(CEDU, sez. I, sent. 20 febbraio 2020, ric. n. 41990/18)

Per garantire una protezione efficace contro lo stupro sono necessarie misure di natura penale

La Corte EDU si è pronunciata su un caso di stupro. La ricorrente si è lamentata dell'inefficacia delle indagini sulla sua accusa di stupro, senza far riferimento ad alcun articolo della Convenzione. E' stato stabilito che lo stupro e le violenze sessuali gravi costituiscono un trattamento che rientra nell'ambito dell'art. 3 della Convenzione che sancisce il divieto di tortura e afferma che "nessuno può essere sottoposto a tortura o a trattamenti o punizioni disumane o degradanti".

Poiché lo stupro e le violenze sessuali coinvolgono anche i valori fondamentali e gli aspetti essenziali di "vita privata", la Corte ha deciso di esaminare il caso anche ai sensi dell'art. 8 che sancisce il diritto al rispetto della vita privata e familiare, affermando che "ognuno ha diritto al rispetto per la sua vita privata".

Il governo bulgaro ha innanzitutto affermato che la ricorrente nella sua causa non ha richiesto neanche un risarcimento del danno. L'indagine a suo avviso, contrariamente a quanto affermato dalla ricorrente, è stata approfondita e completa. Ha inoltre dichiarato che è stato a causa della tendenza della richiedente a presentare accuse prive di fondamento, che è divenuto impossibile identificare il suo aggressore.

Gli stati hanno degli obblighi positivi ai sensi degli artt. 3 e 8 della Convenzione. Hanno il dovere di criminalizzare lo stupro e le violenze sessuali gravi, oltre a quello di indagare efficacemente sulle accuse credibili a tal riguardo.

La Corte osserva che qualsiasi indagine richiesta ai sensi della Convenzione deve soddisfare determinati requisiti minimi. Con il fatto che l'indagine sia stata sospesa per due volte, sebbene è risultata essere soddisfacente sotto altri aspetti, non è riuscita a perseguire correttamente una linea che era ovvia.

La mancanza di un'indagine penale efficace sulle accuse della ricorrente non può essere compensata dalla possibilità per lei di presentare richieste di risarcimento danni nei confronti delle persone presumibilmente responsabili del suo stupro.

Accertato che c'è l'obbligo positivo ai sensi degli artt. 3 e 8 di garantire una protezione efficace contro lo stupro, attraverso misure di natura penale, la Corte riscontrando la mancanza di queste ultime, ha dichiarato la violazione degli obblighi positivi dello stato ai sensi degli artt. 3 e 8 della Convenzione.

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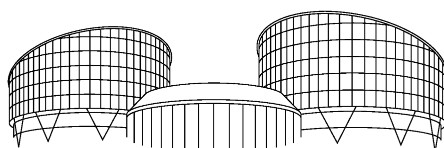

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF Y v. BULGARIA

(Application no. 41990/18)

JUDGMENT

Art 3 and Art 8 • Positive obligations • Lack of effective investigation into allegations of rape • Failure to properly pursue an obvious line of inquiry resulting from DNA evidence

STRASBOURG

20 February 2020

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Y v. Bulgaria,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:
Síofra O'Leary, *President*,
Ganna Yudkivska,
André Potocki,
Yonko Grozev,
Mārtiņš Mits,
Lətif Hüseynov,
Anja Seibert-Fohr, *judges*,
and Milan Blaško, *Deputy Section Registrar*,
Having regard to:

the application against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Bulgarian national, Ms Y ("the applicant"), on 29 August 2018;

the decision to grant the application priority;

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

the decisions to give notice of the complaint concerning the effectiveness of the investigation into the applicant's allegation that she had been raped to the Bulgarian Government ("the Government") and to declare the remainder of the application inadmissible; and

the parties' submissions,

Having deliberated in private on 28 January 2020,

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

INTRODUCTION

The case concerns the question whether a criminal investigation into a woman's allegations of "stranger rape", accepted as credible by the authorities, was sufficiently thorough and effective to meet the requirements of Articles 3 and 8 and of the Convention. In particular, the issue is whether the investigating and prosecuting authorities directed enough effort towards identifying who had

committed the rape, or whether they failed to follow an obvious line of inquiry resulting from the DNA evidence in the case.

THE FACTS

1. The applicant was born in 1964 and lives in Haskovo. She was not legally represented.

2. The Government were represented by their Agents, Ms A. Panova and Ms V. Hristova of the Ministry of Justice.

3. The facts of the case, as submitted by the parties and as they emerge from the material in the domestic case file provided by the parties, may be summarised as follows.

ALLEGED EVENTS OF 10 JULY 2013

4. According to the applicant and the conclusions of the prosecuting authorities based mainly on her allegations, at about 11.30 p.m. on 10 July 2013, when she was on a trip to Sofia and (following an argument with the friend at whose home she had been staying for the previous eight days, since 2 July 2013) seeking accommodation for the night, an unknown man to whom she had briefly chatted at a bus stop and agreed to follow to a nearby train station assaulted her in a poorly lit field on the outskirts of Sofia and raped her. He pushed her to the ground, covered her mouth with his hand, pulled down her trousers and briefs and penetrated her digitally and then with his penis. He then walked away.

5. At about five past midnight on 11 July 2013 the applicant called the emergency police number and two officers arrived at the scene shortly afterwards.

INVESTIGATION INTO THOSE EVENTS

Initial investigation

6. An investigation was opened immediately. The police inspected the scene and recovered four tissues, the applicant's mobile telephone, receipts, a t-shirt, a polo-style blouse and a bag of antibacterial wipes. The applicant also gave them her briefs, trousers, blouse and shoes so that they could be tested.

7. The investigation was taken up by the eighth regional department of the Sofia police and the Sofia district prosecutor's office.

8. The investigator assigned to the case immediately ordered a medical report to establish the extent of the injuries suffered by the applicant. A forensic medical expert examined her at 3.30 a.m. that same morning and found that she had traumatic injuries to her vagina consistent with her allegations of rape, as well as an injury to her lower lip consistent with her allegation that the assailant had covered her mouth.

