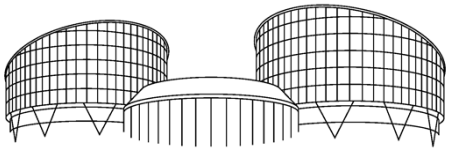

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF NIKOLIĆ v. SERBIA

(Application no. 15352/11)

JUDGMENT

STRASBOURG

19 October 2021

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

In the case of Nikolić v. Serbia,

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

Valeriu Griţco, *President,*
Egidiju Kuris,
Branko Lubarda, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar,*

Having regard to:

the application (no. 15352/11) against the Republic of Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Serbian national, Ms Svetlana Nikolić ("the applicant"), on 10 January 2011;

the decision of 23 September 2016 to give notice to the Serbian Government ("the Government") of the application; and

the parties' observations;

Having deliberated in private on 21 September 2021,

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

INTRODUCTION

1. This application concerns a statute-barred prosecution for minor bodily harm allegedly caused to the applicant by her neighbour.

THE FACTS

2. The applicant was born in 1965 and lives in Belgrade. She was represented by Mr S. Tomić, a lawyer practising in the same city.

3. The Government were represented by their Agent at that time, Ms N. Plavšić.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. THE CIRCUMSTANCES OF THE CASE

A. Record of the alleged incident

5. On 26 March 2006, at around 5 p.m., the applicant's neighbour, D.V., allegedly punched the applicant several times in the head and pulled her hair, causing her to fall to the ground. D.V. then allegedly continued kicking and punching her, with the help of a male friend, N.N. D.V. had allegedly been verbally abusive towards the applicant since 2002 and the applicant had already lodged several criminal complaints with the police in that regard between 2003 and 2005, but to no avail.

6. According to medical records from the hospital emergency department, the applicant sustained a number of injuries to her head and leg (*contusiones capitis* and *constusio femoris*) and also had a few wisps of hair pulled out. She was released from hospital the same day.

B. Criminal proceedings in respect of the alleged incident

7. On 20 April 2006 the applicant brought a private criminal action (*privatnu krivičnu tužbu*) against D.V. for inflicting minor bodily harm (*zbog nanošenja lakih telesnih povreda;* see Article 122 § 1 at paragraph 29 below). She did not lodge a civil compensation claim (*nije istakla imovinsko-pravni zahtev*).

8. On 9 June 2006 the presiding judge sent the case file to the investigating judge to hear the applicant and the accused D.V. and to obtain an expert report. On 11 October 2006 the presiding judge asked the investigating judge to hear a witness D.Z. He did so and returned the case file on 24 April 2007.

9. Between April 2007 and June 2010 a total of four of the ten scheduled hearings were held. Throughout the proceedings the applicant complained of a lack of diligence on the part of the courts.

10. On 5 November 2009 the applicant wrote to the Second Municipal Court and the Supreme Court, alerting them that her criminal proceedings might be terminated as statute-barred owing to the delays. She received replies from the two court presidents on 2 December and 11 November 2009 informing her that her complaints about the possible expiry of the limitation period were unfounded (*neosnovane pritužbe*).

11. On 11 June 2010 the Municipal Court terminated the proceedings against D.V. as time-barred as of 26 March 2010.

12. The applicant did not file a separate civil compensation claim in respect of the underlying incident.

C. Decision of the Constitutional Court and the related proceedings thereafter

13. In the meantime, in a constitutional appeal lodged on 25 December 2009 the applicant asked the Constitutional Court of Serbia (*Ustavni sud Republike Srbije*) to prevent the criminal proceedings becoming statute-barred. She also complained of inefficiency and unlawful conduct by the court, alleging that if the proceedings became time-barred, it would lead to further impunity for the defendant and would prevent her from exercising her rights, achieving moral satisfaction and obtaining compensation for her injuries. She further requested compensation for non-pecuniary damage for the conduct of the adjudication court, as well as for fear, physical pain, mental anguish and damage to her honour and dignity caused by her

neighbour's attack. She relied on Article 32 of the Constitution (see paragraph 24 below), which correspond to Article 6 of the Convention.

14. In an additional submission to her constitutional appeal of 25 May 2010, she filed the decision of 11 June 2010 and informed the Constitutional Court that the criminal proceedings had been terminated and that she remained without any protection. She complained about the manner in which the criminal proceedings had been conducted, resulting in impunity for her neighbour and a lack of redress, adding the issues of inefficiency, illegality and the prolonged length of the criminal proceedings and repeating the various claims for compensation.

15. On 22 July 2010 the Constitutional Court found a violation of her "right to a trial within a reasonable time" on account of the protracted length of the proceedings, disregarding her other complaints. It found that while there had been several periods of judicial inactivity and a number of unwarranted adjournments throughout the criminal proceedings, the applicant had not contributed to the procedural delays in any way. Additionally, the court declared that the applicant was entitled to non-pecuniary damages, in accordance with Article 90 of the Constitutional Court Act. The decision was dispatched on 28 October 2010.

