



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

FOURTH SECTION

CASE OF LEWANDOWSKI AND LEWANDOWSKA v. POLAND

(Application no. 15562/02)

JUDGMENT

STRASBOURG

13 January 2009

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 Lewandowski and Lewandowska v. Poland,
The European Court of Human Rights (Fourth Section), sitting as a
Chamber composed of:
Nicolas Bratza, *President*,
Lech Garlicki,
Giovanni Bonello,
Ljiljana Mijović,
Päivi Hirvelä,
Ledi Bianku,
Nebojša Vučinić, *judges*,
and Lawrence Early, *Section Registrar*,
Having deliberated in private on 9 December 2008,
Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 15562/02) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Polish nationals, Mr Czesław Lewandowski and Ms Danuta Lewandowska (“the applicants”), on 14 March 2002. They lodged the application on behalf of their son, Paweł Lewandowski, who committed suicide on 27 May 2001.

2. The applicants were represented by Mr A. Bodnar of the Helsinki Foundation for Human Rights (Warsaw). The Polish Government (“the Government”) were represented by their Agent, Mr J. Wołosiewicz of the Ministry of Foreign Affairs.

3. The applicants alleged, in particular, a violation of Article 3 of the Convention on account of ill-treatment sustained by their son during his arrest by the police.

4. On 28 September 2006 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1949 and 1953 respectively and live in Legionowo.

1. The arrest of the applicants' son

(a) The applicants' account of events

6. In the evening of 3 August 2000 the applicants' son and his two friends, T.D. and G.S. were drinking beer on a street in Legionowo. After G.S. broke a windowpane on a notice board, they fled.

7. In connection with that event, at about 10.45 p.m. on the same day, Paweł Lewandowski was arrested by two police officers, M.K. and A.J. The police officers established the identity of the applicants' son and ordered him to get into the police car. The applicants' son kept asking about the reasons for his arrest. He rang his sister from his mobile phone to inform her about the situation. One of the police officers asked Paweł Lewandowski “if he did not like something”. The other police officer asked him where he lived and later said that they would bring a charge against him of assaulting a police officer.

8. Shortly afterwards the police officers ordered the applicants' son to leave the car. After crossing the street, they knocked him over and started kicking him. In reaction to that, Paweł Lewandowski began insulting and uttering threats against the police officers. That incident was observed by D.G. from a nearby estate.

9. At about the same time the two friends of Paweł Lewandowski, T.D. and G.S. were arrested by other police officers.

10. Subsequently, the applicants' son was driven to the Legionowo police station. He signed the record of arrest which stated that he was suspected, among other things, of insulting and assaulting a police officer. The applicants' son did not complain about his state of health. It was established by breathalyser test that he had a blood alcohol level of 1.38. The applicants' son did not receive any medical assistance during his detention at the police detention centre, despite showing visible signs of injury.

11. Paweł Lewandowski was released from detention on 5 August 2000 at about 10 a.m. On his release, he went with his parents to see a doctor. On 5 August 2000 Dr D.S. issued a medical certificate for the applicants' son which read as follows:

“Condition after assault. Swelling and reddening of left upper eyelid. Ecchymoses on the left side of the forehead, right side of the neck and inside area of both arms. Light pressure pain in the area of the back of the head and in the area below the right side of the ribs.”

(b) The Government's account of facts

12. The applicants' son was arrested on 3 August 2000 on suspicion of destroying public property. He was also said to have kicked and smashed private cars while fleeing the scene. He had been intoxicated as he had been drinking beer with his two friends, T.D. and G.S.

13. Two police officers, M.K. and A.J., arrived at Aleja Róż where the other police team attempted to arrest the perpetrators of the misdemeanour. On approach the police officers noticed three men fleeing into a forest. The applicants' son was caught first. While resisting arrest, he slapped and kicked police officer M.K. on the right thigh. The police officers had recourse to force during the arrest to the extent that had been necessary in view of the applicants' son's conduct. The applicants' son was pulled to the ground after a brief struggle. He was later handcuffed as he had still been aggressive. The applicants' son used very abusive and insulting language towards the police officers and he uttered very serious threats. Two other men were arrested by the second police team in the forest.

