



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

FOURTH SECTION

**CASE OF MIHAYLOVA AND MALINOVA v. BULGARIA**

*(Application no. 36613/08)*

JUDGMENT

*This version was rectified on 21 April 2015  
under Rule 81 of the Rules of the Court.*

STRASBOURG

24 February 2015

**FINAL**

**24/05/2015**

*This judgment has become final under Article 44 § 2 of the Convention. It may be  
subject to editorial revision.*



**In the case of Mihaylova and Malinova v. Bulgaria,**

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Guido Raimondi, *President*,

George Nicolaou,

Ledi Bianku,

Nona Tsotsoria,

Zdravka Kalaydjieva,

Paul Mahoney,

Faris Vehabović, *judges*,

and Françoise Elens-Passos, *Section Registrar*,

Having deliberated in private on 3 February 2015,

Delivers the following judgment, which was adopted on that date:

## PROCEDURE

1. The case originated in an application (no. 36613/08) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Bulgarian nationals, Ms Ana Borisova Mihaylova (the first applicant) and Ms Lilyanka Yankova Malinova (the second applicant), on 17 July 2008.

2. The applicants were represented by Mrs M. Ilieva, a lawyer practising in Sofia. The Bulgarian Government (“the Government”) were represented by their Agent, Ms Y. Stoyanova of the Ministry of Justice.

3. The applicants complained, in particular, about the killing by the police of their father and partner and the lack of an effective investigation.

4. On 18 October 2011 the application was communicated to the Government.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

5. The applicants, daughter and mother, were born respectively in 2001 and 1980 and live in Samokov. Mr Boris Mihaylov, the victim of the police action in question, was a young Roma man: the first applicant’s father and the second applicant’s unmarried partner.

The facts of the case, as submitted by the parties, can be summarised as follows.

### **A. The events of the night of 3 August 2004**

6. Late in the evening of 3 August 2004, while driving in the centre of Samokov, KK noticed three individuals who were trying to open the doors of a parked lorry. Mr Mihaylov was one of these men. KK called the police. Shortly afterwards, two on-duty police officers from the Samokov District Police Unit, Chief Sergeants S and M, who at that time had been responding to another call, received information from the central office that three “gypsies” had been seen breaking into a lorry and the officers drove immediately to the scene.

7. When the police car, apparently with its siren on, approached the lorry, the three men started running. The officers followed by car. When the street became narrower, they got out of the car and separated, with Chief Sergeant S chasing Mr Mihaylov while Sergeant M followed the other two men, whom he was unable to catch. Chief Sergeant S caught up with Mr Mihaylov by the side of the street, close to a parked car. A short fight followed, and two shots were fired. One of the bullets, fired at very close range, entered the left back of Mr Mihaylov’s head and exited through the right side of his forehead. An ambulance was called and Mr Mihaylov was taken to a hospital where his death was registered at 00.10 a.m. on 4 August 2004.

### **B. The investigation**

8. On the same day a criminal investigation (VII-20/2004) was opened against Chief Sergeant S to establish whether he caused Mr Mihaylov’s death as a result of a disproportionate reaction to an attack (Article 119 of the Criminal Code: see paragraph 42 below). At this stage no charge was brought against him.

#### *1. Investigative measures in the immediate aftermath of the shooting*

9. An autopsy was carried out on Mr Mihaylov’s body on 4 August 2004. In his report the forensic pathologist determined that death had resulted from a severe cerebral trauma and ensuing cardiovascular insufficiency. The trauma was caused by a transitory gunshot: the entry wound was located on the left side of the back of Mr Mihaylov’s head and the exit wound on the right side of the forehead towards the temporal bone. The shot was fired from a distance close to point-blank range. The expert noted that, as the head could move in different directions, on the basis of the route of the bullet it was difficult to establish the dynamic position of the victim’s body in relation to the gun at the moment of shooting. He also noted several bruises on the right side of Mr Mihaylov’s face, his right hand and both knees, which he concluded had in all probability resulted from the fall to the ground after the shooting.

10. The pathologist also examined Chief Sergeant S. He noted a reddish-pink bruise on his right hand, measuring 0.5 centimetres long, and another bruise measuring 0.5 by 0.8 centimetres on his right side. The pathologist concluded that the injuries could have been inflicted in the manner described by the police officer, namely when he was trying to knock the knife from Mr Mihaylov's hand and during the struggle for the gun.

11. An inspection of the scene was carried out at 2.20 a.m. on 4 August 2004 by a military investigator in the presence of two certifying witnesses. There was no subsequent day-light examination. The investigator examined the bonnet of the car next to which Mr Mihaylov's body was found and noted a dent of 3.5 centimetres located at 0.98 metres from the front left corner and 1.03 metres from the front right corner as well as a bullet hole measuring 3 centimetres situated at 1.17 metres from the front left corner and 0.77 metres from the front right corner of the bonnet; blood stains on the bonnet and on the ground next to the car; and another dent with freshly peeling paint on the metal wall of the building to the left of the car. Photographs were taken of the dent and the bullet hole on the bonnet but these were not preserved as physical evidence, nor were impressions made of the dents and bullet holes. The vehicle was not taken away for examination and its owner, a security firm, repaired and sold it before the investigation was formally completed.

12. The investigator found a handgun on the ground under the bonnet of the parked car. The safety lever was lifted and there was one bullet in the barrel and two in the magazine. The investigator found and retrieved one spent cartridge case, on the other side of the street, two to three metres from the parked car where Mr Mihaylov was shot, but no bullets. During the subsequent stages of the investigation proceedings the initial number of cartridges in the officer's gun was not clarified, nor was it determined how many shots were fired, including whether a warning shot was fired. The statements of the Chief Sergeant S were contradictory on this subject. In his testimony of 4 August 2004 he S stated that he had started with five cartridges in his handgun but on 10 September 2004 he changed his testimony, maintaining that he had had six cartridges.

13. A fingerprint report of 9 August 2004 did not record any traces of fingerprints on the handgun suitable for examination. The report on the acetone-drenched swabs of Chief Sergeant S's hands of 11 August 2004 found no traces of gunpowder residue. The expert report on Chief Sergeant S's handgun of 25 August 2004 concluded, *inter alia*, that it had been in good condition and would have discharged a shot only after the trigger was pulled.

14. During the inspection of the scene of the killing which took place in the early hours of 4 August 2004, the investigating officer found a folding knife, with an eight centimetre blade and a ten centimetre metal handle. The protocol of the search stated that it was found on the bonnet of a car parked

across the street from the death scene but it did not state whether the blade was open when it was found. It seems that no steps were taken to check for fingerprints on the knife or to determine its ownership. A mobile telephone was found in a stone vase near the scene of the shooting, but the subsequent investigation did not determine who owned it.

15. The investigator questioned Chief Sergeant S, his colleague Chief Sergeant M and the three security guards who had been standing in the vicinity of the scene at the time of the events.

