled his trousers down while the remaining child had penetrated him with his penis. They took turns raping him in this manner. On the second occasion they had tied a rope around his neck and had penetrated him with their penises. They also told him that if he were to tell anyone what had happened, they would kill him. The criminal proceedings (see paragraph 11 below) established that the applicant had been raped by three of those individuals.

7. In view of the fact that three of the applicant's attackers had been under 15 years old at the time of the attacks, the public prosecutor in charge of the prosecution separated the criminal proceedings by instituting proceedings in respect of those three individuals before the İzmir Juvenile Court on 4 July 2002 and instituting ordinary proceedings before the Bergama Assize Criminal Court in respect of the fourth attacker on 27 May 2002.

8. On 2 August 2002, at the request of the Bergama Assize Court, both sets of proceedings were joined by a decision of the İzmir Juvenile Court, and they continued before the Bergama Assize Court.

9. On 5 November 2003 the Bergama Assize Court issued a decision declining jurisdiction and sent the case back to the İzmir Juvenile Court, having regard to the amendment of 30 July 2003 to the Law on Juvenile Courts which had, *inter alia*, changed the age at which a child should be tried in the juvenile courts from 15 to 18.

10. On 11 December 2004 one of the accused, who had been just under 17 years old at the time of the attack, died. The İzmir Juvenile Court discontinued the proceedings in respect of him. In respect of the other three accused, the court acquitted them on account of a lack of evidence, finding in particular that it was impossible to determine whether at the time of the attack they had had attained the sexual maturity necessary to be capable of committing the sexual offence in question. That decision was given on 26 September 2007.

11. In its decision of 3 July 2012 on appeal, the Court of Cassation upheld the first-instance court's decision to discontinue the proceedings in respect of the accused who had died. In respect of the youngest accused, it rectified the decision acquitting him on the basis that there had been no need to give a decision as he had not attained the age of criminal responsibility, having been less than 12 years old at the time of the attack. As regards the other two accused, the Court of Cassation noted that the limitation period for prosecution had expired in respect of the offence of making threats. However, it quashed the acquittal in respect of the offences of rape and false imprisonment, finding, on the basis of expert opinions and other evidence in

the case file, that those acts had in fact taken place. It appears from the decision of the Court of Cassation that that court applied the relevant provisions of the current Criminal Code, which had entered into force on 12 October 2004 (see paragraphs 16-19 below).

12. Following remittal, the first-instance court discontinued the charges of false imprisonment on account of the expiry of the limitation period for prosecution of that offence. On the charges of repeated counts of rape, it sentenced the two accused to three years, seven months and twenty-two days' imprisonment, under Article 102 § 2 of the current Criminal Code, in view of that Code having more lenient provisions than the former Criminal Code.

13. Both the accused and the applicant appealed against the judgment of the first-instance court. On 29 January 2015 the Court of Cassation upheld the part of the judgment with respect to the discontinuation of the proceedings as regards the charges of false imprisonment. It also set aside the conviction for rape on the grounds that the time-limit for prosecution of that offence had also expired in the meantime in accordance with the provisions of the current Criminal Code, which specified a time-limit of eleven years and three months.

14. On 30 April 2015 the applicant lodged an individual application with the Constitutional Court, complaining that the criminal proceedings brought against his attackers had been ineffective.

15. In a decision of 23 January 2019 the Constitutional Court held that there had been a violation of the State's procedural obligations under Article 3 of the Convention because the criminal proceedings, while not being complex, had taken too long, resulting in their discontinuation owing to the expiry of the limitation period. That state of affairs had inevitably given the impression that the State tolerated the offences in question, and had resulted in the applicant's loss of confidence in the justice system. With that finding, it awarded the applicant 25,000 Turkish liras (TRY) – approximately 4,145 euros (EUR) on the date of the decision – and the reimbursement of his legal costs, while rejecting the remainder (TRY 475,000 – approximately EUR 78,000) of his claims for non-pecuniary damage.

RELEVANT LEGAL FRAMEWORK

I. DOMESTIC LAW

16. The relevant provisions with respect to rape under the former Criminal Code (Law no. 765), which were in force at the time of the commission of the offence in question, and the relevant provisions under the current Criminal Code (Law no. 5237), which entered into force during the course of the criminal proceedings in question, are summarised in *G.U. v. Turkey* (cited above, §§ 45-47).

