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Meeting: 1324th meeting (September 2018) (DH)

Item reference: Action report (05/09/2018)

Communication from Slovenia concerning the case of W. v. Slovenia (Application No. 24125/06)

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Réunion : 1324^e réunion (septembre 2018) (DH)

Référence du point : Bilan d'action

Communication de la Slovénie concernant l'affaire W. c. Slovénie (Requête n° 24125/06)
(anglais uniquement)



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05 SEP. 2018

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

Number: 542-97/2016
Date: 4 September 2018

**Mr Fredrik Sundberg, Head of Department a. i.
Department for the Execution of the Judgments
Council of Europe**

Subject: Revised Action Report for the W. group of cases v. Slovenia

Dear Mr Sundberg,

Attached please find Revised Action Report for W. group of Cases v. Slovenia that comprises measures adopted for the following four cases:

W. (appl. no. 24125/06), judgment of 23 January 2014, final on 23 April 2014,
N.D (appl. no. 16605/09), judgment of 15 January 2015, final on 15 April 2015,
M.A. (appl. no. 3400/07), judgment of 15 January 2015, final on 15 April 2015,
Y. (appl. no. 41107/10), judgment of 28 May 2015, final on 28 October 2015.

We hope you will be able to proceed with closure of this group of cases.

Yours sincerely,



**Tina Brecelj
State Secretary**

Attach.: Revised Action Report for the W. group of cases v. Slovenia

Ljubljana, 4 September 2018

REVISED ACTION REPORT

W. group of cases v. Slovenia

W., appl. No. 24125/06, judgment of 23 January 2014, final on 23 April 2014
M.A., appl. No. 3400/07, judgment of 15 January 2015, final on 15 April 2015
N.D., appl. No. 16605/09, judgment of 15 January 2015, final on 15 April 2015
Y., appl. No. 41107/10, judgment of 28 May 2015, final on 28 October 2015

I. CASE DESCRIPTION

1. These cases concern violations of the applicants' right not to be subjected to inhuman or degrading treatment on account of the authorities' failure to conduct effective trial of the charges of their rape or sexual assault (violations of Article 3 in procedural limb).
2. The violations of Article 3 resulted mainly from the long delays, adjournments of hearings and a lack of procedural activities in the impugned criminal proceedings. All four cases occurred in the period between 1983 and 2009.
3. The W. and N.D. cases furthermore concern inadequate compensation awarded for non-pecuniary damage sustained by the applicants as a result of the excessive length of the above-mentioned criminal proceedings.
4. The Y. case also concerns the violation of the applicant's right to her private life, as the authorities have failed to protect her personal integrity in the criminal proceedings concerning sexual abuse against her (a violation of Article 8).

II. INDIVIDUAL MEASURES

5. The measures have been taken to ensure that the violations at hand are brought to an end and that the applicants are provided adequate redress for the consequences sustained. They are set out below.
6. At the outset, the authorities would like to recall that the impugned proceedings in these cases were brought to an end before the Court rendered its respective judgments.
7. In the cases of W., N.D. and M.A., who were victims of rape or sexual assault, some of the accused had been sentenced to imprisonment. In W. case six defendants were sentenced and two acquitted, in N.D. case the defendant was sentenced, in M.A. case one defendant was sentenced, while one of the suspects died in 2003 and another could not be traced. In this respect, the authorities would like to recall that the Court indicated in these cases that the deficiencies in the conduct of the proceedings could not be rectified anymore by restoring the

situation as it existed before the breach of the Convention, or by preventing the continuation of the violation. The Court therefore considered that an award of compensation constituted an appropriate form of redress for the delays and related mental distress suffered by the applicants.

8. As regards the Y. case in which the defendant was acquitted of all charges, the authorities would like to recall that the violation of victim/witness rights in this case resulted from the delays in the criminal proceedings. It is recalled in this respect that the Court noted that the domestic courts did not find the applicant's allegations of sexual assaults which presumably took place in 2001 to have been proved and indicated that it was not possible to speculate whether these delays prejudiced the outcome of the proceedings in any way (§§99 and 120 in Y.). The judgment on the acquittal of the defendant is final.
9. Following to the Court's judgment in Y., the Minister of Justice responded in December 2015 to a letter received from the applicant's counsel and extended his apologies to the applicant for the inefficient administration of justice in her case.
10. As regards the applicants' redress, the authorities would like to highlight that in all these cases the Court awarded the applicants just satisfaction in respect of non-pecuniary damage. The applicants did not however claim pecuniary damage. The authorities therefore consider that the applicants have been fully redressed for the damage sustained.
11. In view of the above, the authorities therefore consider that the violations at hand have ceased and that the applicants were fully redressed for their negative consequences.

