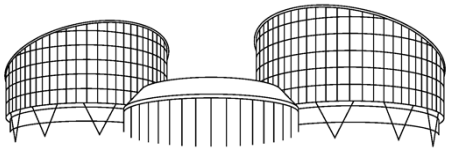

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF K.M. v. NORTH MACEDONIA

(Application no. 59144/16)

JUDGMENT

Art 8 • Positive obligations • Failure to protect a fourteen-year-old girl from sexual abuse • Domestic legal framework, as applied by the domestic authorities, did not afford effective protection

Prepared by the Registry. Does not bind the Court.

STRASBOURG

4 March 2025

FINAL

04/06/2025

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

In the case of K.M. v. North Macedonia,

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

Arnfinn Bårdsen*, President*,
Saadet Yüksel,
Jovan Ilievski,
Anja Seibert-Fohr,
Davor Derenčinović,
Stéphane Pisani,
Juha Lavapuro*, judges*,
and Hasan Bakırcı, *Section Registrar,*

Having regard to:

the application (no. 59144/16) against the Republic of North Macedonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Macedonian/citizen of the Republic of North Macedonia, Ms K.M. ("the applicant"), on 7 October 2016;

the decision to give notice to the Government of North Macedonia ("the Government") of the complaint concerning the lack of legal protection of the applicant's physical and psychological integrity and to declare the remainder of the application inadmissible;

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

the parties' observations;

Having deliberated in private on 4 February 2025,

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

INTRODUCTION

1. The case concerns the respondent State's alleged failure to protect the applicant, a fourteen-year-old girl at the material time, from sexual abuse related to an incident in which an adult had allegedly caressed her leg and touched her breast and shoulders.

THE FACTS

2. The applicant was born on 19 August 1999. She was represented by Mr Z. Stojanovski, a lawyer practising in Tetovo.

3. The Government were represented by their Agent, Ms D. Djonova.

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

I. CRIMINAL PROCEEDINGS

5. On 2 September 2013 the applicant's sister lodged a complaint with the Ministry of the Interior ("the Ministry") against a certain Gj.K., who was

39 years old at the material time, for sexual assault of a minor. She submitted that on 31 August 2013 Gj.K., an employee of a telecommunications company, had come to their house to restore their internet connection. When left alone with the applicant, he had told her that her legs were nicely tanned and he had touched her leg. The applicant had moved away, but he had followed her. He had told her that it was normal that men loved her because she had big breasts. Then he had started massaging her shoulders and had touched her breasts. The applicant had escaped the room. Later the same day, Gj.K. had allegedly also touched the applicant's sister in an inappropriate way.

6. On 3 September 2013 a police officer took a statement from Gj.K., who denied having touched the applicant or her sister.

7. On 28 October 2013 a public prosecutor interviewed the applicant, who stated that Gj.K. had touched her shoulders and one of her breasts, had told her that men sent her messages because they loved her and that she had big breasts, and had also caressed her leg and complimented her tan. He had not threatened her, nor had he used any force. On the same day, the prosecutor also interviewed the applicant's sister and mother. The mother stated, among other things, that after the incident both the applicant and her sister had been scared and upset, and that she had taken them to a psychiatrist, who had prescribed them medication.

8. On 31 October 2013 another public prosecutor ("the prosecutor") interviewed Gj.K., who again denied the accusations.

9. On 6 November 2013 the prosecutor rejected the criminal complaint against Gj.K. for the offence of rape under Article 186 § 4 in conjunction with Article 186 § 1 of the Criminal Code, which criminalised sexual acts other than rape when committed under certain circumstances (see paragraph 20 below). The prosecutor found as follows:

> "It is true that on the day, at the time and in the place [in question], [Gj.K.] touched, with one hand, one of the breasts and caressed the leg of [the applicant], who was 14 years old... without using force or threats ...
>
> In order for the elements of the offence of rape under Article 186 § 4 in conjunction with Article 186 § 1 to exist, the 'other sexual act' must be committed using force or threats.
>
> Given that in the present case [Gj.K.] performed the 'other sexual act' without using force or threats ..., his actions do not constitute the elements of this offence or of another offence subject to public prosecution, but constitute the elements of the offence of insult under Article 173 § 1 of the Criminal Code, which is prosecuted upon a private criminal complaint ..."

The prosecutor informed the applicant and her sister that they could take over the prosecution, within eight days from the service of the prosecutor's decision, in accordance with section 56(2) of the Criminal Proceedings Act (see paragraph 31 below).

II. CIVIL PROCEEDINGS

10. On 30 November 2013 the applicant, represented by a lawyer, lodged a civil claim against Gj.K. and made further submissions on 16 December 2013 and 28 February 2014. She submitted that he had caressed her leg, touched her breasts and massaged her shoulders, and that he had told her that men loved her because she had big breasts. She claimed compensation for non-pecuniary damage and requested the court to hold Gj.K. civilly liable for having insulted her and for having harmed her honour and reputation. In support of her claim she submitted, among other things, an expert report dated 20 November 2013, which found, *inter alia*, that she had suffered fear and psychological distress as a result of the alleged incident.

