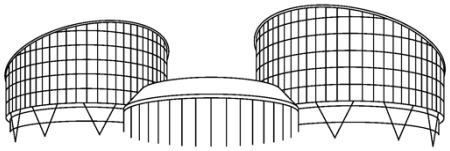

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF E.L. v. LITHUANIA

(Application no. 12471/20)

JUDGMENT

Art 3 (procedural) • Ineffective investigation into applicant's arguable claims of sexual ill-treatment at a foster home • Authorities' reluctance to order a forensic psychiatric and psychological examination • Omission by higher prosecutor and domestic courts of two levels of jurisdiction to address explicitly the necessity of such an examination despite applicant's arguments to that effect

Prepared by the Registry. Does not bind the Court.

STRASBOURG

9 April 2024

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 E.L. v. Lithuania,

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

Arnfinn Bårdsen*, President*,
Jovan Ilievski,
Egidijus Kūris,
Pauliine Koskelo,
Frédéric Krenc,
Diana Sârcu,
Davor Derenčinović*, judges*,
and Hasan Bakırcı, *Section Registrar,*

Having regard to:

the application (no. 12471/20) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Lithuanian national, Mr E.L. ("the applicant"), on 19 February 2020;

the decision to give notice to the Lithuanian Government ("the Government") of the complaint concerning Article 3 of the Convention and to declare the remainder of the application inadmissible;

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

the parties' observations;

Having deliberated in private on 12 March 2024,

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

INTRODUCTION

1. The case concerns the applicant's complaint, under Article 3 of the Convention, that the domestic authorities had failed to effectively discharge their positive obligations in relation to alleged acts of sexual violence against him.

THE FACTS

2. The applicant was born in 2006 and lives in the village of Šatijai, in the Kaunas Region. He was represented by Mr D. Povilius, a lawyer practising in Vilnius.

3. The Government were represented by their Agent, Ms K. Bubnytė-Širmenė.

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

I. BACKGROUND TO THE CASE

5. The parental rights of the applicant's biological parents, Ms S.M. and Mr A.L., were limited for an indefinite period by a court decision of 26 June

2012. By the same decision the Šaltinėlis foster home (hereinafter – "the foster home"), run by the Sisters of the Immaculate Conception, was appointed as the applicant's guardian as of 30 March 2010. He was also placed on the list of children who could be adopted.

The applicant lived in that foster home from January 2008 to February 2008, when he returned to his biological parents, and afterwards from March 2008 to May 2013, when he left for holidays at the home of his future guardian, Ms V.T.

6. By a ruling of 18 December 2013, the Marijampolė Region District Court appointed Ms V.T. as the applicant's guardian, and established the boy's permanent place of residence as being V.T.'s home. The court noted that the applicant had been in contact with V.T. since 1 February 2013, that he had been visiting V.T. in her home, that on 1 September 2013 he had started attending the school near her home, and that he had a good relationship with V.T. and her partner, Mr G.B. For her part, V.T. met all the criteria to be a guardian.

The foster home entirely supported the applicant's transfer to V.T.'s guardianship.

7. On 26 November 2018 the Kaunas police opened a pre-trial investigation into the offence of sexual assault committed against a young child (Article 150 § 4 of the Criminal Code; see paragraph 27 below) on the basis of a complaint of 20 November 2018 by the childcare authority in Kaunas. The childcare authority acted on the basis of statements by the applicant's guardian V.T., whom the applicant had told that during his time at the foster home between 2008 and 2013, three older boys, A.K. (born in 1996), K.S. (born in 1998), and A.D. (born in 1992), who had also been living there, had sexually abused him.

8. On 4 December 2018 the prosecutor asked the court to authorise the tapping of E.'s telephone for one month – at the time when the offence was alleged to have taken place E. had been the director of the foster home. In justifying the request the prosecutor referred to the testimony of V.T., who stated that the applicant had told her that he had informed E. about the abuse when it had happened and that E. had punished the guilty children by taking away computer privileges and had bought the applicant a toy. V.T. said that she had spoken with E. on the telephone, but that E. had not told her anything and instead had started to cry.

The court granted the request for the tapping of E.'s telephone.

On 7 January 2019 the prosecutor asked the court to prolong the authorisation for the tapping of E.'s telephone. The prosecutor stated that E., A.K., K.S. and A.D. had been questioned as special witnesses (see the next paragraph). The monitoring of E.'s telephone conversations had established that she often communicated with A.K., K.S. and A.D.: their conversations were coded (*jų pokalbiai šifruoti*), and they had started to meet often. The interview of the applicant was being planned, and those special witnesses

would have the opportunity to participate in it; accordingly, the special witnesses, having heard the victim's testimony, would be able to coordinate their position and testimony. The court granted the request for tapping.

9. On 19 December 2018 the court had also granted a request by the prosecutor for the telephones of A.K., K.S. and A.D. to be tapped. They were also questioned as special witnesses (Article 80 § 1 and Article 82 § 3 of the Code of Criminal Procedure; see paragraph 28 below) between 27 December 2018 and 14 January 2019, and denied having been involved in any acts of sexual violence in respect of the applicant.

