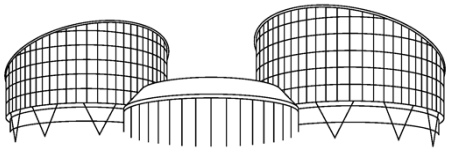

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF N.D. v. SLOVENIA

(Application no. 16605/09)

JUDGMENT

STRASBOURG

15 January 2015

FINAL

15/04/2015

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

In the case of N.D. v. Slovenia,

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

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Ganna Yudkivska,
André Potocki,
Helena Jäderblom,
Aleš Pejchal, *judges,*
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 9 December 2014,

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

PROCEDURE

1. The case originated in an application (no. 16605/09) against the Republic of Slovenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Slovenian national, Ms N.D. ("the applicant"), on 24 March 2009. The President of the Section acceded to the applicant's request not to have her name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant was represented by Ms B. Zidar, a lawyer practising in Celje. The Slovenian Government ("the Government") were represented by their Agent, Mrs T. Mihelič Žitko, State Attorney.

3. The applicant alleged that the criminal proceedings concerning her rape had been unduly long and had not been conducted with the required diligence.

4. On 5 June 2012 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1986 and lives in Loka pri Žusmu.

6. On an unspecified date in 1992 the applicant was raped by her eldest uncle J.D., then aged nineteen, with whom she and her family were living at the time in her grandparents' house. Thereafter J.D. forced the applicant to

engage in sexual intercourse on a regular basis, approximately twice a week. This continued until March 1994, when the applicant, together with her mother, sister and stepfather moved to a nearby village, after which she would only visit her grandparents on the weekends and during the holidays. According to the applicant, on these occasions J.D. touched her in an inappropriate manner, and also attempted to have sexual intercourse with her once again.

A. Criminal proceedings concerning the continuous sexual assault on the applicant

7. On 24 November 2000 the applicant told her school's counsellor that she had been sexually abused. The school counsellor informed the local social work centre of the allegation of sexual abuse of a minor, and they, in turn, informed the police, who took a statement from the applicant.

8. In the next few days the police questioned J.D., the applicant's mother, sister, stepfather and grandfather, her doctor and the school counsellor.

9. On 7 December 2000 a criminal complaint against J.D. for the sexual assault of a person younger than fifteen years of age was submitted to the District Public Prosecutor's Office in Celje under Article 183 § 3 of the Criminal Code.

10. On 29 December 2000 the public prosecutor asked the investigation department of the Celje District Court to open a judicial investigation against J.D. for continuous sexual assault on a child.

11. Having heard J.D., on 29 March 2001 the investigating judge issued a decision to open a judicial investigation against J.D. for continuous sexual assault on a child.

12. On 9 May 2001 the public prosecutor sought to have the investigation against J.D. for continuous sexual assault on a child expanded to include the applicant's younger sister, S.

13. On 16 May 2001 the investigating judge questioned the applicant and S., their mother and the school counsellor whom the applicant had first spoken to about the sexual assault. In her statements to the investigating judge the applicant, who was at the time being treated in a hospital for psychological trauma, gave a detailed account of the events.

14. The investigating judge appointed two clinical psychologists to prepare reports on the psychological states and characteristics of the applicant and of J.D., respectively. On 7 November 2001 the first expert submitted her report, in which she stated that the applicant exhibited characteristics typical of children who have been sexually abused which could be diagnosed as post-traumatic stress disorder. The other report concerning J.D. was submitted on 3 April 2002.

15. On 28 May 2002 the public prosecutor indicted J.D. for sexual assault on a person younger than fifteen years of age. At the trial, the charge was modified to sexual assault on a person younger than fourteen years of age under Article 103 § 3 of the Criminal Code of the Socialist Republic of Slovenia, the applicable legislation at the time of the events in question.

16. On 10 September 2002 the president of the Celje District Court appointed R.G. as the applicant's legal representative, as she was still a minor.

17. On 16 January 2003, the district court excluded from the case file a summary of J.D.'s statement given to the police in the preliminary proceedings, before he had been provided with the guarantees of fair trial.

18. On 22 January 2007 a district court judge to whom the applicant's case had been assigned withdrew from the case on account of having taken note of documents which should have been excluded from the case file.

19. On 19 February 2008 the Celje District Court scheduled the first hearing for 14 April and asked the Ministry of Justice to retrieve any court records regarding J.D.

20. On 14 April 2008 the Celje District Court held a hearing, from which the public was excluded on the grounds of protection of the applicant's and J.D.'s privacy. The court heard J.D., who denied the charges and stated that his nieces had never been entrusted to his care. At the same hearing the court revoked R.G.'s authority to act as the applicant's lawyer, as the applicant had meanwhile attained the age of majority.