16. On 2 November 2010 the applicant's lawyer filed a claim for damages with the then Commission for Compensation on the grounds that the Constitutional Court had acknowledged a violation of the applicant's right to a fair trial. He claimed, on behalf of the applicant, 1,500,000 dinars (RSD – approximately 1,390 euros (EUR) at the time) in compensation under various heads. As the applicant did not receive a reply within the statutory limit (see paragraph 26 below, under Article 90 of the Constitutional Court Act), on 13 December 2010 she urged the Commission to provide a decision.

17. In the meantime, on 25 November 2010, the Commission for Compensation offered to draw up a draft agreement under which the applicant would be paid RSD 20,000 (approximately EUR 185 at the time) for the non-pecuniary damage referred to in the Constitutional Court's decision. The applicant was not served with this decision until 21 March 2011. She refused to accept the amount offered, deeming it insufficient and humiliating.

18. Instead, on 7 February 2011 the applicant brought civil proceedings in the Belgrade First Court of First Instance against the Ministry of Justice, under Article 90 of the Constitutional Court Act (see paragraph 26 below), seeking RSD 1,500,000 for non-pecuniary damage, plus statutory interest. The court ordered the applicant to pay RSD 79,100 (approximately EUR 730 at the time) in court stamp duty as her request for exemption from payment of such fees had been refused.

19. On 16 April 2013 the court allowed the applicant's claim in part and awarded her RSD 150,000 (approximately EUR 1,340), as well as part of the costs and expenses incurred in these proceedings.

20. On 4 February 2015 the Belgrade Court of Appeal (*Apelacioni sud*), decreased the amount to RSD 100,000 (approximately EUR 800), plus statutory interest accrued as of 16 April 2013, and RSD 141,000 in costs and expenses. The applicant was at a later date requested to pay RSD 26,000 in taxes (*sudske takse*) for the appeal and second-instance decision.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. CONSTITUTION OF THE REPUBLIC OF SERBIA (*USTAV REPUBLIKE SRBIJE*; PUBLISHED IN OFFICIAL GAZETTE OF THE REPUBLIC OF SERBIA – OG RS - NO. 98/06)

21. The Constitution of the Republic of Serbia entered into force on 8 November 2006.

22. Article 18 of the Constitution provides for the direct implementation of guaranteed rights. It sets forth that "[t]he Constitution shall guarantee ... the direct implementation of human and minority rights secured by the generally accepted rules of international law ... [and] ... ratified international treaties" and that "[p]rovisions on human and minority rights shall be interpreted pursuant to valid international standards on human and minority rights, as well as the practice of international institutions which supervise their implementation."

23. Article 25 guarantees that physical and mental integrity is inviolable and that no one may be subjected to torture, inhuman or degrading treatment or punishment, or subjected to medical or other experiments without their free consent.

24. Article 32 § 1 provides, *inter alia*, for the right to a hearing within a reasonable time.

25. The Constitution does not contain any provisions on the right to respect for private life corresponding to Article 8 of the Convention.

II. CONSTITUTIONAL COURT ACT (*ZAKON O USTAVNOM SUDU*; PUBLISHED IN OG RS NO. 109/07)

26. The relevant provisions of the Constitutional Court Act read as follows:

Article 7 § 1

"The decisions of the Constitutional Court shall be final, enforceable and binding."

Article 82 §§ 1 and 2

"A constitutional appeal may be lodged against an individual decision or an action of a State body or an organisation exercising delegated public powers which violates or denies human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies have already been exhausted or have not been prescribed or where the right to their judicial protection has been excluded by law.

A constitutional appeal may be lodged even if all available remedies have not been exhausted in the event of a breach of an applicant's right to a trial within a reasonable time."

Article 89 §§ 2 and 3

"When the Constitutional Court finds that an ... individual decision or action has violated or denied a human or minority right or a freedom guaranteed by the Constitution, it shall annul the ... decision in question or ban the continuation of such action or order the implementation of other specific measures as well as the removal of all adverse consequences within a specified period of time.

The decision of the Constitutional Court accepting a constitutional appeal shall constitute a legal basis for requesting compensation or the removal of other adverse consequences before a competent body, in accordance with the law."

Article 90

"... [An applicant who has obtained a Constitutional Court decision in his or her favour] ... may lodge a compensation claim with the Commission for Compensation in order to reach an agreement in respect of the amount ... [of compensation to be awarded] ...

If the Commission for Compensation does not rule favourably in respect of a compensation claim or fails to issue a decision within thirty days from the date of its submission, the applicant may file a civil claim for damages before the competent court. If only partial agreement has been achieved, a civil claim may be filed in respect of the remainder of the amount sought.