10. E. was questioned as a special witness on 27 December 2018 and testified that she had been the director of the foster home from 16 July 2010. She testified that on one occasion the applicant had told her that A.K. had asked him to perform an action which she described as inappropriate, and that afterwards she had had a discussion on the subject with A.K., who neither confirmed nor denied it; E. subsequently told A.K. that such requests were inappropriate. That had been all. After V.T. had become the applicant's guardian, E. had talked several times over the years with her about how the applicant was doing and no accusations had been made.

11. In January 2019 the investigator asked the Užuovėja Centre for Assistance to Child Victims of Sexual Violence (*Vaikų, nukentėjusių nuo seksualinės prievartos, pagalbos centras* "*Užuovėja*"; hereinafter "the Children's Assistance Centre") to accept the applicant in order to perform a psychological examination on him and to provide him with psychological assistance.

The applicant, accompanied by his guardian V.T., was placed at the Children's Assistance Centre from 15 to 18 January 2019 and examined by a psychologist, to whom he said that "that happened a long time ago, when I was still living at the foster home". Referring to the results of the examination, the psychologist then produced a conclusion on the evaluation of a minor who had possibly suffered from sexual violence (*Nepilnamečio, galimai nukentėjusio nuo seksualinės prievartos, įvertinimo išvada*), which concluded that certain reactions by the applicant could be linked to intimate trauma experience and that "information gathered (namely the child's spontaneous hints about possible violence, intense anxious reactions, and his concern about sexuality) was sufficient to raise a reasonable supposition that sexual violence had possibly been experienced".

12. In January 2019 the investigator also asked the State Forensic Medicine Service (*Valstybinė teismo medicinos tarnyba*) to perform a medical examination of the applicant in order to assess whether he had sustained any physical injuries that could prove that forced anal sex had been performed with him.

13. On 16 January 2019 the applicant was interviewed by the pre-trial investigation judge, with the prosecutor, a lawyer, the psychologist from the Children's Assistance Centre, a representative of the childcare authority and

V.T. also present. The applicant, who at that time was 12 years old, testified that he had once been anally raped by K.S. at the foster home, that two other boys, A.K. and A.D., had only watched and one of them had laughed, and that when the applicant had subsequently told the nun (meaning the director of the foster home, E.) what had happened, she had told him "that is enough" and bought him a big red toy car.

II. THE KAUNAS REGIONAL PROSECUTOR'S DECISION

14. On 26 April 2019 a prosecutor at the Kaunas regional prosecutor's office discontinued the pre-trial investigation, having concluded that no crime had been committed. In order to establish the relevant circumstances, the applicant's guardian V.T. had been interviewed and had related the child's story that he had been sexually assaulted by other children at the foster home. The applicant had been interviewed by the pre-trial investigation judge with the assistance of a psychologist. The applicant had stated that he had once been sexually assaulted and that he had told the director of the foster home about it. A psychologists' conclusion (*psichologijos specialistų išvada*) also indicated that the possibility that sexual violence had taken place could not be excluded; taken together, those elements were a sufficient basis to institute criminal proceedings in order to ascertain whether criminal acts had been committed and to identify the possible perpetrators.

15. To that end nearly all potential witnesses who had lived or who had worked at the foster home, or who had been otherwise linked to the incident under investigation, had been identified and interviewed; however, none of them had given any information about the applicant having been sexually assaulted. The victim (*nukentėjusysis*; that is, the applicant) had named specific individuals – K.S., A.K. and A.D. – who had either sexually assaulted him or had been connected in some way to the assault, and said that he had told E., who had had an obligation to ensure a safe environment in the foster home for its inhabitants; it followed that the actions of those four individuals could have been criminal. Nevertheless, there had not been a sufficient basis to bring charges, and when those four individuals had been questioned as "special witnesses", they had denied that any sexual violence against the applicant had taken place. Procedural means had been employed in order to test their statements: witnesses had been questioned and other procedural actions had been taken. However, no information had been received to confirm that the applicant had been sexually assaulted or that the four special witnesses had avoided disclosing certain circumstances. It was also important to pay attention to the "conclusion by a medical specialist" (*medicinos specialisto išvada*; see paragraph 12 above), which stated that there had been no objective evidence that anal sexual intercourse had been performed with the applicant, as he had alleged. Rather, the medical conclusion stated that any constipation-related issues experienced by the applicant had been of a

functional nature, which is to say that they had been caused by physiological and psychological factors or social stress. Regarding the latter, the psychologist (see paragraph 11 above) had pointed out that the applicant's reactions could have been linked to difficult, real-life traumatic experiences – this could involve difficult experiences in his family or his relationships with his biological parents or the guardian's family. Furthermore, the information provided by the childcare services showed that as of May 2009 the applicant had been allowed to visit his biological parents during the weekends but that the boy's health issues related to constipation had surfaced, and therefore, in November 2009, a decision had been taken to recommend that he not be allowed to visit his biological parents.

16. Given the above, the prosecutor concluded that there had been no reason to regard the psychological specialist's conclusions as uncontested or as confirming the applicant's statements, especially given that they were based on probabilities and that they had been formulated as suppositions. As for V.T.'s statements, they had been based on the applicant's account, and apart from them no objective data regarding the alleged criminal actions had been established.

Nor had the investigation gathered any data capable of establishing that the then director of the foster home, E., had committed any offences in relation to the alleged sexual assault. Given that the investigation had uncovered no evidence that sexual violence had taken place it had not been possible to establish any negligence on E.'s part or any consequences stemming from it.

