



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

1959 · 50 · 2009

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 74832/01
by Miluša MIŽIGÁROVÁ
against Slovakia

The European Court of Human Rights (Fourth Section), sitting on 3 November 2009 as a Chamber composed of:

Nicolas Bratza, *President*,
Lech Garlicki,
Ljiljana Mijović,
David Thór Björgvinsson,
Ján Šikuta,
Päivi Hirvelä,
Mihai Poalelungi, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having regard to the above application lodged on 13 April 2001,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mrs Miluša Mižigárová, is a Slovak national who was born in who was born in 1979 and lives in Poprad. She is represented before the Court by Mr A. Dobrushí of the European Roma Rights Centre, a lawyer practising in Budapest. The Slovak Government (“the Government”) were represented by their Agent, Ms A. Poláčková.

A. The circumstances of the case

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

At approximately 8.00 to 8:30 p.m. on 12 August 1999 police officers G. and J. apprehended the applicant's husband, Mr Ľubomír Šarišský, and another person ("R.K.") on suspicion of having stolen bicycles. At the time of his arrest, Mr Šarišský was twenty-one years old and in good health.

Following their arrest Mr Šarišský and R.K. were driven to the District Police Department in Poprad. After four policemen questioned him, Mr Šarišský was taken to another room for further interrogation by Lieutenant F., an off-duty officer with whom he had had previous encounters. At some point during the interrogation, Mr Šarišský was shot in the abdomen. He died after four days in hospital as a result of the bullet wound sustained in the police station during his interrogation.

The following is a more detailed description of the relevant facts as alleged by the applicant.

Facts relating to the lethal injury of Mr Šarišský

After being taken to the District Police Department, Mr Šarišský and R.K. were questioned by police officers H. and K., who were on duty at the time. Officers G. and J. were present during the interrogation. When later testifying before the investigator, Sgt. H. stated that "Šarišský was aggressive during the interrogation, he kept getting up from the chair, banged his head against the wall saying he would jump from the window. Sgt. H. stated that Mr Šarišský had not been handcuffed during interrogation. According to police officer G., however, Mr Šarišský remained handcuffed, at least for the time he was present.

According to officer H., Lt. F. joined the interrogation when Mr Šarišský was signing the record of the interrogation. Mr Šarišský and Lt. F. started arguing, shouting at each other using their first names. Lt. F. was off duty at the time. His shift was to start at 11 p.m.

Lt. F. subsequently phoned his superior, the Director of the Criminal Police Department in Poprad, and informed him that Mr Šarišský and another person had been apprehended. The Director told Lt. F. that he had been informed about the arrest by the operations officer, that he would come to the task assignment meeting at 10.30 p.m. to decide who would question the suspects, and that "it might as well be him".

Lt. F. considered that he had been authorised to question Mr Šarišský. He volunteered to take over the questioning. He took Mr Šarišský to his office in the District Police Directorate, which was located in a different part of the same building. Lt. F. handcuffed Mr Šarišský to a radiator and left his office for a while.

Upon his return Lt. F. removed the handcuffs from Mr Šarišský and resumed the questioning. Mr Šarišský was subsequently shot in the abdomen with Lt. F.'s service pistol. Lt. F. telephoned the operations officer and asked him to call the emergency service. He then ran to the operations centre to repeat his request. Lt. F. returned to his office and carried Mr Šarišský down to the vestibule. From there he was transported to a hospital.

At midday on 13 August 1999 Capt. T., a police officer of the Department of Supervision and Inspection Service of the Ministry of the Interior, questioned Mr Šarišský in his hospital bed. The questioning took place in the presence of the head physician.

Mr Šarišský was able only to move his head in response to questions asked. When asked whether he was shot by the policeman, he answered "no"; whether he shot himself, he answered "yes"; did he steal the gun from the police - "no"; did he ask for the weapon from the policeman and it was handed to him, he answered "yes"; did the policeman hit him - "yes"; and when asked if there was any one else in the room besides the policeman, he answered "no". When asked by Capt. T., the head physician allegedly stated that Mr Šarišský had no injury to the jaw or any hematomas on the body apart from the bullet wound.

The applicant only learned about the incident on 13 August 1999 when she met R.K., who had been released. She went to the hospital with another person and saw that her husband was connected to different tubes. He was conscious but could not speak. She asked him whether he had shot himself. Mr Šarišský responded "no" by moving his head. She repeated the question and received the same answer from him. Her husband could not hear at all in one ear, although he had never had any problem with his hearing. He had bruises all over his body, "below the neck, [...] on the right shoulder, [...] on his face and below, underneath his right eye".

