



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

SECOND SECTION

CASE OF BALOGH v. HUNGARY

(Application no. 47940/99)

JUDGMENT

STRASBOURG

20 July 2004

FINAL

20/10/2004

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

In the case of Balogh v. Hungary,

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

Mr J.-P. COSTA, *President*,

Mr A.B. BAKA,

Mr L. LOUCAIDES,

Mr C. BÎRSAN,

Mr K. JUNGWIERT,

Mr V. BUTKEVYCH,

Mrs A. MULARONI, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 13 May 2003, 25 May and 29 June 2004,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 47940/99) against the Republic of Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Hungarian national, Mr Sándor Balogh (“the applicant”), on 8 April 1999.

2. The applicant was represented by Mr I. Furmann, a lawyer practising in Miskolc, who also assists “the Legal Defence Bureau for National and Ethnic Minorities” (hereafter the “NEKI”). The Hungarian Government (“the Government”) were represented by their Agent, Mr L. Hölzl, Deputy State-Secretary, Ministry of Justice.

3. The applicant alleged that he had been ill-treated by the police and that the investigation into his complaint of ill-treatment was ineffective, in breach of Article 3 of the Convention. Moreover, he complained under Article 6 § 1 of the Convention that he did not have access to an independent and impartial tribunal, nor to an effective remedy, contrary to Article 13 of the Convention. Lastly, he submitted under Article 14 read in conjunction with Articles 3 and 13 that he was discriminated against on account of his Roma origin.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

6. By a decision of 13 May 2003, the Court declared the application admissible.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1). After consulting the parties, the Chamber decided that no hearing on the merits was required (Rule 59 § 3 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1958 and lives in Miskolc, Hungary. He is of Roma ethnic origin.

9. On 9 August 1995 the applicant, accompanied by Ms B. and Mr S., was selling coal from a truck on a door-to-door basis in Orosháza. After an aborted transaction, some would-be purchasers reported to the local police that the three had left their yard without having returned their fuel vouchers. At about 5.45 p.m. two local police officers halted the applicant's truck and instructed the applicant and his companions to report to the Orosháza Police Station. The applicant was interrogated there by police officers S. and K.

10. The applicant stated that during the interrogation one of the police officers repeatedly slapped him across the face and left ear while the other punched him on the shoulder. The officers demanded that he reveal where the stolen vouchers had been hidden.

11. On being released after two hours of interrogation, the applicant was met on the ground floor of the police station by Ms B. and Mr S., as well as by Mr B. and Mr M., both of whom were acquaintances of the applicant and his companions.

The applicant stated that when he and his companions were leaving the police station, a police officer issued the following warning to them: "Tell the Miskolc gypsies that they had better not set foot in Orosháza".

12. Having returned to his home in Miskolc on 11 August 1995, the applicant consulted Dr V., the local doctor, who advised him to report to the Ear, Nose and Throat Department of Diósgyőr Hospital. On 14 August 1995 Dr C. carried out an operation to reconstruct the applicant's ear drum which had been damaged as a result of a traumatic perforation. On 16 August 1995 Dr C. reported the case to the police.

13. On 28 August 1995 the applicant was discharged from hospital. His medical report stated, without reference to any precise date, that he had

sustained a traumatic perforation of the left tympanic membrane. This conclusion also figured in two further medical reports issued later by Dr C. on 25 August 1995 and by Dr V. on 29 September 1995. The applicant's injury was described in a follow-up medical report dated 10 September 1997 as "low-to-medium-grade loss of sound perception" in the left ear.

14. On 25 September 1995 the Szeged Investigation Office informed the applicant that criminal proceedings had been opened against the police officers involved on the basis of information submitted by Dr C. on 16 August. The police officers were charged with the offences of "forced interrogation" and "ill-treatment committed in the course of official proceedings".

15. The Investigation Office heard the applicant and several witnesses. Four persons were heard from the applicant's side.

Mr S. stated as follows:

"[In the building of the police station] I met [the applicant] [...] whose face had a bluish colour in the area under his left ear and was somewhat swollen. I then asked him if they had hurt him. He answered that they had hurt him a little and pointed to the left side of his face saying that it was hurting there. He said that he had no hearing on that side."

Ms B. stated as follows:

"[When the applicant was escorted down to the ground floor], it struck me that the left side of his face and his left ear were swollen. I thought that he had been beaten. I asked him about it, to which he only answered that he had been beaten a little. [...] I remember well that the left side of his face was red and I even saw the traces of fingers on it."

Mr M. stated as follows:

"[When at last the applicant came down to the ground floor], it struck me immediately that his skin was reddish-bluish around his left ear and even underneath his neck. I had no doubt that his face was swollen as a result of a blow. I then asked him if they had hurt him, [...], he only answered: 'A little'."

Mr B. stated as follows:

"[When the applicant was escorted down to the ground floor], it was apparent at once that the left side of his face and his left ear were red. It was obvious that he had been hit. Ms. B. even asked him if he had been hurt. He first answered in the negative. Then I asked him the same question. Then he answered: 'A little'."

The Investigation Office also heard Dr V. and four police officers who had been on duty at the police station at the time of the applicant's interrogation.

The police witnesses denied any knowledge of ill-treatment having been inflicted on the applicant.

