



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

FIRST SECTION

**CASE OF GIULIANO GERMANO v. ITALY**

*(Application no. 10794/12)*

JUDGMENT

Art 8 • Private and family life • Police caution imposed on the applicant in stalking-prevention proceedings without adequate legal protection against abuse • No time-limit for the effects of the caution and no right to obtain its review or revocation • Applicant's exclusion from decision-making process to a significant degree in the absence of demonstrated reasons of urgency • Insufficient judicial review by the judicial authorities of the factual foundation and of the legality, necessity and proportionality of the measure • Absence of relevant and sufficient reasons • Insufficient procedural safeguards

STRASBOURG

22 June 2023

**FINAL**

**06/11/2023**

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



**In the case of Giuliano Germano v. Italy,**

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

Marko Bošnjak, *President*,

Krzysztof Wojtyczek,

Alena Poláčková,

Ivana Jelić,

Gilberto Felici,

Erik Wennerström,

Raffaele Sabato, *judges*

and Renata Degener, *Section Registrar*,

Having regard to:

the application (no. 10794/12) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Italian national, Mr Giuliano Germano (“the applicant”), on 5 January 2012;

the decision to give notice to the Italian Government (“the Government”) of the complaints concerning Articles 6 and 8 of the Convention, and to declare inadmissible the remainder of the application;

the parties’ observations;

Having deliberated in private on 23 May 2023,

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

## INTRODUCTION

1. The application raises issues under Article 8 of the Convention. It concerns allegations that the domestic provision regulating the police caution (*ammonimento*) imposed on the applicant in stalking-prevention proceedings by the head of the local police authority (*questore*) did not meet the standard of the “quality of the law” for the purposes of this provision. It further concerns the question of whether, in the domestic proceedings which led to the imposition of that measure on the applicant, he was allowed to participate in the decision-making process to a degree sufficient to provide him with the requisite protection of his interests, whether the reasons adduced by the domestic authorities to justify the impugned measure were relevant and sufficient, and whether the measure was subjected to sufficient judicial scrutiny by the competent domestic courts.

## THE FACTS

2. The applicant, Mr Giuliano Germano, is an Italian national who was born in 1956 and lives in Savona. He was represented before the Court by Mr R. Sturlese, a lawyer practising in La Spezia.

3. The Government were represented by their Agent, Mr L. D'Ascia, *Avvocato dello Stato*.

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

5. In 2009 the relationship between the applicant and his wife ended, and on 3 May 2009 she left the family home with their daughter.

6. On 6 May 2009 she lodged a criminal complaint (*querela*) against the applicant in respect of ill-treatment allegedly inflicted on her the night she left the family home. The proceedings instituted against the applicant were discontinued on 22 May 2015, as his wife withdrew her criminal complaint.

7. On 13 November 2009 the applicant's wife lodged a request (*richiesta*) with the *questore* of Savona, asking it to issue a police caution as provided for by section 8 of Decree-Law no. 11 of 23 February 2009 on urgent measures for public security and combating sexual violence and stalking ("Decree-Law no. 11/2009"), converted into Law no. 38 of 23 April 2009 ("Law no. 38/2009"; see paragraph 26 below). The request detailed several episodes of physical and verbal violence allegedly inflicted by the applicant on his wife while they were living together and after she had left the family home. The applicant's wife further reported several telephone calls made by the applicant to her, their daughter's babysitter and some mutual friends, allegedly aimed at controlling her personal life and isolating and intimidating her.

8. The police station in question opened an inquiry and collected seventeen witness statements from the people referred to in the applicant's wife's request. Among those witnesses, a friend of the applicant's wife confirmed that episodes of verbal abuse inflicted by the applicant on his wife had taken place in her presence; another stated that he had been told about an episode of physical assault; and another stated that the applicant had telephoned him several times with the aim of obtaining information about his wife's life after she had left the family home. The other fourteen statements did not confirm the applicant's wife's version of the facts, and expressly excluded that the applicant had insulted her in their presence or had tried to isolate her.

9. In an order no. 20406 of 27 November 2009, the *questore* of Savona issued a police caution. The applicant was personally notified of the caution on 28 November 2009 at the Savona police station.

10. The reasoning in the minutes of the caution read as follows:

"In respect of the request lodged on 13 November 2009 ... expressly requesting that a caution be issued in respect of Germano Giuliano ... indicated as being responsible of the crime of stalking committed against [the person who applied for the caution], although she has decided not to lodge a criminal complaint;

Taking into account that, as indicated in the request, Germano Giuliano, husband of the person who applied for the caution, from whom she is currently separating, in the last three years, but with episodes becoming more frequent from May of the current year, [carried out the following] repeated acts such as insults uttered in the presence of other persons, telephone calls made in private and at the workplace to the person who

applied for the caution and other persons who are close to the former spouses, sending text messages, persistent and repeated requests, also made with a potentially threatening attitude, aimed at controlling with insistent, obsessive and intimidating tones [his wife's] movements and, more generally, her habitual daily life, caused to the person who applied for the caution a persisting and serious state of anxiety, fear and concern for her personal safety;

Considering that all the inquiries undertaken by the police and the additional documents gathered, all on the record – irrespective of the context in which Mr Germano's acts took place, namely the pending judicial separation of the spouses and the episodes related to custody of their seven-year-old daughter – and notwithstanding the fact that some of the episodes are of no relevance, show a situation of particular seriousness, sufficiently and objectively confirmed, which is composed of proven episodes, including physical assault, which are in addition the object of pending criminal proceedings and which cannot therefore be mentioned, but also cannot be underestimated when assessing the overall circumstances and the facts reported, and which are objectively capable of provoking in Mr Germano's wife a state of, at least, psychological distress and, therefore, of making her request well founded;

[T]he necessity and urgency [of the measure] to prevent further stalking behaviour being carried out [has been noted] ...”

11. The content of the caution issued in respect of the applicant, as indicated in the minutes delivered to him, reads as follows:

“Mr Germano Giuliano [is] invited to behave in accordance with the law and cautioned that, should he repeat the behaviour which led to the present order being issued, he will be referred to the competent judicial authority pursuant to Article 612-*bis* [of the Criminal Code], even in the absence of a criminal complaint (*querela*) lodged by the person who applied for the caution, in accordance with the [procedure], provided for under section 8 of Decree-Law no. 11/2009, converted into Law no. 38 of 23 April 2009 ... to institute criminal proceedings for the same crime against an individual who has been ‘cautioned’.

Mr Germano Giuliano is also informed that the penalty of up to four years of imprisonment established for the crime provided for by Article 612-*bis* [of the Criminal Code] ‘will be increased if the act is committed by an individual who has been cautioned’ in accordance with section 8 of Decree-Law no. 11/2009 ...”

12. On 14 January 2010 the applicant appealed against the measure before the Liguria Regional Administrative Court (*Tribunale Amministrativo Regionale*, “TAR”). He complained, in particular, of the alleged violation of his right to take part in administrative proceedings guaranteed by section 7 of Law no. 241 of 7 August 1990 (“Law no. 241/1990”; see paragraph 24 below), as he had not been notified of the institution of the administrative proceedings and had not been allowed to express his views; of the caution's alleged lack of reasoning; of the alleged inadequacies of the inquiries undertaken by the police; and of the alleged absence of the conditions required by section 8 of Decree-Law no. 11/2009 for the imposition of the caution. The applicant further raised the issue of the constitutionality of section 8 of Decree-Law no. 11/2009, arguing that it was at odds with Articles 3, 24, 97, 111 and 113 of the Italian Constitution in the light of the alleged violation of the adversarial principle, the rights of defence and the

equality of arms. Lastly, the applicant claimed compensation for the damage allegedly suffered on account of the imposition of the measure on him.

13. The applicant further requested the provisional suspension of the order pending the proceedings before the TAR. On 4 February 2010 the TAR dismissed the suspension request, observing that there was no risk of irreparable harm to the applicant's rights and interests.

14. In its judgment no. 8145 of 30 September 2010, the TAR found that the applicant's participation and defence rights, guaranteed by section 7 of Law no. 241/1990, had been violated and, therefore, upheld the applicant's claim and annulled the police caution issued against him.

15. The TAR observed that the measure at issue, which seriously and directly affected the cautioned individual's right to personal image, could not be imposed on the mere basis of the information and evidence provided by the person who applied for the caution. Such elements had to be compared with the information and evidence provided by the individual affected by the measure, in proceedings which had to have as their basis an appropriate and sufficient inquiry and which allowed the person affected by the measure to express his or her views. According to the TAR, an exception to the respect of the individual's participation rights was justified in cases of strict urgency and necessity, which had to be sufficiently demonstrated and justified in the reasoning of the order. The TAR further observed that a police caution was not an administrative act whose content was predetermined (*atto vincolato*), as it presupposed a complex assessment of the relevant factual circumstances. Therefore, the restriction of the individual's participation rights was not justified.

16. Lastly, the TAR dismissed as inadmissible the applicant's claim for compensation, observing that he had not provided any evidence capable of demonstrating that he had suffered damage as a consequence of the imposition of the police caution.

17. On 3 January 2011 the Ministry of the Interior appealed against the judgment before the *Consiglio di Stato*. In its appeal, the Ministry observed that the first-instance judgment had not taken into account the urgency which characterised stalking-prevention proceedings; it further argued that the participation of the applicant in the administrative proceedings would not have changed the outcome, as the *questore* had found that the applicant's wife's request was well founded.

18. The Ministry further requested the suspension of the impugned judgment. On 11 February 2011 the *Consiglio di Stato* upheld the request. It observed that, in the light of the preventive purpose of the police caution, there was a serious risk of irreparable harm to the applicant's wife.

19. In its judgment no. 4365 of 19 July 2011, the *Consiglio di Stato* upheld the Ministry's appeal, quashed the first-instance judgment, and confirmed the police caution. It acknowledged that the measure had serious consequences on the applicant's personal sphere, as it entailed the possibility to prosecute

him for the crime of stalking even in the absence of a criminal complaint lodged by the victim and the automatic application of an aggravating circumstance in the event of conviction for that crime.

20. However, the *Consiglio di Stato* emphasised the aim of the caution, which was to prevent potentially serious and irreparable harm to the alleged stalking victim. In the *Consiglio di Stato*'s view, the stalking-prevention proceedings were by their very nature characterised by the need for a prompt and immediate response. In the light of the above, it considered that the failure to notify the applicant of the institution of the administrative proceedings before the *questore* and to hear him before the imposition of the measure had not amounted to a violation of the applicant's participation rights, as he could have obtained a full review of the decision by directly addressing a request for review to the police authority (*Questura*) or by lodging an appeal with the higher administrative authority (*ricorso gerarchico*), namely the local prefect (*prefetto*), pursuant to the relevant provisions of Presidential Decree no. 1199 of 24 November 1971 ("Decree no. 1199/1971"; see paragraph 23 below).

21. The *Consiglio di Stato* further noted that the caution did not lack reasoning and did not have its basis in insufficient inquiries, as the *questore* had stated that the investigations undertaken by the police had demonstrated the insulting and intimidating behaviour inflicted by the applicant on his wife.

22. Lastly, the *Consiglio di Stato* observed that the failure to hear the applicant before issuing the caution had been based on the urgent need to prevent a potential escalation of violence perpetrated against his wife.

## RELEVANT LEGAL FRAMEWORK AND PRACTICE

### I. RELEVANT DOMESTIC LAW

#### **A. Presidential Decree no. 1199 of 24 November 1971 (Simplification of procedures concerning administrative appeals)**

23. Decree no. 1199/1971 regulates the appeal which may be lodged against administrative acts and decisions before the higher administrative authority. The relevant provisions read as follows:

##### **Article 1: Appeal**

"Non-final administrative measures may be appealed against before the higher administrative authority, whose decision is not subject to further appeal, on grounds of legitimacy and of merits, by any interested party.

...

The notification of the measures subject to appeal under this Article shall indicate the time-limit and the body to which the appeal must be submitted."

**Article 5: Decision**

“If it finds that the appeal should not have been brought, the competent authority shall declare it inadmissible. If it finds a rectifiable irregularity, it shall grant the appellant a time-limit to rectify it and, if the appellant fails to do so, it shall declare the appeal inadmissible. If it considers that the appeal is ill-founded, it shall dismiss it. If it upholds the appeal for lack of competence, it shall quash the measure and remit the matter to the competent body. If it upholds the appeal on other grounds of lawfulness or on the merits, it shall quash or reformulate the measure, or, if necessary, refer the matter back to the competent body that issued it.

The decision must be reasoned, and it must be issued and notified to the body or agency that issued the contested measure, the appellant and other interested parties to whom the appeal has been notified, either by administrative notification or by registered letter with acknowledgement of receipt.”

**Article 6: Failure to reply**

“If the deciding authority does not communicate its decision within ninety days from the institution of the appeal, the latter shall be deemed to have been dismissed, and the contested measure may be appealed against before the competent judicial authority, or through extraordinary appeal to the President of the Republic.”

**B. Law no. 241 of 7 August 1990 (New provisions concerning administrative proceedings and the right of access to administrative documents)**

24. Law no. 241/1990 regulates administrative proceedings and the right of access to administrative documents. The relevant provisions read as follows:

**Section 3: Reasoning**

“1. Any administrative measure ... must be reasoned, except for the cases provided for in subsection 2. The reasoning shall indicate the factual and legal reasons that justified the decision of the public administration, in relation to the results of the preliminary investigation undertaken.

2. A statement of reasons shall not be required for regulatory measures and for normative measures and general content measures.

...

4. Every document served on the addressee must indicate the time-limit and the authority before which an appeal is possible.”

**Section 7: Notification of the institution of proceedings**

“1. Where there are no impediments arising from specific reasons to expedite the proceedings, the institution of proceedings shall be notified, in the manner provided for in section 8, to the persons in respect of whom the final measure is to have direct effect and to those who by law must intervene. Similarly, in the absence of the above-mentioned reasons, where a measure may cause prejudice to identified or easily identifiable persons other than its direct addressees, the administration is required to notify them of the institution of the proceedings in the same manner.



2. In the cases referred to in subsection 1, this is without prejudice to the power of the administration to adopt, even before the notifications referred to in that paragraph, provisional measures.”

**C. Decree-Law no. 11 of 23 February 2009 (Urgent measures for public security and combating sexual violence and stalking), converted into law on 23 April 2009 (Law no. 38/2009)**

25. Decree-Law no. 11/2009 introduced in the Italian legal order urgent measures for public security and combating sexual violence and stalking. Section 7 introduced a new provision into the Criminal Code (Article 612-*bis*), introducing the criminal offence of stalking (*atti persecutori*). Article 612-*bis*, as in force when the facts relevant for the present application took place, read as follows:

“Unless the act constitutes a more serious criminal offence, anyone who repeatedly threatens or harasses someone in such a way as to cause a persistent and serious state of anxiety or fear, or to create a well-founded fear for his or her own safety or that of a close relative or a person linked to him or her by a relationship of affection, or to force him or her to alter his or her lifestyle, shall be punished by imprisonment of between one year and six years and six months.”

26. Section 8 of Decree-Law no. 11/2009 introduced the measure of the police caution, to be issued in stalking-prevention proceedings by the head of the local police authority (*questore*). It reads as follows:

“1. Until a criminal complaint (*querela*) for the crime provided for by Article 612-*bis* of the Criminal Code, introduced by section 7, has been lodged, the injured party may report the facts to the public security authority by lodging a request (*richiesta*) with the *questore* for a caution to be issued against the author of the behaviour. The request is transmitted to the *questore* without delay.

2. If the request (*richiesta*) is well founded, the *questore*, having obtained, if necessary, information from the investigative bodies and heard the persons having knowledge of the facts, shall orally caution the subject against whom the measure has been requested, inviting him or her to behave in accordance with the law, and draw up minutes (*processo verbale*) of the caution. Copies of the minutes are provided to the person who applied for the caution and to its subject. The *questore* adopts measures concerning weapons and ammunitions.