17. Under the current Criminal Code, the age of criminal responsibility in Türkiye is 12 years, below which no child can be found guilty of a criminal offence. This age limit was 11 years in the former Criminal Code.

18. Under Article 102 § 2 of Law no. 5237, as in force at the time of the ruling of the İzmir Juvenile Court (see paragraph 12 above), rape was defined as an act of penetration of the body with an organ or another object, punishable by seven to twelve years' imprisonment.¹ When rape is committed against a vulnerable person, or when it is committed with a weapon or by more than one person, the penalty is increased by half (Article 102 § 3(a) and (d)). Under the general provisions of Law no. 5237, as in force at the time of the ruling of the İzmir Juvenile Court (see paragraph 12 above), sentences other than life imprisonment were reduced by two-thirds if the offender was between 12 and 15 years old at the time of the commission of the offence, and could not in any event exceed six years' imprisonment. Under Article 7 § 2 of the Criminal Code (Article 2 § 2 of the former Criminal Code), in the event of a difference between the legal provisions in force on the date an offence was committed and those in force after that date, the provision which is more favourable to the offender is applied.

19. In the present case, the provisions governing the offence in question and the limitation periods under the current Criminal Code were applied (see paragraphs 12-13 above). Under Article 66 of that Code, criminal prosecution becomes time-barred after fifteen years for offences in respect of which a sentence of more than five years' and less than twenty years' imprisonment is applicable. Moreover, the limitation period is decreased by half for those who were between the ages of 12 and 15 and by one-third for those who were between the ages of 15 and 18 at the time of the commission of the offence. The limitation period for prosecution runs from the date of the commission of the offence. Conviction by a first-instance court, and certain other steps in the criminal proceedings, interrupt the running of the limitation period. Pursuant to Article 67, interruption of the limitation period cannot result in the limitation period being increased by more than half of the maximum specified duration of that period. Additionally, the time-limits for prosecution cannot be waived and must be applied by the courts of their own motion.

20. It is apparent from Article 314 of the Code of Criminal Procedure that a finding of a violation by the Constitutional Court or by the Court of the State's positive obligations in respect of a victim's Convention rights is not grounds to reopen criminal proceedings which have become final on account of the expiry of the limitation period.

21. Section 50(1) and (2) of Law no. 6216 on the establishment and rules of procedure of the Constitutional Court provides that in cases where a decision finding a violation has been given, the Constitutional Court should

¹ Following an amendment of 18 June 2014, the offence of rape is punishable by a term of imprisonment of no less than twelve years.

give a ruling setting out the steps to be taken to eliminate the violation or its consequences. To that end, where a violation stems from a court decision, the case should be sent back to the relevant court for a retrial with a view to eliminating the violation and its consequences. Where there is no legal interest in holding a retrial, the Constitutional Court may award damages or invite the applicant to apply to a court of general jurisdiction for compensation (see *Uzun v. Turkey* (dec.), no. 10755/13, § 25, 30 April 2013).

II. INTERNATIONAL LAW

A. The United Nations Convention on the Rights of the Child

22. The Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on 20 November 1989, has binding force under international law *vis-à-vis* the Contracting States, including all of the member States of the Council of Europe.

The relevant part of Article 40 provides:

“1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.

...

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.”

B. Recommendation CM/Rec(2008)11 of the Committee of Ministers of the Council of Europe

23. The Recommendation on the European Rules for juvenile offenders subject to sanctions or measures (CM/Rec(2008)11), adopted by the Committee of Ministers on 5 November 2008, reads, in so far as relevant, as follows:

“A. Basic principles

...

4. The minimum age for the imposition of sanctions or measures as a result of the commission of an offence shall not be too low and shall be determined by law.

5. The imposition and implementation of sanctions or measures shall be based on the best interests of the juvenile offenders, limited by the gravity of the offences committed (principle of proportionality) and take account of their age, physical and mental well-being, development, capacities and personal circumstances (principle of individualisation) as ascertained when necessary by psychological, psychiatric or social inquiry reports.

...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

24. Relying on Articles 3 and 13 of the Convention, the applicant complained that the criminal proceedings brought against his attackers had been ineffective as they had become time-barred and had resulted in his attackers’ impunity. He also complained that the remedy of an individual application to the Constitutional Court did not provide effective redress in respect of his Convention complaints.

