



Failure to conduct effective investigation into allegations of sexual assault by chemical submission

In today's Chamber judgment¹ in the case of [A.J. and L.E. v. Spain](#) (application nos. 40312/23 and 40388/23) 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

a violation of Article 8 (right to respect for private and family life).

The case concerned the investigation into the applicants' complaints that they had been drugged and sexually assaulted (by chemical submission) in December 2016, as well as into the subsequent loss and manipulation of crucial evidence in police custody.

The Court found that the Spanish authorities had failed to conduct an effective investigation, in particular due to systematic loss and manipulation of potentially crucial evidence, insufficient guarantees of independence of the investigation, and a manifestly inadequate response to those investigative failures, which went beyond "isolated errors" or minor investigative omissions. The steps taken by the authorities had not been able to compensate for the loss of evidence that had been central to the allegations of chemical submission. Moreover, investigations into possible police misconduct had been instituted only after a considerable lapse of time and had been entrusted to the same judicial and police bodies that had supervised the original investigation.

Principal facts

The applicants, Ms A.J. and Ms L.E., are Spanish nationals.

On the night of 7 December 2016, A.J. and L.E. met two men in a bar and had a drink with them. Waking up undressed the next morning in one of the men's flats, they allege that they remember nothing of the rest of the night but had the sensation that they had had sexual intercourse. They allege that they must have been drugged and raped. When A.J. went to a health centre to be examined, no genital lesions were evident, but the protocol for cases of suspected sexual assault involving chemical submission was activated, which meant that the police were notified.

The National Police Family and Women's Unit (UFAM) subsequently opened investigations and, in late December 2016, the two men were arrested and questioned. They acknowledged that they had had sex with the applicants but maintained that it had been consensual. The court imposed restraining orders against both men prohibiting them from approaching A.J. and L.E.

Formal criminal proceedings were opened on 3 January 2017. During the course of the investigation, it emerged that one of the two was the brother-in-law of a police officer assigned to the UFAM unit responsible for investigating the case. In addition, several pieces of potentially crucial evidence disappeared or were compromised while in police custody. First, a forensic report derived from the data of a mobile phone belonging to one of the men, which had been prepared by the national

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.

police forensic laboratory in Madrid and sent to Pamplona in April 2017, disappeared entirely. Secondly, certain segments of the video surveillance footage from the bar where the four had met went missing or were tampered with. Thirdly, the hard drive used to store the forensic data from the mobile phones of both suspects was found to have been wiped clean and overwritten, resulting in the loss of all its contents.

By a decision of 20 November 2018, the investigating court declined to prosecute the suspects. While acknowledging the seriousness of the allegations and finding the applicants' accounts to be credible and without ulterior motive, the court concluded that there was insufficient evidence to establish that non-consensual sex had taken place.

Subsequently, in light of the applicants' allegations concerning serious irregularities in the handling of forensic material by police officers involved in the investigation, the judge opened separate proceedings to examine potential misconduct and evidence tampering.

The main proceedings were closed on 8 October 2021, without charges being brought. The evidence collected over nearly five years of investigation had failed to prove beyond reasonable doubt that the suspects had administered substances to incapacitate the applicants or that they had been aware that A.J. and L.E. were unconscious during the sexual relations.

The court acknowledged that the investigation had been "notably affected" by procedural irregularities and the disappearance of digital evidence but determined that these factors did not compensate for the lack of substantive evidence. It concluded that, even with the shortcomings of the investigation, the investigative efforts had been exhaustive – three separate investigations had been opened in respect of the irregularities – but had not produced evidence sufficient to substantiate a charge.

In March 2022, A.J. and L.E. declared that they did not accept the closure of the main investigation precisely because the three separate investigations were still pending. However, in July 2022 an order was issued for dismissal of the case. The *Audiencia Provincial* dismissed the applicants' appeal and held their subsequent request for annulment of the proceedings to be inadmissible, as did the Constitutional Court when it considered the *amparo* appeal that they then lodged.

Complaints, procedure and composition of the Court

Relying mainly on Articles 3 (prohibition of inhuman or degrading treatment/lack of effective investigation) and 8 (right to respect for private and family life), the applicants complained that the numerous deficiencies in the investigation, including the loss and manipulation of evidence by the police and the excessive length of the proceedings, had violated their Convention rights and had left them without effective protection against serious sexual violence.

The applications were lodged with the European Court of Human Rights on 3 November 2023. The Court found it appropriate to examine them in a single judgment.

