



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

FIRST SECTION

CASE OF ALHOWAIS v. HUNGARY

(Application no. 59435/17)

JUDGMENT

Art 2 + Art 3 (procedural) • Ineffective investigation into the death of the applicant's brother, a Syrian migrant, who drowned during a border control operation at a river on the Hungarian-Serbian border • No assessment of responsibility for failure to protect right to life • Manner in which domestic justice system operated in response to incident failed to secure the full accountability of State officials or authorities • Ineffective investigation into applicant's arguable allegations of police ill-treatment
Art 2 (substantive) • Life • Positive obligations • Failure to discharge positive obligations by taking operational measures to protect life in circumstances in which it was manifestly at risk
Art 3 (substantive) • Court unable to conclude beyond reasonable doubt, largely due to investigation shortcomings, that physical force was used against the applicant

STRASBOURG

2 February 2023

FINAL

02/05/2023

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

In the case of Alhowais v. Hungary,

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

Marko Bošnjak, *President*,

Péter Paczolay,

Alena Poláčková,

Lətif Hüseyinov,

Ivana Jelić,

Erik Wennerström,

Raffaele Sabato, *judges*,

and Liv Tigerstedt, *Deputy Section Registrar*,

Having regard to:

the application (no. 59435/17) against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Syrian national, Mr Abdullah Mohamed Alhowais (“the applicant”), on 4 August 2017;

the decision to give notice to the Hungarian Government (“the Government”) of the complaints concerning the alleged violation of Articles 2 and 3 of the Convention and to declare inadmissible the remainder of the application;

the parties’ observations;

Having deliberated in private on 8 November 2022 and 10 January 2023,

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

INTRODUCTION

1. The case concerns the death of F., a Syrian migrant and the applicant’s brother, which occurred during a border control operation at a river on the Hungarian-Serbian border; the applicant’s alleged ill-treatment by the Hungarian police; and the respondent State’s alleged failure to carry out an effective investigation into the incident.

THE FACTS

2. The applicant is a Syrian national who was born in 1996. According to information dating from February 2021, he lives in Leipzig, Germany. He was represented by Mr G. Győző, a lawyer practising in Budapest.

3. The Government were represented by their Agent, Mr Z. Tallódi, of the Ministry of Justice.

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

5. On 1 June 2016 the applicant, his brother, F., and their cousin, K.A., who were all Syrian nationals; M.M., another Syrian national; and an Iraqi family, K.K. and A.S. with three children, attempted to cross the Tisza River

by boat, at the border between Serbia and Hungary. The boat was piloted by a smuggler whose identity could not be established.

6. The boat could not get to the shore because of dense reeds along it, and the passengers disembarked among the reeds. The boat was pulled back to the Serbian shore by the smugglers.

7. Police officers stationed in a hunting observation tower some hundred metres from the shore noticed the boat departing from Serbia. According to the applicant, the police officers on the Hungarian shore shouted at the passengers to “Go back to Serbia”.

8. The applicant, F., and K.A. decided to turn back, but as the boat had been pulled back by the smugglers to the opposite side of the river, they attempted to swim to the Serbian shore. The applicant and K.A. managed to reach the Serbian shore, but F. disappeared in the water. The Hungarian officers launched a rescue boat to search for him. The water rescue unit found a floating jacket and an empty backpack in the water, but the approximately half hour-long search operation could not find the applicant’s brother.

9. The Iraqi family managed to get out of the water but could not climb ashore because of a barbed wire barrier deployed along the shore. A rescue boat with a civilian and a police lifeguard found them and took them ashore. The mother and the three children were hospitalised for being at risk of hypothermia.

10. The body of the applicant’s brother was discovered two days later, on 3 June 2016, by a police officer in a backwater of the Tisza River.

11. On 1 June 2016 the Serbian authorities questioned the applicant in relation to an investigation into human trafficking. An official note of the questioning was given to the Hungarian authorities. The applicant gave an explanation of the arrival in Serbia and the border crossing at the river, and a detailed description of the smugglers. As regards the incident at the Hungarian shore, the applicant specified that the boat passengers had disembarked in the reeds some metres away from the Hungarian riverbank where the water reached hip height. They had seen that there were officers on the riverbank, and they had also noticed a police motorboat on the river. The officers had thrown stones at them shouting at them to go back to where they had come from. The boat passengers had wanted to pass the children to the officers, who had reacted by shooting tear gas in their direction. The applicant’s brother had started coughing from the tear gas and had said that they would need to swim back to Serbia. The applicant stated that he had noticed his brother having difficulties crossing and had called to the smugglers on the Serbian side of the river for help. The smugglers had fled, and a fisherman on the Serbian shore had shouted to the Hungarian officers for help.

12. On the same day, Serbian border control officers met the Hungarian police officers of the Border Control Services of the Csongrád County Police Headquarters. The Serbian authorities provided a summary of the applicant’s

statements. The Hungarian authorities provided the information that the Iraqi family had been found by a rescue boat and that the rescue operation for F. was ongoing. They also stated that the Tisza River was a dangerous crossing point and that there had already previously been an incident which had led to migrants being injured while trying to cross the river. They suggested that the border control operations should be enhanced so as not to let anybody enter the river.

13. On 1 June 2016 K.K. was questioned by the Southern Great Plain Regional Directorate of the Immigration and Asylum Office. He stated that when the passengers had got out of the boat, the police officers had shouted at them to go back to Serbia. The family could not climb ashore because of the barbed wire; they had waited for approximately half an hour for the police to go away and had then started to swim back into the river, where the rescue boat had finally found them.

14. On 2 June 2016 K.K. was questioned again by the Immigration and Asylum Office. He stated that the police officers had told them through a loudspeaker in Arabic to go back to their home countries. He had shouted at the police officers to let them enter Hungary as there were children among them. When he had started to move towards the officers, holding his two-year-old son in his hands, the police had sprayed tear gas at his feet. He had also seen a police officer twice throwing rocks in the direction of the other passengers.

15. A.S. was questioned by the Immigration and Asylum Office on the same day. She stated with regard to their arrival in Hungary that the passengers had left Serbia in a rubber dinghy and had disembarked in the reeds close to the Hungarian riverbank, after a five-to-ten-minute boat ride. They had waited for about half an hour for the officers to leave and she had heard the guards shouting, "Go back to Serbia". They could not get onto the shore because of the barbed wire, and her family had started to swim back in the river when they had been rescued by boat. The other five boat passengers had been left in the water.

16. On 1 June 2016 M.M. was questioned by the Immigration and Asylum Office. He stated that after leaving the boat, they had hidden in the reeds for about twenty minutes. The Iraqi family had decided to give themselves up and had approached the police officers, and three of the other passengers had started to swim back in the direction of the place where the boat had left them. He maintained that he had stayed in the water for about an hour and had gone ashore when the police had left. He had later been captured.

17. The report of K.Cs., the police rescue officer on duty on 1 June 2016, stated that at around 6.35 a.m. the rescue boat had taken aboard a family of five Iraqi nationals. The family had been freezing and the body of one of the children had been numb and the child's face had turned blue. The father had been taken into immigration custody and the mother and the three children had been hospitalised.

18. On 1 June, Z.F., the sector commander on duty; K.Cs. and A.L., who had been on duty in the motorboat; and D.B., the police officer who had been stationed in the hunting observation tower, submitted their reports.

19. According to the report of Z.F., the officer stationed in the hunting observation tower some hundred metres from the shore had noticed the boat departing from Serbia at around 5 a.m. The officers on duty had noticed five persons (including three children) approaching the barbed wire from the water, and they had tried to establish contact in English, and had warned the migrants not to approach the barbed wire barrier but to go back to the water where the rescue boat would pick them up. The next day – 2 June 2016 – the commander, Z.F., supplemented his report, stating that the officers on duty had not used any force and had not thrown anything in the water.

20. D.B. submitted that he had seen three migrants swimming in the direction of Serbia at around 5 a.m. He had seen that the last one of them had sunk a couple of times and, while he could observe the first two persons emerging onto the riverbank in Serbia, he had not seen the third person appearing from the water.

21. On 2 June 2016 ten police officers who were on duty on the day of the incident submitted reports concerning the events, stating that they had not used force, had not thrown anything at the migrants, and had not engaged in any illegal conduct. Z.F. also added to his previous report a statement that nobody under his command had used force or thrown anything at any of the migrants during the incident.

22. On 2 June 2016 M.M. was questioned again by the Immigration and Asylum Office. He specified that the police officers had told them through a loudspeaker in Arabic and English to go back to Serbia. He had seen that two to three stones had been thrown in the water from the shore.