16. Questioned in the early hours of 4 August 2004, Chief Sergeant S stated that Mr Mihaylov had been running with his arms open wide while trying to escape. As the sergeant caught up to him, Mr Mihaylov had stopped and turned round. At this point Chief Sergeant S noticed that he held a knife, but it was dark and he could not see it well. Mr Mihaylov swung at the sergeant with his left hand, and the officer tried in vain to knock the knife away. Mr Mihaylov then grasped him tightly with both hands behind his back, while reaching for the handgun, which was in the officer's unbuttoned holster at his waist. The two men had fought briefly for possession of the gun. Chief Sergeant S stated that he felt strongly afraid: it was dark, the other man had his hand on the officer's loaded gun and was armed with a knife. The officer could not remember the exact position of their bodies in the fight that ensued for the gun and at the moment when the shots were fired, nor could he remember how many shots were involved. He had been expecting the man to shoot or stab him at any moment.

17. Questioned later, Chief Sergeant S stated that after the first shot was fired he panicked and could not remember what happened. In his subsequent statements he explained that he had been stabbed on earlier occasions while on duty, which had made him particularly fearful of knives. He was not even aware who actually pulled the trigger and at one moment he had feared that he had been shot, rather than Mr Mihaylov.

18. Throughout the subsequent proceedings the only testimony about the detail of the fight remained that of Chief Sergeant S. The other officer involved in the chase, Chief Sergeant M, and some other eye witnesses were also questioned in the early hours of 4 August 2004. Chief Sergeant M stated that he telephoned Chief Sergeant S when he lost sight of the other two suspects, to discuss how to proceed. Chief Sergeant S asked him to come to him immediately. When he arrived at the site there were a lot of people and he saw a man taken away by ambulance. Chief Sergeant S's handgun was beneath a car and there was a blood stain on the ground next to the car. His colleague was extremely upset and told him that he had done the worst. There was a pocket knife on the bonnet of another car nearby.

## *2. The submissions of the other witnesses*

19. At the time of the events, three employees of a private security company, GK, EK and GD, were chatting in front of their office, which was

in a building adjacent to the street where Mr Mihaylov was shot. They were interviewed on five occasions and their statements were inconsistent, both in respect of each man's previous statements and the statements given by the other men. Their statements varied as regards whether they heard a warning shot, how many shots were fired and whether they saw a knife in Mr Mihaylov's hand. Some of them remembered the officer warning Mr Mihaylov from a distance to stop and lie down. All of them stated that the events unfolded within seconds and that they could not see what exactly happened when the police officer came into contact with Mr Mihaylov because it was dark. None of them had seen a knife or a gun in the hands of Mr Mihaylov or Chief Sergeant S in this short time, although they saw them afterwards. They agreed that when Chief Sergeant S, who had fallen to the ground with Mr Mihaylov, stood up, he was holding a knife, which he threw and which fell on the bonnet of a car parked on the other side of the street. The officer had been very upset, and appeared to be in a state of shock, waving his arms around, pacing up and down and repeatedly proclaiming: "What did I do?"

20. Later in the proceedings it transpired that there was a camera installed above the entrance door of the security company building, facing the street. The car next to which the shooting took place was parked on the opposite side of the street, at a short distance from where the men were standing. In his testimony of 18 October 2007, GK stated that on the night of the incident the security camera installed above the entrance to the building in which they worked had been broken. Another witness stated that the camera did not record footage, but only monitored the street outside, and was used by the night shift security guards to observe the firm's vehicles. The guard on duty on the night of the shooting was GD. He was standing outside with the other two witnesses. There was also a dispatcher whose desk was below the monitor screen, but according to GK she could not see it. During his interview of the same day EK stated that he could not remember which dispatcher was on duty that night and that at that time the dispatchers employed by the firm were all new employees of the company. The camera was not inspected and none of the other employees of the firm were interviewed on this point during the investigation.

### **C. The conclusions of the investigation**

21. On 30 September 2004 the investigating officer completed his work on case-file VII-20/2004. In his findings on the facts he described the unfolding events in detail as follows:

"On 3 August 2004 the operator on duty at the district police station of Samokov Chief Sergeant KB, a witness, took a call from a private person KK who reported that three men were preparing to commit theft from a lorry parked on Tzar Boris III Street. The lorry belonged to Markan Ltd – it was left parked in the street with its signal

lights on by GS, who worked as a supplier for Markan Ltd. The operator dispatched patrol officers Chief Sergeant SM and Chief Sergeant VS to the location in question. When the patrol vehicle approached the lorry on Tzar Boris III Street the three men who were around and inside the lorry attempted to escape and started running in the direction of the town centre. The patrol vehicle followed them along Tzar Boris III Street when two of the men ran towards the town centre and one ran towards Otez Paisii Street. Chief Sergeant SM went in pursuit of the two men running towards the town centre and Chief Sergeant VS followed the man who had gone in the direction of Otez Paisii Street; VS fired a warning shot in the air – using a ‘stop’ bullet. On Otez Paisii Street in proximity to Treger Café, and in front of building No. 5 Chief Sergeant VS caught up to the running man who while running had a mobile telephone in one of his hands and a pocket knife in the other. At this moment VS had already put his Makarov KT 23389 pistol into the holster on his hip so that he could run faster, and at the time there was a live bullet in the barrel of the pistol after the firing of the warning shot. VS was wearing a uniform, he had got off a police vehicle bearing insignia, he had shouted to the running man ‘Stop! Police! Get down on the ground!’ but the man had not stopped running. In front of the building on Otez Paisii Street BM stopped running, turned to face the police officer and swung at him with his hand which held a pocket knife. VS saw the blade in the street light and blocked the hand of the man. Without letting go of the knife, BM threw himself on VS, grabbed him around his waist while holding his arms, and attempted to take the gun out of VS’s holster. VS took hold of BM’s hand which was holding the gun, and then BM pushed VS onto the bonnet of an Opel with number plates CO 5486 KA which was parked nearby. As he was falling, V.S. managed to extricate himself from under B.M., while B.M. kept holding on to his gun with one of his hands, and holding the knife in the other. At the same time VS had both his hands on BM’s hand with which he was trying to take the gun out of the holster. BM had managed to take out the gun while VS held his hand – as a shot was fired and the bullet hit the metal wall of the building of Treger Café. The direction of that shot was to the side and away from the place of the incident, which means that this shot was not fired as a warning shot. After the shooting, because of the fear for his life which he had experienced, VS was in a state of extreme stress and he was not able to recollect the events in detail. The struggle between the two was observed by three witnesses: GD, GK and EK who were standing in front of the building at Otez Paisii No. 5 and who did not interfere. Their testimonies confirm that BM had stopped running and had started to wrestle with VS. However, because of the stress, the dim light and the speed of the events the witnesses cannot recall details about the manner in which BM was shot and the position of the two men’s bodies in relation to one another at the time of the shooting. From the appearance and the location of the gun wound on BM’s head and the gunshot hole found in the bonnet of Opel CO 5486 KA, it is evident that after the first shot was fired, VS had managed to regain possession of the gun and shoot him in the head at close range. After the shooting VS was in a state of shock: he dropped the gun on the ground, he was moving erratically, he was bending down to BM who was lying on the ground, he took the knife from BM’s hand and threw it onto the bonnet of Opel C 3034 IIX. At this moment Chief Sergeant SM was in the town centre and he placed a call to VS’s mobile; VS told him that trouble had occurred and SM called the operator to dispatch support. KB, the operator on duty, sent a patrol vehicle and an ambulance. BM was taken to the hospital in Samokov where in spite of the medical assistance he passed away from a traumatic head injury followed by shock and coma that led to irreversible heart and lung failure.