2. Proceedings against the police officers

14. On 11 August 2000 Paweł Lewandowski made a criminal complaint to the Legionowo District Prosecutor against the police officers, alleging that they had beaten him during his arrest and that his arrest had been unlawful. The applicants' son submitted that the whole incident had been seen by a witness from a nearby estate. He provided the name and address of that witness. He also enclosed a medical certificate issued on 5 August 2000 confirming his injuries.

15. The District Prosecutor heard evidence from the applicants' son on 1 September 2000. Paweł Lewandowski stated that on 3 August 2000 at about 10 p.m. he had been arrested by two police officers while walking down Aleja Róż with two of his friends, G.S. and T.D. He further testified that he had been arrested as the alleged perpetrator of the damage to the windowpane and that he had been beaten by the police officers.

16. On 1 October 2000 the District Prosecutor opened an investigation into the allegations of abuse of power by the police officers during the arrest of the applicants' son.

17. On 25 October 2000 T.D. was heard by the prosecutor. He maintained that on 3 August 2000 he and his friends, Paweł Lewandowski and G.S., had gone to Suwalna Street in Legionowo to collect G.S.'s mother. While waiting for her T.D. had suddenly heard the sound of the

windowpane being broken and he and his friends had decided to run away. T.D. further stated that while walking down Aleja Róż he and G.S. had noticed a police car and immediately fled. T.D. explained that behaviour by the fact that they were intoxicated and were holding beer. T.D. further stated that he had seen one of the police officers standing next to Paweł Lewandowski, but had not noticed any violence. He declared that he had not witnessed the applicants' son being caught.

18. On an unspecified date G.S. was heard. He confirmed the initial course of events. However, he stated that he had seen one of the police officers who had arrested Paweł Lewandowski hit and kick him.

19. On an unspecified date the prosecutor heard evidence from D.G. That witness testified that in the evening of one of the days at the beginning of August 2000, while standing by the gate of his house, he had noticed an unknown man being kicked and hit by two police officers. D.G. also stated that he had not witnessed the incident from the beginning.

20. Police officers M.K. and A.J., who arrested the applicants' son, testified on 3 and 7 November 2000 respectively. They admitted that they had used coercive measures against Paweł Lewandowski because he had actively resisted his arrest and had been aggressive. They denied that they had kicked him.

21. On an unspecified date the prosecutor heard evidence from J.Z., a duty officer at the Legionowo Police Station. He stated that the police officers who had arrested the applicants' son had informed him on their return that they had had to use coercive measures because of the aggressive behaviour of the arrested persons.

22. In the course of the investigation the District Prosecutor also established that on 27 October 2000 the prosecution service had filed a bill of indictment against Paweł Lewandowski in connection with alleged assault on the arresting police officers (case no. 1Ds. 1167/00, see below).

23. On an unspecified date the prosecutor heard evidence from two other police officers, P.W. and S.P., who had taken part in the arrest of Paweł Lewandowski and his two friends on 3 August 2000. Police officer P.W. testified that he had heard the man arrested by police officer M.K. insulting the latter and uttering threats. Police officer S.P. stated that he had seen Paweł Lewandowski hit police officer M.K. in the face and leg. He further stated that police officers M.K. and A.J. had overpowered Paweł Lewandowski. Police officer S.P. denied that police officers M.K. and A.J. had used unlawful force during the arrest.

24. On 8 December 2000 the District Prosecutor ordered the preparation of a forensic report. According to that report dated 16 December 2000 Paweł Lewandowski sustained the following injuries as a result of an assault on 3 August 2000:

1) an injury to his head without loss of consciousness with suspected concussion, which was not confirmed by an electroencephalography examination;

2) ecchymoses on the left side of the forehead;

3) an injury to the area of the left eye socket with swelling and reddening of the left upper eyelid;

4) an injury to the left side of his neck with ecchymoses;

5) an injury to the back of his head with pressure pain;

6) an injury to both arms with ecchymoses on the inside area;

7) an injury to the area below the right part of the ribs with pressure pain.

The forensic report concluded that the injuries sustained by Paweł Lewandowski were to be considered light bodily injuries lasting no longer than seven days within the meaning of Article 157 § 2 of the Criminal Code. It concluded that:

“those injuries could occur in the circumstances described by the victim”.