3. The punishment inflicted for the criminal offence provided for by Article 612-*bis* of the Criminal Code is increased if the offence is committed by a person who has already received a caution in accordance with the present section.

4. If the offence is committed by a person who has already received a caution under this section, criminal proceedings for the crime provided for by Article 612-*bis* of the Criminal Code may be instituted even in the absence of a criminal complaint (*querela*) lodged by the injured party.”

## II. RELEVANT DOMESTIC CASE-LAW

### **A. Case-law on the nature of the measure and the conditions under which the caution set out in section 8 of Decree-Law no. 11/2009 can be issued**

27. The relevant domestic case-law has clarified that police caution imposed under section 8 of Decree-Law no. 11/2009 fulfils a “preventive and deterrent function”, as it aims to prevent repetition of the behaviour criminalised by Article 612-*bis* of the Criminal Code causing irreparable harm to the victim (*Consiglio di Stato*, Third Section, judgments nos. 4365 of 19 July 2011 and 4077 of 25 June 2020; see also Court of Cassation, judgment no. 17350 of 19 August 2020). In the light of this function, the *questore* is not requested to assess the criminal responsibility of the alleged stalker, but to ascertain the probability that such behaviour has taken place and to analyse the potential existence of a danger for the future (*Consiglio di Stato*, Third Section, judgment no. 4077 of 25 June 2020).

28. From a factual point of view, the imposition of the measure requires the establishment of the same behaviours which constitute the criminal offence provided for by Article 612-*bis* of the Criminal Code (*Consiglio di Stato*, Third Section, judgments nos. 2599 of 7 September 2015 and 4077 of 25 June 2020). In particular, in judgment no. 2045 of 21 April 2020, the *Consiglio di Stato*, Third Section, has stressed that a police caution can only be issued where repeated behaviour which can be qualified as “threat or harassment” which produces negative consequences on the physical, psychological and existential state of the victim and restricts his or her self-determination has taken place.

29. Article 612-*bis* of the Criminal Code is indeed composed of three constitutive elements: (i) repeated acts of threats or harassment; (ii) causing the victim a state of anxiety or fear for his or her safety or that of a close relative, or the alteration of the victim’s daily habits; (iii) the existence of a causal nexus between the first and second element. The interpretation of the criminal offence of stalking was clarified by the Constitutional Court in judgment no. 172 of 11 June 2014, in which it held that the provision did not lack clarity and foreseeability, as it was a specification of the criminal offences of threat and harassment provided for, since its original formulation, in Articles 612 and 660 of the Criminal Code.

30. The difference between the establishment of situations leading to the imposition of a police caution and criminal prosecution for the crime of stalking lay, on the one hand, in whether a criminal complaint has been lodged by the victim and, on the other hand, in the burden of proof applied. The case-law has clarified that for the purposes of the imposition of a caution, conclusive evidence of the commission of the crime is not necessary (*Consiglio di Stato*, Third Section, judgment no. 4077 of 25 June 2020). The

measure requires the existence of circumstantial evidence of the fact that the behaviour criminalised by Article 612-*bis* has taken place and, on the basis of a prognostic assessment, that it may take place again in the future (*Consiglio di Stato*, Third Section, judgments nos. 1085 of 15 February 2019 and 4077 of 25 June 2020).

31. The *Consiglio di Stato* has also held that the measure cannot have as its basis solely the version of the facts submitted by the person who applied for the caution. The police authority is required to undertake sufficient inquiries in order to assess whether the request is well founded (*Consiglio di Stato*, Third Section, judgment no. 4077 of 25 June 2020).

32. It has also clarified that, in accordance with section 3 of Law no. 241/1990 (see paragraph 24 above), the existence of such circumstantial evidence is to be duly demonstrated and indicated in the minutes of the caution (among others, *Consiglio di Stato*, Third Section, judgment no. 1085 of 15 February 2019). The reasoning included in the minutes must allow the assessment of the legitimate exercise of administrative powers, in order to avoid the imposition of the measure on the basis of mere and unproven suspicions (*Consiglio di Stato*, Third Section, judgments nos. 2108 of 29 March 2019 and 7883 of 10 December 2020).

## **B. Case-law on the obligations arising from the caution**

33. In its judgment no. 17350 of 19 August 2020, the Court of Cassation (Fifth Section) has clarified that the police caution invites the addressee to refrain from behaviour that falls within the scope of application of Article 612-*bis* of the Criminal Code.

34. According to the Court of Cassation, section 8 of Decree-Law no. 11/2009 was aimed at delimiting the scope of discretion conferred on the *questore*, namely at clarifying the conditions for the adoption of the measure by making reference to the criminal offence of stalking (see paragraph 28 above).

35. However, as far as the addressee of the measure is concerned, the Court of Cassation has clarified that the caution does not impose new legal obligations, as it merely reminds him or her to behave in accordance with Article 612-*bis* of the Criminal Code. It also advises him or her of the “strengthened” *ex lege* consequence which would follow from repeating such behaviour, namely the possibility of prosecuting such a crime even in the absence of a criminal complaint lodged by the victim and the application of an aggravating circumstance in the event of conviction.

36. In the light of those observations, the Court of Cassation concluded that section 8 of Decree-Law no. 11/2009 did not lack clarity and foreseeability.

**C. Case-law on the individual's right to take part in stalking-prevention proceedings under section 8 of Decree-Law no. 11/2009**

37. In the early cases concerning the police caution, the domestic judicial authorities considered that it was an administrative measure which directly affected individuals' interests from the moment of its adoption. As a consequence, it remained subject to the respect of the right to take part in proceedings and of the adversarial principle enshrined in Law no. 241/1990, and to the obligatory assessment by the *questore* of the elements provided by the affected individual in the exercise of his or her right to defence (Liguria TAR, Second Section, judgments nos. 31 of 12 January 2010 and 208 of 15 April 2010). Similarly, in judgment no. 5676 of 21 October 2011, the *Consiglio di Stato*, Third Section, observed that section 8 of Decree-Law no. 11/2009 expressly stipulated that before issuing a caution, the *questore* had to hear the persons with knowledge of the relevant facts, including the addressee of the caution.

38. In the subsequent case-law, two conflicting approaches were developed. The majoritarian approach, following the case-law cited in the previous paragraph, considers that the preventive function of the caution does not justify, *per se*, the derogation from the individual's right to be heard in proceedings. By contrast, a minority of the case-law considers that, in the light of the preventive function of the caution, the *questore* retains full discretion in assessing whether to notify the addressee of the institution of the proceedings and whether to hear him or her before the adoption of the measure.

39. According to the majority of the case-law, the stalking-prevention proceedings must be carried out in accordance with the adversarial principle, in order to allow the addressee of the measure to express his or her views (*Consiglio di Stato*, Third Section, judgments nos. 5676 of 21 October 2011, 4187 of 9 July 2018 and 1085 of 15 February 2019). The participation rights of the addressee can be derogated from exclusively in exceptional circumstances of urgency which must be assessed by the *questore* (*Consiglio di Stato*, Third Section, judgment no. 6038 of 9 December 2014). Such specific reasons, namely the existence of an imminent risk of serious harm, must be duly indicated in the reasoning of the caution (*Consiglio di Stato*, Third Section, judgment no. 2108 of 29 March 2019).

40. The minoritarian approach, by contrast, considers that the stalking-prevention proceedings are characterised, by their very nature, by the need to prevent a risk of irreparable harm to the person who applied for the caution. As a consequence, it remains within the discretionary powers of the *questore* to assess whether to hear the addressee. The failure to hear the addressee of the measure in the absence of demonstrated reasons of urgency cannot be invoked, according to such an approach, as a ground for annulment

of the measure (*Consiglio di Stato*, Third Section, judgments nos. 2419 of 6 June 2016 and 4241 of 13 October 2016).

#### **D. Case-law on the nature of the judicial review of the caution**

41. According to the *Consiglio di Stato*'s case-law, administrative courts have the power to assess whether the measure had sufficient factual grounds, was sufficiently reasoned and was justified in the circumstances of each case. For example, in judgment no. 5676 of 21 October 2011, cited above, the *Consiglio di Stato* found that the caution lacked reasoning, as there had been no assessment of the elements provided by the individual who had been cautioned, which were merely noted in the text. On the merits, the *Consiglio di Stato* noted that there were no demonstrated factual elements justifying the imposition of the measure (see also judgments nos. 5259 of 6 June 2018 and 5445 of 21 April 2020, in which the *Consiglio di Stato*, Third Section, assessed and established the facts in the light of the available evidence, in order to conclude whether the imposition of the caution was justified in the specific circumstances of the cases).

#### **E. Case-law on the review and revocation of public security administrative measures**

42. The applicable legal framework does not set out a time-limit for the effects of the caution, nor does it provide for a procedure of periodic review. According to the general principles applicable to administrative measures, the addressee may request the administrative authority to review the measure, but the latter retains full discretion in deciding whether to exercise its powers of review. Therefore, the administrative authority is not legally obliged to proceed to such a review or to revoke the measure owing to the mere passage of time (*Consiglio di Stato*, Sixth Section, judgment no. 3634 of 9 July 2013). The individual has the right to appeal before the competent administrative court against the dismissal of the request for review or the failure to reply on the part of the administrative authority (*Consiglio di Stato*, Third Section, judgment no. 4565 of 19 July 2011, which was the judgment complained of in the present case).

43. When an individual lodges a review request, the passage of time from the imposition of the measure is one of the elements taken into account by the administrative authority (for example, Bolzano TAR, judgment no. 262 of 24 June 2015). However, under the available case-law, the caution issued in stalking-prevention proceedings is an "instantaneous" measure which is not subject to review or revocation requests. Accordingly, the individual is not entitled to challenge before the administrative courts the implicit or explicit dismissal of a review or revocation request lodged with the *questore* (ibid.; see also Genova TAR, judgment no. 826 of 22 July 2022). Moreover,

pursuant to the case-law of the Court of Cassation, the revocation of the measure by the administrative authority would not preclude its legal effects in the criminal proceedings, namely the possibility of prosecuting the addressee of the measure in the event of him or her reiterating the stalking behaviour, even in the absence of a criminal complaint (*querela*), and the imposition of a heavier penalty in the event of conviction (see Court of Cassation, Fifth Section, judgment no. 34474 of 16 September 2021).

44. According to some recent developments, concerning another public security measure, the power of review conferred on the administrative authority must be interpreted in the light of the constitutional principles of good administration, reasonableness and proportionality. In judgment no. 508 of 20 February 2019, the Sicily TAR, Second Section, considered that when a public security measure affects an individual, and the legal framework does not provide for a time-limit for its effects, the individual must be accorded the right to obtain a review of the justification for the measure. Should a change in the relevant circumstances and the passage of time no longer justify it, the measure must be revoked, as it would not fulfil any public interest (see also Campania TAR, Fifth Section, judgment no. 2859 of 21 May 2015). In those situations, the competent administrative courts might quash the implicit dismissal of the review request deriving from the failure to reply of the administrative authority with which it had been lodged and order the latter to exercise that power and adopt a reasoned decision in respect of the request.

### III. INTERNATIONAL LAW AND MATERIALS

#### **A. Instruments concerning the rights of the individual in administrative procedures**

##### *1. Committee of Ministers Resolution 77 (31) on the protection of the individual in relation to the acts of administrative authorities*

45. This Resolution, adopted by the Committee of Ministers on 28 September 1977, established principles applying to the protection of physical and legal persons in administrative procedures with regard to any individual measures or decisions which are taken in the exercise of public authority, and which are of such nature as directly to affect their rights, liberties or interests.

46. Article I of the Resolution, concerning the right to be heard, reads as follows:

“1. In respect of any administrative act of such nature as is likely to affect adversely his rights, liberties or interests, the person concerned may put forward facts and arguments and, in appropriate cases, call evidence which will be taken into account by the administrative authority.

2. In appropriate cases the person concerned is informed, in due time and in a manner appropriate to the case, of the rights stated in the preceding paragraph.”

47. According to the Appendix, the implementation of the principles established in the Resolution must take into account the requirements of good and efficient administration, as well as the interests of third parties and major public interests. Therefore, the cited interests can justify the modification or exclusion of the principles established in the Resolution, either in particular cases or in specific areas of public administration. However, such modifications or derogation should be in conformity with the fundamental aim of the Resolution, which is the achievement of the highest possible degree of fairness.

48. Article IV, which concerns the reasoning of administrative acts, reads as follows:

“Where an administrative act is of such nature as adversely to affect his rights, liberties or interests, the person concerned is informed of the reasons on which it is based. This is done either by stating the reasons in the act, or by communicating them, at his request, to the person concerned in writing within a reasonable time.”

2. *Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration*

49. This Recommendation, adopted by the Committee of Ministers on 20 June 2007, lays down principles and rules which should be applied by public authorities in their relations with private persons, in order to achieve good administration (Article 1).

50. Article 8, establishing the principle of participation, reads as follows:

“Unless action needs to be taken urgently, public authorities shall provide private persons with the opportunity through appropriate means to participate in the preparation and implementation of administrative decisions which affect their rights or interests.”

51. Article 14, which enshrines a right of private persons to be heard with regard to individual decisions, reads as follows:

“If a public authority intends to take an individual decision that will directly and adversely affect the rights of private persons, and provided that an opportunity to express their views has not been given, such persons shall, unless this is manifestly unnecessary, have an opportunity to express their views within a reasonable time and in the manner provided for by national law, and if necessary with the assistance of a person of their choice.”

52. Article 17 § 2, concerning the form of administrative acts, enshrines a duty to state the reasons for the measure:

“Appropriate reasons shall be given for any individual decision taken, stating the legal and factual grounds on which the decision was taken, at least in cases where they affect individual rights.”

3. *The Charter of Fundamental Rights of the European Union*

53. The relevant parts of Article 41 of the Charter read as follows:

“1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:

– the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;”

54. The Court of Justice of the European Union (CJEU) has held that the right to be heard guarantees every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely. The relevant judgments of the CJEU were cited in the Court’s judgment in *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, § 55, 17 May 2016.

**B. Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)**

55. The Istanbul Convention was ratified by Italy through Law no. 77 of 27 June 2013. The relevant provisions read as follow:

**Article 34 – Stalking**

“Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety, is criminalised.”

**Article 50 – Immediate response, prevention and protection**

“1. Parties shall take the necessary legislative or other measures to ensure that the responsible law enforcement agencies respond to all forms of violence covered by the scope of this Convention promptly and appropriately by offering adequate and immediate protection to victims.

2. Parties shall take the necessary legislative or other measures to ensure that the responsible law enforcement agencies engage promptly and appropriately in the prevention and protection against all forms of violence covered by the scope of this Convention, including the employment of preventive operational measures and the collection of evidence.”

**Article 51 – Risk assessment and risk management**

“1. Parties shall take the necessary legislative or other measures to ensure that an assessment of the lethality risk, the seriousness of the situation and the risk of repeated violence is carried out by all relevant authorities in order to manage the risk and if necessary to provide coordinated safety and support.

2. Parties shall take the necessary legislative or other measures to ensure that the assessment referred to in paragraph 1 duly takes into account, at all stages of the investigation and application of protective measures, the fact that perpetrators of acts of violence covered by the scope of this Convention possess or have access to firearms.”



**Article 53 – Restraining or protection orders**

“1. Parties shall take the necessary legislative or other measures to ensure that appropriate restraining or protection orders are available to victims of all forms of violence covered by the scope of this Convention.

2. Parties shall take the necessary legislative or other measures to ensure that the restraining or protection orders referred to in paragraph 1 are:

- available for immediate protection and without undue financial or administrative burdens placed on the victim;
- issued for a specified period or until modified or discharged;
- where necessary, issued on an *ex parte* basis which has immediate effect;
- available irrespective of, or in addition to, other legal proceedings;
- allowed to be introduced in subsequent legal proceedings.

3. Parties shall take the necessary legislative or other measures to ensure that breaches of restraining or protection orders issued pursuant to paragraph 1 shall be subject to effective, proportionate and dissuasive criminal or other legal sanction.”

