



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

FOURTH SECTION

**CASE OF E.B. v. ROMANIA**

*(Application no. 49089/10)*

JUDGMENT

STRASBOURG

19 March 2019

*This judgment is final but it may be subject to editorial revision.*



**In the case of E.B. v. Romania,**

The European Court of Human Rights (Fourth Section), sitting as a Committee composed of:

Paulo Pinto de Albuquerque, *President*,

Egidijus Kūris,

Iulia Antoanella Motoc, *judges*,

and Andrea Tamietti, *Deputy Section Registrar*,

Having deliberated in private on 26 February 2019,

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

**PROCEDURE**

1. The case originated in an application (no. 49089/10) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Romanian national, Ms E.B. (“the applicant”), on 11 August 2010. The Court decided of its own motion to grant the applicant anonymity pursuant to Rule 47 § 4 of the Rules of Court.

2. The applicant alleged, in particular, that the criminal proceedings concerning the sexual assault against her had been ineffective and had exposed her to traumatic experiences as a victim of rape.

3. On 16 December 2014 the application was communicated to the Government.

4. The applicant was initially represented by Ms C. Schwab, a lawyer practising in Târgu-Mureş, who submitted observations on the admissibility and merits of the case as well as just satisfaction claims on behalf of the applicant.

5. On 15 May 2018 the applicant informed the Court that she intended to pursue the application as lodged by her representative but no longer wished to be represented by her. Having in mind that the exchange between the parties of their observations on the admissibility and merits of the application as well as on the just satisfaction claims was finished on 22 March 2018, the applicant was exceptionally granted leave to represent herself (under Rule 36 of the Rules of Court).

6. The Government objected to the examination of the application by a Committee. Having considered their objection, the Court rejects it.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1973 and lives in Mica. She has been diagnosed with a slight intellectual disability.

#### A. The events of 20 May 2008

8. On 20 May 2008 around 7 p.m. the applicant was walking home from the village of Căpâlna, where she had been helping her husband all day in the fields. Near the village of Mica, she was approached by an unknown individual, identified later as T.F.S., who started walking alongside her and who tried unsuccessfully to engage her in conversation.

9. At some point, they met two men. One of them, whom the applicant knew by sight as I.L., stopped T.F.S. and asked him if he wanted to accompany him in order to finalise a transaction over a horse. T.F.S. replied that he would join him later.

10. In her statement to the police made later (see paragraph 17 below), the applicant described the subsequent events as follows:

After the two men went away, T.F.S. continued walking along with her. He eventually offered her money and a mobile phone if she agreed to have oral sex with him. She refused saying that she was not “that kind of person” and added that she had a husband at home. T.F.S. continued following her and, as the applicant was telling him that he was wasting his time because she would not accept the proposal, he grabbed her by the right arm and the neck and dragged her close to a nearby cemetery. The applicant alleged that she was threatened by T.F.S. to obey, otherwise he would use the knife he had in his possession. He told her to undress and lie on the ground. In a state of shock, the applicant obeyed. Then T.F.S. raped her. After he finished, he told her that they would meet again and warned her not to tell anyone about the incident. He then left.

11. The applicant went straight to the police station in Mica. Nearby, she met I.S., who had previously been the landlady of a local police officer. The applicant told I.S. that she had been raped by a man wearing black clothes. I.S. advised the applicant not to tell anyone about what had happened, as she would make a fool of herself in front of the whole village because she had no witnesses. The applicant nevertheless knocked on the window and then on the door of the police station. As no one answered, she went home and showered. Later that evening she talked to her mother and to a friend, explaining to them what had happened. Next day, when her husband came home from the field where he had spent the night, she told him that she had been raped.

## **B. The criminal complaint and the investigation**

12. In the morning of 21 May 2008 the applicant went to the local police in Mica accompanied by her husband and lodged a criminal complaint. She complained that she had been threatened with a knife by an unknown man and forced to have sexual intercourse with him.

13. The same day the police interrogated I.L., who confirmed he had seen the applicant the previous day walking with T.F.S. He stated that he had not noticed anything special in her behaviour.