The applicant visited her husband again on 14 August 1999, accompanied by two other persons. When asked whether a policeman had shot him, Mr Šarišský nodded. Mr Šarišský had bumps on the head and his face was swollen. They wanted to take pictures of those bruises but the head physician did not allow them to.

Mr Šarišský died on 17 August 1999 as a result of complications caused by the wound. On the same day an investigator from the Police Regional Investigation Office in Prešov ordered the examination and autopsy of the body. He instructed two forensic medical experts to perform an external and internal examination of the corpse and describe the individual wounds and how they arose. He ordered them to submit the report within fourteen days.

The forensic experts carried out the autopsy on 18 August 1999 but the autopsy report was not submitted to the investigator until 26 October 1999.

The report stated that there was a small, visible bruise of 3x2cm on the mucous membrane of the upper and lower lips in the left corner of the

mouth. The autopsy report also described a torn drum in the left auditory canal with clear liquid. According to the report, such a condition could arise as the result of illness or inflammation of the inner ear, but it could also be caused by a blow with a blunt object.

The report concluded that Mr Šarišský had died a violent death, caused by post-traumatic and hemorrhagic shock induced by a perforating gunshot wound to the abdomen inflicted by a projectile fired from a police service pistol. The gunshot ruptured the large intestine, the mesentery of the small intestine, the vena cava inferior, the lumbar spine and spinal cord. There was shock after injury resulting from bleeding which, together with the subsequent complications (including acute inflammation of the soft tissues of the spinal cord and the brain and a serious defect of blood coagulation) led to the death of Mr Šarišský.

According to the testimonies of his close relatives, Mr Šarišský did not know how to handle weapons, he had never owned or handled a gun, and he did not have any record of mental instability.

Ensuing investigation and criminal proceedings against Lieutenant F.

Throughout the course of the subsequent investigation, Lt. F. offered differing accounts of the circumstances which preceded Mr Šarišský's death.

According to the statements by Lt. F., he sat down on a chair at the table next to the window in his office, whereas Mr Šarišský sat down on a chair by the wall. When the questioning resumed, Mr Šarišský denied the thefts. Allegedly, they raised their voices. According to Lt. F., he told Mr Šarišský to write the names of those responsible for the theft on a piece of paper and left him alone in the office without handcuffing him. Lt. F. alleged that when he returned to the office, he had to walk around Mr Šarišský, who was sitting on a chair with his back to the door. As Lt. F. passed him, he felt a sudden blow to his right shoulder and fell to his knees. He heard a click and realised that Mr Šarišský had cocked the pistol. According to Lt. F., when he stood up and turned to face Mr Šarišský, he saw the latter holding his service pistol in his hands, which he aimed at Lt. F. When Lt. F. asked Mr Šarišský not to do anything stupid and to give back the weapon, the latter allegedly pointed the pistol towards himself in the area of the abdomen and, sitting on the chair, pulled the trigger.

According to Lt. F., Mr Šarišský remained in a sitting position on the chair, holding the pistol in his hand. Lt. F. took it from him and put it on the table. He then claimed he phoned the operations officer and asked for medical help. After that, he unloaded the weapon, looked on the floor for the magazine or ammunition and re-assembled it. He looked at Mr Šarišský's wound and saw that on the paper which he had left him was the text "say hello to Kristína". He then ran to the operations centre to

repeat the call for the emergency service. Mr Šarišský remained seated on the chair and when Lt. F. returned to his office, he carried him down to the vestibule.

The applicant points out that both in the report where he provided explanations to his superior on the night of the incident and in a report drawn up on 13 August 1999 Lt. F. briefly described how the suspect had pulled his service pistol out of the holster, cocked it and shot himself in the abdomen. It was only in his later statements that he mentioned any violent or forceful action by the victim. The applicant also points out that Lt. F. was approximately 1.90 metres tall and weighed about 100 kilograms. Mr Šarišský was considerably smaller.

Moreover, Lt. F. offered an inconsistent account of how he had walked by Mr Šarišský in the moment preceding the alleged attack. Lt. F. claimed that Mr. Šarišský had been sitting with his back to the door but according to the statement of another police officer, who entered Lt. F.'s office after hearing the shot, Mr Šarišský was sitting on a chair facing the door. The Government have contested the English translation of this police officer's statement, and contend that in the Slovak version he in fact stated that Mr Šarišský was sitting with his *right side* facing the door. During the first reconstruction of the incident on 8 September 1999, Lt. F. told the investigator that he had passed on the right side of Mr Šarišský, but he later said that he had passed between the table and Mr Šarišský.