56. The relevant passages of the Explanatory Report to the Istanbul Convention, concerning its Article 53 § 2, read as follows:

“270. Paragraph 2 contains a number of specifications for restraining and protection orders. The first indent requires these orders to offer immediate protection and to be available without undue financial or administrative burdens placed on the victim. This means that any order should take effect immediately after it has been issued and shall be available without lengthy court proceedings. Any court fees levied against the applicant, most likely the victim, shall not constitute an undue financial burden which would bar the victim from applying. At the same time, any procedures set up to apply for a restraining or protection order shall not present insurmountable difficulties for victims.

271. The second indent calls for the order to be issued for a specified or a determined period or until modified or discharged. This follows from the principle of legal certainty that requires the duration of a legal measure to be spelt out clearly. Furthermore, it shall cease to be in effect if changed or discharged by a judge or other competent official.

272. The third indent requires Parties to ensure that in certain cases these orders may be issued, where necessary, on an *ex parte* basis with immediate effect. This means a judge or other competent official would have the authority to issue a temporary restraining or protection order based on the request of one party only. It should be noted that, in accordance with the general obligations provided for under Article 49 (2) of this Convention, the issuing of such orders must not be prejudicial to the rights of the defence and the requirements of a fair and impartial trial, in conformity with Article 6 ECHR. This means notably that the person against whom such an order has been issued should have the right to appeal it before the competent authorities and according to the appropriate internal procedures.”

## THE LAW

### I. PRELIMINARY REMARKS

57. The applicant complained under Article 8 of the Convention of the allegedly unlawful interference with his right to private, family and professional life. He further complained under Article 6 § 1 and Article 8 of the Convention of a breach of his rights of participation and defence, of the lack of relevant and sufficient reasons justifying the police caution and of the lack of a sufficient judicial scrutiny of that measure.

58. The Court notes from the outset that it is settled case-law that, while Article 8 of the Convention contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 (see, among other authorities, *M.S. v. Ukraine*, no. 2091/13, § 70, 11 July 2017). Hence, since according to the *jura novit curia* principle it is master of the characterisation to be given in law to the facts of the case (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 114, 20 March 2018), the Court finds it appropriate to examine the applicant's complaints solely under Article 8 of the Convention.

### II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

59. The applicant complained of an alleged violation of his right to private, family and professional life, as provided in Article 8 of the Convention. He argued, in particular, that the legal basis for the measure applied to him had not been compatible with the requirements for the quality of the law under the Convention; that the obligations imposed on him had been excessively wide and generic and that the applicable legal framework had not provided him with the requisite guarantees against arbitrariness; that he had not been afforded in the procedure the possibility of adequately protecting his interests; that there had been no sufficient reasons justifying the measure and that the competent domestic courts had not reviewed those reasons in a thorough manner. Article 8 reads, in so far as relevant, as follows:

“1. Everyone has the right to respect for his private and family 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. Exhaustion of domestic remedies

#### (a) The parties' submissions

60. The Government submitted that the applicant had not properly exhausted domestic remedies, as he could have lodged an appeal with the higher administrative authority. They submitted that in accordance with Article 1 § 1 of Decree no. 1199/1971 (see paragraph 23 above) the applicant could have challenged the assessment of the evidence gathered by the police and obtained a full review by the *prefetto* of the formal and substantive legality of the caution. In the Government's view such a remedy would not have been excessively burdensome, as it was administrative in nature and did not require the assistance of a lawyer or an exact description of the grounds for appeal.

61. The applicant reiterated that he had exhausted the remedies provided for in the Italian legal system, by lodging an appeal with the competent TAR against the police caution. He further observed that the first-instance judgment had been quashed by the *Consiglio di Stato*, whose judgments were not subject to further appeal.

#### (b) The Court's assessment

##### (i) General principles

62. The Court reiterates that the obligation to exhaust domestic remedies requires an applicant to make normal use of remedies which are available and sufficient in respect of his or her Convention grievances. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see *Akdivar and Others v. Turkey*, 16 September 1996, § 66, *Reports of Judgments and Decisions* 1996-IV, and *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 71, 25 March 2014). To be effective, a remedy must be capable of directly redressing the impugned state of affairs and must offer reasonable prospects of success (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004, and *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-II).

63. However, there is no obligation to have recourse to remedies which are inadequate or ineffective (see *Akdivar and Others*, cited above, § 67, and *Vučković and Others*, cited above, § 73).

64. As regards the burden of proof, it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time. Once this burden has been satisfied, it falls to the applicant to demonstrate that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that

there existed special circumstances exempting him or her from this requirement (see, among many other authorities, *Akdivar and Others*, cited above, § 68; *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99 and 7 others, § 69, ECHR 2010; *McFarlane v. Ireland* [GC], no. 31333/06, § 107, 10 September 2010; and *Vučković and Others*, cited above, § 77).

65. The Court further reiterates the Convention institutions' consistent case-law, according to which an appeal to a higher authority which does not give the person making it a personal right to the exercise by the State of its supervisory powers cannot be regarded as an effective remedy for the purposes of Article 35 of the Convention (see *Gibas v. Poland*, no. 24559/94, Commission decision of 6 September 1995, Decisions and Reports 82, pp. 76 and 82; *Horvat v. Croatia*, no. 51585/99, § 47, ECHR 2001-VIII; *Belevitskiy v. Russia*, no. 72967/01, § 59, 1 March 2007, and *Petrella v. Italy*, no. 24340/07, §§ 28-29, 18 March 2021).

66. Lastly, the Court reiterates that an applicant who has exhausted a remedy that is apparently effective and sufficient cannot be required also to have tried others that were available but probably no more likely to be successful (see *Aquilina v. Malta* [GC], no. 25642/94, § 39, ECHR 1999-III, and *Nada v. Switzerland* [GC], no. 10593/08, § 142, ECHR 2012). In this connection, where several remedies are available, the applicant is not required to pursue more than one and it is normally that individual's choice as to which (see *Micallef v. Malta* [GC], no. 17056/06, § 58, ECHR 2009).

(ii) *Application of the above principles to the present case*

67. As regards the remedy suggested by the Government, namely an appeal lodged with the *prefetto*, it should be noted that in accordance with Article 6 of Decree no. 1199/1971 (see paragraph 23 above) the appeal is considered dismissed if, within ninety days, the higher administrative authority does not reply. Under the same provision, in cases of explicit or implicit dismissal of the appeal to a higher administrative authority, an individual can lodge an appeal before the territorially competent administrative court or an extraordinary appeal to the President of the Republic.

68. Although there is no reason for the Court to doubt that, pursuant to the cited domestic provision, an individual can challenge the measure before the competent TAR in cases of implicit or explicit dismissal of the appeal lodged with the *prefetto*, it must be noted that, in reply to the Government's objection, the applicant reiterated that he had lodged a direct appeal with the TAR and that the decision of the *Consiglio di Stato*, quashing the first-instance judgment, was not subject to further appeal (see paragraph 61 above). The Court must also take note of the fact that the Government have not contested the applicant's reply on this issue.

69. The Court is of the opinion that the remedy of which the applicant availed himself was, at least in theory, an effective one. And indeed, at the

time when the applicant instituted the proceedings before the TAR, both first-instance administrative courts and the *Consiglio di Stato* (see paragraph 37 above) had upheld complaints similar to the ones raised by the applicant. The Government also argued that the administrative courts could carry out a sufficient review of police cautions (see the judgments cited in paragraph 41 above), thereby recognising that the applicant had availed himself of a remedy which was, at least in theory, effective.

70. In the light of the foregoing, the Court concludes that the applicant used one of the remedies available in the domestic legal system and that that remedy was, despite its outcome, effective. Accordingly, as the applicant cannot be expected to pursue more than one of several available remedies (see *Toplak and Mrak v. Slovenia*, nos. 34591/19 and 42545/19, § 99, 26 October 2021), the Government's objection must be dismissed.

## 2. *Whether Article 8 is applicable and whether there was an interference*

### (a) **The parties' submissions**

71. The Government submitted that the police caution imposed on the applicant did not have any immediate consequences on the individual being cautioned and did not affect his or her personal life, as it merely cautioned him or her to comply with the laws in force. They further argued that the applicant had failed to demonstrate that the measure had affected his family life with his daughter, as his parental rights had not been restricted, and it had not affected his professional life, as the applicant was still a member of the Bar Association. In the light of the foregoing, the Government considered that a police caution imposed in stalking-prevention proceedings was a "measure *in bonam partem*", favourable to the person being cautioned, as he or she avoided immediate criminal prosecution. Lastly, they submitted that the caution had not had any consequences on the applicant's life in general. In the Government's view the caution had not been enforced, as the applicant had not been criminally prosecuted and, therefore, the potential detrimental effects of a caution had not been applied to him.

72. The applicant argued that Article 8 of the Convention was applicable and that there had been an interference, as the measure was capable of significantly affecting his private life, namely his social relations with friends shared with his wife, and his family life, namely the possibility of having contact with his daughter. He further argued that, as a practising lawyer, he could face disciplinary sanctions by the Bar Association. He highlighted that, in the light of the absence of a time-limit for the measure and the way in which he had been notified of the caution (by the anti-crime division of the local police station), the caution had had a serious impact on his reputation as an individual and as a lawyer.

**(b) The Court's assessment***(i) General principles* $(\alpha)$  Private life

73. The Court reiterates that “private life” is a broad term not susceptible to exhaustive definition (see *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, § 43, ECHR 2004-VIII). It further acknowledges that it would be too restrictive to limit the notion of “private life” to an “inner circle” in which the individual may live his or her own personal life as he or she chooses, thus excluding entirely the outside world not encompassed within that circle (see *Niemietz v. Germany*, 16 December 1992, § 29, Series A no. 251-B).

74. Article 8 thus guarantees a right to “private life” in the broad sense, including the right to lead a “private social life”, that is, the possibility for the individual to develop his or her social identity. In that respect, the right in question enshrines the possibility of approaching others in order to establish and develop relationships with them (see *Bărbulescu v. Romania* [GC], no. 61496/08, § 71, 5 September 2017). Therefore, Article 8 protects, in addition, a right to personal development, and the right to establish and develop relationships with other human beings and the outside world (see *Denisov v. Ukraine* [GC], no. 76639/11, § 95, 25 September 2018).

75. The Court has also found that a person's reputation forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her “private life” (see *Pfeifer v. Austria*, no. 12556/03, § 35, 15 November 2007). In order for Article 8 to come into play, the attack on personal honour and reputation must attain a certain level of gravity and in a manner causing prejudice to personal enjoyment of the right to respect for private life (see *A. v. Norway*, no. 28070/06, § 64, 9 April 2009).

 $(\beta)$  Family life

76. The Court reiterates that it follows from the concept of family on which Article 8 is based that a child born of the union created between the spouses by a lawful and genuine marriage is *ipso jure* part of that relationship; hence, from the moment of the child's birth and by the very fact of it, there exists between him or her and his or her parents a bond amounting to “family life”, even if the parents are not then living together (see *Berrehab v. the Netherlands*, 21 June 1988, § 21, Series A no. 138). Cohabitation is not a *sine qua non* of “family life” between parents and minor children (see *Naltakyan v. Russia*, no. 54366/08, § 151, 20 April 2021).

*(ii) Application of the above principles to the present case*

77. The Court considers that the police caution issued in the stalking-prevention proceedings was capable of affecting the applicant's family life and private social life, as well as his reputation.

78. First of all, the Court notes that the applicant was warned not to repeat the behaviour which had led to the imposition of the measure, such as sending messages to his wife, with whom the applicant shared custody of their daughter, and making telephone calls to mutual friends. Therefore, the caution was formulated in such a way as to restrict, at least in principle, the applicant's possibility to have contact with his daughter and relations with friends (see paragraph 10 above). In particular, given the general wording of the minutes of the caution and the need to carefully modulate the content and nature of communications and contacts with his wife in order not to breach the obligations stemming from the measure, the applicant could have faced limitations on the possibility of organising visits with his daughter, spending time with her and, therefore, exercising his parental responsibilities, which is in the best interests of his child and the need to guarantee her right to co-parenting. Accordingly, the Court considers that the caution was capable of adversely affecting the applicant's enjoyment of family life and private social life (see, *mutatis mutandis*, *Sanchez Cardenas v. Norway*, no. 12148/03, § 33, 4 October 2007).

79. Secondly, given that the measure was adopted in respect of behaviours which fell within the definition of "stalking", and as the text of the police caution in the present case stipulated that the applicant was harassing and intimidating his wife, the Court considers that the measure was capable of having a stigmatising effect on the applicant and affecting his reputation (see, *mutatis mutandis*, *Mikolajová v. Slovakia*, no. 4479/03, § 57, 18 January 2011, and *Vicent Del Campo v. Spain*, no. 25527/13, § 40, 6 November 2018). In particular, the Court considers that the mere fact of being summoned, in person, by a public security authority, being informed that the latter believes that the summoned individual's behaviour falls within the definition of a crime as serious as stalking and being invited to "behave in accordance with the law", is capable of having a strong impact on that individual's reputation. The Court further notes that the *Consiglio di Stato*, although confirming the caution imposed on the applicant, acknowledged that the measure produced serious effects on an individual's personal sphere, as it entailed the possibility of prosecution for the crime of stalking even in the absence of a criminal complaint lodged by the victim and the automatic application of an aggravating circumstance in the event of conviction (see paragraph 19 above). Accordingly, and in the light of the findings in the further domestic case-law examined that the caution directly affects individuals' interests from the moment of its adoption (see paragraph 37 above), the Court is not persuaded by the Government's argument that the caution was a "measure *in bonam partem*", favourable to its addressee.

80. In the light of the foregoing, and taking into account the content of the obligations imposed on the applicant (see paragraph 10 above), the Court cannot accept the Government's argument that the imposition of the measure in issue did not actually have an impact on the applicant's right to private and family life as, at the very least, it had a chilling effect on the exercise of those rights (see, *mutatis mutandis*, *Karastelev and Others v. Russia*, no. 16435/10, § 71, 6 October 2020, and *S.A.S. v. France* [GC], no. 43835/11, §§ 57 and 110, ECHR 2014 (extracts)).

81. Accordingly, the Court concludes that the facts underlying the applicant's complaints fall within the scope of Article 8 of the Convention, both under its family life and private life limbs, which is therefore applicable to the matter at hand, and that there has been an interference with the applicant's rights guaranteed by that provision.

### *3. Overall conclusion on admissibility*

82. The Court notes 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*

83. The applicant argued that the legal basis for the measure had not been compatible with the requirements for the quality of the law under the Convention, as section 8 of Decree-Law no. 11/2009 had not allowed him to understand what behaviours would lead to the caution being issued, and what obligations had been imposed on him as a result of it being issued. He further observed that the case-law developments invoked by the Government in order to demonstrate the jurisprudential clarification of the applicable domestic provision were not relevant for the purposes of the instant case. According to the applicant, a measure which remained in force for an indefinite period of time without any possibility of obtaining its revocation was incompatible with the principles enshrined in the Convention.

84. Moreover, the applicant submitted that there had been no relevant and sufficient reasons justifying the measure, as it had been adopted without referring to the available evidence and notwithstanding the results of the inquiries carried out by the police. He further argued that he had not been allowed to sufficiently protect his interests in accordance with the adversarial principle, as he had not been notified of the institution of the administrative proceedings, and the competent judicial authorities had not carried out a sufficient review of the reasons of urgency justifying such an exception, nor assessed whether the measure had been justified in the concrete circumstances of the case.



85. The Government argued that the measure had been both in accordance with the law and necessary in a democratic society.