25. On 28 December 2000 the Warsaw Regional Prosecutor decided to prolong the investigation. The Regional Prosecutor considered that further evidence needed to be obtained.

26. The Government submitted that on 5 January 2001 the District Prosecutor had commissioned a further expert report on the character of Paweł Lewandowski's injuries. According to that report of an unspecified date, it was not possible to establish on the basis of the medical certificate of 5 August 2000 what had caused the said injuries. The Government have not produced a copy of that report.

27. On 23 March 2001 the Legionowo District Prosecutor discontinued the investigation into the allegations of the abuse of power by the police officers. The prosecutor refused to prosecute the police officers in respect of the offences specified in Articles 231 § 1 and 158 § 1 of the Criminal Code, finding that there was not enough evidence to support the conclusion that they had committed those offences.

28. The District Prosecutor had regard to the fact that two of Paweł Lewandowski's friends, T.D. and G.S., when heard on 4 August 2000 in case no. 1Ds. 1167/00, had stated that they had not seen the arrest of the applicants' son. The prosecutor found that the above statements contradicted the evidence given by T.D. and G.S. in the course of the present investigation. Having regard to the above and to the fact that they were close friends of the applicants' son, the prosecutor observed that their evidence could not be considered reliable.

29. The District Prosecutor found that the version of events as presented by the police officers who had arrested Paweł Lewandowski was to be considered reliable. In the prosecutor's view, their version of events was also corroborated by the forensic report dated 16 December 2000. According to that report, Paweł Lewandowski's injuries could have resulted

from using knees to restrain him, or kicking, or from falling on to a hard surface. The prosecutor further found that there was no other evidence which could indicate beyond doubt that the victim's version of the events was true.

30. On 17 April 2001 Paweł Lewandowski lodged an appeal against that decision with the Warsaw Regional Prosecutor. He contested, in particular, the finding that the evidence of T.D. and G.S., could not be considered credible on the ground that they were close friends of the victim and wanted to present the facts in a particular way. Paweł Lewandowski also emphasised that the testimony of an independent witness, D.G., who had seen the police officers kicking him, had been disregarded.

31. On 16 May 2001 the Warsaw Regional Prosecutor upheld the decision of 23 March 2001 and transmitted the applicants' son's appeal to the Legionowo District Court for review. The Regional Prosecutor considered that the lower prosecutor had correctly assessed the evidence obtained in the case. The evidence did not justify a finding that the police officers had abused their powers. The Regional Prosecutor further found that in accordance with a medical report attached to the file injuries sustained by Paweł Lewandowski might have resulted from being struck or kicked or from falling down on a hard surface. It was thus not possible to establish the origin of those injuries.

32. On 27 May 2001 Paweł Lewandowski committed suicide by hanging himself in his parents' garage.

33. On 28 September 2001 the Legionowo District Court held a hearing. The hearing was attended by a representative of the Helsinki Foundation for Human Rights. According to the report prepared by that representative, the District Prosecutor R.G. stated during the hearing that police officers had beaten the applicants' son.

34. On the same day the District Court upheld the District Prosecutor's decision of 23 March 2001. It reasoned its decision as follows:

“The appeal is not justified and could not be upheld. The prosecutor conducting the investigation had obtained all available evidence in the case, had thoroughly and impartially assessed that evidence and had reached the correct decision. It is not justified to assert that [the prosecutor] arbitrarily considered that witnesses T.D. and G.S. were not reliable, since those witnesses, according to their own statements, had not seen the very moment of the victim's arrest and could not pronounce on the reasonableness of the use of force against the victim. The testimony of D.G., contrary to the victim's assertions, does not confirm that the police officers had abused their powers, because he [D.G.] did not see the beginning of the incident. However, the testimonies of the intervening police officers are logical, consistent and concurring.”

3. Proceedings against the applicants' son for assault on police officers

35. On 4 August 2000 the police opened an investigation against the applicants' son. He was charged with assaulting and insulting police officers (offences specified in Articles 222 § 1 and 226 § 1 of the Criminal Code). The applicants' son maintained that he had been taken out of the police car and beaten. In reaction to that, he had insulted the police officers.