Lt. F. claimed that Mr Šarišský had attacked him from behind, surprising him and simultaneously pulling his pistol from the holster and cocking it. He could not remember how Mr Šarišský had held the pistol, or in which hand, and he gave several accounts of what he did with the pistol after removing it from the victim's hand.

After the incident had occurred, a police officer took the pistol of Lt. F. and placed it in the information officer's room. The investigator then seized the pistol. A task-force was formed which consisted of a forensic technician from the Criminal Police Department of the Police Force District Directorate in Poprad, a Senior Inspector at the Police Force Circuit Department in Poprad and an Investigator from the Police Force District Office of Investigation in Poprad. The task force carried out an on-site inspection on the night of 12 August 1999. Two police officers were present for the inspection.

Starting at 11.50 p.m., they inspected Lt. F.'s room. They did not take samples of gunpowder residue from the hands of Lt. F. The reason given was that they did not have the proper and necessary materials. The samples were taken at approximately 2.00 p.m. the next day by an expert technician from Kosice and no residue was found. Lt. F. claimed that he had not washed his hands before the samples were taken. As for Mr Šarišský, the nurse at the hospital had washed his hands after he underwent the first surgery, thus rendering the test useless.

On 20 August 1999 an investigator from the Regional Office of Investigation in Prešov ordered the Criminology and Expert Opinions Institute of the Police in Bratislava to undertake dactyloscopy, biology and chemistry test on objects, traces and samples found during the site inspection. The results of this examination were all negative. According to the expert opinion of the Criminology and Expert Opinions Institute in Bratislava which examined and evaluated the disks from the hands of Mr Šarišský and Lt. F., no particles coming from firing residue were found. The dactyloscopy expert did not find any fingerprints on the weapon which could be evaluated, due to the insufficient number of papillary lines.

On 6 October 1999 the same institute examined the piece of paper with the text “say hello to Kristína” and compared the writing with the writing of Lt. F. and of Mr Šarišský. The experts concluded that the text had most probably not been written by Lt. F., whereas that part of the text which read “say hello to” had most probably been written by Mr Šarišský. They could not adequately evaluate the word “Kristína” because it was written in capital letters and they did not have sufficient samples of capital letters from the deceased Mr Šarišský. The applicant submits that the investigation file which her representative examined at the Poprad’s courthouse did not contain this document. An independent handwriting test was therefore impossible.

On 8 September 1999, between 7.10 p.m. and 9.15 p.m., the Police Regional Investigation Office in Prešov conducted a reconstitution of the events in the office of Lt. F. The experts were informed of the location of the entry and exit wounds and the location where the bullet hit the chair. The reconstruction documented possible alternatives for the shooting of Mr Šarišský, with Lt. F. and Mr Šarišský in different positions, and with each one firing the fatal shot. The ballistic expert present at the reconstruction concluded that the injury to Mr Šarišský was “most probably” self-inflicted as the direction of the shot was from below upwards and from the right to the left.

On the same night, from 9.20 p.m. until 9.40 p.m., an experiment was performed with the aim of clarifying how the weapon was pulled and respective time intervals. During the reconstruction Lt. F. stated that his shirt had been tucked in under the belt on which he had the holster containing the weapon. According to the report, the investigation experiment measured the time intervals for three different ways of pushing and simultaneously drawing the weapon from Lt. F.’s holster, pushing with the hand, pushing with the forearm and with the left part of the body and the hand. These three alternatives were repeated twice.

On 12 November 1999 a police investigator from the Regional Investigation Office in Prešov accused Lt. F. of the offence of injury to health. He was questioned immediately afterwards and pleaded not guilty.

On 18 November 1999 Lt. F., through his counsel, submitted the grounds and his reasons for pleading not guilty. In particular, he stated that there had been nothing to lead him to the conclusion that Mr Šarišský would injure himself. He also stated his weapon had been properly secured in the holster which he had had on his belt under his shirt. He alleged that the deceased unexpectedly, suddenly, and with the use of force had pulled his weapon out of the case.

The applicant points out that in this testimony Lt. F. altered his previous statements regarding the non-violent behaviour of Mr Šarišský and the way he was carrying the gun. According to this testimony, the pistol had been covered by the shirt so it could not be seen, whereas during the September reconstruction of the events he had stated that his shirt had been tucked in under the belt on which he had the case with the weapon.