9. The applicant was interviewed between 5 and 5.55 a.m. and again between 10 and 10.40 a.m. She gave a description of the alleged assailant.

10. Over the following four days the investigator asked (a) two forensic experts to test the items recovered from the scene of the alleged rape and from the applicant (clothes and swabs from her vaginal and anal areas) for traces of blood, hair or semen; (b) other forensic experts to test the applicant's blouse and briefs and a swab from her vaginal area for traces of DNA; and (c) a psychiatrist and psychologist to say whether the applicant suffered from any kind of mental disorder and whether she was capable of giving reliable evidence about what had happened to her.

11. Four days into the investigation, on 15 July 2013, the police organised two successive identity parades, with four participants in each. It is not entirely clear on what basis the participants were chosen, but it appears that one of the men selected for the first parade, Mr X, who was born in 1977 and employed as a furniture maker, had been chosen because he lived in a lodging house located a few hundred metres from the scene of the rape and his features matched the applicant's description of her assailant; the police had already arrested him on that basis on 11 July 2013. The applicant identified Mr X as the man who had assaulted her, adding that she had recognised him by his facial features, height and build. Mr X denied being the assailant, maintaining that he had been home at the time of the assault on the applicant.

12. The psychiatric and psychological report, filed nine days after the start of the investigation, on 20 July 2013, stated that the applicant, though not suffering from a mental disorder or an intellectual disability, could not give reliable evidence about what had happened to her because she had poor eyesight and a "querulous" personality, with a tendency to quickly pinpoint culprits without even being certain, in order to fulfil her desire for revenge.

13. The forensic report, filed two and a half weeks after the start of the investigation, on 29 July 2013, said that the applicant's briefs and the swab from her vaginal area bore traces of human blood and semen. The applicant's blouse also bore traces of blood, but it could not be determined whether it was human.

14. The following day, 30 July 2013, the investigator asked several mobile telephone operators to provide information about the calls made from six mobile telephone numbers of relevance to the case. The operators did so less than a week later, on 5 August 2013. It appears that this was necessary because the applicant had stated that, shortly before assaulting her, the assailant had been speaking on his mobile telephone.

15. No fingerprints were found on the applicant's mobile telephone and, pursuant to a court order, it was given back to her in October 2013.

16. The DNA report became ready about five months after the start of the investigation, on 14 December 2013. It found no discernible traces of DNA on the applicant's blouse and only traces of her own DNA on the swab from her vaginal area. By contrast, her briefs bore traces of the DNA of a man whose profile featured in the national police DNA database: a Mr Z, who was born in 1975 and had a previous conviction for an unspecified offence. No traces were found of Mr X's DNA (he had been swabbed for a DNA sample when taken to the police station on 11 July 2013).

17. Meanwhile, on 5 November 2013 the investigator asked a hospital to provide information about cataract surgery the applicant had undergone in 2005 with a view to establishing the quality of her eyesight. On 13 January 2014 the hospital provided all the medical documents relating to her operation.

18. On 22 January 2014 the investigator asked the relevant authorities to establish Mr Z's whereabouts. He was located and questioned on 11 March 2014. He said that he was a construction worker, that he had been divorced for eleven years, that he did not have a permanent girlfriend and that his work did not leave him with enough free time to have relationships with women. He also said that at the time of the alleged assault he had had no sexual contact and that he did not know the applicant. He added that at the relevant time he had been living above a Chinese restaurant in a neighbourhood about three kilometres from where the applicant had been assaulted, that he had finished work at about 10 or 11 p.m. and had gone home by bicycle, and that he had no recollection of being in the area of the alleged assault. He gave the number of the mobile telephone that he had been using at the time.

19. It appears that during that period the investigator also interviewed the caretaker of the lodging house where Mr X was living and the friend at whose home the applicant had been staying in the days before the incident.

20. In February 2014 the applicant requested that the case be assigned to another prosecutor, citing, among other things, delays in the investigation. In March 2014 the Sofia city prosecutor's office refused her request, saying that there had been no unwarranted delays to date. The applicant appealed, but in April and August 2014 respectively the Sofia City appellate prosecutor's office and the Supreme Cassation Prosecutor's Office upheld the refusal.

21. In March 2014 the applicant asked the prosecutor to replace the investigator. On 10 April 2014 the prosecutor refused her request.

22. On 9 June 2014 the prosecutor instructed the investigator to carry out a fresh identity parade with the participation of Mr Z, hold a face-to-face confrontation between him and the applicant, question them both – specifically about whether and how they knew each other, what the nature of their relationship was and whether they had ever had sexual contact – and obtain a medical report on the applicant's eyesight. It appears that in the past both Mr Z and the applicant had failed to comply with subpoenas, which prompted the prosecutor to say that they should be compelled to attend and fined if necessary. It appears that the investigator was unable to carry out those instructions because the applicant refused to comply with the subpoena sent to her and Mr Z was not at the address which he had provided earlier.

23. On 18 March 2015 the investigator asked the police in Haskovo, where the applicant was living, to request the applicant to attempt to identify her alleged assailant from photographs. The investigator reiterated her request on 4 May 2015, and asked the Haskovo police to obtain a medical report on the applicant's eyesight with a view to determining whether she had been capable of properly making out her assailant.

24. That same day the investigator asked a psychiatric clinic in Haskovo whether the applicant had undergone treatment there. On 19 May 2015 the clinic confirmed that the applicant had been admitted there on 10 March 2015 and had undergone voluntary inpatient treatment for forty-eight days, until 27 April 2015, having been diagnosed with a delusional disorder. She had previously been seen by a psychiatrist for two years.

25. On 5 June 2015 a police officer in Haskovo interviewed the applicant on behalf of the investigator. The applicant said that she could recognise the man who had assaulted her. Before the assault he had been on the same bus as her, sitting on a seat just behind hers, and she had seen his face when getting off the bus. He had been about one metre seventy-five centimetres tall, of medium build, with short hair. He had looked about thirty-five years old. He had been wearing workman's clothes, but she could not remember whether they had been clean or dirty. She had not managed to make out the exact colour of his skin or hair either. Nor could she describe his nose, eyes or mouth, as she had not been paying attention and it had been dark.