25. The Court reiterates that it is the master of the characterisation to be given in law to the facts of the case and that it is not bound by the characterisation given by an applicant or a Government (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 126, 20 March 2018, and *S.M. v. Croatia* [GC], no. 60561/14, §§ 241-43, 25 June 2020). Having regard to the circumstances complained of by the applicant and the manner in which his complaints were formulated, it considers it more appropriate to examine the complaints under Article 3 of the Convention alone (see, for a similar approach, *X and Others v. Bulgaria* [GC], no. 22457/16, § 149, 2 February 2021).

Article 3 of the Convention reads as follows:

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

A. Admissibility

26. The Government submitted that the applicant had lost his victim status on the basis that the Constitutional Court, in its decision of 23 January 2019, had explicitly acknowledged that the State authorities had failed to comply with their positive obligation to effectively prosecute the offence committed against him and had awarded him compensation in respect of non-pecuniary damage. Relying on the Court’s judgments in *Scordino v. Italy (no. 1)* ([GC],

no. 36813/97, §§ 178-203, ECHR 2006-V), *Cocchiarella v. Italy* ([GC], no. 64886/01, §§ 65-107, ECHR 2006-V), *Kormoš v. Slovakia* (no. 46092/06, § 73, 8 November 2011), *Žúbor v. Slovakia*, (no. 7711/06, § 63, 6 December 2011), *Horváth v. Slovakia* (no. 5515/09, § 93, 27 November 2012) and *Mironovas and Others v. Lithuania* (nos. 40828/12 and 6 others, 8 December 2015), the Government submitted that compensation awarded to an applicant at national level in order to redress a violation of the Convention did not have to be absolutely concordant with the amounts that were awarded by the Court and could even be lower. By way of example, in *Becová v. Slovakia* ((dec.), no. 23788/06, 18 September 2007) the Court had found the compensation awarded at the national level, which had corresponded to 30% of the award the Court would have made, to be sufficient and had therefore ruled that the applicant could no longer claim to be a victim within the meaning of Article 34 of the Convention.

27. In that connection, the Government noted that the Court had awarded applicants, on the basis of similar violations, EUR 15,000 (in *S.Z. v. Bulgaria*, no. 29263/12, § 62, 3 March 2015, and *G.U. v. Turkey*, cited above, § 88); EUR 12,700 (in *Z v. Bulgaria*, no. 39257/17, § 91, 28 May 2020); and EUR 8,000 (in *M.C. v. Bulgaria*, no. 39272/98, § 194, ECHR 2003-XII). Regard being had to those amounts and the threshold established in *Becová* (cited above), the Government argued that the compensation awarded by the Constitutional Court to the applicant had not been insufficient. They stressed in that connection that that court had examined the individual application within a reasonable time despite its heavy caseload in the aftermath of the attempted coup of 15 July 2016.

28. The applicant contested the Government's submissions, arguing that the amount of compensation awarded by the Constitutional Court had been insufficient in view of his suffering, which had been further exacerbated during the criminal trial by the failure of the trial courts to anonymise his name and to conduct the hearings *in camera*. Moreover, on account of constant threats made by his attackers' families and the humiliation suffered by his family, he and his family had had to move to another city. The attack and further anguish caused by the events surrounding the trial had resulted in the worsening of his disability. All these additional elements, which had been raised before the Constitutional Court, had been ignored by it. The applicant further submitted that the Constitutional Court had jurisdiction to award higher amounts of compensation. By way of example, the applicant referred to a case in which that court had awarded TRY 90,000 (approximately EUR 6,000 on the date of that court's decision) to an applicant who had been subjected to treatment contrary to Article 3 by police officers.

29. The question of whether the applicant may still claim to be a victim of a violation of Article 3 of the Convention in respect of the alleged ineffective prosecution is closely linked to the merits of his complaint under that provision. The Court therefore decides to join this matter to the merits

(see, for a similar approach, *N.D. v. Slovenia*, cited above, § 48, and *mutatis mutandis*, *Roth v. Germany*, nos. 6780/18 and 30776/18, § 58, 22 October 2020, and *Barovov v. Russia*, no. 9183/09, § 33, 15 June 2021).

