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

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Failure by France to fulfil the positive obligations requiring it to apply, in practice, a criminal-law system capable of punishing non-consensual sexual acts

In today's **Chamber** judgment[1] in the case of L. and Others v. France (application nos. 46949/21, 24989/22 and 39759/22) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 3 (prohibition of inhuman or degrading treatment) and Article 8 (right to respect for private life) of the European Convention on Human Rights in all three applications, and

a violation of Article 14 (prohibition of discrimination) taken together with Articles 3 and 8 in respect of application no. 46949/21.

In each of the three applications, the applicants complained that French law and practice did not provide effective protection against rape and that their status as minors and the vulnerable situations in which they had been at the time of the events complained of had not adequately been taken into account. The applications mainly concerned the respondent State's compliance with its duty ("positive obligations") under Articles 3 and 8 of the Convention, in their substantive and procedural aspects.

The Court considered that, in all three applications, the investigating authorities and the domestic courts had failed to protect the applicants, who had complained of acts of rape and had been aged only 13, 14 and 16 at the relevant dates, in an adequate manner.

In two of the applications, the Court noted that the criminal proceedings had not been conducted promptly or with due care.

In all three applications, the Court considered that the domestic courts had not properly assessed the impact of all the circumstances surrounding the events; nor had they taken sufficient account, in evaluating whether the applicants had been capable of understanding and of giving consent, of the particularly vulnerable situations in which they had found themselves, particularly in view of their ages.

Reiterating that consent had to reflect a free willingness to engage in sexual relations at a given moment and in the specific circumstances, the Court considered that, given the legal framework in place at the time and the way in which it had been applied, the French State had failed to fulfil its duty to apply, in practice, a criminal-law system capable of punishing non-consensual sexual acts. It also noted that it was not called upon to rule on the criminal liability of those who had perpetrated those acts and that its findings could not therefore be interpreted as an opinion on the guilt of the accused in the respective cases.

In the first application, the Court also found that there had been a violation of Article 14 taken together with Articles 3 and 8, based on the secondary victimisation and discriminatory treatment to which the applicant had been subjected.

A legal summary of this case will be available in the Court's database HUDOC (link).

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.

Principal facts

The applicants, Ms L., Ms H.B. and Ms M.L., were born in 1995, 2005 and 1991 respectively.

L. v. France, no. 46949/21

On 31 August 2010 the applicant (L.) and her mother went to a police station in the Paris region to complain that she had been raped in 2009, when she was 14 years old, by two 21-year-old men who were firefighters based in barracks near her home. The investigation was assigned to the Family Protection Unit of the local police force. L. described herself as being psychologically fragile and a loner, as a result of bullying at school, which had led to her taking medication and being hospitalised several times in a psychiatric unit for children. Over successive interviews, L. stated that she had been suffering from tetanic seizures since she was 12, for which she had received emergency care on a number of occasions from firefighters (*sapeurs-pompiers*), in their role as emergency first-aid providers. She stated that from April 2009 onwards she had had sexual relations several times with one of the firefighters, in his home or hers, in a car or in the forest, and that they had met up solely for that purpose. The applicant stated that her contact details had subsequently been "circulated" among other firefighters at several fire stations, who had contacted her by text or through Facebook.

Following a prosecutor's application of 4 March 2011, a judicial investigation was opened in respect of one firefighter and two of his friends, who were charged with gang rape and sexual assault, of a minor under 15 years of age who was also a vulnerable person.

In an order of 19 July 2019, the investigating judge dismissed the applicant's arguments requesting that the investigation be continued into the offence of rape using psychological coercion resulting from a significant age difference, as defined in Article 222-22-1 of the Criminal Code derived from the interpretative law of 3 August 2018. He reclassified the offences of gang rape and sexual assault of a minor under 15, committed in November 2009, to sexual assault of a minor under 15, occurring without violence, threat, coercion or by taking advantage.

The judge held that there was sufficient evidence to make the case for sexual assault of a minor under 15 and ordered the three defendants to be committed for trial before the criminal court. Lastly, he discontinued the proceedings in respect of all the other offences.