At 9.00 p.m. on 4 May 2000, in view of the new testimony given by Lt. F., the Regional Investigation Office in Prešov and technicians from the Criminal Police Department in Poprad conducted another experiment with the aim of clarifying the manner of drawing the weapon. During the experiment, when the accused was carrying the pistol covered by his shirt in accordance with Lt. F.'s testimony of 22 November 1999, the assistant did not succeed in any one of three attempts to pull the weapon.

On 11 May 2000, following the completion of the investigation, the applicant and her counsel perused the entire investigation file. In the record they confirmed that they had been given sufficient time for the perusal, that they proposed no further investigation be carried out, and that they had no comments on the documents included in the file.

On 29 May 2000 a public prosecutor indicted Lt. F. with the offence of causing injury to health under Section 224(1) and (2) of the Criminal Code as a result of his negligence in the course of duty. In the indictment the public prosecutor stated, *inter alia*, that Lt. F.'s testimony that the pistol was on his belt covered by the shirt was not true, because if that had been the case, Mr Šarišský could not have pulled it away from him.

On 18 October 2000 a judge of the District Court in Poprad issued a penal order under Section 314e of the Code of Criminal Procedure. In it he convicted Lt. F. of injury to health caused by negligence in the course of duty within the meaning of Section 224(1) and (2) of the Criminal Code. The penal order stated that Lt. F. had failed to secure his service weapon contrary to the relevant regulations and that, as a result, Mr Šarišský had managed to draw the weapon from the case and to inflict with it a lethal injury on himself.

Lt. F. was sentenced to one year's imprisonment, suspended for a two-and-a-half-year probationary period. The penal order of 18 October 2000 was based solely on the evidence submitted by the prosecutor and it gave no account of the criminal investigation. The judge

referred the injured parties, including the applicant, to civil proceedings for damages.

Neither the public prosecutor nor Lt. F. challenged the penal order which thus became final.

Lt. F. committed suicide on 23 January 2001.

The applicant had participated in the criminal proceedings as a victim and sought an award of damages. As she did not indicate the quantum of damages sought, as required by Article 43 (2) of the Code of Criminal Procedure, the judge advised her of the possibility of recovering damages through a civil action.

On 27 September 2000 the applicant's counsel lodged a claim for damages with the Ministry of Justice. On 22 January 2001 the claim was rejected on the ground that the Ministry of Justice lacked jurisdiction to hold a preliminary hearing. Pursuant to section 9 of the Act No. 58/1969, only claims for damages resulting from wrongful decisions had to be lodged with the Ministry of Justice. In the present case, the victim suffered damage as a result of the incorrect procedure by a police officer and her action therefore had to be filed directly with a court of law.

The applicant and her daughter's claims for damages

On 28 May 2001 the applicant, through her lawyer, filed an action for damages to the Bratislava III District Court. She claimed 45,000 Slovakian korunas (SKK) in compensation for damage of pecuniary nature and SKK 5 million for damage of non-pecuniary nature. As her submissions did not meet the formal requirements set out in Article 79 § 1 of the Code of Civil Procedure, in its ruling of 23 October 2001 the court gave the applicant 15 days to complement her action failing which the proceedings would be discontinued. The applicant did not comply with the request. The District Court therefore discontinued the proceedings on 17 April 2002.

On 9 August 2002 the applicant filed an action against the Slovak Republic under Articles 11 *et seq.* of the Civil Code. She claimed compensation from the State (represented by the Prešov Regional Directorate of the Police Corps) for non-pecuniary damage in the amount of SKK 900,000 alleging that, as a result of the wrongful conduct of Lt. F., there had been an interference with her husband's physical integrity which had resulted in his death. She relied on the Poprad District Court's penal order of 18 October 2000.

On 7 August 2003 the Poprad District Court dismissed the action. On 10 January 2005 the court of appeal quashed the first-instance decision.

On 6 February 2006 the Poprad District Court admitted the applicant's daughter, Ms Kristína Šarišská, as plaintiff.

On 6 March 2006 the applicant withdrew her claim.

On 31 May 2006 the District Court discontinued the proceedings in respect of the applicant. It dismissed the claim of the applicant's daughter.

It had not been shown that the daughter, who had been ten months old when her father had died and had lived with her grandmother, had suffered any interference with her personal rights warranting protection under Articles 11 *et seq.* of the Civil Code. In addition, the court established that the defendant, as indicated by the applicant, lacked standing in the case. The applicant and her daughter should have directly sued the Prešov Regional Directorate of the Police Corps. Finally, the claim of the applicant's daughter had been filed outside the statutory time-limit. The right claimed by her had therefore lapsed.