11. On 10 March 2015, following remittal by the Gostivar Court of Appeal ("the appellate court"), the Tetovo Court of First Instance ("the first-instance court") dismissed the applicant's claim. It relied on, *inter alia*, section 6 of the Insults and Defamation Act (see paragraph 26 below) and held that under that Act a person could be held liable for an expressed opinion, but not for a specific action, such as those described by the applicant. In addition, following the prosecutor's decision of 6 November 2013 (paragraph 9 above), the applicant could have taken over the prosecution, following which she could have potentially claimed compensation. Having also considered section 191 of the Obligations Act, the court concluded that there were no grounds for compensation under the Insults and Defamation Act.

12. The applicant appealed, arguing that degrading and debasing actions carried out on a person's body could constitute insulting behaviour. All the circumstances, such as her age, the place and time of the alleged incident, as well as the local customs, needed to be taken into consideration. Relying on section 3 of the Insults and Defamation Act (see paragraph 24 below), she argued that in the case of a legal lacuna, the court should apply the Convention and the Court's case-law directly.

13. On 22 March 2016 the appellate court dismissed the applicant's appeal, endorsing the lower court's findings (see paragraph 11 above). It held that the applicant had failed to make out the constituent elements of the offence of insult or to establish a causal link between Gj.K.'s actions and the damage allegedly suffered. The court concluded that there was no statutory provision concerning civil liability which would cover the applicant's claim.

14. On 8 April 2016 the appellate court's judgment was served on the applicant.

RELEVANT LEGAL FRAMEWORK

I. RELEVANT DOMESTIC LAW

A. 1991 Constitution

15. Under Article 11 of the Constitution, the physical and psychological integrity of a person are inviolable (*неприкосновени*).

16. Article 14 § 1 lays down the principle of *nullum crimen nulla poena*.

17. Article 25 guarantees the right to respect for and protection of the privacy of personal and family life, and of dignity and reputation.

18. Under Article 98 § 2, courts make decisions on the basis of the Constitution, laws and international agreements ratified in accordance with the Constitution. Article 118 provides that international agreements ratified in accordance with the Constitution are part of the internal legal order and cannot be amended by law.

B. Criminal Code (*Кривичен законик*, Official Gazette no. 96, with further amendments)

19. Article 173 § 1 of the Criminal Code, in force between 15 May 2006 and 21 November 2012, provided that a person who insulted another person would be fined. Under Article 184, the offence of insult was subject to private prosecution by the victim. On 21 November 2012 amendments to the Criminal Code entered into force, decriminalising insults and providing for the possibility for an alleged victim of an insult to lodge a civil claim for compensation.

20. Article 186 of the Criminal Code, in force at the time of the alleged incident (31 August 2013), was entitled "rape" (*силување*). Under Article 186 § 1, a person who forced another person into sexual intercourse (*обљуба*) by using force or by threatening to directly attack the life or body of that person or another person close to him or her could be imprisoned for a term of between three and ten years. Pursuant to Article 186 § 2, if the offence of Article 186 § 1 resulted in a serious bodily injury, death or other serious consequences, if it was committed by multiple persons or in a particularly cruel and degrading manner, the perpetrator(s) could be imprisoned for at least four years. Under Article 186 § 3, a person who forced another person into sexual intercourse by making serious threats to reveal something which could harm the victim's honour or reputation, or to cause another serious wrong (*зло*), would be imprisoned for a term of between six months and five years. Under Article 186 § 4, if, in the cases described in Articles 186 §§ 1, 2 and 3, a person performed only an "other sexual act" (*друго полово дејствие*), he or she would be imprisoned for a term of between three months and ten years, depending on the case.

21. Article 188, in force at time of the alleged incident, provided that a person who had sexual intercourse or performed an "other sexual act" with a minor below the age of 14 would be imprisoned for at least eight years.

22. In February 2023 amendments to the Criminal Code entered into force, as a result of which a non-consensual sexual act not constituting penetration is now punishable by a term of between one and three years' imprisonment if committed against a person above the age of 15 (Article 186 § 7) and at least three years' imprisonment if committed against a person below the age of 15 (Article 188 § 5). The amendments also introduced the offence of sexual harassment (*полово вознемирување* – Article 190-a).

C. Insults and Defamation Act (*Закон за граѓанска одговорност за навреда и клевета*, Official Gazette no. 143/2012)

23. The Insults and Defamation Act, in force between 22 November 2012 and 30 November 2022, was summarised in *Makraduli v. the former Yugoslav Republic of Macedonia* (nos. 64659/11 and 24133/13, § 37, 19 July 2018). In addition, the following provisions are relevant to the case at hand.

24. Section 3 provided that if a court could not resolve an issue related to liability for insult or defamation by applying the provisions of the Act, or considered that there was a legal lacuna or a conflict between the provisions of the Act and the Convention, it would apply the Convention and the Court's case-law on the basis of the principle of primacy of the Convention over domestic law.