The composition and operation of the Commission for Compensation shall be regulated by the Minister of Justice."

III. GENERAL OPINIONS/PRACTICE DIRECTIONS ADOPTED BY THE CONSTITUTIONAL COURT (PUBLISHED ON THE CONSTITUTIONAL COURT'S WEBSITE)

27. According to the Constitutional Court's general opinions of 30 October 2008 and 2 April 2009, as regards the examination of and ruling on constitutional appeals (*Stavovi Ustavnog suda u postupku ispitivanja i odlučivanja po ustavnoj žalbi koji se odnose na postupak prethodnog ispitivanje ustavne žalbe*), it is "bound" (*vezan*) by the request formulated in the constitutional appeal when examining whether there has been a breach of a right or freedom guaranteed by the Constitution. The Constitutional Court may only consider the appeal within the limits of the request as formulated.

28. The Constitutional Court declines jurisdiction *ratione temporis* to decide on constitutional appeals concerning decisions taken and/or acts occurring before the date the Constitution came into force.

IV. CRIMINAL CODE 2005 (*KRIVIČNI ZAKONIK*, PUBLISHED IN OG RS NOS. 85/05, 88/05, 107/05, 72/09, 111/09, 121/12, 104/13, 108/14 AND 94/16)

29. Article 122 sets out the offence of minor bodily harm and minor health impairment, which is punishable by a fine, up to one year's imprisonment (Article 122 § 1) or up to three years' imprisonment if the injuries are caused by a weapon, dangerous implement or other means likely to inflict serious harm or impairment (Article 122 § 2). A judicial caution may be issued if the perpetrator was provoked by rude or violent conduct on the part of the victim (Article 122 § 3). Prosecution for the above-mentioned offence must be instituted by private action (*privatni tužilac*), that is to say the only authorised prosecutor is the victim himself or herself.

30. Article104 § 6 in conjunction with Article 103 § 1 provides, *inter alia*, that prosecution for the offence defined above becomes time-barred, at the latest, when more than four years have elapsed since its commission.

V. OBLIGATIONS ACT (*ZAKON O OBLIGACIONIM ODNOSIMA*; PUBLISHED IN OFFICIAL GAZETTE OF THE SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA – OG SFRY – NOS. 29/78, AMENDMENTS PUBLISHED IN OG SFRY NOS. 29/78, 39/85, 45/89, 57/89, AND IN OG FRY NO. 31/93)

31. Articles 157, 199 and 200 of the Obligations Act, taken together, provide, *inter alia*, that anyone who has suffered fear, physical pain or mental anguish as a consequence of a breach of his or her reputation, personal integrity, liberty or other personal rights (*prava ličnosti*) is entitled, depending on the duration and intensity, to seek injunctive relief, sue for financial compensation and request other forms of redress "which might be capable" of affording adequate non-pecuniary satisfaction.

32. Article 172 § 1 provides that a legal entity (*pravno lice*), which includes the State, is liable for any damage caused by one of "its bodies" to a "third person". This provision includes State liability for any judicial or police misconduct and/or malfeasance (see, for example, the judgments of the Supreme Court of 10 November 2002, Rev. 6203/02, and 10 April 2003, Rev. no. 1118/03).

33. Article 376 provides that a claim based on the above-mentioned provisions must be brought within three years of the date on which the injured party became aware of the damage in question and the person

responsible, but that such a claim must in any event be lodged within a maximum of five years of the event itself.

34. Article 377 § 1 further provides that if the damage in question has been caused as a result of the commission of a criminal offence, the civil limitation period may be extended so as to correspond to the applicable limitation period for that offence.

Relevant domestic case-law

35. The relevant domestic legislation and case-law concerning the use of civil-law legal remedies in respect of private life-related issues is outlined in the case of *Lakatoš and Others v. Serbia* (no. 3363/08, §§ 43-44 and 51-52, 7 January 2014).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

36. The applicant complained, under Articles 6, 13 and 41 of the Convention, about the manner in which the criminal proceedings had been conducted, effectively resulting in D.V.'s impunity, as well as the respondent State's subsequent failure to provide her with any redress.

37. By virtue of the *jura novit curia* principle the Court is not bound by the legal grounds adduced by the applicant under the Convention and the Protocols thereto and has the power to decide on the characterisation to be given in law to the facts of a complaint by examining it under Articles or provisions of the Convention that are different from those relied upon by the applicant (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 114 and 126, 20 March 2018). Hence, the Court considers that the main legal issue raised by the application falls to be examined from the standpoint of the State's obligations under Article 8 of the Convention (see, for example, *Sandra Janković v. Croatia*, no. 38478/05, § 31, 5 March 2009), the relevant parts of which read as follows:

Article 8

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

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

A. Admissibility

1. The Government's objection of non-exhaustion of domestic remedies

38. The Government argued that the applicant had not exhausted or had not properly exhausted the available and effective domestic remedies, as required by Article 35 § 1 of the Convention.