23. On 2 June 2016 the Szeged Border Control Department prepared a report for the Csongrád County Police Headquarters stating that, according to the evidence and information available and because of the contradictions between the statements of the police officers and the asylum seekers, it could not be established whether the police officers had infringed the rights of the migrants. The report suggested opening investigations into “misconduct during service”. The report relied on the statements of M.M., K.K. and A.S. It also mentioned that the five police officers questioned in the case had unanimously stated that they had not thrown stones at the boat passengers, nor had they used any other force.

24. On 3 June 2016 the chief police officer of the Csongrád County Police Headquarters lodged a criminal complaint against unknown police officers alleging ill-treatment committed in the course of official proceedings (*bántalmazás hivatalos eljárásban*) under Article 171 § 2 of Act no. XIX of 1998 on the Criminal Code.

25. On 6 June 2016 an autopsy was carried out on F. According to the autopsy report, there were no external injuries on F.’s body, no pre-existing

illness could be detected, and the exact hour of death could not be established, but must have occurred forty-eight to seventy-two hours before the body was found.

26. On 6 June 2016 the Iraqi family left the reception centre for an unknown place, and they could not be further questioned in the proceedings.

27. On 7 June 2016 the applicant was questioned at the Szeged police station. He explained that he, together with his brother and cousin, had gone back to the water out of fear of what was happening on the shore, without the Iraqi family or M.M., who could not swim. He stated that his brother was a good swimmer.

28. On 8 June 2016 the applicant was questioned again in the presence of an interpreter. He stated that a smuggler, presumably of Iraqi origin, had offered to take him, his cousin and his brother to Hungary in a rubber dinghy for 100 euros. They had arrived at the Tisza River a day before the accident, where they had been joined by the Iraqi family. They had set off by boat just before dawn and they had not been able to see the Hungarian shore of the river. Four smugglers had remained on the Serbian shore of the river and one had accompanied them in the boat. They had disembarked on the Hungarian side where the water had reached up until their chests, because they could not reach the shore by boat because of the reeds. From about three metres from the shore, they had noticed four officers, some in military uniforms and others in police uniforms, who had told them through loudspeakers to go home and not to enter Hungary. In the applicant's assessment, the police officers could not have seen them because of the reeds. The passengers had stopped at about five metres from the officers, and had stayed in hiding, with the exception of the Iraqi family, where the father had advanced with one of the children towards the officers and had asked to be let in. The officers had fired tear gas at K.K. from about one and a half metres away. In the applicant's recollection, the police officers had thrown stones in their direction, and they had had to protect themselves with their bags.

29. Having seen these events, A.S. had followed K.K. with the other two children, shouting to the officers to let them in. The remaining passengers had followed A.S. and when they were about three metres away from her, the police officers had fired tear gas at them as well. The applicant's brother had started coughing. They had attempted three times to climb ashore but each time they had been stopped by tear gas. By this point the boat that had smuggled them had gone. The police officers had thrown rocks at them, shouting at them to go back, and the police dogs were let loose. The applicant's brother had been hit by a rock on his shoulder blade. The applicant, his brother and his cousin had decided to swim back, all of them being good swimmers. The Iraqi family had decided to give themselves up and M.M. had stayed in hiding, being afraid of the water. By this point the sun had already come up.

30. The applicant stated that he had been the first person to swim back to Serbia and he had heard his brother shouting at the smugglers to send a boat. When he had arrived at the Serbian shore, the smugglers had run away, and he could not find a boat. He could not see his brother anymore and had asked a nearby fisherman for help. He had also shouted at the Hungarian officers to look for his brother, then he had asked the Serbian officers to help.

31. On 15 June 2016 M.M. was questioned at the Szeged police station. He stated that the rubber dinghy smuggling nine people had left Serbia at around 5 a.m. After they had disembarked close to the Hungarian shore, the boat had been pulled back by the smugglers. They had been hiding in the reeds in the water for about one and a half hours when the Iraqi family had decided to go ashore. F. had helped the family to get out of the water and when he had rejoined the remaining passengers, he had said that the officer had sprayed something at him, and he had been coughing. M.M. could not see the officers but had heard them shouting through a loudspeaker in Arabic for them to go back to their home country. He had seen that some objects had been thrown in their direction some four to five times, but none of the passengers had been hit. He said that the applicant, F. and K.A. had decided to swim back to Serbia, but he had not joined them as he could not swim. From where he was hiding, he could not see what had happened to the three of them. He had stayed in the reeds for another one and a half hours and had then gone ashore and had later been captured in a nearby village.

32. On 10 July 2016 the applicant's lawyer requested that the Szeged Prosecutor's Office question K.A. as a witness. He was informed that his request could not be granted, as K.A. had left the reception centre for migrants on 24 June 2016.

33. On 12 July 2016 some of the officers who had been on duty on 1 June 2016 at the border crossing were questioned as witnesses. Police officer G.O. stated that he could not remember exact details of the events in question or even when they had taken place. He had only arrived at the scene when the Iraqi family had approached the barbed wire and had left before the family was taken on board. During this time, he had not seen anybody using force, throwing things, or letting dogs loose. He remembered that some soldiers and six police officers had been present with dogs.

34. In his witness testimony, Z.F., who was the sector commander of the police forces, stated that he had been patrolling with officers C.J. and Á.Zs, when he was informed at around 5 a.m. about an unknown number of migrants approaching Hungary through the Tisza River. Besides the three of them, police officers G.O. and M.Sz. had been present, in addition to four to five soldiers. He had instructed two officers patrolling with dogs to come to the border crossing point and the water rescue officers to report on what they had observed. He stated that the Iraqi family had been very nervous, which had only become worse when they had been called to in English not to cross the barbed wire. At this point he had instructed the motorboat to rescue the

family on the water. In his recollection, it had taken the motorboat about half an hour to pick the family up. He had been informed by D.B., the officer stationed in the hunting tower, that three migrants had tried to swim back to Serbia and that D.B. had lost sight of one of them. He stated that following D.B.'s warning that one of the persons swimming back to Serbia had disappeared, he had immediately reported the incident to the water rescue officers, and that he had not received any information from them about whether they had seen anybody in the water. He denied the use of a loudspeaker, any recourse to force, the use of tear gas, the throwing of stones and the deployment of dogs.

35. According to the witness testimony of police officer Á.Zs., he had been stationed at a border marker with two other officers, Z.F. and C.J., when they had been informed of people hiding in the reeds. When they had arrived at the scene, two unidentified officers had been present with dogs, but they had left shortly afterwards. Subsequently, two other unidentified police officers had arrived and had stationed themselves some four to five metres from the shore with their dogs. He stated that as well as these persons, two other police officers, M.Sz. and G.O., were present, together with a soldier. After checking the barbed wire for signs of intrusion with Z.F., they had returned to the other officers, where they had noticed five persons appearing from the reeds. They had warned those persons first in Hungarian, and then in English, not to approach the barbed wire barrier, however the family had sat down next to it. Z.F. had called for a rescue boat and the police officers had made the family understand that they would be picked up by boat in the water. He also recalled D.B. reporting that three persons had swum back to Serbia, and that one of them had disappeared. In his view, until the rescue operation, the police officers had not been aware of the presence of anybody other than the Iraqi family. Á.Zs. had denied that either the police or the soldiers had used violence or had thrown things at the passengers.

36. The testimony of police officer M.Sz. gave the same account of the events. He had been in a vehicle patrolling along a backwater of the Tisza River. On the instructions of Z.F., he had arrived at the scene of the incident, with G.O. They had noticed the Iraqi family in the reeds after waiting for about an hour. He also recalled the arrival of Z.F. and Á.Zs., and two officers with dogs. He remembered two soldiers being present at the scene with their commander. They had stayed at the scene for about one and a half hours and had left because they were called to intervene at another incident of an irregular border crossing. He maintained that he had only learned about the other migrants from the news.

37. According to the witness testimony of D.B., the officer stationed in the hunting tower, he had noticed persons approaching the Hungarian border at around 5 a.m. Although there had been good visibility, he could not see how many people were coming or whether they had swum or had been in a boat. He had reported this to the commander, Z.F., and the police officers had

arrived at the scene in five to ten minutes. Half an hour later, he had noticed three persons swimming in the direction of Serbia, one of whom was struggling and was under water, which he had reported to Z.F. Five to ten minutes later a motorboat had appeared. The motorboat had searched for about half an hour. He had also heard a fisherman shouting that somebody had drowned in the water. He could not see the location where the Iraqi family had tried to go ashore and therefore could not tell if any force had been used.

38. On 28 July 2016 officer C.J., who was the sector commander of the military forces, testified that four soldiers had been patrolling the area that night, but he could not identify them. He had been present at the scene for about ten minutes, during which time he had noticed persons in the reeds but had not seen either them or the others in the river.

