



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

FOURTH SECTION

CASE OF BISER KOSTOV v. BULGARIA

(Application no. 32662/06)

JUDGMENT

STRASBOURG

10 January 2012

FINAL

10/04/2012

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

In the case of Biser Kostov v. Bulgaria,

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

Lech Garlicki, *President*,

David Thór Björgvinsson,

George Nicolaou,

Ledi Bianku,

Zdravka Kalaydjieva,

Nebojša Vučinić,

Vincent A. De Gaetano, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 6 December 2011,

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

PROCEDURE

1. The case originated in an application (no. 32662/06) 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 a Bulgarian national, Mr Biser Milanov Kostov (“the applicant”), on 1 August 2006.

2. The applicant was represented by Ms Zh. Aldinova, a lawyer practising in Yambol. The Bulgarian Government (“the Government”) were represented by their Agent, Ms N. Nikolova, of the Ministry of Justice.

3. The applicant alleged, in particular, that the authorities had failed to prosecute diligently individuals who had assaulted him.

4. On 4 March 2010 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. The application was later transferred to the Fourth Section of the Court, following the re-composition of the Court’s sections on 1 February 2011.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1951 and lives in Yambol.

A. The incident of 21 April 2004

7. Around 9 a.m. on 21 April 2004, while shopping in a small supermarket in the town of Yambol, the applicant was stopped by supermarket employees on suspicion of stealing a small bottle of vodka. The bottle cost 1.2 Bulgarian leva, the equivalent of approximately 61 euro cents. The supermarket employees took the applicant to an office at the back of the supermarket and left him with the manager, S.F. The owner of the store, P.D., was also informed and arrived at the supermarket before the police came.

8. Meanwhile, someone called the police and notified them that a theft had been committed in the supermarket.

9. According to the applicant, he was searched and his shopping basket was taken away from him. S.F. then accused him of theft, punched him in the face, knocked him down and began kicking his chest, while the applicant was yelling and pleading with him to stop. When S.F. stopped, the applicant managed to stand up and realised that a small amount of his money was missing. When he asked for the money back, as well as his glasses, which had fallen off during the beating, S.F. punched him again in the side of the head and knocked him down, after which P.D. also kicked him several times and told him that people like him caused damage to his business.

10. Shortly thereafter, two police officers arrived and found the applicant squatting by the wall in the presence of S.F. and P.D. The latter left immediately after the police had arrived, apparently using the back door.

11. According to the applicant's statements, made during the ensuing investigation, he had told the police officers that he had been beaten up by two men and that he needed medical help. He also claimed that after the incident he could hardly walk and the police officers had helped him to the police car. During the investigation the police officers stated that upon their arrival they had been informed by the applicant about the beating. They contested the applicant's assertions that he had requested medical help and maintained that he had not been injured and had been able to walk on his own.

12. The policemen drove the applicant to the police station in order to establish the circumstances surrounding the theft. While waiting in the reception hall to meet the officer in charge of the case, the applicant apparently felt severe pain, so he left and asked a stranger to drive him home.

13. Soon after that two police officers headed towards the applicant's apartment. They found him sitting on a bench in front of the apartment building and accompanied him to the apartment. There the applicant signed a record in connection with the theft. During the ensuing investigation one

of the police officers contended that while the officers had been at his apartment the applicant had lain in bed and had looked ill.

14. After the police officers had left, the applicant felt very sick and his wife called an ambulance.

B. The applicant's medical condition

15. On the same day the applicant was admitted to the emergency department of the Yambol Hospital, where it was established that he had five broken ribs, bilateral pneumothorax, subcutaneous emphysema of the upper part of the body and bruising to the head, chest and abdomen.

16. Two days later, on 23 April 2004, the applicant was transferred to Stara Zagora Hospital, where he underwent several examinations. According to the medical reports he had ten broken ribs, subcutaneous emphysema, haematomas on the front, the back, and both sides of the chest, large hematomas in the lumbar area and bilateral hemopneumothorax. On 28 April 2004 he underwent an abdominal ultrasound scan which revealed two-sided pleurisy and traumatic functional changes in the kidneys.