The suspected police officers S. and K. consistently denied the applicant's accusations when questioned on 15 November 1995.

Police officer S. stated, *inter alia*, as follows:

“I remember [the applicant] having said something of the sort that he was working for those persons as a lorry-driver [...] to set off debts incurred by his wife. [...] He was blaming [his companions] for forcing him to work a lot more than if he had been working for money; and he even mentioned to one of my colleagues that they would either leave him behind or beat him up on the way home because of this.”

Police officer K. stated, *inter alia*, as follows:

“After the interrogation police officer S. told me that [the persons interrogated] had also quarrelled amongst themselves, maybe they had not properly paid [the applicant], they had a dispute about money or something of the sort [...]”

16. On 16 November 1995 a medical expert appointed by the Investigation Office expressed the opinion that it could not be excluded that the applicant’s injury had been caused as alleged. However, in the expert’s opinion it could not be determined whether the injury in question had been caused to his ear before, during or after the applicant’s interrogation.

17. On 30 November 1995 the Investigation Office discontinued the criminal proceedings against police officers K. and S. for lack of any conclusive evidence. On 12 December 1995 the applicant filed a complaint against the discontinuation order.

18. On 24 January 1996 the Orosháza District Public Prosecutor’s Office ordered the investigation to be resumed and that confrontations be organised between the applicant and the police officers concerned and between various witnesses. It also ordered that further witnesses be heard.

19. In the framework of the resumed proceedings, the Csongrád County Investigation Office, on 1 March 1996, confronted the applicant with the suspected police officers as well as a third police officer who had been heard as a new witness.

20. On 6 March 1996 the Investigation Office discontinued the investigation.

Relying on the testimonies given, on the one hand, by the applicant – who had consistently maintained his assertions during the proceedings – and by his companions and, on the other hand, by the police officers concerned, as well as on a confrontation involving all three of them, the Investigation Office found that although the applicant’s injuries might have been inflicted as alleged, it could not be excluded beyond all doubt that the injuries had been sustained before or after his interrogation.

Since there was no direct witness to the alleged incident and the medical opinion in the case was not conclusive as to the time when the applicant’s injury had been inflicted, the Investigation Office was obliged to dismiss the applicant’s accusations as unsubstantiated and to discontinue the proceedings.

The order drew the applicant’s attention to his right to file a complaint with the Public Prosecutor’s Office under section 148 §§ 1 and 4 of the Code of Criminal Procedure if he wished to challenge the decision to

discontinue the case. This order was served on the applicant on 11 March 1996.

The applicant did not file a complaint against this order.

As of 1 August 1996 the applicant's working capacity was declared to have diminished by 50% on account of *asthma bronchiale* and impaired hearing; the respective significance of these two factors was not specified. As a consequence, he was unable to have his lorry driver's licence renewed or to obtain employment as a driver.

21. On 30 March 1998 the applicant claimed damages from the Ministry of the Interior. In reply, on 16 April 1998 he was informed by the competent Békés County Police Department that he was not eligible for compensation because he had failed to file a complaint against the discontinuation order of 6 March 1996 and thus to avail himself of an ordinary legal remedy, which was a precondition for establishing official liability.

22. On 22 April 1998 the applicant appointed the NEKI to take his case. A further medical opinion obtained by the NEKI on 19 August 1998 stated that a traumatic perforation of the tympanic membrane was usually caused by a slap on the ear. Although he did not have the earlier medical expert's opinion at hand, the expert went on to qualify the applicant's version of how he had sustained his injury as plausible.

23. Relying on this new evidence, the NEKI lodged on 25 August 1998 a complaint against the decision of 6 March 1996 with the Attorney General's Office requesting that the criminal proceedings be re-opened in accordance with section 141 of the Code of Criminal Procedure.

24. On 5 October 1998 the Csongrád County Public Prosecutor's Office finally dismissed this complaint. In its reasoned decision, the Public Prosecutor's Office stated that:

“[it] had thoroughly examined all the documents in the case file.”

The decision mentioned that in the absence of coherent testimonies or a conclusive medical expert opinion it was impossible to prove either that the applicant's injury had been caused during his police detention or that it had been inflicted by the suspected police officers. The Public Prosecutor's Office noted the delay between the applicant's interrogation on 9 August and his decision to seek medical help only on 11 August 1995. The decision stated that the new expert opinion did not contain any new facts which warranted the continuation of the investigation or the laying of charges against the suspects. The Public Prosecutor's Office concluded that the case should be discontinued since it was impossible to prove the applicant's allegations. The decision was served on the NEKI on 14 October 1998.

II. RELEVANT DOMESTIC LAW

25. Section 55 § 1 of Act no. 1 of 1973 on the Code of Criminal Procedure (now repealed), as in force in the relevant period, provided:

“A civil party is a victim who lays a civil-law claim for determination in criminal proceedings.”

Section 141 of the Code of Criminal Procedure provided:

“(1) The discontinuation of an investigation does not preclude that criminal proceedings in the same case may be later continued.”

Section 148 of the Code of Criminal Procedure provided:

“Remedy during investigation

(1) Anyone aggrieved by the authority’s decision, measure or omission, is entitled to file a complaint.

(...)