The applicant and her parents appealed. In a judgment of 12 November 2020, the Investigation Division of the Versailles Court of Appeal upheld the investigating judge's order. The civil parties – the applicant, her parents and her brother – appealed on points of law.

The Court of Cassation held that the reasons given by the Investigation Division – to the effect that the applicant had had the necessary understanding to be capable of consenting to the acts complained of, particularly once she reached the age of 14 years old –, fell within the trial courts' sole discretion to assess the facts and evidence gathered during the investigation, and found that they were "neither insufficient nor contradictory".

The case was remitted to the Versailles Court of Appeal which, on 1 February 2022, made a partial discharge order. The civil parties appealed on points of law. In a judgment of 18 May 2022, the Court of Cassation declared the civil parties' joined appeals inadmissible.

H.B. v. France, no. 24989/22

On 27 May 2020 the parents of H.B., a teenage girl of 14 years and 10 months, went to Forbach police station to report that their daughter had gone missing on the evening of 26 May. Shortly afterwards, officers recorded that H.B. and her friend had returned to their homes. According to the police report, the applicant was "clearly intoxicated" and had been unable to answer their questions. On 30 May 2020 H.B. was interviewed by police officers.

In the light of statements made by the applicant and by witnesses, and of the investigation, the public prosecutor's office instituted criminal proceedings against two adults, aged 21 and 29, for sexual

assault without violence, coercion, threat or by taking advantage, committed by an adult against a minor under the age of 15. The charges against a minor who had also been present when the offence was committed were dropped.

In a judgment of 9 November 2020, the Sarreguemines Criminal Court held that the offences had to be considered criminal in nature and be classified as aggravated rape. It accordingly held that it lacked jurisdiction and remitted the case to the public prosecutor's office for further action.

In a judgment of 18 March 2021, the Court of Appeal dismissed the civil parties' request for further investigations, considering that it had sufficient information at its disposal, in view of what it considered to be a comprehensive investigation. On the merits, it quashed the judgment and acquitted the defendants.

The applicant's father appealed on points of law. In a decision of 16 February 2022, the Court of Cassation declared that appeal inadmissible.

M.L. v. France, no. 39759/22

On 13 August 2013 the applicant, who was 22, went to the police station of the 10th Administrative District of Paris to lodge a complaint against A.H. She alleged that he had committed repeated acts of non-consensual sexual penetration during the night of 10 to 11 January 2008, at the end of a party she had organised at her home, when she was 16 and the defendant was 18. The investigation was assigned to the Paris Child Protection Unit on the same day.

On 6 January 2015 the Paris public prosecutor decided to take no action on the applicant's complaint, on the grounds that a constituent element of the offence – intent – had not been sufficiently made out.

On 3 November 2016 the applicant lodged a criminal complaint, together with an application to join the proceedings as a civil party. A judicial investigation was opened into the rape charge.

On 29 May 2020 the investigating judge issued an order discontinuing the proceedings for lack of sufficient evidence. He held, in particular, that while it was not contested that the civil party had suffered trauma, the judicial investigation had not made it possible to establish either the acts of violence, coercion, threat or taking advantage constitutive of rape (within the meaning of Article 222-23 of the Criminal Code) or A.H.'s intent to coerce the applicant.

The applicant appealed. in a judgment of 18 May 2021, the Investigation Division of the Paris Court of Appeal upheld the order discontinuing the proceedings.

The applicant appealed on points of law. In a judgment of 6 April 2022, the Court of Cassation declared the appeal on points of law inadmissible.

Complaints, procedure and composition of the Court

The applicants relied on Article 3 (prohibition of inhuman or degrading treatment), Article 8 (right to respect for private life), and (in the case of the first applicant) Article 14 (prohibition of discrimination) taken together with Articles 3 and 8. They complained that French law and practice did not provide effective protection against rape and that their status as minors and the vulnerable situations in which they had found themselves at the time of the events had not been adequately taken into account. The first and third applicants further alleged that the authorities had not promptly complied with their obligation to investigate and punish the perpetrators of the offences complained of. Lastly, the first applicant submitted that she had been subjected to secondary victimisation and discriminatory treatment during the criminal proceedings.