25. By virtue of section 4(2), unless otherwise provided for in the Insults and Defamation Act, the provisions of, *inter alia*, the Obligations Act and the Civil Proceedings Act applied to proceedings for establishing liability for insult and defamation and awarding compensation for damage.

26. Under section 6, a person was liable for insult if he or she, intending to demean another person, expressed (by way of a statement, behaviour, publication or in another manner) a degrading opinion of that person which harmed his or her honour and reputation.

D. Obligations Act (*Закон за облигационите односи*, Official Gazette no. 18/2001, with further amendments)

27. Under section 9-a of the Obligations Act, every person has the right to the protection of his or her personal rights (*лични права*), which include, among other things, the right to honour, reputation and dignity.

28. Section 189 allows a person whose personal rights have been violated to claim compensation for non-pecuniary damage.

29. Section 191 allows a person who is the victim of a criminal offence against sexual freedom and morality (*против половата слобода и половиот морал*), committed by way of fraud, duress or abuse of a

relationship of subordination or dependence, to claim compensation for non-pecuniary damage.

E. Courts Act (*Закон за судовите*, Official Gazette nos. 58/06, 35/2008, 150/10, 83/18, 198/18 and 96/19)

30. The relevant provisions of the Courts Act have been summarised in *Taleski v. North Macedonia* ((dec.), no. 77796/17 and five other applications, §§ 41, 44 and 46, 24 January 2023).

F. 1997 Criminal Proceedings Act (*Закон за кривичната постапка*, Official Gazette nos. 15/97, 44/02, 74/04, 83/08, 67/09 and 51/11)

31. Section 56(2) of the 1997 Criminal Proceedings Act, in force at the material time, allowed the victim of an alleged offence to take over the criminal prosecution in cases where a public prosecutor had found no grounds for prosecution.

G. Civil Proceedings Act (*Закон за парничната постапка*, Official Gazette nos. 79/2005, 110/2008, 83/2009, 116/2010 and 124/2015)

32. Section 2(1) of the Civil Proceedings Act provides that the courts make decisions within the limits of the claims brought before them.

33. Section 176(3) provides that a court will decide a civil claim even where the claimant has not set out the legal grounds for that claim; if the claimant has given the legal grounds, the court is not bound by them.

II. RELEVANT INTERNATIONAL LAW

A. United Nations

34. The United Nations Convention on the Rights of the Child was adopted on 20 November 1989 and the respondent State acceded to it by way of succession on 2 December 1993. Article 19 of that Convention reads as follows:

Article 19

> "1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
>
> 2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and

for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement."

35. The Committee on the Rights of the Child monitors the implementation of the Convention on the Rights of the Child. In its General Comment No. 13 of 18 April 2011, entitled "The right of the child to freedom from all forms of violence", the Committee stated as follows:

"25. Sexual abuse and exploitation. Sexual abuse and exploitation includes:

(a) The inducement or coercion of a child to engage in any unlawful or psychologically harmful sexual activity; [footnote: 'Sexual abuse comprises any sexual activities imposed by an adult on a child, against which the child is entitled to protection by criminal law ...']

...

(d) ... Many children experience sexual victimization which is not accompanied by physical force or restraint but which is nonetheless psychologically intrusive, exploitive and traumatic."

36. In a document entitled "A Statistical Snapshot of Violence against Adolescent Girls" (New York, 2014), UNICEF noted the following:

"Adolescence can be a period of heightened vulnerability to sexual victimization outside the home through increased exposure to both strangers and peers, the latter within the context of both friendship and intimate relationships [reference omitted]. Adolescent girls in particular may encounter more unwanted or insistent sexual advances as they physically mature and begin to assume a sexual identity."

B. Council of Europe

1. *Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201, "the Lanzarote Convention")*

37. The Lanzarote Convention entered into force in respect of the respondent State on 1 October 2012. It was summarised in *X and Others v. Bulgaria* ([GC], no. 22457/16, § 127, 2 February 2021). Article 18 of that Convention reads as follows:

Article 18 – Sexual abuse

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

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

(b) engaging in sexual activities with a child where:

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

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

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

2. For the purpose of paragraph 1 above, each Party shall decide the age below which it is prohibited to engage in sexual activities with a child.

3. The provisions of paragraph 1.a are not intended to govern consensual sexual activities between minors."

38. The Explanatory Report to the Lanzarote Convention clarifies:

"121. When assessing the constituent elements of offences, the Parties should have regard to the case-law of the European Court of Human Rights; in this respect, the negotiators wished to recall, subject to the interpretation that may be made thereof, the *M.C. v. Bulgaria* judgment of 4 December 2003, in which the European Court of Human Rights stated that it was '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' (§ 166). The Court also noted as follows: 'Regardless of the specific wording chosen by the legislature, in a number of countries the prosecution of non-consensual sexual acts in all circumstances is sought in practice by means of interpretation of the relevant statutory terms ("coercion", "violence", "duress", "threat", "ruse", "surprise" or others) and through a context-sensitive assessment of the evidence' (§ 161)."