17. The applicant underwent several medical procedures, including, *inter alia*, thoracentesis for the removal of 200 ml of liquid from the pleural space.

18. The applicant was discharged on 5 May 2004 and was granted forty-five days' sick leave.

19. On 14 May 2004 the applicant underwent a chest and lung examination. In his report the doctor noted, in particular, old fractures of ten ribs and pulmonary fibrosis. At another check up, on 4 June 2004, the doctors reiterated those conclusions.

C. The criminal investigation

20. In the afternoon of 21 April 2004 the authorities of Yambol Hospital informed the police about the admission of the applicant and his condition. A police officer was dispatched to the hospital but was unable to see the applicant because of the latter's serious medical condition.

21. On the next day, 22 April 2004, the same police officer visited the applicant in hospital. This time the applicant was able to communicate and informed the officer that he had been beaten up by two men at the supermarket who he could identify.

22. On the same day a police investigation (*дознание*) was instituted against unknown perpetrators.

23. On 23 April 2004 the applicant's wife filed an official complaint with the Yambol District Police Administration, describing the events and requesting that an investigation be opened and the responsible individuals punished.

24. Between 23 April and 18 May 2004 a police investigator questioned P.D., S.F. and two employees of the shop, the police officers who had been dispatched to the scene of the incident, the police officer who had visited the applicant in hospital and the applicant. The policemen who had been in the supermarket stated that the applicant had smelled of alcohol and had told them he had been beaten up, but that there had been no visible signs of violence on his body. They further stated that he had been able to walk unaided and had not requested medical help. S.F. claimed that while he had been calling the police, the applicant had tried to leave the room. S.F. had put a hand against the applicant's chest to stop him and the latter had bumped into the door. He denied having beaten the applicant up and maintained that the applicant had been drunk and had threatened him. P.D. claimed that when he had arrived at the supermarket the applicant and S.F. had indeed been in the back room but the applicant had been drunk and had not had any injuries. He denied having hit the applicant. He further added that he was not aware of what had happened between the applicant and S.F. while they had been by themselves in the room. The applicant provided a detailed account of the events, although he claimed to have vague memories of certain moments immediately after the incident due to the shock he had experienced.

25. On 18 May the police investigator ordered a forensic medical report, which was submitted on 23 May 2004. It reiterated the information contained in the applicant's hospital file. The expert concluded that the applicant's injuries could have been inflicted in the manner described by the applicant, namely by punching and kicking, but not in the manner asserted by S.F.

26. The investigator organised a line up on 25 May 2004 during which the applicant identified the supermarket manager, S.F., and the owner, P.D., as the individuals who had beaten him up.

27. On 27 May 2004 the applicant was questioned before a judge of the Yambol District Court. He reiterated his account of the events and said that he would bring a civil claim against the alleged perpetrators during the judicial phase of the proceedings.

28. On 2 June 2004 S.F. was questioned as a suspect (*уличен*). He decided to remain silent. On the same day the police investigator concluded the police investigation and transferred the file to the Yambol district prosecutor's office with the opinion that S.F. should be brought to trial for causing the applicant an intermediate bodily harm. It appears that no charges were brought against P.D.

29. On 8 June 2004 prosecutor R.L. at the Yambol district public prosecutor's office terminated the proceedings against S.F., finding that there was not sufficient evidence that he and P.D. had beaten the applicant up. The prosecutor stated, in particular, that the account of the events asserted by the applicant had been contradictory. She made two points in

this regard. First, the applicant had not informed the police officers that he had needed medical help. Secondly, despite his allegations that he had been punched in the head twice the witnesses had not reported any injuries and the doctors who had examined the applicant had not recorded any such injuries in their reports. She further added that in addition, the applicant had vague memories of the period immediately after the incident.

30. On an unknown date the applicant appealed to the court. He maintained that he had informed the police officers that he had been beaten up and that it had been natural for his injuries to become visible later. He also contested the prosecutor's version of events, which, in the applicant's view, could have been interpreted as implying that the applicant had inflicted his injuries by himself.