39. More specifically, she had not brought a separate civil action for damages against D.V. under Articles 157, 172, 199 and 200 of the Obligations Act (see paragraphs 31 and 32 above), even though a criminal conviction was not a prerequisite in this regard and its prospects of success did not depend on the outcome of the criminal proceedings. They relied on the Court's judgment in the case of *Lakatoš and Others* (cited above). Moreover, she had had even more chances to succeed in civil proceedings given that the court had not found the accused not guilty of the alleged crime based on the evidence presented, and had only suspended the criminal proceedings on procedural grounds as statute-barred.

40. In addition or in the alternative, the Government indicated that the applicant had not properly made use of the otherwise available and effective constitutional avenue of redress, given that she had specifically relied on Article 32 of the Constitution, guaranteeing the right to a fair hearing, but had made no reference, either explicitly or implicitly, to Articles 3 or 8 of the Constitution. Nor had the applicant properly addressed the Court, as she had failed to rely on those Articles. The Government relied on the principle of subsidiarity and the case of *S.V. and S.V. v. Bosnia and Herzegovina* ((dec.) no. 31989/06, 10 April 2012), concerning the ineffectiveness of the investigation into the rape of two girls. In that case, the Court noted that as one of the applicants had complained only under Article 6 about the fairness of the criminal proceedings and their outcome, the Human Rights Commission had therefore been given an opportunity to put right the alleged violation and the Court had to declare her complaints inadmissible *ratione materiae*. According to the Government, the complaints in the present case also had to be dismissed for not giving an opportunity to the Constitutional Court to examine the relevant issues, it being bound by the applicant's complaints as defectively raised (see paragraph 27 above).

41. The applicant maintained that she had pursued all the available legal remedies, including the constitutional appeal procedure, to obtain redress, but to no avail. She argued that it would have been very difficult for her to obtain damages, especially from the State, in a judgment in her favour in civil proceedings in the absence of a prior criminal conviction. In any event, the proceedings would have probably lasted and civil redress could not have adequately compensated her for the injuries suffered and the statute-barred proceedings. As regards the constitutional appeal, she had fully and in substance explained the relevant facts, her grievances and requested damages for physical pain and suffering. As to the constitutional provisions

cited, she clarified that she had relied on what had been the "available" (known) practice of the Constitutional Court, but had clearly intended it to determine the defendant's actions or inaction regarding the protection of her physical integrity.

42. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 of the Convention obliges those seeking to bring a case against a State before the Court to firstly use the remedies provided by the national legal system. Consequently, States are dispensed from answering for their acts before an international body before they have had an opportunity to put matters right domestically (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 70, 25 March 2014).

43. As regards legal systems which provide constitutional protection for fundamental human rights and freedoms, such as that of Serbia, it is incumbent on the aggrieved individual to test the extent of that protection (see, *inter alia*, *Vinčić and Others v. Serbia*, nos. 44698/06 and 30 others, § 51, 1 December 2009). An applicant's failure to make use of an available domestic remedy or to make proper use of it, that is to say by bringing a complaint at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law, will result in an application being declared inadmissible before the Court (see, for example, *Vučković*, cited above, § 72; see also, among other authorities, *Cardot v. France*, 19 March 1991, § 34, Series A no. 200, and *Elçi and Others v. Turkey*, nos. 23145/93 and 25091/94, §§ 604 and 605, 13 November 2003).

44. The Court has, however, frequently emphasised the need to apply the exhaustion rule with some degree of flexibility and without excessive formalism (see *Ringeisen v. Austria*, 16 July 1971, § 89, Series A no. 13, and *Akdivar and Others v. Turkey*, 16 September 1996, § 69, *Reports of Judgments and Decisions* 1996-IV).

45. While noting that the Government did not clarify against whom a civil action for damages should have been brought, the Court reiterates that it has already examined and rejected their first preliminary objections in a very similar case in the same context (see *Isaković Vidović v. Serbia*, no. 41694/07, § 47, 1 July 2014), given that effective deterrence against attacks on the physical integrity of a person requires efficient criminal-law mechanisms capable of ensuring adequate protection (see, *mutatis mutandis*, *Sandra Janković*, cited above, § 36, with further reference therein, where the applicant suffered similar or arguably even lesser injuries than the applicant in the present case). The Court finds no particular circumstances in the present case which would require it to depart from its findings in the above-mentioned case.