21. Between 12 June 2008 and 7 April 2009 the court held another four hearings at which it examined the applicant, J.D., the clinical psychologist who had submitted the report on J.D. and the applicant's school counsellor. At the first hearing, the applicant, while unable to remember all the details of the events in question, gave a statement that essentially matched her previous statements given in the investigation. Later on, when the parties and other participants were required to give fresh statements due to two longer periods of adjournment between the hearings, the applicant declared that it would be too traumatic for her to give another full account of the events, so she only provided some additional clarification. J.D. also maintained his plea of not guilty and answered some additional questions. The applicant's mother and S., however, made use of the privilege against giving testimony that arose based on their family relationships with J.D.

The court sought an additional expert opinion with regard to S. and granted a defence request for additional evidence to be obtained from the clinical psychologist who had submitted an opinion on J.D.'s psychological state. Another expert opinion was also obtained from a psychiatrist, who established that at the time of the offences J.D.'s ability to understand his actions and control his behaviour had not been significantly impaired by emotional frustration and confusion as to his identity that he had been

experiencing. The hearings were adjourned between 2 September and 18 December 2008 due to J.D.'s defence counsel being on sick leave.

22. Having been informed by the court of her right to bring a civil claim for compensation against J.D., on 12 June 2008 the applicant first sought 22,000 euros (EUR) for non-pecuniary damage and on 4 February 2009 increased the claim to 53,000 EUR.

23. On 17 September 2008 the applicant submitted an application for free legal aid, which was granted on 16 October 2008. The court assigned a lawyer to represent the applicant henceforth in the criminal proceedings.

24. On 10 February 2009 the applicant lodged a supervisory appeal under the Protection of the Right to a Trial without Undue Delay Act (hereinafter "the 2006 Act"). She was informed on 25 February 2009 that a hearing was scheduled for 7 April 2009.

25. On 8 April 2009 the Celje District Court rendered its judgment, finding J.D. guilty of the charges of continuous sexual assault on a person younger than fourteen years of age in the period from 27 March 1992 until 1994 with respect to the applicant and sexual assault on a person younger than fourteen years of age on an unspecified date in the period from 27 March 1992 until 1994 with respect to S. The court sentenced J.D. to three years and four months' imprisonment. In setting the sentence, the district court took into account, on the one hand, the significant passage of time from the commission of the offence until conviction, and on the other, J.D.'s complete lack of remorse for the offences he had committed. The applicant's claim for compensation was not decided, and she was instructed to pursue it in civil proceedings.

26. J.D. appealed against his conviction and sentence.

27. On 10 March 2010 the Celje Higher Court rendered a final judgment in which it dismissed the appeal and upheld J.D.'s conviction and sentence.

B. The applicant's claim against the State for non-pecuniary damage owing to the delays in the criminal proceedings

28. Following unsuccessful settlement negations with the State Attorney's Office, on 3 September 2010 the applicant lodged a claim under the 2006 Act seeking compensation in the amount of EUR 5,000, the maximum amount that could be awarded for non-pecuniary damage incurred as a result of the length of the criminal proceedings.

29. On 27 May 2011 the Celje Local Court rendered a judgment, finding that the applicant's right to trial within a reasonable time had been breached and ordering that the State pay EUR 4,000 to the applicant, together with default interest, while dismissing the remainder of the applicant's claim. Having regard to the fact that the criminal proceedings in the applicant's case had lasted some nine years and two months, the court, noting in particular the lack of any activity between January 2003 and January 2007,

concluded that this period could not be considered reasonable. In its detailed reasoning, the court emphasised that due to the nature of the criminal acts involved – two counts of continuous sexual assault on a minor committed against two victims, one of whom had been the applicant – the criminal proceedings should have been conducted in a particularly diligent, determined and prompt manner in order to alleviate, as much as possible, the applicant's suffering and severe mental distress caused by frequently having to relive the traumatic events. The local court further pointed out that the delays must have been very stressful for her, in addition to which she had had no effective remedies at her disposal in order to accelerate the proceedings. Considering the continuous nature of the acts suffered by the applicant and the fact that she had been called to testify and relive these events a number of times during the proceedings, the local court deviated from the general practice of the domestic authorities to make an award, within the statutory range of between EUR 300 and 5,000, equal to 45% of the sum that would be awarded for a violation of the right to trial within a reasonable time by the Court. Thus, the applicant was awarded EUR 4,000, although she would not apparently have been entitled to such amount purely on the basis of the excessive length of the proceedings.

30. The State Attorney lodged an appeal against the judgment. On 2 December 2011 the Celje Higher Court modified the first-instance judgment in so far as it concerned the payment of court fees. It rejected the remainder of the appeal.