36. On 4 August 2000 police officers M.K. and A.J. testified. They stated that they had encountered difficulties when apprehending the applicants' son since he had resisted. For this reason, they had used their truncheons and struck him on the buttocks. They had handcuffed him with serious difficulty. Both police officers stated that Paweł Lewandowski had used offensive language and uttered threats against them.

37. Police officer S.P., who had been in the second police team participating in the arrest, stated that he had seen Paweł Lewandowski slapping and kicking police officer M.K. He further stated that the applicants' son had insulted the second police team using very offensive words.

38. On the same day police heard a certain E.D. who lived in the block of flats where the windowpane was destroyed. He testified that on 3 August 2000 at about 10 p.m. when standing on his balcony he had noticed three men who were being very loud, drinking beer and cursing. One of them had broken a metal doormat which was in front of the building. The witness' wife asked them what they were doing there. She had received an offensive response and one of the men threw the doormat into a nearby garden. In the meantime another of them broke the windowpane. Subsequently, they had begun to flee. While fleeing, one of the men had kicked cars parked nearby and their alarms had gone off.

39. On 27 October 2000 the Legionowo District Prosecutor filed with the Legionowo District Court a bill of indictment against the applicants' son. He was charged with assaulting police officer M.K. during his arrest, insulting that police officer and uttering threats against him. He was also charged with insulting and uttering threats against police officer A.J.

40. On 18 May 2001 the District Court held a hearing. On 13 June 2001 the proceedings against the applicants' son were discontinued due to his death.

II. RELEVANT DOMESTIC LAW

1. The Criminal Code 1997

Article 157, in so far as relevant, provides:

“§ 1. A person who causes bodily harm or damage to health other than specified in Article 156 § 1 (grievous bodily harm), shall be liable to imprisonment for a term of from three months to five years.

§ 2. A person who causes bodily harm or damage to health lasting no longer than seven days shall be liable to a fine, a penalty of restriction of liberty or imprisonment for a term not exceeding two years.”

Article 231 § 1 provides:

“A public official, who by abusing his powers or by failing to fulfil his duties, acts to the detriment of a public or private interest, shall be liable to imprisonment for a term not exceeding three years.”

2. Use of force by the police

Article 16 of the Police Act of 6 April 1990 reads, in so far as relevant, as follows:

“1. If a lawful order given by a police authority or a policeman has not been complied with, policemen may apply the following coercive measures:

- 1) physical, technical and chemical means of restraining or escorting persons or of stopping vehicles;
- 2) truncheons;
- 3) water cannons;
- 4) police dogs and horses;
- 5) rubber bullets fired from firearms;

2. Policemen may apply only such coercive measures as correspond to the exigencies of a given situation and are necessary to have their orders obeyed.”

Paragraph 5 of the Ordinance of the Council of Ministers of 17 September 1990 on the Use of Coercive Measures by the Police provides:

“1. Physical force shall be used in order to restrain a person, to counter an attack or to make [a person] obey an order.

2. When using physical force, no one shall hit a person, unless he has to do so in self-defence or in order to counter an unlawful attack against the life, health or property of others.”

Paragraph 6 of the Ordinance provides, in so far as relevant, as follows:

“Handcuffs may be used (...) in order to prevent an escape or to prevent an active assault or active resistance. ...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

41. The applicants complained under Article 3 of the Convention that their son had been ill-treated in the course of his arrest. They alleged that the arresting police officers had caused their son's injuries by using disproportionate force and had violated his dignity. They submitted that their son had not resisted the arrest and stressed that hitting and kicking a person could never be justified, regardless of the behaviour of that person.

Furthermore, the applicants complained that the authorities had not convincingly explained the reasons for their son's injuries, given the medical certificates and the testimony of D.G.

The applicants lastly submitted that their son's suicide had been related to his ill-treatment by the police.

Article 3 of the Convention provides as follows:

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

A. Admissibility

1. The six-month rule

42. The Government argued that the application was inadmissible for failure to comply with the six-month rule. They submitted that the relevant proceedings had been terminated on 28 September 2001 when the Legionowo District Court had upheld the decision to discontinue the investigation against the police officers and, hence, the critical date for lodging the application had expired on 28 March 2002. The Government noted that the applicants had lodged their complaint on 12 April 2002, when their first letter had reached the Court, and not on 14 March 2002 as it had been presented in the statement of facts. The applicants signed their application on the latter date. However, it did not transpire from the documents made available to the Government by the Court that the applicants had lodged their application before the expiry of the six-month time-limit on 28 March 2002.