(4) Such a complaint may be lodged with the authority within a period of eight days from the date of the notification of the decision or from the date on which the complainant becomes aware of the measure or omission.

(5) If the authority itself does not accept the complaint, it shall transfer the case file and its own statement concerning the complaint to the competent public prosecutor within twenty-four hours. The public prosecutor shall decide on the complaint within eight days.

(6) A complaint may be rejected if it has been lodged outside the [above] time-limit or by an unauthorised person.”

26. Section 339 § 1 of Act no. 4 of 1959 on the Civil Code, as amended, provides:

“Anyone who unlawfully causes damage to another person shall be obliged to pay compensation. He shall be exculpated if he proves that he proceeded in such manner as can generally be expected in the given situation.”

Section 349 of the Civil Code provides:

“(1) Liability for damage caused by the State administration shall only be established if damage could not be prevented by means of ordinary legal remedies or if the person concerned has resorted to ordinary legal remedies appropriate for preventing damage.

(...)

(3) These rules shall also apply to liability for damage caused by the courts or the prosecution authorities, unless otherwise provided by law.”

27. Section 3 § 5 of Act no. 3 of 1952 on the Code of Civil Procedure, as amended, provides:

“Unless the law provides otherwise, in the civil procedure, the court shall not be bound, when taking evidence, by any formal rule or given method or application of specific means; it may freely use the parties’ submissions and may use any other evidence which is suitable for establishing the facts (...)”

Section 4 § 1 of the Code of Civil Procedure provides:

“When taking its decision, the court shall not be bound by a decision of another authority or by a disciplinary resolution, or the findings of fact contained therein.”

Section 152 § 1 of the Code of Civil Procedure provides:

“If the adjudication of a case depends on a preliminary matter on which a criminal court ... must decide, the [civil] court may suspend its proceedings until that procedure has been finally concluded (...)”

THE LAW

I. THE GOVERNMENT’S PRELIMINARY OBJECTION

28. The Government submitted that, in its decision on the admissibility of the application, the Court had only examined their preliminary objection from the standpoint of the applicant’s compliance with the six-month rule, whereas the objection was in fact based on the applicant’s failure to exhaust domestic remedies by not having availed himself of the ordinary remedy – a complaint under section 148 of the Code of Criminal Procedure (see paragraphs 20 and 25 above) – against the discontinuation of the criminal proceedings. In their view, even if recourse to an extraordinary remedy might interrupt the running of the six-month time-limit, it should not exempt the applicant from the consequences of his failure to exhaust all available domestic remedies. The applicant failed to file a timely complaint and this failure could not be off-set by his applying subsequently for an extraordinary remedy. The interests of justice required that applicants first and foremost have recourse to those remedies which are the most effective, and the failure to have timely recourse to ordinary remedies cannot be repaired by the belated use of extraordinary remedies.

The applicant did not comment on this point.

29. Article 35 § 1 of the Convention provides:

“The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.”

30. The Court reiterates that the obligation to exhaust domestic remedies requires that an applicant make normal use of remedies which are effective, sufficient and accessible in respect of his Convention grievances. To be

effective, a remedy must be capable of remedying directly the impugned state of affairs (*Mathias Berns and Joseph Ewert v. Luxembourg*, no. 3251/87, Commission decision of 6 March 1991, Decisions and Reports (DR) 68, pp. 137, 164).

31. The Court observes that section 141 of the Code of Criminal Procedure allowed for the resumption of an investigation notwithstanding a discontinuation order. In the present case, the NEKI, once in possession of new evidence, requested that the proceedings be continued in application of this provision. Rather than rejecting these submissions as time-barred, the Public Prosecutor's Office considered the new evidence before it and gave a reasoned decision rejecting the applicant's motion. What is decisive for the Court is the fact that the Public Prosecutor's Office examined the merits of the applicant's allegations and, had it felt it justified, could have re-opened the investigation.

32. In these circumstances, the Court is persuaded that the NEKI's complaint of 25 August 1998 was an effective and sufficient remedy. It follows that the Government's preliminary objection based on non-exhaustion of domestic remedies must be rejected.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

33. The applicant complained that he was ill-treated by the police, in breach of Article 3 of the Convention which provides:

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

A. The applicant's arguments

34. The applicant emphasised that it was difficult for a victim to prove that he had been subjected to police brutality in custody. For that reason, it was for the Government to provide a plausible explanation for his injuries and to prove that their agents were not responsible for those injuries. However, instead of demonstrating that State agents had not caused the applicant's injuries or providing a plausible explanation for them or indicting the suspected police officers, the authorities confined themselves to a conclusion that although the applicant's injuries might have been inflicted as alleged, it could not be excluded beyond all doubt that they had been sustained either before or after his interrogation (see paragraph 20 above).

35. In fact, the authorities had conceded that the applicant's allegations were credible. They acknowledged that he had consistently maintained in full his assertions during the proceedings (see paragraph 20 above) and noted that the applicant's companions had corroborated his account by

confirming that, on his release, the applicant's face was red and that he had immediately told them that he had been ill-treated.

36. Notwithstanding these considerations, and contrary to the medical evidence, the Government denied the incident and failed to provide a plausible explanation for the applicant's injuries.

