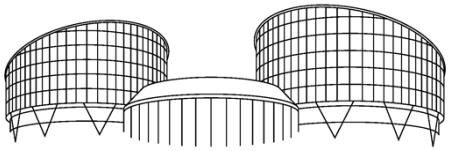

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

# CASE OF ĐEKIĆ AND OTHERS v. SERBIA

*(Application no. 32277/07)*

JUDGMENT

STRASBOURG

29 April 2014

**FINAL**

29/07/2014

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

**In the case of Đekić and Others v. Serbia,**

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

Josep Casadevall, *President,*
Alvina Gyulumyan,
Dragoljub Popović,
Luis López Guerra,
Johannes Silvis,
Valeriu Griţco,
Iulia Antoanella Motoc, *judges,*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 8 April 2014,

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

# PROCEDURE

1. The case originated in an application (no. 32277/07) against the Republic of Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Serbian nationals, Mr Dragan Đekić, Mr Zoran Đekić and Mr Dragan Končar ("the applicants"), on 19 May 2007.

2. The applicants were represented by Mr B. Todorović, a lawyer practising in Niš. The Serbian Government ("the Government") were represented by their Agent, Mr S. Carić.

3. The applicants alleged that they had been ill-treated by the police and that there had been no effective investigation in that regard. They relied on Articles 3, 6 and 13 of the Convention.

4. On 30 August 2010 the application was communicated to the Government.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1976, 1984 and 1976 respectively. The first and second applicants live in Prokuplje and the third applicant lives in Belgrade.

6. On 18 September 2004 at about 2.30 a.m. they were implicated in a minor road traffic accident. Soon thereafter, the police arrived at the scene.

7. According to the applicants, the police immediately handcuffed them and took them to the Prokuplje Police Station where they were beaten up. However, according to the official reports on the use of force prepared by three duty officers, the applicants were drunk and violent from the arrival of the police at the scene of the accident. As they tried to flee the scene and, moreover, attacked the officer who tried to stop them, the police decided to arrest them. At the police station, the applicants continued to behave violently. In order to subdue the applicants, the three duty officers hit them a couple of times with truncheons and then handcuffed them. In the process, as they resisted being handcuffed, Mr Zoran Đekić and Mr Dragan Končar struck their heads against office furniture.

8. Having spent the night at the police station, the applicants were taken to the hospital. According to medical reports, Mr Dragan Đekić had a bruise on his right shoulder, Mr Zoran Đekić had bruises on his head, right arm and right shoulder, and Mr Dragan Končar had bruises on his head, chest, abdomen, back and right shoulder.

9. On the same morning the police lodged a criminal complaint against the applicants accusing them of the offence of obstructing a police officer in the discharge of his duty. At about 8.30 a.m. the applicants were taken to the investigating judge. They complained that they had been beaten up by the police. However, the judge took no action in that regard. They were released at about 1 p.m.

10. On 20 September 2004 two daily newspapers with a large circulation published the applicants' allegations that they had been beaten up by the police. The next day the Press Service of the Ministry of Interior issued an official denial. Between 21 and 27 September 2004, the Inspector General's Service (the internal control service of the Ministry of Interior) carried out an internal investigation into the applicants' allegations. It interviewed the applicants, 18 police officers and 19 civilians (while no civilians were present at the premises of the police station when the police resorted to the use of force against the applicants, the Inspector General's Service interviewed a number of eyewitnesses to the applicants' arrest and the doctor who had examined the applicants on the critical day). All of them except the applicants maintained that the applicants had been drunk and violent at the relevant time. The Inspector General's Service concluded in its report of 27 September 2004 that the police had acted in accordance with law. The report was not made available to the applicants.

11. On 18 November 2004 the public prosecutor charged the applicants with the offence of obstructing a police officer in the discharge of his duty. The applicants were ultimately convicted as charged and given suspended sentences.

12. On 8 December 2004 the applicants lodged a criminal complaint against three police officers accusing them of ill-treatment. Having obtained an official report finding that the police had acted in accordance with law,

on 28 January 2005 the public prosecutor decided not to prosecute. On 2 March 2005 the applicants started a subsidiary prosecution by lodging a bill of indictment against the same officers. They did not file a civil-party claim.