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

B. Merits

31. The applicant maintained his complaints.

32. The Government argued that it was not necessary for the Court to find a violation of Article 3 of the Convention as the Constitutional Court had already acknowledged a violation of that provision and had afforded appropriate redress. Relying on the Court's findings in *Uzun v. Turkey* ((dec.), no. 10755/13, 30 April 2013), the Government submitted that the individual application procedure before the Constitutional Court was an effective remedy in respect of Convention complaints and reiterated that the Constitutional Court's practice of affording redress either in the form of compensation, or in the form of a ruling for the reopening of proceedings – or both, where appropriate – was in line with the Court's own practice.

1. Positive obligation to investigate and to punish rape cases

33. The relevant principles concerning a State's positive obligation to investigate cases of alleged ill-treatment, and in particular abuse committed by private individuals, specifically concerning children or other vulnerable individuals, are set out in *X and Others v. Bulgaria* (cited above, §§ 184-192). For the State's positive obligation to investigate to arise, an applicant must claim on arguable grounds to have suffered acts contrary to Article 3 (*ibid.*, § 184).

34. The acts of rape and violence perpetrated against the applicant was established at the domestic level. The Court therefore notes that the circumstances of the present case are sufficiently serious to come within the scope of application of Article 3 of the Convention in the context of the State's positive obligations (see, *inter alia*, *S.Z. v. Bulgaria*, cited above, § 41).

35. The authorities' positive obligations under Article 3 of the Convention comprise, firstly, an obligation to put in place a legislative and regulatory framework of protection; secondly, in certain well-defined circumstances, an obligation to take operational measures to protect specific individuals against a risk of ill-treatment contrary to that provision; and thirdly, an obligation to carry out an effective investigation into arguable claims of infliction of such treatment (see *X and Others v. Bulgaria*, cited above, § 178).

36. In so far as the applicant's complaint before the Court concerned the procedural aspect of the respondent State to effectively investigate and punish

the grave acts committed against him, the Court need not examine the domestic legal framework in the absence of a specific complaint in this respect (see for a similar approach, *Sabalić v. Croatia*, no. 50231/13, §§ 102-103, 14 January 2021).

37. As regards the requirements relating to the effectiveness of an investigation, while the scope of the State's positive obligations might differ between cases where treatment contrary to Article 3 has been inflicted through the involvement of State agents and cases where violence has been inflicted by private individuals, the Court reiterates that the requirements as to an official investigation are similar (see *D.J. v. Croatia*, no. 42418/10, § 85, 24 July 2012). The Court has held that any investigation should in principle be capable of leading to the establishment of the facts of the case and to the identification and – if appropriate – punishment of those responsible for an offence (see, for example, *X ad Others v. Bulgaria*, cited above, § 184 and, more recently, *X v. Greece*, no. 38588/21, § 69, 13 February 2024). This is not an obligation as to results to be achieved, but as to means to be employed. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, such as by taking witness statements and gathering forensic evidence, and a requirement of promptness and reasonable expedition is implicit in this context (see *Denis Vasilyev v. Russia*, no. 32704/04, § 100, 17 December 2009, with further references). The promptness of the authorities' reaction to the complaints is an important factor (see *Labita v. Italy* [GC], no. 26772/95, §§ 133 et seq., ECHR 2000-IV). Consideration has been given in the Court's judgments to matters such as the time taken to open investigations, delays in identifying witnesses or taking statements (see *Mătăsarv and Saviţchi v. Moldova*, nos. 38281/08, §§ 88 and 93, 2 November 2010), the length of time taken for the initial investigation (see *Indelicato v. Italy*, no. 31143/96, § 37, 18 October 2001), and unjustified protraction of the criminal proceedings, resulting in the expiry of the limitation period for prosecution (see *Angelova and Iliev v. Bulgaria*, no. 55523/00, §§ 101-03, 26 July 2007, and *P.M. v. Bulgaria*, cited above, § 66).

38. Moreover, where an investigation leads to charges being brought before the national courts, the positive obligations under Article 3 of the Convention extend to the trial stage of the proceedings. In such cases the proceedings as a whole, including the trial stage, must meet the requirements of the prohibition enshrined in Article 3. This means that the domestic judicial authorities must on no account be prepared to let the physical or psychological suffering inflicted go unpunished (see *Okkahl v. Turkey*, no. 52067/99, § 65, ECHR 2006-XII (extracts), and *Çelik v. Turkey* (no. 2), no. 39326/02, § 34, 27 May 2010). In this connection, 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 *Ebcin v. Turkey*, no. 19506/05, § 40, 1 February 2011, with further references).