43. The applicants maintained that they had received a letter from the Court dated 18 April 2002 in which the Registrar had confirmed the receipt of their application form dated 14 March 2002. Accordingly, the complaint had been lodged within the time-limit.

44. The Court notes that the applicants' first letter setting out the object of the application was dated 14 March 2002. That letter, as shown by the

postage stamp on the envelope, was sent by registered post on 15 March 2002 and thus the Court finds that the application was introduced before the expiry of the six-month time-limit provided for by Article 35 § 1 of the Convention. Accordingly, the Government's preliminary objection on the ground of belated lodging of the application late must be dismissed.

2. Exhaustion of domestic remedies

45. The Government further argued that the applicants had not exhausted all the available remedies since they could have claimed damages against the State Treasury under Article 417 of the Civil Code. In the civil proceedings the court would have to establish whether the allegations of ill-treatment were well-founded and thus to determine whether there had been a breach of Article 3 of the Convention. The Government stressed that the civil courts were not bound by the findings reached in the criminal investigation.

46. In that regard, the Government relied on the Supreme Court judgment of 26 March 2003 (no. II CKN 1370/00). In that case a plaintiff had successfully sued the police for the damage to his health sustained as a result of the unlawful use of a firearm. The Supreme Court ruled that the discontinuation of the criminal proceedings for abuse of power against a police officer concerned did not constitute a bar to a finding by a civil court that the police officer had committed a tort.

47. The applicants argued that the purported remedy was not adequate. The applicants' son did not want damages for the harm he had suffered due to the unlawful behaviour of the police officers and considered the judgment relied on by the Government irrelevant in the case. The applicants' son wanted the police officers to be found guilty and punished, which was the role of the criminal court.

48. The Court notes that a similar objection raised by the Government in an Article 3 case against Poland was already examined and rejected by the Court (see *H.D. v. Poland* (dec.), no. 33310/96, 7 June 2001). The Court considers that the Government have not submitted any new arguments which would lead it to depart from its previous findings.

49. In any event, the Court reiterates that in cases where an individual has an arguable claim under Article 3 of the Convention, the notion of an effective remedy entails, on the part of the State, a thorough and effective investigation capable of leading to the identification and punishment of those responsible (see *Assenov and Others v. Bulgaria*, 28 October 1998, § 102, RJD 1998-VIII, and *Selmouni v. France* [GC], no. 25803/94, ECHR 1999-XII, § 79).

50. By force of that special obligation created by the Convention for domestic authorities in respect of arguable Article 3 claims, in the present case the applicants' son, by asking the Polish authorities to institute criminal proceedings into his allegations of ill-treatment, discharged his duty under

Article 35 § 1 of the Convention to afford the Polish State an opportunity to put matters right through its own legal system before having to answer before an international body for the acts complained of (see, *mutatis mutandis*, *Egmez v. Cyprus*, no. 30873/96, § 72, ECHR 2000-XII). Accordingly, the Court holds that the applicants need not in addition have sought to pursue the civil remedy relied on by the respondent Government (see, *H.D. v. Poland*, cited above). Moreover, a tort action would have at most resulted in an award of damages, whereas in cases of serious ill-treatment by State agents an alleged breach of Article 3 cannot be remedied exclusively through the payment of compensation (see, among many other authorities, *İlhan v. Turkey* [GC], no. 22277/93, § 61, ECHR 2000-VII). For these reasons, the Government's plea of inadmissibility on the ground of non-exhaustion of domestic remedies must be dismissed.

3. Other grounds for declaring this complaint inadmissible

51. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Alleged ill-treatment by the police

(a) The applicants' submissions

52. The applicants maintained that their son had not resisted arrest. They submitted that the police officers had used a truncheon to effect the arrest of their son. Police officer M.K. acknowledged striking Paweł Lewandowski three times on the buttocks. However, the medical report prepared on 5 August 2000 did not mention any visible signs resulting from the use of a truncheon, but it did indicate other serious injuries sustained by the applicants' son. In the applicants' opinion, that report showed that the course of events surrounding the arrest of Paweł Lewandowski had been different from the one asserted by the authorities.