13. The first hearing before the Prokuplje Municipal Court took place on 11 October 2005. Having heard the police officers accused of ill-treatment, some other officers, the applicants and some eyewitnesses to their arrest, on 18 April 2006 the Prokuplje Municipal Court decided that the use of force against the applicants had been lawful. It therefore acquitted the accused police officers. On 24 October 2006 the Prokuplje District Court upheld that ruling. The last judgment of 24 October 2006 was served on the applicants on 27 November 2006.

14. In December 2006 the applicants applied to the public prosecutor to lodge a request for the protection of legality on their behalf. On 7 August 2007 the public prosecutor decided not to do so.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

15. The Criminal Code 1977 (Official Gazette of the Socialist Republic of Serbia nos. 26/77, 28/77, 43/77, 20/79, 24/84, 39/86, 51/87, 6/89, 42/89; and Official Gazette of the Republic of Serbia nos. 16/90, 21/90, 26/91, 75/91, 9/92, 49/92, 51/92, 23/93, 67/93, 47/94, 17/95, 44/98, 10/02, 11/02, 80/02, 39/03 and 67/03) was in force from 1 July 1977 until 1 January 2006. The relevant Article reads as follows:

**Article 66 (Ill-treatment by public officials acting in an official capacity)**

> "Whoever acting in an official capacity ill-treats or insults another or otherwise treats such person in a humiliating and degrading manner, shall be punished with imprisonment of from three months to three years."

16. The Code of Criminal Procedure 2001 (Official Gazette of the FRY nos. 70/01 and 68/02; and Official Gazette of the Republic of Serbia nos. 58/04, 85/05, 115/05, 49/07, 20/09, 72/09 and 76/10) was in force between 28 March 2002 and 1 October 2013. Most criminal offences (including ill-treatment by public officials acting in an official capacity) were subject to public prosecution, but some minor offences were only subject to private prosecution. Pursuant to Article 20 of the Code, the public prosecutor had to prosecute when there was sufficient evidence that a person had committed a criminal offence which was subject to public prosecution. Article 61 of the Code provided that when the public prosecutor decided not to prosecute such an offence because of a lack of evidence, the victim of the offence had the possibility of starting a subsidiary prosecution within eight days from the notification of the public prosecutor's decision.

17. The Inspector General's Service of the Ministry of Interior was set up by the Inspector General's Service Ordinance 2001[1]. The first Inspector General was appointed in June 2003. As the Ordinance is not in the public domain, little is known about the work of that body in the first years of its existence. It is, however, certain that the Inspector General was answerable to the Minister of Interior. The Service was reorganised and renamed (it is now called the Sector for the Internal Control of the Police) in November 2005, but this is irrelevant in the present case.

18. The Civil Obligations Act 1978 (Official Gazette of the SFRY nos. 29/78, 39/85, 45/89 and 57/89; and Official Gazette of the FRY no. 31/93) has been in force since 1 October 1978. Section 200(1) thereof provides that anyone who has suffered fear, physical pain or mental anguish as a result of a breach of his human rights (*prava ličnosti*) is entitled to sue for damages. In accordance with section 172(1) of the Act, a legal entity, which includes the State, is liable for any tort committed *vis-à-vis* a third party by its organs in the course of, or in connection with, the exercise of their functions.

19. The Civil Proceedings Act 2004 (Official Gazette of the Republic of Serbia nos. 125/04 and 111/09) was in force from 22 February 2005 until 1 February 2012. Section 13 of the Act provided that if a victim of a criminal offence had brought a civil action for damages against the offender, the civil court was bound by a final decision, if any, of the criminal court finding the offender guilty. The civil courts have persistently interpreted that provision so that a criminal conviction was not a condition for an award of damages (see, for instance, judgment Gž. 1739/06 of the Kragujevac District Court of 29 September 2006; judgment Gž. 1257/11 of the Novi Sad Appeals Court of 2 June 2011; judgment Gž. 3273/11 of the Novi Sad Appeals Court of 16 November 2011; judgment Gž. 146/12 of the Novi Sad Appeals Court of 5 April 2012; judgment Gž. 5676/11 of the Belgrade Appeals Court of 2 August 2012; and judgment Gž. 4357/12 of the Novi Sad Appeals Court of 26 October 2012; in which civil courts awarded non-pecuniary damages for injuries sustained during an arrest operation and/or in police custody in the absence of a criminal conviction against any police officer).