39. On the same day the list of soldiers on duty from 31 May to 1 June was transmitted to the investigation authorities. On 30 August 2016 C.J. identified the four soldiers, C.A., B.A., B.D. and T.Z., who had been patrolling in the area in question on the day of the incident.

40. On 12 September 2016 C.A. and B.A. stated that they had been patrolling about four and a half to five kilometres from the incident and they had only seen the Iraqi family once they had been rescued from the water. They had no direct knowledge of the events and did not know of the three persons who had attempted to swim back to Serbia. They were not aware of any use of force.

41. Apparently T.Z. did not remember anything of the events.

42. On the same day, K.Cs., who was patrolling in the police motorboat with A.L., testified that the guards on the Hungarian shore had noticed around ten to twenty persons gathering at the Serbian side of the river, which was illuminated with spotlights from the Hungarian side. At around 4.30 a.m. he had received the information that some people had tried to cross the river. Despite good visibility, he had not seen anybody crossing the river. After stopping in the water for about half an hour, the motorboat had been returning to the harbour when it had been called to rescue the people hiding in the reeds. The officers on the boat had noticed a jacket and an empty backpack. They had informed Z.F., who had instructed them to look around to see if there was anybody to rescue from the water. While searching, they had heard a fisherman shouting at them in Hungarian from the Serbian border that somebody might have drowned in the water, because he had seen one person sinking and not resurfacing again. They had reported this to Z.F. as well, and on his instructions, they had searched for another half hour. They had informed Z.F. that they could not find anybody. Subsequently, they had been called to take the Iraqi family out from the water. When they had found them, two of the children were almost sinking and the youngest child's body had turned blue; he was not moving and had had to be resuscitated. The family had not shown any other injuries. K.Cs. had not seen any stones being thrown

at the migrants, and although he had heard the dogs barking, he could not tell whether they had been let off the leash or not.

43. A.L. confirmed the statements of K.Cs.

44. On 1 September 2016 a toxicological report was issued stating that no toxic substances, neither drugs nor the active ingredients of tear gas, could be detected in F.'s body. On 27 September 2016 a supplementary forensic expert report was issued which stated that the active ingredients of tear gas could only be detected if samples had been taken from the affected body part directly after the tear gas was used. Since F.'s body had been in the water for several days, further examination could not produce any results to determine whether tear gas had been used.

45. On 11 October 2016 the applicant's lawyer submitted his observations to the Szeged Prosecutor's Office. He noted that although four soldiers who had been patrolling on 1 June 2016 had been identified by C.J., two of them had not witnessed the events at all. In addition, other witness testimony had mentioned the presence of four to five soldiers, who had not been identified. He further submitted that the officers with the dogs had not been identified either. He called the authorities' attention to the contradictions in the officers' testimony as regards the search operation. He reiterated that M.M. and K.K. had repeatedly and consistently stated that they had been warned to go back, that stones had been thrown and that the officers had used tear gas. He therefore requested that C.J., the sector commander of the military forces, be questioned again and that the investigation authorities question all the soldiers who were on duty that day. He further requested that the authorities identify the officers with the dogs and question M.M. and K.K. again.

46. The request of the applicant's lawyer was dismissed on 19 October 2016. According to the decision of the Prosecutor's Office, it was not necessary to identify the police officers with the dogs since other witness testimony had already explained in detail the fact that no police dogs had been used during the incident. Furthermore, M.M. and K.K. and his family could not be questioned since they had left Hungary.

47. On 25 October 2016 the Prosecutor's Office discontinued the investigations as the commission of a crime could not be established on the basis of the information gathered during the investigation. Reiterating the content of the witness testimony, the Prosecutor's Office found that it could not be established beyond reasonable doubt that stones had been thrown or tear gas sprayed at the migrants, or that any other force had been used against them. The discrepancies in the testimony could not be resolved and no further evidence could be collected. The Prosecutor's Office thus concluded that it could not be established or ruled out beyond reasonable doubt that a crime had been committed.

48. The applicant's lawyer lodged a complaint, submitted to the Szeged Prosecutor's Office and addressing the Chief Prosecutor's Office, requesting the continuation of the proceedings. As well as maintaining that there was

evidence of the use of force by the police officers, he submitted that some of the police officers present at the incident, including the unit with the police dogs, had not been questioned at all, whereas other officers, who had clearly been absent, had been questioned. He further complained about the failure to question K.A. or to obtain a second testimony from M.M., and drew attention to the contradictions in the witnesses' testimony as regards the rescue operation. He put forward the argument that the investigation should have encompassed the crimes of failure to provide aid or assistance (*segítségnyújtás elmulasztása*) and endangering a minor (*kiskorú veszélyeztetése*), and that the Prosecutor's Office had applied an inappropriate standard of proof (beyond reasonable doubt), which was the legal standard for a conviction.

49. The 3 February 2017 the Chief Prosecutor's Office dismissed the applicant's complaint. It found that the Szeged Prosecutor's Office had not erred in the legal characterisation of the facts. It stated that the witness testimony had not corroborated the applicant's version of events, in particular, that his brother had been hit by a stone, since K.K. had stated that he had seen two stones and M.M. that he had seen four to five objects thrown in the river without hitting the applicant's brother. The release of police dogs had not been confirmed by any witness statement. The Chief Prosecutor's Office concluded that both the assessment of evidence and the legal findings by the Szeged Prosecutor's Office had been well founded.

RELEVANT LEGAL FRAMEWORK

I. RELEVANT DOMESTIC LAW

50. Act no. C of 2012 on the Criminal Code provides:

Article 301

“(1) Any public official who physically abuses another person in the course of official proceedings shall be guilty of a serious offence punishable by imprisonment of between one to five years.”

II. RELEVANT COUNCIL OF EUROPE MATERIAL

51. In Recommendation Rec(2001)10 on the European Code of Police Ethics, adopted on 19 September 2001, the Committee of Ministers of the Council of Europe stated that “[t]he police shall not inflict, instigate or tolerate any act of torture or inhuman or degrading treatment or punishment under any circumstances” (paragraph 36) and that they “may use force only when strictly necessary and only to the extent required to obtain a legitimate objective” (paragraph 37). Furthermore, “in carrying out their activities, [they] shall always bear in mind everyone's fundamental rights”

(paragraph 43) and “police personnel shall act with integrity and respect towards the public and with particular consideration for the situation of individuals belonging to especially vulnerable groups” (paragraph 44).

III. MATERIAL DESCRIBING THE SITUATION OF MIGRANTS ARRIVING IN HUNGARY

A. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT)

52. Between 20-26 October 2017 the CPT, having visited Hungary, reported receiving reliable information substantiated by medical evidence about violent push-back operations by Hungarian police officers. According to that information, before escorting migrants back to Serbia, the police officers assaulted them by beating and kicking them, occasionally also using truncheons. The report of the CPT to the Hungarian Government stated the following:

“13. However, a significant number of foreign nationals interviewed by the delegation who had been apprehended in Hungary and escorted by the Hungarian police through the border fence towards Serbia shortly before the CPT’s visit alleged that they had been physically ill-treated by Hungarian police officers in the context of their apprehension and return through the border fence (push-backs). The alleged ill-treatment consisted in particular of kicks and punches to various parts of the body (including the face and/or head) and baton blows (in particular to the knees, shins and calves), in some cases after the persons concerned had been made to lie down on the ground, as well as of spraying pepper spray directly into the face. Further, several allegations were received from foreign nationals that they had been bitten by unmuzzled service dogs set upon them by police officers. It should also be added that a number of foreign nationals met by the delegation displayed recent traumatic injuries which, in the view of the delegation’s doctor, were consistent with the allegations of ill-treatment made.”

B. Commissioner for Human Rights of the Council of Europe

53. The Commissioner visited Hungary between 4-8 February 2019. She reported the following:

“The Commissioner is deeply concerned about repeated and consistent allegations, highlighted by UNHCR and the CPT, of excessive use of force and violence by the Hungarian police during forcible removals. Alleged ill-treatment by the police includes kicks, punches and baton blows to various parts of the body, also to individuals who are made to lie down on the ground, as well as of spraying pepper spray directly into the face. In addition, the allegations describe police officers releasing unmuzzled service dogs to bite people. Such reports were supported by medical evidence gathered by the CPT delegation’s physician during the CPT visit to Hungary in 2017. In December 2018, the NGO Save the Children reported similar violence perpetrated by the Hungarian police against children. Violence against children was also reported to the Special Representative of the Secretary General of the Council of Europe on

migration and refugees in 2017. In most cases investigations into the allegations have been closed due to insufficient information or lack of evidence.”