14. Later that day T.F.S. gave a statement to the police. He admitted having suggested sexual intercourse to the applicant, but claimed that the applicant's reply was that she was afraid that her husband would find out. He confirmed that the act had taken place on the side of the road but claimed that it had been consensual. He was then allowed to leave.

15. When they checked T.F.S.'s criminal record the police found out that he had a previous conviction for rape.

16. On 22 May 2008 the applicant went to the Târgu-Mureş Institute of Forensic Medicine for examination. The report drafted on that occasion concluded that the applicant had two bruises on her right arm consistent with a compression between two hard surfaces, resulting in temporary disability of two to three days. It also stated that the applicant did not have any "rape-specific injuries" in her genital area.

17. On 3 June 2008 the applicant gave a second statement to the police. She gave a detailed description of the events of 20 May, and mentioned that after T.F.S. had grabbed her violently and dragged her along the ground, she had entered into a state of shock, was afraid for her life and could neither react nor resist. She further mentioned that she feared that the aggressor might have given her a venereal infection. She concluded that ever since the attack she had been in a constant state of distress and was afraid to leave the house, fearing that the attacker would come and find her because she had dared to complain to the police. For these reasons, she requested protection for herself and her family.

18. On 9 July 2008 the police interrogated I.S., who confirmed that she had seen the applicant arriving at the police station on 20 May 2008 to lodge a complaint of rape and that she had seen the applicant leaving, as the police station was closed.

19. On several occasions in June, July and August, T.F.S. was searched for by the police for further statements, but was not found at his house.

20. On 21 January 2009 the Prosecutor's Office attached to the Târnăveni District Court decided not to open criminal proceedings, as the acts committed by T.F.S. did not constitute a crime. The prosecutor relied on the following elements: I.L. had testified that he had not noticed anything unusual when he had met the applicant and T.F.S. on 20 May, prior to the alleged rape; the applicant had failed to ask for help although,

prior to the sexual intercourse, she and T.F.S. must have passed in front of a petrol station on their way to the village; the forensic medical examination had revealed no injury in the genital area; as regards the bruises on the applicant's right arm, the forensic report provided no indication as to when they had been caused; no other injuries had been found on the applicant's body.

21. On 22 February 2009 the applicant made a complaint against the prosecutor's decision to the chief prosecutor of the Prosecutor's Office attached to the Târnăveni District Court. She reiterated that T.F.S. had threatened her that he would use a knife, and had violently grabbed her by the arm and throat, and that that was why she had complied with his orders. Furthermore, she mentioned that she had been advised by the police to withdraw her complaint, because there were no witnesses. She complained that after the police took her initial statement they had failed to provide her with information about her procedural rights as a victim. Subsequently, she had to call the 112 emergency services in order to find out that she needed to go to the forensic medicine institute for a medical examination. She also mentioned that when her husband went to the prosecutor's office in order to submit the results of her medical exams, the case prosecutor had told him that the complaint had been withdrawn. She requested the prosecutor to ask for clarification of the forensic medical certificate as regards the possible date of the bruises found on her arm. She also requested that a psychiatric expert report be made in the case, in view of the fact that she was suffering from oligophrenia and depressive syndrome. The applicant also requested that witnesses, and in particular I.L., be reheard in more detail, and that the alleged perpetrator be subjected to a polygraph test. Lastly, she stated again that she was afraid for her life, and requested protection from the police for her and her family. A medical certificate dated 30 May 2008 indicating that she was suffering from first-degree oligophrenia with an IQ of 57 and depressive syndrome was attached to her complaint.

22. On 24 February 2009 the chief prosecutor rejected the applicant's complaint, finding that the evidence available did not suggest that physical force had been used by T.F.S. to have sexual intercourse with the applicant. The prosecutor relied firstly on the fact that I.L. had not noticed anything unusual about the applicant or T.F.S. when he had met them, and secondly on the absence of injury to the applicant's genital area.