2. Recommendation Rec(2002)5 of the Committee of Ministers of the Council of Europe on the protection of women against violence

39. In this Recommendation the Committee of Ministers recommended that member States adopt and implement, in the manner most appropriate to each country's national circumstances, a series of measures to combat violence against women. Paragraph 35 of the appendix to the Recommendation states, *inter alia*, the following:

"*Criminal law*

35. ... [N]ational law should:

...

– penalise any sexual act committed against non-consenting persons, even if they do not show signs of resistance;

...

– penalise any abuse of the position of a perpetrator, and in particular of an adult *vis-à-vis* a child.

Civil law

Member states should:

36. ensure that, in cases where the facts of violence have been established, victims receive appropriate compensation for any pecuniary, physical, psychological, moral and social damage suffered, corresponding to the degree of gravity, including legal costs incurred;

37. envisage the establishment of financing systems in order to compensate victims."

40. According to the analytical study of the results of the third round of monitoring the implementation of Recommendation Rec(2002)5 (Strasbourg, 2010), by 2010 the majority of Council of Europe member States had penalised all sexual acts against non-consenting persons (pages 14, 38 and 39).

3. Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 2010, "the Istanbul Convention")

41. The Istanbul Convention was adopted on 11 May 2011 and entered into force in respect of the respondent State on 1 July 2018. Article 36 of that Convention provides the following:

Article 36 – Sexual violence, including rape

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

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

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

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

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

42. The relevant parts of the Explanatory Report to the Istanbul Convention read as follows:

Article 36 – Sexual violence, including rape

"189. This article establishes the criminal offence of sexual violence, including rape. Paragraph 1 covers all forms of sexual acts which are performed on another person without her or his freely given consent and which are carried out intentionally. ...

190. ... Lit b. covers all acts of a sexual nature without the freely given consent of one of the parties involved which fall short of penetration ...

193. In implementing this provision, Parties to the Convention are required to provide for criminal legislation which encompasses the notion of lack of freely given consent to any of the sexual acts listed in lit.a to lit.c. It is, however, left to the Parties to decide on the specific wording of the legislation and the factors that they consider to preclude freely given consent. Paragraph 2 only specifies that consent must be given voluntarily

> as the result of the person's free will, as assessed in the context of the surrounding circumstances."

Paragraph 191 of the Explanatory Report to the Istanbul Convention is essentially identical to paragraph 121 of the Explanatory Report to the Lanzarote Convention (see paragraph 38 above).

43. On 7 September 2023 the Council of Europe Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) published its (Baseline) Evaluation Report in respect of the respondent State (GREVIO/Inf(2023)5). The relevant part of the report reads as follows:

> "259. GREVIO welcomes the amendments to the elements of the offences set out in Article 186, which are fully in line with the requirement under Article 36 of the Istanbul Convention to criminalise all non-consensual sexual acts. This being a very recent development, GREVIO has not had the opportunity to assess its implementation by the judiciary. GREVIO nonetheless wishes to point out that with the new rape legislation the onus is on the individual to ensure that all sexual acts are engaged in voluntarily. This shift in perspective is what is needed to move away from case law that all too often focuses on the behaviour of the victim, including her appearance and actions prior, during and after the act. ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

44. The applicant complained under Article 1 of Protocol No. 12 to the Convention that her right to protection from sexual assault had not been secured and that, as a result, she had been left without any legal protection. The Court, being the master of the characterisation to be given in law to the facts of the case (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 110-26, 20 March 2018 and *Grosam v. the Czech Republic* [GC], no. 19750/13, § 90, 1 June 2023) does not consider itself bound by the characterisation given by an applicant or a government (see *Ghișoiu v. Romania* (dec.), no. 40228/20, § 42, 29 November 2022). When giving notice of the applicant's complaint, the Court considered that it would be more appropriate to examine it under Article 8 of the Convention, which, in so far as relevant, reads as follows:

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

A. Admissibility

1. The parties' submissions

45. The Government submitted that the application had been lodged outside the six-month time-limit. The applicant should not have waited for the outcome of the civil proceedings under the Insults and Defamation Act, which, in view of the wording of section 6 of that Act and the finding of the

domestic courts, had only been able to protect her psychological but not her physical integrity. The applicant had been represented by a lawyer in the civil proceedings, who should have been aware that a claim for compensation for insult was not an effective remedy for the purposes of the applicant's complaint before the Court.

46. The Government further submitted that the applicant had not exhausted the available and effective domestic remedies. Firstly, she had not pursued a criminal prosecution under section 56(2) of the Criminal Proceedings Act as she had been advised to do by the prosecutor. Secondly, she had not lodged a compensation claim for the protection of her personal rights under sections 9-a and 189 of the Obligations Act.