II. RELEVANT DOMESTIC LAW

A. Applicable criminal law

31. The 1977 Criminal Code of the Socialist Republic of Slovenia, applicable at the time of the incident and thus used in the criminal proceedings at issue, provided that sexual intercourse or any other sexual act with a person who had not attained the age of fourteen years was punishable by imprisonment ranging from one year to eight years.

32. As regards the protection of underage victims of criminal offences of a sexual nature, the Criminal Procedure Act provides that minors must, from the initiation of the criminal proceedings onwards, have a lawyer to protect their rights, particularly in connection with the protection of their dignity during examination before the court and the enforcement of their claims for compensation. Underage victims who have no lawyer are assigned one by the trial court.

33. In order to ensure the smooth course of a judicial investigation, the parties and the victim may, pursuant to section 191 of the Criminal Procedure Act 1994, complain to the president of the court charged with the investigation about delays and other irregularities. Upon the examination of

the complaint, the president is required to inform the complainant of any steps taken in this regard.

34. Finally, as to the time frame for scheduling a criminal trial, section 286(2) of the Criminal Procedure Act provides that the presiding judge shall schedule a first trial hearing within two months of receipt of an indictment. If he fails to do so, he must inform the president of the court thereof, and the latter is required to take the necessary steps to schedule the hearing.

B. Applicable civil law

35. Article 148 of the Code of Obligations regulating the liability of legal persons for damage inflicted by one of its subsidiary bodies, which also applies to the determination of the State's liability for damages, provides that a legal person is liable for damage inflicted on a third party by one of its subsidiary bodies in the exercise of its functions or in connection therewith.

36. According to Article 179 of the Code of Obligations, which constitutes the statutory basis for awarding compensation for non-pecuniary damage, such compensation may be awarded in the event of the infringement of a person's personality rights, provided that the circumstances of the case, and in particular the level and duration of the distress and fear caused thereby, justify an award.

C. The 2006 Act

37. Under Section 2 of the 2006 Act, the right to a trial within a reasonable time is guaranteed to, amongst others, injured parties in criminal proceedings. Section 16 of the Act provides for a compensatory remedy and fixes the maximum amount that may be awarded. It reads as follows:

> "(1) Monetary compensation shall be payable for non-pecuniary damage caused by a violation of the right to a trial without undue delay. Strict liability for any damage caused shall lie with the Republic of Slovenia.
>
> (2) Monetary compensation in respect of individual, finally decided cases shall be awarded in an amount of between 300 and 5,000 euros.
>
> (3) When deciding on the amount of compensation, the criteria referred to in section 4 of this Act shall be taken into account, in particular the complexity of the case, the actions of the State, the actions of the party [making the claim] and the importance of the case for that party."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

38. The applicant complained that the State had failed to effectively address her complaint of sexual abuse, contrary to Articles 3 and 8 of the Convention. However, as the applicant's complaints were limited to the effectiveness of the criminal proceedings concerning the continuous sexual assault committed against her, the Court considers that it is not necessary in the particular circumstances of the present case, where the offences against the applicant were committed from 1992 until 1994 and therefore at least to a large extent before the entry into force of the Convention in respect of Slovenia on 28 June 1994, to decide whether its temporal jurisdiction also extends to issues under Article 8 (see *P.M. v. Bulgaria*, no. 49669/07, § 58, 24 January 2012). Having already held that Article 3 provides sufficient legal basis for the State's duty to conduct an effective investigation and/or trial of such criminal offences, the Court considers that the applicant's complaints fall to be examined solely under this provision, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Admissibility

1. Non-exhaustion of domestic remedies

39. The Government objected that the applicant had failed to exhaust domestic remedies, as she had not introduced an action against the State for compensation of non-pecuniary damage caused by the State authorities based on Articles 148 and 179 of the Code of Obligations. According to the Government, any unlawful conduct on the part of the authorities might constitute a violation of an individual's personality rights. In support of their submissions, they cited seven decisions of the Supreme Court adopted between 1999 and 2009 and three decisions of the Ljubljana Higher Court of 2010 and 2011 showing that the State had been found by the domestic courts to be liable for damages related to the work of its employees and the exercise of their powers. Moreover, the Government submitted twelve decisions of the Supreme Court, the Ljubljana Higher Court and the Maribor Higher Court adopted between 1993 and 2011, in which a wide range of rights, such as the rights to personal dignity, to physical and mental integrity, to family life, to a healthy living environment, to personal liberty, to respect for the deceased and to the inviolability of the home had been considered as "personality rights" by the courts and their unlawful

infringement had been found to cause mental distress warranting compensation.

40. Moreover, the Government claimed that the applicant could have availed herself of the possibility provided under section 191 of the Criminal Procedure Act and complained about the delays to the president of the court charged with the investigation (see paragraph 33 above).