In his 20 years of service with the Ministry of Interior Chief Sergeant VS has never been disciplined; he was awarded four times. The man who was killed, BM, had



committed a large number of offences. He has been registered for 12 thefts and two robberies. He was convicted five times for the following crimes: ....”

Based on these findings, the investigator proposed to the prosecutor to discontinue the investigation since he considered that Chief Sergeant S had acted in self-defence within the meaning of Article 12a of the Criminal Code (see paragraph 42 below), which in his view meant that the acts of the police were not liable to prosecution. He further indicated that “even if there was no danger to the officer’s life, Chief Sergeant S was authorised to use a firearm in such circumstances, although he did not do so until his life was threatened”.

22. On 6 October 2004 the applicants’ counsel requested access to the investigation file. On 29 October 2004 a prosecutor from the Sofia military prosecutor’s office dismissed the request, on the grounds that at this stage the applicants were not participating in the criminal proceedings.

23. In a decree of the same day the prosecutor discontinued the criminal proceedings against Chief Sergeant S, stating that the officer had shot Mr Mihaylov but that this had not constituted an offence. In reaching his conclusion, the prosecutor found it established that, when running, Mr Mihaylov had been holding a mobile telephone in one hand and a knife in the other. At some point he had stopped abruptly, had turned around and had swung at the officer with the knife. When the officer had tried to knock away the knife, Mr Mihaylov had wrestled with him, tried to reach the officer’s handgun, and pushed him onto the bonnet of the car. A short struggle for the gun had followed and one shot had been fired accidentally. Following that, according to the prosecutor, the officer had managed to get hold of the gun and shoot Mr Mihaylov. As the victim had still been holding the knife, the police officer took it from his hands and threw it away. In the prosecutor’s view Mr Mihaylov attacked the officer in order to avoid arrest and also to help his accomplices, who at that time were running away with a cassette player stolen from the lorry.

24. On the basis of this account of the facts, the prosecutor reached the following conclusions. First, he concluded that Mr Mihaylov had attacked Chief Sergeant S. Secondly, the reaction of the police officer, who had shot Mr Mihaylov, had not been disproportionate to the attack. Chief Sergeant S had acted in self-defence against a much younger man who had been holding a knife. Because of the weak light and the speed of the events, the circumstances of the shooting and the position of the bodies could not be established. Thirdly, once Chief Sergeant S identified himself as a police officer and fired a warning shot he was entitled under Article 12a of the Criminal Code (see paragraph 42 below) to use force to arrest Mr Mihaylov, even if it had not been necessary to act in self-defence. The prosecutor also noted that Chief Sergeant S had never been disciplined but had been commended a number of times and that Mr Mihaylov had been known to the police and had been convicted five times. The fact that Mr Mihaylov

held the knife in his left hand and that he must have used the same hand to grasp the gun of the officer, who was facing him, was not given attention.

#### **D. Judicial review**

25. In response to the applicants' counsel's appeal, by a decision of 13 December 2004 the Sofia Military Court quashed the prosecutor's decree, finding that the prosecutor's account of the events was based on arbitrary and contradictory assumptions rather than on established facts; the interviews of the witnesses had been formalistic and their statements were vague and contradictory. In particular, the prosecutor had failed to establish the number of shots fired, the position of the two bodies at the time of the fatal shooting, the trajectory of the bullet and the position of the victim's head in relation to the barrel of the gun. The court also noted that the prosecutor had failed to give reasons for his conclusions regarding the applicability of the rules on self-defence or Article 12a of the Criminal Code (see paragraph 42 below). In view of those shortcomings the court remitted the case and instructed the prosecutor to re-interview the eyewitnesses; if possible, to find and interview other witnesses; to have prepared a medical-ballistics report in order to establish, in particular, the position of the bodies and the trajectory of the bullet; and to organise a reconstruction of the events in order to verify the witnesses' statements.

##### *Further investigation and discontinuance of the proceedings*

26. In execution of the court's instructions, on 19 January 2005 the investigator commissioned a medical-ballistics report. The authors of the report made no mention of the bullet hole in the car bonnet and concluded that they could not determine the exact position of the two bodies at the time of the shooting. They found that at the moment of the shooting the gun was almost touching the back left side of Mr Mihaylov's head, and that it had been pointing upwards and slightly to the right.

27. The investigator questioned Chief Sergeant S on 17 January 2005. Relying on his status as a witness, the sergeant refused to take part in a reconstruction, claiming that he had received threats from the Roma community in Samokov. On 11 August 2005 the investigator was discharged from the case for his failure to comply with the court's directions and a new investigator was appointed. The new investigator questioned the three security guard eyewitnesses on 13 September and 20 September 2005 and he questioned Chief Sergeant S on 12 September 2005 and on 13 January and 1 February 2006. Chief Sergeant S maintained that he had acted in self-defence and in accordance with the rules governing the use of force. He was in shock and unable to remember the exact positions of himself and Mr Mihaylov when the latter was shot.

28. In a decree of 16 March 2006 the prosecutor discontinued the criminal proceedings on the grounds that the police officer had not committed an offence. The applicants again sought judicial review. In a decision of 13 June 2006 the Sofia Military Court quashed the prosecutor's decree and remitted the case for further investigation. The court stated that the investigative authorities had failed to comply with the court's previous directions and had thus obstructed the investigation. It noted again that the interviews of the witnesses had been formalistic, that their statements were contradictory and that the investigative authorities had failed to organise a reconstruction or confrontations in order to clarify the facts. The court noted that the forensic evidence suggested that at the moment of the shooting Mr Mihaylov had been facing the bonnet of the car. Also, the investigative authorities had never established the exact number of cartridges fired and the statements of Chief Sergeant S were inconsistent on this point. The court further noted that the experts who had carried out the medical-ballistics report had failed to discuss the bullet hole in the car bonnet. Furthermore, the investigative authorities had failed to inspect the knife and to analyse the circumstances surrounding its use or to inspect the mobile telephone and its whereabouts at the time of the events.

29. Following the remittal, the investigator re-questioned the security guards. They stated that they had only vague memories of the incident and refused to participate in a reconstruction. Chief Sergeant S again refused to give a further statement or to participate in a reconstruction. The fingerprint expert report on the knife of 26 July 2006 found no fingerprints suitable for examination.

30. On 13 October 2006 the applicants' counsel examined the investigation file and requested the collection of additional evidence, namely that steps be taken to seek out other witnesses; that the certifying witnesses who had participated in the inspection of the crime scene early in the morning following the incident be questioned; that the two police officers be re-interviewed with a view to clarifying whether they had followed a preliminary plan for the arrest of Mr Mihaylov and his companions; that an additional medical-ballistics report be prepared to clarify the position of the bodies, in particular whether Mr Mihaylov had been neutralised at the moment of the fatal shooting, and the number of cartridges in the handgun as it had not been clear how many shots had been fired in total. She also demanded the inspection of the security camera, installed above the entrance of the building opposite the site of the shooting; a reconstruction of the events; and an identification by Mr Mihaylov's family of the knife found at the scene. On 7 November 2006 these requests were rejected by the prosecutor on the grounds that they were aimed at delaying the proceedings. The prosecutor noted, *inter alia*, that any video recordings made by the camera belonging to the security firm would not qualify as evidence under the Criminal Procedure Act.