Having regard to the similar subject matter of the applications, the Court found it appropriate to examine them jointly in a single judgment.

The applications were lodged with the European Court of Human Rights on 17 September 2021 and on 12 May and 6 August 2022.

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

María **Elósegui** (Spain), *President*,
Mattias **Guyomar** (France),
Armen **Harutyunyan** (Armenia),
Gilberto **Felici** (San Marino),
Andreas **Zünd** (Switzerland),
Kateřina **Šimáčková** (the Czech Republic),
Mykola **Gnatovskyy** (Ukraine),

and also Victor **Soloveytchik**, *Section Registrar.*

Decision of the Court

Articles 3, 8 and 14

The Court noted that the offence of rape under Article 222-23 of the Criminal Code did not contain any express reference to the concept of "consent". The same was true of the provisions relating to sexual assault and the sexual assault of minors. However, the absence of consent had long been taken into consideration by the Court of Cassation in its case-law.

Application no. 46949/21 (L. v. France)

The Court emphasised, first, the extremely vulnerable situation of the applicant, who had been 13 years old at the time of the first acts complained of. It also took note of her psychological fragility, which had been the reason for the emergency care she had received from firefighters at her home on numerous occasions.

The Court noted that in evaluating the applicant's conduct and whether she had given consent, the domestic courts had failed to carry out a contextual assessment of the circumstances surrounding the case, particularly in terms of the imbalance in the relationship between the applicant and the persons with whom she had had sexual relations.

The Court also noted a failure to weigh up the applicant's conduct, by balancing it against the impact on her of those circumstances, having due regard to the factors which rendered her particularly vulnerable, whether her health – which she had mentioned when lodging her complaints – or the conclusions in the expert psychiatric reports, submitted in 2010 and 2013.

The Court considered that the Court of Appeal's reasoning had been seriously flawed in so far as it concerned the assessment of whether – in view of her extreme vulnerability, arising from her very young age and her state of health – L. had had sufficient understanding to be capable of genuinely consenting to repeated sexual acts with several partners.

Secondly, with regard to the requirement that the investigation be effective, including in particular that criminal proceedings be conducted promptly, the Court noted that the main investigative measures had been taken over the period, equating to more than 10 and a half years, between the applicant lodging her complaint on 31 August 2010 and the delivery of the Court of Cassation's first partial judgment on 17 March 2021. This period had to be extended to 11 years and nearly 9 months once the Court of Cassation's judgment of 18 May 2022, upholding with final effect the discharge order for all the charges of rape of a minor under 15, was taken into account.

Lastly, in respect of the applicant's alleged secondary victimisation, the Court noted, first, that her health had deteriorated over the course of the investigations. Secondly, the Court considered that on at least two occasions the national authorities had failed in their duty to protect the applicant's dignity,

by permitting the use of moralising and guilt-inducing statements, which propagated gender stereotypes and were capable of impairing victims' confidence in the justice system.

The Court reiterated that, in the context of the institutional response to gender-based violence and combating gender inequality, it was essential that the courts avoided perpetuating gender stereotypes and minimising gender-based violence in their decisions. The Court considered that the gender stereotypes used by the Investigation Division of the Court of Appeal in its judgment of 12 November 2020 had served no purpose and had infringed the applicant's dignity.

With regard to the complaint under Article 14 of the Convention taken together with Articles 3 and 8, the Court considered that its findings above, concerning the secondary victimisation suffered by L., were sufficient to enable it to find that the grounds of the Investigation Division's judgment had also disclosed discrimination on the grounds of sex. Lastly, the Court noted that the Court of Cassation had not commented on this point, although in her submissions to that court the applicant had relied on Articles 3, 8 and 14 of the Convention and on the Istanbul Convention.