The Civil Proceedings Act 1977 (Official Gazette of the SFRY nos. 4/77, 36/77, 6/80, 36/80, 43/82, 72/82, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90 and 35/91; and Official Gazette of the FRY nos. 27/92, 31/93, 24/94, 12/98, 15/98 and 3/02), which was in force until 22 February 2005, contained the same provision (see section 12(3) thereof).

[1] *Pravilnik o radu Službe generalnog inspektora RJB*, published in an internal gazette of the Ministry of Interior in March 2001.

## III. RELEVANT INTERNATIONAL DOCUMENTS

20. The International Covenant on Civil and Political Rights, adopted under the auspices of the United Nations on 16 December 1966, entered into force in respect of Serbia on 12 March 2001. The "concluding observations" on Serbia of the Human Rights Committee, the body of independent experts set up to monitor the implementation of this treaty, read, in the relevant part, as follows (document CCPR/CO/81/SEMO of 12 August 2004, § 15):

> "While taking note of the establishment in Serbia of [Inspector General's Service] in June 2003, the Committee is concerned that no independent oversight mechanism exists for investigating complaints of criminal conduct against members of the police, which could contribute to impunity for police officers involved in human rights violations. The State party should establish independent civilian review bodies at the Republic level with authority to receive and investigate all complaints of excessive use of force and other abuse of power by the police."

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

21. The applicants maintained that they had been ill-treated by the police on 18 September 2004. They also alleged a lack of an effective investigation into their ill-treatment. Article 3 provides:

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

### A. Admissibility

22. The Government did not raise any admissibility objections. As this complaint is neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention nor inadmissible on any other grounds, it must be declared admissible.

### B. Merits

#### *1. Alleged ill-treatment of the applicants by the police (the substantive aspect of Article 3 of the Convention)*

23. The applicants submitted that they had been beaten with truncheons, punched and kicked in police custody for no apparent reason.

24. While acknowledging that the applicants had indeed suffered injuries at the Prokuplje Police Station on the critical day, the Government contested

the applicants' version of the events. They endorsed the official account set out in paragraph 7 above.

25. As the Court has held on many occasions, Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour. That being said, allegations of ill-treatment must be supported by appropriate evidence. Furthermore, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (see, among many other authorities, *Labita v. Italy* [GC], no. 26772/95, §§ 119-21, ECHR 2000-IV).

26. In the present case, it is not in dispute between the parties that the police used force against the applicants at the premises of the police station and that the applicants' resulting injuries are sufficiently serious to fall within the scope of Article 3. The burden hence rests on the Government to demonstrate with convincing arguments that the use of force was not excessive (*Mikiashvili v. Georgia*, no. 18996/06, § 73, 9 October 2012).

27. The Court notes that various domestic proceedings have arisen out of this incident, including the criminal proceedings described in paragraph 13 above. Where domestic proceedings have taken place, as in this case, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for those courts to assess the evidence before them (see *Klaas v. Germany*, 22 September 1993, § 29, Series A no. 269, and the authorities cited therein). It is true that the Court is not bound by the findings of domestic courts, but in normal circumstances it needs cogent elements to lead it to depart from the findings of fact of those courts (see *Matko v. Slovenia*, no. 43393/98, § 100, 2 November 2006).

28. The present applicants' injuries were consistent with either their or the official version of the events. However, the national courts found against the applicants. In reaching the conclusion that the duty officers had not used excessive force, the national courts had the benefit of seeing many witnesses give their evidence and of evaluating their credibility. Since a number of witnesses (both civilians and police officers) had testified that the applicants had been drunk and violent at the time of their arrest, the national courts gave credence to the testimony of the accused officers and a number of other police officers who had claimed that the applicants had continued to behave violently at the police station and that the use of force against them had therefore been absolutely necessary. No material has been adduced in the course of the proceedings before the Court which could call into question the findings of the national courts and add weight to the applicants' allegations before the Court. No cogent elements have thus been provided which could lead the Court to depart from the findings of fact of the national courts (contrast *Rivas v. France*, no. 59584/00, § 40, 1 April 2004).