III. GENERAL MEASURES

12. The Court found violations on account of:

- the authorities' failure to ensure effective trial of the charges of rape and sexual assault and prompt criminal proceedings concerning these criminal acts (violation of Article 3 under its procedural limb);
- inadequate compensation awarded for non-pecuniary damage under the 2016 Protection of Right to Trial without Undue Delay Act as a result of deficiencies and delays of the proceedings (W. and N.D. cases);
- a lack of special diligence in cases to which minors are parties (§61 in the N.D. judgment); and
- the authorities' failure to protect the victim's personal integrity in criminal proceedings concerning sexual abuse – violation of Article 8 in the Y. case.

13. The measures have been taken to prevent the address the above shortcomings identified by the Court and prevent similar violations. These measures are set out below.

A. MEASURES AIMED AT PREVENTING THE EXCESSIVE LENGTH OF CRIMINAL PROCEEDINGS

14. The facts of the cases occurred in the period when there was a systemic problem of excessive length of criminal proceedings. In particular, the criminal charges were filed in case M.A. in 1983, in W. in 1990, in N.D. 1992 and in Y. in 2002.
15. Following the impugned facts of these cases, the Republic of Slovenia has taken a series of legislative, IT, capacity-building, awareness-raising and other measures to prevent the excessive length of criminal proceedings within the context of the *Lukenda group of cases* (Final Resolution CM/ResDH(2016)354 and Action report (DD(2016)1212)). According to the available information there are no similar complaints in cases concerning rape or sexual assaults. In addition, the 2018 Justice scoreboard noticed further progress in shortening the duration of the judicial procedures in Slovenia.

B. MEASURES AIMED AT PREVENTING INADEQUATE COMPENSATION AWARDED FOR NON-PECUNIARY DAMAGE UNDER THE 2006 ACT AS A RESULT OF EXCESSIVE LENGTH OF CRIMINAL PROCEEDINGS (W. AND N.D. CASES)

22. The European Court indicated that regardless of the fact that the domestic courts awarded compensation on the basis of the 2006 Protection of Right to Trial without Undue Delay Act for non-pecuniary damage sustained by the applicants as a result of a violation of their right to a trial without undue delay in the criminal proceedings (to W. EUR 5,000, to N.D. EUR 4,000), the awarded compensation did not constitute sufficient redress (albeit set at the statutory maximum) for the delays and related mental distress suffered by the applicants and thereby also for the violation of Article 3 of the ECHR.
23. In this respect, the measures have been taken and explanations provided to the Committee of Ministers within the context of the *Lukenda group of cases* (Final Resolution CM/ResDH(2016)354 and Action report (DD(2016)1212)).

C. MEASURES AIMED AT PREVENTING THE LACK OF SPECIAL DILIGENCE IN CASES TO WHICH MINORS ARE PARTIES (§61 IN THE N.D. JUDGMENT)

24. The measures have been taken to ensure efficient criminal proceedings, including those involving minors, within the context of the *Lukenda group of cases* (Final Resolution CM/ResDH(2016)354 and Action report (DD(2016)1212)).
25. The authorities would like to highlight that victims of crime who are minors enjoy special protection in accordance with the Criminal Procedure Code (ZKP 1999). In criminal proceedings conducted as a result of criminal offences against sexual inviolability, an injured party who is a minor shall, from the initiation of the criminal proceedings onwards, have an attorney to care for his rights, particularly in connection with the protection of his integrity during examination before the court and during the assertion of a claim for indemnification (ZKP 65/3). A person whom the victim trusts may also be present alongside the minor victim. Such person may also be present alongside any other injured party who is the victim of violence (ZKP 65/4). In the investigation stage, the defendant may not be present in the examination of a witness under 15 years of age who is the victim of a crime against sexual inviolability (ZKP 178/4). In questioning a minor person in a main hearing, especially if he was a victim of a crime, a properly considerate approach must be employed to ensure that the hearing will not have an injurious effect on their mental state. Examination of the witness may be performed with the help of an education expert or other expert. In hearing evidence from a witness under 14 years old, a person whom the witness trusts may be present (ZKP 240/4, 2008). The direct examination of persons under 15

years old who have been victims of such crimes in a main hearing is not permitted; a record of prior examination of such persons is read out (ZKP 331/5). Courts may also employ the option of a hearing via video connection or from a safe room. As part of their procedural controls, judges have options regarding inadmissible questions (ZKP 241) and unnecessary questions (ZKP 299).