C. UN Human Rights Committee

54. The Concluding Observations to the Sixth Periodic Report of Hungary of 9 May 2018 (CCPR/C/HUN/CO/6) contains the following:

Non-refoulement and excessive use of force

“47. While noting the information provided by the State party on the applicable standards and the safeguards against non-refoulement, the Committee is concerned that the State party’s legal framework does not afford full protection against non-refoulement. It notes with concern: (a) the ‘pushback’ law, first introduced in June 2016, which allows the summary expulsion by the police of anyone who crosses the border irregularly and is detained on Hungarian territory within 8 km of the border, a limit that was subsequently extended to the entire territory of the State party; and (b) Decree No. 191/2015 designating Serbia a ‘safe third country’, thereby authorizing pushbacks at the border between Hungary and Serbia. The Committee notes with concern reports that pushbacks have been applied indiscriminately and that individuals subjected to this measure have very limited opportunity to submit an asylum application and virtually no right of appeal. It also notes with concern reports of collective and violent expulsions, allegedly accompanied by heavy beatings, attacks by police dogs and shooting with rubber bullets, which have resulted in severe injuries and, at least in one case, in the death of an asylum seeker (arts. 2, 6, 7, 9 and 13).”

D. UN Committee on the Elimination of Racial Discrimination

55. The Concluding Observations on the combined Eighteenth to Twenty-fifth Periodic Reports of Hungary of 6 June 2019 (CERD/C/HUN/CO/18-25) contains the following:

Refoulement and the use of force against asylum seekers

“24. The Committee is deeply concerned at the reports that the principle of non-refoulement is not fully respected in law and in practice. It expresses deep alarm at the reported excessive use of force and violence by law enforcement officers against third country nationals found anywhere in Hungary, while ‘pushing back’ those found near the border to Serbia, resulting in injuries and bodily harm.

25. The Committee recommends that the State party take all measures to ensure the full respect of the principle of non-refoulement. It also recommends that the State party prevent the excessive use of force and ensure training for, and effective and independent monitoring of, law enforcement personnel involved with refugees, migrants and asylum seekers, to eliminate ill-treatment.”

THE LAW

I. PRELIMINARY REMARKS

56. The Government submitted that the applicant had no known address in Hungary and that it was most likely that he had left Hungary. In their view the applicant's representative had not demonstrated that he was still in contact with the applicant. In the Government's understanding, the applicant did not intend to pursue his application, which was to be struck out of the list of cases in accordance with the Court's case-law in *V.M. and Others v. Belgium* ((striking out) [GC], no. 60125/11, 17 November 2016).

57. The applicant's lawyer replied by a letter dated 19 February 2021 that he was in contact with the applicant, and he submitted a declaration from the applicant stating that he wished to pursue his case before the Court.

58. In *V.M. and Others v. Belgium* (cited above), the Court specified, in the light of Article 37 § 1 (a), that an applicant's representative not only had to supply a power of attorney or written authority (Rule 45 § 3 of the Rules of Court), but that it was also important that contact between the applicant and his or her representative be maintained throughout the proceedings, both in order to learn more about the applicant's particular circumstances and to confirm the applicant's continuing interest in pursuing the examination of his or her application.

59. The Court considers that in the present case there is no reason to doubt the credibility of the information provided by the applicant's lawyer as to the truth of his contact with the applicant and the wish of the latter to pursue his application. Thus, the Court will pursue the examination of the application.

II. ALLEGED VIOLATION OF ARTICLES 2 AND 3 OF THE CONVENTION IN THEIR PROCEDURAL ASPECT

60. The applicant alleged that no effective investigation had been carried out into F.'s death or into the ill-treatment that he had suffered, in breach of Articles 2 and 3 of the Convention.

A. Admissibility

1. *The parties' submissions*

61. The Government submitted that the complaint concerning the alleged failure to carry out an effective investigation into the death of the applicant's brother under Article 2 and his related complaint under Article 3 were inadmissible since the applicant had failed to exhaust domestic remedies, namely, to lodge an official liability action.

62. They argued that the criminal complaint against the alleged perpetrators could not be regarded as an effective remedy against the

allegedly unlawful conduct of the investigation authorities of not taking urgent investigative measures. In their understanding, if the criminal liability of the perpetrators had been impossible to establish, it was because of the negligent conduct of the investigation authority. This could only have been remedied by an official liability action. These two types of legal avenues of redress did not have the same objective, as a criminal complaint was meant to establish the criminal liability of perpetrators whereas a civil action was meant to establish the liability of an allegedly negligent authority. The domestic courts were better placed than an international tribunal to assess the effects of any omission by the investigation authorities on the outcome of the proceedings. In the Government's view, pursuing a criminal remedy against the alleged perpetrators did not exempt the applicant from seeking a civil-law remedy for the alleged breach of his rights under the Convention against the investigation authorities.

63. The applicant submitted that the crux of his complaint was the alleged ill-treatment by the Hungarian police officers. By pursuing his criminal complaint, he had made use of the only legal avenue that could have provided effective redress for his grievances.

64. As regards the civil action put forward by the Government, the applicant also noted that the Court had previously rejected arguments of the Government referring to civil lawsuits for damages for illegal acts attributable to the State (see *Barta v. Hungary*, no. 26137/04, 10 April 2007). He argued that the subject matter of the civil action for damages against the investigation authorities would not have been the criminal responsibility of the perpetrators for ill-treatment but rather the alleged omissions of the investigation authorities.

65. Furthermore, a civil lawsuit could not be considered as a remedy capable of providing redress in respect of his complaints, because it could have merely resulted in an award of damages. In any event, even if more than one potentially effective remedy was available, he was required to have used only one of them.

2. *The Court's assessment*

66. The Court reiterates that even in cases of non-intentional interferences with the right to life or physical integrity, there may be exceptional circumstances where an effective criminal investigation is necessary to satisfy the procedural obligation imposed by Article 2. Such circumstances can be present, for example, where a life was lost or put at risk because of the conduct of a public authority which goes beyond an error of judgment or carelessness, or where a life was lost in suspicious circumstances or because of the alleged voluntary and reckless disregard by a private individual of his or her legal duties under the relevant legislation. The Court has held that where it was established that the negligence attributable to State officials or bodies had gone beyond an error of judgment or carelessness, in that the

authorities in question, fully realising the likely consequences and disregarding the powers vested in them, failed to take measures that were necessary and sufficient to avert the risks inherent in a dangerous activity, the fact that those responsible for endangering life had not been charged with a criminal offence or prosecuted could amount to a violation of Article 2, irrespective of any other types of remedy which individuals could pursue on their own initiative (see *M.H. and Others v. Croatia*, nos. 15670/18 and 43115/18, § 135, 18 November 2021, with further references).

67. The present case, as presented before the domestic authorities, concerned the allegation that the Hungarian police officers were responsible for F.'s drowning in the Tisza River, because the deterrent measures against him had been a contributing factor to his death and that the same deterrent measures subjected the applicant to police ill-treatment. Furthermore, the case before them indicated that F. had died in circumstances potentially engaging State responsibility.

68. According to the Court's established case-law, the remedy normally available in Hungarian law in respect of inhuman and degrading treatment allegedly caused by police officers is a complaint to the prosecuting authorities (see *Barta*, cited above, § 47). In addition, according to the Court's case-law, the obligation to protect the right to life under Article 2, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alia*, agents of the State (see *McCann and Others v. the United Kingdom*, 27 September 1995, § 161, Series A no. 324).

69. Furthermore, in circumstances indicating that the police actions which allegedly immediately preceded F.'s death might have involved a deliberate disregard of the duties to take the necessary measures to save F.'s life, the procedural obligation imposed by Article 2 required that a criminal investigation be opened, also having regard to the fact that the situation could have given rise to criminal liability on the part of the police officers involved.

70. The Court notes that it is common ground that the applicant made full use of the remedy provided by the criminal-law proceedings. It is not disputed that an adequately carried out criminal investigation could have led to a decision determining the individual responsibility of any State officials who might have been held accountable for the applicant's brother's death and the applicant's ill-treatment. Nor is it disputed that in his complaint against the discontinuation of the investigation by the public prosecutor's office, the applicant raised the alleged shortcomings of the investigation. The second-instance proceedings could in principle, if pursued successfully, have remedied any alleged misconduct of the investigation authorities. The applicant must therefore be regarded as having brought the substance of his

complaint to the notice of the national authorities and as having sought redress through the national channels for his complaints.