41. The applicant challenged the Government's arguments, observing that non-pecuniary damage could only be claimed under Article 179 of the Code of Obligations in cases falling under one of the categories listed therein, and that there was no indication that the domestic courts considered the positive obligations of the State as belonging to one of these categories. The applicant asserted that the case-law submitted by the Government was not relevant to her case and added that non-pecuniary damage resulting from the excessive length of proceedings was not considered by the domestic courts to interfere with any of the rights secured by the Code of Obligations and was, accordingly, actionable under a different legal provision. The applicant therefore concluded that she could not have been required to exhaust a remedy which, in the particular circumstances of her case, was not established in law or practice.

42. Firstly, as regards the availability of a civil action for compensation, the Court notes that the Government has raised a similar objection already in *W. v. Slovenia* (no. 24125/06, §§ 75-77, 23 January 2014). In that case, the Court found that all of the domestic decisions advanced by the Government related to substantive rights and not to the rights arising from the State's positive obligation to conduct an effective investigation and criminal proceedings. Thus, it held that the action for compensation had not offered the applicant reasonable prospects of success and rejected the Government's objection. Considering that in the present case the Government submitted no domestic jurisprudence refuting this conclusion, the Court sees no reason to depart from the conclusion reached in *W. v. Slovenia*.

43. Furthermore, as to the alleged failure of the applicant to complain about the delay to the president of the court charged with the investigation, the Court notes that the almost six-year-long period of inactivity on the part of the domestic authorities, which is the main focus of the applicant's complaint, did not take place during the investigation stage of the proceedings, but after the indictment against J.D. had already been lodged – at which stage the trial was supposed to be scheduled within two months (see paragraph 34 above). Neither did the Government provide any case-law showing that this remedy could have been successfully used in a situation such as that of the present case. Finally, it cannot be overlooked that the Celje Local Court, in its judgment granting the applicant's claim for compensation under the 2006 Act, pointed out that the applicant had had no effective remedies available to accelerate the proceedings (see paragraph 29

above). Therefore, in the Court's opinion a complaint to the president of the court also cannot be considered to have constituted an effective remedy for the purposes of Article 35 § 1 of the Convention.

44. It follows that the Government's objection of non-exhaustion of domestic remedies should be dismissed.

2. Lack of victim status

45. The Government objected that the applicant could no longer claim to be a victim of a violation of Article 3, having been awarded and paid compensation on the grounds that the criminal proceedings against J.D. had not been concluded within a reasonable time. In addition, they pointed out that the applicant had not appealed against the amount awarded in the domestic proceedings.

46. The applicant disputed this, emphasising that the remedies under the 2006 Act did not, as established by the Court, effectively address situations in which the excessive length of proceedings was examined in terms of compliance by the State with its positive obligations under Articles 2 or 8 of the Convention.

47. Article 34 of the Convention, in so far as relevant, provides:

> "The Court may receive applications from any person ... claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. ..."

48. Having regard to the fact that the national authorities acknowledged a violation of the applicant's right to trial within a reasonable time under Article 6 of the Convention and awarded her compensation under this head, the Court considers that the issue of whether the applicant can still be considered a victim of the violation complained of depends on whether the domestic decisions rendered in the course of the 2006 Act proceedings entailed an acknowledgment, at least in substance, of a violation of the State's positive obligations under Article 3 to undertake the effective prosecution of the criminal offences committed against the applicant, and whether the compensation she received constituted appropriate and sufficient redress. The Court finds that these questions are closely linked to the substance of the applicant's complaint and should accordingly be joined to the merits.

3. Failure to comply with the six-month rule

49. The Government argued that in so far as the applicant complained of not having been assigned a lawyer to represent her while she was still a minor, the only procedural action in which she had taken part without a lawyer had been giving a statement to the investigating judge on 16 May 2001. According to the Government, this deficiency had been rectified by the subsequent appointment by the trial court of R.G. as the applicant's

lawyer on 10 September 2002. Accordingly, in the opinion of the Government, the applicant's complaint regarding the failure of the State to appoint a representative for her had been lodged after the expiry of the six-month period and was therefore inadmissible.

50. The applicant disputed this objection by arguing that the lack of legal representation was only one of the elements showing that the criminal proceedings had not been conducted diligently and that her interests had not been properly protected.

51. The Court notes that in cases of sexual abuse committed by private individuals, where the duty of the State consists of a procedural requirement to identify and prosecute the responsible persons, this requirement is of a continuous nature and binds the State throughout the period in which the authorities can reasonably be expected to take measures with the aim of elucidating the circumstances of the commission of the offence and establishing responsibility for it (see, *mutatis mutandis*, *Šilih v. Slovenia*, [GC], no. 71463/01, § 157, 9 April 2009, and the cases cited therein). However, as regards the applicant's complaint of the lack of legal representation at the initial stage of the criminal proceedings, it is noted that this deficiency was rectified by the domestic court's appointment of R.G. as her lawyer on 10 September 2002 and therefore did not give rise to a continuing state of affairs. In this regard, it is true that in the course of a criminal investigation and/or trial there may be specific events occurring on identifiable dates or omissions limited in time which, nevertheless, adversely affect the overall effectiveness of the proceedings and must accordingly be examined as elements of a more general complaint. However, in the present case, it must first be ascertained whether the untimely appointment of legal counsel was relevant to the effectiveness of the investigation of the applicant's rape. The Court therefore finds that this question is also closely linked to the substance of the applicant's complaint and should accordingly be joined to the merits.