86. According to them, section 8 of Decree-Law no. 11 of 2009 was accessible and sufficiently clear, as it specified the conditions under which the measure could be adopted, and the obligations imposed on the individual who has been cautioned. In particular, they observed that in its judgment no. 4077 of 25 June 2020, the *Consiglio di Stato* had clarified that a caution could be issued when the behaviour prohibited under Article 612-*bis* of the Criminal Code had taken place. They added that the behaviour prohibited by Article 612-*bis* was clear and foreseeable, as specified by the Constitutional Court in its judgment no. 172 of 11 June 2014, and that the obligations imposed on the person who has been cautioned were sufficiently clear and foreseeable, as they merely reiterated the obligation not to commit the crime of stalking (see judgment no. 17350 of 19 August 2020 of the Court of Cassation).

87. As to the necessity of the measure, the Government argued that although the applicant had not taken part in the administrative proceedings before the *questore*, he could have requested the latter to conduct a review of the measure or could have lodged an appeal with a higher administrative authority, which would have allowed a full review of the measure. They further observed that in the event of that appeal being dismissed, the applicant could have lodged an appeal before the competent administrative court. In the Government's view, the review carried out by the administrative courts was fully compliant with the principles established in the Court's case-law.

88. They further argued that the failure to notify the applicant of the institution of the stalking-prevention proceedings had been justified by the extreme urgency of the situation.

89. Lastly, the Government argued that given its aim, namely, the prevention of crime and the protection of the health of the applicant's wife, the measure had been proportionate. They admitted that there was no time-limit on the measure, but in their view the applicant had not suffered any prejudice on that account. They further admitted that the applicable legal framework did not confer on the applicant the right to obtain a review and revocation of the measure, as the administrative authorities' power of review was fully discretionary, but they disagreed that any detrimental consequences arose for the person who has been cautioned. They further observed that, according to some recent case-law developments, the right to obtain a review or revocation of the measure had started to be recognised (Sicily TAR, Second Section, judgment no. 508 of 20 February 2019)

## 2. *The Court's assessment*

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

90. The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities (see, for example, *Jansen v. Norway*, no. 2822/16, § 88, 6 September 2018) and that an interference with an applicant's right to private and family life will give rise to a breach of Article 8 of the Convention unless it can be justified under its paragraph 2 as being "in accordance with the law", pursuing one or more of the legitimate aims listed therein, and being "necessary in a democratic society" in order to achieve the aim or aims concerned (see *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, § 167, 24 January 2017).

#### (i) *Legal basis*

91. According to the Court's settled case-law, the expression "in accordance with the law" not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the persons concerned, foreseeable as to its effects and compatible with the rule of law (see *De Tommaso v. Italy* [GC], no. 43395/09, § 107, 23 February 2017, and *Brazzi v. Italy*, no. 57278/11, § 39, 27 September 2018). The Court further points out that the concept of "law" must be understood in its "substantive" sense, not its "formal" one. It therefore includes everything that goes to make up the written law, including court decisions interpreting the law (see *Cumhuriyet Halk Partisi v. Turkey*, no. 19920/13, § 93, 26 April 2016).

92. The phrase thus implies that domestic law must be sufficiently foreseeable in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which the authorities are entitled to resort to measures affecting their rights under the Convention (see *Fernández Martínez v. Spain* [GC], no. 56030/07, § 117, ECHR 2014 (extracts)), although absolute certainty must not be expected (see *Slivenko v. Latvia* [GC], no. 48321/99, § 107, ECHR 2003-X).

93. For domestic law to meet those requirements it must also afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise (see *Ivashchenko v. Russia*, no. 61064/10, § 73, 13 February 2018, and the cases cited therein).

94. The procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when

fixing the regulatory framework, remained within its margin of appreciation. In particular, the Court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 (see *Connors v. the United Kingdom*, no. 66746/01, § 83, 27 May 2004). What is required by way of safeguard will depend, to some extent at least, on the nature and extent of the interference in question (see *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 170, ECHR 2013).

95. In various contexts of Article 8 of the Convention, the Court has emphasised that the concepts of lawfulness and the rule of law in a democratic society also require that measures affecting human rights must be subject to some form of adversarial proceedings before an independent body competent to review in a timely fashion the reasons for the decision and the relevant evidence (see *Ivashchenko*, cited above, § 74, and the cases cited therein). A domestic court would not be in a position to provide “relevant and sufficient” reasons for the interference without some form of adversarial proceedings in which the arguments put forward by the domestic authority could be weighed up against those of the affected party (see, *mutatis mutandis*, *Taganrog LRO and Others v. Russia*, nos. 32401/10 and 19 others, § 203, 7 June 2022).

(ii) *Legitimate aim and necessity in a democratic society*

96. In determining whether the impugned measures were “necessary in a democratic society”, the Court has to consider whether, in the light of the case as a whole, the reasons adduced to justify them were relevant and sufficient (see *Pişkin v. Turkey*, no. 33399/18, § 212, 15 December 2020). The notion of necessity further implies that the interference corresponded to a pressing social need and, in particular, that it was proportionate to the legitimate aim pursued (see *Tortladze v. Georgia*, no. 42371/08, § 58, 18 March 2021). Regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, the aims in the second paragraph of Article 8 being of a certain relevance (see *Polat v. Austria*, no. 12886/16, § 106, 20 July 2021).

97. While it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the reasons cited for the interference are relevant and sufficient remains subject to review by the Court for conformity with the requirements of the Convention (see *Ghailan and Others v. Spain*, no. 36366/14, § 62, 23 March 2021, and *Naumenko and SIA Rix Shipping v. Latvia*, no. 50805/14, § 50, 23 June 2022).

98. The Court further reiterates that, while Article 8 contains no explicit procedural requirements, the Court cannot satisfactorily assess whether the reasons adduced by national authorities to justify their decisions were “sufficient” for the purposes of Article 8 § 2 without at the same time determining whether the decision-making process, seen as a whole, provided the applicant with the requisite protection of his interests, as safeguarded by

that Article (see *Lazoriva v. Ukraine*, no. 6878/14, §§ 62-63, 17 April 2018, and *Fernández Martínez*, cited above, § 147).

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

*(i) Whether the measure was in accordance with the law*

99. In the present case, it is common ground between the parties that the police caution had a basis in national law, namely section 8 of Decree-Law no. 11/2009, and that the latter was accessible. However, the applicant argued that that provision did not allow him to foresee what behaviours would lead to the imposition of the measure, that the obligations imposed on him were unclear and extremely wide, that he had been unable to protect his interests, as he was not allowed to participate in the administrative proceedings before the *questore*, and that the *Consiglio di Stato* did not sufficiently review the legality of the measure, which furthermore remained in force for an indefinite period of time and in respect of which no right to obtain a review or a revocation was provided by the applicable legal framework.

100. The Court notes that the legal basis for the measure against the applicant was the classification of his actions as “potentially” constituting the crime of stalking and the risk of him repeating those actions, and that the measure adopted had the stated purpose of preventing the commission of that crime (see paragraphs 27-28 above). As a consequence, as far as the legal basis is concerned, the present case raises three different issues: (i) whether the domestic law sufficiently delimited the scope of discretion conferred on the *questore* in adopting the measure; (ii) whether the obligations imposed on the applicant on account of the caution were formulated with sufficient precision to enable him to regulate his future behaviour; and (iii) whether Italian law afforded a measure of legal protection against arbitrary interferences by public authorities with the applicant’s right to private and family life.

*(α) Whether section 8 of Decree-Law no. 11/2009 sufficiently delimited the discretion conferred on the questore*

101. The Court must first assess whether the legal basis determined the conditions under which the *questore* was entitled to impose the caution. In this connection, the Court reiterates that the scope of the concept of foreseeability depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed (see *Georgouleas and Nestoras v. Greece*, nos. 44612/13 and 45831/13, § 65, 28 May 2020, and *Milanković v. Croatia*, no. 33351/20, § 62, 20 January 2022).

102. In the light of the above, the Court notes that the police caution, issued in stalking-prevention proceedings, was introduced by Decree-Law no. 11/2009, which was aimed at combating sexual violence and the crime of

stalking. While section 7 of that Decree-Law introduced the criminal offence of stalking in the Italian legal order, section 8 stipulates, in its first paragraph, that until a criminal complaint for the crime of stalking provided for under Article 612-*bis* of the Criminal Code has been lodged, the alleged victim may report the facts to the *questore*. Under the second paragraph of the provision, a police caution may be issued, provided that the *questore* has obtained, if necessary, information from the investigative bodies and has heard the persons with knowledge of the facts, and that he or she considers that the request is well founded (see paragraph 26 above). Therefore, section 8 of Decree-Law no. 11/2009 clearly referred to its section 7. Accordingly, the Court notes that the domestic authorities interpret the applicable provision in the sense that stalking-prevention proceedings may be instituted and a caution issued with regard to those behaviours which fall within the definition of the criminal offence of stalking provided for by Article 612-*bis* of the Criminal Code (see paragraph 30 above).

103. As the applicant did not contest as such the clarity and foreseeability of Article 612-*bis* of the Criminal Code, or provide any element capable of raising doubts in that sense (see, in this regard, judgment no. 172 of 11 June 2014 of the Constitutional Court, cited in paragraph 29 above), the Court concludes that the text of section 8 of Decree-Law no. 11/2009, considered in its context and in the light of its purpose, was formulated with a sufficient degree of clarity in order to delimit the scope of discretion conferred on the *questore* and, therefore, to prevent arbitrariness.

104. The Court further notes that such conclusion has been consistently validated by subsequent case-law of the *Consiglio di Stato* (see paragraph 28 above) and the Court of Cassation (see paragraph 33 above), which identified the conditions for applying the measure by reference, made in the text of section 8 of Decree-Law no. 11/2009, to the crime of stalking. The case-law clarified that the difference between criminal prosecution of an alleged stalker and the imposition of a police caution lay, from a procedural point of view, in whether a criminal complaint had been lodged by the victim, and in the different burden of proof applied. Conclusive evidence of the commission of the crime is not necessary to issue a caution; it requires the existence of serious reasons for believing, on the basis of circumstantial evidence characterised by an adequate degree of reliability, that the behaviour prohibited by Article 612-*bis* of the Criminal Code has taken place and may take place again in the future (see paragraph 30 above).

- (β) Whether the caution was formulated with sufficient precision to enable the applicant to regulate his future behaviour

105. The Court will next assess whether the obligations imposed on the applicant on account of the imposition of the police caution were sufficiently clear as to allow him to regulate his future behaviour. In this regard, the Court notes that the obligations imposed on the applicant could appear to be worded

in very general terms and their content vague and indeterminate. In particular, the measure warned the applicant “to behave in accordance with the law” and not to repeat the behaviour which had led to the imposition of the measure (see paragraph 11 above).

106. However, the Court cannot conclude that the expression “to behave in accordance with the law” in the present case was an open-ended reference to the entire Italian legal system which did not give any further clarification as to the specific norms whose non-observance would entail the application of the legal consequences of non-compliance with the police caution (contrast *De Tommaso*, cited above, § 122).

107. Since the caution was expressly aimed at preventing the commission of the crime of stalking (see paragraph 27 above), the Court considers the applicant could have foreseen which behaviours were prohibited, namely those criminalised by Article 612-*bis* of the Criminal Code. Moreover, as already noted, the applicant was warned not to repeat the behaviour which had led to the adoption of the measure which, according to the text of the caution, included a series of behaviours undertaken “with a potentially threatening attitude, aimed at controlling with insistent, obsessive and intimidating tones [his wife’s] movements and, more generally, her habitual daily life”, capable of causing “to the person who applied for the caution a persisting and serious state of anxiety, fear and concern for her personal safety” (see paragraph 11 above).

108. The Court therefore considers that, on the basis of the text of the caution, the applicant knew or should have known that the behaviour proscribed by the measure corresponded to the crime of stalking and, in particular, to acts of “threat and harassment” repeated in such a way as to cause his wife a persisting and serious state of anxiety, fear and concern for her personal safety.

109. The Court also acknowledges that the subsequent case-law, in particular judgment no. 17350 of 19 August 2020 of the Court of Cassation, confirmed that the expression “to behave in accordance with the law” had to be understood as a reference to the behaviours criminalised by Article 612-*bis* of the Criminal Code (see paragraphs 33-35 above).

(γ) Whether the applicable legal framework provided sufficient guarantees against arbitrariness

110. The Court reiterates that the existence of sufficient procedural safeguards must be assessed by having regard to, to some extent and at least among other factors, the nature and the extent of the interference in question (see *Ivashchenko*, cited above, § 74, and *Oleksandr Volkov*, cited above, § 170).

111. Having regard to the applicant’s complaints, the Court will assess whether the applicable legal framework allowed the applicant to be involved in the decision-making process, seen as a whole, to a degree sufficient to

provide him with the requisite protection of his interests (see, *mutatis mutandis*, *Maslák v. Slovakia* (no. 2), no. 38321/17, § 159, 31 March 2022), whether the measure was amenable to a sufficient judicial review (see, *mutatis mutandis*, *Pişkin*, cited above, § 209, and *Karastelev and Others*, cited above, §§ 94-97, and the cases cited therein), and whether the legal basis regulated the duration of the measure (see, *mutatis mutandis*, *Enea v. Italy* [GC], no. 74912/01, § 143, ECHR 2009, and *Falzarano v. Italy* (dec.), no. 73357/14, § 19, 15 June 2021).

112. As to the individual's participation rights, the Court reiterates that the right to be heard increasingly appears as a basic procedural rule in democratic States, above and beyond judicial procedures, as demonstrated, *inter alia*, by Article 41 § 2 (a) of the Charter of Fundamental Rights of the European Union in relation to individual decisions taken by institutions, bodies, offices and agencies of the European Union (see *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, § 156, 17 May 2016, and paragraph 53 above). It further observes that the importance of the right to be heard in administrative procedures adversely affecting individuals' interests has been stressed by the Committee of Ministers in Resolution 77 (31) on the protection of the individual in relation to the acts of administrative authorities (see paragraph 46 above), and in Recommendation CM/Rec(2007)7 on good administration (see paragraph 51 above).

113. The Court notes that Resolution 77 (31) establishes that the right to be heard may be modified or excluded in order to protect the principle of good and efficient administration, as well as the interests of third parties (see paragraph 47 above). For its part, Article 8 of the Appendix to Recommendation CM/Rec(2007)7 stipulates that private persons must be provided the opportunity to participate in the preparation and implementation of administrative decisions which affect their rights or interests "unless action needs to be taken urgently" (see paragraph 50 above). Article 14 of the Appendix adds that, if the individual has not been involved in the procedure, the right to be heard must be guaranteed within a reasonable time (see paragraph 51 above).

114. The Court therefore considers that the manner and mode of implementation of the right to be heard must be adapted to the inherent characteristics and purpose of the relevant procedure and the measure to be adopted. In the present case, the measure in question was aimed at preventing the reiteration of behaviours which constitute the crime of stalking and, thus, it falls within the scope of Article 53 of the Istanbul Convention, concerning "restraining or protection orders" in the context of domestic violence, the second paragraph of which stipulates that such measures are "where necessary, [to be] issued on an *ex parte* basis which has immediate effect" (see paragraph 55 above). In this connection, the Court notes that paragraph 272 of the Explanatory Report to the Istanbul Convention clarifies

that, pursuant to that provision, “in certain cases” and “where necessary” such measures are to be issued on the request of one party only, with immediate but temporary effect. Therefore, the Istanbul Convention, while providing for the possibility of adopting such measures without previously hearing their addressee, recognises that this possibility must be grounded on the necessity shown by the circumstances of the specific case.

115. With regard to the domestic legal framework in issue in the present case, the Court observes that, according to the relevant domestic case-law, the right to be heard has its basis in section 7(1) of Law no. 241/1990, which enshrines a general right of interested individuals to be notified of the institution of administrative proceedings; pursuant to the same provision, that right can be derogated from where there are “specific reasons to expedite the proceedings” (see paragraph 24 above). Moreover, section 8(2) of Decree-Law no. 11/2009, regulating the stalking-prevention proceedings, expressly stipulates that the *questore*, before issuing the caution, must hear the persons with knowledge of the facts (see paragraph 26 above). The Court further observes that since the very first cases in which the measure at issue was subjected to the judicial review of the administrative courts of first instance and of the *Consiglio di Stato* (see the judgments cited in paragraph 37 above), it has been clarified that the caution is an administrative measure which, as such, is subject to the respect of the participation rights enshrined in Law no. 241/1990, namely the right to be heard before the adoption of the measure, except in cases of exceptional urgency, which must be duly demonstrated and reasoned. Lastly, the Court notes that that interpretation is currently followed in the majority of the case-law available nowadays, which has further clarified that the reasons of exceptional urgency allegedly justifying a derogation from the individual’s right to be heard are subject to the judicial scrutiny of the competent administrative courts (see paragraph 39 above).