26. Straight after the interview the officer presented the applicant with a photograph album and asked her whether she recognised any of the four men whose pictures featured in it – one of whom was Mr Z – as her assailant. The applicant said that none of the men looked like her assailant.

27. Immediately afterwards the officer interviewed the applicant again. She said that none of the men featured in the album was her assailant, that she had already recognised him at the identity parade in July 2013, and that she would definitely recognise him if she saw him in the flesh. She refused to have her eyesight tested by medical experts. She admitted to suffering from eyesight problems, particularly when she was tired or stressed, but insisted that they were not serious enough to have prevented her from making out her assailant.

28. On 3 August 2015 the investigator asked a medical expert to state, based on the documentary evidence, whether the applicant suffered from any eyesight problems and whether they were of such a nature as to have prevented her from making out her assailant's face and other features. In his report, filed three days later, on 6 August 2015, the expert said that although the applicant had had cataracts in both eyes, they had been surgically removed in 2005. There was nothing to suggest that she had had any eyesight problems since, or that she had been unable to make out the facial features of her assailant, particularly given how close up an assailant's face would be during a typical rape.

29. On 23 September 2015 the prosecutor instructed the investigator to obtain, if possible, expert evidence about the approximate date on which the DNA on the applicant's briefs had been deposited. The investigator asked an expert to indicate whether this could be done. In his report, filed on 9 December 2015, the expert replied that there was no scientific method that could be used to ascertain when biological material had been deposited on an item.

30. On 9 February 2016 the material in the case file was presented to the applicant by the police in Haskovo. This appears to have been done because the applicant had on several earlier occasions refused to go to Sofia to consult the material. She challenged the expert evidence and insisted that Mr X be charged.

31. On an unknown date in February or March 2016 the material in the case file was also presented to a lawyer appointed by the investigating authorities on an unknown earlier date to represent the applicant in view of her psychological vulnerability. It appears that the lawyer did not make any objections or requests; there is no information about whether he ever contacted the applicant.

Suspension of the initial investigation

32. On 11 March 2016 the investigator recommended that the investigation be discontinued, saying that despite all the steps taken to date, it was impossible to establish with any degree of certainty that an offence had been committed.

33. On 23 March 2016 the prosecutor of the Sofia district prosecutor's office in charge of the case instead decided to suspend the investigation pursuant to Article 244 § 1 (2) of the Code of Criminal Procedure (see paragraph 60 below). He stated that the applicant's allegations of rape were consistent with the medical evidence – the medical report had confirmed bruises to her vagina and her lower lip – and that her statements about the way in which the assault had happened were sufficiently detailed and credible.

34. Nevertheless, despite the investigation's efforts, it was impossible to come to a safe conclusion about the assailant's identity. In particular, the applicant's allegations in relation to Mr X were not credible. Her descriptions of the assailant's features during her interviews and just before the identity parade had been vague and fluctuating. She had also said that she had been unable to properly see the assailant's face, and at the identity parade had failed to describe any of his specific features. The psychological and psychiatric report had stated that she had a querulous personality with a tendency to quickly pinpoint culprits without even being certain, just so that she would have an actual person to blame.

35. Mr X had categorically denied being the assailant and said that at the time of the assault on the applicant he had been at the lodging house where he had been renting a room. That alibi was confirmed by the lodging house's caretaker, who had been on duty from 5 p.m. on 10 July 2013 until 8 a.m. the following morning. He had given evidence to the effect that he had seen Mr X entering the building at about 10 or 10.30 p.m. on 10 July 2013, about an hour before the assault, and that he was certain that Mr X had not gone out after that. He had also said that the door where he had been on duty was the only possible way out, and that he had not fallen asleep at any point during his shift. The caretaker had no links with Mr X and therefore there was no reason to doubt his evidence.

36. Nor was there any physical evidence, such as fingerprints or DNA, putting Mr X at the scene of the rape, or communications data showing that his mobile telephone had been used nearby (according to the applicant, the assailant had been speaking on his mobile telephone shortly before she had been assaulted). There was therefore no basis on which to suppose that he had been the assailant.

37. The DNA traces recovered from the applicant's briefs had belonged to another man, Mr Z, but the applicant had not named him as the assailant. He himself had also denied this, and the experts

could not pinpoint the time when his DNA had been deposited on the applicant's briefs and thus confirm with certainty that it had happened at the time of the assault. Nor was there any other evidence to suggest that he could have been the assailant. The DNA evidence alone was not sufficient to reach such a conclusion.

38. There was no reason to doubt the expert evidence, some of which had been challenged by the applicant. All the experts were recognised specialists in their respective fields, and had carried out their duties with due care.

39. In those circumstances, the evidence available was not sufficient to charge anyone. It was therefore appropriate to suspend the investigation and instruct the police to continue with their efforts to identify the assailant.

Overruling of the suspension of the initial investigation

40. The applicant sought judicial review of the suspension of the investigation. She challenged the credibility of the expert evidence and the way in which the investigating and prosecuting authorities had conducted the proceedings and assessed the evidence, arguing that the prosecutor in charge of the case had failed properly to carry out his duties.

41. In a decision of 4 May 2016, which was not amenable to appeal, the Sofia District Court overruled the suspension of the investigation. It held that although the investigating authorities had taken a considerable number of steps, they had not done everything possible to elucidate the facts. In particular, they had not interviewed the police officers who had arrived first at the scene. It was necessary to do so and obtain any contemporaneous notes from them. It was also necessary to interview two witnesses – Mr X's partner and a friend who had been living in the same lodging house as him – who, according to Mr X, had been with him on the evening of the rape.

