



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

THIRD SECTION

CASE OF BOUTAFFALA v. BELGIUM

(Application no. 20762/19)

JUDGMENT

Art 6 § 1 (criminal) • Unfair trial • Applicant convicted of resistance to police on sole basis of statements by officers including those who had subjected him to degrading treatment acknowledged by Government • Scope of Government's unilateral declaration restricted by Court of Appeal • Declaration concerning Art 3 requiring national courts to examine allegations of resistance with utmost caution and be satisfied that they were conclusively made out

Art 46 • Execution of judgments • Striking-out decision not falling within ambit of Art 46, which concerns only final judgments of the Court • Art 46 conferring no right that could be asserted in individual application to Court • Supervision of execution of friendly settlement falling to Committee of Ministers • National authorities required to draw appropriate conclusions fair-mindedly from Government's unilateral declaration and giving rise to decision of Court having taken note thereof

STRASBOURG

28 June 2022

FINAL

28/09/2022

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Boutaffala v. Belgium,

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

Georges Ravarani, *President*,

Georgios A. Serghides,

María Elósegui,

Darian Pavli,

Anja Seibert-Fohr,

Andreas Zünd,

Frédéric Krenc, *judges*,

and Milan Blaško, *Section Registrar*,

Having regard to:

the application (no. 20762/19) against the Kingdom of Belgium lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Belgian national, Mr Khaled Boutaffala (“the applicant”), on 9 April 2019,

the decision to give notice to the Belgian Government (“the Government”) of the complaint concerning Article 6 § 1 of the Convention,

the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

the comments received from the Ligue des droits de l’homme, which had been granted leave to intervene by the President of the Section;

Having deliberated in private on 7 June 2022,

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

INTRODUCTION

1. The case concerns the applicant’s complaint that the domestic courts, in violation of Article 46 of the Convention, read in conjunction with Article 3, had misconstrued a unilateral declaration previously submitted to the Court by the Government and had convicted him of resistance to a public officer (*rébellion*) in violation of Article 6 § 1 of the Convention.

THE FACTS

2. The applicant was born in 1976 and lives in Brussels. He was represented by Mr T. Mitevov, a lawyer.

3. The Government were represented by their Agent, Ms I. Niedlispacher, of the Federal Justice Department.

I. CIRCUMSTANCES HAVING GIVEN RISE TO THE APPLICATION

4. The applicant was arrested by the police on 28 August 2009 after incidents on the public highway in Saint-Gilles (Brussels).

5. According to the applicant, while driving home from work he had stopped after spotting his brother. He had noted that the road was closed to traffic and that paramedics were in the process of performing CPR. The applicant and his brother had moved on once they were certain that the patient was not a relative of theirs. A few moments later they had been joined by an acquaintance, R. When they had arrived at the scene of the incident, police officers had seized R. about the waist and knocked his legs out from under him. R. had fallen to the ground face-first and the officers had bound his wrists with zip cuffs.

6. In the applicant's version of events, a police officer had come towards him and, without warning, had struck him on the chest with a truncheon while asking him to move along. As a protective reflex the applicant had crossed his hands. Meanwhile another police officer had sought to seize him from behind while placing a truncheon at his throat. Thrown off balance, the applicant had fallen onto the first officer, with the second officer falling on him.

7. In the version given by those police officers and other eyewitnesses, R. had resisted while urging others present at the scene to help him evade arrest. The applicant had positioned himself in front of the officer who had accosted R. and had shoved him forcefully. Having failed to comply with orders to step back and leave the scene, the applicant had been thrust back by the police officer. He had then attempted to seize the officer's truncheon and had eventually been wrestled to the ground and restrained with the help of another officer who had come to assist.

8. The applicant was then zip-cuffed and taken away in a transport van. The cuffs having come undone, the applicant attempted to get out of the van but, according to him, was forcefully prevented from doing so. There were nine police officers in the van, of whom six were in the back with the applicant. The Government admitted that the applicant had been the target of insults during the transfer.

9. On the evening of his arrest, after having been taken to the hospital, the applicant was questioned by the police. He was released the next day. A medical certificate was drawn up by the hospital reporting bruises in the periorbital and parietal areas, along the cervical vertebrae, on the left hemithorax and on the left thigh, as well as a cut in the scalp at the back of the head. The applicant was certified unfit for work until 24 September 2009.

10. Two sets of judicial proceedings were instituted in the wake of these events. The first proceedings were brought against the applicant for assaulting the two police officers who had apprehended him and for the offence of resistance to a public officer. They form the subject matter of the present application (III.). The second case in chronological order was brought against the police officers who had apprehended the applicant. Those proceedings, which formed the subject matter of application no. 48302/15, were instituted

upon the applicant's complaint and civil-party application alleging assault occasioning bodily harm (II.).

II. PROCEEDINGS AGAINST THE POLICE OFFICERS (APPLICATION NO. 48302/15)

11. On 3 September 2009 the applicant contacted and was interviewed by the General Inspectorate of Federal and Local Police.