46. As regards the Government's objection that the applicant failed to raise her complaints under the relevant Articles with the Constitutional

Court and the Court, it is not necessary for the Convention right, and particularly its specific legal grounds, to be explicitly raised in domestic proceedings provided that the complaint is raised "at least in substance" (see, *mutatis mutandis*, *Castells v. Spain*, 23 April 1992, § 32, Series A no. 236; *Fressoz and Roire v. France* [GC], no. 29183/95, § 37, ECHR 1999-I; *Vučković and Others*, cited above, §§ 72, 79 and 81-82; and *Platini v. Switzerland* (dec.), no. 526/18, § 51, 11 February 2020). This means that if the applicant has not relied on the provisions of the Convention, he or she must have raised arguments to the same or like effect on the basis of domestic law, in order to have given the national courts the opportunity to redress the alleged breach in the first place (see *Gäfgen v. Germany* [GC], no. 22978/05, §§ 142, 144 and 146, ECHR 2010; *Radomilja and Others*, cited above, § 117; *Karapanagiotou and Others v. Greece*, no. 1571/08, § 29, 28 October 2010; *Marić v. Croatia*, no. 50132/12, § 53, 12 June 2014; *Portu Juanenea and Sarasola Yarzabal v. Spain*, no. 1653/13, §§ 62-63, 13 February 2018; and, in relation to a complaint that was not raised, even implicitly, at the final level of jurisdiction, *Association Les Témoins de Jéhovah v. France* (dec.), no. 8916/05, 21 September 2010; and *Nicklinson and Lamb v. the United Kingdom* (dec.), nos. 2478/15 and 1787/15, §§ 89-94, 23 June 2015). Thus, in order properly to exhaust domestic remedies it is not sufficient for a violation of the Convention to be "evident" from the facts of the case or the applicant's submissions. Rather, the applicant must actually have complained (expressly or in substance) of it in a manner which leaves no doubt that the same complaint that is subsequently submitted to the Court was indeed raised at the domestic level (see *Farzaliyev v. Azerbaijan*, no. 29620/07, § 55, 28 May 2020, and *Peacock v. the United Kingdom* (dec.), no. 52335/12, § 38, 5 January 2016).

47. The Court notes that the applicant did not explicitly rely on Articles 3 or 8 of the Convention in her appeal to the Constitutional Court, no provision on the right to respect for private life corresponding to Article 8 even being enshrined in the 2006 Serbian Constitution (see also *Milovanović v. Serbia*, no. 56065/10, § 97, 8 October 2019). Her constitutional appeal essentially referred instead to only the right to a fair trial contained in Article 32 of the Constitution, which corresponds to Article 6 of the Convention.

48. The Court notes, nevertheless, that the applicant lodged the constitutional appeal even before the criminal proceedings had become statute-barred, forewarning the Constitutional Court and asking it to prevent that (see paragraph 13 above). Having regard to its formulation in the appeal, she explicitly complained of inefficiency and unlawful conduct by the court, alleging that if the proceedings became time-barred, it would lead to further impunity for the defendant and prevent her from exercising her rights, achieving moral satisfaction and obtaining compensation for her injuries. She requested compensation for non-pecuniary damage for the

conduct of the adjudication court, as well as for fear, physical pain, mental anguish and damage to her honour and dignity caused by her neighbour's attack. Once the criminal proceedings had been discontinued (*obustavljen*) as statute-barred, she amended her appeal, stating that she remained without any protection, adding the issue of the prolonged length of the criminal proceedings (see paragraph 14 above). It is clear from the applicant's constitutional appeal – in how the complaint was defined by its factual allegations, legal arguments and the final request for damages – that the essence of her complaints concerned her grievances and that she intended for the Constitutional Court to determine the defendant's actions or inaction regarding the rights and responsibilities guaranteed by the Constitution.

49. In its decision in response to that appeal, the Constitutional Court, while disregarding the applicant's other complaints, held that she had suffered a breach of her "right to a trial within a reasonable time" (see paragraph 15 above). The Court notes that the Constitutional Court has admittedly had a practice consisting in rigidly observing the forms prescribed by law or developed in its practice, and not going in its examination of any complaint or request beyond the issues as formulated by the appellant[1]. However, it came to this conclusion even though the applicant had not lodged a civil compensation claim within the criminal proceedings, which would normally make such a complaint inadmissible *ratione materiae* under Article 6 before the Constitutional Court and the Court. The former court found that there had been several periods of judicial inactivity and a number of unwarranted adjournments throughout the criminal proceedings. Additionally, it declared that the applicant was entitled to non-pecuniary damages.