In sum, having assessed all the material of the pre-trial investigation, the prosecutor considered that it was possible to state that concrete data about prohibited sexual actions or molestation had not been obtained. Similarly, failure to properly perform official duties had not been established, and therefore the criminal proceedings had to be discontinued on the basis that no elements of a criminal act had been established.

III. THE CHIEF PROSECUTOR'S DECISION

17. On 10 May 2019 the applicant, represented by his guardian V.T., appealed against the prosecutor's decision, arguing that the pre-trial investigation had not been thorough and that not all the relevant circumstances had been established. The applicant considered that the case file contained "clear evidence" that sexual violence had been perpetrated against him, this being supported by his own statements (to the pre-trial investigation judge; see paragraph 13 above), V.T.'s statements when interviewed, and the conclusion of the psychologist's conclusion (see paragraph 11 above), which had confirmed that the applicant's statements about experiencing sexual violence had been founded. The applicant cited the Supreme Court's case-law (rulings 2K-205/2013, no. 2K-323/2013 and

2K-294-648/2017) to the effect that it was a specificity of cases of sexual violence against minors that usually there were no witnesses, and that the most important source of evidence in such cases were the conclusions and findings of court-ordered forensic psychological and psychiatric specialists, in addition to physical evidence and (as indirect evidence) the statements by those who had communicated with the child and in whom the child had confided about the sexual violence experienced. As stated by the Supreme Court, the testimony of the minor should not be evaluated too strictly or too categorically, for certain contradictions in his or her testimony could be due to (young) age, a lack of social or psychological maturity, or the shock he or she had experienced. The applicant emphasised that in his case all three types of evidence (his own statements, indirect evidence in the form of testimony by those he had confided in about the sexual violence he had experienced, and the psychologist's evaluation) had been present. The fact that a comprehensive forensic psychiatric and psychological expert examination (*teismo psichiatrijos – teismo psichologijos ekspertizė*) had not been ordered by that point clearly indicated that the pre-trial investigation had not been performed thoroughly and had not established all the relevant circumstances. That had contradicted the Supreme Court's practice in analogous cases.

18. The applicant also stated that the decision to discontinue the criminal proceedings had mainly rested on the testimony of those who should have been suspected of having committed the crime against him and of those under whose responsibility he had been placed and who should have prevented the sexual violence against him if they had carried out their duties properly. Those individuals had had a clear and direct motive to hide the circumstances linked to the crime, and to give untrue statements and deny that sexual violence had taken place. The statements of such individuals could not be the basis of a decision to discontinue the criminal investigation.

19. Lastly, the applicant submitted that not all the circumstances described by V.T. in her statements had been mentioned in the decision to discontinue the pre-trial investigation. Similarly, that decision had not reflected all the circumstances which directly showed the behaviour of the foster home's employees when the allegation that the applicant had experienced sexual violence had come to light, behaviour which had confirmed the employees' desire to conceal that fact. The prosecutor's decision had thus referred only to those circumstances which supported it while ignoring other relevant circumstances, and accordingly it was unfounded.

20. On 28 May 2019 the chief prosecutor at the Kaunas regional prosecutor's office rejected the applicant's complaint, holding that the lower prosecutor had comprehensively examined all the relevant circumstances of the case and that the decision had thus been lawful and founded. All the necessary and possible investigation actions had been performed. Most of the individuals who had lived or worked at the foster home at the pertinent time

had been questioned, yet no information had been obtained about the alleged sexual violence against the applicant. The witness E., who had been the director of the foster home from 16 July 2010 and in whom the applicant claimed to have confided about the crime, had categorically disputed his testimony. She had claimed to have given him the red toy car on the occasion of his christening rather than to keep him silent, and had provided photographs to support her statements. During the investigation the telephones of E., K.S, A.K and A.D. had been tapped but no relevant information had been discovered. The chief prosecutor also referred to the principles of *in dubio pro reo* and of the presumption of innocence: the evidence gathered had not allowed the drawing of an unquestionable and categorical conclusion that a crime had been committed in respect of the applicant. Specifically, the applicant's claims that the investigation had been not comprehensive and that procedural actions had not been performed were to be considered unfounded and declaratory. Under Article 178 of the Code of Criminal Procedure, it was for the prosecutor to decide what procedural actions to perform – the positions of the parties to the proceedings on that issue were not binding on the prosecutor. The chief prosecutor concluded that in the case at hand:

> "the prosecutor took all the measures provided by law to dispel all the doubts and contradictions; however, having employed all the procedural possibilities, this had not been feasible".

IV. THE KAUNAS DISTRICT COURT

21. On 11 June 2019 the applicant appealed against that decision to the Kaunas District Court, this time through his guardian V.T.; he was also represented by a lawyer, D.P. The applicant asked that the pre-trial investigation be reopened.