39. Turning to the present case, the Court begins by noting that the applicant's alleged perpetrators were minors at the time of the commission of the offence and one of them had not even reached the age of criminal responsibility. It notes in this connection that general principles emerging from its case-law on the issue of alleged ill-treatment committed by private persons have primarily been formulated with a view to persons having attained the age of criminal responsibility, the determination of which remains a matter with the States' margin of appreciation, especially in view of the absence of a clear common European standard as to the minimum age of criminal responsibility (see, *mutatis mutandis*, *T. v. the United Kingdom* [GC], no. 24724/94, § 72, 16 December 1999). The Court further considers that the duty to investigate offences committed by juvenile offenders who are above the age of criminal responsibility may not always require resorting to criminal proceedings in view of the need to strike the right balance between the protection of society, including the victim, and the best interest of the child offender (see paragraphs 22-23 above). Nevertheless, the Court reiterates that in situations where the acts complained of constituted treatment prohibited by Article 3 and it was not possible to institute criminal proceedings against an alleged perpetrator on account of his or her age being below the age of criminal responsibility, the authorities would still be bound by their procedural obligation to shed light on the facts (see *X and Others v. Bulgaria*, cited above, 220 and also *A.P. v. the Republic of Moldova*, no. 41086/12, § 32, 26 October 2021). In *X and Others v. Bulgaria*, the Court further held that an investigation leading to the adoption of appropriate measures in respect of children who had allegedly committed reprehensible acts but were not criminally responsible were in principle adequate for the purposes of Article 3 of the Convention (*ibid.*, § 202).

40. In respect of the alleged perpetrator who was below the age of criminal responsibility, the Court notes that the authorities did not take any further and appropriate investigative measures into his involvement in the offences against the applicant once the Court of Cassation determined that he could not be prosecuted on account of his age. Likewise, the oldest alleged perpetrator died in the course of the criminal proceedings with the result that his culpability could not be determined posthumously.

41. Regarding the remaining child offenders, the Court notes that the authorities investigated their alleged involvement in the offences against the applicant in the course of the criminal proceedings as was required by the domestic legislation. Having regard to the domestic legal framework, the definitions of various offences that amount to ill-treatment committed by private individuals, the gravity of the punishments, and the incident in question, the Court does not find that the domestic courts classified the attacks suffered by the applicant in an inadequate manner. Neither can the

domestic courts be reproached for applying the more favourable provisions to the offenders as this was required under both Criminal Codes. However, in the present case, the Constitutional Court identified the unjustified protraction of the criminal proceedings resulting in the expiry of the limitation period as the reason for the failure of the State to comply with its procedural obligation to carry out, *inter alia*, an effective investigation into the attack on the applicant, as required under Article 3 of the Convention. The Constitutional Court emphasised in this respect that these criminal proceedings, which were not considered complex, had lasted for 13 years (see paragraph 15 above). The Court sees no reason to depart from the findings of the Constitutional Court in this respect, noting that what led to the proceedings becoming time-barred was not the shortened limitation period as such but the failure of the prosecuting authorities and the domestic courts to establish the facts in a timely manner.

2. *Whether the applicant has lost his victim status*

42. The Court reiterates that it falls, firstly, to the national authorities to redress any violation of the Convention. In that regard, the question whether an applicant can claim to be the victim of the violation alleged is relevant at all stages of the proceedings under the Convention (see, among other authorities, *Gäfgen v. Germany* [GC], no. 22978/05, § 115, ECHR 2010, and *Scordino*, cited above, § 179). A decision or measure favourable to the applicant is not, in principle, sufficient to deprive him of his status as a “victim” for the purposes of Article 34 of the Convention unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention (see, among other authorities, *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI, and *Scordino*, cited above, § 180).

43. As regards the first condition, the Court notes that the Constitutional Court ruled that the State had failed to comply with its positive obligations to conduct an effective criminal trial in respect of the applicant’s attackers (see paragraph 15 above), and it expressly acknowledged that Article 3 of the Convention had been violated.