4. Conclusion

52. The Court notes that the application 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 applicant's victim status

53. The Court considers that in the present case it cannot answer the question whether the applicant subsequently lost her initial status as the victim of a breach of Article 3 of the Convention within the meaning of

Article 34 of the Convention without having first examined whether the domestic authorities discharged their positive obligation under Article 3 to effectively investigate and prosecute the criminal offence of continuous sexual assault. Thereafter, the adequacy or otherwise of the authorities' response thereto can be considered (see *Gäfgen v. Germany* [GC], no. 22978/05, § 78, ECHR 2010).

(a) The existence of a positive obligation to punish rape and to investigate rape cases

(i) The parties' submissions

54. The applicant complained that the inactivity of the domestic authorities in the criminal proceedings concerning the continuous sexual assault on her had caused her a lot of anguish. She had taken a risk by reporting sexual violence committed by her relative, but had been unable to prove his guilt for a number of years simply because the competent court had not started working on her case. The criminal law mechanisms by which the acts committed by her uncle, which had gravely interfered with the most private aspect of her personal life and injured her for life, were prosecuted had been ineffective in practice for more than five years. The applicant emphasised that she had been put into foster care as a result of the abuse. In order for her to be able to move on, it had been crucial to obtain J.D.'s apology or, at least, recognition that the abuse had taken place.

55. The Government argued that, while there had been a delay between the lodging of the indictment and the first trial hearing, in general the authorities had conducted the proceedings rapidly and effectively. From the moment the applicant had told the school social worker about the sexual abuse, the police, investigating judge and public prosecutor had all acted with promptness. They had taken statements from the victims, suspect and possible witnesses, obtained expert opinions on the psychological states of the victims and J.D., and an indictment had been lodged only a few days after the investigation had been concluded. In addition, once the competent court had commenced the trial on 14 April 2008, the proceedings had again been conducted conscientiously and effectively; J.D.'s appeal against conviction and sentence had been decided in six months. The offender had therefore been identified and appropriately punished, and so the fundamental purpose of the criminal proceedings had been fulfilled. In view of this, the Government asserted that the only point in relation to which they could be considered as not having complied with their positive obligations under Article 3 was the excessive length of the criminal proceedings. In this connection, however, they argued that the situation had resulted from a systemic problem of court backlogs, which had, however, been effectively addressed as part of the "Lukenda" project created specifically to deal with considerable delays in processing cases. One of the measures adopted

within this project was the 2006 Act, under which the applicant had been awarded compensation for the excessive length of the proceedings.

(ii) The Court's assessment

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

57. As regards the Convention requirements relating to the effectiveness of an investigation, the Court has held that any investigation should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible for an offence. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, 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 *Mătăsaru 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 statute of limitations (see *Angelova and Iliev v. Bulgaria*, no. 55523/00, §§ 101-103, 26 July 2007, and *P.M. v. Bulgaria*, no. 49669/07, § 66, 24 January 2012).

58. Moreover, in so far as the investigation leads to charges being brought before the national courts, the positive obligations under Article 3 of the Convention extend to the trial stage of the proceedings. In such cases the proceedings as a whole, including the trial stage, must meet the requirements of the prohibition enshrined in Article 3. This means that the domestic judicial authorities must on no account be prepared to let the physical or psychological suffering inflicted go unpunished (see *Okkalı 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 respect, 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).

59. Turning to the present case, the Court observes that it took the domestic authorities altogether some nine years and two months to conclude the case. Following the applicant's complaint, the preliminary stage of proceedings was conducted conscientiously; a number of investigative steps were undertaken in order to examine her allegations (see paragraphs 7-15 above), and the indictment against J.D. was lodged a year and a half after the report of the offence.

60. However, it is noted with concern that the trial began almost six years after the public prosecutor lodged the indictment and that, in between, hardly any procedural activity was undertaken by the competent court. It does not appear that this delay could be attributed to any specific obstacles which would have prevented the trial from taking place, such as the absconding of the defendant. The Government explained that the situation had resulted from a systemic problem of court backlogs, which had meanwhile been effectively resolved. However, the Court, taking the view that the failure of the State to ensure effective prosecution of rape cannot be justified by a backlog of cases in the relevant courts (see, *mutatis mutandis*, *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 183, ECHR 2006-V, and the references cited therein), cannot accept this argument, especially as, even in the face of difficulties, a prompt response by the authorities is vital in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in, or tolerance of, unlawful acts (see *Šilih*, cited above, § 195, and *Okkalı*, cited above, § 65).