12. On 26 January 2010 the applicant filed a complaint, with an application to join the proceedings as a civil party, alleging assault occasioning bodily harm resulting in unfitness for work, damage to personal honour and reputation and violation of the Law of 30 July 1981 aimed at punishing certain acts motivated by racism or xenophobia. He complained that he had been beaten by the two officers who had apprehended him and that he had suffered physical abuse and insults during his transfer in the van. He further complained that he had been the victim of abuse at the police station. Ten police officers – the two who had intervened directly to arrest the applicant and eight others who were present at the scene – were formally charged and placed under judicial investigation.

13. On 17 May 2011 a confrontation was held between the applicant, R. and three police officers.

14. The Pre-Trial Division of the Brussels Court of First Instance delivered a discontinuance decision on 21 December 2012 in keeping with submissions by the public prosecutor's office. On 30 May 2013 the Indictment Division of the Brussels Court of Appeal upheld the discontinuance decision in respect of the ten police officers. In a judgment delivered on 14 January 2014 the Court of Cassation quashed the Indictment Division's judgment for lack of reasoning.

15. The Indictment Division of the Brussels Court of Appeal, with a differently constituted bench, dismissed the applicant's appeal in a judgment delivered on 26 June 2014. In its judgment of 24 March 2015 the Court of Cassation dismissed the appeal on points of law that had been lodged by the applicant.

16. On 23 September 2015 the applicant lodged an application with the Court. Relying in particular on Articles 3, 5, 6 and 14 of the Convention, he complained that he had suffered excessive violence at the hands of the police, both at the time of his arrest and during his detention, while in a particularly vulnerable position; that the ill-treatment to which he had been subjected had been motivated by racial prejudice; and that his arguable allegations of ill-treatment in violation of Article 3 imposed a duty on the State – one they had not fulfilled – to conduct an in-depth and effective investigation in order to identify and punish those responsible. He further complained that he had been arbitrarily detained.

17. After notice of the application had been given on 14 December 2016 to the Belgian Government, they submitted a unilateral declaration on 10 February 2017 acknowledging that “the circumstances under which the applicant had been apprehended had not been conducive to full respect for his right not to be subjected to degrading treatment as guaranteed by Article 3 of the Convention” and agreed to pay him the sum of 15,000 euros (EUR) in respect of non-pecuniary damage.

18. The applicant agreed to the terms of the unilateral declaration on 9 March 2017.

19. The Court took note of the implicit friendly settlement between the parties and struck the application out of the list (see *Boutaffala v. Belgium* (dec.), 48302/15, 27 June 2017).

20. On 31 January 2018 the Committee of Ministers took note of the Government’s execution of the terms of the friendly settlement and closed the case (Resolution CM/ResDH(2018)27).

III. PROCEEDINGS AGAINST THE APPLICANT (PRESENT APPLICATION)

21. On 29 August 2009 the Brussels Crown Prosecutor drew up an application requesting the opening of a judicial investigation. That same day, without examining the applicant, the investigating judge formally charged him with assaulting and resisting the two police officers who had apprehended him. On 21 October 2009 the investigating judge deemed the investigation complete and transmitted the file to the prosecution.

22. On 26 March 2010 the Crown Prosecutor filed submissions to commit the applicant for trial before the Brussels Criminal Court.

23. On 15 July 2010 the applicant filed an application for additional investigative steps, requesting that relevant documents from the proceedings against the police officers be added to his file; that third-party witnesses be examined concerning the acts of which he was accused; and that a search for other witnesses be conducted. On 27 July 2010 the investigating judge issued a decision that the documents be added to the file, in so far as this was consistent with the prosecutor’s submission, while reserving the right to determine subsequently whether the other steps requested by the applicant were still relevant.

24. On 29 April 2013 the prosecutor joined the cases. On the basis of the prosecutor’s submissions, the Indictment Division of the Brussels Court of Appeal decided on 30 May 2013 that the judicial investigation in connection with both cases was complete.

25. In a decision of 23 April 2014 the Pre-Trial Division of the Brussels French-language Court of First Instance committed the applicant and his brother to stand trial before the Criminal Court. That decision was upheld on

appeal in a judgment of the Indictment Division of the Brussels Court of Appeal delivered on 28 October 2015.

26. On 20 June 2016 the Criminal Court acquitted the applicant on the charge of assaulting the officer who had apprehended him and convicted him for resisting and assaulting the officer who had come to assist. Given that the proceedings had not complied with the reasonable-time requirement, the court delivered a judgment merely finding the applicant guilty.

27. On 14 July 2016 the applicant appealed against the judgment. He complained of shortcomings in the investigation which had prevented him from proving his version of the facts. He subsequently relied on the Government's unilateral declaration to the Court to argue that it was a matter of considerable importance that the police officers who had accused him had taken part in a violation of Article 3 of the Convention.

28. The Brussels Court of Appeal delivered its judgment on 13 March 2018. Firstly, with regard to the proceedings, it considered that the applicant's right to a fair trial and his defence rights had not been infringed. While it was true that the investigating judge had not examined the applicant or the police officers involved in his arrest, the applicant had been questioned by a police officer on the day of his arrest and all the relevant parties had been interviewed by the General Inspectorate of Police (see paragraphs 9 and 11 above) in the context of the applicant's complaint. Moreover, the applicant had failed to explain how an examination specifically conducted by the investigating judge would have allowed new evidence to be brought to light that would have proved helpful in discovering the truth. Nor had the applicant demonstrated the relevance of a confrontation between him and the police officers who had arrested him, given that the General Inspectorate had already conducted such a confrontation in the other proceedings. As to the investigating judge's failure to initiate enquiries to identify other witnesses, the Court of Appeal considered that it was counterbalanced by the fact that several third-party witnesses – four for the defence and two independent witnesses – had already been heard in the other proceedings and that their statements had been added to the case file.

