



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

SECOND SECTION

CASE OF RÉTI AND FIZLI v. HUNGARY

(Application no. 31373/11)

JUDGMENT

STRASBOURG

25 September 2012

FINAL

25/12/2012

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

In the case of Réti and Fizli v. Hungary,

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

Françoise Tulkens, *President*,

Danutė Jočienė,

Dragoljub Popović,

Isabelle Berro-Lefèvre,

András Sajó,

Işıl Karakaş,

Guido Raimondi, *judges*,

and Françoise Elens-Passos, *Deputy Section Registrar*,

Having deliberated in private on 4 September 2012,

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

PROCEDURE

1. The case originated in an application (no. 31373/11) against the Republic of Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two US/Hungarian double nationals, Mr Gergely Miklós Réti and Mrs Z. V. Fizli (“the applicants”), on 16 May 2011.

2. The applicants were represented by Mr G. Győző, a lawyer practising in Budapest. The Hungarian Government (“the Government”) were represented by Mr Z. Tallódi, Agent, Ministry of Public Administration and Justice.

3. The applicants alleged under Article 3 of the Convention that they had been subjected to ill-treatment by the police and that the investigation into it had not been adequate.

4. On 15 November 2011 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1962 and 1976 respectively and live in Budapest.

6. At about 3.45 a.m. on 1 October 2006 the applicants were riding a motorbike in Budapest. Police Officers N. and S. halted them in order to carry out an identity check. The applicants produced American passports.

1. The applicants' version of the incident

7. According to the applicants, the procedure to check their identities degenerated as follows. After Mr Réti's stepping aside and attempting to make a cell phone call, Officer N. started to behave aggressively and repeatedly kicked him. Officer S. first tried to restrain his partner, but following a remark made by Ms Fizli, he also became aggressive; the officers hit Mr Réti repeatedly and finally handcuffed him, forcing him to the ground. Subsequently, reinforcement was called in. Several officers arrived and joined their colleagues in hitting Mr Réti. When Ms Fizli intervened, an officer pushed her in the chest and then down on the ground, knelt on her face, ordered her to shut up, and finally banged her head against the soil. Simultaneously, another officer knelt on Mr Réti's back, while an officer forced his truncheon against his neck, thus compressing his throat. Mr Réti lost consciousness. Eventually, the applicants were driven to the police station in two separate police vehicles.

2. The Government's version of the events

8. The Government gave the following account of the incident. Despite their understanding of the purpose of the police measure, Mr Réti and Ms Fizli initially insisted on speaking English and were not willing to cooperate, therefore the police officers, Officer N. and Officer S., applied force. As Mr Réti resisted, the police patrol called in reinforcements and handcuffed him with the help of the officers just arriving. Ms Fizli questioned in anger the police officers applying force against her partner and, in the heat of the argument, suddenly turned against Officer P., one of the reinforcement officers. It was perceived that she was trying to hit the officer with the cell phone she held in her hand. Officer P. raised his hands in defence and pushed her away. Ms Fizli bounced back from the officer's hands, lost her balance and fell against the officer standing behind her, who immobilised her.

Mr Réti was then driven to the police station on suspicion of drunken driving and violence against an official. In the police car, he furiously banged his head against the window and kept kicking the window; therefore, force had to be used to restrain him. On account of her behaviour and lack of cooperation, Ms Fizli was also handcuffed, placed in another police car and taken to the police station.

9. Committed to the Budapest II District Police Headquarters, the applicants were tested for blood alcohol levels. Mr Réti was under very mild influence (0.45 g/l) while Ms Fizli was under none.

Subsequently, the applicants were released.

3. The applicants' injuries

10. According to the medical report submitted, Mr Réti suffered the following injuries: a contusion and a haematoma on the right cheek, another over the right eye, a further one behind the right knee, several abrasions and contusions on the chest and the belly, and a brain commotion. Ms Fizli had haematomas on her right wrist, several contusions on her right palm, a contusion on her left foot, and a haematoma with a contusion on the right side of her waist.

4. Subsequent proceedings

11. On 9 October 2006 the applicants filed a criminal report for ill-treatment in official proceedings. In the subsequent proceedings they maintained in essence the above version of the events. Officers N., S. and P. were interrogated as witnesses. They stated that only lawful force had been applied to overcome the applicants' resistance.

12. A forensic expert was appointed, according to whose opinion it could not be determined whether the applicants' injuries had been caused as they suggested or according to the officers' version.

13. On 11 June 2007 the Budapest Investigation Office discontinued the investigation, essentially with regard to the inconclusive medical evidence.