50. In view of the foregoing, the Court finds that the applicant brought the substance of her complaints to the attention of the Constitutional Court and gave it an opportunity to prevent or put right the alleged violations against the State before those allegations were submitted to the Court, even though it examined the case to an extent and found a violation of the right to a fair trial. Furthermore, the present case, in the Court's view, is different from the case referred to by the Government in their observations (see paragraph 40 above), concerning the ineffectiveness of the investigation into the rape of two girls, both in terms of factual differences and their impact on the legal outcome, given that one of the applicants in that case complained under Article 6 about the fairness of the criminal proceedings and their outcome, but "at no stage [relied on] Article 3 or raise[d] the substance of an Article 3 based complaint, for example, a lack of diligence in the investigation of her complaint". In any event, she could have still lodged another constitutional appeal given the alleged continuing violation in that case.

[1] "*Ne eat judex ultra et extra petita partium* ("not beyond the request")

51. The Government's two-pronged objection regarding the exhaustion requirement must be therefore dismissed.

2. Victim status

52. The Government argued that the applicant had lost her status as a "victim" within the meaning of Article 34 of the Convention. They pointed out that the Constitutional Court had explicitly acknowledged the alleged violation of her right to a fair trial and her right to be awarded compensation in respect of non-pecuniary damage in its decision (see paragraph 15 above). Relying on the case of *Vidaković v. Serbia* ((dec.), no. 16231/07, §§ 26 and 28, 24 May 2011), the Government suggested that the first condition for the loss of victim status had been met. Afterwards, the domestic civil courts had awarded the applicant about EUR 820 (see paragraph 20 above), which was an adequate amount for a violation of the right to a fair trial within a reasonable time.

53. The applicant contested the Government's assertion that she had received EUR 820 on the basis of the decision of the Constitutional Court. While that court had acknowledged a violation of her right to a fair trial and the right to compensation, its decisions were, according to the applicant, only declaratory and abstract. That is to say, the Constitutional Court had not awarded proper compensation, nor had it been awarded by the deficient Commission in charge of such payments (see paragraph 17 above) – it had offered EUR 185 in compensation for the violation four months later, despite the statutory deadlines (see paragraph 26 below, under Article 90 of the Constitutional Court Act). The decision of the Constitutional Court, which was allegedly "final, executive and mandatory" (see paragraph 26 below, under Article 7 § 1 of the Constitutional Court Act), was only a legal basis for initiating further lengthy litigation to obtain damages for the violations found. The civil proceedings initiated by her to obtain adequate compensation had lasted more than four and a half years (see paragraphs 18-20 above), without the need to interview any witnesses or experts, and even though she had already acquired a legal basis (*pravni osnov*), a Constitutional Court decision. The final amount was inadequate, especially bearing in mind the costs incurred and requested from her.

54. The applicant lodged her application with the Court on 10 January 2011, after the Constitutional Court's decision, but while her request for compensation was still pending. While initially awaiting the outcome, the Court ultimately decided to give notice of the application to the Government. The Court reiterates that the question of whether an applicant can claim to be the victim of the violation alleged is relevant at all stages of the proceedings under the Convention (see, *inter alia*, *Siliadin v. France*, no. 73316/01, § 61, ECHR 2005-VII; *Milanović v. Serbia*, no. 44614/07, 14 December 2010; *Vidaković*, cited above; and *Karahalios v. Greece*, no. 62503/00, § 21, 11 December 2003).

55. According to the Court's settled case-law, a decision or measure favourable to an applicant is not in principle sufficient to deprive him or her of his or her status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and subsequently afforded appropriate and sufficient redress for the breach of the Convention (see, for the main principles, *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 178-213, ECHR 2006-V, and *Cocchiarella v. Italy* [GC], no. 64886/01, §§ 69-98, ECHR 2006-V; see also, among other authorities, *Normann v. Denmark* (dec.), no. 44704/98, 14 June 2001; *Jensen and Rasmussen v. Denmark* (dec.), no. 52620/99, 20 March 2003; and *Nardone v. Italy* (dec.), no. 34368/02, 25 November 2004). The Court has generally considered this to be dependent on all the circumstances of the case, with particular regard to the nature of the right alleged to have been breached (see *Gäfgen*, cited above, § 116), the reasons given for the decision (see *M.A. v. the United Kingdom* (dec.), no. 35242/04, ECHR 2005-VIII, and contrast *Jensen v. Denmark* (dec.), no. 48470/99, ECHR 2001-X) and the persistence of the unfavourable consequences for the person concerned after that decision (see *Freimanis and Līdums v. Latvia*, nos. 73443/01 and 74860/01, § 68, 9 February 2006). Only when these conditions are satisfied does the subsidiary nature of the protective mechanism of the Convention preclude examination of an application (see *Cocchiarella*, cited above, § 71, and *Cataldo v. Italy* (dec.), no. 45656/99, 3 June 2004).