37. As regards the delay in seeking medical assistance, the applicant stated that he had had no experience with the police or with any other authorities before the incident. He was not therefore aware of the importance of contacting officials at once about his injuries. Although his injuries required immediate medical attention, he felt humiliated and ashamed because of the incident. Being unfamiliar with the towns which he subsequently passed through on his way home, he did not seek medical help until he returned to his home town. However, he was in constant pain throughout this period on account of the severity of his injuries.

B. The Government's arguments

38. The Government maintained that, according to the conclusions of the criminal investigations carried out by the domestic authorities, it could neither be excluded nor proved that the applicant's injuries were inflicted by the two police officers who interrogated him.

39. The Government, with reference to the Court's judgments in the cases of *Selmouni v. France* ([GC], no. 25803/94, ECHR 1999-V), *Ribitsch v. Austria* (judgment of 4 December 1995, Series A no. 336) and *Tomasi v. France* (judgment of 27 August 1992, Series A no. 241-A), accepted that where an individual was taken into custody but was found to be injured at the time of his release, it was incumbent on the State under Article 3 to provide a plausible explanation as to the cause of that injury. However, the circumstances of the applicant's case were different. The applicant was not found to be injured while in custody or at the time of his release. His injuries were only inspected and treated two days after his release. This circumstance justified the decision of the investigating authorities to dismiss the applicant's complaint for want of proof. The Government were thus dispensed from having to provide a plausible explanation for the applicant's injuries.

40. It was true that the only explanation put forward for the applicant's injury was the applicant's own version of what happened at the police station. However, it was impossible to establish the truth of his account beyond reasonable doubt and that account was not found to be sufficiently plausible to justify the prosecution of the police officers concerned. Due to the applicant's belatedness in seeking medical help – and in contrast to the *Selmouni* case where the investigating authorities were only faced with the question of how Mr Selmouni's injuries had been inflicted – the medical expert in the applicant's case could not determine with certainty whether the

applicant's injuries had been inflicted before, during or after his interrogation.

41. Furthermore, the applicant opted to press criminal charges against the suspected police officers as individuals, rather than suing for damages in civil proceedings. In the Government's view, on the strength of that choice the applicant had implicitly accepted that the police officers could not be held criminally liable unless their guilt could be proved beyond reasonable doubt. Had the applicant pursued an action in damages, this rigorous standard of proof would not have applied, and proving his allegations would have been less burdensome.

42. The Government further observed that the applicant's explanation was undermined by the testimony given by one of the suspected police officers, who alluded to another possible explanation for the cause of the injuries (see paragraph 15 *in fine* above). Although this version of the events, implicating the applicant's companions in the applicant's injury, was not supported by further evidence, it was capable nonetheless of casting doubt on the truth of the applicant's allegations.

43. Furthermore, the Government maintained that the prosecution's decision not to pursue the case was based on their awareness of the standard of proof required by the courts in such cases and on their careful assessment of the strength of the evidence against the police officers in the light of the relevant domestic case-law. When the NEKI, acting on behalf of the applicant, challenged this assessment two and a half years later, the prosecuting authorities had to take into account a further factor in deciding whether or not to indict the alleged perpetrators, namely, the significant lapse of time since the commission of the offence.

C. The Court's assessment

44. Article 3, as the Court has observed on many occasions, enshrines one of the fundamental values of democratic society. Even in the most difficult of circumstances, such as the fight against terrorism or crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.

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

principle an infringement of the right set forth in Article 3 (*Tekin v. Turkey*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, pp. 1517–18, §§ 52 and 53).

46. In the instant case the Court considers that the injury suffered by the applicant was sufficiently serious to amount to ill-treatment within the scope of Article 3 (see, for example, *A. v. the United Kingdom*, judgment of 23 September 1998, *Reports* 1998-VI, p. 2699, § 21; and the above-mentioned *Ribitsch* judgment, pp. 9 and 26, §§ 13 and 39). It remains to be considered whether the State should be held responsible under Article 3 for these injuries.

47. The Court reiterates that where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused (see, for example, *Selmouni v. France*, *op. cit.*, § 87).

48. The Court notes that medical reports confirmed that the applicant had suffered a traumatic perforation of the left tympanic membrane. According to a forensic expert, the most common cause of such injuries was a slap on the face.

It observes that the applicant, having been interrogated in police custody on 9 August 1995, was said by his four companions to have left the police station with a red and swollen face. All these witnesses deposed, in consistent terms, that he must have been beaten. It is true that the Government have submitted that, when interrogated, the applicant indicated that he was afraid that something untoward might happen to him and that he mentioned his companions in this connection. However, any such utterance by the applicant sits uncomfortably with the fact that he has consistently maintained that he was assaulted by police officers in custody. Furthermore, it does not appear from the materials in the case-file that the applicant's companions were ever questioned about the meaning of the applicant's alleged remarks. For the Court, this explanation for the cause of the applicant's injury cannot be considered persuasive.

49. It is true that the applicant did not seek medical help in the evening of the alleged incident or on the next day, but waited until 11 August 1995 before doing so. However, in view of the fact that the applicant immediately sought medical assistance on his arrival in his home town, the Court is reluctant to attribute any decisive importance to this delay, which, in any event, cannot be considered so significant as to undermine his case under Article 3.