### **C. The trial**

23. On 20 March 2009 the applicant, represented by her husband, complained about the prosecutors' decisions before the Târnăveni District Court. In her submissions, she stressed that T.F.S. had admitted having used force on her. She also claimed that during the reconstruction of the scene conducted by the Mica police, when she was showing the police officer how

T.F.S. had grabbed her by the neck, the latter had “jumped at her” and stated furiously that he had not “grabbed her that hard”. The applicant stated that during the events of 20 May T.F.S. had constantly threatened that he would use the knife he had with him. She further complained about the attitude of the authorities who had investigated her complaint, mentioning that she had been advised by the police to withdraw her complaint because there were no witnesses and because “she was asking for it” and in any event “it did her good”. She requested the court to order a clarification of the forensic certificate in order to specify the possible date of the injuries on her arm.

24. On 6 May 2009 the Târnăveni District Court allowed the applicant’s complaint and decided to refer the case back to the prosecution with a view to opening criminal proceedings against T.F.S. The court found that the prosecutor’s conclusion to the effect that the sexual act had been consensual was unsupported by evidence. It further found that the lack of reference in the forensic certificate to the date of the applicant’s injuries should have led the prosecutor to investigate further in order to redress this omission. The court also stated that the absence of injury to the applicant’s genital area was consistent with the allegation of threat. Finally, the court criticised the prosecutor’s failure to consider the fact that the injuries to the applicant’s arm were consistent with being grabbed forcefully.

25. The court ordered the prosecutor to proceed to the following acts: a psychiatric examination in order to determine whether, having regard to the applicant’s diagnosis of oligophrenia, she was able to react or to fight back or whether she may have not been able to express her will; the re-interrogation of I.S. in order to clarify the applicant’s state of mind when she had met and talked to this witness; a confrontation between the applicant and T.F.S. with a view to clarifying the contradictions in their statements with reference to the psychological and physical coercion; and a socio-moral assessment of the applicant to ascertain her behaviour in society and her level of credibility in the community. Finally, the court advised the prosecution to take into account the fact that T.F.S. had previously been convicted of rape and therefore may have been aware of the legal requirements for the existence of the crime of rape.

26. On 15 October 2009 the prosecutor attached to the Târnăveni District Court appealed on points of law (*recurs*) against the decision of 6 May 2009, on the grounds that the evidence the District Court had requested was irrelevant. A psychiatric evaluation of the victim, when more than seventeen months had passed since the incident, would no longer be conclusive. Similarly, neither the re-interrogation of I.S. nor a confrontation between the applicant and T.F.S. were necessary. Finally, the prosecutor stressed that, in the present case, the refusal to open criminal proceedings had been done on the ground that the act committed by T.F.S. lacked the elements defining the crime of rape. More specifically, in the absence of a connection between the injuries to the applicant’s arm and the alleged

physical coercion, and in the absence of any injuries specific to the crime of rape in the genital area, the alleged physical coercion had not been proved.

27. The applicant was represented before the appeal court by an *ex officio* lawyer, appointed upon a request made by her husband. The lawyer stressed that the evidence ordered by the Târnăveni District Court in the decision of 6 May 2009 was extremely important to the case, and that failure to collect this evidence at the relevant time was the prosecution's fault. She also pointed out that the applicant should have been given legal assistance *ex officio* during the investigation in order to adequately protect her procedural rights.

28. T.F.S. stated before the court that he agreed with the prosecutor's appeal and "if the injured party thinks he is guilty, she should bring witnesses to prove it".

29. On 11 February 2010 Mureş County Court allowed the prosecution's appeal and rejected the applicant's complaint with final effect. The court stated in particular that it was unnecessary to re-interrogate S.I., since in her first statement she had not mentioned having seen the applicant in a state of discomfort whilst confessing to her that she had been raped. The court further found that the forensic report did not support the applicant's allegations, since, on the one hand, it did not reveal injuries specific to rape in the genital area, and, on the other, the injuries to the applicant's arm were undated. It finally found both the conduct of a psychiatric assessment and the confrontation between the applicant and T.F.S to be unnecessary, and deemed a socio-moral assessment to be irrelevant.

30. As a result, the applicant was ordered to pay the court fees for the proceedings initiated by her before the first-instance court.

## II. RELEVANT LAW AND PRACTICE

### A. Relevant domestic law

31. Article 197 (1) of the Criminal Code regulating the criminal offence of rape, as in force at the time of the events, reads as follows:

"(1) Sexual intercourse of any kind, with a person of a different sex or of the same sex, by constraint or by taking advantage of the victim's lack of capacity to express [his/her] will, is punished with imprisonment from 3 to 10 years and the withdrawal of certain rights. ..."