61. Moreover, it is striking that, in view of the nature of the criminal offences committed against the applicant and her young age, the case was not given priority and handled expeditiously, seeing that the best interests of the applicant, a minor at the time, would have required a speedy trial to reduce, as much as possible, what must have been a traumatic and distressing situation for her. It is true that, once it began, the trial was concluded in a year. Moreover, J.D.'s conviction was confirmed on appeal, which took six months to decide. However, in the Court's opinion the fact that the criminal proceedings remained at an almost complete standstill for six years was manifestly at variance with the State's obligation to respect the best interests of the applicant as an underage victim of sexual offences (see*, mutatis mutandis*, *C.A.S. and C.S. v. Romania*, no. 26692/05, § 82, 20 March 2012).

62. Therefore, the Court finds that the domestic authorities did not comply with their positive obligations under Article 3 of the Convention. Having regard to this conclusion, the Court considers that it is not required to examine the applicant's complaint that the authorities had failed to appoint a court-appointed lawyer to represent her in due time.

(b) Whether the applicant lost her victim status

(i) Arguments of the parties

63. The Government argued that in a situation such as the present one, where the applicant claimed, on the basis of the same circumstances, a violation of her right to trial within a reasonable time before the domestic authorities and a violation of the State's positive obligations under Article 3 of the Convention, it was necessary to examine whether the complaint had already been appropriately addressed by the competent domestic authorities and whether the applicant had already been granted just satisfaction. Recalling that the applicant had been awarded and paid compensation for non-pecuniary damage before the domestic courts, the Government emphasised that in deciding the applicant's claim, the domestic courts had taken account of the particular circumstances of the criminal proceedings, emphasising that the applicant, then a minor, had been a victim of a series of offences over a long period of time, and that during the criminal proceedings she had been required to repeatedly testify and relive the abuse she had suffered. In its judgment, the competent local court had considered the whole duration of the proceedings and the way in which their particular circumstances had affected the applicant. The court had evaluated all these circumstances in relation to the activity expected of the competent authorities.

64. Moreover, in deciding the amount to be awarded to the applicant, the local court had duly considered the nature of the criminal acts committed against her, as well as the fact that the events in question and the length of the criminal proceedings had been, from a human perspective, acutely painful and of great consequence to the applicant. Consequently, the applicant had been awarded a considerably higher amount than would normally have been granted under the 2006 Act. In conclusion, the Government asserted that the domestic authorities had identified, examined and evaluated the substantial deficiencies on which the applicant had based her allegation of a violation of the State's positive obligations under Article 3, and had awarded her just satisfaction, the amount of which she had evidently agreed with, as she had not contested the judgment in so far as part of her claim had been dismissed.

65. The applicant disputed this, emphasising that the remedies under the 2006 Act did not constitute effective remedies in respect of complaints made under provisions of the Convention which create positive obligations of the State, such as Articles 2 and 8 of the Convention. In support of her submissions, she referred to *Šilih v. Slovenia* (cited above, §§ 169-170) and *Eberhard and M. v. Slovenia* (no. 8673/05 and 9733/05, § 105, 1 December 2009). The applicant further asserted that the judgment in her favour adopted pursuant to the 2006 Act had only acknowledged a violation of her right to trial within a reasonable time, and not a violation of the State's

procedural requirements under other Convention provisions. In conclusion, the applicant pointed out that in order for a measure favourable to an applicant to deprive him or her of his or her victim status, a violation had to be acknowledged expressly or at least in substance, and subsequently redressed.

(ii) The Court's assessment

66. The Court reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, for example, *Amuur v. France*, 25 June 1996, § 36, *Reports* 1996-III, and *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI).

67. In the present case, the domestic authorities acknowledged that the applicant's right to trial within a reasonable time had been violated and awarded her compensation for this violation. The Court must therefore examine whether this acknowledgment ought also to apply in respect of the applicant's complaint under Article 3 of the Convention, and if so, whether the compensation constituted appropriate and sufficient redress for the breach of the applicant's rights under the Convention.