On 20 September 2007 the Prešov Regional Court upheld the first-instance judgment. It held that any non-pecuniary damage which the plaintiff had suffered resulted from the fatal injury which, as it had been established in the course of the criminal proceedings, her father had inflicted on himself. There had therefore been no interference with the plaintiff's personal rights as guaranteed by Articles 11 *et seq.* of the Civil Code. The Regional Court did not accept the first-instance finding according to which (i) the defendant lacked standing in the case and (ii) the right claimed had become statute-barred.

Constitutional proceedings

On 18 January 2008 the applicant's daughter, represented by the applicant, lodged a complaint to the Constitutional Court. The plaintiff relied, *inter alia*, on Articles 2, 3, 8 and 13 of the Convention and referred to the above proceedings leading to the Prešov Regional Court's judgment of 20 September 2007.

On 5 November 2008 the Constitutional Court dismissed the complaint as being manifestly ill-founded. It found no arbitrariness or unlawfulness in the proceedings complained of. With reference to its case-law the Constitutional Court further held that, in the absence of any shortcomings in the proceedings under examination, the ordinary courts involved could not be held liable for any breach of the plaintiff's material rights under Articles 2, 3 and 8 of the Convention. The Regional Court had examined the plaintiff's appeal; the latter had therefore had an effective remedy at her disposal as required by Article 13 of the Convention.

B. Reports of alleged police brutality in respect of persons of Roma origin

1. United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance (Annual Report, E/CN.4/1999)

The report indicates, *inter alia*, that human rights monitoring bodies observed that the police exerted pressure on the victims of police brutality to withdraw their complaints.

2. Conclusions and Recommendations of the Committee Against Torture (11 May 2001)

The report refers to allegations of instances of police participation in attacks against Roma, to the failure on the part of the authorities to carry out prompt, impartial and thorough investigations into allegations of such actions or to prosecute and punish those responsible as well as to allegations that the law enforcement officials ill-treated detainees during detention and in police custody, particularly in lock-ups and police cells.

3. The European Commission against Racism and Intolerance (ECRI): Second Report on Slovakia adopted on 10 December 1999

The report noted that:

“...the problem of police mistreatment of members of minority groups, particularly Roma, is of particular concern to ECRI...Victims are reportedly very unwilling to come forward through fear of reprisals and for lack of confidence in the possibilities for redress. ECRI stresses that any incidence of police brutality against minority groups should not be tolerated by the authorities, and that this should be made clear by a firm and public condemnation from politicians and police leaders. Steps should be taken to investigate all alleged mispractices and punish offenders: an independent investigatory body should carry out all such investigations...”

At the level of prosecuting authorities and judges, it is noted that very few cases of racially motivated crime reach the courts at all, or, if they do, they are generally prosecuted as ordinary crimes.”

4. US Department of State 1999 Country Reports on Human Rights Practices – Slovak Republic

The report noted that:

“In January police officers reportedly raided a Roma settlement in Kosice, injuring 16 Roma...In October, during a raid on a Romani community in Žehra, police allegedly used excessive force as they detained 9 Roma on charges of hooliganism. During the incident, the police shot a 13 year old Romani boy with a plastic bullet, and he was hospitalised as a result of his injury. Police reportedly use pressure and threats to discourage Roma from pressing charges of police brutality. Human rights monitors continued to charge that police...used their device of countercharges to pressure Roma victims of police brutality to drop their complaints...”

5. US Department of State 2000 Country Reports on Human Rights Practices – Slovak Republic

The report observed that:

“Police reportedly use pressure and threats to discourage Roma from pressing charges of police brutality. In 1998 and 1999, Roma in the town of Vráble lodged complaints against a local law enforcement officer ... for allegedly attacking teenage Romani boys. The Ministry of the Interior investigated the case and found [the officer] not guilty ... In March two Roma from the eastern town of Michalovce voluntarily came to the police station for questioning. They were allegedly beaten by some police officers. The victims suffered several injuries including broken legs, hands and ribs. When questioned about the incident, the police first claimed that the action was justified but later admitted that it was unwarranted.”