32. Law no. 211/2004 on the protection of victims of crime, as in force at the relevant time, included an obligation on the judicial authorities to provide victims of crime with information concerning their rights. More specifically, the law provided in Article 4 an obligation on the judicial authorities to inform the victims about their procedural rights, the availability of psychological counselling or any other social assistance, and



the opportunity to apply for legal aid. Psychological counselling (Article 8) and legal aid (Article 14) were to be provided free to victims of rape. The law received several amendments throughout the years but the above provisions remained in force and are still included in its most recent version of 5 May 2018.

## **B. Relevant domestic practice**

33. The Government submitted seventy-seven judgments in order to illustrate the practice of the domestic authorities in the matter of rape, as set forth below:

34. Six judgments (adopted between 2009 and 2012) concerned convictions for rape in cases where adult victims did not have any injuries on their body. In all these cases the domestic courts held, based on the evidence in the files, that the victims had been threatened with violence and therefore coerced to have sex with the perpetrators. In three of these cases the crimes were committed by two perpetrators together.

35. Nineteen judgments (adopted between 2010 and 2015) concerned convictions for rape in cases where evidence showed that adult or minor victims had been threatened with knives.

36. Thirty-six judgments (adopted between 2010 and 2015) concerned convictions for rape in cases where evidence (witness statements, injuries on the victims' bodies, perpetrators' confessions, police reports) was coupled with the specific circumstances of the cases (minor victims of a very young age, perpetrators being members of the family, victims kidnapped, intoxicated or in a coma).

37. The remaining sixteen judgments (adopted between 2009 and 2014) concern victims with mental disabilities (such as schizophrenia), some of them minor, some hospitalised and medicated with tranquillisers. In the majority of these cases the domestic courts held, on the basis of psychiatric assessments, that the victims' mental disabilities were so severe that they lacked any capacity to understand the content and consequences of their acts. In some of these cases the convictions are based on the perpetrators' confessions.

38. The Government also submitted sixty-six indictments (adopted between 2009 and 2015) charging with rape and sending for trial perpetrators in cases where victims had been threatened with violence but had no injuries on their bodies. The majority of these indictments concerned minor victims. Some of these indictments were adopted in the cases mentioned in paragraphs 34-37 above, others involved cases where victims had been threatened with knives or with being thrown in lakes or rivers.

### C. Relevant international law

39. A detailed description of the relevant international material concerning violence against women can be found in *M.G.C. v. Romania* (no. 61495/11, §§ 38-46, 15 March 2016), and *Bălșan v. Romania* (no. 49645/09, §§ 43-44, 23 May 2017).

40. The relevant international materials regarding abuse against people with disabilities can be found in *I.C. v. Romania* (no. 36934/08, §§ 41-44, 24 May 2016).

41. Excerpts from the relevant Council of Europe and European Union materials on the rights of the victims of crime are described in *Y. v. Slovenia* (no. 41107/10, §§ 71-72, 28 May 2015).

42. In a statement issued on 11 November 2018 on the occasion of her visit to Romania, the Council of Europe Commissioner for Human Rights mentioned that “Romania needs to strengthen its institutional framework to better protect the rights of persons with disabilities, and should step up the efforts to combat violence against women”. The Commissioner underscored the importance of Romania’s ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) in 2016 and urged the authorities to reinforce capacity-building measures to ensure that women’s complaints against violence are effectively investigated and that victim protection is strengthened.

## THE LAW

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

43. The applicant complained under Articles 3, 6 § 1 and 13 of the Convention that the Romanian authorities had not investigated her allegations of rape effectively, and had breached their positive obligation to provide effective legal protection against sexual abuse. In addition, she complained that the authorities had failed to protect her as a victim of crime in that she did not benefit from legal assistance or counselling and the criminal proceedings exposed her to traumatic experiences which violated her personal integrity.