Resumed investigation

42. On 10 May 2016 the prosecutor of the Sofia district prosecutor's office sent the case back to the investigator with instructions to carry out the steps outlined in the Sofia District Court's decision. On 7 June 2016, after receiving a letter from the applicant claiming that she had participated as a certification witness in an earlier identity parade relating to an alleged vehicle theft also involving Mr X, the prosecutor supplemented his instructions, asking the investigator to check whether any such parade had taken place, as it would have presumably tainted the results of the identity parade on 15 July 2013.

43. On 11 August and 19 December 2016 respectively the investigator interviewed the two witnesses who, according to Mr X, had been with him on the evening of the rape – his partner and the friend who had been living in the same lodging house as him. They both said that on the evening of the rape they had all arrived home at about 10 p.m. and not gone out until the following morning.

44. The investigator questioned Mr X again on 21 October 2016. He said that he fully stood by his earlier statements, and denied having taken part in any other identity parades.

45. On 15 November 2016 and 7 February 2017 respectively the investigator interviewed one of the first responders to the scene and another officer who had spoken to the applicant shortly after her arrival at the police station in the early hours of 11 July 2013. The officer from the station could not recall the events very well. The first responder said that when he and his colleague had gone to the lodging house, which was not far from the scene of the incident, the caretaker had told them that Mr X, who matched the applicant's description of the assailant, had come home at about 11.30 p.m. on 10 July 2013. When interviewed on 30 August 2017, the officer's colleague said that he had no recollection of these events. This prompted the investigator to question the first officer again, and in his second interview, which took place on 10 November 2017, the officer said that at his first interview he had not expressed himself correctly and that in actual fact he had not managed to find out from the lodging house's caretaker at what precise time Mr X and his friend had come home. Only the caretaker could say more about the matter.

46. In the meantime, on 12 October 2017 the investigator questioned Mr X again. He insisted that on the evening in question he had gone home earlier than the alleged rape and had not left the lodging house again that night. He reiterated that this could be confirmed by his partner, his friend and the lodging house's caretaker.

47. On 17 May 2017 the material in the case file was presented to the applicant by the police in Haskovo. She requested new DNA tests and another identity parade with the participation of Mr Z, even though she still insisted that her assailant had been Mr X. On 7 August 2017 the prosecutor refused her requests, saying that all the items recovered from the scene had already been submitted for DNA analysis and that it was impossible to carry out a repeat identity parade as the applicant had already seen a photograph of Mr Z.

48. On 2 April 2018 the material in the case file was again presented to the applicant by the police in Haskovo. The applicant requested that Mr X be charged and reiterated that Mr Z had nothing to do with the case. On 24 April 2018 the prosecutor refused the applicant's request in relation to Mr X, saying that he would decide whether or not to press charges against anyone at the close of the investigation.

49. That same day the prosecutor instructed the investigator to interview four other police officers who had worked on the case and obtain their notebooks, if they were still available. He also asked the investigator to check whether an earlier identity parade involving the applicant and Mr X had taken place.

50. The investigator interviewed three of those officers on 21 May, 8 June and 3 July 2018 respectively. None of them could recall the events in question. The fourth officer could not be interviewed because he had moved to the United States of America.

51. On 26 June 2018 the investigator interviewed Mr X again. He said that he had no recollection of taking part in another identity parade apart from the one on 15 July 2013. When interviewed on 23 July 2018, his friend and neighbour also said that he had no information of Mr X ever taking part in another identity parade. The police station records made no mention of any such parade either.

52. On 24 August 2018 the material in the case file was presented to the applicant by the police in Haskovo. The applicant reiterated her request that Mr X be charged. On 4 September 2018 the prosecutor refused, saying that he would decide how to proceed with the case at the close of the investigation.

53. On 17 October 2018 the material in the case file was also presented to the applicant's legal representative in the proceedings. He did not make any objections or requests.

Complaint about the pace of the resumed investigation

54. In June 2018 the applicant complained to the Sofia city prosecutor's office about delays in the investigation. It obtained from the Sofia district prosecutor's office information about the course of the proceedings and in July 2018 dismissed the applicant's complaint. It found that the investigation had not been unduly protracted, particularly given the complexity of the case. The applicant appealed to the Sofia appellate prosecutor's office. In September 2018 it overruled the decision of the Sofia city prosecutor's office on the basis that it was not competent to deal with the matter, referring it to the Inspectorate attached to the Supreme Judicial Council. In a report issued in October 2018 the Inspectorate did not find any problems with the duration or conduct of the proceedings.

Suspension of the resumed investigation

55. On 17 October 2018 the investigator again recommended that the prosecuting authorities discontinue the investigation, saying that despite all the additional steps taken after its resumption, it was still not possible to establish with any degree of certainty that an offence had been committed.

56. On 6 November 2018 the Sofia district prosecutor's office again decided to suspend the investigation rather than discontinue it. It opined that although the Sofia District Court's instructions in its first decision to overrule the suspension had been pointless, because compliance with them had not led to the alleged rapist being identified, and they had also possibly been in excess of the court's jurisdiction in such proceedings, the investigator had followed all of those instructions. Predictably, though, none of the new steps taken by the investigator had led to any fresh leads about the identity of the alleged rapist. It remained the case that the evidence available – including the statements of Mr X's partner and friend and those of the police officers who had worked on the case – did not implicate Mr X and indeed even confirmed his alibi. There was still not enough evidence to implicate Mr Z either, for the same reasons as those given in the earlier decision to suspend the investigation (see paragraph 37 above), or to charge anyone else. It was thus still appropriate to suspend the investigation pursuant to Article 244 § 1 (2) of the Code of Criminal Procedure (see paragraph 60 below), and instruct the police to keep up their efforts to identify the assailant.

Judicial review of the suspension of the resumed investigation

57. The applicant sought judicial review of the suspension of the resumed investigation. She again contested the way in which the investigating and prosecuting authorities had conducted the

proceedings and assessed the evidence, arguing that there had been undue delays in the investigation.

58. In a decision of 11 February 2019, which was not amenable to appeal, the Sofia District Court upheld the suspension of the resumed investigation. It found that throughout it the investigator had complied with all the instructions given by the judge who had first overruled the suspension. The evidence available still excluded the possibility that Mr X could be the alleged assailant, and no evidence had come to light to suggest who the assailant could have been.