116. The Court finds that the domestic legal framework, as interpreted by the domestic courts, strikes a fair balance between the competing interests, as it ensures the achievement of the protective aim pursued by the measure without unduly encroaching on the possibility for the individual affected by it to sufficiently protect his or her interests. And indeed, while reiterating the importance of the right to be heard (see paragraphs 112-13 above), the Court notes that in the stalking-prevention proceedings at issue in the present case the effectiveness of the caution, namely the achievement of the aim of protecting the right to physical and psychological integrity of the individual who seeks the adoption of the measure, often depends on a rapid decision-making process (see, *mutatis mutandis*, *Cumhuriyet Vakfi and Others v. Turkey*, no. 28255/07, § 71, 8 October 2013, and *Micallef v. Malta* [GC], no. 17056/06, § 86, ECHR 2009). The Court therefore accepts that in cases of urgency, duly indicated in the reasoning in the minutes of the caution and subjected to the judicial review of the competent administrative courts,



the *questore* may decide that the right to be heard can be derogated from (see, *mutatis mutandis*, *Tortladze*, cited above, § 66, and *Kuzminas v. Russia*, no. 69810/11, § 24, 21 December 2021).

117. In the light of the above, the Court considers that the domestic legal framework allowed the individual affected by the measure to be involved in the decision-making process to a degree which, in the light of the nature and extent of the interference in question and of its purpose, is sufficient to provide him or her with the requisite protection of their interests.

118. As to the existence of an effective judicial review, the Court notes that the *questore* is required to indicate, in the minutes of the caution, the factual and legal reasons justifying the measure (see paragraph 32 above). Having carefully examined the case-law on the issue provided by the Government (see paragraph 41 above), the Court is satisfied that the competent administrative courts have the power to exercise a sufficient judicial review of those reasons. They can, in particular, assess whether the police authority undertook sufficient inquiries, whether the establishment of facts is compatible with the inquiries undertaken and whether, as a consequence, they lead to the conclusion that the request of the alleged victim is well founded. As the administrative courts are competent to review the reasons for the measure as indicated in the minutes of the caution and the relevant evidence, the Court is satisfied that such an assessment amounts to a sufficient judicial review, within the meaning of its case-law.

119. As to the time-limit of the measure, the Court notes that the Government admitted (see paragraph 89 above) that the measure remains in force for an indefinite period of time and that the individual does not have the right to obtain a periodic review or reassessment of the measure leading to its revocation, which might be discretionally granted by the administrative authority which adopted it (see paragraph 42 above). While the Government provided one first-instance domestic decision in which it had been considered that the individual should have the right to obtain the review and revocation of a measure similar to the one at issue in the present case (see paragraph 44 above), in other cases the domestic administrative courts considered that the police caution at issue in the present case was an “instantaneous” measure which was not subject to review or revocation (see paragraph 43 above). The Court therefore observes that, at least when the facts which led to the present application took place, some guarantees against arbitrariness were not available in the applicable legal framework, and that as things stand it is at least doubtful that it is possible to obtain the review or revocation of the measure.

120. The Court considers that the fact that a domestic legal framework does not provide for a time-limit for the effects of measures affecting rights protected under the Convention, or the right to obtain a review or revocation of them should they no longer be justified, is problematic from the point of view of the guarantees against arbitrariness imposed by the principle of

legality. Article 53 § 2 of the Istanbul Convention stipulates that restraining or protection orders in cases of domestic violence are to be “issued for a specified period or until modified or discharged” (see paragraph 55 above), and paragraph 271 of the Explanatory Report to the Istanbul Convention clarifies that this is imposed by the principle of legal certainty (see paragraph 56 above). However, taking into account the Court’s conclusions with regard to the necessity and proportionality of the measure in the specific circumstances of the present case (see paragraph 144 below), it is not necessary to assess whether this factor alone leads to the conclusion that the interference in question was not “in accordance with the law”, within the meaning of Article 8 of the Convention. Moreover, the Court reiterates that in any case the element of uncertainty in the statute and the considerable latitude it affords the authorities from this point of view are material considerations to be taken into account in determining whether the measure complained of struck a fair balance between the competing interests (see, *mutatis mutandis*, *Beyeler v. Italy* [GC], no. 33202/96, §§ 109-10, ECHR 2000-I, *Alentseva v. Russia*, no. 31788/06, § 65, 17 November 2016, and, *mutatis mutandis*, *Béla Németh v. Hungary*, no. 73303/14, § 40, 17 December 2020, and *Zelenchuk and Tsytsyura v. Ukraine*, nos. 846/16 and 1075/16, § 106, 22 May 2018, and paragraph 134 below).

121. Accordingly, the Court will continue its assessment on the assumption that the measure was “in accordance with the law” for the purposes of Article 8 § 2 of the Convention.

*(ii) Whether the measure pursued a legitimate aim*

122. The parties did not dispute that the interference with the applicant’s right to respect for his private and family life pursued several legitimate aims for the purposes of Article 8 § 2 of the Convention, namely the prevention of disorder and crime and the protection of health, or the protection of the rights and freedoms of others (see *M.S. v. Italy*, no. 32715/19, § 121, 7 July 2022).

123. The Court further notes that with the purpose of fulfilling the legitimate aims mentioned above Italy has ratified the Council of Europe Convention on preventing and combating violence against women and domestic violence, and that compliance with the obligations established therein is, *inter alia*, the aim of the measure at issue (see paragraph 55 above).

*(iii) Whether the measure was necessary in a democratic society and proportionate*

124. In this context, taking into account the applicant’s complaints, the Court will examine whether (i) the applicant was involved in the decision-making process to a degree sufficient to provide him with the requisite protection of his interests (see *Lazoriva*, cited above, §§ 62-63), (ii) the reasons adduced by the domestic authorities to justify the measure were relevant and sufficient (see *Pişkin*, cited above, § 212), and (iii) whether

the measure was subjected to a sufficient judicial review (see *Fernández Martínez*, cited above, § 147).

- (α) Whether the applicant was sufficiently involved in the decision-making process which led to the imposition of the measure

125. The Court reiterates that the right to be heard is an important procedural safeguard which must be implemented in accordance with the nature and purpose of the measure to be adopted (see paragraphs 112-13 above) which, in the present case, is preventing the reiteration of stalking behaviours, in accordance with the obligations enshrined in the Istanbul Convention (see paragraphs 55-56 and 115 above). Accordingly, the Court reiterates that in cases raising issues of domestic violence States have positive obligations under Articles 2, 3 and 8 of the Convention to take preventive operational measures to protect victims, or potential victims, from real and immediate risks to their life and from breaches of their physical and psychological integrity (see, among many others, *Kurt v. Austria* [GC], no. 62903/15, §§ 177-89, 15 June 2021, *Volodina v. Russia* (no. 2), no. 40419/19, §§ 47-49, 14 September 2021, *Malagić v. Croatia*, no. 29417/17, § 57, 17 November 2022).

126. In such cases, the Court stressed that the decision by the authorities as to which operational measures to take will inevitably require, at both general policy and individual level, a careful weighing of the competing rights at stake and other relevant constraints. The Court has emphasised in domestic violence cases the imperative need to protect the victims' human rights to life and to physical and psychological integrity. At the same time, there is a need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects due process and other safeguards that legitimately place restraints on the scope of their actions, including the guarantees contained, as far as relevant for the purposes of the present case, in Article 8 of the Convention (see *Kurt*, cited above, § 182).

127. The Court must also take into account the fact that the caution is immediately enforceable, and that the appeal lodged against it before the competent administrative courts does not entail its automatic suspension (contrast, *mutatis mutandis*, *Dyagilev v. Russia*, no. 49972/16, § 77, 10 March 2020).

128. In the present case, the Court notes that the applicant was not heard by the *questore* before the issuing of the caution (see paragraph 9 above). Consequently, he was not afforded the opportunity to put forward arguments in support of his position. The caution was, by contrast, granted on the basis of the arguments and evidence presented by the person who applied for the caution only. In this connection, the Court reiterates that according to its case law, after receiving a complaint of domestic violence the authorities are under a duty to conduct an "autonomous" and "proactive" assessment of the risk (see *Kurt*, cited above, § 169), and considers that a decision on the measures

to be taken must take into consideration the entirety of the evidence available to the authorities.

129. The Court further observes that the minutes of the caution, as issued by the *questore*, did not set out the pressing circumstances which allegedly necessitated an urgent measure. The minutes merely stipulated that there existed a “necessity and urgency” to prevent further stalking behaviour against the applicant’s wife (see paragraph 10 above). The TAR annulled the measure on this ground (see paragraphs 14-15 above). By contrast, the *Consiglio di Stato* quashed the first-instance judgment on the assumption that the caution, being a preventive measure, was in itself characterised by the need to urgently intervene in order to prevent serious irreparable consequences for the person being stalked and that, as a consequence, no reasons had to be adduced by the *questore* (see paragraphs 19-20 above). Accordingly, it cannot be said that it carried out an independent review of whether there was an imminent risk for the applicant’s wife’s safety or other reasons justifying the failure to hear the applicant. It follows that no justification was provided, either by the *questore* or by the administrative courts, for the derogation from the applicant’s right to be heard in the administrative proceedings before the *questore*.

130. The Court notes that some reasons were provided by the Government in the present proceedings. They argued that such reasons existed in the specific circumstances of the case, as demonstrated by the fact that the caution was issued two weeks after the request had been lodged by the applicant’s wife. The Court, however, is not persuaded by those reasons. And, indeed, in those two weeks the police authorities heard the testimonies of seventeen different individuals mentioned by the applicant’s wife in her request (see paragraph 8 above). The Court sees no reason why the domestic authorities could have not heard the applicant as well.

131. In addition, the Court observes that the approach followed by the *Consiglio di Stato* in the present case is at odds with the case-law then available of the administrative courts of first instance and of the *Consiglio di Stato* (see paragraph 37 above), and with the approach followed nowadays in the majority of the domestic case-law (see paragraph 39 above), in accordance with which the reasons of necessity and urgency must be duly demonstrated in the light of the circumstances of each specific case and subjected to the judicial scrutiny of the administrative courts.

(β) Whether the domestic authorities provided relevant and sufficient reasons for the measure

132. The Court reiterates that it is in the first place for the national authorities to assess and give the reasons justifying an interference with the rights protected under the Convention (see paragraph 97 above). The fundamental importance of the obligation to state the reason for administrative acts affecting individual interests has been stressed, *inter alia*,

in Article IV of Committee of Ministers Resolution 77 (31) on the protection of the individual in relation to the acts of administrative authorities (see paragraph 48 above) and Article 17 § 2 of Recommendation CM/Rec(2007)7 of the Committee of Ministers on good administration (see paragraph 52 above). In the exercise of its supervisory jurisdiction the Court must assess whether those reasons were “relevant and sufficient”. In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in the Convention and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see *Taganrog LRO and Others*, cited above, § 150).

133. In exercising its supervisory jurisdiction, the Court will also take into account the fact that the national authorities are accorded a certain margin of appreciation, the scope of which will depend on such factors as the nature and seriousness of the interests at stake and the gravity of the interference (see *Naumenko and SIA Rix Shipping*, cited above, § 51).

134. While reiterating the importance of the aim pursued by the police caution at issue, the Court considers that several factors militate in favour of strict scrutiny in the present case. First, the measure produces serious consequences, as it entails the possibility of prosecution for the criminal offence of stalking even in the absence of a criminal complaint lodged by the victim and the automatic application of an aggravating circumstance in the event of conviction (see paragraph 26 above). Secondly, although the Court concluded that the measure was in accordance with the principle of legality, in assessing its proportionality it must take into account that the obligations imposed on the applicant were worded in very general terms (see paragraphs 11 and 105 above), that the measure remains in force for an indefinite period of time and that, at least when the caution was issued, there was no right to obtain a periodic review or reassessment of the measure aimed at its revocation (see paragraph 120 above). Thirdly, the measure was adopted without previously allowing the applicant to put forward his arguments (see paragraph 128 above).

135. In this connection, the Court observes that the minutes of the caution issued by the *questore* lacked in reasoning, as they merely stipulated that, in the light of the inquiries undertaken by the police force, the episodes referred to by the applicant’s wife were proven, although they observed that some of them were not relevant (see paragraph 10 above). The Court cannot but note that the relevant facts, in addition to being referred to “as indicated by the person who applied for the caution”, were worded in an extremely generic fashion (see paragraph 10 above). The minutes of the caution referred, for example, to: “insults uttered in the presence of other persons”, without clarifying which insults had been used and in the presence of whom; “telephone calls made in private and at the workplace to the person who applied for the caution and other persons”, without indicating the content of

those telephone calls; and “sending text messages [and] persistent and repeated requests”, again without indicating the content and context of those messages. Similarly, the Court finds that the qualification of those behaviours as having been undertaken with a “potentially threatening attitude” was very vague.

136. The Court further observes that there is no reference in the minutes of the caution to the fact that the vast majority of the witnesses had not confirmed the applicant’s wife’s version of the facts, and there is no assessment of the facts resulting from the inquiries carried out by the police. The minutes further mention some “additional documents gathered” but there is no indication as to what those documents were and what conclusions were drawn from them. The reasoning, as can be inferred from the minutes of the caution, took as its starting-point the hypothesis of the facts as alleged by the applicant’s wife, and stipulated that those facts were proven, without mentioning the inquiries that had been undertaken and without assessing in what way the results of those inquiries confirmed the original hypothesis. Therefore, such reasoning does not allow the Court to assess in what way the administrative authority assessed the evidence gathered through the inquiries.

137. The Court is mindful that the measure at issue in the present case is an “oral” caution, and that the minutes (*processo verbale*) delivered to its addressee (see paragraph 26 above) are a record of the inquiries undertaken by the police and a summary of the assessment of the *questore* which, in cases of urgency, must be drafted in a very short time. However, this cannot exempt the domestic authorities from the obligation to provide relevant and sufficient reasons justifying measures interfering with rights protected under Article 8 of the Convention (see paragraph 132 above), also in the light of the need to guarantee a full judicial review of those reasons. In any case, no reasons of urgency were shown by the domestic authorities in the present case (see paragraph 129 above).

(γ) Whether the measure was subjected to a sufficient judicial review

138. The Court reiterates that measures affecting human rights must be subjected to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and the relevant evidence. The individual must be able to challenge the executive’s assertions. Failing such safeguards, the police or other State authority would be able to encroach arbitrarily on rights protected by the Convention (see, *mutatis mutandis*, *Liu v. Russia* (no. 2), no. 29157/09, § 87, 26 July 2011). In the present case, a thorough judicial review was all the more necessary, given the failure on the part of the *questore* to provide relevant and sufficient reasons for the adopted measure (see paragraphs 135-36 above).

139. In this connection, the Court notes that the applicant complained before the competent domestic courts of the measure imposed on him. However, the Court considers that in the present case sufficient procedural

guarantees were not afforded to the applicant, as the domestic courts did not provide relevant and sufficient reasons as to whether the actions imputed to him were indeed capable of justifying the imposition of the measure.

140. In this regard, the Court notes that the TAR quashed the measure on procedural grounds (see paragraph 14 above) and, therefore, did not assess the applicant's complaints concerning the justification of the measure in the light of the available evidence or rule on the substantive legality of the caution.