26. In practice, the courts attach a booklet, issued by the Supreme court, to the invitation for the hearing of a minor victim or defendant. A booklet is specially dedicated to minors, explaining their rights. In September 2017 also the Ministry of justice published a booklet intended for the minors and their parents, who are invited to the court.
27. Slovenia is dedicating special attention to the improvement of protection of children - victims of a crime and is participating in the European Union and Council of Europe joint project: Barnahus/Children's House, which is running since 19.2.2018 to 18.10.2018. The project is aimed at supporting the Slovenian authorities to improve the response towards child sexual exploitation and abuse and to set up and implement the Barnahus response model for child victims and witnesses of violence. The Committee of the Parties responsible for the monitoring of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) referred in its 1st implementation report (2015) to the Icelandic Barnahus (Children's House) as an example of a promising practice with regard to collection of data, the best interest of the child in investigations and criminal proceedings and victim support. A multidisciplinary group has been established for the implementation of the project with the participation of judges and prosecutors among others.
28. In addition, the Court's judgment has been disseminated among national courts raise their awareness on the Court's findings and the need to observe special diligence in cases involving minor victims of criminal offences.

D. MEASURES AIMED AT ENSURING PROTECTION OF THE VICTIM'S PERSONAL INTEGRITY IN CRIMINAL PROCEEDINGS CONCERNING SEXUAL ABUSE

29. It is recalled that the Court found in the case of Y. that the domestic authorities failed to protect the applicant's personal integrity in criminal proceedings concerning sexual abuse for the following reasons: inappropriate questions posed to the applicant during cross-examination; inadequate work of the court appointed expert in gynecology; the opposite party's lawyer learned the facts of the case before assuming representation of the opposite party from the applicant who wished to hire him.
30. The authorities would like to highlight that the case Y. constitutes an isolated incidence of the failure of the domestic courts to protect a victim's personal integrity in criminal proceedings concerning sexual abuse. Given that there are no similar applications currently pending before the Court referring to this point, the authorities maintain that the legislation in place should provide adequate safeguards for the victim's personal integrity. The authorities therefore consider that the publication and dissemination of the Court's judgment will be capable of preventing similar violations.

Disqualification of a counsel

31. The Court indicated that the domestic law on disqualification of counsel, or the manner in which it was applied in the present case, did not take sufficient account of the applicant's interests (§§ 110-111).

32. The authorities would like to point out that prior informal consultation between the victim and the lawyer, who had later been appointed as defendant's council ex officio, could, in accordance with the relevant legislation, raise an issue of conflict of interests which could lead to the latter's disqualification, especially in light of the possible negative psychological effect on the victim being cross-examined by such lawyer. Such circumstances could fall under "other justified reasons" for dismissal of a counsel, as provided by article 5 of the Attorneys Act and Criminal Procedure Code, and ought to be considered by the judge when taking a decision on disqualification.
33. Legislation defines the possibility to decline the representation and disqualification of a counsel, nominated ex officio. The Attorneys Act stipulates that the counsel ex officio may decline the representation only, if there are reasons, for which he must decline the representation (defined in paragraph 2 of article 5), or due to other justified reasons. Criminal Procedure code further stipulates in Article 72 that counsel ex officio can request for his dismissal only if there are justified reasons (paragraph 2), the decision is taken by the court (paragraph 3). The legislation does not specify exactly what are »other justified reasons«, but there are no legal obstacles, nor opposite court practice, which would prevent, that the specific situation, similar to Y. case, could not lead to the dismissal of the council ex officio. The examination of existence of justified reasons (such as conflict of interests or the use of information from alleged informal contacts with victim's mother prior to his appointment as counsel ex officio) and the decision on disqualification is left to the court.
34. The authorities would like to point out that the question on existence of similar cases has been distributed by Supreme Court to the first instance courts in the framework of the execution of judgment. Even if there was no information on similar cases, related to relation between defendant's lawyer and victim, that raised the issue of conflict of interests, the inquiries themselves contributed to raising awareness on the importance of this issue. In addition, the courts have been informed of the position of the Court regarding application of the law in the specific case through dissemination of the judgment.