47. In their additional observations the Government argued that the applicant had not raised in her application the complaint that there had been a legal lacuna in the domestic criminal legislation concerning the protection of children above the age of 14 from "other sexual acts" (see paragraph 48 below). That complaint was therefore inadmissible. They further submitted that under section 2(1) of the Civil Proceedings Act, the civil courts had been prevented from adjudicating beyond the claim submitted by the applicant; accordingly, the applicant's interpretation of section 176(3) of the Civil Proceedings Act could not be accepted.

48. The applicant argued that she had submitted the application within six months from the delivery of the appellate court's judgment in the civil proceedings, which had been the last effective legal remedy for the purposes of her complaint. The criminal-law framework had not ensured the protection of a child above the age of 14 from "other sexual acts". The criminal offence of insult had no longer existed at the material time. In view of that legal lacuna, she could not have effectively undertaken a private prosecution under section 56(2) of the Criminal Proceedings Act. She had therefore needed to resort to protection under the civil law by lodging a compensation claim in proceedings in which the courts could directly apply the Convention. The applicant had not considered that criminal proceedings had been the only effective remedy. Under section 176(3) of the Civil Proceedings Act, the domestic courts had not been bound by the grounds set out in her civil claim for compensation.

2. The Court's assessment

49. In order to determine whether an applicant has complied with the obligation to exhaust domestic remedies in the light of the particular circumstances of the case, the Court must first identify the act of the authorities of the respondent State which is complained of by the applicant (see *Jeronovičs v. Latvia* [GC], no. 44898/10, § 76, 5 July 2016).

50. The requirements contained in Article 35 § 1 as to the exhaustion of domestic remedies and the six-month period are closely interrelated. Thus, as a rule, the six-month period runs from the date of the final decision in the

process of exhaustion of domestic remedies. Article 35 § 1 cannot be interpreted in a manner which would require an applicant to inform the Court of his complaint before his position in connection with the matter has been finally settled at the domestic level, otherwise the principle of subsidiarity would be breached. However, this provision allows only remedies which are normal and effective to be taken into account, as an applicant cannot extend the strict time-limit imposed under the Convention by seeking to make inappropriate or misconceived applications to bodies or institutions which have no power or competence to offer effective redress for the complaint in issue under the Convention. Thus, the pursuit of remedies which do not satisfy the requirements of Article 35 § 1 will not be considered by the Court for the purposes of establishing the date of the "final decision" or calculating the starting point for the running of the six-month rule (see, for example, *Savickis and Others v. Latvia* [GC], no. 49270/11, § 131, 9 June 2022). The general principles regarding the effectiveness of domestic remedies under Article 35 § 1 of the Convention are set out in *Vučković and Others v. Serbia* ((preliminary objection) [GC] (nos. 17153/11 and 29 others, §§ 74-77, 25 March 2014).

51. As a general rule, the Court does not examine any new matters raised after the Government have been given notice of the application, unless the new matters are an elaboration on the applicant's original complaints to the Court (see, for example, *Aliyev v. Azerbaijan*, nos. 68762/14 and 71200/14, § 94, 20 September 2018). However, because an applicant may subsequently elucidate or elaborate upon his or her initial submissions, the Court must take into account not only the application form but the entirety of his or her submissions in the course of the proceedings before it which may eliminate any initial omissions or obscurities (ibid., with reference to *Radomilja and Others*, cited above, §§ 122 and 129). A complaint consists of two elements: factual allegations and legal arguments (ibid., § 126, and *Grosam*, cited above, § 88).

52. The Court also reiterates that effective protection against sexual abuse requires measures of a criminal-law nature (see, among many other authorities, *M.C. v. Bulgaria*, no. 39272/98, § 186, ECHR 2003-XII; see also *A and B v. Croatia*, no. 7144/15, § 110, 20 June 2019 and, more recently, *Vučković v. Croatia*, no. 15798/20, § 50, 12 December 2023). In this connection, the Court recalls that, in the absence of an effective criminal investigation, it has dismissed pleas of inadmissibility where respondent States have suggested civil remedies as a substitute for the exhaustion of domestic remedies (see, for example, *R.B. v. Estonia*, no. 22597/16, § 65, 22 June 2021, with further references; *A and B v. Croatia*, cited above, § 92, and *H. v. Iceland* (dec.), no. 29785/07, 27 September 2011).

53. The Court observes that immediately after the incident the applicant initiated criminal proceedings against Gj.K., which were ultimately unsuccessful. In this regard, it is essential to highlight the following key