29. Next, with regard to the charges, the Court of Appeal emphasised that the Government's unilateral declaration had to all appearances been motivated by the testimony of an inspector who had been in the van and had expressed her indignation at the insults proffered by her colleagues during the transfer, characterising their behaviour as out of line. The Court of Appeal nevertheless held that the Government's acknowledgment before this Court of a violation of Article 3 did not call into question the decision of 26 June 2014 to discontinue proceedings against those police officers, which had been justified, *inter alia*, by their use of legitimate and proportionate force. That discontinuance decision had become final since the applicant's appeal on points of law had been dismissed by the Court of Cassation (see paragraph 15 above).

30. The Court of Appeal considered that the charge of resistance to a public officer had been made out, being based on sufficient evidence in the case file. Having reviewed all versions of the events and the content of the statements, it held that there was no reason to question the officers' detailed statements to the effect that the applicant had attempted to obstruct R.'s arrest and had resisted the police officers by shoving one of them, attempting to seize his truncheon and struggling when they had restrained him on the ground. These statements had been corroborated by the concordant versions given by several other officers present at the time. The official records of their interviews constituted information that could be attributed probative value on account of the trust placed by the law in the office of those by whom they were drawn up. That information had not been contradicted by the statements taken from the two independent witnesses in the other proceedings, even if they had not confirmed the existence of assault on the part of the applicant. As to the statements of the four witnesses called upon by the applicant to testify in the other proceedings, their independence was not sufficiently guaranteed, as they knew him personally, and their testimony was not corroborated by the other evidence in the file.

31. The Court of Appeal upheld the applicant's acquittal on the charge of assault against the police officer who had apprehended him. Finding that the charge of assault against the officer who had come to assist in restraining the applicant had not been sufficiently made out, the Court of Appeal acquitted the applicant on that charge as well.

32. Lastly, in determining the sentence, the Court of Appeal merely delivered a finding of guilt in the light of the fact that the applicant had no prior convictions; that the events had taken place more than eight years earlier; and that the judicial investigation had lain idle for three years.

33. In its judgment of 10 October 2018 the Court of Cassation dismissed the applicant's appeal on points of law against the Court of Appeal's judgment.

34. The Court of Cassation dismissed as having no basis in law the ground of appeal alleging violations of Articles 3 and 46 of the Convention, in which the Court of Appeal's judgment had been criticised for having run counter to the authority of *res judicata* of this Court's decision of 27 June 2017 (see paragraph 19 above). It noted that this had been a decision to strike out the case before it as a result of an offer of compensation from the Government, which had acknowledged that the circumstances of the applicant's arrest had failed to ensure full respect for his right under Article 3 of the Convention not to be subjected to degrading treatment. The Court of Cassation considered that the Court had not found the Belgian State to be in violation of the Convention and that the decision of 27 June 2017 did not have the authority of *res judicata*.

35. The applicant had further criticised the Court of Appeal for failing to guarantee him a fair hearing within the meaning of Article 6 § 1 of the

Convention by giving preponderant weight to the statements of the police officers responsible for the breach of Article 3 while dismissing the evidence of third parties in his favour, and for failing to respond to his summary submissions to the effect that the acknowledgment of a violation of Article 3 significantly negated the probative value of the police officers' statements.

36. The Court of Cassation noted that in criminal matters, where statute did not prescribe a particular form of evidence, the principle of unfettered discretion in the choice of that form prevailed. Moreover, the appellate court had not systematically dismissed the statements of witnesses for the defence in favour of those of the police officers involved in the applicant's arrest. Endorsing the findings of the impugned judgment, the Court of Cassation held that they had not resulted in the proceedings being unfair and had duly responded to the arguments raised in the submissions, such that the appellate court had provided adequate reasons and legal justification for its decision.

37. The Court of Cassation moreover held that the mere fact that the investigating judge had failed to examine the applicant during the investigation could not have resulted in an infringement of the rights of the defence when, as in this case, having had occasion to examine all the evidence against him, the applicant had been afforded the opportunity to challenge it in the courts below.

RELEVANT DOMESTIC LAW AND PRACTICE

I. RESISTANCE TO POLICE OFFICERS

38. Resistance to public order by private citizens is a criminal offence under Articles 269 to 274 of the Criminal Code. Resistance to police officers constitutes a major offence (*délit*).

II. PROBATIVE VALUE OF OFFICIAL REPORTS

39. Article 154, first paragraph, and Article 189 of the Code of Criminal Procedure provide that evidence of major and minor offences may be supplied by official reports (*procès-verbaux*). The law attaches probative value to such reports on account of the trust it places in the members of the police by whom those reports are drawn up. However, such reports only constitute evidence of the facts personally noted by the reporting officers, in so far as they are empowered to make such findings. Probative value therefore attaches to the constitutive facts and not to the statements or assessments of the reporting officer or to the legal consequences he or she deduces from such findings. Moreover, that probative value is limited since the judge is in principle not bound by such reports, which merely constitute information, in accordance with ordinary criminal evidence law.