(α) The acknowledgment of a violation

68. The Court observes that the applicant's complaint under Article 3 of the State's failure to ensure an effective trial of the charge of continuous sexual assault on her was mainly directed against the delays in the proceedings. Therefore, while mindful of the fact that the remedies provided by the 2006 Act – including the award of compensation – specifically concern the right to have one's case examined within a reasonable time, within the meaning of Article 6 § 1 of the Convention (see paragraph 35 above), and do not in principle address situations in which delays are examined in terms of interference by the State with an applicant's rights under other Convention provisions (see, in this regard, *Šilih*, cited above, §§ 169-170, and *Eberhard and M. v. Slovenia*, no. 8673/05 and 9733/05, § 105, 1 December 2009), the Court does not exclude the possibility that the compensation awarded to the applicant under this Act may have provided her with effective redress for the breach of her rights under Article 3, on condition that the breach of this provision was acknowledged by the relevant domestic courts in substance.

69. In this regard, the Court agrees with the Government that the local court deciding on the compensation to be awarded to the applicant took particular account of the nature of the criminal acts committed against her, emphasising their gravity and the mental distress and anguish endured by her. Moreover, the Court notes that the local court explicitly criticised the authorities' inactivity, emphasising that the competent court should have

conducted the proceedings in a particularly diligent and prompt manner (see paragraph 29 above). Therefore, although the criminal proceedings were examined from the perspective of the "reasonable time requirement", the Court finds that the local court's reasoning, confirmed by the higher court, included both recognition of the State's obligation to effectively prosecute cases of sexual abuse and a finding that the competent authorities had failed to comply with this obligation. Moreover, it is not to be overlooked that the serious nature of the applicant's case influenced the amount of the compensation awarded to her, the local court having departed from the established domestic criteria for the calculation of awards made in compensation for the breach of the right to trial within a reasonable time.

70. In light of the foregoing, the Court finds that although the domestic courts did not specifically refer to Article 3 of the Convention in their decisions, their reasoning entailed an acknowledgement in substance of a breach of this Article.

(β) The characteristics of the redress

71. The Court reiterates that the question whether the applicant received reparation for the damage caused – comparable to just satisfaction as provided for under Article 41 of the Convention – is an important issue (see *Shilbergs v. Russia*, no. 20075/03, § 72, 17 December 2009).

72. In the present case the violation of the Convention found by the Court consists of the State's failure to conduct a prompt and effective trial of the charge of continuous sexual assault of the applicant. Having regard to the fact that the deficiencies in the conduct of the proceedings cannot now be rectified by restoring the situation as it existed before the breach of the Convention, or by preventing the continuation of the violation, an award of compensation could constitute an appropriate form of redress for the delays and related mental distress suffered by the applicant.

73. It remains to be ascertained whether the redress already afforded to the applicant at the domestic level was sufficient. In this regard, the Court is first called to examine whether the dispute has already been effectively resolved by the award of EUR 4,000 to the applicant in the domestic proceedings under the 2006 Act. In this regard, the Government pointed out that the applicant could have, but did not contest the dismissal of part of her claim, which in their opinion meant that she had evidently agreed with the amount awarded. The applicant, however, relied on the established case-law of the Court whereby the remedies available in respect of undue delays under the 2006 Act are not considered as effectively addressing complaints made under other provisions of the Convention which impose procedural requirements on the State.

74. The Court notes that the 2006 Act is aimed specifically at addressing the issue of length of proceedings, which is evident from the criteria used in assessing its reasonableness (see *Grzinčič v. Slovenia*, no. 26867/02, § 40,

3 May 2007), but also from the limitation of the amount of compensation which may be awarded for non-pecuniary damage to a maximum of EUR 5,000. Thus, in a number of cases in which the procedural shortcomings examined under Articles 2 and 8 consisted mainly or predominantly of delays (see, in addition to *Šilih and Eberhard*, cited above, *Z. v. Slovenia*, no. 43155/05, § 129, 30 November 2010, and *K. v. Slovenia*, no. 41293/05, §§ 111-120, 7 July 2011), the Court did not require the applicants to use the remedies available under the 2006 Act, as the focus of its analysis was not merely the length of proceedings, but the question whether, in the circumstances of the case seen as a whole, the State had complied with its positive obligations under the relevant provisions of the Convention. It is true that in the present case, the local court, in addition to assessing the criteria relating to the length of the proceedings – the complexity of the case, the conduct of the authorities and that of the applicant, and the importance of what was at stake for the applicant in the dispute – took notice of the fact that the State had failed to ensure the diligent prosecution of the criminal offence committed against the applicant. Still, its lengthy and detailed reasoning was mainly focused on the aforementioned length criteria, and the award of damages was, ultimately, made in respect of the excessive length of the proceedings. In these circumstances, and in view of the Court's above-mentioned case-law, the applicant's acceptance of the amount awarded for the violation of her right to have the trial concluded within a reasonable time in the domestic proceedings cannot be considered as a waiver of her claim under Article 3 made before the Court and thus as prejudicial to her status of victim in the present case. Accordingly, it must next be determined whether the compensation awarded to the applicant in the domestic proceedings was in fact sufficient to deprive her of her victim status.