elements that further differentiate the present case from those cited above (see paragraph 52). In rejecting the applicant's criminal complaint, the prosecutor considered that the elements of an offence subject to public prosecution had not been made out. Yet the prosecutor did acknowledge the presence of elements constituting the criminal offense of insult (see paragraph 9 above). However, almost a year before the prosecutor's decision in the applicant's case (ibid.), that offence had been decriminalised, rendering the prosecution on that ground impossible, and civil liability for insult had been introduced (see paragraphs 19 and 23 above). The applicant, represented by a lawyer, therefore resorted to bringing civil proceedings, which was the only possible fact-finding judicial forum for the establishment of any liability on the part of Gj.K. for the alleged abuse (compare *Selami and Others v. the former Yugoslav Republic of Macedonia*, no. 78241/13, § 83, 1 March 2018, in which the Court dismissed a non-exhaustion objection in a case of ill-treatment inflicted by the State authorities where the applicant, without having lodged a criminal complaint, complained about the amount of compensation awarded in civil proceedings against the State). These crucial contextual elements distinguish the present case also from the case of *Jørgensen and Others v. Denmark* ((dec.), no. 30173/12, §§ 11-13 and 19, 28 June 2016, concerning an investigation into the allegedly unlawful use of force by State agents which required a criminal law-response), where there had been no impossibility to resort to criminal prosecution and there had been no finding or instruction by the public prosecutor such as the one in the present case. The particular circumstances of the present case thus justify a more nuanced approach, without putting into question the well-established principle that effective protection against sexual abuse requires measures of a criminal-law nature (see paragraph 52 above). Given the prosecutor's explicit finding that the alleged conduct constituted an insult, which was subject to civil liability at the material time, the Court does not consider the applicant's recourse to civil proceedings to have been unreasonable (see paragraphs 10-14 above). The respondent State's legal framework explicitly provided for a civil remedy in response to decriminalised conduct, which the applicant, arguably having no other accessible judicial recourse, attempted to exhaust, thereby providing an opportunity to the domestic courts to ensure legal protection and a means of redress for her grievances.

54. The Court further observes that the Government have not provided any examples of case-law showing that the interpretation of the notion of insult as applied by the civil courts in the applicant's case had been established well before the applicant had lodged her compensation claim, such as to render the civil proceedings futile. On the contrary, the compensation claim was lodged within a year from the entry into force of the Insults and Defamation Act, when the relevant domestic case-law was arguably still developing. In this connection, the Court reiterates that the existence of mere doubts as to the prospects of success of a particular remedy

which is not obviously futile is not a valid reason for failing to exhaust that avenue of redress (see *Vučković and Others*, cited above, § 74). It is a fundamental feature of the machinery of protection established by the Convention that it is subsidiary to the national systems safeguarding human rights (ibid., § 69).

55. In view of the foregoing, and having regard to the nature of the applicant's complaints before it, the Court cannot, in the specific circumstances of the present case, blame the applicant for having pursued the civil proceedings against Gj. K. (see, *mutatis mutandis*, *A.P. v. Armenia*, no. 58737/14, § 98, 18 June 2024). The question whether that remedy, as applied by the courts in her particular case, actually afforded her protection is a distinct question which will be addressed in the Court's assessment of the merits of the case.

56. The Court therefore accepts that, in the applicant's case, the six-month time-limit started to run from the moment when the final decision in the civil proceedings she had initiated was served on her (on 8 April 2016 – see paragraph 14 above). She lodged her application on 7 October 2016, that is, in compliance with the six-month rule.

57. The Court next turns to the Government's objection that the applicant did not raise in her application the complaint that there had been a legal lacuna in the domestic criminal-law legislation (see paragraph 47 above). Assuming that that objection concerns the six-month time-limit, the Court observes that in her application the applicant referred to both the criminal and civil proceedings she had initiated following the alleged incident. She complained that, following the outcome of the civil proceedings, she had been left without any legal protection (see paragraph 44 above). The Court considers that the applicant's argument that there was a legal lacuna in the criminal-law system is not a new complaint, but merely an elaboration on the complaint concerning the alleged lack of legal protection afforded by the domestic legal system against Gj.K.'s acts. It therefore dismisses the Government's objection.

58. Turning to the Government's objections of non-exhaustion of domestic remedies (see paragraph 46 above), the Court refers again to the finding of the public prosecutor that there were no elements of any publicly prosecutable criminal offence in the applicant's case. It further notes that the privately prosecutable offence of insult no longer exists in the legal system. The Government have not indicated any other ground on which the applicant could have pursued a criminal prosecution. The Court cannot therefore find that the applicant should have pursued a criminal prosecution under section 56(2) of the Criminal Proceedings Act, as it appears that such proceedings would have had no prospect of success.

59. As to the possibility for the applicant to lodge a compensation claim against Gj.K. for the protection of her personal rights, as defined in sections 9-a and 189 of the Obligations Act, the Court observes that in her

civil claim the applicant described the facts of the alleged incident, arguing that they constituted insult, and claimed compensation. The Court has already concluded that it was not unreasonable for the applicant to make use of the civil proceedings described in paragraphs 10-14 above. It reiterates that when one remedy has been pursued, the use of another remedy which has essentially the same objective is not required (see, for example, *Elmazova and Others v. North Macedonia*, nos. 11811/20 and 13550/20, § 53, 13 December 2022). Therefore, the applicant's failure to lodge another compensation claim concerning the same facts, but on a different legal ground (a violation of personal rights), is not tantamount to non-exhaustion of domestic remedies.

60. Consequently, the Government's objections of non-compliance with the six-month rule and non-exhaustion of domestic remedies must be dismissed.