RELEVANT LEGAL FRAMEWORK

59. The substantive criminal law in Bulgaria relating to rape has been set out in detail in *M.C. v. Bulgaria* (no. 39272/98, §§ 74-86, ECHR 2003-XII).

60. Article 244 § 1 (2) of the Code of Criminal Procedure provides that the prosecuting authorities must suspend an investigation if the identity of the alleged perpetrator has not been established. Their decision to do so is amenable to judicial review at the request of, among others, the victim of the alleged offence. The relevant first-instance court must examine the claim on the papers, and its decision is not amenable to appeal (Article 244 § 5).

61. Article 245 § 1 of the same Code provides that when the prosecuting authorities suspend an investigation on the basis that the identity of the alleged perpetrator cannot be established, they must send the case material to the police, the National Security Agency or the customs authorities, as the case may be, in order for them to continue inquiries in that regard. If and when the obstacle blocking the pursuit of the investigation disappears, the proceedings must be resumed (Article 245 § 2).

THE LAW

ALLEGED VIOLATION OF ARTICLES 3 AND 8 OF THE CONVENTION

62. The applicant complained, without specifying any Article of the Convention or its Protocols, that the investigation into her allegations of rape had been ineffective.

63. It is settled that rape and serious sexual assault amount to treatment falling within the ambit of Article 3 of the Convention (see *Aydın v. Turkey*, 25 September 1997, § 83, *Reports of Judgments and Decisions* 1997-VI, and *Maslova and Nalbandov v. Russia*, no. 839/02, § 85, 24 January 2008, which concerned rape of detainees by State officials, and *M.C. v. Bulgaria*, no. 39272/98, §§ 149 and 151, ECHR 2003-XII; *P.M. v. Bulgaria*, no. 49669/07, § 63, 24 January 2012; *D.J. v. Croatia*, no. 42418/10, § 83, 24 July 2012; *M.N. v. Bulgaria*, no. 3832/06, § 34, 27 November 2012; *W. v. Slovenia*, no. 24125/06, § 63, 23 January 2014; *M.A. v. Slovenia*, no. 3400/07, § 46, 15 January 2015; *N.D. v. Slovenia*, no. 16605/09, § 56, 15 January 2015; *S.Z. v. Bulgaria*, no. 29263/12, § 41, 3 March 2015; *I.P. v. the Republic of Moldova*, no. 33708/12, § 32, 28 April 2015; *Y. v. Slovenia*, no. 41107/10, § 95, ECHR 2015 (extracts); *S.M. v. Russia*, no. 75863/11, § 67, 22 October 2015; *I.C. v. Romania*, no. 36934/08, § 52, 24 May 2016; and *B.V. v. Belgium*, no. 61030/08, § 55, 2 May 2017, which concerned rape or serious sexual assault by private persons).

64. Since rape and serious sexual assault typically implicate fundamental values and essential aspects of "private life", the Court has also examined cases relating to the positive obligation to investigate cases of rape under Article 8 of the Convention (see *M.C. v. Bulgaria*, §§ 150 and 152-53; *D.J. v. Croatia*, § 84; and *M.N. v. Bulgaria*, § 34, all cited above).

65. In view of the above case-law, the Court finds that the complaint regarding the effectiveness of the investigation into the applicant's allegations of assault and rape may be examined jointly under Articles 3 and 8 of the Convention. The relevant parts of these provisions read as follows:

Article 3 (prohibition of torture)

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

Article 8 (right to respect for private and family life)

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

Admissibility

Objection that the complaint was premature

(a) The parties' submissions

66. The Government argued that the complaint was premature because the investigation had been suspended rather than completely discontinued.

67. The applicant did not comment on this point.

(b) The Court's assessment

68. When the applicant lodged her application on 29 August 2018, the investigation was still ongoing, the first decision to suspend it having been overruled by the Sofia District Court (see paragraphs 33, 41, and 50-52 above). Just over two months later, however, on 6 November 2018, the investigation was again suspended by the prosecuting authorities, and that second suspension decision was upheld by the Sofia District Court on 11 February 2019 (see paragraphs 56 and 58 above). The Court has consistently held that when examining a complaint it can take into account facts – such as the second suspension decision in the present case – which have occurred after the lodging of the application but are directly related to those covered by it (see *Stögmüller v. Austria*, 10 November 1969, p. 41, § 7, Series A no. 9; *Matznetter v. Austria*, 10 November 1969, pp. 31-32, § 5, Series A no. 10; and, more recently, *Merabishvili v. Georgia* [GC], no. 72508/13, § 250 *in fine*, 28 November 2017). It is true that the suspension did not formally discontinue the investigation, and that the police could still continue with their inquiries about the identity of the alleged rapist even after the suspension (see paragraph 61 above). But neither the fact that the investigation is still technically ongoing nor the merely theoretical possibility that it might one day be resumed are sufficient to consider it to still be effectively underway (compare *Çelikbilek v. Turkey*, no. 27693/95, § 93, 31 May 2005; *Taşçı and Duman v. Turkey* (dec.), no. 40787/10, § 19, 9 October 2012; and *Sakine Epözdemir and Others v. Turkey*, no. 26589/06, § 52, 1 December 2015).

69. The complaint cannot therefore be regarded as premature.

Exhaustion of domestic remedies

(a) The parties' submissions

70. The Government also argued that the applicant had failed to exhaust domestic remedies because she had not sought compensation for the allegedly unreasonable length of the criminal proceedings under section 2b of the State and Municipalities Liability for Damage Act 1988. Once those proceedings were formally discontinued, she would also be able to seek compensation under sections 60a et seq. of the Judiciary Act 2007. Nor had she brought claims for damages against the people allegedly responsible for her rape.

71. The Government also submitted that the applicant had never cited Articles 3 or 8 of the Convention in her dealings with the domestic authorities; indeed, she had not even done so in her application to the Court.

