

X and Others v Bulgaria (European Court of Human Rights, 2 February 2021)

Submitted by the Child Witness Institute

KEY CONCEPTS	
Child Rights	Children in institutional care
Child sexual abuse	Lanzarote Convention
Access to procedural justice for children	European Court of Human Rights
Investigations of cases involving sexual abuse of children	

This judgment was delivered by a Grand Chamber of the European Court of Human Rights (ECtHR) on the 2nd February 2021. In this matter, the applicants alleged that they had been abused when resident in an orphanage in Bulgaria and argued that the Bulgarian authorities had failed in their positive obligation to protect them against the abuse as well as in their obligation to conduct an effective investigation into their allegations, following their disclosure. In 2019 the Chamber considered the complaints in terms of Articles 3 and 8 and held that there had been no violation of either article. The complaint was, however, accepted by the Grand Chamber. In a divided judgement, the Grand Chamber found that the Bulgarian authorities had breached their obligation under Article 3 of the European Convention on Human Rights, which requires authorities to conduct an effective investigation into claims of torture, inhuman or degrading treatment. Although the Bulgarian authorities had taken steps to investigate allegations that the applicants (3 children) had been sexually abused in the orphanage, the Grand Chamber found that they had not met the requirement of 'effective.' One of the reasons for this failure was that the authorities had not taken any steps to involve the victims in the investigation.¹

Facts of the case

The applicants in this case were three minor siblings, a boy and two girls. They were placed in an orphanage in Bulgaria after they had been abandoned by their mother. When the children were 12, 10 and 9 respectively, they were adopted by an Italian couple and moved to Italy. Three months thereafter, the children disclosed to their adoptive parents that they had engaged in sexual practices amongst themselves and that they had been sexually abused while at the orphanage. The adoptive parents reported this to various Italian authorities. Eventually the Bulgarian authorities were made aware of the complaints and they took steps to investigate, including checks by social services and opening a preliminary police investigation. The case was discontinued as the office of the public prosecutor was of the opinion that there was not sufficient evidence to prove that any offences had been committed.

Judgement

The Grand Chamber of the Court examined the complaints under Article 3, taking into account other applicable international instruments and, in particular, the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention). The Grand Chamber examined the complaint in terms of both the substantive and procedural limbs of the Article and found that there had been no violation of the substantive limb of Article 3 of the

¹ Liefwaard, T., Valentine, J. and Van Dijck, L. 2021. Victims of 'vulnerability': Balancing protection, privacy and participation of child victims in X and Others v. Bulgaria. <https://strasbourgobservers.com/2021/04/26/victims-of-vulnerability-balancing-protection-privacy-and-participation-of-child-victims-in-x-and-others-v-bulgaria/> (accessed 29/04/2022)

Convention. They ruled, however, by nine votes to eight, that there had been a violation of the procedural limb of Article 3.

Substantive limb of Article 3 of the Convention

In examining the positive obligation required by Article 3 to put in place an appropriate legislative and regulatory framework, it found that the legislative and regulatory framework of Bulgaria was satisfactory with respect to the protection of children living in institutions against serious breaches of their integrity. This finding was based on the fact that:

- the *Bulgarian Criminal Code* punishes sexual abuse of minors
- the *Child Protection Act* protects children from all forms of violence and incorporates the child's best interests as a guiding principle
- a specialised authority, the State Agency for Child Protection, is tasked with carrying out periodic inspections of children's residential facilities and has the authority to take steps to protect children where shortcomings are detected
- the children's facilities prevented outsiders from accessing the orphanage
- the children were always under supervision
- they had visits from an outside general practitioner and psychologist
- they had access to a telephone and the number of a helpline for children in danger.

With respect to the positive obligation to take preventative operational measures, the Grand Chamber found that there was insufficient information to establish that the authorities should have known of the real and immediate risk that the children were being abused. The psychologist and a general practitioner, who monitored the children on a regular basis, had not detected any signs of violence or sexual abuse.

Procedural limb of Article 3

The Grand Chamber found that there were several shortcomings in the investigation that had been undertaken by the Bulgarian authorities, and that this amounted to a violation of the article. The Grand Chamber found that the investigation was not thorough enough for the following reasons:

- the on-site checks conducted by child protection services and police officials fell short of the standards set out in the Lanzarote Convention
- the children were not interviewed in a manner adapted to their age and level of maturity
- interviews were not video-recorded
- one child had to be interviewed twice
- the authorities also failed to follow certain lines of inquiry
- no attempt was made assess the need to) interview the applicants and their parents
- no measures were put in place to assist and support the applicants
- no request was made for a medical examination of the applicants
- no interviews were conducted with other children who had left the orphanage in the meantime
- did not consider investigatory measures of a more covert nature, given the nature and seriousness of the alleged abuse.