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

B. Merits

1. The parties' submissions

62. The applicant submitted that the domestic legal system and the actions of the authorities in her particular case had not fulfilled the requirements of the State's positive obligation under Article 8 to protect her from Gj.K.'s actions. The criminal-law provisions did not cover "other sexual acts" committed against children above the age of 14. The courts in the civil proceedings had failed to consider the Convention, or any provision of the Obligations Act (except for section 191) or the Civil Proceedings Act, in addressing her grievances.

63. The Government submitted that the domestic legal framework and the actions of the domestic authorities in the instant case fully satisfied the requirements of the State's positive obligation under Article 8. Section 188 of the Criminal Code criminalised "other sexual acts" performed without force or threat against a child below the age of 14, which complied with the requirements of the Lanzarote Convention. The applicant, however, had already reached the age of 14 at the time of the alleged incident. The domestic authorities had conducted an effective criminal investigation into the applicant's allegations. The legal framework had also ensured protection under civil law, notably by way of the possibility for the applicant to lodge a civil compensation claim for protection of personal rights under sections 9-a and 189 of the Obligations Act. The State had a wide margin of appreciation in regulating issues such as those arising in the present case.

2. The Court's assessment

(a) General principles

64. The general principles concerning the State's positive obligation under Article 8 of the Convention have been summarised in *Söderman v. Sweden* ([GC], no. 5786/08, §§ 78-85, ECHR 2013, with further references). In particular, regarding the protection of the physical and psychological integrity of an individual from other persons, the authorities' positive obligations may include a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals (ibid., § 80).

65. The Court reiterates that the member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the criminalisation and effective prosecution of any non-consensual sexual act (see *M.C. v. Bulgaria*, cited above, § 166, and *J.L. v. Italy*, no. 5671/16, § 85, 27 May 2021).

66. Regarding, more specifically, serious acts such as rape and other forms of sexual abuse of children, including sexual battery, where fundamental values and essential aspects of private life are at stake, it falls to the member States to ensure that criminal-law provisions for the effective punishment of sexual abuse of children are in place and that they are applied in practice through effective investigation and prosecution (see *A and B v. Croatia*, cited above, § 110, and the cases cited therein).

67. Concerning such serious acts, the State's positive obligation under Articles 3 and 8 to safeguard the individual's physical integrity may also extend to questions relating to the effectiveness of the criminal investigation and to the possibility of obtaining reparation and redress, although there is no absolute right to obtain the prosecution or conviction of any particular person where there were no culpable failures in seeking to hold perpetrators of criminal offences accountable (see *Söderman*, cited above, § 83). At this juncture, the Court reiterates that the obligations incurred by the State under Articles 3 and 8 of the Convention in cases of alleged sexual abuse of children require respect for the best interests of the child. The right to human dignity and psychological integrity requires particular attention where a child is the victim of violence (see, for example, *R.B. v. Estonia*, cited above, § 83, with further references).

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

68. The Court observes that the acts that Gj.K. is alleged to have committed against the applicant, who was 14 at the material time, included non-consensual sexual physical contact (touching her breast, shoulders and leg) accompanied by statements with a sexual connotation. Those acts undoubtedly concerned intimate aspects of the applicant's private life. It appears that following the alleged incident the applicant was given medical

treatment and suffered fear and psychological distress (see paragraphs 7 and 10 above). The Court therefore considers that the seriousness of the acts in question required a criminal-law response (compare *A, B and C v. Latvia*, no. 30808/11, § 160, 31 March 2016, concerning under-age girls exposed naked in front of an adult male who massaged them and touched their intimate parts; and contrast *C. v. Romania*, no. 47358/20, § 67, 30 August 2022, which concerned sexual harassment of an adult in the workplace, not involving physical contact with intimate parts of the body). The Court also observes that UNICEF has highlighted adolescents' heightened vulnerability to sexual victimisation (see paragraph 36 above).

69. In this connection, the Court notes that pursuant to Article 36 of the Istanbul Convention, any intentional non-consensual sexual act performed on another person amounts to "sexual violence" and should be criminalised (see paragraphs 41 and 42 above). At the time of the alleged incident the Istanbul Convention had not yet entered into force in respect of the respondent State. This requirement has also been highlighted in the Explanatory Reports to the Lanzarote Convention and to the Istanbul Convention (see paragraphs 38 and 42 above, with reference to *M.C. v. Bulgaria*, cited above, § 166). In addition, as early as 2005, the Committee of Ministers of the Council of Europe recommended that member States criminalise any sexual act committed against non-consenting persons, and by 2010 most of them had done so (see paragraphs 39 and 40 above).

70. Turning to the domestic criminal-law framework applicable at the material time, the Court observes that it penalised "other sexual acts" not amounting to rape, solely if they were committed by way of force or threats (see Article 186 § 4 in conjunction with Article 186 §§ 1 and 3 of the Criminal Code, referred to in paragraph 20 above). It also criminalised "other sexual acts" against minors, but only if they were below the age of 14 (see Article 188 of the Criminal Code, referred to in paragraph 22 above). The Court cannot but conclude that the applicable criminal-law framework did not offer any protection against non-consensual sexual acts performed, without using force or threats, on a person who had turned 14, as was the case with the applicant. This is consistent with the prosecutor's finding that the acts allegedly committed by Gj.K. against the applicant were not covered by any other publicly prosecutable offence (see paragraph 9 above), and the Government have not argued that they were covered by any privately prosecutable offence.