71. The Government have argued that in the course of civil proceedings, the liability of a negligent investigation authority could have been established, but they have failed to demonstrate how those proceedings could have been more pertinent than the investigation carried out by police and prosecutorial authorities within the context of criminal-law proceedings which provide for all the legal and practical means necessary for that purpose. The Government have failed to explain altogether how civil-law proceedings would have been relevant at all to investigate the circumstances of the death of the applicant's brother. The Court cannot but note in this context that the focus of the civil-law proceedings referred to by the Government would necessarily not have been the event itself or the conduct of the officers during the border control operation, but the alleged misconduct of the investigation authorities. Accordingly, recourse to the civil-law proceedings referred to by the Government would not have resulted in the effective examination of the death of the applicant's brother and the ill-treatment that the applicant alleged to have suffered as a result of the impugned incident, or in the identification and punishment of those responsible. In any event, civil-law remedies against illegal acts attributable to the State or its agents could have only led to the award of damages, which cannot be considered as sufficient for Contracting State's obligations under Articles 2 and 3 of the Convention (see *Barta*, cited above, § 46).

72. In these circumstances the Court is satisfied that the applicant has exhausted domestic remedies. The applicant's complaints cannot therefore be rejected on the grounds that he did not institute civil proceedings for damages against the State. Consequently, the Government's objection must be dismissed.

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

B. Merits

1. The parties' submissions

74. The applicant contended that the domestic authorities had not discharged their duty to carry out an effective and prompt investigation as required by the procedural limbs of Articles 2 and 3. They had not identified members of the military personnel and the members of the police dog unit to take their testimony. They had drawn erroneous conclusions from the forensic evidence as regards the use of tear gas and had failed to clarify whether stones had been thrown by the officers. In addition, they had failed to take the necessary investigative measures promptly, resulting in the non-availability

of the witnesses. No efforts had been undertaken in this regard to locate the witnesses who had left Hungary.

75. The Government submitted that the criminal investigation carried out by the authorities in the instant case had been effective. The authorities had initiated a prompt criminal investigation into the circumstances of the incident, they had carried out an on-site inspection, and an autopsy, and had obtained a toxicology expert opinion. At the request of the applicant's lawyer, they had also commissioned a second medical expert opinion, which had not refuted the findings of the toxicology report. Furthermore, they had questioned all possible witnesses, including M.M. and K.K. The reason for their inability to question K.A. had been a clerical error during his registration in the asylum system, which had only been rectified once K.A. had left the country. Moreover, the witnesses had left the country at an early stage of the investigation, and the testimony of absentee witnesses could not have been used in any eventual criminal trial against the police officers.

2. *The Court's assessment*

(a) **General principles**

76. The Court will examine together the complaints submitted under Articles 2 and 3 of the Convention in the light of the converging principles deriving from both those provisions (see *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, § 314, ECHR 2014 (extracts)). The Court has already stated that, in interpreting Articles 2 and 3, it must be guided by the knowledge that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective (*ibid.*, § 315).

77. The general principles concerning the effectiveness of a criminal investigation, necessary to satisfy the procedural obligation imposed by Articles 2 and 3, have been summarised in *Nicolae Virgiliu Tănase v. Romania* ([GC], no. 41720/13, §§ 164-71, 25 June 2019) and *Bouyid v. Belgium* ([GC], no. 23380/09, §§ 118-23, ECHR 2015), respectively. The Court has also recently in *S.M. v. Croatia* ([GC], no. 60561/14, §§ 311-20, 25 June 2020) summarised its case-law on the procedural obligation under the converging principles of Articles 2, 3 and 4 of the Convention.

(b) **Application of the above principles to the present case**

78. The Court notes that in the present case the Hungarian authorities had detailed information first from the Serbian authorities and subsequently from the testimonies of the applicant and other witnesses about the allegation of use of deterrent measures by the police officers as well as about the death of F. in circumstances potentially attributable to the omission of the authorities. For the Court the authorities, faced with "arguable" claims within the

meaning of the Court's case-law, of police ill-treatment, had a duty under Article 3 of the Convention to take the necessary measures without delay to assess the credibility of the claims. Besides, they were additionally required to investigate whether the police officers had failed to take measures that were necessary and sufficient to avert the risks to F.'s life (see paragraph 66 above).

79. The Court observes that immediately after the accident, the chief police officer of the Csongrád County Police Headquarters instigated, of his own motion, a criminal investigation into ill-treatment committed in the course of official proceedings (see paragraph 24 above).

80. For the Court the first point for decision is whether the criminal investigation launched this case, that is the criminal proceedings against unknown police officers for the alleged ill-treatment in the course of official proceedings, was in itself sufficient to discharge that duty.

81. The Court observes in this regard that by deciding to open an investigation into the alleged ill-treatment by police officers, the substantive scope of the criminal investigation remained limited and was not meant to inquire into the alleged failure of the authorities to do enough to protect F.'s life. As it is not for the Court to characterise the circumstances of the incident under the relevant provisions of domestic criminal law, it would simply observe that in the instant case the sole purpose of the investigation in issue was to establish whether individual police officers could be held liable for "ill-treatment committed in the course of official proceedings" under Article 301 of the Criminal Code (see paragraph 50 above), which provision does not in any way relate to life-endangering acts or the protection of the right to life within the meaning of Article 2.

82. The ensuing investigation into police ill-treatment was therefore concerned with the physical element of the alleged conduct, and was restricted to verifying the allegations of the use of force, and in particular the throwing of stones, the spraying of tear gas and the deployment of police dogs by the police officers. It disregarded altogether the other elements of the police operation and did not provide any assessment of responsibility for failing to protect the right to life.

83. Furthermore, as the Court has previously pointed out, sometimes lives are lost as a result of failures in the overall system rather than individual error entailing criminal or disciplinary liability. In complex police operations failings could be institutional, individual or both (see *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, § 284, 30 March 2016). The domestic authorities in the present have not come to any conclusions about possible shortcomings in that respect. It cannot escape the Court's attention either that in the present case the institutional responsibility of the police was never considered.

84. The Court thus concludes that the manner in which the Hungarian justice system operated in response to the event did not secure the full

accountability of State officials or authorities for their role in conducting the border control operation as they did. In particular, although the investigation authorities had the power to instigate an investigation into the incident as a whole, they failed to do so. It follows that the proceedings did not discharge the State's duty under Article 2 of the Convention to investigate those matters.

85. As regards the issue of whether the investigation into police ill-treatment was effective, the Court notes that the authorities took the first indispensable steps of commissioning a toxicology and medical expert report, and questioning the police officers, the applicant and M.M to assess what they considered to be the material outstanding issue: the use of force by the police officers.

86. The authorities were faced with two conflicting versions of events on that point. The first was that of the police officers involved in the incident, supporting the testimony of each other and concurring in the sense that they all denied the use of force. The second was that of the direct eyewitnesses, K.K and M.M., who were not related either to the applicant or to his brother and who unanimously stated the contrary, asserting that the police had used force to prevent their disembarkation. The medical expert opinion found no evidence of bodily injury and could not provide a conclusive result concerning the use of tear gas.

87. When discontinuing the investigation, the domestic authorities concluded that there was no evidence to find that the police had engaged in the use of force, drawing almost exclusively on the statements given by the police officers implicated in the events. They discounted the testimony given by the applicant personally, apparently because it could not be corroborated by other evidence.

88. It is beyond doubt that it is for the domestic authorities to determine such factual issues. The question, however, is whether they made a reasonable attempt to do so.

89. The Court observes in this respect a somewhat inconsistent approach to the assessment of evidence by the national prosecuting authorities, who seem to have accepted the police officers' statements without giving a sufficiently convincing explanation as to their discrepancies with the testimony given by the migrants, and despite the fact that those statements might also have been subjective and potentially aimed at evading criminal liability.

90. The Court notes that in the present case the investigation's outcome was determined to a significant extent by the taking of oral testimony and the resolution of contradictions in eyewitness statements concerning the factual circumstances of the incident. However, as it appears from the case file, the applicant's assertions could not be corroborated by any findings of fact. The authorities had at their disposal the testimony of M.M., A.S. and K.K. given in the immigration proceedings, but none of them was available for further

questioning in the criminal proceedings. Moreover, K.A. was not questioned at all. The migrants present during the incident had all left Hungary before the conclusion of the proceedings. With the passage of time the availability of evidence greatly diminished and once the eyewitnesses had left Hungary, the applicant could not adduce any further evidence. Moreover, there is no indication that the domestic authorities tried to locate the witnesses. The authorities did not explore any other options to resolve the factual contradictions with which they were faced.

91. A further element of the investigation which calls for comment is the failure to identify other police officers who were present at the scene and to take statements from them. While it was clear from the statements of the police officers that further persons were deployed with police dogs, those persons were not questioned in the course of the proceedings.

92. Thus, it does not seem that the authorities in charge of the proceedings deployed reasonable efforts to gather the evidence and establish the facts. For the Court, these deficiencies limited the potential of the investigation to shed light on the veracity of the applicant's allegations, undermining the reliability and effectiveness of the investigation.