40. It can be seen from the Court of Cassation's case-law that by giving credence to a statement contained in an official report duly included in the case file and which the parties have been afforded the opportunity to challenge, the court infringes neither the rules of evidence nor the rights of the defence (Court of Cassation (Cass.), 22 September 2010, P.10.0226.F). The court is not required, according to the Court of Cassation, to dismiss an official report on the sole ground that, after having drawn it up, proceedings were taken against the reporting officer by the person about whom the report was made.

41. The right to a fair trial does not prohibit a police officer from declaring himself or herself to be the victim of assault, resistance or insults, or from drawing up an official report to that effect, the credibility of which it will then fall to the trial courts to assess (Cass., 20 November 2013, P.13.0432.F, see also 23 January 2019 - P.18.0826.F).

RELEVANT INTERNATIONAL LAW MATERIALS

42. In its Concluding observations concerning the fourth periodic report of Belgium, adopted at its 1838th session (28 July 2021), the United Nations Committee against Torture found as follows:

“7. The Committee remains concerned by the prevalence of ill-treatment and the excessive use of force by the police, including when restraining prisoners, which have, in some cases, led to the death of the persons apprehended. It also takes note of reports of excessive intervention by the police in public protests, as seen, for example, at the gatherings on 1 April and 1 May 2021 that were banned on account of the pandemic. Bearing in mind the foregoing, the Committee regrets that the State party has not provided specific, aggregated and updated information on the unlawful use of force, given the fragmented nature of the services that oversee police work and the difficulty of determining the number of complaints filed and the number of cases brought before the courts. According to the figures provided in annex 1 of the State party's report, between 2012 and 2016, only 20 per cent of such cases resulted in prosecution and 59 per cent were dismissed. The Committee is, likewise, concerned by the lightness of the criminal penalties that are imposed and the fact that a very high proportion of the sentences handed down are suspended sentences. It notes with concern that there are gaps in the application of the law on disciplinary action, resulting in the suspension of proceedings and a lack of penalties, even when an offence is found to have occurred. The Committee once more expresses its concern about the ineffectiveness of the inquiries carried out by oversight bodies, in particular the Investigation Service of the Standing Committee for Police Oversight (Committee P), which is made up of full members and members seconded from the police and is responsible not only for inquiries but also for identifying police failings and helping the police to remedy them, a situation that can give rise to a conflict of interests and undermine its impartiality. ...

8. Recalling the recommendation contained in its previous concluding observations, the Committee calls on the State party to urgently conduct an independent and transparent investigation into the use of ill-treatment and the excessive use of force by the police, with a view to establishing the necessary prevention policies and strengthening internal and external oversight mechanisms. In this connection, the Committee recommends that the State party:

...

b) Promptly and proactively launch independent, thorough, scrupulous and impartial inquiries into all allegations of unlawful violence by the police, ensuring that there is no practical, institutional or hierarchical connection between the investigators and the alleged perpetrators and that the latter, if found guilty, are given sentences that are commensurate with the gravity of their offences;

c) Ensure, in cases where torture or ill-treatment is alleged to have occurred, that the suspects are immediately suspended from duty for the duration of the inquiry;

...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 46 READ IN CONJUNCTION WITH ARTICLE 3 OF THE CONVENTION

43. The applicant complained that the Belgian authorities had misconstrued the scope of the striking-out decision of 27 June 2017 whereby the Court had taken note of the Government’s acknowledgment of a violation of Article 3 of the Convention. The result, he argued, had been a breach of the obligation to execute that decision of the Court in good faith. The applicant relied on Article 46 of the Convention taken in conjunction with the procedural limb of Article 3. Those provisions read as follows:

Article 3

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

Article 46

“1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution. ...”

44. The Court would point out that, in the context of the application concerning the proceedings brought by the applicant against the police officers (application no. 48302/15), the Government submitted a unilateral declaration acknowledging that the circumstances of the applicant’s arrest had not been conducive to full respect for his right not to be subjected to degrading treatment as guaranteed by Article 3 of the Convention and agreeing to pay him compensation in respect of the resulting non-pecuniary damage sustained by him. The applicant having agreed to the terms of that unilateral declaration, the Court took note of the friendly settlement that had been implicitly reached by the parties and subsequently struck the application out of its list (see *Boutaffala v. Belgium* (dec.), no. 48302/15, 27 June 2017).

45. The Government's unilateral declaration was added to the case file in the criminal proceedings brought against the applicant on the charge of resistance to a public officer. In those proceedings the Brussels Court of Appeal considered that the unilateral declaration had to all appearances been motivated by the testimony of a police officer who had expressed her indignation at the insults her colleagues had directed at the applicant in the van during the transfer to the police station. According to the Court of Appeal, the Government's acknowledgment did not call into question the Indictment Division's decision of 26 June 2014 to discontinue proceedings against the police officers, which decision had become final as a result of the Court of Cassation's judgment of 24 March 2015 dismissing the applicant's appeal on points of law (see paragraph 29 above).