31. On 2 July 2004 the Yambol District Court quashed the prosecutor's decree as ill-founded and remitted the case for further investigation. Judge D.S. held that there was substantial circumstantial evidence that the applicant had been beaten up by two men in the shop. As regards the conclusions of the prosecutor, the court noted that right after the incident the applicant had informed the police officers that he had been beaten up by two individuals and had later identified them and that the alleged punching in the head had been recorded in the medical documents which stated, *inter alia*, that the applicant had suffered from subcutaneous emphysema of the upper part of the body and contusion of the head. The court also specifically referred to the expert's report, which found that the applicant's injuries could have been inflicted in the manner described by the applicant, namely, by punching and kicking, but not in the manner asserted by S.F.

32. Following the remittal, on 15 July 2004 the prosecutor instructed the investigator to question the police officers who had seen the applicant in the police department in order to elucidate whether the applicant had had visible injuries, had requested medical help, had needed assistance walking and whether he had consumed alcohol. On 16 and 19 July 2004 the police investigator questioned several officers. The witnesses stated, in particular, that the applicant had been able to move on his own and had not had any visible injuries.

33. On 20 July 2004 the police investigator concluded the investigation and transferred the file to the prosecutor's office with the opinion that S.F. should be brought to trial for inflicting intermediate bodily harm.

34. On 22 July 2004 prosecutor R.L. once again terminated the criminal proceedings against S.F., finding with identical reasoning that despite the additional investigative measures taken there was no evidence that the alleged perpetrators had beaten the applicant up. She stated, in particular, that the applicant had not requested medical help and had had no visible injuries.

35. The applicant appealed against that decree, maintaining that the prosecutor had failed to discuss crucial evidence. He further argued that the

evidence collected supported accusations not only against S.F., but also against P.D.

36. On 4 October 2004 the Yambol District Court quashed the decree of 22 July 2004 as ill-founded and remitted the case. Judge G.K. noted, in particular, that the applicant had complained to the police officers that he had been beaten up and had later identified the alleged offenders; furthermore, his statements regarding his injuries had been corroborated by the doctors' opinions. In view of that the court concluded that there was sufficient evidence allowing the prosecutor to bring the accused to trial. Nevertheless, in order to supplement the evidential material, the court instructed the prosecution authorities to question the applicant's wife and an employee at the shop, who had not been questioned earlier.

37. Following the remittal, in accordance with the court's instructions the police investigator questioned the said witnesses. On 15 October 2004 the police investigator concluded the investigation and transferred the file to the prosecutor with the opinion that S.F. should be brought to trial.

38. On 3 November 2004 prosecutor R.L. once again terminated the criminal proceedings against S.F. with identical reasoning. She further concluded that the statements of the witnesses who had been additionally questioned could not alter her prior conclusions.

39. The applicant appealed, reiterating his earlier arguments against the discontinuation. In a decision of 9 December 2004 the District Court quashed the decree of 3 November 2004 and remitted the case to the prosecution authorities for a third time. Judge N.N. noted that most of the inflicted injuries had been internal and therefore the witnesses could not have noticed them. The court found that the prosecutor's conclusions did not correspond to the facts of the case, that she had failed to take into account the medical reports and that there had been sufficient evidence to bring the offenders to trial. It also instructed the prosecutor to question one of the police officers who had been at the scene of the incident.

40. In the meantime the applicant filed a complaint with the Yambol regional public prosecutor's office, stating that prosecutor R.L. was not impartial and should be replaced. By a decree of 27 December 2004 the regional prosecutor dismissed the complaint. He stated that the discontinuation of the investigation had been based on the prosecutor's opinion, which had been formed on the basis of the additional investigation carried out in compliance with the court's instructions, and that in the absence of other indications the mere fact that the prosecutor had discontinued the proceedings on several occasions did not cast doubt on her impartiality.

41. On 17 January 2005 the police investigator questioned one of the police officers who had been in the supermarket and on 21 January 2005 concluded the investigation with the opinion that the accused should be brought to trial. On 25 February 2005 the same prosecutor terminated the

criminal proceedings for the fourth time with identical reasoning. She stated that the applicant's memory about events was extremely vague and that there was no information indicating what exactly had happened in the period between his leaving the police department and his arrival at his home.