53. Even assuming that the applicants' son had struggled with the police officers, the Government did not furnish any arguments which would provide a basis to explain the degree of force used. The applicants claimed that the force had had to be significant judging from the injuries sustained by their son as described in the medical report of 5 August 2000 (see paragraph 11 above). The applicants argued that there was no evidence that their son had been particularly dangerous or in possession of a weapon.

Similarly, there was no evidence of any injuries sustained by the police officers.

54. The present case had to be distinguished from *Berliński v. Poland* (nos. 27715/95 and 30209/96, 20 June 2002) where the Court could not establish whether any ill-treatment had occurred in the police van as alleged by the applicants and where it found that the applicants' injuries had resulted from their resistance to the police officers effecting their arrest. The present case was different since D.G. had seen police officers kicking and hitting the applicants' son. The applicants argued that it was irrelevant that D.G. had not seen the incident from the beginning as under no circumstances could kicking a helpless person who was lying on the ground be justified. Moreover, while in *Berliński* it was not disputed that there had been a struggle between the applicants and the police at the moment of arrest. In the instant case the matter was disputed. Consequently, the State should be held responsible under Article 3 in respect of the injuries sustained by the applicants' son.

(b) The Government's submissions

55. The Government stressed that the applicants' son had been apprehended in the course of a random operation which had given rise to unexpected developments, as he had resisted arrest and had attacked the policeman. According to forensic reports the injuries sustained by Paweł Lewandowski could have resulted from a fall on to a hard surface.

56. The Government emphasised that in the light of evidence obtained in the investigation it could not be said that Paweł Lewandowski had been subjected to inhuman or degrading treatment or that the police officers had abused their powers during his apprehension. That finding had been confirmed by both the district and regional prosecutor and subsequently by a court. The use of force to effect the applicants' son's submission to the lawful requirements of the police officers had been made necessary by his own conduct. Furthermore, the allegations that Paweł Lewandowski had been ill-treated by the police had not been confirmed in the domestic investigation.

57. The Government argued that, even assuming that the injuries of the applicants' son had been sufficiently serious to amount to ill-treatment to fall within the scope of Article 3, during the arrest he had resisted the legitimate actions of the police officers and used very abusive language. Moreover, the forensic reports had not confirmed that the impugned injuries had resulted from abuse of power by the police. Thus, in the Government's view, the present case was similar to the case of *Berliński* and the applicants' complaint was manifestly ill-founded.

(c) The Court's assessment

58. The Court reiterates that where an individual is taken into police custody in good health and is found to be injured on 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, among other authorities, *Selmouni v. France* [GC], cited above, § 87). The same principle applies to alleged ill-treatment resulting in injury which takes place in the course of an applicant's arrest (see *Klaas v. Germany*, 22 September 1993, §§ 23-24, Series A no. 269, and *Rehbock v. Slovenia*, no. 29462/95, §§ 68-78, ECHR 2000-XII).

59. According to the Court's case-law, Article 3 does not prohibit the use of force for the purposes of effecting an arrest. However, such force may be used only if indispensable and must not be excessive (see, among others, *Rehbock*, cited above; *Altay v. Turkey*, no. 22279/93, § 54, 22 May 2001, and *Ivan Vasilev v. Bulgaria*, no. 48130/99, § 63, 12 April 2007). In respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 (see *Ribitsch v. Austria*, 4 December 1995, § 38, Series A no. 336).

60. The parties did not dispute that the applicants' son's injuries had occurred in the course of the arrest. However, differing versions of how the applicants' son actually sustained the injuries were put forward by the applicants and the Government. The applicants claimed that their son had been asked to get out of the police car and later knocked over and kicked by police officers while lying on the ground. They underlined that he had not resisted arrest.

61. The Government, on the other hand, argued that the police had used necessary force against the applicants' son, who had resisted arrest and had been aggressive. He had, in their submission, slapped and kicked one of the officers on the leg and abused them verbally. The Government submitted that the applicants' son injuries could have resulted from a fall on to a hard surface, apparently following the struggle with the police.