72. The applicant did not comment on any of the points raised by the Government.

(b) The Court's assessment

73. The first limb of the Government's objection was that the applicant has not sought compensation in respect of the length of the investigation under section 2b of the State and Municipalities Liability for Damage Act 1988 or sections 60a et seq. of the Judiciary Act 2007. An identical objection was rejected in the case of *S.Z. v. Bulgaria* (cited above, §§ 31-35) – which also concerned the effectiveness of an investigation into allegations of rape – on the basis that those remedies had been put in place solely with a view to providing redress for complaints under Article 6 § 1 of the Convention about the length of civil and criminal proceedings, whereas the complaint under Article 3 of the Convention regarding the effectiveness of the investigation into the applicant's rape allegations was broader in scope. Nothing in the case at hand calls for a different conclusion.

74. The question whether the applicant should have brought claims for damages against the people allegedly responsible for her rape goes to the merits of her complaint (see, *mutatis mutandis*, *A, B and C v. Latvia*, no. 30808/11, § 130, 31 March 2016); it does not concern the exhaustion of domestic remedies for the failure of the authorities to investigate effectively her rape allegations. Indeed, the Court has held that suing a private individual is not a remedy with respect to action on the part of the State (see *Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991, § 48, Series A no. 222; *Iatridis v. Greece* [GC], no. 31107/96, § 47 *in fine*, ECHR 1999-II; and *JGK Statyba Ltd and Guselnikovas v. Lithuania*, no. 3330/12, § 104, 5 November 2013). The same goes for an alleged failure to comply with a positive obligation – in this instance, the alleged failure of the authorities to investigate effectively the applicant's allegations.

75. Lastly, the fact that the applicant did not cite Articles 3 or 8 of the Convention before the national authorities cannot be held against her. The question of the effectiveness of the investigation was at issue both in her complaints to the higher prosecuting authorities and in her claims for judicial review of the two decisions to suspend the investigation, all of which she lodged

without legal representation or assistance (see paragraphs 20, 40, 54 and 57 above). She thus raised before the national authorities, in substance, the grievance which she has submitted to the Court (see, *mutatis mutandis*, *Glasenapp v. Germany*, 28 August 1986, § 44, Series A no. 104; *Fressoz and Roire v. France* [GC], no. 29183/95, §§ 38-39, ECHR 1999-I; and *L.L. v. France*, no. 7508/02, § 23, ECHR 2006-XI).

76. It follows that the Government's objection must be rejected.

The Court's decision on the admissibility of the complaint

77. The complaint is neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention nor inadmissible on any other ground. It must therefore be declared admissible.

Merits

The parties' submissions

78. The Government submitted that the investigation had been thorough and comprehensive. The investigating authorities had interviewed a number of witnesses, organised an identity parade and obtained a plethora of physical and expert evidence and communications data. The experts had said that the applicant had a tendency to make unsubstantiated allegations and that her statements should hence not be taken at face value. Moreover, during the investigation she had made many groundless complaints and challenges, all of which had contributed to slowing matters down. This, as well as her confused and conflicting witness statements, had made it necessary to re-examine witnesses and had, along with her uncooperative attitude, made the investigator's work harder. Despite their sustained efforts, the authorities had been unable to positively identify the assailant. The person the applicant had identified following a parade, Mr X, had had an alibi, and her assertions in relation to him could not be considered fully credible. The authorities had also sought to establish whether the person whose DNA had been found on the applicant's briefs, Mr Z, could be the assailant, but had been unable to find any other evidence to that effect, and both the applicant and Mr Z had denied that possibility. The DNA evidence alone was insufficient to reach the conclusion that Mr Z had been the assailant. For all those reasons, the prosecuting authorities had opted to suspend the investigation rather than bring charges. After that decision had been overruled, the investigating authorities had fully complied with the instructions given by the court, and the prosecutor's second suspension decision had been upheld. It could not therefore be said that the investigation had been ineffective.

79. The applicant submitted that she had suffered a serious assault on her personal integrity, which had profoundly affected her psychologically. She further stated that the investigation in connection with her rape had been dragging on since July 2013 without the authorities being able to identify her assailant, who according to her was Mr X rather than Mr Z, and bring him to justice.

The Court's assessment

(a) General principles

80. It is settled that the Contracting States have positive obligations under Articles 3 and 8 of the Convention to criminalise rape and serious sexual assault, and effectively investigate credible allegations in that regard (see *M.C. v. Bulgaria*, §§ 149-53; *M.N. v. Bulgaria*, §§ 35-38 and 40; and *A, B and C v. Latvia*, §§ 148-49, all cited above, as well as *G.U. v. Turkey*, no. 16143/10, §§ 59-61 and 65, 18 October 2016, and *B.V. v. Belgium*, cited above, §§ 55-56).

81. The characteristics which an investigation into such matters must display to be seen as effective – including promptness, reasonable expedition, adequacy, thoroughness, objectivity and sufficient involvement of the victim – are set out in a number of cases relating to such issues (see *M.N. v. Bulgaria*, § 39; *P.M. v. Bulgaria*, § 64; *W. v. Slovenia*, § 64; *S.Z. v. Bulgaria*, §§ 45-47; *G.U. v. Turkey*, §§ 62-64; and *B.V. v. Belgium*, §§ 57-60, all cited above).