6. International Helsinki Federation for Human Rights: Human Rights in the OSCE Region: The Balkans, the Caucasus, Europe, Central Asia and North America, Report 2001

The report indicated that:

“The most common human rights violation committed by the police was the disproportionate use of coercive methods, which often resulted in injuries to the arrestee and the need for medical care. Such abuse, however, was almost impossible to prove since there was no independent control commission for complaints of ill-treatment and misconduct by law enforcement officials.”

7. International Helsinki Federation Annual Report 1999

This report observed that:

“In recent years, although racist violence against Roma in Slovakia has increased, effective prosecution and punishment have been rare. Also the police have resorted to abuse. On 27 October police officers assaulted Roma inhabitants of the village of Hermanovce, eastern Slovakia. Police entered the homes of two Roma families and beat two Roma youths, handcuffed them, forced them into the trunk of a car, and drove them to the police station ... The police offered no explanation to the detainees or their families; nor did they show arrest or search warrants to justify their actions. At the police station the two youths were allegedly beaten with truncheons and kicked. They were interrogated and shown diverse items, and pressed to falsely admit to stealing some of them. They were later released the same day, apparently without having been charged with any crime. Doctors who examined them documented bruises consistent with a beating. At no point were the two detainees advised on their rights.”

C. Relevant domestic law

Pursuant to Article 166 (1) of the Code of Criminal Procedure, where the investigator considers the investigation into a case to be completed and where the results of such investigation justify the filing of an indictment, the investigator shall give the accused, the victim, as well as their counsels

and/or authorised representatives sufficient time for perusing the case file and, if necessary, for proposing any additional investigation be carried out.

Article 224(1) and (2) of the Criminal Code provides that a person who by negligence and in violation of his or her duties causes a serious injury to health or the death of another person shall be punished with a prison sentence of between six months and five years or with a fine.

Under Article 314e (1) of the Code of Criminal Procedure, a single judge may issue a criminal order, without a public hearing, where the facts are reliably proved by the evidence submitted.

Pursuant to Article 314g (1) and (3) of the Code of Criminal Procedure, a penal order may only be challenged by the public prosecutor, the accused person or those who can file an appeal in the latter's favour. Where such an objection is filed, the judge shall hold a hearing in the case.

Article 314g (2) provides that a third party who joins the criminal proceedings with a claim for damages can file an objection to a penal order only in case and to the extent that compensation is thereby granted. When a third party files such an objection, the judge shall quash the relevant part of the penal order and refer the person concerned to proceedings before a civil court.

COMPLAINTS

The applicant complained that the death of her husband in police custody and the subsequent failure of the Slovakian authorities to undertake a thorough and effective investigation into the circumstances surrounding his death amounted to a violation of Article 2 of the Convention. The applicant also complained under Article 3 of the Convention that her husband was ill-treated in police custody and that the authorities failed to carry out an adequate investigation into that ill-treatment. The applicant further complained that she had not had an effective remedy within the meaning of Article 13 of the Convention. Finally, the applicant complained that her rights, and the rights of her deceased husband, under Articles 2, 3 and 13 of the Convention were violated in conjunction with Article 14 on grounds of ethnic origin.

THE LAW

A. Article 2 of the Convention

The applicant complained that the death of her husband in police custody and the subsequent failure of the Slovakian authorities to undertake a thorough and effective investigation into the circumstances surrounding his death amounted to a violation of Article 2 of the Convention.

Article 2 of the Convention provides as follows:

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

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

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

The Government submitted that the applicant had failed to exhaust domestic remedies. First, they submitted that although the applicant filed a claim for damages in the criminal proceedings, the claim was unsuccessful because she failed to indicate the amount of damages sought. Moreover, her civil action for pecuniary and non-pecuniary damages was discontinued as she failed to meet the formal requirements of the Code of Civil Procedure. Secondly, the Government submitted that the applicant did not file a motion requesting further investigations to be carried out after the first investigation was completed. Pursuant to Article 166 § 1 of the Code of Criminal Procedure, the applicant had a right to inspect the case record once the investigation had been completed and she could then make motions for further investigation. Although she perused the investigation records after the investigation was completed in May 2000, she did not make a motion for further investigation.

The applicant submitted that she had exhausted domestic remedies. First, she argued that she was only required to pursue one remedy, even if others were available (*McCann and Others v. the United Kingdom*, 27 September 1995, Series A no. 324; *Yağcı and Sargın v. Turkey*, 8 June 1995, Series A no. 319-A). Secondly, she submitted that in view of the gravity of the situation, only a criminal remedy would be considered effective, sufficient and necessary to exhaust (*Kaya and Others v. Turkey*, no. 36564/97, § 105, 27 May 2004). Thirdly, she argued that she had done all that she could reasonably be expected to have done, having already brought her case to the attention of the Slovak authorities and received no adequate remedy.