50. It cannot be overlooked that independent investigations were carried out into the applicant's allegation. The prosecutor, whose task was made difficult on account of the absence of independent eyewitness testimony, heard the statements of the applicant and his companions, and tested the veracity of their statements against the evidence taken from the police officers who had been on duty at the police station at the time of the

applicant's interrogation, including those officers who were alleged to have beaten him in custody. Confrontations were organised in order to assess the credibility of both sides' versions of the events. In any case, the prosecutor decided that there was insufficient evidence against the police officers on which to mount a successful prosecution. The investigation was accordingly discontinued.

51. However, and notwithstanding this investigation, it still remains the case that the authorities have not provided any plausible explanation for the cause of the applicant's injury. It recalls in this connection that it is open to the Court, if appropriate, to find a breach of Article 3 even in the event of a successful prosecution of State agents on charges of ill-treatment (see, for example, the above-mentioned *Selmouni* case).

52. On the basis of all the material before it, the Court concludes that the Government have not satisfactorily established that the applicant's injuries were caused otherwise than by the treatment meted out to him in police custody.

53. The Court reiterates that, in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention. The requirements of an investigation and the undeniable difficulties inherent in the fight against crime cannot justify placing limits on the protection to be afforded in respect of the physical integrity of individuals (*Tomasi v. France*, judgment of 27 August 1992, Series A no. 241-A, p. 42, § 115).

54. Having regard to the above considerations, the Court concludes that there has been a violation of Article 3 of the Convention in the instant case.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

55. The applicant submitted that he did not have an effective remedy before the national authorities in respect of his complaint of ill-treatment by the police, in breach of Article 13 which provides:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. The applicant's arguments

56. The applicant stressed that public prosecutors, who are exclusively responsible for examining charges of police misconduct, lack sufficient independence and impartiality, given their dual and contradictory functions: they are both parties to and supervisors of criminal proceedings. This resulted in the absence of a thorough and effective investigation into his

allegations, which manifested itself in the disregard of the testimonies of his witnesses and his medical evidence and in terminating the case for want of conclusive evidence.

At the material time, no possibility existed for a victim of a crime to pursue a private prosecution in the event of the authorities' failure to fulfil their duty to carry out an adequate investigation into complaints such as his. Moreover, the non-indictment decisions taken by public prosecutors were not subject to judicial review and, for the reasons outlined in connection with his Article 6 complaint (see paragraph 70 below), also undermined the prospects of a possible civil action against the police.

B. The Government's arguments

57. The Government submitted that an *ex officio* criminal investigation was carried out into the applicant's allegations. The decision to discontinue the proceedings for want of conclusive evidence was susceptible to a procedural complaint.

In these proceedings, the authorities treated the applicant's allegations seriously and did not reject them outright. In the course of the investigation, several witnesses were heard, the applicant was confronted with the suspects and the opposing witnesses, and a medical expert opinion was obtained. However, the evidence gathered remained inconclusive and the suspects' criminal liability could not be established beyond reasonable doubt.

58. Furthermore, although individual prosecutors may be instructed by their superiors and thus their independence is not comparable to that of judges, they may not be instructed or influenced by victims or suspects, let alone by the police. Unlike the latter, prosecutors are not under governmental supervision, but answerable only to the Attorney-General, who is elected by Parliament. The prosecuting authority is, therefore, in no manner dependent on the Government through the Minister of Justice or the Minister of the Interior, as is the case in some European legal systems.

59. Moreover, the applicant could have brought an official liability action against the police, provided all other remedies had been exhausted.

The discontinuation of criminal proceedings against or even the acquittal of a defendant on the ground of insufficient evidence does not preclude a finding of civil liability. According to section 4 § 1 of the Code of Civil Procedure (see paragraph 27 above), civil courts are not bound by the criminal courts' findings of fact. As is clear from the Hungarian courts' relevant jurisprudence (see, *e.g.*, BH2001.173, a review judgment of the Supreme Court), the establishment of criminal and civil liability, respectively, requires different factual elements to be proved. Whereas in criminal proceedings facts not proved beyond reasonable doubt may not serve as a basis for establishing criminal liability, in civil proceedings

judges are free to assess evidence, to accept plausible statements as proven, to draw inferences from the presence or absence of any evidence, and to establish civil liability on the basis of the “co-existence of sufficiently strong, clear and concordant inferences” (cf. *Selmouni v. France*, *op. cit.*, § 88). While it is true that in civil proceedings the plaintiff bears the burden of proving the occurrence of an unlawful act, the damage and the causal link, the required level of certainty is lower than in criminal proceedings. In sum, the non-indictment of the police officers did not have any decisive negative repercussions on the prospects of a civil claim by the applicant.

C. The Court’s assessment

60. It is to be observed that part of the parties’ arguments concerns the procedural limb of Article 3. The Court considers it more appropriate to address the alleged breach of the Article 3 procedural obligation in the context of Article 13 (see *Ilhan v. Turkey* [GC], no. 22277/93, §§ 92-93, ECHR 2000-VII).