46. The applicant criticised the Court of Appeal for having misconstrued the scope of the Government's unilateral declaration in the proceedings before the Court. More specifically, he criticised it for failing to draw the appropriate conclusions from the Government's acknowledgment of a violation of Article 3 of the Convention arising not only from the insults proffered by the officers but also from their unlawful use of force.

47. The Government shared the applicant's view that the Belgian State should have drawn all the necessary conclusions from the striking-out decision of 27 June 2017 by duly taking into account the acknowledgment of the violation of Article 3 in respect of the applicant in the then pending domestic proceedings in so far as they concerned the applicant's prosecution for resistance to the police officers. However, the Government submitted that the acknowledgment had been limited to the sound evidence that the police officers had insulted the applicant, without prejudging the outcome of the domestic proceedings on the charge of resistance or the court's assessment of whether the force used to restrain him had or had not been proportionate.

48. Focusing on the applicant's complaint under Article 46 taken in conjunction with Article 3 of the Convention, the Court notes firstly that it is very doubtful that Article 46 can be regarded as conferring upon an applicant a right that can be asserted in proceedings originating in an individual application (see *United Macedonian Organisation Ilinden – PIRIN and others v. Bulgaria* (no. 2), nos. 41561/07 and 20972/08, § 67, 18 October 2011, and *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, § 103, CEDH 2004-VIII). While it is true that the Court has previously examined several applications concerning steps taken by a respondent State to execute a judgment of the Court – where those applications raised new issues not determined by the original judgment (see in particular *Bochan v. Ukraine* (no. 2) [GC], no. 22251/08, ECHR 2015, and *Moreira Ferreira v. Portugal* (no. 2) [GC], no. 19867/12, 11 July 2017) – the fact remains that, outside of proceedings instituted pursuant to the “infringement procedure” under Article 46 §§ 4 and 5 of the Convention, the Court does not have

jurisdiction to verify whether a State Party has complied with the obligations laid down by one of its judgments (see *Bochan*, cited above, § 33).

49. In any event, even on the assumption that the applicant could rely on a breach of Article 46 taken in conjunction with Article 3, it suffices to note in the present case that the striking-out decision of 27 June 2017 did not amount to a judgment finding a violation of the Convention (see, *mutatis mutandis*, *Willems and Gorjon v. Belgium*, nos. 74209/16 and 3 others, § 61, 21 September 2021). In that decision, the Court merely took note of the Government's unilateral declaration, and the applicant's agreement to the terms thereof, before striking the application out of its list. The Court did not examine the admissibility, let alone the merits, of the applicant's complaints. Consequently, the striking-out decision did not fall within the ambit of Article 46, which concerns only final judgments of the Court. In the circumstances, therefore, the applicant cannot claim a violation of that provision before the Court.

50. Moreover, where the parties have reached a friendly settlement in consequence of which the Court has struck the application out of its list, the task of supervising the execution of the settlement falls not to the Court but to the Committee of Ministers pursuant to Article 39 § 4 of the Convention. In that connection, the Committee of Ministers has taken note of the Government's execution of the terms of the friendly settlement (see paragraph 20 above).

51. It is nonetheless important to underscore that, in a spirit of shared responsibility on the part of States and the Court to ensure respect for Convention rights, applicants are entitled to expect the national authorities, courts included, to draw fair-mindedly the conclusions that follow from a unilateral declaration by the Government acknowledging a violation of Article 3 and giving rise to a decision of the Court taking note of it (see, *mutatis mutandis*, *Willems and Gorjon*, cited above, §§ 61 and 64).

52. That expectation is heightened by the fact that the issues at stake concern Article 3, a provision enshrining one of the most fundamental values of democratic societies – the right not to be subjected to torture or to inhuman or degrading treatment (see *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V, *Gäfgen v. Germany* [GC], no. 22978/05, §§ 87 and 107, ECHR 2010, and *El Haski v. Belgium*, no. 649/08, § 85, 25 September 2012).

53. In the present case, the issue of the conclusions which the domestic courts drew from the Government's unilateral declaration and from the Court's subsequent striking-out decision will be examined below in addressing the complaint under Article 6 of the Convention (see paragraphs 71-75 below).

54. For the reasons given above (see paragraphs 48-50 above), the applicant's complaint alleging a violation of Article 46 taken in conjunction with Article 3 of the Convention is incompatible *ratione materiae* with the

Convention, within the meaning of Article 35 § 3 (a), and must be dismissed pursuant to Article 35 § 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

55. The applicant alleged that his defence rights had been infringed and that the domestic courts had placed an excessive burden of proof on him in violation of his right to a fair trial under Article 6 § 1 of the Convention.

56. The relevant parts of the provision relied on read as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by a ... tribunal ... established by law.”

A. Admissibility

57. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) 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 applicant**

58. As a preliminary remark, the applicant noted that the acts of which he had been accused were greater in number and more serious than those ultimately imputed to him by the courts. According to him, this supported the hypothesis that he had been falsely accused of resistance in order to justify the violence used by the police, a practice noted by numerous public and associative stakeholders in Belgium but which the domestic courts had failed to take into account in the present case.