29. Accordingly, there has been no breach of Article 3 of the Convention under its substantive limb.

*2. Official investigation into the alleged ill-treatment (the procedural aspect of Article 3 of the Convention)*

30. The applicants argued that there had been no effective investigation into their alleged ill-treatment and, notably, that the police investigation and the public prosecutor's investigation had lacked independence.

31. The Government contested that argument.

32. The Court reiterates that where a person makes a credible assertion that he has suffered treatment contrary to Article 3 of the Convention at the hands of State officials, that provision, read in conjunction with the general duty under Article 1 of the Convention, requires by implication that there should be an effective official investigation (see, for example, *Labita*, cited above, § 131). Whatever the method of investigation, the authorities must act as soon as an official complaint has been lodged. Even when strictly speaking no complaint has been made, an investigation must be started if there are sufficiently clear indications that ill-treatment has been used. The authorities must take into account the particularly vulnerable situation of victims and the fact that people who have been subjected to serious ill-treatment will often be less ready or willing to make a complaint (see *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 133, ECHR 2004-IV, and the authorities cited therein).

33. The Court has also held that the investigation should be capable of leading to the identification and punishment of those responsible. If not, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for State agents to abuse the rights of those within their control with virtual impunity (see *Labita*, cited above, § 131). The investigation must also be thorough: 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. Furthermore, the investigation must be prompt and independent. The investigation lacks independence where members of the same unit as those implicated in the alleged ill-treatment undertook the investigation (*Mikheyev v. Russia*, no. 77617/01, §§ 108-110, 26 January 2006). Lastly, the investigation must afford a sufficient element of public scrutiny to secure accountability. While the degree of public scrutiny required may vary, the complainant must be afforded effective access to the investigatory procedure in all cases (*Batı and Others*, cited above, § 137).

34. In the present case, the Court has not found it proved, because of a lack of evidence, that the police used excessive force against the applicants (see paragraph 28 above). Nevertheless, as it has held in previous cases, that does not preclude this complaint from being "arguable" for the purposes of the positive obligation to investigate under Article 3 (see *Aysu v. Turkey*, no. 44021/07, § 40, 13 March 2012). In reaching this conclusion, the Court

has had particular regard to the fact that the applicants had sustained injuries in police custody. An investigation was therefore required (see, in this regard, *Boicenco v. Moldova*, no. 41088/05, § 103, 11 July 2006, in which the Court held that any injury sustained in police custody would give rise to a strong presumption that the person concerned was subjected to ill-treatment).

35. An initial investigation into the applicants' alleged ill-treatment was carried out by the Inspector General's Service of the Ministry of Interior. It would appear that the investigation was prompt and thorough (see paragraph 10 above). However, it lacked independence since the officers conducting the investigation were subordinated to the same chain of command as those officers under investigation (see *Oğur v. Turkey* [GC], no. 21594/93, § 91, ECHR 1999-III; *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 120, ECHR 2001-III; *Matko*, cited above, § 89; *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, § 335, ECHR 2007-II; the CPT standards, document no. CPT/Inf/E (2002) 1 - Rev. 2011, p. 97). This conclusion must in no way be interpreted as prohibiting police officers from performing any tasks in investigations into the use of force by other police officers (see *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 322, ECHR 2011), but if the police participate in such investigations, sufficient safeguards should be introduced in order to satisfy the requirement of independence (see *Hugh Jordan*, cited above, § 120, and *Ramsahai and Others*, cited above, §§ 342-46). In the present case, there were no such safeguards.

36. An investigation was also carried out by the public prosecutor. It is noted, however, that the public prosecutor based her decision to dismiss the applicants' criminal complaint only on a report submitted by the police (see paragraph 12 above). She did not undertake any independent steps, such as interviewing the applicants, the officers involved and other witnesses. There are no indications that she was prepared in any way to scrutinise the police account of the events (compare *Đurđević v. Croatia*, no. 52442/09, §§ 89-90, ECHR 2011; contrast *Berliński v. Poland*, nos. 27715/95 and 30209/96, §§ 69-70, 20 June 2002, and *Stojnšek v. Slovenia*, no. 1926/03, § 101, 23 June 2009).

