



## No structural bias or discrimination in the handling of sexual violence cases, but failure to apply a consent-centred standard in one investigation

Today's **Chamber** judgments<sup>1</sup> in the cases of [Z v. Iceland](#) (application no. 3538/21) and [R.E. and Others v. Iceland](#) (nos. 59809/19, 8034/20, 14407/20 and 17008/20) concerned investigations into the applicants' complaints of sexual assault and their allegations of structural and systemic gender-based discrimination in those investigations.

In the case of **R.E. and Others v. Iceland**, which concerned investigations into the four applicants' complaints of sexual violence between 2012 and 2017, two of whom were minors, the European Court of Human Rights held, unanimously, that there had been **no violation of Articles 3 (prohibition of inhuman or degrading treatment) and 8 (right to respect for private and family life)** of the European Convention on Human Rights, and **no violation of Article 14 (prohibition of discrimination)** read in conjunction with Articles 3 and 8.

The Court found that the national legal framework had afforded adequate protection against sexual violence, with Iceland having maintained a consent-based approach to rape since 2007. While acknowledging delays in two of the four cases before the questioning of suspects, the Court concluded that the investigations as a whole had met the threshold of effectiveness required by the Convention. The authorities had collected medical, psychological and documentary evidence where available, had interviewed the applicants, suspects and relevant witnesses, and had thoroughly reviewed all the material.

In the case of **Z v. Iceland**, which concerned the investigation into Z's complaint that she had been sexually assaulted at a festival when she was 16 years old, the European Court held, unanimously, that there had been a **violation of Article 8** of the European Convention, and **no violation of Article 14** read in conjunction with Article 8.

The Court found that, while the police investigation had been thorough, the prosecuting authorities had failed to apply a consent-centred standard when assessing whether to prosecute the suspect. Although he had admitted initiating sexual contact with Z without any prior indication of her consent, the authorities had focussed on whether the harassment had been intentional rather than on whether he had had any reason to assume consent had been given.

In neither case had the Court found evidence of structural bias or discriminatory effect in the handling of sexual violence cases.

### Principal facts

#### **R.E. and Others v. Iceland**

The applicants in this case are four Icelandic nationals, R.E., X, Y and S.O., two of whom were minors at the time of the events.

1. Under Articles 43 and 44 of the Convention, these Chamber judgments are not final. During the three-month period following their delivery, any party may request that a 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](http://www.coe.int/t/dghl/monitoring/execution).

R.E., reported an alleged rape by her co-worker K. that had occurred two months earlier, in October 2017, after an office party. She stated that she had drunk alcohol and had little recollection of the evening but remembered waking up in K.'s bed afterwards to find that he was having intercourse with her. K. was questioned ten months after R.E.'s complaint. He denied any wrongdoing, stating the intercourse had been consensual and that while both had been inebriated, R.E. had been conscious and responsive. Six witnesses were questioned. In January 2019 the police discontinued the investigation, concluding that the evidence was insufficient given conflicting accounts of consent, R.E.'s limited recollection and the absence of direct witnesses. The State Prosecutor upheld this decision in May 2019.

X, aged 17 at the time, alleged that she was raped by F., a 25-year-old co-worker in July 2017. She stated that she had woken up in her bed to find him on top of her, engaging in non-consensual sex. She formally pressed charges in September 2017 through her mother, who acted as her legal guardian. A legal rights protector was appointed, and the Child Protection Services were notified. F. was interviewed in March 2018, over six months after X's complaint. He claimed that the sexual activity had been consensual. Eight witnesses were questioned between March and August 2018. In May 2019 the District Prosecutor discontinued the case, citing insufficient evidence. The State Prosecutor upheld this decision in August 2019.

Y, a minor at the time of the incident in July 2018, alleged sexual assault by T., also a minor, during a camping trip. She stated that she had been drunk and remembered little of the evening, waking up the following morning with her underwear awry. In early 2019 she found out that T. had told friends that they had had sex. She pressed charges in March 2019 through her mother. Both a legal rights protector and a representative from the Child Protection Services were present when her statements were taken. T. was questioned in March 2019. He described consensual intimate activity after they had kissed, though admitted subsequently lying to friends about the extent of their encounter. Witnesses present at the campsite were questioned. In June 2019 the police discontinued the investigation, finding insufficient evidence that it had been clear Y was not in a fit state to consent. The State Prosecutor upheld this decision in September 2019.

S.O. filed a complaint in May 2018 concerning alleged sexual assaults by two men, R. and A., in June 2012. She stated that she had gone to A.'s hotel room where they had initially had consensual sex, but when R. had entered the room, she was no longer consenting, though she had not said so. The police questioned A. in August 2018 and R. in October 2018. Both denied any wrongdoing and maintained that S.O. had consented throughout. Nine witnesses were questioned, including persons to whom S.O. had later disclosed the incident. In June 2019 the District Prosecutor discontinued the case, acknowledging that S.O.'s account was credible but concluding that, with no witnesses and the case coming to police attention almost six years after the incident, the evidence was insufficient. The State Prosecutor upheld this decision in October 2019.

### **Z v. Iceland**

In June 2019 Z, aged 16, reported to police that she had been sexually assaulted by O., a 23-year-old, at a festival. In the early hours of the morning, feeling unwell, she had retired to a tent where she had passed out drunk. When she had woken up the next morning, with her clothing out of place, O. had been beside her, partially undressed, touching her breasts and genitals. She had tried to push him away and had told him to stop, which he had not done until she had left the tent.

O. denied guilt but acknowledged his actions were "a little wrong" as he had acted before "asking her". He stated that when he had gone into the tent to sleep, he had found Z there. He admitted placing his hand under her jumper and touching her breast but claimed he had stopped as soon as he noticed she was uncomfortable. He denied touching her genitals or removing her clothing and stated that no words had been exchanged between them. When asked about his intention, he stated he would not describe it as sexual. He denied any intention to have sex and stated that he had known that she was a minor.