The applicant reiterated his argument that a comprehensive forensic psychiatric and psychological examination had been required (see paragraph 17 above). He also emphasised that the decision to discontinue the pre-trial investigation specifically mentioned that after most of the individuals who had lived or worked at the foster home at the relevant time had been questioned, no information had been obtained about sexual violence against the applicant. The applicant surmised that most of the individuals who had been questioned were those who had been responsible for ensuring his safety at the foster home, or those who might have been suspected of the crime. Accordingly, he argued that such individuals should not have been expected to yield pertinent information and that their failure to do so should not have led to the closure of the pre-trial investigation. By such logic, he continued, only crimes to which the suspects confessed could be successfully investigated, and in cases where there was no confession the investigation should be discontinued – as had happened in the applicant's case. Again, as

the Supreme Court had emphasised, "the specificity of sexual violence crimes against minors was that usually there were no witnesses to such violence ..." The absence of witnesses, in the view of the Supreme Court, was clearly not a reason not to investigate such cases and send them for trial. The Supreme Court had also clearly stated what was necessary in such cases in terms of seeking to establish a sufficient pool of evidence. The prosecutors' unwillingness to do so could not be considered founded and lawful.

22. On 3 July 2019 the Kaunas District Court dismissed the applicant's appeal. The court did not address his assertion that a comprehensive forensic psychiatric and psychological examination had been necessary in his case. Instead, the court held that it had been within the prosecutor's remit to decide whether the evidence in the file supported a conclusion that a crime had been committed. The district court also stated that a pre-trial investigation judge could assess whether a pre-trial investigation had been performed comprehensively, but he or she could not instruct the prosecutor to perform specific procedural actions, because the prosecutor had to oversee the investigation independently. It also had to be borne in mind that procedural actions had to have a purpose.

23. In the applicant's case, the court fully agreed with the prosecutors' conclusion that there was no objective evidence that a crime had been committed. In the court's view, after all the necessary pre-trial investigation actions had been taken, including the questioning of nearly all the individuals who had lived and worked in the foster home during the relevant period, there was no objective evidence that a crime under Article 150 § 4 of the Criminal Code had been committed, except for the under-age victim's statements, "which in any case were not sufficiently detailed and concrete" ("*išskyrus mažamečio nukentėjusiojo parodymus, kurie be viso kito nėra pakankamai detalūs ir konkretūs*"). The court concluded:

> "The prosecutor took all measures possible under the law to resolve doubts and contradictions that arose during the pre-trial investigation, yet, even having employed all procedural measures, this had been impossible."

24. As to the facts, the medical expert conclusion (see paragraph 12 above) had indicated that there was no objective evidence that anal sexual intercourse had taken place with the applicant. Even though specific individuals – K.S., A.K. and A.D. – whom the applicant named as having sexually violated him or as having been in some way connected to that assault, and E., in whom he had confided, had been interviewed, they had denied that any sexual violence had taken place against the applicant. There was no evidence to contradict their testimony. Besides, there had not been sufficient information in the case file to hold that the applicant had suffered sexual violence or that those special witnesses might not be telling the truth. The fact that the criminal complaint had been made after quite a long time had passed since the alleged offence had made gathering evidence more difficult, since the victim could not precisely describe the nature and intensity

of the alleged acts and the other participants in the proceedings could not recount precisely and in detail all the circumstances relevant to the pre-trial investigation. The material gathered during the pre-trial investigation had led to the conclusion that there was no justification for relying solely on the statements of the victim and his guardian V.T., the latter of whom had learned about the possible sexual abuse only from the victim and only after quite a long time had passed. The case file had contained no other evidence capable of indisputably confirming that the criminal act referred to in Article 150 § 4 of the Criminal Code had been committed. A pre-trial investigation could not be based on suppositions or guesses.

V. THE KAUNAS REGIONAL COURT

25. On 18 July 2019 the applicant further appealed against the decision to discontinue the investigation. He was represented by his guardian V.T., who acted through a lawyer, V.P., and reiterated the above-mentioned arguments about the need for a court-ordered comprehensive forensic psychiatric and psychological expert examination (see paragraph 17 above) and other arguments he had submitted to the first-instance court (see paragraphs 18 and 19 above). The applicant also emphasised (in bold) that the first-instance court had been entirely silent on the need to order a forensic examination. That was despite the Supreme Court's clear stance on the need for such forensic examinations, and despite the fact that the applicant's appeals had specifically mentioned that the prosecutors who had carried out the pre-trial investigation had avoided even discussing the issue of whether a forensic psychiatric and psychological examination should be ordered.

26. By a final ruling of 27 August 2019, the Kaunas Regional Court dismissed the applicant's appeal, upholding the lower court's ruling. The court held that the decision to discontinue the pre-trial investigation had been founded, that all the information needed to take a procedural decision had been gathered and evaluated by the prosecutors, and that "there would be no purpose in performing the other procedural actions requested by the applicant because they would not provide any meaningful information", without explicitly elaborating on his argument that the forensic expert examination should have been performed.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

27. The Criminal Code reads, in so far as relevant:

Article 150. Sexual assault

"1. A person who satisfies his sexual desires through anal, oral or interfemoral intercourse with another person against that person's will by using physical violence or by threatening the immediate use thereof or by otherwise depriving the victim of the possibility of resistance or by taking advantage of the helpless state of the victim

shall be punished by arrest or by a custodial sentence for a term of up to seven years.

...

4. A person who carries out the actions provided for in paragraph 1 of this Article in respect of a young child

shall be punished with a custodial sentence for a term of between three and thirteen years."

28. The Code of Criminal Procedure reads, in so far as is relevant:

Article 80. Circumstances precluding persons from being questioned as witnesses

"The following people may not be questioned as witnesses:

1) Anyone who might testify about a crime he or she has committed, unless he or she agrees to testify, and provided that the particularities of testifying set out in Article 82 § 3 of the Code apply; ..."