62. Furthermore, the Court notes that the District Prosecutor in his decision of 23 March 2001, relying on the forensic report dated 16 December 2000, had concluded that the applicants' son's injuries could have resulted from using knees to restrain him, or kicking, or a fall on to a hard surface. The Regional Prosecutor in her decision of 16 May 2001 found that in accordance with an unspecified subsequent forensic report the same injuries could have resulted from the applicants' son being struck or kicked or from his falling on to a hard surface. The Court observes that the forensic report dated 16 December 2000 was made available to it by the applicants and was not contested by the Government. It listed the injuries sustained by the applicants' son and concluded that they "could occur in the circumstances described by the victim", namely following an assault by

police officers. The report did not mention the conclusions relied on by the District Prosecutor and the Court is thus unable to see how the prosecutor could refer to them. The other forensic report referred to in the Regional Prosecutor's decision suggested that the applicants' son's injuries could have also resulted from his being struck. The Court notes that the other forensic report apparently obtained by the prosecuting authorities was not produced by the Government. In addition, its conclusions and the conclusions referred to by the District Prosecutor are inconsistent with the medical report of 5 August 2000 and the forensic report of 16 December 2000. Having regard to the above, the Court considers that the Government's explanation as to the origin of the injuries of the applicants' son is deficient (see, *mutatis mutandis*, *Corsacov v. Moldova*, no. 18944/02, § 59, 4 April 2006).

63. When establishing the circumstances of the alleged ill-treatment, the Court attaches particular importance to the evidence given by D.G. who was a person independent from the applicants' son and his two colleagues. In the course of the investigation he testified that at the material time he had seen from his estate two police officers kicking and hitting a man. However, his testimony was disregarded by the District Prosecutor apparently on the ground that he had not seen the impugned incident from the start. The Court fails to see any justification for such an approach and agrees with the applicants that it was irrelevant whether the witness had seen the incident from the beginning. Moreover, by doing so the prosecuting authorities appear to give the regrettable impression that kicking and hitting a person under police control could be justified. The Court observes that the present case can be distinguished on that ground from *Berliński v. Poland* (cited above) where there were no witnesses to establish whether any ill-treatment had occurred in the police van as alleged by the applicants in that case. Furthermore, in *Berliński* it was established that the applicants had submitted to the arrest only when threatened with a gun and had been subsequently convicted of an assault on the police officers.

64. The Court further notes the Government's argument that the applicants' son had been apprehended in the course of a random operation which had given rise to unexpected developments. However, it considers that that argument does not carry significant weight in the circumstances of the case. Even assuming that the applicants' son – apparently intoxicated – had struggled with the police officers, there is no evidence that he was particularly dangerous or in possession of a weapon. Furthermore, no evidence of any injury to the police officers was adduced by the Government. The Government did not advance any additional argument that would allow the Court to establish that the applicants' son's conduct was of such a character as to justify recourse to the considerable physical force that, judging by the relative seriousness of the injuries, must have been employed by the police (see *Dzwonkowski v. Poland*, no. 46702/99, § 55, 12 April 2007).

65. The Court must scrutinise the alleged breach of Article 3 with heightened vigilance, because this provision prohibits inhuman or degrading treatment in absolute terms, irrespective of the victim's conduct (see *Ribitsch*, cited above, § 32, and *Ivan Vasilev*, cited above, § 64). It reiterates that the applicants' son sustained a number of relatively serious injuries as evidenced by the medical and forensic reports of 5 August and 16 December 2000 (see paragraphs 11 and 24 above). On the basis of all the material placed before it, the Court does not find it established that the recourse to physical force in this case was made necessary by the conduct of the applicants' son (see, by contrast, *Berliński v. Poland*, cit. above). Having regard to the nature of the injuries, the Court considers that the Government have not furnished convincing or credible arguments which would provide a basis to explain or justify the degree of force used during the arrest. Accordingly, the force used was excessive and unjustified in the circumstances (see *Dzwonkowski*, cited above, § 56).

66. There has therefore been a violation of Article 3 of the Convention on account of the inhuman and degrading treatment to which the applicants' son was subjected during his arrest.