31. In a decree of 10 November 2006 the prosecutor discontinued the criminal proceedings since he considered that Chief Sergeant S had not committed an offence. In relation to the court's instructions regarding further inquiries, the prosecutor stated that, despite efforts made, no other eyewitnesses had been identified; the inspection of the knife had not revealed any new evidence; it had been impossible to establish the owner of the mobile telephone; and that a reconstruction of the events would have been futile as Chief Sergeant S refused to take part owing to a justified fear of violence from the relatives of the victim and members of the Roma community. The prosecutor stated that when the fight had started Chief Sergeant S and Mr Mihaylov had fallen on the bonnet of the car. The prosecutor did not come to any conclusion as to whether Mr Mihaylov had been holding the knife when the fatal shot was fired, but noted only that at that moment the officer had been very afraid. The prosecutor reproduced the legal conclusions on the rules of self-defence under Article 12a of the Criminal Code, contained in the decree of 29 October 2004 (see paragraphs 23-24 above). Relying on unspecified information about injuries inflicted on Chief Sergeant S during earlier police operations, the prosecutor concluded that the latter should not be punished because he had acted in a state of acute fear.

32. The applicants challenged the decree, claiming, *inter alia*, that the authorities, influenced by their prejudice towards Roma, had conducted only a formalistic investigation. In a decision of 22 November 2006 the Sofia Military Court quashed the decree and remitted the case to the prosecutor. It held that the investigative authorities had failed to comply with the instructions given by the court in previous decisions and that they had intentionally protracted the investigation and failed to employ any meaningful efforts to establish the truth. The court noted, *inter alia*, that the exact circumstances of the fight and the shooting had not been established; that no reconstruction had been organised and no valid reasons given for this omission; and that the authorities had also failed to conduct confrontations, inspections of the knife and the mobile telephone or to order an additional medical-ballistics report.

33. Following the remittal by the Sofia Military Court, on 16 March 2007 the investigator arranged for an inspection of the knife, but this failed to determine whether the blade had been open or closed at the time of the shooting. A further medical-ballistics report, dated 27 March 2007, made no reference to the bullet hole in the bonnet of the car and concluded that it was impossible to establish the exact position of the bodies at the time of the shooting. The investigator also requested Chief Sergeant S to take part in confrontations with GD and GK, and a reconstruction, but the Chief Sergeant refused to participate.

34. On 21 April 2007 the applicants' counsel repeated her earlier requests for additional investigative measures. In a decree of 31 May 2007

the prosecutor again discontinued the criminal proceedings. He repeated verbatim the reasoning given in the decree of 10 November 2006, but added as an additional ground that Chief Sergeant S had been suffering from fear and confusion and that in these circumstances, as a matter of domestic law, there had been no excess of force. The applicants sought judicial review. In a decision of 27 June 2007 the Sofia Military Court quashed the prosecutor's decree and remitted the case for further investigation. The court stated that despite the numerous remittals the prosecutor had repeatedly failed to comply with the court's instructions and that the actions of the authorities and the measures employed had been a parody of an investigation, revealing unwillingness to collect the evidence and establish the truth.

35. Following the remittal the investigator questioned the three security guards, Chief Sergeant M and two additional witnesses, as requested by the applicants. During the interview of GD on 18 October 2007, the investigator in one question referred to Mr Mihaylov as "the gypsy". On 5 December 2007 the investigator organised a reconstruction of the events. Chief Sergeant S did not take part, relying on his capacity as a witness. A further ballistics report dated 14 December 2007 found, in particular, that on the basis of photographs it had not been possible to establish the morphology, character and orientation of the bullet hole and thus the exact position of the bodies at the time of the shooting. Meanwhile, it appears that around this time the prosecutor in charge of the investigation stated that he disagreed with the court's instructions and requested to be allowed to withdraw from the case. It appears that this request was not granted, as he continued working on the case.

36. In a decree of 9 January 2008 the prosecutor discontinued the criminal proceedings finding, as before, that the police officer had shot Mr Mihaylov to defend himself from the latter's attack and that the use of force had, in any case, been justified under Article 12a of the Criminal Code (see paragraph 42 below) once the police officer had asked Mr Mihaylov to stop and had fired a warning shot. The prosecutor noted, in support of his finding of self-defence, that an offender with a criminal record had attempted to attack a police officer, who had never been disciplined and who had received awards. The applicants sought judicial review, contending, *inter alia*, that the authorities had not bothered to carry out an effective investigation because of Mr Mihaylov's ethnicity and low social status. The Sofia Military Court upheld the prosecutor's decree. Upon the appeal of the applicants, in a decision of 22 July 2008, the Military Court of Appeal set aside the lower court's decision. The Court of Appeal raised serious doubts in respect of the prosecutor's impartiality. It further noted the prosecutor's failure to establish who had fired the fatal shot and in what circumstances. The court also held that on the basis of the evidence collected, namely the eyewitnesses' testimony that the shooting had taken

place on the car's bonnet and the conclusions of the medical-ballistics report about the channel of the wound, it was clear that at the moment of the lethal shooting Mr Mihaylov had been facing the bonnet of the car and the police officer had fired from behind. Thus the court found that immediately before the shooting the police officer had had full control over the victim, the use of force had not been necessary and there was sufficient evidence that the police officer had intentionally killed Mr Mihaylov. The court remitted the case, instructing the prosecutor to bring charges against the sergeant for murder as well as to discharge anybody who had demonstrated partiality from working on the case.

37. On 1 December 2008 a newly-appointed prosecutor laid charges against Chief Sergeant S for causing death as a result of a disproportionate reaction to an attack. However, two weeks later, in a decree of 15 December 2008, the prosecutor discontinued the criminal proceedings against Chief Sergeant S, using almost identical reasoning to that in the decree of 9 January 2008, with some additional findings, some of which appeared contradictory. For example, at one point in the decree the prosecutor found that Mr Mihaylov had dropped the knife before he had reached for the sergeant's handgun, but subsequently he found that Mr Mihaylov had dropped the knife at the moment the fatal shot was fired. The prosecutor also referred to the police officer's fear of knives as justification for using force. Chief Sergeant S had claimed in his testimony of 12 September 2005 that he had developed a fear of knives after he was stabbed while making another arrest a year before the incident with Mr Mihaylov. No assessment of the police officer's psychological condition or his fitness to perform his duties at the material time was mentioned in the decree. In the report, the prosecutor advanced three different justifications for the use of force, namely, the justified use of force to make an arrest; self-defence; and the excessive use of force due to fear. No attempt was made to reconcile these three theories.