82. The Court has also outlined, albeit in some instances in cases examined under Article 2 of the Convention and relating to violent acts by State agents, the considerations for its assessment of whether an investigation, when one is required, meets the requirements of adequacy and thoroughness:

(a) that, above all, the obligation to investigate is one of means, not of result (see, specifically in relation to investigations of rape or sexual abuse, *P.M. v. Bulgaria*, § 64, and *W. v. Slovenia*, § 64, both cited above). Thus, in the absence of tangible omissions, the ultimate inability to identify the perpetrator does not in itself render an investigation deficient (see *Kardisauskas v. Lithuania*, no. 62304/12, § 75, 7 July 2015);

(b) that, although the Court is not concerned with alleged errors or isolated omissions in an investigation, or called upon to assess the facts under investigation or decide on anyone's criminal liability (see, specifically in relation to rape investigations, *G.U. v. Turkey*, § 68, and *B.V. v. Belgium*, § 61, both cited above), it must ensure that the national authorities have made a serious attempt to elucidate the facts and have not wrapped up their investigation on the basis of hasty or ill-founded conclusions (see *B.V. v. Belgium*, cited above, § 60);

(c) that the thoroughness of an investigation must be judged in the light of the practical realities of investigation work (see *Velikova v. Bulgaria*, no. 41488/98, § 80, ECHR 2000-VI; *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 302, ECHR 2011 (extracts); and *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, § 162, 25 June 2019);

(d) that the variety of situations which might occur cannot be reduced to a bare checklist of investigative steps or other simplified criteria (see *Velikova*, cited above, § 80; *Velcea and Mazăre v. Romania*, no. 64301/01, § 105, 1 December 2009; and *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, § 176, 14 April 2015), since in this specific context each case turns on its own facts;

(e) that it is not appropriate to interfere with the lines of inquiry pursued by the national authorities unless they have manifestly failed to take into account relevant elements or are arbitrary (see, in relation to a rape investigation, *S.Z. v. Bulgaria*, cited above, § 50, and, in other contexts, *Georgi Georgiev v. Bulgaria* (dec.), no. 34137/03, 11 January 2011; Dimitrova and Others v. Bulgaria, no. 44862/04, § 76, 27 January 2011; and *Petrović v. Serbia*, no. 40485/08, § 94, 15 July 2014), but that a failure to pursue an obvious line of inquiry can decisively undermine the effectiveness of

an investigation (see, in relation to a rape investigation, *M.N. v. Bulgaria*, cited above, § 48, and, in other contexts, *Kolevi v. Bulgaria*, no. 1108/02, § 201, 5 November 2009; *Giuliani and Gaggio*, cited above, § 302; and *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, § 234, 30 March 2016).

83. There is no reason why these considerations – even though some of them were set out in the context of cases under Article 2 of the Convention – should not guide the Court when assessing whether the investigation into an alleged rape or serious sexual assault has been adequate and thorough. It is true that the investigative obligations implicit in various provisions of the Convention may differ, both in their content and in terms of their underlying rationale, depending on the particular situations which have triggered them (see *Banks and Others v. the United Kingdom* (dec.), no. 21387/05, 6 February 2007, as well as *Georgi Georgiev*, cited above, where the Court referred to a number of different examples under Article 2 of the Convention). Nonetheless, any investigation required under the Convention must meet certain minimum requirements (see *Zashevi v. Bulgaria*, no. 19406/05, § 57, 2 December 2010); as noted above, two of those are for it to be adequate and thorough. The nature and degree of scrutiny which would satisfy these requirements naturally depends on the particular circumstances of each case (see *Velikova*, § 80, and *Armani Da Silva*, § 234, both cited above).

(b) Application of those principles to the case at hand

84. The investigation in the case at hand started right away. The police arrived at the scene shortly after the applicant's midnight emergency call, inspected it and recovered physical evidence (see paragraph 6 above). They also promptly obtained physical evidence from the applicant: clothes and swabs (see paragraphs 6 *in fine* and 10 above). The applicant was then rapidly given a medical examination, which corroborated her assertions that she had been attacked and had suffered non-consensual vaginal penetration (see paragraph 8 above). The next morning she was formally interviewed and gave a description of the alleged assailant, which enabled the police to identify a potential suspect – Mr X – and organise an identity parade with his participation four days later (see paragraphs 9 and 11 above). Five days later the investigator in charge of the case obtained a psychiatric and psychological report on the applicant's competence as a witness (see paragraph 12 above).

85. The physical evidence was then relatively quickly submitted for forensic testing (see paragraphs 13 above). However, the results of the DNA tests did not become available until five months after the beginning of the investigation (see paragraph 16 above); the Court notes the effects of the passage of time on both victim and suspects. These results threw up a second potential suspect – Mr Z, a man who, owing to a previous conviction (for an unspecified offence) featured in the national police DNA database. He was located within approximately three months and taken in for questioning (see paragraphs 16 and 18 above). Meanwhile, the investigator was apparently checking Mr X's alibi (see paragraphs 11 *in fine* and 19 above).

86. When the investigator interviewed Mr Z, however, he denied knowing the applicant or having had sexual contact with her; indeed, he denied having had any sexual intercourse at all during the relevant period (see paragraph 18 above). These statements were in apparent contradiction with the DNA evidence, which revealed that biological material belonging to him had been deposited

on the applicant's briefs. There is no indication that during that interview the investigator attempted to resolve that contradiction, even though – as also appears from the instructions given by the prosecutor in charge of the case about three months after the interview (see paragraph 22 above) – this plainly required further explanation. Nor does the interview record suggest that there was any attempt to probe the reliability of Mr Z's account, in particular about his whereabouts at the time of the assault on the applicant.

87. It does not appear that the authorities made any subsequent attempts to establish the whereabouts of Mr Z at the time of the assault. Nor did they try to find other evidence about the relations, if any, between Mr Z and the applicant, or conversely, to check whether there was an alternative explanation for the discovery of his DNA on her briefs, or to verify the reliability of that DNA evidence.

88. It is true that in the months following Mr Z's interview the applicant repeatedly refused, seemingly for no good reason, to travel from Haskovo to Sofia to take part in an identity parade with Mr Z's participation, which compelled the investigator to ask the Haskovo police to request her to attempt to identify him from photographs (see paragraphs 22, 23 and 25-27 above). It is also true that when the applicant was, over a year later, presented with a photograph album containing a picture of Mr Z, she did not identify him as her assailant (see paragraphs 26 and 27 above). But at that stage the investigator already had expert evidence throwing doubt on the reliability of the applicant's identification of her assailant (see paragraphs 12 and 24 above). The investigator also appeared to doubt the applicant's ability to have properly made out the physical features of her assailant (see paragraphs 12, 17 and 23 *in fine* above); this assessment was shared by the prosecutor (see paragraph 34 above). It does not appear that in any of her interviews the applicant was asked to explain the nature of her relationship, if any, with Mr Z, or to attempt to explain the presence of his DNA on her briefs. Nor is there any indication that before interviewing the applicant the authorities attempted to clarify to her the significance of DNA evidence.