59. The applicant complained that the courts had made their determination on the basis of a file that was not the outcome of an effective investigation into the accusations against him. His single interview on the evening of his arrest could not be deemed sufficient in this regard. The applicant should have been examined in a timely manner when charges were being considered to allow him to put forward exonerating evidence. Moreover, no action had been taken to follow up on his request that additional steps be taken to reinterview the third-party witnesses to the events on the basis of which he had been charged.

60. The applicant went on to criticise the courts for having failed to draw any conclusions from the Government's having, through their unilateral declaration, acknowledged a violation of Article 3 of the Convention also with regard to the police officers' use of unlawful force. Without calling into question the discontinuance of proceedings, the courts should have taken note

of the factual finding that the applicant had been the victim of unlawful violence at the hands of the police officers who had accused him of resistance and put into doubt a decisive piece of evidence used against him. In this connection, the Court of Appeal had distinguished between verbal abuse and physical abuse and had restricted the scope of the unilateral declaration solely to the insults directed at him. By refusing to condemn the Court of Appeal's approach, the Court of Cassation had lent support to that manifest error of assessment.

61. The applicant further criticised the domestic courts for having systematically undervalued exonerating testimony. The Court of Appeal had considered that four of the third-party statements were by definition biased and had undervalued them from the outset for their alleged lack of independence. Yet the applicant had produced them precisely because the investigating judge had failed to carry out the additional steps he had requested. Moreover, the Court of Appeal had made no use of the evidence contained in their statements, which corroborated the applicant's own statements to the effect that he had been encircled by the police officers and had been unable to leave the scene in the urgent, precipitous and tense circumstances of the police intervention. On the contrary, the Court of Appeal had relied exclusively on certain passages which tended to discredit the applicant's account.

62. By contrast, in convicting the applicant of resistance, the Belgian courts had relied unreservedly on the statements of the police officers who had apprehended him and on the evidence given by their colleagues, giving them particular evidential weight.

63. In conclusion, the applicant, despite his status as the acknowledged victim of a violation of Article 3, had been placed in a position where his assertions and those of the witnesses who had corroborated them had had no chance whatsoever of being heard.

(b) The Government

64. The Government's acknowledgment of a breach of Article 3 of the Convention with regard to the proceedings against the police officers could not reasonably have been construed as covering physical abuse as that would have meant calling into question the decision to discontinue proceedings against the police officers and prejudged the outcome of the proceedings against the applicant. In this connection, while it was true that the domestic court had a responsibility to exercise caution in analysing the facts and the evidence for each side and not to contradict the State's prior acknowledgment of degrading treatment inflicted by its agents, it so happened in this case that the applicant had been questioned on the very evening of the events; that all relevant participants and witnesses had been heard; and that the Court of Appeal had carefully analysed all the evidence in the file and had logically

and impartially compared the accounts of the events as presented by each side to arrive at a conclusion both favourable and unfavourable to the applicant.

65. The appellate court had not given undue, preponderant weight to the law enforcement officers' version of events. Although it had pointed out that the testimony for the defence contradicted the applicant's version of events as to the circumstances of his fall and the exchange of blows, it had also taken that same testimony into account to acquit him of the charge of assault against one of the inspectors. According to the Government, an exhaustive analysis of the reports and of the confrontation between the witnesses for either side had been able neither to establish beyond any reasonable doubt that the applicant had not committed the offence of resistance nor to discredit the law enforcement officers' version of events as to the use of justified force given the circumstances. In sum, the applicant was merely retrying his case and developing arguments which could not reasonably be said to refute the charge of resistance that had been accepted by three levels of domestic courts.

2. *Observations of Ligue des droits de l'homme (LDH)*

66. Although the matter before the Court in the present case was of a different nature from application no. 48302/15, it had to be analysed in the light of the broader context of police violence in Belgium. That context was characterised by a structural failure to comply with the principle of equality of arms to the detriment of victims, who were often accused of resistance when a law enforcement officer was implicated in a case of unlawful use of force.

67. The LDH emphasised that the close connection between police violence and accusations of resistance has been recognised by various bodies, both national (the *Centre interfédéral pour l'égalité des chances* – Inter-Federal Centre for Equal Opportunity (UNIA) and the General Delegate to the Rights of the Child) and international (United Nations Human Rights Committee and Committee against Torture).

3. *The Court's assessment*

68. The Court notes that the circumstances surrounding the applicant's arrest, which formed the basis for the charge of resistance to a public officer, were disputed by the various protagonists in the domestic proceedings concerning police violence and resistance respectively. For his part, in his first interview on the day of his arrest and in the resulting two sets of proceedings, the applicant contended that he had been encircled by the police officers and had been prevented from leaving the scene. He consistently denied having put up any resistance and attributed his injuries notably to blows he had received at the hands of the police officers who had restrained him at the time of his arrest (see paragraphs 5-7 above).

69. In its judgment of 13 March 2018 the Brussels Court of Appeal upheld the applicant's criminal conviction at first instance for resistance to the police officers who had apprehended him. It found that, unlike the statements of those officers, the applicant's version of events was not credible. It considered that although the official reports of the police officers' interviews were not necessarily to be accepted as fact without further evidence, they nevertheless constituted information to which probative value could be attached owing to the trust placed by the law in the office of those by whom they were drawn up (see paragraphs 30 and 39 above). The Court of Appeal consequently endorsed the charge of resistance that had been laid against the applicant, holding that it had been established "without the slightest doubt" that he had put up resistance (see paragraph 30 above).