38. The applicants sought judicial review. In a decision of 14 January 2009 the Sofia Military Court quashed the prosecutor's decree and remitted the case for further investigation. The court considered ill-founded the prosecutor's conclusions that Mr Mihaylov had been holding a knife when he had turned to the sergeant and that at the beginning of the fight Mr Mihaylov had pushed the sergeant onto the bonnet of the car. The court found that the officer had had full control over Mr Mihaylov and that the use of force had been excessive. The court also noted the failure of the investigative authorities to comply with previous judicial directions.

39. Following the remittal, the prosecutor interviewed two witnesses who stated that Chief Sergeant S had been injured before, in 1997 and 2003, during police operations. In a decree of 8 June 2009 the prosecutor again discontinued the criminal proceedings. This time the prosecutor maintained that Mr Mihaylov had dropped the knife before reaching for the handgun.

He further held that the fight had taken place next to the car and not on its bonnet and that Mr Mihaylov had fallen on the bonnet after he had been shot. Following an appeal by the applicants, on 7 July 2009 the Sofia Military Court quashed the prosecutor's decree and again remitted the case for further investigation. Chief Sergeant S appealed against the decision. In his appeal he did not claim to have acted in self-defence but instead claimed that it had been an accidental killing, falling under Article 15 of the Criminal Code. The prosecutor also challenged the decision. His appeal was rejected in a decision of the Military Court of Appeal on 22 July 2008. In a decree of 13 October 2009 the prosecutor discontinued the proceedings for the eighth time, stating that Mr Mihaylov had been holding a knife when he attacked the officer and that he had pushed the officer onto the bonnet of the car, dropping the knife and reaching for the handgun, and that after the shooting the officer had taken the knife and had thrown it away. The applicants sought judicial review. By a decision of 6 November 2009 the court granted the appeal and remitted the case, finding that the court's earlier instructions had not been complied with, that no additional investigation had been conducted, and that the prosecutor had based his conclusions on contradictory facts.

40. Chief Sergeant S challenged the court's decision before the Military Court of Appeal and reiterated his claim that the shooting had been an accident. By a final decision of 17 December 2009 the Military Court of Appeal quashed the lower court's decision and upheld the prosecutor's decree. The court endorsed the conclusions of the prosecutor on the facts. It found that the police officer had been faced with a real and imminent attack by the victim which was not interrupted until the two shots were fired. The police officer had acted in self-defence and had not, therefore, committed an offence.

## II. RELEVANT DOMESTIC LAW

### A. Use of firearms by the police

41. The relevant legislation applicable at the time of Mr Mihaylov's death (August 2004) was Article 80 of the Ministry of Interior Act, which provided as follows:

“(1) Law enforcement authorities may use fire arms as a last resort:

1. in cases of armed attack, or threat with firearms;
2. in cases of rescue of hostages and abducted persons;
3. in cases of self-defence;
4. (amended, State Gazette No. 17, 2003) after a warning in effecting the arrest of a person in the course of their committing - or who has committed - a publicly prosecutable offence, where the person is resisting or is trying to escape;

5. after a warning in preventing the escape of a person lawfully detained for committing a publicly prosecutable offence;

(2) When resorting to firearms, law enforcement authorities are obliged, if possible, to protect the life of the person against whom firearm is used, and to not place at risk the life and health of other persons.

...

(6) After resorting to firearms, law enforcement authorities are obliged to write a report as prescribed by the relevant procedure.”

The wording of section 74(1)(1), (1)(3) and (2) of the Ministry of Internal Affairs Act 2006, currently in force, repeats verbatim that of section 80(1)(1), (1)(4) and (2) of the 1997 Act. On 30 May 2012 Parliament enacted a bill amending section 74 of the 2006 Act; the amendment came into force on 1 July 2012. The words “as a means of last resort” in section 74(1) were changed to “only where absolutely necessary”, and the words “to protect, as far as possible” in section 74(2) were replaced by “do everything possible to protect”. A new subsection 5 was added to section 74, providing that “[t]he police shall discontinue the use of firearms immediately after attaining its lawful aim”, as well as a new subsection 6, providing that “[i]t shall be prohibited to use firearms to arrest or prevent the escape of a person who is about to commit or has committed a non-violent offence if that person does not pose a danger to the life or health of another”. A new section 74a was added, providing that “[t]he planning and control of the use of physical force, auxiliary means and firearms by the police ... shall include [the taking of] measures to attain the lawful aim at minimal risk to the life and health of the citizens”. In the explanatory notes to the bill the Government referred to, *inter alia*, the need to bring domestic law fully into line with the applicable international standards and the Court’s case-law.

## **B. Relevant provisions of the Criminal Code of 1968**

42. The law concerning the use of force in self-defence, as it applied at the time in question was set out in Article 12 of the Criminal Code of 1968, which provided as follows:

“**Article 12** (1) An act shall not be punishable when it is carried out in defence against an imminent and unlawful attack against the interests of state or society, or against the defender’s own person or rights, or against those of others, by causing harm to the attacker within the limits of necessity.

(2) Causing harm in excess of the limits of necessity occurs when the defence clearly does not correspond to the nature of the attack and the threat posed by it.

(3) Whatever the harm caused, it is not considered in excess of the limits of necessity if the attack consists of entering someone’s home by the use of violence or by breaking in.



(4) A person shall not be punished when he has committed the act in excess of the limits of necessity if it has resulted from fear and confusion.

**Article 12a [Introduced in 1997]** (1) Causing harm shall not be punishable when harm is caused to a person who has committed a crime and it is caused in effecting his apprehension with a view to turning this person to the authorities and the prevention of the committal of any other offence, when there are no other means for his apprehension and when his apprehension is carried out without excess of the necessary and lawful means.

(2) The necessary means for the apprehension of a person who has committed a criminal offence are exceeded when the nature and degree of the gravity of the offence committed by the apprehended person are clearly incompatible with the circumstances of the apprehension, as well as when the person sustains damages that are clearly excessive.”

In addition, Article 119 of the Code created an offence of causing death through the excessive use of force in self-defence, as follows:

“Causing death to a person when acting in self-defence in excess of the limits of necessity is punishable by up to five years of imprisonment.”

43. Article 15 of the Code dealt with the accidental causing of death, *inter alia*, as follows:

“An act shall not be culpable if the person who committed it did not have the obligation or ability to foresee the occurrence of the harm caused by his conduct (an accidental act).”

### **C. Exemption from the duty to testify**

44. Pursuant to Article 96 § 1 of the Code of Criminal Procedure 1974, in force at the material time, a witness was relieved from the duty to testify when answering a question which would lead to self-incrimination. This provision was reproduced verbatim in the Code of Criminal Procedure 2006 (Article 121 § 1).

## **THE LAW**

### **I. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION**

45. The applicants complained that Mr Mihaylov had been killed by the police in circumstances in which the use of lethal force had not been absolutely necessary. They also complained that the authorities had failed to conduct an effective investigation into that matter. They relied on Article 2 of the Convention, which, in so far as relevant, provides as follows:

“1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

### **A. Admissibility**

46. The Government argued that the application should be declared inadmissible for non-exhaustion of domestic remedies, since there was an appeal in a private criminal case pending before the Military Court of Appeal.

47. The applicants responded that at the time the application was lodged, the investigation had been closed. It had already lasted too many years and failed in many respects to comply with the requirements of Article 2.

