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

Information Note on the Court's case-law 248

February 2021

N.Ç. v. Turkey - 40591/11

Judgment 9.2.2021 [Section II]

Article 3

Effective investigation

Failure to protect the personal integrity of a vulnerable child in the course of excessively long criminal proceedings relating to sexual abuse: *violation*

Article 8

Positive obligations

Article 8-1

Respect for private life

Failure to protect the personal integrity of a vulnerable child in the course of excessively long criminal proceedings relating to sexual abuse: *violation*

Facts – The applicant was forced to work as a prostitute by two women while she was only twelve years old. The following year she lodged a complaint against them, and against the men with whom she had had sexual relations.

The applicant complained firstly, about the failure to protect her personal integrity in the course of the criminal proceedings relating to the sexual abuse to which she had been subjected and, secondly, about the lack of effectiveness of the investigation.

Law – Articles 3 and 8:

The severity threshold required for the application of Article 3 of the Convention was met in the applicant's case. Given her young age at the relevant time, she had been in a vulnerable situation. In this context, the sexual abuse suffered by her, and the allegations of secondary victimisation, that is, the shortcomings in the criminal proceedings to ensure the applicant's protection, were sufficiently weighty to fall within the scope of Article 3. Further, in view of the impact of both aspects of the applicant's complaints on her physical and psychological integrity, the events complained of by the applicant also fell within the scope of Article 8 of the Convention.

(a) *Protection of the applicant during the proceedings* – An investigation was opened rapidly after the applicant's complaint and the majority of the defendants were sentenced to terms of imprisonment. Nonetheless, in such a serious case, concerning the sexual exploitation of a girl aged under fifteen years, the Court could not limit itself to this general finding in assessing whether or not the respondent State had fulfilled its obligations under Articles 3 and 8.

(b) *The failure to provide the applicant with help during the proceedings* – Several international instruments on the protection of victims of physical or mental harm and on protection against secondary victimisation provided guidance regarding the assistance that should be provided to child victims of sexual abuse and exploitation. In this case, for eighteen months after her complaint had been lodged the applicant was at no point supported by a welfare assistant, a psychologist or any kind of expert, either before the police or the prosecutor, or during the hearings before the assize court. This finding was sufficient to conclude that the applicant had not been cared for in an adequate manner during the proceedings in question.

(c) *The failure to protect the applicant from the defendants* – The applicant's situation worsened during the assize court hearings, since no measure was taken to separate her from the defendants. Over several hearings, she was placed opposite the defendants and was obliged to recount in detail the assaults, threats and rapes of which she had been victim, which had undoubtedly created an extremely intimidating environment for her. However, the file contained no indication that the victim had requested this confrontation or even that it had been necessary for an adequate and effective exercise of the rights of the defence, so that the Court could not conclude that an appropriate balancing exercise had been conducted. There had thus been a failure to protect the applicant from the defendants in this serious case of prostitution and sexual abuse against a child aged under fifteen years.

(d) *Pointless reconstruction of the rapes* – The applicant had been required to reproduce, before all the defendants and their representatives, the positions in which the sexual acts had occurred. The assize court had taken no measure to reduce the humiliation that the applicant legitimately considered she had sustained in that respect. Moreover, there was also nothing in the case file to explain why this reconstruction had been necessary to establish the facts or their characterisation in law. For the applicant, these hearings must therefore have been extremely traumatic, and simply deciding to conduct them without the public being granted access was not in itself sufficient to protect her from the damage to her dignity and the invasion of her private life. Those hearings had adversely affected her personal integrity and substantially exceeded the level of discomfort inherent in giving evidence as a victim of alleged sexual exploitation and assaults. Accordingly, they could in no way be justified by the requirements of a fair trial for the defendants.

(e) *Repetitive medical examinations* – The applicant was examined on ten occasions at the request of the judicial authorities, either to establish her exact age, or to establish the after-effects of the rapes perpetrated against her. This excessive and unexplained number of medical examinations, many of them extremely intrusive, thus represented an unacceptable interference with the applicant's physical and psychological integrity.

(f) *The lack of security* – At the close of the hearings the applicant had also been required to confront the aggressive attitude of the defendants' relatives, to the extent that on one occasion a police escort had been necessary to enable her to leave the town. It seemed that the authorities had taken no preventive measures in this connection. There was no justification for the assize court's refusal to move the trial to another town, a practice that was nonetheless common in sensitive criminal cases and which could have helped to ensure the orderly functioning of the hearings and the applicant's safety.

g) *The assessment of the victim's consent* – In so far as the applicant challenged the validity of her consent by arguing her very young age at the relevant time, the Court's task was to examine whether or not the impugned legislation and its application in the case at hand, combined with the alleged shortcomings in the investigation, had had such significant flaws as to amount to a breach of the respondent State's positive obligations under Articles 3 and 8 of the Convention. Human dignity and psychological integrity required particular attention when dealing with a child victim of sexual assault, and the

State's obligations imposed effective implementation of the child's rights. Thus, the child's best interests had to take precedence, and the national authorities had to respond in an appropriate manner to the needs arising from the child's particular vulnerability. The national authorities' failure to make substantial efforts to establish all the circumstances surrounding the events and their failure to carry out a context-sensitive assessment of the victim's consent could give rise to problems in relation to the provisions in question.