141. The *Consiglio di Stato*, for its part, merely held that the *questore* had "carefully indicated" the inquiries undertaken by the police authorities, from which it was possible to corroborate the statements of the applicant's wife concerning the intimidating behaviour inflicted by the applicant on her (see paragraph 21 above). The Court is unable to find that this was a "sufficient scrutiny", within the meaning of its case-law (see, *mutatis mutandis*, *Ramos Nunes de Carvalho e Sá v. Portugal*, nos. 55391/13 and 2 others, §§ 177-86, 6 November 2018). Notwithstanding the applicant's specific complaints raised before the domestic courts, there is no reference in the judgment of the *Consiglio di Stato*, nor in the caution to which it refers, to the facts as described by the seventeen witnesses that had been heard, nor any reference to the "additional documents gathered" which supposedly confirmed the version of the facts submitted by the applicant's wife. As a consequence, it is not possible to assess, by reading the reasoning of the judgment or the caution to which it refers, what the factual and legal circumstances justifying the measure were. The *Consiglio di Stato* did not carry out an independent review of whether the measure had a reasonable basis in fact, as it did not examine any evidence to confirm or refute the applicant's allegations. It failed, in particular, to examine the critical aspect of the case, namely whether the *questore* was able to demonstrate the existence of specific facts serving as a basis for the assessment that the applicant constituted a danger to his wife. These elements lead the Court to conclude that the *Consiglio di Stato* confined itself to a purely formal examination of the decision to impose the caution.

142. The judgments referred to by the Government demonstrate the possibility, for the administrative courts, to assess the factual basis and the legality of the measure (see paragraph 41 above). However, the Court notes that such an assessment was not sufficiently undertaken in the present case, in which the *Consiglio di Stato* merely held that the caution was legitimate in the light of the reasons adduced by the *questore* without undertaking an assessment of the available evidence.

143. Accordingly, the Court concludes that the judicial authorities did not carry out a sufficient judicial review of the factual foundation and of the legality, necessity and proportionality of the measure.

(δ) Conclusions

144. In the light of the above, the Court finds that the applicant was excluded from the decision-making process to a significant degree in the absence of demonstrated reasons of urgency, that the domestic authorities failed to give relevant and sufficient reasons justifying the measure and that, in view of how the *Consiglio di Stato* carried out the review of the matter, any safeguards it provided the applicant were limited. In sum, the domestic authorities did not afford the applicant the adequate legal protection against abuse to which he was entitled under the rule of law in a democratic society. The interference with the applicant's right to private and family life cannot therefore be said to have been "necessary in a democratic society" for the purposes of paragraph 2 of Article 8 of the Convention.

145. There has accordingly been a violation of Article 8 of the Convention.

### III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

146. 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

147. The applicant claimed 30,000 euros (EUR) in respect of non-pecuniary damage.

148. The Government did not lodge observations in reply to the applicant's claim, but the Court considers that it is excessive.

149. The Court awards the applicant, on an equitable basis, EUR 9,600 in respect of non-pecuniary damage, plus any tax that may be chargeable.

#### B. Costs and expenses

150. The applicant also claimed EUR 6,589.50 in respect of the costs and expenses incurred before the TAR, EUR 5,428 in respect of those incurred before the *Consiglio di Stato*, and EUR 9,920 in respect of those incurred before the Court.

151. The Government did not lodge observations in reply to the applicant's claim.

152. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum (see, for example, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96,



§ 54, ECHR 2000-XI). That is to say, the applicant must have paid them, or be bound to pay them, pursuant to a legal or contractual obligation, and they must have been unavoidable in order to prevent the breaches found or to obtain redress. The Court requires itemised bills and invoices that are sufficiently detailed to enable it to determine to what extent the above requirements have been met (see *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, § 158, ECHR 2014). Simple reference to the tariff fixed by the local bar associations, for example, is insufficient in this regard. In the present case, the Court notes that the applicant has not submitted any evidence (bills or invoices) about the costs and expenses incurred, or that demonstrate that he is legally or contractually obliged to pay them. Therefore, this claim must be rejected for lack of substantiation.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 8 of the Convention;
3. *Holds*
  - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 9,600 (nine thousand six hundred 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 22 June 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener  
Registrar

Marko Bošnjak  
President

GIULIANO GERMANO v. ITALY JUDGMENT

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Sabato is annexed to this judgment.

M.B.  
R.D.

## CONCURRING OPINION OF JUDGE SABATO

### I. INTRODUCTION: SEVERAL STEPS BACKWARDS IN HUMAN-RIGHTS PROTECTION IN THE CONTEXT OF GENDER-BASED VIOLENCE

1. I can share only one finding (which I will set out below in §§ 51-52 of this Opinion) of the several made by the majority in this case. This enabled me to support the conclusion that there has been a violation by the respondent State of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”). I regret having been unable to share the other findings of my distinguished colleagues in the majority, which in my view mark not one, but several, steps backwards in human-rights protection in the context of gender-based violence.

2. Since the majority’s positions and my own diverge in areas of the application of the Convention that are of the utmost importance – in that they concern certain core aspects of the ways and means by which States are to prevent and combat gender-based violence, support and protect victims, and hold perpetrators accountable while respecting the procedural rights of the accused – I feel obliged to set out in some detail the reasons for my dissent, albeit in a concurring opinion. Indeed, should some the principles asserted by the majority acquire the warm patina of undisputed precedent, I fear that the role of the Convention as a powerful instrument to protect individuals<sup>1</sup> from the global epidemic of gender-based violence, in harmonious legal integration with specific international instruments such as the Convention on preventing and combating violence against women and domestic violence (“the Istanbul Convention”)<sup>2</sup>, would be - at least partly - undermined. Thus, it is my hope

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<sup>1</sup> In *Opuz v. Turkey*, § 132, 9 June 2009, the Court clarified, once and for all, that domestic violence, “which can take various forms ranging from physical to psychological violence or verbal abuse”, is “a general problem which concerns all member States and which does not always surface since it often takes place within personal relationships or closed circuits”. It has clarified also that it is not only women who are affected, but men may also be the victims and, indeed, that “children, too, are often casualties of the phenomenon, whether directly or indirectly.” That being stated, it is all too obvious why I will refer in the text to women as victims: statistically and conceptually, women are the almost exclusive victims of gender-based violence.

<sup>2</sup> The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) was adopted by the Committee of Ministers and opened for signature in Istanbul on 11 May 2011. The Convention entered into force on 1 August 2014, and recognises gender-based violence against women as a violation of human rights and a form of discrimination. It may be worth clarifying at the outset that, although it is not the Court’s “task to review governments’ compliance with instruments other than the European Convention on Human Rights and its Protocols”, the Istanbul Convention – “which, like the Convention itself, was drawn up within the Council of Europe” – may “provide it with a source of inspiration”, “like other international treaties” (see, for instance, with reference to the European Social Charter, *Zehnalová and Zehnal v. the Czech*

that, in this or other cases, the departures from the case-law entailed by the majority’s judgment will be speedily corrected by further jurisprudential developments.

3. In order to clarify the issues at stake, I will (in part II of this opinion) deal with some of the facts that have, in my view, been too quickly disposed of by the majority. Understanding the facts makes it easier to understand the law that ought to be applied, as well as the concepts that the majority and myself have used. In particular, as I relate more about the content of the statement made by the “applicant’s wife” to the police, identifying the applicant as an alleged stalker, and the content of the depositions collected by the police, the references to legal concepts such as witness evidence, urgency of the measure, sufficient reasoning, etc. will appear in a new light.

4. I will then (in part III, which I will subdivide into several chapters) identify the (several) points of disagreement between the majority’s findings and my own, as well as the (one) point of agreement. I will finally draw some conclusions (part IV).

## II. THE FACTS AND THEIR ASSESSMENT

### A. The victim’s account (and the victim counts!)

5. The majority, in paragraph 7 of the judgment, relate that “On 13 November 2009 the applicant’s wife”, Ms C.S.<sup>3</sup>, lodged a request (*richiesta*) with the *questore* [local police authority] of Savona, asking it to issue a caution as provided for by section 8 of Decree-Law no. 11 of 23 February 2009 on urgent measures for public security and combating sexual violence and stalking (“Decree-Law no. 11/2009”), converted into Law no. 38 of 23 April 2009 (“Law no. 38/2009” – see paragraphs 25-26 of the judgment).

6. Paragraph 7 of the judgment, in the subsequent two sentences, contains an accurate – but in my view too short – summary of the content of the alleged victim’s request. The woman’s narrative was contained in an 8-page *richiesta* to the police; the Government, in their first observations (pp. 4-5), summarise it in one and a half pages; this will be the length also of my recapitulation.

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*Republic* (dec.), no. [38621/97](#), ECHR 2002-V). Moreover, the Convention cannot be interpreted in a vacuum and must be construed in harmony with the general principles of international law. I would point out, in this regard, that the Court has referred to the Istanbul Convention as a source of inspiration, for example, in *Kurt v. Austria*, 62903/15 [GC], §§ 167, 172, 175, 180-1, 197, 15 June 2021.

<sup>3</sup> I consider that respect for the dignity of the alleged victim imposes an obligation on me to use her name, by way of her initials (Ms C.S.). She was the requesting party in the caution administrative proceedings and was thus also a party (albeit *in absentia*), along with the Ministry of the Interior, to the subsequent domestic judicial proceedings. Literature on the naming of women has become in recent decades an integral part of historical and legal research on discrimination.

This is a necessary exercise: in the area of violence against women, which “often takes place within personal relationships or closed circuits” (see *Opuz v. Turkey*, § 132, 9 June 2009), the victim, who is always also an important witness and often the only one, should never see her narration underestimated. Victims count (although unfortunately in the majority judgment Ms C.S. has not been “counted” as a witness – see paragraph 17 of this Opinion).<sup>4</sup>

7. As I am about to embark on the dangerous exercise of re-reading, within an international court, evidence that the domestic authorities had before them, I must clarify that I indulge in this exercise only because the majority did so first (by counting and comparing witnesses, by substantially disregarding Ms C.S.’s account, by holding that there was no urgency, etc. – see below). Given the Court’s subsidiary role, second-guessing the domestic assessment of evidence should take place only when arbitrariness is evident. The majority held that such arbitrariness existed, while – in principle – I do not (as mentioned, I find only a procedural flaw). However, if the second-guessing of evidence in a case concerning violence against women must be done, then I consider that, as a starting point, the Court should take the voice of the alleged victim seriously. I repeat, victims count.

8. In reading the victim’s request of 13 November 2009, one learns that Ms C.S., born in 1971 and an optometrist who managed her own optician’s shop, and Mr Giuliano Germano, born in 1956 and a lawyer, had married in 1998; a daughter had been born in 2002.

9. Ms C.S. complained that her husband had displayed “repeated harassing conduct, as narrated below”, which had “forced her to radically change [her] daily habits, generating well-founded fear for [her] personal safety and causing, for these reasons, a persistent and serious state of anxiety and terror”.

10. Ms C.S.’s 8-page document reported, among other points:

(a) “oppressive and obsessive behaviour ... determined by an excessive and unjustified jealousy” on her husband’s part, which had led him,

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<sup>4</sup> Unfortunately the majority judgment considers that “the vast majority of the witnesses had not confirmed the applicant’s wife’s version of the facts”, that is, the “hypothesis of the facts as alleged by her” (see paragraph 136 of the judgment). As I will reiterate, in the majority’s view “fourteen statements did not confirm the applicant’s wife version of the facts”; of the other three witnesses, one was mentioned as being “a friend of the applicant’s wife”. Leaving aside the fact that, in the context of violence against women, it is often the situation that only “friends know”, I wish merely to emphasise that Ms C.S.’s account has not been regarded as that of a witness (the main one, in my view), but as a “version”, necessarily needing confirmation. Victims count, and as I mention in the main body of the opinion they should be counted as witnesses. Indeed, it is a widely recognised standard that in domestic-violence cases the intrinsic credibility of the victim can suffice, once the defence rights have been guaranteed. I will include in my conclusions (Part IV) some considerations on the dangers of reducing gender-based violence to mutual accusations and opposed “versions” of the facts.

“especially in recent years, to subject [her] to frequent checks and unlawful investigations”;

(b) from 2006 (three years before the request to the police) the applicant’s behaviour had begun to “turn into real violence” against her person; in particular, he inflicted “beatings and injuries” in that year, as attested by a police intervention at the home and a report by a hospital emergency unit; after a month during which Ms C.S. had found shelter at her parents’ home, the husband had convinced her not to further contact the police, which she accepted in view of the fact that their daughter was then only 4 years old;

(c) in 2008 (the year before the request to the police) he had punched her in the chest, while in 2009 (when the request to the police was made) the applicant, in front of numerous witnesses in a seaside establishment, verbally insulted her and grabbed her by the neck, with attacks continuing in the evening and until the next morning, when she was again treated, as in 2006, by a hospital emergency unit; Ms C.S. decided to file a criminal complaint with regard to this episode, in respect of which criminal proceedings were pending;

(d) in 2009 Ms C.S. initiated judicial separation proceedings; although the family court granted her custody rights in respect of their daughter, Mr Germano continued to utter threats and apply abusive pressure during encounters;

(e) Ms C.S. had then learned that physical assaults, allegedly committed by Mr Germano, had also been reported by other women who had previously been in relationships with him;

(f) in the seven months before the request to the police, Mr Germano’s conduct moved towards “clear stalking”, in that:

- on 8 May 2009, while the woman was with her daughter and in the presence of one of her friends, Ms L.V., Mr Germano appeared at the foot of the building in which she was housed, shouting and ranting, and instructing her from the street to show him their daughter; the insults (some of them specifically cited in the request to the police) continued when the child, accompanied by L.V., went downstairs to see her father; a month later Mr Germano threatened L.V., ordering her not to report the incident; Mr Germano further threatened L.V. by telephone;

- at 5.30 a.m. on the same morning her e-mail provider had notified Ms C.S. about suspicious attempted access to her mailbox, for which Mr Germano knew a previous password;

- in the same month of May 2009, throughout an entire afternoon, Mr Germano made several phone calls to the child’s baby-sitter, each time interrupting the call; this was followed at 7 pm by a phone call from Mr Germano to Ms C.S., accusing her of having ordered the baby-sitter not to answer the phone; he mentioned that he would therefore have asked the judge in charge of the separation proceedings to verify the relevant telephone records, demonstrating this fact as being pertinent to his arguments;

- on 9 May 2009 Ms C.S. had dinner with two couples; the next morning Mr Germano telephoned one person from each couple, asking about his wife's acquaintances;
- Mr Germano then requested information to find out whether Ms C.S. had genuinely attended an optometry course she was enrolled in;
- on 19 May 2009 Mr Germano waited for Ms C.S. at the exit of a beauty parlour and, after insulting her, yanked and followed her as she walked away, giving up only when she threatened to call the police;
- on 23 May 2009 Ms C.S. became certain that she had been shadowed in her movements that day, because when she left her optician's shop, where her daughter remained with the baby-sitter, Mr Germano phoned the latter to ask where Ms C.S. was heading for;
- again on 3 June 2009, Mr Germano was found standing in front of the optician's shop, behind columns from where he was observing Ms C.S.;
- on 29 May 2009, while an employee, Ms S.G., was in the shop, Mr Germano telephoned her, asking for information and alluding to the fact that Ms C.S. was also certainly inside the shop with her lover; due to the constant pressure she was subjected to by Mr Germano, Ms S.G. stated that she wanted to leave her job in the shop;
- on 11 May 2009 Ms C.S. received 15 phone calls from Mr Germano, during which he "constantly threatened [her] that he would wipe the smile off [her] face" and said that "he was making legal moves to ruin [her]" and to make sure that he would "not pay even 1 euro for either the child or [her]";
- in September 2009, further to a heated argument between the spouses concerning the child (who was present), Mr Germano began to shout, lashing out at Ms C.S., putting his hands around her neck in the gesture of strangling her, and finally dragging away the child, in tears, who did not want to sleep at her father's home;
- the girl subsequently reported to her mother that she no longer wanted to go to her father's, "because he says terrible things about [the mother] and insults [her]";
- on 13 October 2009 Mr Germano informed Ms C.S., by text message, that he would have 12 bags containing her personal belongings delivered to her, along with 3 bags containing the child's winter clothes, in order to vacate the former family home; the bags were unloaded in broad daylight in front of the optician's shop by employees of a funeral home, who removed them from a hearse of the type used to transport the deceased to cemeteries; the abnormal use of a funeral home vehicle was reported by Ms C.S. to the competent authorities;
- on the same date of 13 October 2009 Ms C.S. received several telephone calls from Mr Germano, at a telephone number which had been kept confidential; this showed that he was intruding into her private life;

- on 5 November 2009, when opening up the shop, she found excrement deposited on the doorstep; at the same time, on the pavement, she spotted Mr Germano with his current girlfriend, both of whom were laughing.