44. The Court reiterates that by virtue of the *jura novit curia* principle it is not bound by the legal grounds adduced by the applicant under the Convention and the Protocols thereto and has the power to decide on the characterisation to be given in law to the facts of a complaint by examining it under Articles or provisions of the Convention that are different from

those relied upon by the applicant (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 126, ECHR 2018). Therefore, having regard to the nature and the substance of the applicant's complaints, they fall to be examined under Articles 3 and 8 of the Convention (see *M.G.C. v. Romania*, no. 61495/11, § 48, 15 March 2016), which read as follows:

#### **Article 3**

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

#### **Article 8**

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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

### **A. Admissibility**

45. 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 parties' submissions*

##### **(a) The applicant**

46. The applicant alleged that the authorities had not investigated her allegations of rape effectively. She contended that the statements taken during the investigation had been too brief, and had not clarified the facts. The authorities had failed to take into consideration her psychological state, which was supported by medical documents, and had failed to conduct a psychiatric assessment in order to assess her capacity to defend herself. They had also failed to test the credibility of the alleged perpetrator, notably the fact that he had a previous conviction for rape which had been totally overlooked during the investigation.

47. She stressed that the authorities had failed to inform her of her procedural rights and to provide her with free legal assistance and counselling, in breach of their obligations as provided by Law no. 211/2004 on the protection of victims of crime. Moreover, the applicant submitted

that no weight had been attached to her particular vulnerability as a psychologically impaired woman victim of rape. As a result, she could not effectively participate in the investigation and was subjected to additional suffering.

48. The applicant also alleged that she had raised all the above complaints before the domestic courts; however, the Mureş County Court, in the judgment adopted on 11 February 2011, decided with final effect to uphold the prosecutor's decision not to open criminal proceedings, without replying to any of her arguments.

**(b) The Government**

49. The Government submitted that the investigation had been prompt, thorough and effective. They conceded that the documents in the file did not indicate that the applicant had been informed of her rights as provided by Law no. 112/2004. However, the applicant had failed to inform the police that she had oligophrenia. Nevertheless, the Government stressed that, during her hearing by the police, the applicant had been accompanied by her husband, who was fully capable of ensuring respect for her rights. Moreover, the applicant proved that she had been well aware of her rights since she had used all the available remedies provided by the law against the prosecutor's decision not to open an investigation, and she had succeeded in applying for *ex officio* legal assistance before the courts. On this point, the Government also maintained that the failure of the investigative authorities to provide the applicant with an *ex officio* lawyer during the investigation had been remedied before the courts, where the applicant had in fact had access to a lawyer. In any event, they submitted that the presence of a lawyer during the applicant's questioning by the police would not have influenced the course of the investigation, as no evidence was found to support the applicant's accusations. They concluded that the authorities' omission to inform the applicant of her rights under Law no. 211/2004 had not had any negative effect on her situation.

50. The Government further submitted that the applicant could have requested the courts to render the investigation acts void because of the authorities' failure to inform her of her rights provided by Law 211/2004. Such a decision could have been taken by the courts under the provisions of the Criminal Procedure Code if a breach of rights had been observed and that breach could not have been remedied otherwise.

51. As regards the applicant's allegations that the investigation had subjected her to additional suffering, the Government maintained that there had been no direct interaction between the applicant and T.F.S.; all their encounters had been as limited as possible and had taken place only in the presence of police officers. Similarly, during the trial before the courts T.F.S. had not addressed the applicant directly but through the intermediary of the judge. In addition, the advice to the applicant to withdraw her

complaint, advice allegedly given her by the police, may have been just information about the possible results of the criminal proceedings she was about to initiate.

52. Lastly, they contended that the domestic courts had thoroughly analysed the applicant's arguments and no significant or considerable shortcomings in the investigation could be observed, by contrast with the case of *M.C. v. Bulgaria* (no. 39272/98, 4 December 2003). In addition, the applicant had had effective remedies at her disposal, as required by Article 13 of the Convention. Therefore, the system put in place by the Romanian State to deal with sexual violence was in accordance with the requirements set forth by Articles 3 and 8 of the Convention.

## 2. *The Court's assessment*

### (a) **General principles**

53. The Court reiterates that the obligation of the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals. These measures should provide effective protection, in particular of children and other vulnerable persons, and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge. In the case of people in a vulnerable position, including people with disabilities, the Court held that the authorities must show particular vigilance and afford increased protection, in view of the fact that such individuals' capacity or willingness to pursue a complaint will often be impaired (see *I.C. v. Romania*, no. 36934/08, § 51, 24 May 2016, and the cases cited therein).