56. In view of the above and turning to the present case, the Court considers that, quite apart from (i) whether the Constitutional Court's finding could be considered as proper acknowledgement, either expressly or in substance, of the alleged violation of the Convention; (ii) the very lengthy proceedings the applicant had to institute in order to obtain compensation and whether they could be considered an effective legal remedy; and (iii) the high costs imposed on her in this regard (see *Milovanović v. Serbia*, no. 56065/10, 8 October 2019, with further references in respect of the preventive and compensatory nature of a remedy in the context of Article 8), the actual amount of compensation awarded to the applicant in the circumstances of the present case (see paragraph 20 above) was in any event not appropriate and sufficient redress compared with the amounts awarded in comparable situations in the Court's case-law (see, for example, *Sandra Janković*, cited above, § 74, and *Isaković Vidović,* cited above, § 70). The Court considers that the Government's reference to the *Vidaković* case is not relevant as the proceedings, in another context, were still pending and the Constitutional Court ordered their acceleration and awarded compensation.

57. Accordingly, the applicant can still claim to be a "victim" of a violation of Article 8 of the Convention within the meaning of Article 34. The Government's objection in this regard must therefore be dismissed.

3. Conclusion

58. The Court finds that the application 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

59. The applicant reaffirmed her complaint and repeated her arguments described at paragraphs 36 and 53 above. Ultimately, the respondent State had offered no redress since the criminal proceedings brought against D.V. had been terminated owing to the expiry of the applicable statutory limitation period.

60. The Government contested the applicant's allegations. They maintained at the outset that Article 8 was not applicable, as the circumstances of the present case, unlike the cases of *Sandra Janković* and *Isaković Vidović*, indisputably indicated that the alleged act of violence to which the applicant had been subjected had not had lasting harmful and psychological effects on her physical and moral integrity in order to fall within the ambit of Article 8. For the same reason, the entire incident had not been serious enough to amount to a violation of Article 8 of the Convention.

2. Relevant principles

61. The Court reiterates that the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities. However, this provision does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there are positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see *M.C. v. Bulgaria*, no. 39272/98, § 150, ECHR 2003-XII).

62. As regards respect for private life, the Court has previously held, in various contexts, that the concept of private life includes a person's physical and psychological integrity. The Court has previously held that the authorities' positive obligations – in some cases under Articles 2 or 3 of the Convention and in other instances under Article 8 taken alone or in combination with Article 3 – may include a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals (see, *inter alia*, *Söderman v. Sweden* [GC], no. 5786/08, § 80, ECHR 2013; *Bevacqua and S. v. Bulgaria*, no. 71127/01, § 65, 12 June 2008; *Sandra Janković*, cited above, § 45; *A v. Croatia*,

no. 55164/08, § 60, 14 October 2010; *Đorđević v. Croatia*, no. 41526/10, §§ 141-43, ECHR 2012; *Costello-Roberts v. the United Kingdom*, 25 March 1993, § 36, Series A no. 247-C; *D.P. and J.C. v. the United Kingdom*, no. 38719/97, § 118, 10 October 2002).

63. Concerning such serious acts, the State's positive obligation under Articles 3 and 8 to safeguard the individual's physical integrity may also extend to questions relating to the effectiveness of the criminal investigation and to the possibility of obtaining reparation and redress (see, among other authorities, *M.C. v. Bulgaria*, cited above, § 152; *M.P. and Others v. Bulgaria*, no. 22457/08, §§ 109-10, 15 November 2011; and *C.A.S. and C.S. v. Romania*, no. 26692/05, § 72, 20 March 2012), although there is no absolute right to obtain the prosecution or conviction of any particular person where there were no culpable failures in seeking to hold perpetrators of criminal offences accountable (see, for example, *Brecknell v. the United Kingdom*, no. 32457/04, § 64, 27 November 2007).

64. The Court reiterates that its task is not to substitute itself for the competent domestic authorities in determining the most appropriate methods for protecting individuals from attacks on their personal integrity, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation. The Court will therefore examine whether Serbia, in handling the applicant's case, has been in breach of its positive obligation under Article 8 of the Convention (see *Sandra Janković*, cited above, § 46).

3. Application of these principles to the present case

65. As to the applicability of Article 8 of the Convention, the Court observes that the facts of the impugned attack were not established by the first-instance court as the criminal proceedings were terminated as statute-barred. According to the applicant, her neighbour punched her in the face several times and pulled her hair, causing her to fall down, and continued doing so, with the help of a man, while the applicant was on the floor. A medical report from the hospital emergency department stated that the assault on the applicant had resulted in a number of injuries to her head and leg and her losing a few wisps of hair. Lastly, the Court notes that the applicant, having previously been subjected to repeated verbal attacks from her neighbour, had allegedly already lodged several criminal complaints against D.V. for harassment, to no avail. In view of the foregoing, the Court considers that the attack to which the applicant was subjected had a sufficiently adverse impact on her physical and moral integrity to engage the positive obligations of the State within the meaning of Article 8 (see *Sandra Janković*, cited above, § 31, and contrast *Tonchev v. Bulgaria*, no. 18527/02, § 41, 19 November 2009; see also, in the context of Article 3, *Milanović*, cited above, § 87, where the injuries consisted of several cuts),

without suggesting that all physical confrontations and neighbourly disputes resulting in minor bodily injuries would always fall within this ambit.