Article 82. Particularities of testifying

"...

3. Anyone who, by a prosecutor's decision, is questioned about a criminal act possibly committed by himself or herself shall have the right to have a representative present during the questioning and the right to ask to be granted the procedural status of a suspect ..."

Article 89. Specialist

"1. A specialist shall be a person with the necessary special knowledge and skills to be entrusted with the examination of objects and the provision of conclusions or explanations on matters within his or her competence...."

Article 208. Grounds for ordering an expert examination

"An expert examination shall be ordered where the pre-trial judge or the court determines that it is necessary to conduct a special examination requiring scientific, technical, artistic or other special knowledge to establish the circumstances of the criminal act."

Article 209. Procedure for ordering expert examination

"1. Upon establishing that it is necessary to order an expert examination, the prosecutor shall inform in writing the suspect, his or her counsel, and other parties to

the proceedings concerned with the findings of the expert examination and shall indicate the period during which the aforesaid persons may submit requests for questions to the expert, for the appointment of a specific expert and for the submission of additional material for expert examination ..."

29. As described by the Government, the List of types of forensic examination and tasks to be dealt with by the types of forensic examination, approved by decision no. KT-40 of 6 September 2018 of the Council for the Coordination of the Activities of Forensic Experts, states that during the forensic psychiatric examination of minors within criminal proceedings, some of the tasks are (i) to assess the minor's current mental state and ability to participate in court proceedings, and (ii) to assess the mental state of the minor victim, his or her ability to give adequate testimony, and the extent of his or her mental disturbance. Some of the tasks of a forensic psychological examination of minors within criminal proceedings are (i) to assess the ability of a minor witness or victim – taking into account his or her age, level of mental development, emotional state and individual psychological peculiarities, and situational circumstances – to adequately understand the relevant circumstances of the case and give explanations about them, and (ii) to assess the ability of a minor victim – taking into account his or her age and level of intellectual abilities, emotional state and individual psychological characteristics – to understand the nature and significance of the actions performed with him or her and the possibility of offering resistance.

30. The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention) that entered into force on 1 July 2010 (ratified by Lithuania) provides in its Chapter VII concerning investigation, prosecution and procedural law as follows:

Article 30 – Principles

"1 Each Party shall take the necessary legislative or other measures to ensure that investigations and criminal proceedings are carried out in the best interests and respecting the rights of the child.

2 Each Party shall adopt a protective approach towards victims, ensuring that the investigations and criminal proceedings do not aggravate the trauma experienced by the child and that the criminal justice response is followed by assistance, where appropriate.

3 Each Party shall ensure that the investigations and criminal proceedings are treated as priority and carried out without any unjustified delay..."

Article 35 – Interviews with the child

"1 Each Party shall take the necessary legislative or other measures to ensure that:

a interviews with the child take place without unjustified delay after the facts have been reported to the competent authorities;

b interviews with the child take place, where necessary, in premises designed or adapted for this purpose;

c interviews with the child are carried out by professionals trained for this purpose;

d the same persons, if possible and where appropriate, conduct all interviews with the child;

e the number of interviews is as limited as possible and in so far as strictly necessary for the purpose of criminal proceedings;

f the child may be accompanied by his or her legal representative or, where appropriate, an adult of his or her choice, unless a reasoned decision has been made to the contrary in respect of that person...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

31. The applicant complained under Article 3 of the Convention that the domestic authorities had failed to effectively discharge their positive obligations in relation to the alleged acts of sexual violence against him. The provision reads as follows:

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

A. Admissibility

1. The parties’ submissions

32. The Government submitted that the complaint was manifestly ill-founded.

The applicant disagreed.

2. The Court’s assessment

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

B. Merits

1. The parties’ submissions

(a) The applicant

34. The applicant complained that the Lithuanian authorities had failed to effectively discharge their positive obligations in relation to the alleged acts of sexual violence against him.

35. The applicant submitted that, notwithstanding the systematic, consistent and generalised position of the Lithuanian Supreme Court regarding the significance and necessity of forensic psychiatric and psychological conclusions in cases involving the possible sexual abuse of

minors, and the fact that, in the clear opinion of the Supreme Court, such expert findings were one of the most important pieces of evidence in such cases, as well as the Supreme Court's clear indication that such evidence (forensic conclusions) must be gathered, the Government had sought to deny the significance of such expert findings. In order to undermine the significance of forensic conclusions for the purpose of evidence the Government had argued that the purposes of such examinations were only to determine the current mental and psychological state of the subject: whether he or she was able to understand the meaning of the actions performed with him and to fight back, or whether he or she could adequately testify about those circumstances. However, the Government had failed to mention other purposes of such conclusions. In reality, forensic examinations could also answer a number of other questions relevant for the investigation of such cases, including whether sexual abuse committed against a child had resulted in a health impairment in a psychological or psychiatric sense, and whether the aforementioned disorder could be attributed to a particular perpetrator of sexual abuse.

The applicant submitted that in this manner, forensic conclusions provided clear and objective evidence of committed crimes. Their findings, in conjunction with other evidence, went hand in hand with the victim's own testimony and formed the basis not only of the criminal investigation, but also of subsequent convictions. According to the applicant, that fact had been repeatedly emphasised by the Supreme Court (he referred to several rulings of the Supreme Court in criminal cases concerning sexual abuse, including where the victims had been minors – rulings nos. 1A-27-300/2015, no. 1-20-581/2016, no. 1A-88-483/2017 and no. 1-116-966/2018).