54. On that basis, the Court considers that States have a positive obligation inherent in Article 3 of the Convention to enact criminal-law provisions that effectively punish rape and to apply them in practice through effective investigation and prosecution (see *M.C. v. Bulgaria*, cited above, § 153).

55. Furthermore, positive obligations on the State are inherent in the right to effective respect for private life under Article 8; these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves. While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, effective deterrence against serious acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection (see *M.C. v. Bulgaria*, cited

above, § 150). The Court has not excluded the possibility that the State's positive obligation under Article 8 to safeguard the individual's physical integrity may extend to questions relating to the effectiveness of a criminal investigation (*ibid.*, § 152).

56. In the light of the above, the Court is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim (*ibid.*, § 166).

**(b) Application of the above-mentioned principles to the present case**

57. The Court notes that the authorities in the current case were confronted with two conflicting versions of the events. The applicant alleged that she had been raped on the evening of 20 May 2008. However, the man involved in the incident claimed that she had consented to sexual intercourse that evening. Therefore, the authorities' central task in this case was to determine whether or not the sexual intercourse had been consensual.

58. In similar cases the Court has already held that the presence of two irreconcilable versions of the facts obviously called for a context-sensitive assessment of the credibility of the statements made and for verification of all the surrounding circumstances (see *M.C. v. Bulgaria*, cited above, § 177). That could have been done by questioning people known to the applicant and the perpetrator, such as friends, neighbours and others who could shed light on the trustworthiness of their statements, or by seeking an opinion from a specialist psychologist. In this context, the authorities could also verify whether any reasons existed for the victim to make false accusations against the alleged perpetrator (see *I.C. v. Romania*, cited above, § 54). However, the Court observes that none of the above was done at any stage of the investigation and trial in the current case.

59. The Court further observes that according to a medical document dated 30 May 2008 submitted to the prosecutor on 22 February 2009 (see paragraph 21 above) the applicant had been diagnosed with a slight intellectual disability. In this context, the nature of the sexual abuse against her was such that the existence of useful detection and reporting mechanisms was fundamental to the effective implementation of the relevant criminal laws and to the applicant's access to appropriate remedies. Indeed, the Court has already expressed the view that failure to properly investigate or provide appropriate judicial response to complaints of sexual abuse against children or other vulnerable persons such as persons with intellectual disabilities creates a background of impunity which may be in

breach of the State's positive obligations under Article 3 of the Convention (see *I.C. v. Romania*, cited above, § 55).

60. In such circumstances, the Court considers that the applicant's intellectual disability, confirmed by medical documents, placed her in a heightened state of vulnerability and required both the investigating authorities and the domestic courts to show increased diligence in analysing her statements. Moreover, particular attention should have been also focused on analysing the validity of the applicant's consent to the sexual acts in the light of her intellectual capacity (*ibid.*, § 56). However, it appears that none of the personal circumstances of the applicant, such as her level of mental and physical development or the circumstances in which the incident took place – in the evening, in the proximity of a cemetery – were considered by the prosecutors or the judges deciding on this case.

61. The conclusions drawn by the prosecutor and the domestic courts appear to have been based only on the fact that the applicant had not asked for help, taken together with the fact that the applicant's body showed no signs of violence specific to rape (see paragraphs 20, 22 and 29 above).

62. On this point, the Court observes that Article 197 of the Romanian Criminal Code does not mention any requirement for physical resistance by the victim (see paragraph 31 above). What is decisive, therefore, is the meaning given by the investigating authorities and the courts to words such as "constraint" and "the victim's lack of capacity to express his/her will". The Court notes from the examples of case-law submitted by the Government in the present case that the majority of convictions for rape were adopted in cases involving violence, where the victims were clearly in situations in which they could not express their will, where the perpetrators confessed, or where direct evidence was available from witnesses (see paragraphs 35-38 above). In very few of the cases submitted as examples – six out of seventy-seven, to be precise – did the domestic courts adopt convictions for rape in the absence of any injuries on the victim's body and in the absence of other direct evidence (see paragraph 34 above). It cannot therefore be concluded that settled and consistent practice had been developed by the national courts in cases concerning rape where little or no physical injuries had been established.