Inappropriate questioning by the defendant in the main hearing

35. In the case of Y. the Court determined that during the criminal proceedings there was an imbalanced encroachment on the rights of the person prejudicial to a fair trial, in that denigrating questions and comments were permitted from the alleged perpetrator during cross-examination, although the domestic court did not permit any questions and the hearing was adjourned (§ 109 and 114).
36. In the case of Y. the domestic court weighed up the right of the defence, including cross-examination and the respect for the personal integrity of the victim/witness. It should be taken into account that at the time of the questioning in the main hearing, the plaintiff as witness had already attained majority, otherwise as a minor she would have enjoyed special protection.
37. According to the Criminal Procedure Code (ZKP) the court must work to prevent any abuse of the rights held by parties in the proceedings (ZKP 15). The president of the court panel is duty bound to ensure that the case is universally resolved and that they reject anything that could draw out the proceedings without serving for any clarification of things (ZKP 299). The duty of the panel's president is to ensure order in the courtroom and the dignity of the court. To this end, immediately after the start of the session the president may caution those present at the main hearing to behave with dignity and not impede the work of the court (ZKP 301/1). A person being examined may also request a break, if they feel that the hearing is excessively long and arduous (ZKP 312/1). The ZKP also provides for the possibility of penalising a party if in a submission or

their speech they denigrate the court or anyone participating in the procedure (ZKP 78), along with measures for ensuring order in the courtroom and for the dignity of the court (ZKP 301).

38. The Criminal Procedure Code also envisages for instance exclusion of the public from the main hearing; removal of the defendant from the chamber during the examination of a witness; adjournment and postponement of a hearing owing to the distress of an injured party/witness; cautioning the defendant not to repeat questions and forbidding inadmissible and unnecessary questions. Courts may also employ the option of a hearing via video conference or from a safe room.
39. Well balanced assessment of a judge in a specific case of the rights of the defence (and cross-examination) against respect for the personal integrity of the victim/witness is the key. Such weighing up is a part of the court's procedural leadership and the search for the material truth in the individual case. Through dissemination of the Court judgment, courts were informed of the Court ruling in the specific case of Y. regarding the adequacy of the balance between the right to defence and personal integrity.

IV. DISSEMINATION AND PUBLICATION

41. In addition to the above-mentioned measures, the Court's judgments were translated to Slovenian.
42. The translated judgments were communicated to the relevant courts that were dealing with the cases in question as well as to Supreme Court and Ministry of Justice.

The Slovenian translations of the judgments have also been published on the website of the State Attorney's Office (<http://www2.gov.si/dp-rs/escp.nsf>).

43. Their summaries have been published in the monthly journal for judges "Sodnikov Informator", No. 4/2015, pp. 8-12 for W., in No. 7/2015 for Y., and in No. 1/2017 for N.D. and M.A. "Sodnikov informator" is available on the website of the Supreme Court of the Republic of Slovenia.
44. Furthermore, in April 2016 the judgment in the Y. case was presented by a Supreme Court judge during a workshop on criminal law. He also published an article on this judgment in *Pravosodni bilten* No. 3/2016¹.

The above measures ensured that domestic courts are now aware of the Court's findings in these cases and the need to comply with the Court's findings and Convention standards in similar cases.

V. JUST SATISFACTION

45. The amounts of just satisfaction awarded to the applicants in these cases have been disbursed within the time-limits set by the European Court. The details are set out below.

	Non-pecuniary damage	Costs and expenses	Paid on:
W	EUR 15,000	EUR 1,800	23 July 2014

¹ http://www.mp.gov.si/fileadmin/mp.gov.si/pageuploads/23.11.2017.3.Pravosodni_bilten_3-2016_v4.pdf

N.D.	EUR 4,000	EUR 3,300 4,026 incl. VAT	15 July 2015
M.A.	EUR 16,000	EUR 1,011.31	15 July 2015
Y.	EUR 9,500	EUR 4,000	27 November 2015

VI. CONCLUSIONS

46. The authorities of Republic of Slovenia consider that the violations at hand have ceased and that the applicants have been fully redressed for their negative consequences.
47. The authorities furthermore deem that the above-mentioned general measures taken are capable of preventing similar violations.
48. It is therefore considered that the Republic of Slovenia has complied with its obligation under article 46 § 1 of the Convention.