93. Overall, the Court finds that the response of the domestic authorities (see paragraphs 84 and 92 above) was in breach of the State's procedural obligations under Articles 2 and 3 of the Convention.

94. Accordingly, there has been a violation of Articles 2 and 3 of the Convention in their procedural aspect.

III. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION IN ITS SUBSTANTIVE ASPECT

95. The applicant complained that his brother, F., had died as a result of a border control operation conducted by the Hungarian authorities. He also claimed that the State had failed to comply with its obligation to protect his brother's right to life. He relied on Article 2 of the Convention, which provides:

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

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

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

A. Admissibility

1. The parties' observations

96. First, the Government contended that this complaint was inadmissible *ratione personae* with the provisions of the Convention. In their view F.'s death was not attributable to the Hungarian authorities; rather it had been caused by his own actions, instigated by his fear. Furthermore, any fear that illegal migrants had in relation to border police had only been instilled by NGOs, allegedly dedicated to helping them.

97. In the applicant's submission, his brother's death was attributable to the State since the Hungarian authorities had used violence against him during the push-back operation, and he had been forced to swim back to Serbia, as a consequence of which he had drowned in the river.

2. The Court's assessment

98. The Court considers that the Government's plea of inadmissibility *ratione personae* raises issues which are closely linked to the merits of the applicant's complaints. It therefore decides to join this objection to the merits of the complaint made under Article 2 (see *Iordanovi v. Bulgaria*, no. 10907/04, § 41, 27 January 2011).

99. The Court further notes that this complaint is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' observations

(a) The applicant

100. The applicant maintained that there was a causal link between the officers' conduct and his brother's death. The police officers had sprayed tear gas at F., which had made him cough and feel dizzy. F. had also been hit by stones, causing him pain and further hindering him in swimming. These factors, at least indirectly, had contributed to his death.

101. The applicant pointed out that in addition to his witness testimony, the account of the events given by M.M. and K.K. had also confirmed that stones had been thrown at them and that the police officers had used tear gas. In his view the absence of any physical evidence did not rule out the use of force against them. Similarly, although it could not be established how the police dogs had been deployed, owing to the failure of the investigation authorities to question the relevant police unit, it was clear that the use of dogs had constituted a coercive deterrent measure.

102. In any case, F. had not decided to try to return Serbia of his own motion. The officers on the riverbank had used unjustified force and had actively blocked the migrants from climbing ashore and entering the territory

of Hungary, thus they had been forced to swim back, which had directly put F.'s life in danger, engaging the positive obligations of the Hungarian authorities.

103. Lastly, the applicant argued that the rescue operation had not been conducted in a manner that could have protected F.'s life. The authorities had failed to react swiftly to the risk posed by swimming through the Tisza River. The circumstances of the rescue operation had not been clearly established in the course of the domestic proceedings and the contradictions in the witness testimony of the staff of the rescue boat and the section commander had not been resolved.

(b) The Government

104. In the Government's opinion, the death of the applicant's brother was not caused by actions attributable to the Hungarian authorities. In particular, the State agents had not used any force that could have led to his death. The Government submitted that there was no evidence proving the allegations that the applicant's brother was ill-treated by the agents of the State. In particular, in the light of the testimony of the officers and the conclusion of the domestic investigations, it could not be established that police officers had thrown stones at him or sprayed tear gas at him, or that he had been attacked by police dogs. According to the witness testimony of K.K., only two stones had been thrown in the direction of the migrants trying to cross the border; M.M. had also stated that he had heard two to three stones being thrown, and it was only the applicant who had alleged that his brother had been hit, which had also not been confirmed by the autopsy. Similarly, while both K.K.'s and M.M.'s testimony had confirmed the use of tear gas, they had differed as to the circumstances of its use. Furthermore, the toxicology expert had not been able to detect any signs of tear gas on F.'s body.

105. The Government argued that F.'s drowning had been the result of the fact that he could hardly swim and had been exhausted. In their view, if F. had waited to be rescued, he would have been saved.

2. The Court's assessment

(a) General principles

(i) Assessment of evidence and standard of proof

106. The general principles concerning the assessment of evidence and the standard of proof applied by the Court are set out in *Giuliani and Gaggio v. Italy* ([GC], no. 23458/02, §§ 180-82, ECHR 2011 (extracts)).

107. In addition, in certain circumstances, where the events lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of the death of a person within their control in custody, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and

convincing explanation of, in particular, the causes of the detained person's death (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 157, ECHR 2005-VII). In all cases where the Court is unable to establish the exact circumstances of a case for reasons objectively attributable to the State authorities, it is for the respondent Government to explain, in a satisfactory and convincing manner, the sequence of events and to exhibit solid evidence that can refute the applicant's allegations (see *Tagayeva and Others v. Russia*, nos. 26562/07 and 6 others, § 586, 13 April 2017).

(ii) *General principles relating to the substantive aspect of Article 2*

108. Article 2 does not solely concern deaths resulting from the use of force by agents of the State but also, in the first sentence of its first paragraph, lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction (see, for example, *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports of Judgments and Decisions* 1998-III, and *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 54, ECHR 2002-II). The Court has found that the absence of any direct State responsibility for the death of an individual or for placing his or her life in danger does not exclude the applicability of Article 2 (see *Cavit Tınarlıoğlu v. Turkey*, no. 3648/04, § 61, 2 February 2016, with further references).

109. This approach has also been applied to areas where risks to life have arisen owing to “dangerous activities”, such as the settlement of people in slum dwellings next to a massive rubbish dump and naturally-occurring hazards such as mudslides, where the authorities, knowing about the potential danger, are under obligations to respond with due regard to protection of the right to life (see *Öneryıldız v. Turkey* [GC], no. 48939/99, ECHR 2004-XII, and *Budayeva and Others v. Russia*, nos. 15339/02 and 4 others, ECHR 2008 (extracts)). The Court has also found that positive obligations may apply in the context of armed forces' operations (see *Stoyanovi v. Bulgaria*, no. 42980/04, § 61, 9 November 2010), the health sector (see *Vo v. France* [GC], no. 53924/00, §§ 88-89, ECHR 2004-VIII), or ensuring safety on building sites (see *Pereira Henriques and Others v. Luxembourg* (dec.), no. 60255/00, 26 August 2003).

110. The above list of sectors is not exhaustive. Indeed, in its judgment in *Öneryıldız* (cited above, § 71), the Grand Chamber observed that the Article 2 positive obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake.

111. The Court has found Article 2 to be applicable in circumstances in which the applicant was the victim of conduct by State agents which, by its very nature, was potentially lethal or put the applicant's life at risk (see *Makaratzis v. Greece* [GC], no. 50385/99, §§ 52 and 55, ECHR 2004-XI, and *Alkın v. Turkey*, no. 75588/01, § 29, 13 October 2009).

112. Furthermore, the Court has considered that the sphere of application of Article 2 of the Convention cannot be interpreted as being limited to the time and direct cause of the individual's death. Chains of events that were triggered by a negligent act and led to loss of life may also fall to be examined under Article 2 (see *Dodov v. Bulgaria*, no. 59548/00, § 70, 17 January 2008).

113. Positive obligations will vary in their application depending on the context. In previous cases involving non-intentional infringements of the right to life, the Court held that positive obligations required States to adopt regulations in this context for the protection of people's safety in public spaces, and to ensure the effective functioning of that regulatory framework (see *Ciechońska v. Poland*, no. 19776/04, § 69, 14 June 2011).

114. The obligation to safeguard lives extends in appropriate circumstances to a positive obligation on the authorities to take such preventive operational measures as were necessary and sufficient to protect an individual whose life was at risk, in circumstances when they themselves had set up and authorised the activity which gave rise to the risk in question (see *Paşa and Erkan Erol v. Turkey*, no. 51358/99, § 31, 12 December 2006), or as protection from the criminal acts of another individual or, in certain particular circumstances, as protection from himself or herself (see *Nicolae Virgiliu Tănase*, cited above, §§ 135-36, with further references). The general principles applicable in a situation where the duty to take preventive operational measures under Article 2 arises have been summarised in *Kurt v. Austria* ([GC], no. 62903/15, §§ 158-60, 15 June 2021, with further references).

115. In the context of policing operations resulting in the death of one or more individuals, the Court must examine the planning and control of the operation to assess whether, in the particular circumstances of the case, the authorities took appropriate care to ensure that any risk to life was minimised and that they were not negligent in their choice of action (see *Giuliani and Gaggio*, cited above, § 248, and *McCann and Others v. the United Kingdom*, 27 September 1995, § 194, Series A no. 324) The Court has also held that policing operations must be sufficiently regulated by national law, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force, and even against avoidable accident (see *Andreou v. Turkey*, no. 45653/99, § 50, 27 October 2009).