75. In this regard, it has already been established by the Court that in cases involving a breach of Article 3 at national level, an applicant's victim status may, *inter alia*, depend on the level of compensation awarded at domestic level, having regard to the facts complained about before the Court (see *Gäfgen v. Germany* [GC], no. 22978/05, § 118, ECHR 2010). Having regard to the wider margin of appreciation left to the domestic courts in this regard (see *Shilbergs*, cited above, § 77, and the references cited therein), the Court has emphasised, in particular, that the sums awarded may not be unreasonable in comparison with the 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, taking into account different factors, among which are the duration and severity of the violation (see, *mutatis mutandis*, *Shilbergs*, cited above, § 74, and *Shishkin v. Russia*, no. 18280/04, § 108, 7 July 2011). Where the amount of compensation is substantially lower than what 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).

76. 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 domestic courts in the present case attempted to assess the level of suffering and anguish sustained by the applicant as a result of the lack of effectiveness in conducting the criminal proceedings concerning the continuous sexual assault committed against her. Nevertheless, the amount received by her was, albeit increased, based on criteria applied by the domestic courts for awarding non-pecuniary damages for excessive length of proceedings. This amount, however, is substantially lower than the Court's award in the similar case of *W. v. Slovenia* (cited above, § 92) or, indeed, in other cases involving deficiencies in an investigation and/or a prosecution of cases of sexual or physical abuse committed by private individuals (see *P.M. v. Bulgaria*, cited above; *C.A.S. and C.S. v. Romania*, cited above; *M.C. v. Bulgaria*, cited above; *Šečić v. Croatia*, no. 40116/02, 31 May 2007; *Milanović v. Serbia*, no. 44614/07, 14 December 2010, and *D.J. v. Croatia*, no. 42418/10, 24 July 2012).

77. In the Court's opinion the applicant's prolonged uncertainty as to the outcome of the criminal proceedings lasting over nine years, coupled with her young age at the beginning of the criminal proceedings and the continuous distress caused to her because she was made to relive the painful events during the lengthy time of the proceedings, the trial eventually taking place seven-and-a-half years after the abuse was uncovered, are comparable to the breaches found by the Court in the cases cited in the previous paragraph, which should be reflected in the amount of compensation awarded to the applicant. This finding cannot be changed by the fact that the outcome of the present case was, as pointed out by the Government, favourable to the applicant.

78. Therefore, the Court considers that the compensation awarded to the applicant by the domestic courts did not constitute sufficient redress and thus she may still claim to be a "victim" of a breach of Article 3 of the Convention. Accordingly, the Government's objection must be rejected.

2. Compliance with Article 3

79. 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.

80. There has therefore been a violation of Article 3 of the Convention under its procedural limb.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

81. 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

82. The applicant claimed 15,000 euros (EUR) in respect of non-pecuniary damage. She alleged that she had suffered considerable trauma and anguish due to the prolonged uncertainty as to the outcome of the proceedings, which had been caused by the negligent handling of the case resulting in significant delays. She had been put at risk by reporting the sexual violence committed by her relative, and had then had to wait for years to be able to prove her allegations in court.

83. The Government disputed the applicant's claim, taking the view that her claim was excessive, especially considering the fact that she had already been awarded EUR 4,000 in the domestic proceedings.

84. The Court reiterates that the amount it will award under the head of non-pecuniary damage under Article 41 may be less than that indicated in its case-law where the applicant has already obtained a finding of a violation at the domestic level and compensation by using a domestic remedy. The Court considers, however, that where an applicant can still claim to be a "victim" after making use of that domestic remedy he or she must be awarded the difference between the amount actually obtained from the national authorities and the figure which, but for the national compensation, the Court would have awarded on equitable principles.

85. Regard being had to the above criteria, and taking into account the gravity and duration of the violation found, as well as the compensation she has received at the domestic level, the Court awards the applicant EUR 4,000.

B. Costs and expenses

86. The applicant also claimed EUR 3,300 for costs and expenses incurred before the Court.

87. The Government submitted that the applicant's claim was unsubstantiated and excessive as to quantum. Under these circumstances,

the Government were of the opinion that no award should be made under this head.

88. 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 have been 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 full amount claimed.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Joins* to the merits the Government's objections regarding the applicant's status as a victim and non-compliance with the six-month limit regarding the applicant's complaint of the untimely appointment of legal counsel;

2. *Declares* the application admissible;

3. *Holds* that the applicant may still claim to be the "victim" of a violation of Article 3 of the Convention for the purposes of Article 34 of the Convention;

4. *Holds* that there has been a violation of the State's positive obligations under Article 3 of the Convention on account of the delays in the proceedings, and that, accordingly, it is not necessary to examine the complaint of the untimely appointment of legal counsel;

5. *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 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 3,300 (three thousand and three hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 15 January 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President