36. The applicant also complained that, despite the findings by the psychologist of the Children's Assistance Centre to the effect that his reactions indicated that he had possibly experienced sexual abuse, the prosecutor, who was neither a specialist nor an expert, had found at her own discretion that the child's condition had not been manifestly traumatic at the time of the event (see paragraph 15 above). Furthermore, having decided that that psychologist's findings were not sufficiently substantiated – despite the psychologist's having concluded that there were indications that the applicant had been sexually abused – the pre-trial investigation authorities had not only refrained from further investigating the validity of that conclusion in order to confirm or contradict it (by means such as a court-ordered forensic psychiatric and psychological examination), but had actually discontinued the investigation altogether.

37. The applicant further submitted that the Government's argument that neither he nor his representatives had applied for a forensic psychiatric and psychological examination (see paragraph 41 *in fine* below) was irrelevant. Prior to the decision to terminate the pre-trial investigation, the applicant and his representatives had not been aware that the investigation was about to be

terminated, or of the fact that the forensic in question would not be carried out. That notwithstanding, the applicant had emphasised the need for such an forensic examination from the very first procedural document appealing against the decision to terminate the investigation.

38. Although in their observations the Government had referred to several statements by the Supreme Court regarding the absence of necessity of the forensic examinations carried out by experts in forensic psychiatry and forensic psychology (criminal cases nos. 2K-107/2012 and no. 2K-370/2014, see paragraph 42 below), those examples were not relevant because in those criminal cases the courts had not questioned the reliability of the victims' testimony. In other words, in the cases relied upon by the Government the evidence already present in the case file had been sufficient for the court to establish that a crime had been committed and to establish the accused's guilt, and the court therefore had not considered that additional evidence, which could be obtained by a forensic examination, had been necessary. In the applicant's case, in contrast, the pre-trial investigation had been terminated on the grounds that sufficient evidence had not been gathered, which in itself meant that the necessary evidence should have been sought by carrying out a forensic examination.

(b) The Government

39. The Government submitted that the State had fulfilled its positive procedural obligations under Article 3 of the Convention. The pre-trial investigation had been opened without undue delay, the relevant individuals had been questioned, the conclusions of a medical specialist and a psychology specialist had been obtained, and a coercive procedural measure against the individuals who had allegedly committed the crime or who had allegedly known about it had been approved. Nonetheless, after the prosecutor had taken all the measures provided for by law, no objective data – apart from the applicant's own testimony, which had not been sufficiently detailed or specific – had been gathered to confirm the commission of a crime.

40. Regarding the applicant's grievance that no forensic examination of him had been ordered before the decision had been taken to discontinue the pre-trial investigation, the Government referred to Article 208 of the Code of Criminal Procedure (see paragraph 28 above). They likewise referred to the List of types of forensic examination and tasks to be dealt with by the types of forensic examination (see paragraph 29 above).

41. The Government further observed that a forensic examination could be granted at any time during a pre-trial investigation, should the need arise. Article 209 of the Code of Criminal Procedure thus granted the prosecutor a right, but not a duty, to request the pre-trial investigation judge to order a forensic psychiatric and psychological examination. In that connection the Government noted that during the pre-trial investigation the applicant had not

made any reasoned request regarding the necessity of a forensic psychiatric and psychological examination.

42. According to the Government, the domestic case-law regarding child sexual abuse cases did not, in principle, contain any direction on the necessary (mandatory) ordering of a forensic psychiatric and psychological examination. For instance, in case no. 2K-107/2012 the Supreme Court had considered that the use of specialist and expert knowledge in criminal proceedings was necessary where it would be impossible to establish the circumstances relevant to the case without such expertise. In that particular case, however, there had been no need to grant the request by the appellant (the convicted person) for an expert examination of the victim because the lower-instance courts had had no doubts as to the reliability of the victim's testimony when assessing the circumstances of the case.

In another case, no. 2K-370/2014, the convicted person had complained that, among other things, his request for a comprehensive forensic psychiatric and psychological examination of the victims in order to establish their perception of the nature and meaning of his actions, and to assess [the reliability of] their testimony had been granted only before the appellate court. The Supreme Court had held that the Code of Criminal Procedure did not oblige courts to comply with all the applications and requests of the parties, including requests for expert examinations. Such requests had to be granted where there was a likelihood that they would lead to new data being obtained that might be relevant to the outcome of the case or capable of providing more detail as to its circumstances.

43. The Government stated that the conclusion of the psychology specialist had been sufficiently detailed and significant for the pre-trial investigation; besides, it had been drawn up by a qualified psychologist with experience in working with minors who possessed the status of specialist under Article 89 of the Code of Criminal Procedure. That conclusion had been assessed by the prosecutor in the context of the body of other evidence gathered during the pre-trial investigation. Even so, the prosecutor had determined that, under the circumstances, there had been no grounds to assess the conclusions of the psychologist as indisputable or as confirming the applicant's testimony, especially since they were based on probabilities and had been presented as suppositions (see paragraph 16 above).

