



Victim of alleged sexual assault should not have been exposed to offensive questioning by alleged offender

In today's **Chamber** judgment¹ in the case of [Y. v. Slovenia](#) (application no. 41107/10) the European Court of Human Rights held:

unanimously, that there had been a **violation of Article 3 (prohibition of inhuman or degrading treatment)** of the European Convention on Human Rights, and

by six votes to one, that there had been a **violation of Article 8 (right to respect for private and family life)**.

The case concerned a young woman's complaint about the criminal proceedings brought against a family friend, whom she accused of repeatedly sexually assaulting her while she was a minor, alleging that the proceedings were excessively long and traumatic for her.

The Court found that the Slovene authorities had failed to protect the alleged victim's personal integrity during the criminal investigation and trial. In particular, they should have prevented the alleged assailant from using offensive and humiliating remarks while cross-examining her during the trial.

Principal facts

The applicant, Ms Y., is a Slovenian national who was born in Ukraine in 1987. She arrived in Slovenia in 2000 with her sister and mother, who had married a Slovenian. The case concerned the criminal proceedings brought against a family friend whom Y. accused of repeatedly sexually assaulting her.

Y.'s mother first lodged a criminal complaint against the family friend in July 2002, accusing him of having forced her daughter, who was 14 years old, to engage in sexual intercourse with him between July and December 2001. The family friend, 55 years old at the time, often took care of Y., together with his wife, helping her to prepare for beauty contests.

In the course of the ensuing investigation and trial, the authorities questioned Y. and her alleged assailant – who denied having had any sexual relations with Y. –, examined a number of witnesses and appointed experts to clarify the conflicting testimonies. Thus, two gynaecological reports neither confirmed nor disproved Y.'s allegations and two other experts came to contradictory conclusions: the first, a psychologist, found that Y. clearly showed symptoms of sexual abuse; and the second, an expert in orthopaedics, considered that the defendant could not have overpowered Y. and performed the acts of which he was accused on account of a disability (his left arm had been disabled since birth). During the gynaecological consultation, the doctor confronted Y. with the findings, in particular, of the orthopaedics report and questioned her why she had not defended herself more vigorously.

Y.'s request that the legal representative of the defendant should be disqualified from the proceedings – on the grounds that, having known him previously, she and her mother had consulted

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

him concerning the sexual assaults even before the police was informed – was rejected by the trial court, finding that there were no statutory grounds for such disqualification.

During two of the hearings in the case, the defendant personally cross-examined Y. He maintained that he was physically incapable of assaulting her and that her accusations against him were prompted by her mother's wish to extort money from him; several questions were phrased in a way to suggest a particular answer and he continuously contested the veracity of Y.'s answers, alleging that she was able to cry on cue to make people believe her.

In September 2009, after having held 12 hearings in total, the first-instance court acquitted Y.'s alleged assailant of all charges. The State prosecutor's appeal against that judgment was rejected in May 2010, as was Y.'s request for the protection of legality with the Supreme State Prosecutor a few months later.

Complaints, procedure and composition of the Court

Y. alleged, under Article 3 (prohibition of inhuman or degrading treatment), that the investigation into her allegation of sexual assault on her and the ensuing judicial proceedings had been unreasonably delayed – having lasted seven years between the lodging of her complaint and the pronouncement of the first-instance judgment – and ineffective, the authorities being biased against her on account of her Ukrainian origin. Secondly, she complained, under Article 8 (right to respect for private and family life), of breaches of her personal integrity during the criminal proceedings and in particular that she had been traumatised by having been cross-examined by the defendant himself during two of the hearings in her case.

The application was lodged with the European Court of Human Rights on 17 July 2010.

Judgment was given by a Chamber of seven judges, composed as follows:

Mark **Villiger** (Liechtenstein), *President*,
Angelika **Nußberger** (Germany),
Boštjan M. **Zupančič** (Slovenia),
Ganna **Yudkivska** (Ukraine),
André **Potocki** (France),
Helena **Jäderblom** (Sweden),
Aleš **Pejchal** (the Czech Republic),

and also Claudia **Westerdiek**, *Section Registrar*.