The Grand Chamber relied heavily on the standards set out in the Lanzarote Convention (Articles 12 - 14 and 30 - 38) as well as Article 19(2) Of the UN Convention on the Rights of the Child (UNCRC), which also refers to the procedural obligations to conduct an effective investigation. It specifically cited Article 31(1)(c) of the Lanzarote Convention in its assessment, highlighting the need to enable child victims "to be heard, to supply evidence and to choose the means of having their views, needs and concerns presented, directly or through an intermediary, and considered." The Grand Chamber specifically addressed the dual role of the children as victims and witnesses and the need to assist and support the children in their capacity as witnesses.

In the present instance, the Bulgarian authorities could have travelled to Italy to interview the children or requested the Italian authorities to conduct the interviews. Cognisant of the risks involved in interviewing children in cases of this nature, such as the possibility of exacerbating trauma or tainting the evidence, the Grand Chamber found that the authorities should have assessed the need to request such interviews, which had apparently not been considered by the authorities. The second and third investigations did not include taking any evidence from the applicants directly and, in fact, they had not even watched the video recordings of the statements taken from the children in Italy.

Commentary

This is an important judgement from the perspective of international children's rights, and especially for children who are victims of rights violations in institutional care.² Children often face a number of barriers in accessing justice, and this is particularly relevant to the closed nature of institutions which stands in the way of effective investigations and evidence gathering. This case highlights how children's rights may be inadequately protected where state authorities do not show the requisite diligence and rigour.

The dissenting opinion in the judgement claimed that the desire of the majority to "respond to the applicant's sad story" has created uncertainty as to the protection of privacy rights of victims in similar cases. They argue that it might put at risk the best interests of children in similar vulnerable position "by encouraging excessively intrusive and finally unreliable investigative measures." Liefwaard,³ however, argues that by pitting privacy rights and best interests against the notion that child victims should be involved overlooks the fact that the views of the child are a vital element of any assessment of the child's best interests.⁴ The best interests of a child includes taking into account the views of the child. Therefore, taking into account the views of a child would not jeopardise the child's right to privacy, provided that adequate support is in place.

Liefwaard⁵ emphasises that the significance of access to justice for children as a means to seek effective remedies for rights violations should not be underestimated, particularly in the case of children placed in institutions such as orphanages. Institutionalised children are in a very vulnerable situation and at a much higher risk of multiple rights violations than children under parental care. Children in institutions, therefore, require additional safeguards to ensure that they have a mechanism to make complaints.

Liefwaard⁶ argues that the Grand Chamber's assessment of the substantive aspects of Article 3 were "somewhat superficial" in that, although acknowledging that a state's duty was heightened in situations where children were deprived of parental care, it did not consider in much detail the steps involved for a child to bring a complaint in such a context:

- What information or guidance do children in these contexts have about their right to be free of abuse?
- What information do they have about accessing remedies where their rights have been infringed?
- What information do they have about the telephone hotline?

² Ibid.

³ Ibid.

⁴ Committee on the Rights of the Child. General Comment No.14 and General Comment No.12.

⁵ Ibid. Note 1.

⁶ Ibid.

- Was the psychologist and general practitioner trusted by the children so that they could make a disclosure?

Despite these shortcomings, the Court's reliance on the Lanzarote Convention reflects the need for children to participate in an investigation and indirectly references the child's right to be heard (Article 12 UNCRC). Liefgaard⁷ notes that it is regrettable that the Grand Chamber did not explicitly incorporate the need to enable child victims to decide the way in which they will be heard, but that it is promising that the Court's conclusion places a strong obligation on state authorities to do more to involve child victims in their investigations.

Another point of concern is that, although the Court notes the need to prevent undue delay, it does not explain why this is important in the case of children. This case illustrates the problem that lengthy proceedings mean that the children have become adults by the time that the judgment has been delivered.

Overall the judgement provides a favourable message about the procedural rights of child victims in investigations in the context of institutions, suggesting that 'vulnerability' need not prevent a child from being involved in a case in which much is at stake for them. It highlights the particular vulnerability of children in institutions and underscores the importance of their access to justice.

⁷ Ibid.