(a) Scope and extent of the Court's review

70. The Court would first reiterate that it is not its task to decide on the guilt or innocence of individuals (see *Topić v. Croatia*, no. 51355/10, § 46, 10 October 2013; see also, *mutatis mutandis*, *Tekin and Arslan v. Belgium*, no. 37795/13, § 81, 5 September 2017). In accordance with Article 19 of the Convention, it is not its function to deal with errors of fact or of law allegedly committed by the domestic courts, but to ascertain, in examining a complaint under Article 6 of the Convention, whether the national proceedings as a whole were conducted in such a way as to guarantee the applicant a fair hearing (see *El Haski*, cited above, §§ 81-83).

(b) The Government's unilateral declaration as to police violence

71. The particularity of the present case lies in the Belgian State's prior express acknowledgment to the Court that the circumstances under which the applicant had been apprehended had not been conducive to full respect for his right under Article 3 of the Convention not to be subjected to degrading treatment.

72. The Brussels Court of Appeal construed the unilateral decision in such a way as to restrict its scope solely to the insults proffered by the police officers during the applicant's transfer to the police station after his arrest (see paragraph 29 above). Having thus restricted the conclusions that could be drawn from that acknowledgment in the context of the proceedings on the charge of resistance, the Court of Appeal stressed that the acknowledgment did not call into question the Indictment Division's decision of 26 June 2014 to discontinue proceedings against the police officers, as that decision had become final (see paragraphs 15 and 29 above).

73. The Court finds however that the terms of the Government's unilateral declaration were not confined solely to the circumstances surrounding the applicant's transfer to the police station after his arrest. The Government expressly acknowledged a violation of Article 3 with regard to the

circumstances in which the applicant had been apprehended, and they did so in the context of an application to the Court alleging that the officers had been excessively violent as well as motivated by racial prejudice.

74. Admittedly, the Government's acknowledgment of an arrest contrary to Article 3 of the Convention in no way means that the applicant was not guilty of resistance. Nevertheless, such acknowledgment of a violation of Article 3 by the Belgian State imposed a duty on the domestic courts to examine the allegations as to the applicant's resistance with the utmost caution and to be satisfied that they were conclusively made out.

75. The Court reiterates, firstly, that a violation of Article 3 constitutes a breach of one of the most fundamental values enshrined in the Convention (see paragraph 52 above), the seriousness of which cannot be trivialised. Moreover, the Court notes that the allegations of police violence and of resistance by the applicant both arose in connection with his arrest.

(c) Assessment as to the fairness of the proceedings on the charge of resistance

76. On the basis of the above, the Court is now required to examine the fairness of the proceeding having resulted in the applicant's conviction for resistance to a public officer.

(i) Pre-trial stage of the criminal proceedings

77. The Court has already emphasised, having regard to Article 3 of the Convention, that those responsible for investigating allegations of police violence must provide every objective guarantee of independence (see *Bursuc v. Romania*, no. 42066/98, § 104, 12 October 2004, and *Bouyid v. Belgium* [GC], no. 23380/09, § 118, ECHR 2015).

78. Before the Court, as before the domestic courts, the applicant complained that he had not been examined by the investigating judge in either the proceedings in connection with police violence or those concerning the charge of resistance. He was interviewed on the evening of his arrest by a colleague of the police officers who had apprehended him, and subsequently by the General Inspectorate in connection with his complaint that he had been the victim of police violence.

79. In the present case, there is nothing in the file before the Court to cast doubt on the integrity or independence of his interviewers (see, *mutatis mutandis*, *L.G. v. Belgium* no. 38759/14, § 62, 18 September 2018). In addition, the investigation concerning the charge of resistance – as that concerning police violence – was conducted under the authority of a judge whose independence and impartiality have not been called into question by the applicant. In the Court's view, the mere fact that a person charged with a crime has not been examined by the investigating judge does not constitute a violation of Article 6 § 1 of the Convention where, as here, the person has been afforded the opportunity to argue his or her case in the trial courts and

to challenge, on that occasion, the entirety of the evidence for the prosecution (see *Imbrioscia v. Switzerland*, 24 November 1993, § 38, Series A no. 275).

(ii) *Trial stage*

80. The Court finds that in convicting the applicant on the charge of resistance the Court of Appeal gave preponderant weight to the statements given by the officers who had apprehended him, despite the Government's acknowledgment that the circumstances of that arrest had breached Article 3 of the Convention.

81. The Court has previously held that, in a dispute over the key facts underlying the charges where the only witnesses for the prosecution are the police officers who played an active role in the events at issue, it is indispensable for the courts to use every reasonable opportunity to check their incriminating statements and that failure to do so runs counter to the fundamental principles of criminal law, in particular the principle *in dubio pro reo* (see *Navalnyy v. Russia* [GC], nos. 29580/12 and 4 others, § 83, 15 November 2018).