61. As the Court has stated on many occasions, Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. Article 13 thus requires the provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief, although the Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 also varies depending on the nature of the applicant’s complaint under the Convention. Nevertheless, the remedy required by Article 13 must be “effective” in practice as well as in law (see, among other authorities, *Aydin v. Turkey*, judgment of 25 September 1997, *Reports* 1997-VI, pp. 1895-96, § 103).

62. The Court has previously held that where a right of such fundamental importance as the right to life or the prohibition against ill-treatment is at stake, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigation procedure (see *Kaya v. Turkey*, judgment of 19 February 1998, *Reports* 1998-I, pp. 330-331, § 107). Furthermore, in the case of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for non-pecuniary damage flowing from the breach should in principle be part of the range of available remedies (*Z and Others v. the United Kingdom* [GC], no. 29392/95, §§ 108-109, ECHR 2001-V).

63. However, the effectiveness of a remedy for the purposes of Article 13 does not depend on the certainty of a favourable outcome for the applicant (see *Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 215, p. 39, § 122).

64. In the instant case, the Court notes that the authorities were prepared to treat the applicant's allegations seriously and not to dismiss them outright. It is to be observed in this connection that three prosecution instances examined his complaints. Furthermore, the prosecuting authorities agreed to re-open the investigation at the request of the NEKI.

65. During these investigations, the applicant was questioned as to his version of the events which had occurred in the police station. The suspected police officers were also questioned in the course of the investigations, including in the presence of the applicant in the context of a confrontation. Moreover, the applicant's companions and the police officers on duty at the relevant time were heard as witnesses.

The investigators also appointed a medical expert to clarify the nature and possible cause of the applicant's injury, and had regard to the medical report commissioned by the NEKI.

66. It is to be noted that the criminal proceedings were ultimately closed for want of sufficient proof that the applicant's ear injury was caused by the suspected police officers.

For its part, the Court is satisfied that the investigations conducted were thorough and capable of leading to the identification and punishment of any State agent found to be responsible in the light of the evidence gathered (compare and contrast, for example, *Labita v. Italy* [GC], no. 26772/95, §§ 130-136, ECHR 2000-IV). Furthermore, it does not accept the applicant's allegation that the prosecuting authorities did not discharge their duties in an independent and impartial manner.

67. Moreover, the Court does not consider it necessary to examine the effectiveness of the remedy contained in section 349 of the Civil Code, which the applicant was in any event prevented from pursuing because of his failure to lodge a timely complaint against the discontinuation order of 6 March 1996 (see paragraphs 21 and 26 above).

68. In these circumstances, the Court considers that the applicant had available to him an effective remedy in relation to his complaint under Article 3.

Consequently, there has been no violation of Article 13 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

69. The applicant claimed that he was denied effective access to a court, in breach of Article 6 § 1 of the Convention, which provides, *inter alia*:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...”

70. The applicant submitted in particular that the decision of the prosecuting authorities not to indict the suspected police officers denied him access to a court in respect of a potential civil claim for damages. Since the criminal proceedings were discontinued, he could not take part in such proceedings as a civil party under section 55 § 1 of the Code of Criminal Procedure (see paragraph 25 above) in order to claim compensation. Moreover, although it would in theory have been possible for him to bring an action for compensation under section 339 of the Civil Code, since the damage in question arose out of an alleged criminal act, a civil court might, under section 152 § 1 of the Code of Civil Procedure (see paragraph 27 above), have stayed any such action until the issue of criminal liability had been determined. In sum, it is arguable that, in the circumstances, no civil action could have been brought in the absence of a criminal indictment arising out of the same facts.

71. The Government recalled at the outset that Article 6 does not guarantee a right to institute criminal proceedings against third parties, even if they are State agents (see *Chizhov v. Ukraine*, no. 6962/02, 6 May 2003). Therefore, access to court must be guaranteed only in respect of civil claims arising out of alleged ill-treatment. In the instant case, the applicant could have brought an action for damages under section 339 or an official liability action under section 349 of the Civil Code (see paragraph 26 above).

In the latter case, a pre-condition of access to a court would have been the exhaustion of ordinary legal remedies. A complaint under section 148 of the Code of Criminal Procedure against an order to discontinue investigations (see paragraph 25 above) is an ordinary legal remedy to be exhausted before any damages may be sought from the investigating authorities for their acts or omissions in the criminal proceedings. In the present case, the applicant failed to make timely use of this remedy and thereby lost the possibility of access to a court for the determination of his civil claims.

72. For the Court, any claim for damages brought by the applicant and based on alleged ill-treatment by the police would have involved “the determination of his civil rights”. Article 6 § 1 is, for that reason, applicable (see *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3292, § 110).

The Court further notes that the applicant does not deny that section 339 of the Civil Code provided him with a cause of action which would have enabled him to commence proceedings in the civil courts. He contends, however, that any such action might have been stayed under section 152 § 1 of the Code of Civil Procedure.

In the latter respect, the Court observes that civil courts are entitled, rather than obliged, under section 152 § 1 to suspend their proceedings pending the outcome of criminal proceedings on preliminary issues. Furthermore, sections 3 § 5 and 4 § 1 of the Code of Civil Procedure (see paragraph 27 above) grant civil courts a wide margin of appreciation in selecting and evaluating evidence. Any possible uncertainty as to the application of the relevant rules of civil procedure could have been eliminated had the applicant availed himself of an action in damages. Since he failed to do so, his submissions concerning the possible outcome of such an action are a matter of speculation.