63. In view of the above elements, the Court considers that the authorities in the current case also put undue emphasis on the absence of proof of resistance from the applicant, and they failed to take a context-sensitive approach (see *M.C. v. Bulgaria*, cited above, § 182). The authorities' conduct was aggravated by the fact that no psychological or psychiatric assessment had ever been carried out for the purposes of obtaining a specialist analysis of the applicant's reactions from the point of view of her mental capacity, although this was requested by the applicant during the investigation (see paragraph 21 above) and also ordered by the

Târnăveni District Court in their judgment of 6 May 2009 (see paragraph 25 above).

64. As regards the applicant's allegations that she was subjected to additional suffering as a result of the authorities' failure to inform her of her procedural rights and to provide her with free legal assistance and counselling, in breach of Law no. 211/2004, the Court notes that the Government has not disproved those allegations, but merely submitted that the omissions complained about did not undermine the effectiveness of the investigation.

65. In this connection, the Court notes that the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence requires the Contracting Parties to take the necessary legislative and other measures to protect the rights and interests of victims. Such measures involve, *inter alia*, protection from intimidation, retaliation and victimisation, as well as informing them of the rights and the services at their disposal and providing them with appropriate support services so that their rights and interests are duly presented and taken into account (see paragraph 41 above). In the same context, in a recent statement the Council of Europe Commissioner for Human Rights urged the Romanian authorities to strengthen the protection of victims (see paragraph 42 above).

66. Against this background, the Court observes that in the current case there is no evidence that the provisions of the domestic law on the rights of victims were observed as regards the applicant. Moreover, her complaints in this respect (see paragraphs 21, 23 and 27 above) were overlooked by the domestic courts (see paragraph 29 above). The Court also notes that the applicant on several occasions alerted the authorities, to no avail, that she was afraid of retaliation by the alleged perpetrator (see paragraphs 17 and 21 above). An approach such as the one taken by the authorities in the current case deprived the national legal framework on violence against women and protection of victims of its purpose, and was inconsistent with international standards on these issues.

67. In view of the above, without expressing an opinion on the guilt of T.F.S., the Court finds that the failure to adequately respond to the allegations of rape in this case and to adequately respect the applicant's rights as a victim of violence raises doubts as to the effectiveness of the system put in place by the State in accordance with its international obligations, and leaves the criminal proceedings in the case devoid of meaning.

68. The foregoing considerations are sufficient to enable the Court to conclude that the authorities failed to meet their positive obligations to apply effectively a criminal-law system punishing all forms of rape and sexual abuse and to ensure adequate protection of the applicant's physical integrity.



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

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

69. 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

70. The applicant claimed 12,000 euros (EUR) in respect of non-pecuniary damage.

71. The Government submitted that in similar cases examined by the Court (see, for example, *M.C. v. Bulgaria*, cited above) the Court has awarded the applicants lower amounts than the one requested by the applicant in the current case.

72. The Court considers that the applicant must have suffered distress and psychological trauma because of the authorities' failure to adequately respond to her allegations of rape and to adequately respect her rights as a victim of violence. Making an assessment on an equitable basis, the Court awards the applicant the entire amount claimed in respect of non-pecuniary damage.

### B. Costs and expenses

73. The applicant also claimed EUR 1,400 for the costs and expenses incurred before the Court. In support of this request the applicant submitted an invoice for the amount of 6,300 Romanian lei (ROL, approximately EUR 1,400) representing legal assistance services provided by Ms C. Schwab, the lawyer who represented the applicant before the Court until 15 May 2018.

74. The Government requested the Court to award an amount proportionate to the activity conducted by the lawyer.

75. 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 sum of EUR 1,400 for costs and expenses for the proceedings before the Court.

### C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Articles 3 and 8 of the Convention;
3. *Holds*
  - (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
    - (i) EUR 12,000 (twelve thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
    - (ii) EUR 1,400 (one thousand four 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.

Done in English, and notified in writing on 19 March 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti  
Deputy Registrar

Paulo Pinto de Albuquerque  
President