37. Whilst they were not required to pursue the prosecution of officers accused of ill-treatment on their own (see *Otašević v. Serbia*, no. 32198/07, § 25, 5 February 2013), the applicants nonetheless took over the prosecution (see paragraph 12 above). The criminal proceedings started in March 2005, when the applicants lodged a bill of indictment, and lasted until October 2006, when the acquittal of the accused officers entered into force. The trial court heard the applicants, the accused officers, some other police officers and several eyewitnesses to the applicants' arrest. Some key witnesses were, moreover, cross-examined by the applicants. The Court is satisfied with the diligence displayed by the trial court in trying to establish whether the police had used excessive force, as argued by the applicants, or

not. The fact that those accused of ill-treatment were eventually acquitted is not sufficient in itself to find a violation of Article 3 of the Convention, as the procedural obligation under Article 3 is not an obligation of result, but of means (see *Vladimir Fedorov v. Russia*, no. 19223/04, § 67, 30 July 2009). The Court further notes that the criminal proceedings were conducted with reasonable promptness and expedition. There is also no indication that they lacked transparency or that the criminal courts lacked independence.

38. The ultimate question is whether the criminal proceedings remedied the deficiencies of the investigations carried out by the Ministry of Interior and the public prosecutor. The Court finds that they did, considering notably the fact that the criminal courts, in an adversarial procedure, addressed all of the relevant issues and examined all of the relevant evidence (contrast *Gül v. Turkey*, no. 22676/93, §§ 92-94, 14 December 2000; compare *Tanrıbilir v. Turkey*, no. 21422/93, § 85, 16 November 2000). Moreover, it does not appear that those deficiencies undermined the capability of establishing the circumstances of the case or the person responsible (*Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 113, ECHR 2005-VII). As a result, the investigation into the applicants' allegation of ill-treatment was, on the whole, "effective" for the purposes of Article 3.

39. There has therefore been no violation of Article 3 of the Convention under its procedural limb.

## II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

40. The applicants further complained about the fairness of the criminal proceedings against the police officers accused of ill-treatment. They relied on Article 6. The relevant part of that Article reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

41. While the Government did not raise any objection as to the Court's competence *ratione materiae*, this issue calls for consideration *ex officio* by the Court (see *Blečić v. Croatia* [GC], no. 59532/00, § 67, ECHR 2006-III).

42. The wording itself of Article 6 ("against him") makes it clear that in criminal cases its guarantees protect the person who faces a criminal charge (see *AGOSI v. the United Kingdom*, judgment of 24 October 1986, Series A no. 108, p. 22, § 65). The criminal limb of Article 6 is thus not applicable in this case. As to its civil limb, the Court notes that the applicants did not file a civil-party claim in the context of the criminal proceedings. In addition, as under the Serbian law, a criminal conviction is not a formal precondition for obtaining damages in civil proceedings (see paragraph 19 above; contrast

*Perez* v. *France* [GC], no. 47287/99, § 66, ECHR 2004-1), the outcome of the criminal proceedings in issue was not decisive for the applicants' "civil rights". The civil limb of Article 6 is thus not applicable either in the present case. This complaint is, accordingly, incompatible *ratione materiae* with the provisions of the Convention and must be rejected pursuant to Article 35 §§ 3 (a) and 4.

## III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

43. The applicants complained under Article 13 that they had not had an "effective remedy before a national authority" for their complaint about the alleged ill-treatment at the Prokuplje Police Station. Article 13 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."

44. The Government contested that argument.

45. The Court considers that this complaint is manifestly ill-founded for the reasons outlined in paragraphs 34-38 above. It must therefore be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

## FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints under Article 3 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 3 of the Convention under its substantive limb;

3. *Holds* that there has been no violation of Article 3 of the Convention under its procedural limb.

Done in English, and notified in writing on 29 April 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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|---|---|
| Santiago Quesada<br>Registrar | Josep Casadevall<br>President |