Furthermore, it is to be noted that it was the applicant's own failure to file a timely section 148 complaint that appears to have barred his access to a court in respect of a possible official liability claim under section 349 of the Civil Code.

In these circumstances, it cannot be said that the applicant was denied access to a court or deprived of a fair hearing in the determination of his civil rights.

73. Consequently, there has been no violation of Article 6 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

74. The applicant complained that his alleged ill-treatment and the subsequent proceedings conducted by the authorities showed that he was discriminated against on account of his ethnic origin, contrary to Article 14 read in conjunction with Articles 3 and 13 of the Convention.

Article 14 provides:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

75. The applicant submitted that the suspected police officers were aware of the fact that he was of Roma origin. He stated that the Hungarian police's discriminatory conduct *vis-à-vis* persons of Roma origin was well-documented. He quoted a police officer telling him when he was leaving the police station: “Tell the Miskolc gypsies that they had better not set foot in Orosháza”.

76. The Government pointed out, as a preliminary objection, that the applicant had not exhausted domestic remedies as required by Article 35 § 1 of the Convention, since he did not complain in the domestic proceedings that his alleged ill-treatment was motivated by his ethnic origin. The allegation of a possible racist motive was not raised in his complaint against the decision of 30 November 1995, neither was the point mentioned in the complaint submitted by the NEKI in August 1998.

77. Furthermore, the applicant's assertion that the police officers interrogating him were aware of his ethnic origin, and that their conduct was based on this, was devoid of any proof. The Government observed that the applicant's arguments in this connection relied only on statements about the alleged existence of prejudice against the Roma within Hungarian society in general and the police in particular. However, for the Government, such general considerations could not justify a conclusion that the applicant was discriminated against by the police on the ground of his ethnic origin. In such cases, proof "beyond reasonable doubt" was required, which may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Velikova v. Bulgaria*, no. 41488/98, ECHR 2000-VI; *Anguelova v. Bulgaria*, no. 38361/97, ECHR 2002-IV). Although some inferences could be drawn from the general information adduced by the applicant about the alleged existence of discriminatory attitudes, such inferences could not be sufficient to find a violation of Article 14 in the present case, bearing in mind also that the applicant's submission concerning the police officer's alleged statement was not supported by the other witnesses who had testified in his favour.

78. As regards the alleged racist motives for the non-pursuit by the authorities of the applicant's allegations of ill-treatment, the Government stressed that the applicant had only adduced general information in support of this claim.

79. The Court considers that it is not necessary to examine whether or not the applicant has exhausted domestic remedies in respect of his complaint under Article 14. In its opinion, and having regard to the all the materials in the case file, there is no substantiation of the applicant's allegation that he was discriminated against in the enjoyment of any of the Convention rights relied on (compare and contrast *Nachova and Others v. Bulgaria* nos. 43577/98 and 43579/98, §§ 155 to 175, ECHR 2004-).

Consequently, there has been no violation of Article 14 read in conjunction with Articles 3 or 13 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

80. 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

81. The applicant claimed that, due to the incident complained of, he had practically lost all opportunity to obtain proper employment and had to live on social allowances. The accrued difference between his present monthly income and the average monthly income of a Hungarian manual worker, calculated from the moment of the incident until the age of 62 – which is the average age of retirement in Hungary – amounted to 11,668,636 Hungarian forints (HUF). The applicant claimed this amount by way of pecuniary damage.

82. As regards the physical and mental trauma he suffered in consequence of his ill-treatment by the police, the applicant claimed HUF 5 million.

83. The Government found the applicant’s claims excessive.

84. As regards pecuniary damage, the Court observes that the applicant’s diminished working capacity is due, to an undetermined extent (see paragraph 20 *in fine* above), to the ear injury which he suffered. Although there is no direct causal link between the ill-treatment suffered and the loss of income claimed by the applicant on account of his impaired hearing, the Court accepts that the applicant must have suffered some pecuniary damage as a result of his condition and finds it equitable to award him 4,000 euros (EUR) under this head.

85. As to non-pecuniary damage, the Court finds that the applicant can reasonably be considered to have suffered non-pecuniary damage on account of the distress and suffering resulting from his ill-treatment by the police. Making its assessment on an equitable basis, the Court awards the applicant EUR 10,000 euros under this head.

B. Costs and expenses

86. The applicant claimed EUR 6,000 for the costs of his legal representation up to the introduction of the case, EUR 2,000 up to the admissibility decision, EUR 2,000 for the merits stage and EUR 1,000 for costs incurred in respect of friendly-settlement negotiations. All these

amounts were stated to be subject to VAT at a rate of 25%. The applicant submitted an agreement concluded with his lawyer on 29 June 2003 according to which he was liable to pay the costs of his legal representation only if his case was successful and just satisfaction, along with reimbursement of legal costs, was granted.