116. As regards rescue operations, the Court explained in *Finogenov and Others v. Russia* (nos. 18299/03 and 27311/03, §§ 214-16, ECHR 2011 (extracts)) that different degrees of scrutiny can be applied to different aspects of a situation raising issues under Article 2. The degree of scrutiny depends on the extent to which the authorities were in control of the situation and other relevant constraints inherent in the operational decision-making in this difficult and sensitive sphere. Normally, the planning and conduct of the rescue operation can be subjected to a heightened scrutiny.

117. Whenever a State undertakes or organises dangerous activities, or authorises them, it must ensure through a system of rules and through sufficient control that the risk is reduced to a reasonable minimum. If damage nevertheless arises, it will only amount to a breach of the State's positive obligations if it was due to insufficient regulation or insufficient control, but not if the damage was caused by the negligent conduct of an individual or the concatenation of unfortunate events (see, for comparison, *Kalender v. Turkey*, no. 4314/02, §§ 43-47, 15 December 2009).

118. The State's duty to safeguard the right to life must also be considered to extend to the provision of emergency services where it has been brought to the notice of the authorities that the life or health of an individual is at risk on account of injuries sustained as a result of an accident. Depending on the circumstances, this duty may go beyond the provision of essential emergency services such as fire brigades and ambulances and include the provision of air-mountain or air-sea rescue facilities to assist those in distress. The State's duty in this context also involves the setting up of an appropriate regulatory framework for rescuing persons in distress and ensuring the effective functioning of such a framework (see *Furdik v. Slovakia* (dec.), no. 42994/05, 2 December 2008).

(b) Application of those principles to the facts of the present case

119. The Court notes at the outset that it is undisputed by the parties that the applicant's brother drowned in the border river when trying to swim back from Hungary to Serbia. The applicant maintained that there was a causal link between the actions of the Hungarian authorities and the death of F., in particular owing to the fact that the police had used force to prevent the migrants from disembarking in Hungary. The Government, for their part, found it established that no force had been used against the applicant's brother and no harm had been inflicted on him.

120. The Court notes that it is confronted with divergent accounts of the events and circumstances of the incident, in particular, as regards the conduct of the police during the border control operation. Although the applicant claimed that tear gas was sprayed and stones were thrown at them, and that police dogs were released when they tried to get ashore, all the official witness statements substantiated the allegation that no force of this kind was used against the migrants when trying to disembark on the Hungarian side of the river. The Court observes that the respondent Government's version of facts on this point is contradicted by the witness statements of M.M. and K.K., produced in the course of the domestic proceedings. They both unambiguously stated that tear gas and stones were used to prevent their disembarking on the riverbank. Furthermore, the testimony of M.M., A.S. and K.K. confirmed the applicant's version of events that they were warned not to cross the border and were called on to go back.

121. The Court further takes note that the autopsy revealed no external injuries on F. (see paragraph 25 above). It also has regard to the reports of the CPT, the Commissioner for Human Rights of the Council of Europe, and the Concluding Observations of the UN Human Rights Committee and the UN Committee on Elimination of Racial Discrimination, which relate to a series of events and cases of violence that occurred during push-back operations near the Serbian border (see paragraphs 52-55 above).

122. While it is true that the attainment of the required evidentiary standard (see paragraphs 106 and 107 above) may follow from the coexistence of sufficiently strong, clear and concordant inferences or un rebutted presumptions, their evidential value must be considered in the light of the circumstances of the individual case and the seriousness and nature of the charge to which they give rise against the respondent State.

123. The Court finds insurmountable the discrepancy between the migrants' and the police officers' testimony. However, it notes that the Chief Prosecutor's Office closed the investigation into ill-treatment (see paragraph 49 above). Thus, notwithstanding the serious concerns to which the circumstances of the present case and the reports cited above give rise, the Court does not consider that the material in the case file enables it to establish beyond reasonable doubt that tear gas or police dogs were used against the applicant's brother, or that stones were thrown at him. The Court notes at the same time that its inability to reach any conclusion in this regard largely stems from the shortcomings in the investigations conducted by the competent authorities (see paragraph 92 above).

124. What is at issue in the present case is not the taking of the life of the applicant's brother by the border police. As the Court has already established, this situation does not necessarily exclude the responsibility of the Government for the death of the applicant's brother and the Court is called on to determine whether the facts of the instant case engage the State's positive obligation under Article 2 of the Convention and whether they disclose a failure by the respondent State to protect the right to life of F. (see paragraph 108 above).

125. Even if the Court cannot find that F. was subjected to the use of force by the police officers, as suggested by the applicant, or that the officers caused any quantifiable harm to F., it cannot accept the argument of the Government that any negligence or lack of foresight should be attributed to the victims of the incident.

126. The Court considers that, having regard to its findings under the procedural limb of Article 2 (see paragraph 92 above), it cannot rule on several specific elements of the border control operation. However, it observes that some of the facts surrounding the events of 1 June 2016 are not disputed between the parties or emerge from the documents submitted by the parties and the domestic investigation file. It will therefore examine the

present complaint under Article 2 of the Convention on the basis of these facts.

127. In assessing the level of knowledge which can be imputed to the authorities at the relevant time, the Court notes at the first place that the Hungarian authorities were carrying out a border control operation when the accident occurred. It was known to the authorities – as it was a matter of common knowledge – that the Tisza River was a dangerous crossing point and that there had already previously been at least one incident which had led to the injury of migrants trying to cross the river (see paragraph 12 above). Furthermore, the police officers were aware of the migrants arriving on the Hungarian side of the river: according to the account given by the police officers, the water rescue officers on duty on the motorboat spotted the gathering on the Serbian shore, and the police officer stationed in the hunting observation tower noticed people trying to cross the river (see paragraph 37 above).

128. The Court cannot disregard the fact in this connection that before deciding to swim back to Serbia, the migrants were waiting in the water in their clothes and with their bags after having been smuggled across the river, which circumstances inevitably made them more vulnerable to the hazards inherent in crossing the river. In this respect, the Court finds it relevant to note that members of the Iraqi family, once they had been rescued from the water, had to be hospitalised for hypothermia, with one of the children being in a critical state, and considers that the conditions of the family were illustrative of the circumstances facing the migrants.

129. In sum, the evidence available to the Court is sufficient for it to be satisfied that the authorities must be regarded as being aware of the real and imminent risk the migrants were facing and the necessity to take measures to protect their lives.

130. Consequently, in the light of the foregoing, in particular the fact that the authorities themselves conducted the operation which gave rise to the risk in question, the Court considers that the circumstances examined above show that in the instant case the State's responsibility was engaged under Article 2.

131. It remains to be ascertained whether the authorities satisfied their positive obligation to take measures to protect the life of the applicant's brother, in circumstances in which it was manifestly at risk.

132. The Court considers that the State's positive obligations as regards the protection of life extend to the planning and control of the operation to ensure that any risk to life is minimised. It involves the obligation to take preventive operational measures to avoid a real and immediate risk to life of which the authorities had or ought to have had knowledge, while bearing in mind that State agents cannot be expected to succeed in rescuing every person in a situation of danger, especially since the duty to take those measures is an obligation of means and not of result (see *Safi and Others v. Greece*, no. 5418/15, § 157, 7 July 2022, and *Kurt*, cited above, § 159).

133. In this connection, the Court reiterates that according to its established case-law under Article 3, Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (see *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 113, ECHR 2012). Nevertheless, the Court has also stressed that the problems which States may encounter in managing migratory flows or in the reception of asylum-seekers cannot justify recourse to practices which are not compatible with the Convention or the Protocols thereto (see *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, § 170, 13 February 2020). In addition, the Court is mindful of the fact that the present application does not concern the organisation of border management as a whole. It is confined to examining, among other things, whether in the present case, in the organisation and planning of the border control operation in question, failings occurred which can be linked directly to the death of F.

134. The Court observes that at the material time the Hungarian authorities were required to work under the conditions of an increased influx of asylum-seekers and migrants, which necessitated putting in place measures to deal with this new situation. It also accepts that irregular movements of migrants across the border represented a challenge to the authorities in trying to prevent migrants circumventing border protection in Hungary. However, this also means that the authorities must have known in advance about the very real possibility of the arrival of migrants at the border crossing point.

135. In that connection the Court reiterates that incidents at the Tisza River had been observed before the events of 1 June 2016, and it could have been easily predicted that further attempts at crossing the river would take place. The circumstances of the present case were therefore not exceptional, but rather a more or less routine border control operation; the Hungarian authorities had sufficient knowledge to evaluate the dangers the river-crossing presented and to carefully organise their border operations accordingly.