44. As to the second condition, namely redress for the breach acknowledged, the Court reiterates that where a finding of a violation stems from the State authorities’ failure to conduct an effective investigation, the principle of *restitutio in integrum* requires the applicant to be put, as far as possible, in the same situation as that in which he would have found himself had there not been a breach of that provision, which would normally require the State authorities to reopen the criminal proceedings. That being so, in the present case, having regard to the limitation period resulting in the attackers being exempted from criminal responsibility, the deficiencies in the conduct of the criminal proceedings can no longer be rectified by restoring the situation that existed before the breach of the Convention. In that connection,

the Court has accepted in its case-law that there may be situations where it is *de jure* or *de facto* impossible to reopen criminal investigations into the incidents giving rise to the applications being examined by the Court. Such situations may arise, for example, in cases in which the alleged perpetrators have been acquitted and cannot be put on trial for the same offence, or in cases in which the criminal proceedings have become time-barred on account of the limitation periods set out in the national legislation (see *Taşdemir v. Turkey* (dec.), no. 52538/09, § 14, 12 March 2019). Indeed, the reopening of criminal proceedings that have been terminated on account of the expiry of the limitation period may raise issues concerning legal certainty (see *Coëme and Others v. Belgium*, nos. 32492/96 and 4 others, § 146, ECHR 2000-VII) and may thus have a bearing on a defendant's rights under Article 7 of the Convention (see, *mutatis mutandis*, *Kononov v. Latvia* [GC], no. 36376/04, §§ 228-33, ECHR 2010).

45. Having regard to the foregoing and the *de jure* impossibility of reopening the criminal proceedings in the present case, the Court notes that an award of compensation by the Constitutional Court constituted an appropriate form of redress for the violation suffered by the applicant.

46. It remains to be ascertained, having regard to the facts complained about before the Court, whether the level of compensation awarded at domestic level was sufficient (see *Gäfgen*, cited above, § 118). In view of the wide margin of appreciation left to the domestic courts in this regard, the Court has emphasised, in particular, that the sums awarded may not be unreasonable in comparison with awards made by the Court in similar cases. Whether the amount awarded may be regarded as reasonable falls to be assessed in the light of all the circumstances of the case. These circumstances include the value of the award judged in the light of the ordinary living standards and the general level of incomes in the State concerned, and the fact that the remedy in the national system is closer and more accessible than an application to the Court (see *Scordino*, cited above, §§ 206 and 268, and *Shilbergs v. Russia*, no. 20075/03, § 72, 17 December 2009). However, where the amount of compensation is substantially lower than that which the Court generally awards in comparable cases, the applicant retains his or her status as a “victim” of the alleged breach of the Convention (see, *mutatis mutandis*, *Scordino*, cited above, §§ 182-92 and 202-15).

47. Turning to the present case, the Court begins by noting that contrary to the Government's submissions, it has never set out a general rule to the effect that a domestic award in respect of non-pecuniary damage amounting to at least 30% of what it would award in similar cases would be considered reasonable. It reiterates in this connection that whether the amount awarded may be regarded as reasonable falls to be assessed in the light of all the circumstances of the case (see, *inter alia*, *N.D. v. Slovenia*, cited above, § 75).

48. The Court is mindful that the task of making an estimate of damages to be awarded is a difficult one. It is especially difficult in a case where

personal suffering, whether physical or mental, is the subject of the claim. There is no standard by which pain and suffering, physical discomfort and mental distress and anguish can be measured in monetary terms (see *Shilbergs*, cited above, § 76, and *Nardone v. Italy* (dec.), no. 34368/02, 25 November 2004). The Court does not doubt that the Constitutional Court in the present case attempted to assess the level of mental distress and suffering sustained by the applicant as a result of the lack of effectiveness in conducting the criminal proceedings concerning his rape. The amount awarded by the Constitutional Court, however, is substantially lower than the amounts awarded by the Court in other cases involving deficiencies in an investigation and/or a prosecution of cases of sexual abuse committed by private individuals (see, for example, the amounts awarded in *M.C. v. Bulgaria*, cited above, § 194; *P.M. v. Bulgaria*, cited above, § 74; *C.A.S. and C.S. v. Romania*, no. 26692/05, 20 March 2012, § 92; *D.J. v. Croatia*, cited above, § 112; *G.U. v. Turkey*, cited above, § 88; *N.Ç. v. Turkey*, cited above, § 143, and see also, *mutatis mutandis*, *İlker Deniz Yücel v. Türkiye*, no. 27684/17, § 73, 25 January 2022 and the authorities cited therein, where the Court concluded that the applicant could still claim to be a victim in view of the inadequacy of the compensation awarded by the Turkish Constitutional Court). Moreover, the Court must factor in the individual circumstances of the case, such as the applicant's position as a vulnerable person and the time the Constitutional Court took in deciding his individual application, namely three years and nine months – falling short of a prompt response.