89. Mr Z, who was questioned once on 14 March 2014, does not appear to have been questioned again. Nor does it seem that, as noted above, any efforts were made to independently verify any of his statements, which sits in stark contrast with the authorities' repeated efforts to verify the statements of Mr X (see paragraphs 19, 35, 36, 43 and 46 above).

90. The only attempt made with a view to elucidating these matters was the investigator's request to an expert – apparently made on the basis of an assumption that the applicant had had consensual sex with Mr Z at some earlier point in time – to say when exactly Mr Z's DNA had been deposited on the applicant's briefs. This, however, turned out to be impossible, as there was, according to the expert, no scientific method of ascertaining this (see paragraph 29 above).

91. Instead of attempting to shed light on these points – which, as recognised by the prosecutor himself, manifestly called for clarification – the investigator proposed closing the investigation on the basis that it was impossible to establish with any degree of certainty that an offence had been committed (see paragraph 32 above). The prosecutor, in his decision to instead suspend the investigation, while analysing in considerable detail the evidence in relation to the person identified by the applicant during the parade, Mr X, paid scant attention to the available evidence

concerning Mr Z. He was content to record that the applicant had not named him as the assailant, that he himself had also denied this, and that there was no evidence to that effect apart from the DNA evidence (see paragraph 37 above). It is particularly striking that the prosecutor analysed in depth the applicant's unreliability as a witness in relation to Mr X (see paragraph 34 above), while at the same time taking her statements with respect to Mr Z at face value, even though there were doubts about the applicant's ability to have properly made out the physical features of her assailant, and despite the DNA evidence – which, as a rule, has very high probative value. It is also notable that the prosecutor did not try to analyse whether Mr Z's statement, which likewise ran against the DNA evidence, was credible and instead chose to believe it fully, without explaining why. Nor did the prosecutor say anything about the reliability of the DNA evidence itself.

92. The resumed investigation does not appear to have focused on that aspect of the case at all (see paragraphs 42-53 above). When suspending the investigation for a second time, the prosecutor simply repeated his earlier reasoning about the evidence relating to Mr Z (see paragraph 56 above).

93. All of the above suggests that the investigation, though satisfactory in several other respects, failed to properly pursue a line of inquiry which was obvious (compare *M.N. v. Bulgaria*, § 48, and *S.Z. v. Bulgaria*, § 50 *in fine*, both cited above). It is true that the applicant herself did not press for the pursuit of this line of inquiry. But the obligation to investigate effectively is not limited to responding to assertions and specific requests by the alleged victim. Indeed, the Court has held, albeit in somewhat different contexts, that such a requirement is inherent in the authorities' procedural obligations and does not depend on the initiative of a complainant to take responsibility for the conduct of investigatory procedures (see *Bouyid v. Belgium* [GC], no. 23380/09, § 119, ECHR 2015; *C.N. v. the United Kingdom*, no. 4239/08, § 69, 13 November 2012; and *L.E. v. Greece*, no. 71545/12, § 68, 21 January 2016). This is especially so in cases, such as the one at hand, in which the authorities are aware of the complainant's particular psychological vulnerability.

94. It is immaterial whether that line of inquiry would, even if pursued, have remained ultimately fruitless (see, *mutatis mutandis*, *Mazepa and Others v. Russia*, no. 15086/07, § 78, 17 July 2018). It should also be emphasised in this connection that it is not for the Court, which cannot act as a domestic criminal court or a court of appeal from the national courts, to express a view on whether or not Mr Z had any role in the alleged assault on the applicant, make any findings about the evidence in that regard, or give a ruling on any points of criminal liability, those all being matters for the competent domestic authorities. In particular, nothing in the present analysis should be taken to imply that Mr Z is guilty of the alleged assault. The Court's task is limited to examining the effectiveness of the investigation, and it finds that the authorities' failure to make a serious attempt to clear up the above-mentioned discrepancies, which – in view of the DNA evidence – were central to the case, was not simply an isolated error but a significant shortcoming which undermined the adequacy of the investigation.

95. The lack of an effective criminal investigation into the applicant's allegations cannot be made good by the possibility for her to bring claims for damages against the people allegedly responsible for her rape. It is settled that the positive obligation under Articles 3 and 8 of the

Convention to ensure effective protection against rape calls for measures of a criminal-law nature (see *M.C. v. Bulgaria*, cited above, § 186; *M. and C. v. Romania*, no. 29032/04, § 122, 27 September 2011; and *A, B and C v. Latvia*, cited above, §§ 148 and 159-64).

96. There has therefore been a breach of the respondent State's positive obligations under both Articles 3 and 8 of the Convention.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

97. 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."

Damage

98. The applicant claimed 50,000 euros (EUR) in respect of the damage she had allegedly suffered on account of the lack of an effective investigation into her rape allegations.

99. The Government submitted that the claim was exorbitant and out of line with the awards made by the Court in previous similar cases.

100. The Court finds that although the applicant did not specify this, her claim must be taken to concern non-pecuniary damage. It considers that she must have suffered such damage as a result of the failure of the national authorities to effectively investigate her allegations of rape. In view of the specific facts of the case and its case-law in this particular context, the Court finds it appropriate to award EUR 7,000 to the applicant, plus any tax that may be chargeable.

Costs and expenses

101. The applicant did not submit a claim for costs and expenses.

Default interest

102. 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,

Declares the application admissible;

Holds that there has been a violation of the respondent State's positive obligations under both Articles 3 and 8 of the Convention;

Holds

(a) that the respondent State is to pay the applicant, in respect of non-pecuniary damage, within three months from the date on which this judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 7,000 (seven thousand euros), plus any tax that may be chargeable, the

resulting sum 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;

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

Done in English, and notified in writing on 20 February 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan BlaškoSíofra O'Leary
Deputy RegistrarPresident