71. The Court also takes note of the subsequent entry into force of the Istanbul Convention in respect of the respondent State in 2018 and the amendments made to the Criminal Code in February 2023, which appear to criminalise acts such as those in the present case. However, in view of the *nullum crimen sine lege* principle (see paragraph 16 above), it appears that the applicant could not rely on the new legislation regarding the alleged incident which took place in 2013 (compare *Söderman*, cited above, § 107).

72. It follows that the domestic criminal-law framework in force at the material time did not afford the requisite protection for the applicant's rights under Article 8 of the Convention. The Court considers that the lack of an effective criminal-law response to the alleged sexual abuse, resulting in the dismissal of the applicant's criminal complaint, did not correspond to the requisite respect of the best interests of the child (see paragraph 67 above).

73. The Court further notes that the applicant's complaint also concerns the domestic civil-law response to the acts allegedly committed by Gj.K. Reiterating that the obligation under Article 8 to safeguard the individual's physical integrity may also extend to questions relating to the possibility of obtaining reparation and redress (see paragraph 67 above), the Court considers that, in the very particular circumstances of the present case, it must also assess whether the available domestic civil-law remedies, as applied in practice by the domestic courts, afforded sufficient protection to the applicant in respect of those alleged acts.

74. In this connection, the Court observes firstly that the domestic civil courts dismissed the applicant's compensation claim, as well as her request that Gj.K. be found liable for insult. They found that the acts allegedly committed by Gj.K. did not constitute insult within the meaning of section 6 of the Insults and Defamation Act. Therefore, the civil remedy under that Act, as interpreted by the courts in the applicant's case, did not afford her protection against those alleged acts.

75. Secondly, in their judgments the domestic courts took into consideration section 191 of the Obligations Act (see paragraphs 11 and 13 above), which allows a victim of a criminal offence against his or her sexual freedom, committed by way of fraud, duress or abuse of a relationship of subordination or dependence, to seek compensation (see paragraph 29 above). However, given that Gj.K. was not convicted of such a criminal offence, it appears that section 191 of the Obligations Act was not applicable to the facts of the applicant's case (see, similarly, *Söderman*, cited above, § 111).

76. Thirdly, the Government argued that a civil claim for compensation for damage suffered as a result of a violation of a personal right, provided for by sections 9-a and 189 of the Obligations Act, could have afforded the applicant protection under civil law (see paragraphs 27, 28 and 63 above). However, they have not submitted any domestic case-law in support of that contention. Moreover, the domestic courts did not refer to sections 9-a and 189 of the Obligations Act in deciding the applicant's case, but took only into account of section 191 of that Act. Finally, in its judgment, the Court of Appeal found that there were no statutory provisions covering the applicant's claim (see paragraph 13 above *in fine*). In such circumstances, the Court can only conclude either that the civil compensation claim for protection of personal rights did not offer any prospect of success in the applicant's case, or, in the alternative, that the Court of Appeal did not carry out a sufficiently

thorough assessment of the circumstances of her case in reaching that conclusion.

77. The Court therefore concludes that the domestic civil-law provisions, as applied in practice by the domestic courts, did not afford the applicant the necessary protection against sexual abuse.

78. In view of the above conclusions (see paragraphs 72 and 77 above), the Court is not satisfied that the domestic legal framework, as applied by the domestic authorities, enabled the applicant to obtain effective protection against the alleged violation of her personal integrity.

There has therefore been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

79. 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

80. The applicant claimed 30,000 euros (EUR) in respect of non-pecuniary damage, without providing any further details. She also claimed additional EUR 30,000 for the pain and suffering caused by the violation.

81. The Government contested the claims as excessive, ungrounded and unsubstantiated.

82. The Court accepts that the applicant must have suffered non-pecuniary damage as a result of the respondent State's failure to protect her physical and psychological integrity. Accordingly, ruling on an equitable basis, it awards the applicant EUR 4,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

83. The applicant also claimed EUR 10,000 for costs and expenses, without providing any further details as to her claim.

84. The Government contested the claim as excessive and unsupported by any documents.

85. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum (see, among many other authorities, *L.B. v. Hungary* [GC], no.36345/16, § 149, 9 March 2023). That is to say, the applicant must have paid them, or

be bound to pay them, pursuant to a legal or contractual obligation (see, for example, *Elmazova and Others*, cited above, § 86).

In the present case, regard being had to the above criteria and the absence of any supporting documents to show that the applicant paid the amounts claimed or was under an obligation to do so, the Court rejects her claim under this head as unsubstantiated.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 4,500 (four thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 4 March 2025, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı Registrar	Arnfinn Bårdsen President