44. The Government wished to emphasise that psychiatric and psychological forensic examinations were not examinations of truth. Their purpose was different – namely to determine the mental state of the person under examination. In the applicant's case, neither the psychologist's conclusion, nor any other data gathered during the pre-trial investigation contained information that could call into question the applicant's mental state. Nor had there been any reasonable doubts as to his understanding of the relevant circumstances or any doubts about the validity of his testimony. At the time of the assessment, the prosecutor had considered that the minor was

not in an apparent post-traumatic state. The Government thus stood by their position that it had not been possible to identify a need for a forensic psychiatric and psychological examination of the applicant in order for the investigative authorities to make a reasoned decision on the further progress of the investigation.

45. In conclusion, given the long period of time that had passed since the alleged crime, the pre-trial investigation had been carried out in detail and all the necessary data had been collected; however, no evidence apart from the applicant's own testimony had been obtained to suggest that sexual abuse had taken place. The other procedural actions requested by the applicant, namely a forensic psychiatric and psychological examination, would not have provided any additional pertinent information or changed the outcome of the pre-trial investigation. As a result, the duty of the law-enforcement authorities to respond to and thoroughly investigate information received about the alleged sexual abuse of a minor in order to establish the circumstances of a possible criminal act and the persons who might have committed it had been properly discharged.

2. The Court's assessment

(a) General principles

46. The States' interlinked positive obligations, when an arguable claim of ill-treatment has been raised, have been summarised in *Munteanu v. the Republic of Moldova* (no. 34168/11, § 62, 26 May 2020). They include:

(a) the obligation to establish and apply in practice an adequate legal framework affording protection against ill-treatment by private individuals;

(b) the obligation to take reasonable measures that might have been expected in order to avert a real and immediate risk of ill-treatment of which the authorities knew or ought to have known; and

(c) the obligation to conduct an effective investigation when an arguable claim of ill-treatment has been raised (see *Bevacqua and S. v. Bulgaria,* no. 71127/01, § 65, 12 June 2008; *Opuz v. Turkey*, no. 33401/02, §§ 144-55 and 162-65, ECHR 2009; *Eremia v. the Republic of Moldova*, no. 3564/11, §§ 49-52 and 56, 28 May 2013; *Talpis v. Italy*, no. 41237/14, §§ 100-106, 2 March 2017; *Bălşan v. Romania*, no. 49645/09, § 57, 23 May 2017; and *Volodina v. Russia*, no. 41261/17, §§ 76 and 77, 9 July 2019). Generally speaking, the first two aspects of these positive obligations are classified as "substantive", while the third aspect corresponds to the State's positive "procedural" obligation (see *X and Others v. Bulgaria* [GC], no. 22457/16, § 178, 2 February 2021). The States' procedural obligations have been summarised in paragraphs 184-190 of *X and Others v. Bulgaria* [GC] judgment.

(b) Application of the general principles to the present case

47. The Court notes that in 2018 the childcare authorities, acting on statements by the applicant's guardian V.T., had reported serious acts of sexual violence against the applicant to the police, which were alleged to have taken place years before in the foster home where he had then lived. That complaint to the police amounted to an arguable claim of ill-treatment, triggering the obligation to carry out an investigation satisfying the requirements of Article 3 (see *X and Others v. Bulgaria* [GC], cited above, §§ 200 and 201).

48. Responding to the childcare authorities' complaint, the prosecutor promptly opened and carried out a pre-trial investigation during which an attempt was made to establish the circumstances of the possible criminal acts: the relevant individuals, including the possible perpetrators of the crime and those linked to it, A.K., K.S. and A.D., as well as the director of the foster home, E., were identified and questioned as special witnesses (see paragraphs 7, 9 and 10 above). In addition, at the prosecutor's request the telephones of those four individuals were tapped, and the authorisation of that tapping was prolonged when the prosecutor noted that the four special witnesses had started communicating more often and by coded messages (see paragraph 8 above). The Court also notes that the applicant was interviewed (see paragraphs 10 and 13 above), and that two specialist conclusions were obtained on the initiative of the law-enforcement authorities: firstly, the medical conclusion, which showed no unexplainable injuries on the applicant's body that could indicate the occurrence of sexual violence (see paragraphs 12 and 15 above), and, secondly, the conclusion by the psychologist at the Children's Assistance Centre, where the applicant had undergone an examination on the authorities' instructions (see paragraph 11 above). That being so, the Court cannot find that up to that point the authorities failed to make a genuine effort to conduct an effective investigation that would comply with the procedural requirements under Article 3 of the Convention.

49. Be that as it may, the Court must consider other aspects of the criminal proceedings which it finds deficient.

50. It notes that the scope of the inquiries conducted by prosecutors on several occasions appears to have been confined to hearing the alleged perpetrators' version of the events (see paragraphs 15 and 20 above). That issue was raised by the applicant during the criminal proceedings (see paragraph 18 above), the applicant also having argued that if investigations were always discontinued where the suspect did not confess, then all criminal investigations would produce no results (see paragraph 21 above).

51. The main dispute between the parties, on which the case rests, appears to have lain in the fact that no forensic psychiatric and psychological examination of the applicant was ordered by the prosecutor and/or the court.

52. The Government blamed the applicant for a lack of initiative because he had not requested such an examination during the pre-trial investigation (see paragraph 41 *in fine* above). They could be understood as arguing that the applicant's failure to request such an examination had prevented the pre-trial investigation authorities from seeking one via an application to the court. The Court cannot accept that view (see, *mutatis mutandis*, *Volodina*, cited above, § 99, as regards the authorities' obligation to investigate domestic-violence cases of their own motion as a matter of public interest and to punish those responsible for such acts). The Court also notes in that connection the applicant's argument that he had learned that no forensic psychiatric and psychological examination would take place only after the pre-trial investigation had been terminated (see paragraph 37 above).