11. In the request to the police, Ms C.S. further stated that it had become evident that Mr Germano had threatened a number of persons in order to induce them not to have contact with her, and in particular to convince them not to provide her, and the courts, with information of a financial nature that could be useful in the separation proceedings: for example, the electrician, I., had refused to accept a job she requested, as he was afraid of Mr Germano; C.M. had refused to provide a document attesting the purchase of household appliances made at his business; D.G. had refused to make a statement about the upholstery work carried out in the former family house; F.F. had refused to provide photographs he had taken of some works of art owned by the spouses. All of these providers of services had reported their fear of retaliation to Ms C.S.

12. In her account Ms C.S. referred additionally to Ms V.V., to whom Mr Germano had declared that he wanted to make life impossible for his wife by ruining her economically.

13. On 7 November 2009 Mr Germano requested, via text message to the victim, to see their young daughter, who was then out of town with her maternal grandparents. This had caused Mr Germano to contact the police, so that police officers came to the optician's shop to inquire about possible abduction of the child. In the victim's view, such intimidation was completely unnecessary, as the father knew where the child was.

14. The woman concluded her request with an indication of the names of persons whom she had informed about the situation.

15. I will abstain from commenting on the merits of the *richiesta* but, in my view, although – when confronted with the above account – the domestic authorities summarised the facts “as indicated by the person who applied for the caution” (see paragraph 135 of the judgment) with language (appearing in the third sub-paragraph of paragraph 10 of the judgment) which the majority found “lack[ing] in reasoning”, this does not justify the majority's finding that the caution was worded “in an extremely generic fashion” (paragraph 10). This is especially true if one takes into account that “all the inquiries ... and ... documents were on record” (third sub-paragraph of paragraph 10 of the judgment), and were thus undisputedly accessible to Mr Germano (who, in consequence, was able to produce and comment on them before the domestic courts and this Court). In contrast to the majority, who took an abstract and formalistic approach, the police – by referring to those episodes that they considered to be proven as contained in detail in Ms C.S.'s account – provided sufficient reasoning for the caution.



**B. The witnesses' depositions: *testes ponderantur, non numerantur***

16. Having clarified what the victim stated, as the first and the most important witness, the exercise I commented on above, with reference also to its limits, must be continued with regard to the other witnesses.

17. In paragraph 8 of the judgment, the majority confirmed that the police took the woman's account seriously: they "opened an inquiry" and, in two weeks, "collected seventeen witness statements from the people referred to in the applicant's wife's request". In the same paragraph, in an assessment which I will comment upon only briefly below, the majority engage – in the context of an international court – in an exercise that is typical of domestic courts, that is, weighing up and comparing witness statements. Thus, according to the majority, "fourteen statements did not confirm the applicant's wife's version of the facts" (emphasis added); only one witness (but "a friend of the applicant's wife", an expression usually aimed at diminishing credibility – emphasis added) "confirmed ... episodes" of merely "verbal abuse ... in her presence"; while another witness had merely "been told about an episode of physical assault". The final witness merely stated that the applicant "had telephoned him several times with the aim of obtaining information about his wife's life". Thus, according to the majority, the reasoning in the caution was also insufficient with regard to the assessment of evidence, because "there is no reference ... to the fact that the vast majority of the witnesses had not confirmed the applicant's wife's version of the facts" (see paragraph 136 of the judgment). In sum, the match ends 14-3 or even 15-2, depending on how one counts; the eighteenth person (Ms C.S., the victim), as I mentioned, is not included in the final headcount. The victim should count, and be counted.

18. If we overlook the fact that evidence must be weighed and not counted (*testes ponderantur, non numerantur*), in these circumstances even the very numbers indicated by the majority could be considered – with all due respect – not to add up, as my exercise will show. While the depositions are summarised in two sentences in the above passage of the majority's judgment (the final sentences of paragraph 8), they are much more clearly referred to in two half-pages (pp. 5-6) of the Government's first observations. My summary follows:

(a) C.M., an appliance dealer (as noted above), denied having been pressured and stated that he had been unable to certify the sales because they had occurred quite some time previously;

(b) U.D., a friend of both spouses, reported the separation proceedings as being very conflictual, and acknowledged that there had been outbursts by Mr Germano; however, he did not consider them to be defamatory;

(c) L.V., a friend of Ms C.S.'s (as mentioned above, and, according to the majority, the only witness to endorse her "version"), indeed confirmed the episode in which verbal abuse had taken place in her presence; in addition to

what is noted in the judgment, she mentioned that the child had also been present; she provided the further information that she had been warned by Mr Germano not to testify in the separation proceedings in favour of his wife, “otherwise [he] would have to make [her] pay”; she did not confirm that she had received additional telephone threats, but reported that she had received anonymous letters;

(d) the threatening phone call received by L.V. was confirmed by E.O., L.V.’s mother, who had witnessed the receipt of the call;

(e) M.G.E. and D.E., speaking in generic terms, confirmed the conflictual nature of the separation proceedings;

(f) V.V. stated that Mr Germano had told her that he wanted to take his wife to a point where she would say “enough”; indeed Mr Germano boasted that he had not incurred legal fees, while Ms C.S. had to pay the lawyers she hired; when V.V. had referred in a conversation with Mr Germano to the circumstance that it was he who was in the wrong, because he had beaten his wife, he had replied: “she will have to prove it”; similarly, when she reproached him for having kept all the furniture paid for by his wife, he had walked away, saying “she will have to prove it”;

(g) R.P., an estate agent, denied having been pressured by Mr Germano, and stated that he had advised Ms C. S. not to rent an apartment he was managing as an estate agent simply because he would be embarrassed that Mr Germano, his friend, would learn that they had been in contact;

(h) D.A. confirmed that he had carried out upholstery work, paid for by Ms C.S., but denied that he had refused to issue payment receipts due to pressure, as he simply no longer remembered the details;

(i) F.F., the above-mentioned photographer, confirmed that he had refused to give Ms C.S. a reprint of a photo shoot relating to paintings and works of art in the couple’s apartment, but this had been only because the service had been requested by Mr Germano and not by her;

(j) P.R.D.R., owner of the funeral home, stated that his staff had transported packages free of charge, given his friendship with Mr Germano; however, the vehicle used was not the hearse used to transport coffins, but the accompanying vehicle used to carry flowers at funerals;

(k) M.G.A. confirmed that a day after she had gone out for dinner with Ms C.S., she had received a phone call from Mr Germano, who wanted to know if Ms C.S. was having an affair with somebody; she also reported the argument that ensued when she reprimanded him for beating his wife;

(l) A.M. stated that he knew nothing about the episode on which he was called to testify;

(m) F.B. confirmed that, a day after going out for dinner with Ms C.S., he had received a phone call from Mr Germano, asking who the woman was with;

(n) S.G., the child’s baby-sitter, confirmed that she had received many phone calls from Mr Germano asking where his wife was and what she was

doing; in particular, when S.G. told him once that Ms C.S. was absent in order to protect her privacy, he had said on the phone “Well then, today she is with her lover”; as a result of the pressure, S.G. reported having given up her baby-sitting job; she additionally reported that she had once found the child in tears, saying that her parents had quarrelled over the weekend and that Mr Germano had beaten her mother, who had left home;

(o) I.L., an electrician, admitted that he had declined a request by Ms C.S. for electrical work because he did not want to remain “involved in the dispute” between the spouses, without however having been subjected to any pressure from Mr Germano;

(p) R.R., Ms C.S.’s brother-in-law, reported that he had not been a direct witness of mistreatment or violence, but such abuse had been reported to him by his sister-in-law.

19. I believe that such a summary is self-explanatory. On this basis, just as I had to indicate my different position with regard to the majority’s failure to give due credence to the alleged victim’s account, summarised in the two final sentences in paragraph 7 of the majority’s judgment, I consider that I cannot share their assessment that “fourteen statements did not confirm the applicant’s wife’s version of the facts”, only one witness (but “a friend of the applicant’s wife”) “confirmed ... episodes” of merely “verbal abuse ... in her presence”, while another had just “been told about an episode of physical assault” and the final one merely stated that the applicant “had telephoned him several times with the aim of obtaining information about his wife’s life”. Indeed, there is much, much more, which I do not consider it my task to assess in detail.

### **C. Were there possible documents?**

20. The majority – albeit with the reductive approach to which I have drawn attention – are right in saying that, although the minutes of the caution made reference not only to “the inquiries undertaken by the police” but also to “the additional documents gathered, all on the record” (see paragraph 10), “there is no indication as what those documents were and what conclusions were drawn from them” (see paragraph 136). Our file only contains the witnesses’ depositions. However, if one considers the limits of evidence-taking at the Court, based on submissions from the applicant and the Government, one might easily conclude that it is not important – especially in a matter concerning allegations of stalking – the totality of what the Court has before it: aware of its subsidiary role, it should review only the non-arbitrariness of the domestic authorities’ assessment of evidence.

21. In a context in which, although defining the facts as “ill-founded”, in his appeal before the TAR (pp. 2-3) the applicant mentions that he “does not want to dwell on (*ci si esime da*) refuting the fluvial mass of accusations” made by Ms C.S., and concentrates only on legal aspects, I consider that the

Court could easily have credited the national authorities with having checked, and documented by copies and/or screenshots, all the factual elements which Ms C.S. very specifically mentions in her request. This specificity deserves *prima facie* credibility, and the fact that Mr Germano does not want to dwell on them has some meaning: previous police interventions, visits to hospital emergency rooms, text messages indicated with numbers and dates and stored on Ms C.S.’s telephone, as well as elements from pending criminal proceedings, were probably in the hands of the national authorities.

### III. THE ASSESSMENT OF LAWFULNESS AND NECESSITY/PROPORTIONALITY

#### A. A digression on the nature of the measure complained of

22. Having provided some additional details as to the factual aspects of the case, I can now review the majority’s assessment of the lawfulness and necessity/proportionality under Article 8 of the Convention (I refer only to these two elements, since the existence of a legitimate aim is clear – see paragraph 123 of the judgment). Before doing so, I deem it useful to devote a short digression to the nature of the measure complained of.

23. The “police caution”, as provided for under the Italian legislation cited above, clearly falls within:

(a) the general context of initiatives aimed at complying with Article 34 of the Istanbul Convention, which – under the title “Stalking” – obliges Parties to take “the necessary legislative or other measures to ensure that the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety, is criminalised”;

(b) the more specific context governed by Article 53 of the Istanbul Convention, setting out the obligation to ensure that national legislation provides for “restraining” and/or “protection orders” for victims of all forms of violence covered by the scope of that Convention, and therefore also for stalking.

24. Indeed, when Italy enacted its legislation – as the judgment (see paragraphs 25-26) clarifies, this was as far back as 2009 – the Istanbul Convention had not yet been drafted. But the core of the problems relating to stalking was already well known. Some important studies on this criminal and social phenomenon were conducted at the European Union (EU) level, starting in 2003 with the multidisciplinary so-called “Modena” Group<sup>5</sup>, from whose work some articles of the Istanbul Convention are clearly derived. An official EU study was finished by 2010.

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<sup>5</sup> The first report was: Modena Group on Stalking, *Female Victims of Stalking: Recognition and Intervention Models: a European Study*, FrancoAngeli, 2005; many other reports followed, supported by the European Union.

25. By a legislative option which would later be in compliance with Article 55 of the Istanbul Convention (which does not prevent *ex parte* prosecution of stalking in order for this offence to be criminalised pursuant to Article 34 of that Convention), the respondent State considered it appropriate to create a way out of the criminal-law path for first-time offenders, placing the woman at the centre of attention<sup>6</sup>. For “minor” harassing behaviours (i.e. those that are not apt to be criminalised *per se* under different domestic provisions) and first-time offenders, prosecution was made conditional. According to general policies, the victim was to be duly informed of her right to obtain prosecution and to file a complaint (*querela*). Should the victim choose not to ask for prosecution, and no other offence requiring an *ex officio* action was at stake, the victim was offered the alternative of filing a request (*richiesta*) to the police chief, in an administrative-law context, so that an “oral” warning or injunction (“*ammonimento*” – in the judgment the expression “police caution” is employed along with the English parlance<sup>7</sup>) be issued, after hearing the victim (who is the requesting party) and persons entitled to give depositions (see paragraph 26 of the judgment).

26. This warning is but one of a series of preventive measures provided for in the legislation of 2009, which also introduced protective orders, no contact orders, etc., which are in the competence of the courts, rather than the police. In this “panoply” of the Italian toolkit, the “police caution” is at the lowest scale of risk assessment.

27. In view of nature of this measure (the clarification of which justified my digression), I concur with the majority (see paragraph 114 of the judgment) that the Italian “police caution” is to be understood as specifically governed by Article 53 of the Istanbul Convention, setting out the obligation

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<sup>6</sup> It might be interesting here to note that this choice is in full harmony with the fourth indent of Article 53 § 2 of the Istanbul Convention. Paragraph 273 of the Explanatory Report to the Convention states:

“The fourth indent seeks to ensure the possibility for victims to obtain a restraining or protection order whether or not they choose to set in motion any other legal proceedings. For example, where such orders exist, research has shown that many victims who want to apply for a restraining or protection order may not be prepared to press criminal charges (that would lead to a criminal investigation and possibly criminal proceedings) against the perpetrator” (emphasis added).

<sup>7</sup> The Italian *ammonimento* is not technically a “caution”, in that - unlike in some common-law jurisdictions - it does not suppose that the perpetrator accepts the charges; the accused may, on the contrary, appeal before administrative justice. The Italian *ammonimento*, of an administrative nature, was subsequently extended by Law no. 119 of 2013 to cases of domestic violence *stricto sensu* (beyond stalking); and by Law no. 71 of 2017 to cyberbullying, when the author of the facts is a minor. I will deal in my Opinion with the fact that as a rule it does not have a fixed duration; but it does for the minor author of cyberbullying (in this case, it ends when the juvenile turns 18). Italian legislation offers many other examples of warnings by authorities, whose nature and discipline has almost nothing in common with the case being dealt with in the present judgment.

to ensure that national legislation provides for “restraining” and/or “protection orders” for victims of stalking. Although this Article’s title refers literally to “restraining or protection orders”, paragraph 268 of the Explanatory Report makes it clear that the drafters decided to use that definition as an “umbrella category”, explicitly including “injunctions” (in French, “*ordonnances d’injonction*”).<sup>8</sup>

28. Having drawn this inference from the characterisation of the police caution as an injunction under Article 53 of the Istanbul Convention, a number of consequences follow, but I consider that the majority have unfortunately neglected them. I will deal with these aspects separately, as they also represent a sort of *fil rouge* for my points of dissent from the majority’s approach.

### **B. The indefinite duration of the measure**

29. In assessing the lawfulness requirement, the majority formulate a reservation, but do not make a finding as to whether the fact that the caution is issued for an indefinite period, with no “right of the individual” to obtain “periodic review or reassessment”, and at any rate with “uncertainty in the statute and ... considerable latitude” afforded to authorities, is in accordance with the law from the point of view of an inclusion of guarantees against arbitrariness (see paragraphs 119-120 of the judgment). Thus, although the majority continue on the basis that the measure was lawful (see paragraph 121), this aspect is then revived from the point of view of proportionality and there, on that ground, a basis for the violation is found (see paragraph 134).