49. Therefore, the Court considers that the compensation awarded to the applicant by the Constitutional Court did not constitute sufficient redress and thus he may still claim to be a “victim” of a breach of Article 3 of the Convention.

3. Compliance with Article 3

50. Having regard to the above findings, the Court finds that the criminal proceedings regarding the applicant's rape did not comply with the procedural requirements imposed by Article 3 of the Convention.

51. There has therefore been a violation of that provision.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. 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.”

53. In his application form the applicant indicated that he would claim amounts in respect of pecuniary and non-pecuniary damage as well as cost and expenses at a subsequent stage of the proceedings. However, he failed to submit a claim in respect of just satisfaction when invited to do so after the notice of the application had been given to the Government. The Court reiterates that an applicant who wishes to obtain an award of just satisfaction must make a specific claim to that effect (Rule 60 § 1 of the Rules of the Court). While the Court is, even in the absence of a properly submitted claim, empowered to afford just satisfaction, this applies only in respect of non-pecuniary damage and in exceptional circumstances (see *Nagmetov v. Russia* [GC], no. 35589/08, §§ 74-82, 30 March 2017). The Court does not discern any exceptional circumstance which could have required it to make an award in respect of non-pecuniary damage in the present case. It therefore makes no award under this head (see, for a similar approach, *Abdi Ibrahim v. Norway* [GC], no. 15379/16, §§ 164-170, 10 December 2021).

FOR THESE REASONS, THE COURT,

1. *Decides*, unanimously, to join to the merits the Government's objections regarding the applicant's victim status and dismisses it;
2. *Declares*, unanimously, the application admissible under Article 3 of the Convention;
3. *Holds*, unanimously, that there has been a violation of the respondent State's positive obligations under Article 3 of the Convention;
4. *Holds*, by five votes to two, that in the absence of a quantified claim, there is no legal basis for an award of just satisfaction.

Done in English, and notified in writing on 27 August 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı
Registrar

Arnfinn Bårdsen
President

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

PARTLY DISSENTING JOINT OPINION OF JUDGES
SÂRCU AND DERENČINOVIĆ

54. We agree that in this case there has been a violation of Article 3 in its procedural limb.

55. However, we respectfully disagree with the majority's decision not to award non-pecuniary damage to the applicant.

56. Under Article 41 of the Convention, the just satisfaction afforded to the injured party may consist of, *inter alia*, granting any claim for non-pecuniary damage. The Court has a discretion to grant compensation, if necessary. The Rules of Court (Rule 60) and the Practice Direction on just satisfaction claims further specify that this discretion of the Court applies if the applicant has made an appropriate claim for non-pecuniary damage.

57. We can accept that in this case the applicant and his lawyer failed to specify the claim for non-pecuniary damage. Still, in exceptional circumstances the Court may exercise its discretion and award non-pecuniary damage even in the absence of a proper claim by the applicant. The conditions for applying this exception were established by the Grand Chamber in the *Nagmetov* case (see *Nagmetov v. Russia* [GC], no. 35589/08, §§ 64-92, 30 March 2017). This case is, in our opinion, owing to its very specific context, particularly suitable for the application of the *Nagmetov* criteria and consequently for awarding non-pecuniary damage to the applicant.

58. It seems to be very clear that both the substantive conditions set out in *Nagmetov* (cited above) are met in this case – the particular gravity and impact of the violation, and the overall context of the case read in conjunction with the (in)adequacy of reparation received at domestic level. Obviously, there is no possibility of reopening the case at the domestical level because the limitation period has expired. Likewise, at the time of the alleged attack, the applicant was a vulnerable individual with disabilities who was subjected to grave sexual violence. The authorities failed to bring the suspects to justice because the criminal proceedings became time-barred.