82. In the present case, the Brussels Court of Appeal's justification for declining to cast doubt on the officers' incriminating statements had been that they were borne out by concordant, detailed statements from other officers who had been bystanders to the events (see paragraph 30 above).

83. The Court notes however that those officers had themselves been named in the proceedings initiated by the applicant in connection with police violence (see paragraph 12 above) and that the Government's acknowledgment of the violation of Article 3 had concerned the "circumstances" of the applicant's arrest. Moreover, it cannot be ruled out that the officers might have been reluctant to testify against direct colleagues, and indeed it was open to the applicant to regard them as insufficiently independent from those colleagues (see, *mutatis mutandis*, concerning the procedural limb of Article 3 of the Convention, *Najafli v. Azerbaijan*, no. 2594/07, §§ 52-54, 2 October 2012).

84. The Court notes, by contrast, that the Court of Appeal attached less probative value to the statements of the four witnesses for the defence on the ground that, as persons who knew the applicant, their independence was not sufficiently guaranteed (see paragraph 30 above).

85. Upon examination of the judgment of the Brussels Court of Appeal, the Court notes that there is no other witness testimony or evidence of any kind from the domestic proceedings to support the police officers' account of the applicant's resistance. This is especially problematic in the specific circumstances of the present case, where the applicant's arrest has been acknowledged to be in breach of Article 3 of the Convention (see paragraphs 74 and 75 above).

86. In this regard, the Court notes that the allegation that the applicant assaulted the police officers was in no way corroborated by the statements of the two independent witnesses.

87. The Court reiterates that, in determining whether the proceedings as a whole were fair, regard must be had as to whether the rights of the defence were respected. In particular, it must be examined whether the applicant was given an opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, as must the circumstances in which it was obtained and whether these circumstances cast doubts on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker. In this connection, the Court further attaches weight to the question whether the evidence in question was or was not decisive for the outcome of the proceedings (see *Gäfgen*, cited above, § 164).

88. In the present case it cannot be denied that in convicting the applicant the Court of Appeal attached decisive weight to the incriminating testimony of the police officers who had apprehended him, and to the evidence given by the other officers who were present at the scene, in spite of the fact that the arrest was acknowledged to have breached Article 3 of the Convention.

89. The Court cannot accept the Government's submission (see paragraph 65 above) that the evidence adduced in the domestic courts had failed to establish "beyond reasonable doubt" that the applicant had not committed the offence of resistance. To so require would be to reverse the burden of proof applicable in criminal cases. This is because the fairness of proceedings demanded by Article 6 is inseparable from due respect for the presumption of innocence guaranteed by Article 6 § 2 of the Convention (see *Melich and Beck v. the Czech Republic*, no. 35450/04, § 47, 24 July 2008). Under the principle of *in dubio pro reo*, which constitutes one of the most fundamental principles of criminal law (see *Navalnyy*, cited above, § 83), the onus of proof is on the prosecution, and the accused cannot be compelled to prove his or her innocence (see *Melich and Beck*, cited above, § 47).

90. Having regard to the foregoing, the Court is of the view that the domestic courts failed to afford the applicant a fair trial compatible with the requirements of Article 6 § 1 of the Convention.

91. There has accordingly been a violation of Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

92. 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

93. The applicant claimed 7,500 euros (EUR) in respect of non-pecuniary damage he had allegedly sustained owing to the unfair nature of the proceedings on the charge of resistance, including the denial of justice resulting from the manner in which the Government’s acknowledgment of a breach of Article 3 had been misconstrued.

94. The Government pointed out that the applicant had already been awarded EUR 15,000 in the proceedings concerning police violence in respect of the non-pecuniary damage recognised by the State as a result of the insults (see paragraph 17 above). They could not see on what basis that sum should be increased for a failure to satisfy the applicant’s expectation of a finding of unlawful use of public force against him.

95. The Court is of the view that the non-pecuniary damage resulting from the breach it has identified in the proceedings on the resistance charge (see paragraphs 90-91 above) is separate from that which was compensated for in the proceedings in connection with police violence. Ruling on an equitable basis, the Court awards the applicant the sum claimed, that is to say EUR 7,500 in respect of non-pecuniary damage, plus any tax that may be chargeable on this amount.

96. The Court further points out that it is possible to reopen proceedings under Belgian law and that the use of this possibility will be a matter for assessment, if appropriate, by the Court of Cassation, having regard to domestic law and to the particular circumstances of the case (see *Beuze v. Belgium* [GC], no. 71409/10, § 200, 9 November 2018).

B. Costs and expenses

97. The applicant claimed EUR 17,600 in respect of the costs and expenses he had incurred in the proceedings on the resistance charge before the domestic courts and in the present proceedings before the Court.

98. The Government left the matter to the Court’s discretion.

99. 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 were actually and necessarily incurred and are reasonable as to quantum. Furthermore, costs and expenses are only recoverable to the extent that they relate to the violation found. 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 applicant the sum of EUR 8,500, plus any tax that may be chargeable on this amount.

C. Default interest

100. 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 concerning Article 6 § 1 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
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:
 - (i) EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 8,500 (eight thousand five hundred euros), plus any tax that may be chargeable to the applicant, 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 French, and notified in writing on 28 June 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Registrar

Georges Ravarani
President