136. However, in the present case, while several officers had been deployed at the border crossing where the incident occurred, it does not seem that the officers followed any operational plan developed for the purpose of dealing with search and rescue situations that could occur, to ensure that the life of those trying to cross the border were protected. There is no evidence either in the parties' submission to the Court or in the domestic investigation file indicating that they took any measures or received any instructions upon the detection of the boat carrying the migrants to ensure the safety of the passengers, or that they made any allowances for the migrants' safe interception and disembarkation. It follows that the authorities cannot be considered to have done all that could be reasonably expected of them to avoid a real and immediate risk to life which they knew was liable to arise.

137. As regards the authorities' conduct once they received information about one of the migrants being in distress, the Court considers first of all, that the rescue operation put in place cannot be held to have been spontaneous: as noted above, the authorities had knowledge that the river served as a crossing point between the two countries, allowing them to reflect on the necessities for a rescue operation and to make specific preparations in the event that an accident occurred in the water. Moreover, as they had advance knowledge that the migrants were approaching the Hungarian border by boat, it would certainly have been possible for the authorities to mount a search and rescue operation. As noted above, they had a number of officers nearby who arrived at the site some five to ten minutes following the warning, however, there is no evidence of any preparations being made for a rescue operation or to provide medical assistance to those in need.

138. Nonetheless, despite the information which was available to the water rescue officers about the arrival of the migrants, the motorboat was heading away to dock, and was only called for assistance once the officers had discovered the Iraqi family in the reeds. As appears from the officers' testimony, the motorboat was instructed to help with the disembarkation of the Iraqi family, who could not go ashore because of the barbed wire. There is no evidence of any attempt made by the officers who were present at the scene to verify whether additional persons were stuck in the water and in need of assistance.

139. The Court also notes certain inconsistencies in the officers' witness testimony as regards the subsequent conduct of the rescue operation. According to the water rescue officers, they were called to assist the Iraqi family and were not made aware that additional persons were in the water, of whom one was in distress. It was only when they reported seeing an empty backpack and a jacket in the water that they received the instruction to look for a person who had disappeared. Being unable to find the missing person, they were redirected to assist the Iraqi family, leaving F. to his fate (see paragraph 42 above).

140. According to the officers on shore, the section commander notified the water rescue officers about the three migrants swimming towards Serbia on the basis of the information received from the officer stationed in the hunting tower (see paragraph 35 above). However, it is not certain whether the water rescue officers were made aware of the fact that F. was in distress and in urgent need of assistance.

141. For the Court, what can be distilled from the testimony is that there was no clear order of priorities or course of action set for dealing with migrants in a vulnerable situation that could have guided the officers in their choices. It can hardly be questioned that the officers had to manage a difficult situation in what appeared to be a choice between assisting the Iraqi family where there were children or looking for F., whose life they knew to be in danger. Nonetheless, even when the officers became aware that one of the

migrants crossing the river was in danger, no assessment was made as to how to respond to the multiple risks that the different groups were facing, or how to assist F., without an impractical diversion of the resources that were being used to rescue the Iraqi family. The degeneration of the situation was largely due to the fact that the rescue operation appears not to have been thought through.

142. The Court does not lose sight of the fact either that there might be situations when operational choices must be made in terms of priorities and resources to respond to unexpected developments. However, it notes with concern that there is no indication of any effort to look for F. after the rescue boat left the spot where he had apparently disappeared.

143. In addition, it was only the water rescue officers in the rescue boat who in practice were called on to assist both the Iraqi family and F. It can readily be recognised that the rescue capacities present at the incident did not correspond to the requirements of the emergency situation as it developed. Although this must also have been clear to the officials present at the scene, there is no evidence in the investigation file to document any attempts to call for assistance to adequately respond to the real and immediate danger the migrants were facing.

144. Accordingly, the Court cannot but conclude that, by their failure to act rapidly and decisively, the authorities involved did not take the operational measures within the scope of their powers which, judged reasonably, might have been expected to protect F's life.

145. In view of all these factors, the Court finds that the Government's preliminary objection as to compatibility *ratione personae* of this part of the application with the Convention should be rejected. It further concludes that the authorities failed to discharge their positive obligation to protect F.'s life and that there has been a violation of Article 2 of the Convention in its substantive aspect.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION IN ITS SUBSTANTIVE ASPECT

146. The applicant maintained that the conduct of the police officers, forcing him and the other migrants to return to Serbia, constituted ill-treatment, in breach of 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. Admissibility

1. *The parties' submissions*

147. The Government argued that the applicant's complaint under Article 3 was inadmissible *ratione materiae* since the stress the applicant had suffered on account of the actions of the police officers had not exceeded the level normally inherent in any encounter with border guards during an illegal border crossing. The complaint was inadmissible *ratione personae* since the applicant's anxiety had not been caused by actions attributable to the Hungarian State authorities. Any emotional suffering on the part of the applicant had merely occurred owing to his own bad choices, such as swimming back to Serbia although he could hardly swim.

148. The applicant maintained that his ill-treatment had taken place in the course of official proceedings, while he was under the supervision of the Hungarian authorities, rendering Article 3 applicable.

2. *The Court's assessment*

149. The Court notes that the applicant in the present case complained under the substantive limb of Article 3 exclusively about the use of force by police officers. He did not complain about the adverse psychological effects of the police operation. Since the Government's preliminary objections relate precisely to the adverse psychological effects of the operation, the Court rejects the Government's preliminary objections *ratione materiae* and *ratione personae* as they do not actually concern the subject matter of the applicant's complaint.

150. Other than that, the Court notes that the relevant part of the application 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*

151. The applicant reiterated his claims that the police officers had thrown stones, used tear gas and police dogs, and blocked him and the other migrants from climbing ashore, which conduct constituted ill-treatment. He had decided to swim back with his family members owing to fear of the actions of the police officers.

152. The Government maintained that there was no evidence of the use of force against the applicant by the police officers. In their view, the applicant had decided not to surrender to the Hungarian authorities and to return to Serbia either because of his unfounded fear of the Hungarian authorities or

because he did not want to submit an asylum application in Hungary before reaching his final destination.

2. *The Court's assessment*

153. The general principles as to whether treatment falls within Article 3 of the Convention and those concerning the assessment of evidence of ill-treatment are set out in *Bouyid*, cited above, §§ 81-90).

154. As noted above, the applicant's complaint under the substantive limb of Article 3 relate exclusively to the alleged use of force by police officers.

155. As to the applicant's allegation of physical assault during the border control operation, for the reasons described above (see paragraph 123), the Court cannot conclude beyond reasonable doubt that physical force was used against the applicant. In this respect, the Court notes that the difficulty in determining whether there was any substance to the applicant's allegations of use of physical force to a large extent stems from the authorities' failure to conduct an effective investigation, which has already resulted in a finding of a violation of the procedural limb of Article 3 of the Convention (see paragraph 92 above).

156. In view of the above, the Court cannot establish a violation of the substantive limb of Article 3 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

157. 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**

158. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage for the violation of Article 2 and EUR 10,000 in respect of non-pecuniary damage for the violation of Article 3.

159. The Government contested these claims.

160. The Court considers that in view of circumstances of the case and the violations found, the applicant undeniably suffered non-pecuniary damage which cannot be made good by the mere finding of a violation. Ruling on an equitable basis, as required by Article 41 of the Convention, the Court awards him EUR 34,000, plus any tax that may be chargeable on that amount.

B. Costs and expenses

161. The applicant also claimed EUR 5,600 for the costs and expenses incurred before the Court. He submitted that he would only be billed if the case was decided in his favour. This sum corresponds to 36.5 hours of legal work billable by his lawyer at an hourly rate of EUR 150 (in total EUR 5,475) and EUR 125 in clerical costs.

162. The Government contested these claims as excessive.

163. 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 amount claimed in full.

C. Default interest

164. 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 complaints under Article 2 and 3 of the Convention in their procedural aspect admissible;
2. *Holds* that there has been a violation of Articles 2 and 3 of the Convention in their procedural aspect;
3. *Joins* to the merits of the complaint under Article 2 of the Convention in its substantive aspect the Government's objection as to compatibility *ratione personae* and *rejects* it;
4. *Declares* the complaints under Articles 2 and 3 of the Convention in their substantive aspect admissible;
5. *Holds* that there has been a violation of Article 2 of the Convention in its substantive aspect;
6. *Holds* that there has been no violation of Article 3 of the Convention in its substantive aspect;

7. *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 the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 34,000 (thirty-four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 5,600 (five thousand six 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;

8. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 2 February 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Liv Tigerstedt
Deputy Registrar

Marko Bošnjak
President