48. The Court recalls that the only remedies which an applicant is required to exhaust are those that relate to the breaches alleged and which are at the same time available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied. Moreover, an applicant who has exhausted a remedy that is apparently effective and sufficient cannot be required also to have tried others that were available but probably no more likely to be successful (see *Aquilina v. Malta* [GC], § 39, ECHR 1999-III). In the present case, the criminal investigation initiated by the State authorities was closed by a final decision of the Sofia Military Court of Appeal on 17 December 2009. While the applicants might additionally have sought to bring a private criminal prosecution, which is still pending, the effectiveness of this remedy in the above circumstances has not been established. The Government’s preliminary objection must, therefore, be rejected.

49. The Court notes that the complaints under Article 2 are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

## B. Merits

### 1. *The parties' arguments*

#### a. **The applicants**

50. The applicants did not accept that Mr Mihaylov had attacked the police officer with a knife. If this had been the case, the officer would have sustained cuts, rather than “bruises due to tangential action by hard blunt objects”. In the applicants’ view, the knife was an obvious construction by the authorities to protect the policeman from criminal prosecution; it appeared late in both witness testimony and materially in the case file; and the findings of the authorities in respect of it were contradictory and inconsistent. As regards the Government’s claim that the officer was justified in shooting Mr Mihaylov because he believed that the latter had committed a crime, it was apt to recall that the alleged crime was theft of a car radio. Even if Mr Mihaylov was guilty of that crime, which had not been established, it was a petty, non-violent crime and it was disgraceful to suggest that this was good a reason for killing him.

51. The applicants submitted that Mr Mihaylov’s killing was the result of a clear abuse of force. As the domestic courts observed on a number of occasions, the forensic evidence indicated that Mr Mihaylov was shot from behind, in a position that gave the policeman full control over him. The relevance and significance of these findings was not altered by the fact that, in its final judgment, the Military Court of Appeal upheld the prosecutor’s decree exonerating the policeman. The Court of Appeal’s ruling lacked any analysis of its own concerning the necessity of the killing; it merely reproduced the partial reasoning of the prosecutor’s office which had been declared inadequate and false a number of times previously by more critical and independent-thinking judges of the same court and of the lower court. Moreover, the Military Court of Appeal, in upholding the prosecutor’s decision to exonerate the police officer, applied a legal test which was not in compliance with Article 2 of the Convention. Domestic law during the period in question did not require a test of absolute necessity to justify recourse to lethal force by the police. The Court had been critical of this same legal framework in a number of judgments, for example *Karandja v. Bulgaria*, no. 69180/01, 7 October 2010 and the national authorities had themselves recognised that the law was in need of reform and had taken steps to amend it (see paragraph 41 above). The fact that the domestic courts on a number of occasions, even applying the more lenient national law standard as it then applied, found that the killing was unjustified made it all the more clearer that the use of force was in breach of the more rigorous requirements of Article 2.

52. The applicants further contended that the investigation was clearly inadequate. On seven occasions the domestic courts quashed the

prosecutor's decision not to pursue charges against Chief Sergeant S and remitted the case for further investigation. On each occasion, the courts gave detailed instructions as to the steps which should be taken and on each occasion the investigator failed fully to comply with these directions. In the end, the investigation never answered the central question, how could Mr Mihaylov have threatened the officer if he was not facing him at the time he was shot? It was the applicant's view that the prosecutor's office worked with the sole aim of protecting the policeman. The domestic court called this "a parody of an investigation". The applicants alleged that one investigator was replaced because of bias but that the prosecutor continued to be in charge of the case even after he had explicitly stated that he would not heed the courts' instructions. Finally, it should be underlined that the investigators applied the deficient national legal standard referred to above. This automatically rendered the investigation inadequate for the purposes of Article 2. It never dealt with the issue of absolute necessity of the force used against the victim, as this was not a part of the applicable domestic legislation.

**b. The Government**

53. The Government denied that there was any inconsistency in the witness statements prepared during the investigation. In particular, they emphasised that Chief Sergeant S and the other witnesses had given consistent evidence that Mr Mihaylov had put up armed resistance through the use of a knife. It was also indisputable that the gun was taken out as a result of the fight between the two men but was not prepared in advance. The three security guard witnesses confirmed during their initial interrogation that after the fight and the gunshot, when Mr Mihaylov fell to the ground, a knife fell out of Chief Sergeant S's hand. This witness evidence was confirmed by the forensic evidence. In particular, the medical examination of Chief Sergeant S found that he had sustained grazes consistent with an attack by a blunt instrument. The evidence supported the view that there had been an assault involving the use of force and a weapon against the police officer.

54. In the Government's view, against this background, the force used by Chief Sergeant S could not be described as excessive. In pursuing Mr Mihaylov, Chief Sergeant S acted with the firm conviction that he was detaining a person who had committed a criminal offence and to prevent him from committing any further offences. He did not initially intend to use his gun but did so only when Mr Mihaylov forcibly resisted arrest. The police officer, who had been stabbed in the abdomen the year before, had been frightened and had felt a real and immediate danger for his life, given that Mr Mihaylov was armed with a knife and had been struggling for possession of the officer's gun. The officer's use of force was within the legal limits and was absolutely necessary within the meaning of

Article 2 § 2 of the Convention. In accordance with the legislation in force at the time of the events in question, the police officer was authorised to use his weapon in self-defence following an armed assault, as here (see Article 80 of the Ministry of Interior Act, set out in paragraph 41 above).

55. The Government contended that a thorough and exhaustive investigation was held, which established the indisputable facts. The investigation commenced immediately. An inspection of the crime scene was carried out in a timely manner; statements were taken from the eyewitnesses; and forensic medical and ballistics examinations were made. Pursuant to the instructions issued by the Sofia Military Court in its ruling of 13 December 2004, the witnesses were interrogated again and a further complex forensic medical and ballistic expert report was commissioned. After it was concluded that the acts of the first investigator assigned to the investigation had resulted in the obstruction of the truth, he was removed from the case and mandatory written instructions were issued to a new investigator. The legal proceedings were held before an independent and impartial court and the fact that the Sofia Military Court repeatedly remitted the case for further investigation showed that the judiciary were committed to ensuring an effective investigation to establish the truth. As a result of this process, the alleged defects in the investigation were remedied and all the parties' requests were satisfied. The applicants were able to inspect and copy all documents in the case-file and to take an active part. The Government emphasised that the procedural obligation under Article 2 is one of means and not of result. The forensic examinations, having taken into account the large number of possible positions of the two men's bodies, were unable to come to any firm conclusion. This was a consequence of the dynamics of the fight, but was not evidence of any failure in the investigation.

## 2. *The Court's assessment*

56. The Court underlines, at the outset, that it is not a court of appeal from the national courts and that it is not normally within its province to substitute its own assessment of the facts for theirs (see *Filipovi v. Bulgaria*, no. 24867/04, § 65, 4 December 2012, and the cases cited therein; see also *Dimitrov and Others v. Bulgaria*, no. 77938/11, § 127, 1 July 2014).