However, attributing equivalent weight to the consent of a child aged under fifteen and to the consent of an adult could not under any circumstances be admissible in the context of a case involving sexual exploitation and abuse. The investigation and its conclusions had to focus primarily on the issue of lack of consent. Accordingly, the Court noted with interest that the wording of Article 414 of the Criminal Code, indicating the act as being a "rape", contained no mention of the term "consent" or "willingness" or any synonym for them; nor did Article 416 of the Criminal Code, punishing even consensual sexual relations with a child aged under fifteen years, which placed greater emphasis on the need not to take consent into consideration with regard to a child aged under fifteen.

Nonetheless, the national courts had attached decisive weight to the applicant's "consent" in concluding that Article 414 § 1 was applicable; they had interpreted that provision as criminalising any sexual relations, even on a consensual basis, with a minor aged under fifteen, without however indicating why in the present case neither the alleged threats and violence, nor the payments made, were not considered as meeting the criteria set out in Article 414 § 2, interpreted by the national authorities as situations entailing a "lack of consent" on the victim's part. That provision laid down longer terms of imprisonment, referring to "force, violence or threats" or "fraudulent means rendering the victim incapable of resisting"; this latter criterion did not set out any limit as to the physical, psychological or material nature of the fraudulent means in question.

The judicial authorities' controversial interpretation had even been excessive with regard to one of the defendants, who had threatened to inform the applicant's family about her activities in order to obtain sexual relations from her on several occasions. Referring to a decision by the Court of Cassation to the effect that the constituent elements of a threat would not be made out if the threat derived from the activities of the individual concerned, the assize court held that this defendant's actions could not be characterised as a threat, thus ruling out the application of the second paragraph of Article 414. In the Court's view, there could possibly be a logic to this interpretation in an appropriate context, such as where a criminal was threatened with disclosure so that the person making the threat could to benefit financially. However, it was totally unacceptable to draw such an analogy with regard to the threats proffered against the victim in the context of the sexual exploitation and rape of a child.

The judicial authorities had gone to great lengths to avoid applying Article 414 § 2, which provided for longer prison sentences, and had shown no concern at any stage for the vulnerability of the applicant, who had been aged under fifteen at the relevant time. This restrictive interpretation, which took no account of the victim's age, was completely at odds with an objective assessment of the sensitive context of this case and with protection of a child victim of sexual exploitation and abuse.

(h) *The effectiveness of the investigation* – The criminal proceedings had lasted around eleven years, examined four times over two levels of jurisdiction. Although the case had been a complex one, on account of both the difficulty of establishing the facts and the number of defendants, it did not seem that any delay could be attributed to the conduct of the applicant or her lawyers. The numerous unexplained medical examinations had caused significant delays in the proceedings. There had then been an unexplained period of inactivity, which had lasted virtually five years. The two periods in which the case had been pending before the Court of Cassation, each lasting one year, were also

unexplained. Further, the charges of false imprisonment and incitement to prostitution had become time-barred. Thus, the judicial authorities' conduct had been entirely incompatible with the requirement of promptness and expedition necessary in this case, which called for special attention and priority treatment in order to ensure the protection of a child.

(i) *Conclusion* – The lack of assistance to the applicant, the failure to provide protection *vis-à-vis* the defendants, the unnecessary reconstruction of the rape incidents, the repeated medical examinations, the failure to ensure a calm and safe environment at the hearings, the assessment of the victim's consent, the excessive length of the proceedings and, lastly, the fact that two of the charges had become time-barred had amounted to a serious case of secondary victimisation of the applicant.

The national authorities' conduct had not been compatible with the obligation to protect a child who had been the victim of sexual exploitation and abuse. It had been first and foremost the responsibility of the assize court judges to ensure that respect for the applicant's personal integrity was adequately protected at the trial. The intimate nature of the subject matter, as well as the applicant's age, had been points of particular sensitivity which inevitably called for a correspondingly sensitive approach on the part of the authorities to the conduct of the criminal proceedings in issue.

As to the improvements introduced from 2005 onwards in the Turkish judicial system, with the exception of assistance from a psychologist when evidence was taken from the applicant on commission, those changes had not been applied in her case.

In the light of those considerations, the conduct of the proceedings had failed to ensure effective application of the criminal law to the infringement of the values protected by Articles 3 and 8 of the Convention.

Conclusion : violation (unanimously).

Article 41: EUR 25,000 in respect of non-pecuniary damage; claim for pecuniary damage dismissed.

(See also *Y. v. Slovenia*, 41107/10, 28 May 2015, Legal Summary; S.M. v. Croatia [GC], 60561/14, 25 June 2020, Legal Summary)