In relation to the merits of the case, the applicant submitted first, that her husband was deprived of his right to life as a result of his intentional shooting in police custody, and secondly, that the State authorities failed adequately to protect his right to life by undertaking a thorough and effective investigation into the circumstances surrounding his death.

In relation to the first submission, she relied on the principle, established by the Court, that where an individual is taken into police custody in good health but is later found dead, it is incumbent on the State to provide a plausible explanation of the events leading to his death, failing which the authorities must be held responsible under Article 2 of the Convention (*Velikova v. Bulgaria*, no. 41488/98, § 70, ECHR 2000-VI). Moreover, where the events in issue lie wholly or in large part within the exclusive knowledge of the authorities, the burden of proof may be regarded as resting with the authorities to provide a satisfactory and convincing explanation (*Hugh Jordan v. the United Kingdom*, no. 24746/94, § 103, ECHR 2001-III (extracts)).

In the present case, Mr Šarišský was taken into custody in good health. It is not disputed that he received his injuries, including the fatal wound, while in police custody. While in hospital he repeatedly told the applicant and other relatives that he did not shoot himself, and their testimonies unequivocally stated that he had never owned or used a gun. In the circumstances, the applicant submitted that the investigating authorities did not fulfil their obligation to provide a plausible explanation for his death. Rather, they continued to rely on a highly implausible theory which did not withstand scrutiny: namely, that Mr Šarišský had forcibly taken the gun from Lt. F. and shot himself.

In relation to her second submission, the applicant contended that the investigation conducted by the authorities was plagued by omissions and inconsistencies and, consequently, the State failed to undertake a thorough and effective investigation into her husband's death. In particular, she submitted that the investigators failed properly to secure gunpowder residue and fingerprint tests; that police officers were never asked to explain how and when her husband received the serious injuries on his face and left ear; that the prosecution gave full credit to the testimony by the police officers involved in the incident, flatly denying the use of force against the victim; that the investigation failed to resolve the differences in the testimony of police officers regarding the position the victim was found in after the shooting; and finally, that there was a failure to resolve the apparent contradictions in the testimonies given by Lt. F.

The Government submitted that the theory that Mr Šarišský committed suicide was not highly implausible. In particular, they submitted that on 17 August 1999 an autopsy was ordered to determine the manner of death, the angle and range of the handgun with which the victim was shot, and any other facts or circumstances relevant to the finding of an objective

explanation for the death. On 20 August 1999 a forensic analysis of fingerprints, biological and chemical samples and a handwritten note was commissioned. This was followed by a reconstruction on 8 September 1999 to clarify the circumstances leading to the death of Mr Šarišský. Although the testimony of Lt. F. was considered during the reconstruction, it relied primarily on the objective evidence such as the position of the entry and exit wounds and the gunshot damage to the chair. Following the reconstruction the investigators concluded that in all probability Mr Šarišský had shot himself. The investigations conducted, and the evidence that the Mr Šarišský previously had been aggressive and attempted to self-harm while in police custody, refuted the applicant's allegation that suicide was a highly implausible theory and that the investigators had relied uncritically on the testimony of Lt. F.

In response to the applicant's specific allegations about the omissions and inconsistencies in the investigation, the Government submitted first, that the firearm was confiscated for the purpose of conducting forensic tests but no classifiable or identifiable fingerprints could be lifted from it; that swabs for lifting gunshot residue were not standard issue for criminal investigators at that time; that the injuries to Mr Šarišský's face and left ear were irrelevant as they had no relation to the cause of death; that any discrepancy in the police officers' statements could be accounted for by the exclusion of the words "right side" from the English translation; and finally, that when Lt. F. altered his testimony, a new re-enactment was carried out to test the veracity of his latest account. Consequently, the Government submitted that there was an effective, impartial, thorough and careful investigation into the death of Mr Šarišský which led to the person responsible, Lt. F., being identified and punished.

The Court reiterates that the rule of exhaustion of domestic remedies in Article 35 § 1 of the Convention requires applicants first to use the remedies provided by the national legal system, thus dispensing States from answering before the European Court for their acts before they have had an opportunity to put matters right through their own legal system. The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and practice at the relevant time, namely, that the remedy was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (*T. v. the United Kingdom* [GC], no. 24724/94, § 55, 16 December 1999).