14. In different proceedings conducted against the applicants for violence against officials, Officers N., S., P. and V. were heard as witnesses. Officers N. and S. were also confronted with the applicants. This procedure was eventually discontinued on 15 May 2007 for want of conclusive evidence.

15. The applicants filed a complaint against the discontinuation of their case (see paragraph 13 above). They submitted a number of motions in order to have more evidence taken. However, on 24 July 2007 the Budapest Public Prosecutor's Office dismissed the complaint.

16. On 27 September 2007 the applicants, acting as substitute private prosecutors, filed a motion with the Budapest Regional Court.

The court held five hearings and heard the applicants as well as Officers N., S. and P., along with several witnesses. It took testimonies from the other officers present at the incident and the medical expert. In these proceedings, no confrontation took place, although Ms Fizli by then stated that an Officer M. – rather than the accused Officer P. – had brutalised her. For the court, this amounted to an inconsistency.

In his final address to the court, the applicants' lawyer pointed out that several contradictions in the file and the testimonies were not resolved. In particular, it remained unclear how many times and under what circumstances the officers had forced the applicants to the ground, and how

the applicants could strongly smell of alcohol (as reported by the officers) given the very low blood values.

17. On 5 October 2009 the court acquitted the accused, observing *inter alia* that the medical evidence was inconclusive.

The applicants appealed. On 21 October 2010 the Budapest Court of Appeal held a hearing and upheld the acquittal (service: 29 November 2010).

II. RELEVANT DOMESTIC LAW

18. Act no. XIX of 1998 on the Code of Criminal Procedure provides:

Chapter IX

Title III – Conduct of the investigation

Discontinuation of the investigation

“Section 190 (1) The public prosecutor shall, by decision, discontinue the investigation:

- a) if the action does not constitute a criminal offence,
- b) if, on the basis of the results of the investigation, the commission of a criminal offence cannot be established and no result can be expected from the continuation of the procedure,
- c) if the criminal offence was not committed by the suspect, or on the basis of the results of the investigation it cannot be established whether or not the criminal offence was committed by the suspect,
- d) if a ground excluding punishability occurs, unless it appears necessary to order involuntary treatment in a mental institution,
- e) due to the death of the suspect, lapse of time or pardon,
- f) due to other statutory grounds eliminating punishability,
- g) if there has been no private motion, request or complaint, and none can be submitted subsequently,
- h) if the action has already been adjudicated by a final decision, including the case regulated in section 6 of the Criminal Code,
- i) if the identity of the perpetrator could not be established in the investigations,
- j) [the prosecutor shall discontinue the investigation and issue a reprimand] if the action committed by the suspect no longer poses a threat – or poses such an

insignificant level of threat – to society that even the imposition of the most lenient punishment allowed under the law or the application of any other measure is unnecessary.”

“Section 191 (1) Unless an exception is made in this Act, discontinuation of the investigation shall not prevent the subsequent resumption of the proceedings in the same case.

(2) Resumption of the proceedings shall be ordered by the public prosecutor or, if the investigation was terminated by a public prosecutor, by a senior prosecutor. If the suspect was reprimanded (section 71 of the Criminal Code), the public prosecutor or the senior prosecutor, respectively, shall quash the decision discontinuing the investigation. Against the decision ordering resumption of the investigation, no objection shall lie.

(3) If no objection was filed against the discontinuation of the investigation or the senior prosecutor did not order the resumption of the investigation, subsequently only a court can order the resumption of the investigation against a person in respect of whom the investigation had previously been discontinued.

(4) If the court rejected the motion for the resumption of the investigation, a repeated motion for resumption on the same ground shall not be allowed.”

“Section 207 (1) Prior to the preferment of the bill of indictment, the responsibilities of the court shall be performed at first instance by the judge designated by the president of the county court (‘investigating judge’).

(2) The investigating judge shall...

c) decide on the resumption of an investigation after its discontinuation (section 191(3)).”

Title IV – Remedy during the investigation

“Section 195 (6) A motion for review may be filed with the public prosecutor’s office against [certain] decisions ..., and against a decision rejecting a complaint against a prosecutorial decision ... within eight days of delivery. The prosecutor’s office shall forward the motion for review and the case file to the court [i.e. the investigating judge] within three days.”

“Section 198 (1) If the criminal report was filed by the aggrieved party, he may submit a complaint against the rejection of the report within eight days of its delivery in order to have the investigation ordered.

(2) If the prosecutor terminated the investigation, the aggrieved party may file a complaint with a view to the continuation of the procedure within eight days of the delivery of the decision on discontinuation.”