42. The applicant appealed. On 11 July 2005 the District Court quashed the decree of 25 February 2005 as unlawful and unsubstantiated and remitted the case. Judge A.A. held, *inter alia*, that the prosecutor's conclusions suggested that after leaving the police department the applicant had somehow injured himself or had been attacked by unknown individuals. The court stated that, having regard to the time and location of the incident as suggested by the prosecutor, namely while the applicant was returning home, it was very unlikely that it would have gone unnoticed.

D. The discontinuation of the criminal proceedings

43. Meanwhile on an unspecified date S.F. made a request under Article 239a of the Code of Criminal Procedure 1974 that the case against him be examined by a court or terminated as the proceedings had already lasted for too long. In a decision of 24 November 2005 the District Court instructed the prosecutor to either submit an indictment within two months or terminate the proceedings.

44. It appears that no investigation was conducted in the period between 11 July and 2 December 2005. On 2 December 2005 the case was assigned to another prosecutor as prosecutor R.L. had been promoted.

45. On 10 January 2006 the prosecutor instructed a different police investigator to proceed with the investigation.

46. On 17 January 2006 the police investigator ordered a medical report. On an unspecified date before 2 February 2006 the medical expert presented his conclusions. He stated that the injuries sustained by the applicant had aggravated with time, therefore he had been able to walk independently immediately after the incident. He also stated that it normally took thirty minutes to up to two hours for haematomas to become visible; therefore it was possible that the applicant's injuries could not have been seen immediately after they had been inflicted.

47. As in the meantime the two-month deadline under Article 239a for discontinuing the proceedings or filing an indictment to the court had expired, by a decision of 9 February 2006 the District Court terminated the criminal proceedings.

48. The applicant appealed against the decision, arguing that although intermediate bodily harm was a serious offence within the meaning of Article 93 § 7 of the Criminal Code and the accused was therefore entitled to request discontinuation of the proceedings after two years of

investigation, the two-year period had not expired and the accused's request in this respect had therefore been premature.

49. On 8 May 2006 the Yambol Regional Court upheld the decision. It held that intermediate bodily harm was an offence which did not fall within the scope of Article 93 § 7 of the Criminal Code and therefore the accused's request had not been premature. It reasoned that pursuant to Article 239a of the Code of Criminal Procedure of 1974 after a certain period of time the suspect was entitled to have his case examined by the court or terminated and that in this case the court was only competent to verify whether the prosecution authorities had observed the statutory deadlines and could not examine the merits of the case.

E. Other developments

50. On 3 August 2006 the applicant lodged a complaint with the Chief Public Prosecutor, stating, in particular, that prosecutor R.L. had repeatedly terminated the criminal proceedings despite the court's instructions to bring the accused to trial and that the second prosecutor in charge of the case had been inactive, which had led to the termination of the proceedings.

51. On 16 August 2006 a prosecutor from the Supreme Cassation Prosecutor's Office opened an inquiry into the applicant's allegations and requested an explanation from the second prosecutor in charge of the case and his superior in respect of the delay in filing an indictment with the court.

52. On 30 August 2007 the district prosecutor of Yambol informed the Supreme Cassation Prosecutor's Office that no disciplinary penalty had been imposed on the prosecutor as he was considered a reliable employee and that the failure to file an indictment on time had been an unintentional mistake.

53. There is no information on whether disciplinary action was pursued against prosecutor R.L.

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. Intermediate bodily harm

54. The Criminal Code 1968 defines intermediate bodily harm (*средна телесна повреда*) as, *inter alia*, involving a temporary life-threatening health disorder or a permanent non-life-threatening health disorder (Article 129 § 2). At the relevant time the wilful infliction of intermediate bodily harm was an offence punishable by up to five years' imprisonment (Article 129 § 1). It is publicly prosecutable (Article 161).

55. Article 93 § 7 provides that offences punishable by more than five years' imprisonment shall be considered "serious" for the purposes of the Code.