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<sup>8</sup> Paragraph 268 of the Explanatory Report, dealing with Article 53, reads as follows:

“Its purpose is to offer a fast legal remedy to protect persons at risk of any of the forms of violence covered by the scope of this Convention by prohibiting, restraining or prescribing a certain behaviour by the perpetrator. This wide range of measures covered by such orders means that they exist under various names such as restraining order, barring order, eviction order, protection order or injunction. Despite these differences, they serve the same purpose: preventing the commission of violence and protect the victim. For the purpose of this Convention, the drafters decided to use the term restraining or protection order as an umbrella category” (emphasis added).

It is perhaps interesting to note that the subsequent paragraph 269 deals with the possibility that restraining or protection orders be governed by civil or, as in the Italian system, administrative law. It reads as follows:

“The drafters decided to leave to the Parties to choose the appropriate legal regime under which such orders may be issued. Whether restraining or protection orders are based in civil law, criminal procedure law or administrative law or in all of them will depend on the national legal system and above all on the necessity for effective protection of victims” (emphasis added).

30. Frankly, I do not understand on which Convention principles this finding is based, if any; nor is any precedent indicated in the judgment to support the view that an injunction must necessarily have a limited duration and be subject to a periodic review.

31. Moreover, Article 53 § 2, second indent, of the Istanbul Convention clearly goes against this finding by the majority. The Explanatory Report, at paragraph 271, clarifies that there is no obligation for States to set a period of duration, since it is perfectly acceptable that the measure be in place “until modified”:

“The second indent calls for the order to be issued for a specified or a determined period or until modified or discharged”; “it shall cease to be in effect if changed or discharged by a judge or other competent official”.

32. The above references are also present in paragraph 120 of the judgment but, bafflingly, while it is noted that measures can be valid “until modified”, the text is obscure, as if only the parts referring to measures having a duration were relevant (see the reference to the principle of legal certainty, only relevant to measures having some unclear duration, but not to those valid “until modified”).

33. The judgment then goes on to examine, on the basis of a limited number of domestic case-law references, the consequences drawn by the Italian courts from the “instantaneous” nature of the caution (see paragraph 119), which would not allow for modification or revocation; but other considerations could be made as to whether, in the Italian system, a “discharge” is possible (for example, where unlawfulness is subsequently discovered).

34. In my view, what matters is that there is no language in the case-law (or the Istanbul Convention) preventing an injunction (especially if assisted by the right to a judicial review) from being stable over time.

### **C. The right to be heard and the urgency of the measure**

35. The majority, in assessing lawfulness within the Court’s review of the existing guarantees against arbitrariness, find that the domestic framework, as interpreted in the manner that they believe domestic courts generally do (on foundations, however, which are different from those considered by the *Consiglio di Stato* – that is, the superior administrative court – in the case at hand), strikes a fair balance as to the perpetrator’s right to be heard before the caution is issued (a right which, according to the majority, could be derogated from only in the event of “urgency” and on a case-to-case basis, which should be “duly indicated in the reasoning in the minutes of the caution and subjected to judicial review” – see paragraph 116 of the judgment; pursuant to this test, the majority then go on to find reasons for a violation under the proportionality assessment – see paragraphs 125-131 of the judgment).

36. Indeed, in the present case the *Consiglio di Stato* clearly stated that the caution had a “protective and preventive” nature (*funzione cautelare e preventiva* – p. 4 of the *Consiglio di Stato* judgment) and that when an “immediate intervention” is needed, the interested party’s participation can be postponed to the appeals phase, taking place before higher authorities or the courts (pp. 6-7 of the same judgment).

37. In setting out their understanding of domestic law, the majority have decided that they should concern themselves with subsequent case-law (in a limited number of cases) by the same *Consiglio di Stato* granting wider participation rights to the alleged perpetrators. Thus, in my humble view, the majority construed their own understanding of domestic law, contrary to what the *Consiglio di Stato* had held in this specific case, and then derived from it the consequence that their understanding was the only Convention-compliant one.

38. The focus of the Court’s judgment should instead have been the principle of law applied in the case at hand, to be verified against the benchmark of the Convention. Additional guarantees, if any, even if leaves aside the temporal dimension of more recent case-law developments and the fact that these do not represent settled case-law, are at most material under Article 53 of the Convention.

39. If one verifies the principle affirmed by the *Consiglio di Stato* in our case, it too turns out to be totally Convention-compliant.

40. In this connection, the first consideration I would make is, again, related to the context of gender-based violence, which I find to have been neglected by the majority. Hearing the alleged perpetrator as a matter of course before the order is issued can be a naïve move, as it opens the way to an escalation of violence, pressure on witnesses, etc. I see an example of the majority’s distance from the context of stalking and domestic violence in general in the passage in which they state that they “[see] no reason”, given that “in two weeks the police authorities heard the testimonies of seventeen different individuals”, “why ... they could not have heard the applicant as well” (see paragraph 130 of the judgment). On the other hand, the very concept of “injunction” alludes to *ex post facto* participation by the alleged perpetrator.

41. A second consideration concerns, again, the basis on which – contrary to the concept that the Convention does not recognise a general and absolute right to be “previously” heard in administrative matters – the majority build their finding: I do not read any relevant case-law in paragraphs 112 and 113, nor do the several international legal sources cited therein support such an absolute right. The concept is that the party interested in an administrative set of proceedings must be given an opportunity to put forward arguments, and it is not disputed that this occurred in the present case; however, this can occur “after” the issuing of the caution, with full defence guarantees (in Italy, in two instances of judicial proceedings).



42. A third aspect concerns the use that the majority make of Article 53 § 2, third indent, of the Istanbul Convention. Paragraph 272 of the Explanatory Report is very clear in underlining that:

“The third indent requires Parties to ensure that in certain cases these orders may be issued, where necessary, on an *ex parte* basis with immediate effect. This means a judge or other competent official would have the authority to issue a temporary<sup>9</sup> restraining or protection order based on the request of one party only. It should be noted that, in accordance with the general obligations provided for under Article 49 (2) of this Convention, the issuing of such orders must not be prejudicial to the rights of the defence and the requirements of a fair and impartial trial, in conformity with Article 6 ECHR. This means notably that the person against whom such an order has been issued should have the right to appeal it before the competent authorities and according to the appropriate internal procedures.” (emphasis added)

43. I do not read in the above language any reference to urgency as such, but rather to cases “where [it is] necessary” to issue injunctions *ex parte*. Such necessity, in the context of gender violence, can also be the need to protect the victim. As the Istanbul *acquis* allows, the person indicated as perpetrator will of course have the right to appeal. In the meantime, however, possible risks would have been, to the extent that this is possible, avoided.

44. In contrast, the majority, having mentioned the above Istanbul Convention rule (see paragraph 114), draw conclusions (in paragraph 116) that go far beyond it. They introduce “urgency, duly indicated in the reasoning in the minutes of the caution and subject to ... judicial review” as the only possible derogation from the perpetrator’s right to be “previously” heard. I consider, on the contrary, that in the context of violence against women, urgency as such may be lacking, but nonetheless – according to options that must remain within the States’ margin of appreciation – a “surprise” measure may be necessary. To state the contrary is to underestimate the risks entailed in domestic violence.

45. I will now assume for a moment that “urgency” is – as the majority state – the sole situation in which a derogation from prior “disclosure” to the perpetrator of the stalking allegations is allowed. Should this be so, I do not see why “urgency” cannot, once and for all, be legally recognised at the

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<sup>9</sup> In paragraph 114, the majority stress too much, in my view, the adjective “temporary” in this paragraph of the Explanatory Report, which they use, indirectly, to complement their arguments on the need for the duration to be predetermined or subject to review. To contest their assumption, it is worth noting that: - the relevant indent of Article 53 § 2 mentions the “*ex parte*” measure with immediate effect, with no inclusion of the concept of “temporariness”, which is only contained in the Explanatory Report; - the Explanatory Report, in its French version, uses the different adjective “*provisoire*”; - the scope of the sentence containing the “temporariness” requirement is thus closely connected with the “*ex parte*” basis of the provisional order. If, as in the Italian system, the injunction is always issued after investigations, the temporariness requirement may not apply. What is important, in this passage of the Explanatory Report, is that the right of defence is ensured by way of a subsequent appeal, and not by means of previous participation, as required, on the contrary, by the majority.

domestic level as applicable to a category of orders whose characteristics alone, and in abstract, justify the general approach. In other words, if a certain order can be issued if, and only if, stalking conduct is at stake, why can urgency not be *ipso iure et facto* present?

46. This is what the *Consiglio di Stato* stated in our case. But sociologists and criminologists, women’s movements, and the Court also say the same: “an immediate response to allegations of domestic violence is required from the authorities” (see *Kurt*, cited above, § 165, and *Talpis v. Italy*, no. 41237/14, § 114, 2 March 2017).

47. A specific link exists between the obligation of immediate response and preventive injunction measures, such as the Italian police caution. Thus, Article 50 of the Istanbul Convention is entitled “Immediate response, prevention and protection”, and under Article 53 § 2, first indent, injunctions must be “available for immediate protection”. Paragraph 270 of the Explanatory Report underlines that the above indent “requires these orders to offer immediate protection .... This means that any order should take effect immediately after it has been issued and shall be available without lengthy court proceedings” (emphasis added). Moreover, as I have mentioned already, paragraph 272 of the same Report is very clear in stating that “The third indent requires Parties to ensure that in certain cases these orders may be issued, where necessary, on an *ex parte* basis with immediate effect.”

48. In sum, the Istanbul Convention explicitly accepts that even a mere “*ex parte*” request is enough for an injunction (with no investigation) and defence rights can be guaranteed afterwards. Logically this must be even more so in the Italian context, in which a caution is considered as an urgent measure as such, but investigations precede its issuance and defence rights are fully guaranteed, at least by way of subsequent appeals<sup>10</sup>.

#### **D. The reasoning of the minutes of the caution and the reasoning of court decisions providing judicial review**

49. The majority have clarified well the oral nature of the “caution” and the fact that, in the Italian framework, some reasoning compatible with the urgent nature of the measure is provided in the minutes, a copy of which is given to the aggrieved party (see paragraph 137 of the judgment). Based on their reading, however, the majority find that in the present case the minutes did not provide sufficient reasoning (see paragraph 135 of the judgment).

50. I hold otherwise, and I had an opportunity to state my dissent above when commenting on the facts of the case (so that I need not repeat my points here). I provided a rather different reading, finding that the minutes were sufficiently reasoned in themselves, and the requirements of further

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<sup>10</sup> The majority mention domestic case-law developments in this area, but as they are far from stable, I do not take them into consideration here.

specifications that the majority expect in paragraph 135 are indeed excessive. This is even more so once one accepts – as I accept along with the Istanbul Convention – that a full adversarial procedure follows, in which disclosure of the depositions referred to (and, above all, of the request of the victim/witness) allows the alleged perpetrator to understand fully the references which minutes must necessarily make to other documents.

51. In contrast, I agree with the majority that “the domestic courts did not provide relevant and sufficient reasons as to whether the actions imputed to [the applicant]” justified the measure, since the *Consiglio di Stato* (there was no relevant reasoning on this point in the TAR judgment, as this judgment quashed the measure in first instance) limited itself to “[holding] that the *questore* had “carefully indicated” all inquiries that would make it possible to corroborate Ms C.S.’s account of the facts (see paragraphs 21 and 139-141 of the judgment). While the domestic case-law has developed in the direction of allowing that the administrative courts, in respect of this kind of measure, can assess the factual basis and not only the legality of the measure (see paragraphs 41 and 142 of the judgment), I consider that this was indeed a procedural flaw, as the reasoning provided by the *Consiglio di Stato* indeed showed a “purely formal examination” of the facts (see paragraph 141 of the judgment).

52. As I consider that such a lack of independent judicial review with regard to insufficient reasoning could well, taken alone, have led to an assessment that the interference was, overall, proportionate given that many other safeguards were allowed, nonetheless I deem it appropriate to take a firm stand as to the need for a fully-fledged judicial review once I have accepted – unlike the majority – that the alleged perpetrator’s rights of participation can be limited to the judicial-appeal phase of the stalking-prevention caution proceedings. One learns in mathematics that, in a transposition, one can move a term from one side of an equation to the other, but it is necessary to change the sign. Thus, the guarantees I subtracted from the part of the procedure at the *questore* stage must necessarily be added to the part before the courts.

#### IV. CONCLUSIONS

53. I would point out that the legal option of a police caution, established in the respondent State under section 8 of Decree-Law no. 11/2009 and converted into Law no. 38/2009, was examined by the Court in *Talpis v. Italy*, cited above, § 51, within the framework of a wider panoply of preventive measures with respect to gender-based violence. Since the domestic authorities in that case had remained passive with respect to an escalation of violence against a woman, violations were found. Later, in *Kurt v. Austria*, cited above, § 190, the Grand Chamber refined the principles governing the obligation on authorities to provide an immediate response to allegations of

domestic violence, after an autonomous, proactive and comprehensive risk assessment.

54. That being said, I consider that the above Opinion has demonstrated that the majority’s judgment in this case represents many backward steps in the protection, under the Convention, of women from gender-based violence in general, and stalking in particular. In addition to the several unnecessary and often counter-productive safeguards that the majority, in a total case-law void, claim to derive from Article 8 of the Convention and seek to impose on States with regard to issuing restraining or protection orders under Article 53 of the Istanbul Convention, and from which I regret having had to distance myself as above, further demonstration of such backward steps can be traced in a total *detournement* from the Court’s jurisprudential *acquis*, as found in paragraph 128 of the judgment.

55. In citing paragraph 169 of *Kurt*, the majority use the concept of “autonomous” and “proactive” (I would also add “comprehensive”) risk assessment, developed in that Grand Chamber judgment, to support the idea that, “after receiving a complaint”, a decision on the measures should first have “afforded [the perpetrator] the opportunity to put forward arguments in support of his positions”. But this is not what the Court – on the basis of long-standing developments in scientific research on gender-based violence – meant when it referred to “autonomous” and “proactive” assessment of risk. As paragraphs 169 and 170 of *Kurt* clearly show, , the terms “autonomous” and “proactive” refer to the requirement for the authorities not to rely solely on the victim’s perception of the risk, but to complement it by their own assessment, considering the general vulnerability of victims of domestic abuse and how likely they are to withdraw complaints, change statements, deny past violence, and return to live with the perpetrator (see *Talpis*, cited above, §§ 107-25). Instead, in the majority’s view, an “autonomous” and “proactive” assessment of risk implies, before a restraining or protective order is issued, that the authorities must search out the perpetrator and “afford[ing] him the opportunity to put forward arguments in support of his position”, that is, exactly the opposite aim from that supported by the Grand Chamber in its pursuit of better protection for vulnerable victims who are unable to report in full the violence they sustain.

56. Overprotection of the alleged perpetrator, and wanting at all costs to obtain his “version”, in opposition to that of the alleged victim, will – as experience shows – usually lead to mutual accusations of false statements, allegations of provocative behaviour, or even allegations of reciprocal violence. In some case, there might be grounds for issuing injunctions against both the victim and the perpetrator. This is something that should be avoided, as it can even – by a well-known phenomenon of heterogony of ends - jeopardise the establishment of the truth. I can refer once more to the Explanatory Report to the Istanbul Convention, which at § 276 tells us that “Lastly, since establishing the truth in domestic violence cases may, at times,

be difficult, Parties may consider limiting the possibility of the adversary/the perpetrator to thwart attempts of the victim to seek protection by taking the necessary measures to ensure that, in cases of domestic violence, restraining and protection orders as referred to in paragraph 1 may not be issued against the victim and perpetrator mutually. Also, Parties should consider banning from their national legislation any notions of provocative behaviour in relation to the right to apply for restraining or protection orders. Such concepts allow for abusive interpretations that aim at discrediting the victim and should be removed from domestic violence legislation.”