Application no. 24989/22 (H.B. v. France)

The Court noted that in assessing whether the applicant had given consent, the Court of Appeal, in a verdict that was not subsequently called into question by the Court of Cassation, had considered, first, that in view of the applicant's conduct, the accused could legitimately have believed that she had given her consent and, secondly, that there was no evidence that they had acted by violence, coercion, threat or by taking advantage. In reaching that conclusion, the appellate courts had held that H.B.'s judgment was not impaired by the alcohol consumed by her when taking part in the sexualised games, since she had never argued that she had lost consciousness or been forced to engage in these acts, stating simply that she felt remorse.

The Court also noted that the Court of Appeal had chosen not to assess the effect on the applicant's state of awareness and conduct of the very large quantity of alcohol she had consumed, although she had stated throughout the criminal proceedings that she "would never have done [that]" if she "had not drunk alcohol", that she had no precise recollection of the sequence of events, and that she had mentioned "having agreed when completely out of it" and having been "taken advantage of", from her very first statements to the investigators on the day in question.

Application no. 39759/22 (M.L. v. France)

The Court observed, first, that the Court of Appeal's assessment of the facts complained of had been based mainly on the accused's statements, without attaching the same weight to those of the applicant or evaluating them in context. Secondly, it noted that, although the two parties were in agreement about the alcohol and other intoxicating substances taken, that circumstance had not been taken into account by the domestic courts as a factor which had placed the applicant in a particularly vulnerable situation.

Having noted that the gender stereotypes used by the appeal courts had served no purpose and been inappropriate, the Court concluded that they had inferred the applicant's consent mainly on the basis of her passive behaviour and the fact that she had not fought back, without taking into proper consideration either her particular vulnerability or her psychological state, contrary to current knowledge about the behaviour of rape victims, particularly where they were of a young age.

The Court observed that the Court of Cassation had not remedied the above-mentioned shortcomings.

With respect to the part of the complaint alleging the ineffectiveness of the criminal proceedings, the Court noted that they had lasted a total of 8 years and 8 months and had ended with a decision to dismiss the application that the accused be committed for trial. In the Court's view, this showed a lack of due care in the conduct of the criminal proceedings, in what had not been a particularly complex case.

Conclusion

In conclusion, the Court considered that, in all three applications, the investigating authorities and domestic courts had failed to protect the applicants, who had complained of acts of rape and had been aged only 13, 14 and 16 at the relevant dates, in an adequate manner.

Having noted, in two of the applications, that the criminal proceedings had not been conducted promptly or with due care, the Court found, in all three applications, that the domestic courts had not properly assessed the impact of all the circumstances surrounding the events; nor had they taken sufficient account, in evaluating whether the applicants had been capable of understanding and giving their consent, of the particularly vulnerable situations in which they had found themselves, particularly in view of their ages.

Reiterating that consent had to reflect a free willingness to engage in sexual relations at a given moment and in the specific circumstances, the Court considered that, given the legal framework in place at the time and the way in which it had been applied, the respondent State had failed to fulfil its duty, in the light of the requirements of the Court's case-law and international standards, to apply, in practice, a criminal-law system capable of punishing non-consensual sexual acts. It also noted that it was not called upon to rule on the criminal liability of those who had perpetrated the acts in issue and that the above findings could not therefore be interpreted as an opinion on the guilt of the accused in the respective cases.

The Court concluded that the respondent State had failed to comply with its positive obligations in respect of the three applicants and, accordingly, that there had been a violation of Articles 3 and 8 of the Convention in all three applications. It also found, with regard to L.'s application (no. 46949/21), that there had been a violation of Article 14 taken together with Articles 3 and 8.

Just satisfaction (Article 41)

The Court held that France was to pay 25,000 euros (EUR) to Ms L. and EUR 15,000 each to Ms H.B. and Ms M.L. in respect of non-pecuniary damage; and EUR 16,020 to Ms L., EUR 1,000 to Ms H.B. and EUR 3,000 to Ms M.L. in respect of costs and expenses.

The judgment is available only in French.

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