2. Taking a case to court at the request of the accused

56. Article 239a of the Code of Criminal Procedure of 1974, in force at the relevant time, provided, *inter alia*, that individuals accused of committing a crime, the preliminary investigation against whom had not been completed within one year, were entitled to request to have their case examined by a court or terminated. For serious offences such a request could be lodged if the authorities failed to complete the preliminary investigation within two years.

57. In such instances the court would send the case to the public prosecutor's office with instructions to either submit an indictment within two months or discontinue the criminal proceedings. If the prosecutor's office failed to take action, the court had to terminate the criminal proceedings.

58. The provision was reproduced almost verbatim in Articles 368 and 369 of the new Code of Criminal Procedure 2005. On 25 March 2010 Parliament repealed Articles 368 and 369 with effect from 28 May 2010. In a decision of 28 September 2010 (реш. № 10 от 28 септември 2010 г., по к. д. № 10/2010 г., обн., ДВ, бр. 80 от 12 октомври 2010 г.) the Constitutional Court dismissed the request of the President of the Republic to strike down the repeal, finding that the repeal was not contrary to the Constitution. It noted, *inter alia*, that the main weakness of the repealed procedure was that it used a formal, purely quantitative criterion to determine what constituted a "reasonable time" for the pre-trial phase of the proceedings to last. It further stated that while in most cases that approach would lead to a correct assessment, in some complex cases that criterion might, contrary to the public interest that all offenders be brought to justice, give the accused an undue advantage.

3. State liability for damages

59. Pursuant to section 1 of the State and Municipalities Responsibility for Damage Act of 1988 (hereafter "the State Responsibility Act") the State is liable, in particular, for damage suffered by individuals as a result of unlawful decisions, actions or omissions by its organs and officials, committed in the course of or in connection with the performance of administrative action. According to the Supreme Court of Cassation's case-law, the actions of the investigative and the prosecuting authorities in the context of a criminal investigation do not amount to administrative action and those authorities are therefore not liable under section 1 of the

Акт (тълк. реш. № 3 от 22 април 2005 г. на ВКС по тълк.д. № 3/2004 г., ОСГК).

60. Section 2 of the State Responsibility Act sets out that the State is liable for damage caused to individuals by, *inter alia*, the organs of investigation and prosecution for: (i) unlawful pre-trial detention, (ii) unlawful accusation of a crime, (iii) execution of a sentence above and beyond the specified period.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

61. The applicant complained that the criminal investigation into the act of violence against him had been ineffective. He relied on Article 6 § 1 of the Convention.

62. The Court considers that this complaint falls to be examined under Article 3 of the Convention, which reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

A. The parties’ submissions

1. The Government

63. The Government submitted that the applicant had failed to exhaust domestic remedies as he did not bring an action against the investigative authorities under the State Responsibility Act or a civil claim against the alleged perpetrators.

64. In addition, the Government noted that the investigation into the alleged ill-treatment had started immediately and had been swift and comprehensive. The prosecutor had strictly followed the court instructions at remittal and had undertaken additional investigatory steps accordingly.

65. The authorities had made efforts to establish the facts and had gathered significant evidential material. Thus in the Government’s view it had been established that the applicant had consumed alcohol, had committed theft in the supermarket and instead of having sought assistance from the police officers had practically fled from the police station.

66. The Government further argued that the applicant’s account of the events had been contradictory and had not been corroborated by the witnesses’ statements or by the medical documents. The Government stated

that the expert report had not established with sufficient certainty that the applicant's injuries had been inflicted in the manner asserted by him and that the doctor's record of 4 June 2004 had noted "old injuries" on his ribs, thus casting doubt on the exact moment when these fractures had been inflicted.

2. The applicant

67. The applicant stated that the State Responsibility Act was not applicable in his case as he had been neither accused nor convicted.

68. The applicant further argued that he had never committed theft and even if he had done so, the latter could not have justified his ill-treatment. Furthermore, he had requested medical help on the day of the incident and several medical documents had recorded his injuries. In view of the Government's statement that the expert report had not been convincing enough, the applicant asserted that it clearly stated that the injuries could have been inflicted in the manner described by him.