2. Adequacy of investigation

(a) The applicants' submissions

67. The applicants argued that the investigation had not been sufficiently thorough and effective to meet the requirements of Article 3. The prosecuting authorities had not explained the origin of the numerous injuries sustained by the applicants' son and had unconditionally accepted the testimonies of the police officers. They had further disregarded the evidence of D.G., the only witness who had had no interest in the outcome of the case. The prosecuting authorities had also failed to hear Dr D.S. who had prepared the medical report of 5 August 2000 and the sister of the applicants' son whom he had contacted from his mobile at the time of his arrest. The applicants further submitted that the problem of excessive use of force by law enforcement officials in Poland had been underlined by the United Nations Committee Against Torture during its 38th session on 18 May 2007.

(b) The Government's submissions

68. The Government contended that the investigation in the present case had complied with Article 3 requirements. The fact that the investigation had been discontinued for lack of conclusive evidence of ill-treatment could not be tantamount to a violation of the Convention. The domestic authorities had shown resolve and spared no effort to identify those responsible. The District Prosecutor had heard all witnesses, commissioned two forensic

reports and examined the case files of the proceedings against the applicants' son. Furthermore, his decision had been examined and upheld by a higher prosecutor and a court.

69. The Government argued that the investigation had been prompt and thorough. There had been no other evidence that the prosecuting authorities should have taken in order to establish the facts of the alleged ill-treatment. In their view, the prosecutors had not evaluated the evidence before them in an arbitrary manner.

(c) The Court's assessment

70. The Court reiterates that where an individual makes a credible assertion that he has suffered treatment infringing Article 3 at the hands of the police or other agents of the State, that provision, 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 an effective official investigation. This investigation should be capable of leading to the identification and punishment of those responsible (see, among other authorities, *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV). The investigation into arguable allegations of ill-treatment must be thorough. That means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions (see *Assenov and Others*, cited above, § 103 et seq).

71. On the basis of the evidence adduced in the present case, the Court has found that the respondent State is responsible under Article 3 for the ill-treatment of the applicants' son (see paragraph 66 above). The applicants' complaint in this regard is therefore "arguable". The authorities thus had an obligation to carry out an effective investigation into the circumstances in which the applicants' son sustained his injuries.

72. The Court notes that following the applicants' son's complaint that on 3 August 2000 he had been ill-treated by police officers, the public prosecutor carried out an investigation. However, the investigation appears flawed in several respects. Firstly, the prosecutor failed to explain the origin of the applicants' son's extensive injuries despite the medical evidence. Even though the forensic reports relied on by the prosecuting authorities suggested that the injuries could have resulted from excessive use of force, they still failed to address that point and appeared to presume that all of them resulted from the conduct of the applicants' son. Secondly, the prosecutor dismissed without giving cogent reasons the evidence of D.G. which had clearly indicated that the police officers had ill-treated the applicant. Thirdly, the prosecutor failed to hear evidence from Dr D.S., who had examined the applicant shortly after his release and prepared the first medical report in the case.

73. The Court also finds that the prosecuting authorities unconditionally accepted the statements of the police officers without taking any note of the fact that they had obviously had an interest in the outcome of the case and in diminishing their responsibility (see *Dzwonkowski*, cited above, § 65).

74. In the light of the above, the Court considers that the investigation was superficial, lacked objectivity and ended in decisions which contained conclusions unsupported by a careful analysis of the facts.

75. Against this background, in view of the lack of a thorough and effective investigation into the applicant's arguable claim that he was ill-treated by police officers, the Court finds that there has been a violation of Article 3 of the Convention in this respect as well.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

76. 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

77. The applicants claimed 15,000 euros (EUR) in respect of non-pecuniary damage for suffering and distress occasioned as a result of ill-treatment of their son. Apart from physical suffering, their son had also experienced mental suffering that led him to commit suicide. The parents' anguish could not be underestimated.

78. The Government submitted that the applicants' claim was exorbitant in the light of the Court's case-law.

79. The Court found above that the applicants' son had suffered relatively serious injuries at the hands of police officers. Having regard to the awards made in previous similar cases and to the circumstances of present case, the Court awards the applicants EUR 10,000 in respect of non-pecuniary damage.

B. Costs and expenses

80. The applicants made no claim in respect of costs and expenses.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 3 of the Convention on account of ill-treatment of the applicants' son;
3. *Holds* that there has been a violation of Article 3 of the Convention on account of the lack of an effective investigation;
4. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 13 January 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President