57. In the present case, the Military Court of Appeal, on 17 December 2009, confirmed the decision of the prosecutor not to indict Chief sergeant S since he had acted in self-defence, faced with a real and imminent danger of attack by Mr Mihaylov (see paragraph 40 above). It is true that the acquittal of a police officer by a criminal court bound by the presumption of innocence does not absolve Bulgaria from its responsibility under the Convention (see *Filipovi*, cited above, § 65). The Court does not consider that it would be appropriate in this case for it to attempt to make its own

findings in respect of any substantive breach of Article 2. By all accounts, this was an unplanned and fast moving situation, with the police officer required to act in the heat of the moment (see, *mutatis mutandis*, *Andronicou and Constantinou v. Cyprus*, 9 October 1997, § 192, *Reports of Judgments and Decisions* 1997-VI and *Bubbins v. the United Kingdom*, no. 50196/99, § 139, ECHR 2005-II (extracts)). It is entirely possible, as confirmed by the domestic court, that the officer used lethal force in response to an honest belief that his life was in danger.

58. However, as explained in detail below, the investigation into the incident was deficient; in particular, the investigator did not explore the possibilities that Mr Mihaylov may have been killed through the excessive use of force by the officer, accidentally and/or as a result of the intense fear experienced by the latter and did not pursue evidential leads which might have sustained these hypotheses. In this instance, unfortunately there is no evidence available to the Court either to support or fully exclude the applicants' contention that Mr Mihaylov was killed through the use of force that was more than absolutely necessary. Moreover, the Court is sensitive to the subsidiary nature of its role and recognises that it must be cautious in taking on the role of a fact-finding tribunal where this is not rendered unavoidable by the circumstances of a particular case. It does not therefore propose to take a stance on the findings of fact made by the national courts (*ibid.*).

59. Further, in connection with the substantive aspect of the protection of the right to life under Article 2 § 1, the Court recalls that in the previous cases of *Tzekov v. Bulgaria*, no. 45500/99, 23 February 2006; *Vasil Sashov Petrov v. Bulgaria*, no. 63106/00, 10 June 2010 and *Karandja v. Bulgaria*, no. 69180/01, 7 October 2010, it examined provisions identical to section 80 § 1 of the Ministry of Internal Affairs Act 1997 (see paragraph 41 above), which allowed police officers to use firearms to effect an arrest, regardless of the seriousness of the offence which the person concerned was suspected of having committed or the danger which he or she represented. In each of those cases, the Court found that the legal provisions governing the use of firearms by the police in respect of individuals fleeing arrest were fundamentally insufficient to protect those concerned against unjustified and arbitrary encroachments on their right to life (see, for example, *Karandja*, cited above, § 59). The shooting in the present case took place against the same legislative background and this legislation was relied on consistently by the authorities throughout the proceedings. However, the Court does not find it established that the legal framework had as important a causative role in Mr Mihaylov's death as in the shootings examined in the cases cited above, given the circumstances outlined above.

60. The Court must scrutinise whether the national authorities carried out an effective investigation into the death and whether, in assessing the

necessity of the force used against Mr Mihaylov, the national courts may be deemed to have submitted the case to the careful scrutiny required by Article 2 of the Convention (*ibid.*, § 66). The general principles governing the State's obligation to carry out an effective investigation when individuals have been killed as a result of the use of force by, among others, agents of the State are well-settled in the Court's case-law. They have recently been set out in detail in paragraphs 298-306 of the Grand Chamber's judgment in *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, §§ 298-306, ECHR 2011 (extracts).

61. Turning to assess the facts of the present case in the light of those principles, the Court notes that the domestic courts were extremely critical of the manner in which both the investigation was conducted and the prosecutor reached his conclusions. The case was remitted for further investigation on no less than seven occasions (see paragraphs 25, 28, 32, 34, 36, 38 and 39 above). On 27 July 2007, almost three years after Mr Mihaylov was shot, the Sofia Military Court went so far as to describe the investigation as a "parody", revealing an unwillingness to collect the relevant evidence and establish the truth (see paragraph 34 above). In its decision of 6 November 2009 the Military Court again found that the prosecutor had not ensured that all the investigatory steps ordered by the courts had been taken. The measures in question had still not been taken when the Military Court of Appeal reached its final decision (see paragraphs 39 and 40 above).

62. The deficiencies in the investigation were apparent from the outset. During the inspection of the scene in the immediate aftermath of the shooting, the key item of physical evidence, namely the car bonnet which was dented and marked by the fatal bullet, was not preserved (see paragraph 11 above). This failure had implications for the effectiveness of the investigation since, without taking into account the bullet hole in the car, none of the forensic-ballistic reports commissioned were able to establish the position of the men at the time of the shooting (see paragraphs 26, 33 and 35 above). At no point was the surveillance camera which was pointing at the site of the killing examined, to determine whether or not useful video footage had been recorded (see paragraph 20 above). No record was preserved as to whether the folding knife found on the opposite side of the street was open or closed, and no attempt was made subsequently to determine whether this knife had belonged to Mr Mihaylov (see paragraph 14 above). The investigation failed to determine how many bullets were fired from Chief Sergeant S's gun (see paragraph 12 above). The simple procedure of returning for a daylight search of the scene was omitted, although this might have revealed further physical evidence, such as bullets or casings (see paragraph 11 above). As the Sofia Military Court found, the statements taken from the three security guard eye-witnesses and from Chief Sergeant S were formalistic and contained only vague and

contradictory accounts of the sequence of events, with no real attempt to determine the truth as to what had happened (see paragraph 25 above). Finally, although Chief Sergeant S's account of his struggle with Mr Mihaylov for possession of the knife and the gun was imprecise and the conclusions drawn by the prosecutors about the exact sequence of events were criticised by the domestic courts as unsupported by evidence, implausible and contradictory, no reconstruction of the fight and shooting was ever undertaken to establish whether his account was plausible.

63. Furthermore the Court notes that, as the domestic courts observed on several occasions, there were grounds to question the impartiality of the investigatory authorities. For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (see *Giuliani and Gaggio*, cited above, § 300). In this connection the Court notes that the official who was in charge of the investigation during the crucial initial period when the physical evidence had to be secured and the first witness statements taken, proved so unwilling to comply with the courts' directions that he was discharged, a year into the investigation (see paragraph 27 above). Towards the end of 2007 the prosecutor assigned to the case stated that he disagreed with the courts' instructions and wished to withdraw; nonetheless, he was allowed to continue working on the case (see paragraph 35 above). In its decision of 22 July 2008 the Military Court of Appeal raised serious doubts about this prosecutor's impartiality. Throughout, as noted above, the investigatory authorities failed to comply with the courts' instructions to take the measures designed to establish the circumstances. Moreover, the decrees issued by the prosecutors throughout the case strongly give the impression that the excellent service record of Chief Sergeant S was a key factor in persuading them that he could not have used excessive force (see paragraphs 24 and 36 above).