69. The applicant further argued that the investigation could not be regarded as effective. He pointed out that the prosecutor had failed to conduct a proper investigation despite the court's numerous instructions in this regard. As a result of the protracted and belated investigation, the accused had obtained discontinuation of the proceedings under Article 239a of the Code of Criminal Procedure 1974.

B. The Court's assessment

1. Admissibility

70. The Government contended that the applicant had failed to exhaust domestic remedies as he could have lodged an action under the State Responsibility Act against the investigative authorities or a civil claim against the alleged perpetrators.

71. The Court notes that a potential claim against the investigative authorities does not appear to fall within the scope of the State Responsibility Act. Under the domestic case-law investigative and prosecuting authorities are not liable under section 1 of the State Responsibility Act. At the same time, while section 2 contains a list of specific circumstances under which the responsibility of the investigative authorities can be engaged, this list does not include a situation similar to that of the applicant (see paragraphs 59-60 above). In any event the Government failed to substantiate its assertion that the State Responsibility Act was applicable in the present case by providing relevant domestic case-law concerning awards of damages in similar situations.

72. In respect of a possible claim against the alleged perpetrators for the damage sustained, the Court considers that having exhausted the possibilities available to him within the criminal justice system, the applicant was not required to use the civil remedy invoked by the Government (see, *mutatis mutandis*, *Assenov and Others v. Bulgaria*, 28 October 1998, § 86, *Reports of Judgments and Decisions* 1998-VIII). Moreover, the civil remedy relied on by the Government cannot be regarded as sufficient for the fulfilment of a State's obligation under Article 3 in cases such as the present one, as it is aimed at awarding damages rather than identifying and punishing those responsible (see *Beganović v. Croatia*, no. 46423/06, § 56, 25 June 2009).

73. It follows that the Government's objection of non-exhaustion of domestic remedies in respect of the applicant's complaint under Article 3 must be dismissed.

74. The Court further notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and not inadmissible on any other ground. It must therefore be declared admissible.

2. Merits

a) General principles

75. The Court reiterates that Article 3 enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment.

76. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim (see *A. v. the United Kingdom*, 23 September 1998, § 20, *Reports of Judgments and Decisions* 1998-VI).

77. The Court reiterates that the obligation of the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals (see, among other authorities, *Šečić v. Croatia*, no. 40116/02, § 52, 31 May 2007).

78. Where an individual raises an arguable claim of ill-treatment, including of ill-treatment administered by private individuals, Article 3 of the Convention gives rise to a procedural obligation to conduct an independent official investigation (see *Šečić*, cited above, § 53; *Nikolay Dimitrov v. Bulgaria*, no. 72663/01, § 67, 27 September 2007 and, *mutatis*

mutandis, Menson and Others v. the United Kingdom (dec.), no. 47916/99, 6 May 2003). The investigation must be capable of leading to the identification of those responsible with a view to their punishment.

79. The scope of this obligation by the State is one of means, not of result; the authorities must have taken all reasonable steps available to them to secure the evidence concerning the incident (see *Nikolay Dimitrov*, cited above, § 69, and, *mutatis mutandis, Menson and Others*, cited above). A requirement of promptness and reasonable expedition is implicit in this context. Tolerance by the authorities towards such acts cannot but undermine public confidence in the principle of lawfulness and the State's maintenance of the rule of law (see, for example, *Members (97) of the Gldani Congregation of Jehovah's Witnesses v. Georgia*, no. 71156/01, § 97, ECHR 2007-V, and *Milanović v. Serbia*, no. 44614/07, § 86, 14 December 2010).

b) Application of those principles to the present case

80. On the basis of the submitted medical evidence, which appears reliable and comprehensive and which established that the applicant had ten broken ribs, large bruises on the upper part of his body, suffered from emphysema and pneumothorax and was in need of major surgery, the Court considers that the treatment complained of was sufficiently serious to amount to ill-treatment within the meaning of Article 3 of the Convention.