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

Kateřina Šimáčková (the Czech Republic), *President*,
María Elósegui (Spain),
Gilberto Felici (San Marino),
Diana Sârcu (the Republic of Moldova),
Mykola Gnatovskyy (Ukraine),
Vahe Grigoryan (Armenia),
Sébastien Biancheri (Monaco),

and also Victor Soloveytkhik, *Section Registrar*.

Decision of the Court

The Court reiterated that Articles 3 and 8 both entailed duties (“positive obligations”) for States, first, to criminalise and effectively prosecute all non-consensual sexual acts and, secondly, to enforce the legal provisions through prompt and thorough investigation and prosecution. In order to be effective, the investigation had to be capable of leading to the identification and punishment of those responsible and had to be thorough, impartial and timely. This included safeguarding medical and forensic evidence, witness testimony and relevant documents.

The Court was satisfied that Spain had established an adequate legal framework for the protection of victims of sexual offences. It also acknowledged that the Spanish authorities had responded promptly to the applicants’ allegations. Their initial response had therefore been consistent with the obligation to act promptly and to take operational measures to protect the alleged victims.

When considering the alleged shortcomings in preserving the initially available evidence, the Court observed that digital forensic analysis of the suspects’ mobile telephones would ordinarily constitute an obvious line of inquiry in an alleged chemical-submission case, where mobile communications might be decisive for clarifying the circumstances. It appeared that the forensic report on one suspect’s telephone, prepared by the national police laboratory and acknowledged as received by the investigating unit, had subsequently disappeared from police custody. That missing report might have shed light on the suspect’s activities and communications and could possibly have disclosed whether chemical substances had been procured or discussed.

The Court noted also that video-surveillance footage from the bar where the applicants and suspects had met constituted another important piece of evidence that might have been able to elucidate the timeline, the nature of interactions and the applicants’ condition before the alleged assaults. Such video evidence might have assisted in confirming or refuting the applicants’ account. However, the video footage from the bar was not complete, with certain portions apparently unavailable to the investigating authorities, though it was unclear whether this had resulted from technical issues during the transfer of data, a subsequent erasure, or other circumstances.

Most notably, the Court observed that the external storage device containing digital evidence appeared to have been wiped and overwritten, resulting in the loss of contents. This appeared to have happened after the allegations had been raised and was particularly concerning since a judicial preservation order had been in force. Given that the destroyed evidence could have been decisive in proving or disproving the applicants’ claims, its disappearance represented a particularly serious failure in evidence preservation.

Chemical-submission cases presented particular investigative challenges that heightened the need for swift and meticulous preservation of evidence. The transient nature of the substances involved, coupled with the victims’ impaired recollection, rendered circumstantial items such as digital communications, video recordings and forensic findings of paramount importance. The loss of items of evidence may have been especially prejudicial in this case, in which the suspects accepted that sexual intercourse had occurred but contested the issues of consent and the applicants’ state of consciousness. The failure to safeguard the material in question was therefore a matter of serious concern, given that the effectiveness of the investigation depended heavily on the retention and analysis of precisely the kind of evidence that had been lost or destroyed whilst in police custody.

The Court concluded that, taken together, the evidence-preservation failures had gone beyond “isolated errors” or minor investigative omissions. The steps taken by the authorities to counterbalance the evidence loss, including undertaking hair analysis, witness interviews, searches of the suspects’ homes and examination of bank records, had not been able to compensate for the loss of the digital evidence that had been crucial for the investigation into the allegations of chemical submission.

Moreover, investigations into possible police misconduct had been instituted only after a considerable lapse of time, several years after the items had been lost or destroyed. What was more, those inquiries had been entrusted to the same judicial and police bodies that had supervised the original investigation, raising further concerns about the independence and effectiveness of the response to these systematic shortcomings. In addition, the close family relationship between one of the investigating officers and one of the suspects had fallen short of the standard of sufficient independence required by the Convention.

There had accordingly been a violation of Articles 3 and 8 of the Convention on account of the authorities' failure to conduct an effective investigation, in particular due to the systematic loss and manipulation of potentially crucial evidence, the insufficient guarantees of independence of the investigation, and the manifestly inadequate response to those investigative failures.

Just satisfaction (Article 41)

The Court held that Spain was to pay each of the applicants 20,000 euros (EUR) in respect of non-pecuniary damage, and EUR 5,000 jointly in respect of costs and expenses.

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.