87. The Government found the applicant's claims excessive.

88. According to the Court's case-law, an applicant is entitled to reimbursement of his 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 information in its possession and the above criteria, the Court considers it reasonable to award the applicant the sum of EUR 3,000 for costs incurred in the Convention proceedings.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objection concerning non-exhaustion of domestic remedies in respect of the complaint under Article 3 of the Convention;
2. *Holds* by 4 votes to 3 that there has been a violation of Article 3 of the Convention;
3. *Holds* unanimously that there has been no violation of Article 13 of the Convention;
4. *Holds* unanimously that there has been no violation of Article 6 of the Convention;
5. *Holds* unanimously that there has been no violation of Article 14 read in conjunction with Articles 3 or 13 of the Convention;
6. *Holds* by 4 votes to 3
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted

into the national currency of the respondent State at the rate applicable at the date of settlement:

- (i) EUR 4,000 (four thousand euros) in respect of pecuniary damage;
- (ii) EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage;
- (iii) EUR 3,000 (three thousand euros) in respect of costs and expenses;
- (iv) any tax that may be chargeable on the above amounts;
- (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;

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

Done in English, and notified in writing on 20 July 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following partly dissenting opinion of Mr Baka joined by Mr Jungwiert and Mr Butkevych is annexed to this judgment.

J.-P.C.
S.D.

PARTLY DISSENTING OPINION OF JUDGE BAKA JOINED
BY JUDGES JUNGWIERT AND BUTKEVYCH

The majority of my colleagues in the Chamber has rightly pointed out that it is well-established in the case-law of the Court that where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention (see the *Tomasi v. France* judgment of 27 August 1992, Series A no. 241-A, pp. 40-41, §§ 108-111, and the *Ribitsch v. Austria* judgment of 4 December 1995, Series A no. 336, pp. 25-26, § 34).

On these occasions – and rightly so – the burden of proof is reversed and it is for the authorities to prove that the police or, as the case may be, the prison authorities were not responsible for the injuries suffered by the detainee during custody or detention. In other words, the Government must be able to offer a credible alternative explanation for the cause of any injury which the detainee did not have when brought under the control of State agents but did have *on his release*.

In the instant case, however, the circumstances are quite different. The applicant left the police station where he was allegedly ill-treated. He did not seek a medical examination on the evening of the alleged incident. Nor did he do so on the next day. He only went to a doctor two days later. In my view, it is not for the Government to provide an explanation for an injury which the applicant could have suffered at any time between his release and his first medical examination. Immediately following his release, the applicant should have reported his injuries to the authorities and obtained a medical opinion without delay. By failing, or delaying, to do so, it must be accepted that an individual considerably diminishes his chances of substantiating that he was ill-treated in custody and makes it very difficult, even impossible, for independent investigating authorities to discover the real facts at issue.

In my view, this is exactly what happened in the present case. There were no eye-witnesses to the alleged ill-treatment, and notwithstanding a subsequent rigorous and thorough domestic investigation (see judgment, paragraphs 64 to 66) it was not possible to establish beyond reasonable doubt that the applicant had been ill-treated by the police. The judgment in the present case requires the Government to establish to the Court's satisfaction the cause of the applicant's injuries, even though the injuries could have been sustained after his release. By doing so, I feel that the Court unjustifiably extends the much stricter liability rule for injuries sustained in custody to the post-custody period, a period about which the authorities have limited information and in respect of which they have a more limited responsibility. This extended liability and reversed burden of proof

approach would mean that the authorities would have extremely limited possibilities for exculpating themselves from allegations of ill-treatment in custody in circumstances where an applicant only belatedly seeks medical confirmation of his injuries and makes no effort whatsoever to prove or report the existence of his injury on his release.

In addition to the above considerations, I see no reason in the present case which would justify a departure from the domestic authorities' conclusions on the applicant's complaints or which would enable the Court to establish on the material before it, beyond reasonable doubt – as required by Article 3 of the Convention –, that the applicant's injuries were caused by the police as alleged. Even if the domestic authorities' fact-finding activity is not unlimited and may be subject to review by the Court, they are, in general, in a better position to establish the facts. The Court's task is not to take the role of the domestic authorities which are in a better position to assess the relevant facts of the case. Rather, its role is to review under the Convention the decisions taken by them in the exercise of their powers (c.f. *Tkácik v. Slovakia* (dec.), no. 42472/98, 14 October 2003; *Farkas v. Hungary* (dec.), no. 31561/96, 2 March 2000; *Bronda v. Italy*, judgment of 9 June 1998, *Reports* 1998-IV, p. 1491, § 59).

In the instant case, the authorities carried out an independent investigation into the alleged assault, heard all the witnesses available and gave reasons for their decisions not to prosecute the police officers suspected of ill-treating the applicant. The investigation was undeniably a thorough one. Two years after the first investigation of the case had been closed, the domestic authorities again re-opened the investigation at the request of the NEKI, even though they had no statutory obligation to do so.

Despite the rigorous investigation carried out, the investigating authorities were not able to establish that the applicant was ill-treated during police custody. The national authorities had the benefit of direct contact with all persons concerned and had the inestimable advantage of being able to examine all the witness testimonies and evidence immediately after the events. In my view, it is not for the Court to gainsay the prosecuting authorities' independent assessment of the weakness of the case against the police officers and their conclusion that a successful prosecution could not be mounted on the strength of that evidence.

On the basis of the above considerations, and with much regret, I disagree with the majority of the Court that there has been a violation of Article 3 of the Convention in the present case.