59. Whether the first element (prerequisite) set out in *Nagmetov* (cited above), namely, an unequivocal indication that the applicant wishes to obtain monetary compensation, was met may be subject to different interpretations. The relevant part of the test in question reads as follows:

“79. The Court finds it conceivable that an applicant may choose to limit (*ab initio* or at a later stage) his or her application before the Court to a recognition that the rights under the Convention or the Protocols thereto were violated by the respondent State, while seeking no monetary reparation before the Court ... or preferring to subsequently seek it at domestic level, for instance where effective remedies become clearly available in view of the Court's judgment. Therefore, the Court would attach particular importance to indications unequivocally showing that an applicant expressed a wish to obtain monetary compensation in addition to the recognition of the violation of the Convention, and that his or her interest in obtaining compensation is expressed in relation to the same facts as those that underlie the Court's findings about a violation of

the Convention in his or her case. It is further necessary to ascertain that there is a causal link between the violation and the non-material harm arising from the violation of the Convention.”

The cited passage makes it clear that the Court sought to differentiate between, on the one hand, cases where an applicant simply chooses to limit his or her application to a recognition that Convention rights were violated by the respondent State, while seeking no monetary reparation, and, on the other hand, cases where an applicant expresses a wish to obtain monetary compensation in addition to the recognition of the violation of the Convention. The latter scenario is necessarily contextual. It depends on unequivocal “indications” of a wish to obtain monetary compensation expressed “in relation to the same facts as those that underlie the Court’s findings about a violation of the Convention in his or her case”.

As we understand it, this indication of a wish can be in any form and expressed at any stage of the proceedings. That is how we read *Nagmetov*. Any different reading of this prerequisite would, in our opinion, blur the distinction between a formal claim made under Rule 60 of the Rules of Court and a mere indication of a wish to obtain compensation, which, as already noted, must depend on contextual factors linked to the substance of the application to the Court.

60. The applicant in this case, as did the applicant in *Nagmetov*, sought in his application form compensation for the related violation of the Convention (see *Nagmetov*, cited above, § 38). He was even more specific than the applicant in *Nagmetov*, as he indicated that he would claim amounts in respect of pecuniary and non-pecuniary damage as well as costs and expenses at a subsequent stage of the proceedings (see paragraph 53 of the present judgment). He reiterated this wish in his later observations on the admissibility and merits and claims for just satisfaction sent on 30 December 2022. It might be argued that it was not expressed explicitly, but the context and arguments raised by the applicant (the insufficient amount awarded by the Constitutional Court, the worsening of his health condition after the attack and as a result of the length of the proceedings, and so on) indicate that he continued wishing to obtain monetary compensation.

61. For this particular reason we do not agree with the analogy that the majority made with the *Abdi Ibrahim* case (see *Abdi Ibrahim v. Norway* [GC], no. 15379/16, 10 December 2021), because in that case the “case file disclosed no explicit wish from the applicant to file a claim for just satisfaction in the ordinary proceedings before the Chamber” and the applicant herself acknowledged that she had not made a claim, owing to an oversight (see *Abdi Ibrahim*, cited above, §§ 166 and 170). Moreover, contrary to the present case, the *Abdi Ibrahim* case had no link on the substance to the question whether adequate monetary compensation had been obtained or not. In the present case, again, it would not seem right to turn a

blind eye to the fact that the applicant indicated, more than once, his wish to obtain monetary compensation (see *Abdi Ibrahim*, cited above, § 7).

62. Furthermore, having in mind the specific context of this case and the fact that, unlike in *Nagmetov* (cited above), the domestic authorities had already acknowledged a violation and provided redress to the applicant (although the amount was not sufficient), it is very clear that the motivation of the applicant in his application to the Court was to obtain compensation commensurate with the gravity of violation.

63. The Court followed that line of reasoning and, after establishing that the applicant had not lost his victim status (because the amount of non-pecuniary damage awarded by the Constitutional Court was significantly lower than what would be awarded by the Court), found a violation of Article 3 in its procedural limb.

64. In this connection, we regret that the majority stopped halfway and refused to accept that the *Nagmetov* (cited above) test for exceptionally awarding non-pecuniary damage even in the absence of a proper claim for just satisfaction had been met in the particular context of this case. That failure, in our opinion, makes this judgment almost meaningless from the human rights perspective.