66. The Court therefore considers that acts of violence such as those in the instant case require the States to adopt adequate positive measures in the sphere of criminal-law protection (see *Sandra Janković*, cited above, § 47). As to the criminal-law mechanisms provided for in the Serbian legal system, the Court notes that violent acts committed by private individuals are prohibited in a number of provisions of the Criminal Code, including the crimes of serious and minor bodily harm (see paragraph 29 above). The Court further observes that Serbian criminal law distinguishes between criminal offences which are prosecuted by a public prosecutor, either of his or her own motion or upon a private application, and those which are prosecuted by means of a private prosecution. The latter category concerns criminal offences of a lesser nature, such as the crime committed against the applicant. A private prosecution is initiated by a private prosecutor (see paragraphs 29-30 above) and a criminal complaint lodged in due time in respect of a criminal offence subject to private prosecution is to be treated as a private prosecution (see Article 48(3) of the Code of Criminal Procedure). In these circumstances, the Court is satisfied that in the present case domestic law afforded the applicant adequate protection, as the Convention does not require a State-assisted prosecution in all cases (see *Sandra Janković*, cited above, § 50).

67. In the present case, the applicant instituted a private prosecution against D.V. for inflicting minor bodily harm, and against an unknown person who was also present on the day of alleged incident. As regards the manner in which the criminal-law mechanisms were implemented, the Court notes that the private criminal proceedings ended without tangible results owing to their termination on the expiry of the statutory limitation period and were thus concluded without a final decision on the attackers' guilt (see *Sandra Janković*, cited above, § 57). The applicant's attempts to prevent non-prosecution of the perpetrators were disregarded. During the four years concerned, the competent court appears to have questioned only one witness, held four and adjourned a total of six hearings, the latter for reasons which cannot be attributed to the applicant's conduct (see paragraphs 19-23 above). In view of the protracted course of the proceedings and their ultimate outcome, they cannot be said to have had a sufficient deterrent effect on the individuals concerned, or to have been capable of ensuring the effective prevention of unlawful acts such as those complained of by the applicant. The failure to adequately respond to her allegations in this case raises doubts as to the effectiveness of the system put in place by the State and leaves the private criminal proceedings in the case devoid of meaning. Having regard to the fact that the applicant did not personally contribute to the delay at issue, the Court considers that the impugned practices in the specific circumstances of the present case did not provide adequate

protection to her against an attack on her physical integrity and showed that the manner in which the criminal-law mechanisms were implemented were defective to the point of constituting a violation of the respondent State's positive obligations under Article 8 of the Convention (see *Sandra Janković*, §§ 52-58; and *Isaković Vidović*, §§ 58-64, both cited above; see, also, albeit in the context of Article 3 of the Convention, *Çelik v. Turkey (no. 2)*, no. 39326/02, §§ 33-36, 27 May 2010; and *Beganović v. Croatia*, cited above, §§ 71 and 74-88).

II. ALLEGED VIOLATION OF ARTICLES 3 AND 13 OF THE CONVENTION

68. The applicant complained of a further violation of Articles 3 and 13 of the Convention, which read as follows:

Article 3

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

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

69. Given that the applicant's complaints under Articles 3 and 13 are effectively the same as her complaint already considered under Article 8, and having regard to its finding in respect of the latter (see, in particular, paragraph 67 above), the Court declares the former complaints admissible but considers that they need not be examined separately on the merits (see *Zorica Jovanović*, § 80, and *Sandra Janković*, §§ 58 and 59, both cited above).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

70. 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."

71. The applicant claimed 20,000 euros (EUR) for physical pain and mental anguished suffered, and the violations of the various Articles of the Convention.

72. The Government contested these claims.

73. The Court considers that the applicant has certainly suffered some non-pecuniary damage. Having regard to the nature of the violation found in

the present case and making its assessment on an equitable basis, the Court awards her EUR 3,000 under this head.

74. The applicant also claimed a total of EUR 5,620 for the costs and expenses incurred before the domestic courts within the criminal, constitutional and civil proceedings for damages, as well as for those incurred before the Court.

75. The Government contested this claim as unsubstantiated and insufficiently specified.

76. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to their quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,500 covering costs under all heads.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

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

3. *Holds* that there is no need to examine the complaints under Articles 3 and 13 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the following amounts**,** to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 3,000, plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 2,500, plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 19 October 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

{signature_p_2}

Hasan Bakırcı Deputy Registrar	Valeriu Griţco President