81. Therefore the authorities had a procedural obligation to conduct an official investigation. The Court notes at the outset that the authorities took a number of investigatory steps. They instituted criminal proceedings shortly after the incident, questioned a number of witnesses, commissioned a medical report and conducted a line up. At the close of both the original and the renewed investigations the police investigator, having assessed the evidence, proposed to the prosecutor that S.F. be brought to trial. All of that shows that in the early stages of the investigation the authorities deployed reasonable efforts to gather the evidence and establish the facts.

82. Having said that, the Court further observes that the prosecutor decided to terminate the proceedings, concluding that no ill-treatment had taken place in the supermarket, on two main grounds: the fact that the applicant had not requested the police officers to provide him with medical help and the fact that despite his allegations that he had been punched in the head twice the witnesses had not reported any injuries on his person and the doctors who had examined him had not recorded any such injuries. The Court notes that the applicant sought judicial review of the prosecutor's decrees, contesting on all occasions her reasoning, and when examining the applicant's appeals the domestic court acceded to his arguments and rejected the prosecutor's conclusions as ill-founded (see paragraphs 30 and 31 above). Nevertheless, despite the court's findings, which clearly disproved the two basic arguments for the discontinuation of the

proceedings, the prosecutor terminated the proceedings three more times with identical reasoning, thus rendering the judicial review practically ineffective.

83. In the light of the aforementioned, while acknowledging the fact that the prosecutor has a certain discretion when assessing the evidence and deciding whether to bring an accused to trial, the Court considers that in the particular circumstances of the instant case, by discontinuing the criminal proceedings on four occasions with identical reasons despite court findings which disproved the prosecutor's position and even explicitly stated that there was sufficient evidence to bring the accused to trial, the prosecution authorities failed to act diligently and also unjustifiably delayed the proceedings.

84. Furthermore, following the District Court's decision of 24 November 2005, which gave a two-month deadline for submitting an indictment, the prosecution authorities were required to react promptly. Instead, they did not resume working on the case until 10 January 2006 and only commissioned a medical report on 17 January 2006. The report was presented to the authorities before 2 February 2006 but despite its findings the authorities failed to react immediately. Thus, as a result of the procrastination of the prosecutor, the proceedings were terminated under Article 239a of the Code of Criminal Procedure of 1974.

85. In respect of the procedure under Article 239a, the Court has already observed that it was the only remedy which could be considered effective (at least in some situations) in respect of complaints about the excessive length of criminal proceedings. However, as was pointed out by the Bulgarian Constitutional Court (see paragraph 58 above), that remedy used a formal criterion to measure "reasonable time", which in some cases could, contrary to the public interest that offenders be brought to justice, result in the undue discontinuance of criminal prosecutions (see *Dimitrov and Homanov v. Bulgaria*, nos. 48059/06 and 2708/09, § 119, 10 May 2011). In the Court's view, that is precisely what occurred in the instant case. The successful invocation by the accused of the Article 239a remedy brought to an abrupt end a deficient investigation marked by an obstinate refusal of the prosecutor to address the concerns repeatedly expressed by the courts. The result must be regarded as at variance with the requirements of the respondent State's procedural obligation under Article 3 (see, in this connection, *Beganović*, cited above, §§ 85-87).

86. In the light of the foregoing the Court concludes that in the present case the authorities failed to conduct an effective investigation into the applicant's allegations of ill-treatment which led to the expiration of the relevant deadline and the impossibility to prosecute any further. Accordingly, there has been a violation of Article 3 of the Convention in its procedural limb.

II. THE REMAINDER OF THE APPLICANT'S COMPLAINTS

87. The applicant also complained, relying on Article 6 § 1, that the inactivity of the public prosecutor had precluded him from seeking damages from his attackers.

88. The Court has examined this complaint as submitted by the applicant. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

89. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

90. 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

91. The applicant claimed 15,000 euros (EUR) in respect of non-pecuniary damage.

92. The Government contested this claim as unfounded and excessive.

93. The Court considers that the applicant must have suffered anxiety and frustration as a result of the violation found. Accordingly, deciding on an equitable basis, it awards him EUR 4,000.