64. While the Court does not consider that it is possible, given the facts of this case, to find that the legislation in force at the time of the shooting contributed to a substantive breach of Article 2 (see paragraph 59 above), it notes that the legislation appears to have been a factor in limiting the scope of the investigation. In particular, the investigator indicated in his report of 30 September 2004 that even if there had been no risk to Chief Sergeant S's life, he would have been authorised to use his gun to apprehend the suspect (see paragraph 21 above). Furthermore, as previously stated (see paragraph 58 above), the investigator did not fully investigate the alternative possibilities that Mr Mihaylov was killed through the use of excessive force in self-defence or as a result of intense fear on the part of the police officer, despite the fact that Chief Sergeant S stated in his witness statements that he had been very afraid, partly due to the fact that he had been stabbed on previous occasions when on duty which had left him



particularly fearful of knives (see paragraphs 16 and 17 above). This investigative failure left open legitimate doubts as to whether all relevant evidence was included in the file which formed the evidentiary basis of the national authorities' decisions. In addition, the Military Court of Appeal did not provide reasons in its decision to explain why at the end of the proceedings, in contrast with the earlier decisions of seven other courts and in the absence of any new evidence, it agreed with the views of the prosecution authorities in this regard. Finally, the investigation did not address the question, raised by Chief Sergeant S's testimony, whether his understandable fear of attack by knife following the earlier assaults on him had had any bearing on his conduct or left him unsuited for active duty and whether any steps had been taken to assess this before he was again sent out on patrol. This left it unclear whether Chief Sergeant S's own account of the incident and his state of mind at the time qualified his acts as self-defence, excessive use of force in self-defence or use of force due to fear, each of which carries different consequences under domestic law.

65. Taken together, these deficiencies do not allow the Court to conclude that the authorities did everything possible to clarify all the circumstances, as required by Article 2, so as to disperse any doubts of any attempt by them to ensure that the police officer enjoyed impunity in respect of Mr Mihaylov's death. The Court does not, therefore, consider that the respondent State complied with its procedural obligation under Article 2 to secure an independent and effective investigation into the shooting. In conclusion, there has been a violation of Article 2.

## II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

66. The applicants also complained that, in breach of Article 13, they were denied an effective remedy in respect of their complaint under Article 2 about Mr Mihaylov's killing. The investigation was deeply flawed and no civil remedy could have compensated for that. Finally, they complained of racial discrimination in breach of Article 14 of the Convention taken in conjunction with Article 2, alleging that Chief Sergeant S had had less hesitation about using excessive force because of Mr Mihaylov's Roma ethnic origin and low social status and that these factors had also contributed to the authorities' failure to conduct an effective investigation into his death. In contrast with *Nachova and Others*, cited above, there was no complaint about any alleged failure on the part of the authorities to investigate possible racist motives in their killing.

67. Having regard to the reasons for which it found a breach of the State's procedural obligation under Article 2 of the Convention, the Court declares the complaint under Article 13 admissible but considers that it is not necessary to examine whether there has also been a violation of

Article 13 (see, for example, *Karandja*, cited above, § 72 and *Dimov and Others v. Bulgaria*, no. 30086/05, § 89, 6 November 2012).

68. As regards the complaint under Article 14, having assessed all the relevant elements, the Court does not find it established that racist attitudes played a role in Mr Mihaylov's death (see, *mutatis mutandis*, *Nachova and Others*, cited above, §§ 144-159); nor does it find it established that the deficiencies which it has identified in the investigation were motivated by racist attitudes. As a result, these complaints must be declared inadmissible as manifestly ill-founded, pursuant to Article 35 §§ 3(a) and 4 of the Convention.

### III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

69. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

#### A. Damage

70. The applicants claimed 100,000 euros (EUR) in respect of non-pecuniary damage. They submitted that the authorities' conduct in terms of Mr Mihaylov's killing and the ensuing investigation caused them severe, long-lasting anguish. In particular, the acts of the State authorities had affected the psychological development of the first applicant, who was only three when her father was killed.

71. The Government contended that this claim was unfounded and exorbitant.

72. The Court considers that the applicants must have suffered as a result of the violations of their rights under Article 2 of the Convention found in the present case. Ruling in equity, as required under Article 41 of the Convention, and taking into account the nature of the violation that it has found in this case, it awards them jointly EUR 16,000, together with any tax that may be chargeable.

#### B. Costs and expenses

73. The applicants also claimed EUR 7,520 for the costs and expenses incurred by the legal representatives provided to them by the Bulgarian Helsinki Committee, before the domestic courts and subsequently this Court. The claim included 50 hours' work preparing eight appeals against the prosecutor's decrees and decisions before the Sofia Military Court and two appeals to the Sofia Military Court of Appeal; two hours' work

preparing and sending four identical complaints to the Supreme Bar Council, the Sofia Bar Association, the Supreme Judicial Council and the Prosecutor General; and 42 hours' work on the application and observations to this Court, all at a rate of EUR 80 per hour.

74. The Government considered that the amount claimed was many times higher than was justified by reference to national economic standards and awards for legal fees made by the domestic courts. In addition, the Government questioned why any claim had been made in respect of domestic legal costs.

75. The Court recalls that applicants are entitled to an award in respect of the costs and expenses incurred by them at domestic level to prevent the breach found by the Court or to obtain redress therefor (see *Dimitrov and Others v. Bulgaria*, no. 77938/11, § 181, 1 July 2014). In the instant case, the purpose of the proceedings before the national courts was to obtain redress for the breach of Article 2 of the Convention. Accordingly, the costs incurred in the course of those proceedings are in principle recoverable under Article 41. With regard to the hourly rate claimed, the Court notes that it is settled case-law that when considering a claim for just satisfaction it is not bound by domestic scales or standards (see *Dimitrov and Others*, cited above, § 190) and it does not find the rate claimed to be excessive when compared to claims in recent similar Bulgarian cases. However, it does find that the number of hours claimed for is excessive. Although there were a total of ten appeals against the prosecutors' decisions before the domestic courts, the arguments raised by both sides during each of those appeals were broadly similar, and were repeated again in the proceedings before this Court. Having regard to the materials in its possession and these considerations, the Court finds it reasonable to award jointly to the two applicants the sum of EUR 6,000 plus any tax that may be chargeable to them, to cover their legal costs under all heads. This sum is to be paid directly to the applicants' legal representatives.

76. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 14 of the Convention taken in conjunction with Article 2 inadmissible and the remainder of the application admissible;
2. *Holds* that there has been a violation of Article 2 of the Convention;

3. *Holds* that there is no need to examine the complaint under Article 13 of the Convention;
4. *Holds*
  - (a) that the respondent State is to pay jointly to the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Bulgarian levs at the rate applicable at the date of settlement:
    - (i) EUR 16,000 (sixteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be paid directly to Ms Lilyanka Yankova Malinova, the second applicant in the case and mother of the first applicant who is a minor;<sup>1</sup>
    - (ii) EUR 6,000 (six thousand euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses, to be paid into the bank account of the Bulgarian Helsinki Committee;<sup>2</sup>
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 24 February 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos  
Registrar

Guido Raimondi  
President

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<sup>1</sup> Rectified on 21 April 2015. The following text was added: “to be paid directly to Ms Lilyanka Yankova Malinova, the second applicant in the case and mother of the first applicant who is a minor”.

<sup>2</sup> Rectified on 21 April 2015. The text “to be paid into the bank account of the applicant’s legal representatives” was replaced by the text “to be paid into the bank account of the Bulgarian Helsinki Committee”.