“Section 199 (1) On the basis of the complaint, the prosecutor or the senior prosecutor may:

a) quash the decision rejecting the report or terminating the investigation, and deliver a decision on ordering or continuing the investigation or on pressing charges;

b) reject the complaint if he finds it unfounded.

(2) After the rejection of his complaint, the aggrieved party may act as a supplementary private prosecutor if:

a) the report was rejected under section 174(1) a) or c), or

b) the investigation was terminated under section 190(1) a) to d) or f).”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

19. The applicants complained that they had sustained ill-treatment by the police and that the ensuing investigation had not been adequate. They relied on Article 3 of the Convention, which reads as follows:

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

20. The Government contested that argument.

A. Admissibility

21. The Government argued that the applicants should have requested the investigating judge to re-open the case under section 191(3) of the Code of Criminal Procedure. By not availing themselves of this procedural avenue, they did not exhaust domestic remedies.

22. The applicants pointed out that section 191 of the Code of Criminal Procedure concerned cases where the investigation was discontinued without an indictment. In the present case, however, substitute private prosecution had taken place, followed by a criminal court procedure resulting in a final and binding judgment, not susceptible to a resumption of the investigation by the investigation judge. Therefore, this legal instrument could not be considered effective in the circumstances.

23. The Court recalls that the obligation to exhaust domestic remedies requires that an applicant make normal use of remedies which are effective, sufficient and accessible in respect of his Convention grievances. To be effective, a remedy must be capable of remedying directly the impugned state of affairs (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004). The existence of the remedies in question must be sufficiently certain not

only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see *Akdivar and Others v. Turkey*, 16 September 1996, § 66, *Reports of Judgments and Decisions* 1996-IV).

24. In the present circumstances, the Court however considers that it is not necessary to embark on a closer scrutiny of the parties arguments' about the effectiveness of a motion to be submitted to the investigating judge, since in any case, the Government have not produced any evidence to show that such a request has proved effective in similar cases and would consequently constitute a remedy to be exhausted in the circumstances.

25. Moreover, the Court notes that the applicants filed a criminal report concerning the alleged ill-treatment and pursued substitute private prosecution as well.

26. It follows that the application cannot be rejected for non-exhaustion of domestic remedies (see *Gubacsi v. Hungary*, no. 44686/07, §§ 30 to 33, 28 June 2011). Furthermore, the Court considers that it is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

a. The Government

27. The Government stressed, as a cardinal consideration, that the medical evidence in the case was inconclusive (see paragraph 12 above). Moreover, they argued that the applicants had been under the influence of alcohol and resisted a lawful police measure, which had necessitated the use of force. However, the nature and severity of the injuries sustained did not indicate that the officers had had recourse to excessive force. Nor did those injuries attain the level of severity which is required to bring Article 3 into play.

28. Furthermore, the authorities had carried out an effective investigation into the applicants' allegations of ill-treatment, during the course of which the protagonists could freely present their positions and the authorities, including two court instances, addressed their arguments in detail. In the Government's view, the fact that the proceedings had resulted in no criminal conviction did not undermine the effective character of the investigation.

b. The applicants

29. The applicants also noted that the forensic expert's opinion was inconclusive. They emphasised nevertheless that it did not exclude their version of the incident. As regards the injuries sustained, they maintained that they were serious enough to bring Article 3 into play. They further stressed that Mr Réti had been under mild and Ms Fizli under no influence of alcohol; therefore, no aggressive conduct on their part, caused by intoxication, warranted the use of force. Concerning Ms Fizli's contradictory statements about the identity of the officer who had allegedly ill-treated her (see paragraph 16 above), the applicants argued that this was due to the absence of an identification parade during the investigation – an omission ignored by the trial court. They also drew attention to the fact that the criminal proceedings conducted against them had been discontinued for want of conclusive evidence (see paragraph 13 above) and moreover, that some contradictions in the testimonies of the officers had not been resolved (see paragraph 16 above).

As to the adequacy of the investigation into their complaints, the applicants submitted that the public prosecutor had failed to pursue the case, and it could reach the court only by virtue of their motion of private prosecution. Furthermore, they argued that in cases of alleged police brutality, the burden of proof was on the State, and it should not have been up to them to produce "conclusive evidence", as expected by the domestic court. In particular, the State should prove that the use of force was indispensable and that it did not exceed the degree necessary in the circumstance.

2. The Court's assessment

30. Article 3 of the Convention, as the Court has observed on many occasions, enshrines one of the fundamental values of democratic society. Even in the most difficult of circumstances, such as the fight against terrorism or crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of its Protocols, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.