Decision of the Court

Article 3

The Court noted with concern that the proceedings had been marked by several longer periods of complete inactivity. The police had submitted an incident report of Y.'s complaint to the prosecutor only a full year after their investigation had been concluded and upon being urged by the prosecutor to do so. Following the prosecutor's prompt request for a judicial investigation to be initiated, the investigating judge took 21 months to decide on that request. Once the investigation had been concluded, the trial hearing was scheduled eight months after the indictment had been confirmed, in breach of national procedural rules. Due to several adjournments, the first hearing was held almost a year and a half after the defendant had been indicted.

While it was impossible to speculate whether the fact that it took more than seven years between Y. lodging her complaint and the rendering of the first-instance judgment had prejudiced the outcome

of the proceedings, such a delay could not be reconciled with the requirements of promptness. There had accordingly been a violation of the State's procedural obligations under Article 3.

Article 8

Having regard to the fact that Y.'s testimony at the trial constituted the only direct evidence in the case and the fact that the other evidence – the psychologist's report and the orthopaedics report – was conflicting, it was in the interest of a fair trial that the defence be provided with an opportunity to cross-examine Y, who was moreover an adult at the time of the hearings. Nevertheless the Court had to determine whether a fair balance had been struck between her personal integrity and the rights of the defence.

In the Court's opinion, the fact that Y.'s questioning had stretched over four hearings, held over seven months, without an apparent reason for the long intervals between hearings, in itself raised concerns.

As regards the nature of the cross-examination by the defendant himself, the Court noted that, while the defence had to be allowed a certain leeway to challenge Y.'s credibility, cross-examination should not be used as a means of intimidating or humiliating witnesses. Some of the defendant's questions and remarks, such as his allegation that Y. could cry on cue in order to manipulate people, had aimed not only to challenge her credibility but also to degrade her character. Such offensive insinuations exceeded the limits of what could be tolerated for the purpose of mounting an effective defence. It would have been first and foremost the responsibility of the presiding judge to ensure that respect for Y.'s integrity was adequately protected from those remarks, an intervention which could have mitigated what must have been a distressing experience for her.

Concerning Y.'s assertion that the defendant's lawyer should have been disqualified as she had previously consulted him, it was not the Court's task to speculate on the question to what extent she had known the lawyer before. However, assuming that her allegation was true, the negative psychological effect of being cross-examined by him should not have been entirely disregarded. Moreover, the information the lawyer might have received from her should not have been used to benefit a person with adverse interests in the proceedings. Nevertheless, her motion was rejected, as under national law there were no statutory grounds for dismissing a legal representative in the situation at hand. The Court therefore found that the Slovene legislation on disqualification of counsel, or the manner in which it had been applied, did not take sufficient account of Y.'s interests.

Finally, as regards the gynaecological consultation conducted in the course of the investigation, the Court observed that the doctor – in particular by confronting Y. with the findings of the orthopaedics report and questioning her concerning her self-defence – had exceeded the scope of his task.

The Court acknowledged that the authorities had taken a number of measures to prevent Y. from being traumatised further, such as excluding the public from the trial and having the defendant removed from the courtroom when she gave her testimony. However, given the sensitivity of the matter and her young age at the time when the alleged sexual assaults had taken place, a particularly sensitive approach would have been required. The Court found that – taking into account the cumulative effect of the shortcomings of the investigation and the trial – the authorities had failed to take such an approach and to provide Y. with the necessary protection. There had accordingly been a violation of Article 8.

Just satisfaction (Article 41)

The Court held that Slovenia was to pay Ms Y. 9,500 euros (EUR) in respect of non-pecuniary damage and EUR 4,000 in respect of costs and expenses.

Separate opinions

Judge Yudkivska expressed a partly dissenting opinion. This opinion is annexed to the judgment.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.