Between June and August 2019 investigators collected ten witness statements. None were direct witnesses to the incident. Multiple witnesses confirmed that Z had described waking up to find a man groping her and her clothes not on properly.

On 30 March 2020 the District Prosecutor discontinued the case, concluding that conviction was unlikely. The prosecutor noted the applicant's limited recollection and that witnesses had largely confirmed her statement but had added little detail. The prosecutor concluded that for Article 199 of the General Penal Code (sexual harassment) to apply, intention to sexually harass must be established, and the benefit of the doubt was given to O. who had stated that he had stopped immediately upon realising that Z did not consent. The State Prosecutor upheld this decision in August 2020.

## Complaints, procedure and composition of the Court

Relying mainly on Articles 3 (lack of effective investigation), 8 (right to respect for private and family life), and 14 (prohibition of discrimination) read in conjunction with Articles 3 and/or 8, the applicants complained that the national authorities had failed to carry out an effective criminal investigation into the alleged acts of sexual violence and that they had been discriminated against as women in the enjoyment of their Convention rights.

The applications were lodged with the European Court of Human Rights on various dates between 8 November 2019 and 11 January 2021.

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

Arnfinn **Bárdsen** (Norway), *President*,  
Saadet **Yüksel** (Türkiye),  
Jovan **Ilievski** (North Macedonia),  
Péter **Paczolay** (Hungary),  
Oddný Mjöll **Arnardóttir** (Iceland),  
Gediminas **Sagatys** (Lithuania),  
Hugh **Mercer** (the United Kingdom),

and also Hasan **Bakırcı**, *Section Registrar*.

## Decision of the Court

### Articles 3 and 8

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, effective, impartial and thorough investigation and prosecution. However, the Court could not overrule the national authorities’ assessment unless there had been significant shortcomings in the investigation capable of weakening its ability to establish circumstances or identify those responsible. The substantive obligation on the State was for it to establish a legal framework that afforded adequate protection based on contemporary standards recognising absence of consent as the central element rather than whether there had been use of force.

As regards the legal framework, the Court observed that Icelandic law criminalised the full spectrum of non-consensual sexual activities. Article 194 of the General Penal Code concerned rape, while Article 199 covered sexual harassment including touching of breasts or genitals. Since 2007 Iceland had maintained provisions focusing on absence of consent rather than use of force, with 2018 amendments further clarifying the approach. Subsequently, the case-law of Icelandic courts had consistently applied a consent-based approach. The Court found that Iceland had maintained a

substantive and procedural framework capable of providing effective protection against sexual violence and affording protection to sexual autonomy.

In **R.E. and Others v. Iceland**, the Court observed that the national authorities had properly addressed both consent and the applicants' capacity to give consent. In the cases of X and Y, who were minors, the authorities had applied special procedural safeguards including the appointment of legal rights protectors and notification of Child Protection Services.

As regards the scope of the investigations, the Court found that in all four cases the authorities had collected available evidence and interviewed the applicants, suspects and relevant witnesses. No obvious lines of inquiry had been disregarded.

Regarding promptness, the Court acknowledged delays in questioning suspects in R.E.'s case (ten months) and X's case (over six months). However, these delays had to be assessed contextually. Both complaints concerned events reported several weeks after they had occurred. The suspects had already been aware of allegations. No physical or documentary evidence was alleged to have disappeared. The overall durations, whilst showing room for improvement, remained within time frames the Court had previously considered compatible with diligence requirements. In Y's case, the investigation had proceeded promptly. In S.O.'s case, given the six-year delay before the complaint was made, the intervals before questioning suspects could not be considered unreasonable.

Taking the investigations as a whole, the Court found that whilst those in R.E. and X's cases could have progressed more swiftly, the delays did not reach a level of seriousness sufficient to constitute a breach. There had accordingly been **no violation of Articles 3 and 8**.

In **Z v. Iceland**, the Court noted that O., an adult, had admitted to entering the tent where Z, a 16-year-old minor, was lying asleep or half-asleep, and to stroking her breasts under her clothing without any prior communication that indicated consent. However, the authorities had accepted his assertion that contact had not been sexual and that he had stopped as soon as he had perceived Z's discomfort. They concluded that the subjective element of intent of sexual harassment had not been established.

The Court found that the prosecutorial approach had been unduly narrow. Whilst characterisation of the incident as sexual harassment (Article 199 of the Penal Code) appeared adequate, the authorities had not carefully assessed whether there had been any reason for O. to have assumed that consent had been given.

The Court considered that sexual touching initiated in such circumstances should be subject to rigorous scrutiny in accordance with the emphasis on sexual autonomy and the requirement that consent be expressed unambiguously. The crucial element was not whether O. had stopped upon perceiving Z's discomfort, but that he had initiated sexual contact without any prior indication of consent from her who, while having reached the minimum age for sexual consent, had still been a minor. The failure to evaluate the touching against the consent-based standard meant the investigation had not been geared towards establishing whether there had been non-consensual sexual contact and thus had not secured protection of Z's physical and psychological integrity.

Without expressing an opinion as to O.'s innocence or guilt, the Court concluded there had been a **violation of the procedural aspect of Article 8**.

#### Article 14

As regards discrimination, the Court observed that obvious evidence of structural bias or disproportionate effect had to be established to shift the burden of proof to the State. The applicants had relied on statistical data showing lower prosecution rates in sexual offences compared to other violent crimes. However, the Court found this evidence required caution. The absence of comprehensive statistics meant the data might not offer a complete picture. Lower prosecution rates could be explained by inherent evidentiary challenges in sexual violence cases, which typically