53. The Court is also mindful of the Supreme Court's case-law, relied upon by the applicant, to the effect that witnesses are usually absent in cases concerning the sexual abuse of minors and that psychiatric and psychological forensic conclusions therefore form an important piece of evidence in such cases (see paragraph 21 above). The Court further observes that in the present case the victim's own statements (and those of his guardian when relating his account) were not the only evidence of the alleged sexual crime: the possibility that the applicant could have sustained sexual violence had been indicated by the psychologist from the specialised Children's Assistance Centre (see paragraph 11 above). Regrettably, that conclusion appears to have been downplayed by the prosecutor (see paragraph 16 above), a circumstance which was acknowledged to some extent by the Government (see paragraph 43 above) and criticised by the applicant (see paragraph 36 above).

54. The Government also appear to have suggested that forensic psychological or psychiatric conclusions by court-appointed experts are normally ordered in other circumstances – for instance, where it is necessary to establish a minor's state of mind (see paragraph 44 above). The Court does not find it necessary to engage with this argument, but it notes the following. Firstly, it has previously had occasion to decide cases where court-ordered forensic psychiatric and psychological conclusions were recognised as relevant pieces of evidence (see *T.K. v. Lithuania*, no. 14000/12, §§ 19 and 99, 12 June 2018, and *Stankūnaitė v. Lithuania*, no. 67068/11, §§ 21 and 22, 29 October 2019). Secondly, as already observed, the probatory value of such evidence has been recognised by the Supreme Court in cases concerning sexual abuse (see paragraphs 17 and 35 *in fine* above). Thirdly, as pointed out by the applicant, the case-law referred to by the Government does indeed concern a different situation – one where a convicted person's complaint that a forensic psychological examination of the victim had not been performed in a context where there was already a body of other evidence sufficient for conviction (see paragraph 42 above). In the present case, however, it was the applicant who – having the procedural status of the victim – wished to undergo the forensic examination in a context where the other evidence in the

case was lacking in the prosecutors' view (see paragraphs 16, 17 and 21 above). Fourthly, and above all, the question of whether there was a need for a court-appointed forensic psychiatric and psychological examination was not examined or addressed by the higher prosecutor or by the courts at two levels of jurisdiction, which appear to have persistently hidden behind the façade of the legal provision that it was the prosecutor's prerogative to decide which investigative measures to take (see paragraphs 20 and 23-26 above), rather than making an effort to explain to the applicant why a forensic psychiatric and psychological examination had been unnecessary. The Court observes that this attitude was shown despite a psychologist's conclusion that sexual violence might have taken place and the prosecutor's own admission that the four individuals designated as special witnesses had begun meeting more often and that there was a possibility that their aim was to coordinate their versions of events (see paragraphs 8 and 11 above).

55. With reference to, *inter alia*, Articles 30 and 35 of the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention, see paragraph 30 above), the Court is mindful of the need to protect alleged victims of sexual abuse, notably minors, from repeated examinations that may lead to secondary victimization and further traumatization, and the corollary obligation that rests upon the authorities to balance the need for an effective investigation of alleged abuse on the one side and the required protection of the victims of such alleged abuse on the other. The Court, moreover, recalls that the domestic investigatory authorities and courts are far better placed than the Court to carry out such a balancing and, furthermore, to assess more globally the need for further investigatory steps to be taken, in light also of the need to protect vulnerable victims.

56. However, the Court must nonetheless ascertain that the investigatory steps taken in the applicant's case, when considered as a whole, support the conclusion that an investigation, which encompassed a series of effective measures, took place (see paragraph 46 above). In that respect the Court agrees with the Government that a number of pertinent and timely measures were taken. Nevertheless, in light of the above – notably the authorities' reluctance to order the applicant's forensic psychiatric and psychological examination in connection with his alleged sexual ill-treatment at the foster home (compare and contrast, *B v. Russia*, no. 36328/20, §§ 63-67, 7 February 2023), and the omission by the higher prosecutor and the courts of two levels of jurisdiction to address explicitly the necessity of such an examination despite the applicant's arguments to that effect – the Court finds that in the particular circumstances of the particular case the State failed to discharge its duty to effectively investigate the ill-treatment that the applicant allegedly had endured.

57. There has accordingly been a violation of Article 3 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. 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

59. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage he had suffered on account of the authorities' failure to properly investigate his complaint of sexual abuse as a minor.

60. The Government did not wish to speculate on what might be an appropriate amount of just satisfaction in the applicant's case.

61. The Court reiterates that it has found a violation of Article 3 of the Convention. It considers that the applicant must have suffered distress and anxiety which the finding of a violation of the Convention in this judgment does not suffice to remedy. Making its assessment on an equitable basis, the Court awards the applicant EUR 5,000 under this head.

B. Costs and expenses

62. The applicant made no claims in respect of the costs and expenses incurred before the domestic courts or for those incurred before the Court.

63. The Court accordingly makes no award under this head.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 3 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 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (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 9 April 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı Registrar	Arnfinn Bårdsen President