B. Costs and expenses

94. The applicant also claimed EUR 1,500 for costs and expenses incurred for legal work carried out by his lawyer after the communication of the present application to the Court. In support of the claim he submitted a contract for legal representation, stipulating the said amount as remuneration for the legal services provided.

95. The Government contested this claim as unfounded and excessive.

96. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the Court, noting that the exact number of

hours of legal work done was not indicated and that the applicant's lawyer did not represent him at the initial stage of the proceedings (see, for the same approach, *Bachvarovi v. Bulgaria*, no. 24186/04, § 40, 7 January 2010), considers it reasonable to award the sum of EUR 1,000 covering costs and expenses under all heads.

C. Default interest

97. The Court considers it appropriate that the default interest 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 concerning the alleged ineffectiveness of the criminal investigation into the applicant's ill-treatment admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 3 of the Convention under its procedural limb;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, 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 leva at the rate applicable at the date of settlement:
 - (i) EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of costs and expenses;
 - (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;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 10 January 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Lech Garlicki
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Kalaydjieva and De Gaetano is annexed to this judgment.

LG
FA

JOINT SEPARATE OPINION OF JUDGES KALAYDJIEVA AND DE GAETANO

1. We fully subscribe to the conclusion that the Bulgarian authorities failed to meet their obligations under the procedural limb of Article 3 of the Convention. However, quite apart from considerations relating to delay, we are of the view that the case raises serious questions concerning another aspect of the positive obligation to conduct “an independent official investigation...capable of leading to the identification of those responsible with a view to their punishment” (§ 78), which aspect has not been adequately addressed in the present judgment.

2. While we are prepared to accept that a prosecutor must be accorded a degree of discretion to decide whether the facts and the evidence justify a decision to bring an alleged offender before the courts in order to seek his punishment, we also believe that this power is based on the premise that the discretion is exercised in good faith; and, generally speaking, the exercise of this discretion will be compatible with the positive obligation under Article 3 only if accompanied by some system of appropriate checks and balances capable of preventing abuse. Where this discretion is capable of being exercised arbitrarily or in bad faith, as is suggested by the facts of the instant case, the very object of the procedural requirement of Article 3 is undermined, since the punishment component can never materialise notwithstanding that the investigation *was* capable of identifying the offender or offenders.

3. The applicant’s appeals against the successive orders for the discontinuation of the investigation proceedings provided for a semblance of such checks at the national level and, indeed, resulted in four different independent judges expressing in clear terms their concern as to the good faith of the prosecution authorities when the latter repeatedly found the facts and evidence in the case insufficient for the purposes of indictment. Even assuming that the prosecutors in the present case acted in the sincere belief that these facts and evidence did not justify a decision to indict the suspect/s in question, we fail to see any justification for the absence of further diligent investigation of other avenues which the prosecution authorities might have seen as a more plausible explanation of the origin of the applicant’s serious injuries. In the opinion of one of the judges in the appeal proceedings, “the prosecutor’s conclusions suggested that ... the applicant had somehow injured himself or had been attacked by unknown individuals...[H]aving regard to the time and location of the incident as suggested by the prosecutor, namely while the applicant was retuning home, it was very unlikely that this would have gone unnoticed.”

4. The questionable good faith with which the investigation proceedings were repeatedly discontinued also raised a sufficient degree of concern with the higher prosecution authorities which led them to consider the possibility of disciplinary measures against the responsible prosecutors. We see no reason not to share their concerns. However, such concerns were clearly insufficient to either bring the identified suspects before the courts, or to trigger any further investigation to ascertain other circumstances or perpetrators.

5. In the instant case the situation amounted to *de facto* tolerance by the authorities towards violence causing suffering beyond the threshold of Article 3, which cannot but undermine public confidence in the principle of lawfulness and maintenance of the rule of law. We regret that the present judgment fails to examine the extent to which the demonstrated arbitrary exercise of prosecutorial discretion contributed to the respondent Government's failure to meet the obligations under Article 3. Unaccountable discretion renders meaningless the positive obligation to conduct an investigation capable of leading to punishment and, in practice, relegates the victim to the position obtaining before the development of the positive obligation doctrine in the context of Articles 2 and 3.