31. The Court recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim. In respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in

principle an infringement of the right set forth in Article 3 (see *Tekin v. Turkey*, 9 June 1998, §§ 52 and 53, *Reports of Judgments and Decisions* 1998–IV).

32. The Court notes that as a result of the police intervention, Mr Réti sustained a contusion and a haematoma on the right cheek, another over the right eye, a further one behind the right knee, several abrasions and contusions on the chest and the belly, and a brain commotion, whereas Ms Fizli had haematomas on her right wrist, several contusions on her right palm, a contusion on her left foot, and a haematoma with a contusion on the right side of her waist (see paragraph 10 above).

33. The Court considers that the injuries suffered by the applicants were serious enough to bring the matter within the scope of Article 3. It remains to be considered whether the State should be held responsible under Article 3 for these injuries.

34. The Court observes that the applicants were apprehended in the course of an identity check carried out by the police on the suspicion of their drunken driving. It notes the Government's assertion that the coercion applied by the police was necessitated by the applicants' alleged resistance to a lawful measure. However, it takes the view that the Government have not furnished any convincing or credible arguments which would provide a basis to explain or justify the degree of force used during the operation. In particular, it has not been clarified what particular conduct on the applicants' side warranted a reaction in the course of which Mr Réti suffered numerous haematomas, contusions and a commotion, and Ms Fizli sustained several haematomas and contusions as well. Especially in the face of the fact that the applicants eventually proved to be respectively under very mild and no influence of alcohol, the Court finds that the Government's explanation for the incident sits uncomfortably with the circumstance that several law enforcement agents were involved in the scene, who should have been able to master the situation without causing such injuries. For the Court, this is so even if the applicants were unwilling to cooperate with those officers or if Ms Fizli's sudden gesture (see paragraph 8 above) was mistaken for an attempted hit – an assumption hardly conceivable in the circumstances.

It is true that the forensic evidence was inconclusive as to the origins of the applicants' injuries (see paragraph 12 above); however, for the Court, the fact remains that the applicants were released from custody with a range of injuries not accounted for convincingly by the Government.

The Court would further note that the criminal proceedings conducted against the applicants were eventually discontinued for want of evidence (see paragraph 14 above).

Since the Government have not shown the contrary, the Court cannot but conclude that, even assuming that the situation objectively required the use of force, the extent to which it was applied was excessive. Such use of force

resulted in injuries and suffering of the applicants, amounting to degrading treatment.

35. Moreover, as regards the applicants' complaint about the adequacy of the investigation, an issue falling under the procedural limb of Article 3 (see *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV), the Court notes at the outset that no internal investigation or disciplinary procedure appears to have been carried out within the police force concerning the appropriateness of the police action.

It further observes that in pursuit of the criminal report filed by the applicants, a criminal investigation was launched but then discontinued. Substitute private prosecution was required on the applicants' side to have the case examined by a court. In these proceedings, several witnesses were heard and testimonies were obtained from the protagonists. However, these testimonies were, for the domestic court, irreconcilable with the inconclusive medical evidence and the principle of presumption of innocence favouring the accused officers. No genuine effort, in particular in the form of confrontations, was made to resolve the contradictions in these proceedings. Finally, no individual criminal responsibility of any particular police officer could be established.

In these circumstances, the Court finds that there has been no sufficiently adequate investigation into the applicants' allegations, capable of leading to the identification of the alleged perpetrators. For the Court, this cannot be regarded as having been substituted for by the investigation into the parallel case conducted against the applicants.

36. Having regard to the above considerations, the Court concludes that the applicants have been subjected to degrading treatment and that no adequate investigation has been carried out into their allegations. There has, accordingly, been a breach of Article 3 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

37. 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

38. Each applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

39. The Government contested this claim.

40. The Court considers that the applicants must have suffered some non-pecuniary damage and awards each of them EUR 5,000 in respect of under this head.

B. Costs and expenses

41. The applicants also claimed EUR 3,350 for the costs and expenses incurred before the Court. This sum corresponds to 33 hours of legal work billable by their lawyer at an hourly rate of EUR 100, plus EUR 50 of clerical costs.

42. The Government contested this claim.

43. 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, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the full sum claimed, that is, EUR 3,350.

C. Default interest

44. 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 application admissible;
2. *Holds* that there has been a violation of Article 3 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay 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 Hungarian forints at the rate applicable at the date of settlement:
 - (i) EUR 5,000 (five thousand euros) to each applicant, plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 3,350 (three thousand three hundred and fifty euros) to the applicants jointly, plus any tax that may be chargeable to the applicants, 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 applicants' claim for just satisfaction.

Done in English, and notified in writing on 25 September 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President