In the present case the applicant's complaint is that her husband died in police custody and the respondent State failed to conduct an effective investigation to establish responsibility for his death. The Court observes that the investigations which the Contracting States are obliged by Articles 2 and 13 of the Convention to conduct in cases such as this must be able to lead to the identification and punishment of those responsible.

This obligation cannot be satisfied merely by awarding damages, otherwise the State's obligation to seek those guilty of fatal assault might thereby disappear (see *Kaya v. Turkey*, 19 February 1998, *Reports* 1998-I, p. 329, § 105; *Yaşa v. Turkey*, 2 September 1998, § 74, *Reports of Judgments and Decisions* 1998-VI). The Court therefore finds that the first remedy proposed by the Government, namely the filing of an application for a claim for damages within the criminal proceedings, was not capable of providing redress for the applicant's complaint as it was not capable of leading to the identification and punishment of the persons responsible for her husband's death. Moreover, in view of the criminal investigation's conclusion that Mr Šarišký fired the fatal shot, it is unlikely that any claim for damages would have a reasonable prospect of success. The Court therefore finds that the applicant was not required to exhaust this remedy before bringing her application to the Court.

While a motion for further investigation under Article 166 § 1 of the Code of Criminal Procedure may in theory have been capable of providing redress for the applicant's complaint, the Court is not persuaded that in practice it would have constituted an effective remedy for the purposes of Article 35 § 1 of the Convention. By the time the principal investigation was concluded nearly a year had passed since Mr Šarišký's death and, in the absence of any new evidence, it is difficult to see what purpose any further investigation would have served. Only Mr Šarišký and Lt. F. were in the room when the shot was fired. Mr Šarišký had died shortly thereafter and Lt. F. was a suspect who had already given inconsistent and conflicting accounts of the incident. Moreover, Lt. F. committed suicide on 23 January 2001. Important forensic samples had not been taken on the night of the shooting and it is unlikely that any further forensic evidence could have been obtained nearly a year later. The Government have therefore not discharged the burden of proving that in the present case this remedy was accessible, capable of providing redress and offered reasonable prospects of success.

The foregoing considerations are sufficient to enable the Court to conclude that the applicant has exhausted domestic remedies for the purpose of Article 35 § 1 of the Convention. It further notes that the complaints under Article 2 of the Convention are not inadmissible on any other grounds.

The complaints must therefore be declared admissible.

B. Article 3

The applicant complained that her husband was ill-treated in police custody and that the authorities failed to carry out an adequate investigation into that ill-treatment.

Article 3 of the Convention provides as follows:

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

The Government submitted that the alleged ill-treatment did not exceed the minimum level of severity required by Article 3 of the Convention. They therefore submitted that the complaints under Article 3 were manifestly ill-founded.

It is clear that the applicant’s husband died as a result of serious injuries sustained in police custody. There were no independent eyewitnesses to the incident and conflicting accounts were given by the applicant’s husband and Lt. F. The Court therefore considers that serious issues arise requiring examination on the merits. It follows that this part of the application cannot be rejected as manifestly ill-founded pursuant to Article 35 § 3 of the Convention, nor is any other ground of inadmissibility made out.

The complaint must therefore be declared admissible.

C. Article 13

The applicant complained that she had not had an effective remedy within the meaning of Article 13 of the Convention.

Article 13 of the Convention provides as follows:

“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.”

In particular, she submitted first, that the authorities failed to carry out a competent and thorough investigation of the violation of Article 2, which constituted a separate and independent violation of her right to an effective remedy. Secondly, the applicant submitted that under Slovak law, no effective remedy existed in the event that the prosecution and investigation authorities did not fulfil their responsibility to carry out a thorough and effective investigation of alleged violations of rights protected by the Convention.

The Government submitted that the applicant’s complaints under Article 13 of the Convention were manifestly ill-founded as an effective investigation was conducted following her husband’s death in police custody.

The Government submitted first, that the investigation into the death of Mr Šarišský was effective and the applicant therefore had an effective remedy in respect of the violation of Article 2. Secondly, they submitted that an effective remedy existed in the event that prosecution and investigation authorities did not fulfil their responsibility to carry out a thorough and effective investigation. In particular, they submitted that the Prosecutor’s Office supervised whether investigators and police officers complied with their duties and issued binding instructions concerning the

investigation of criminal offences. Moreover, a victim in criminal proceedings had the right to ask the Prosecutor to eliminate any delays or errors in the conduct of the investigation (Article 167 of the Code of Criminal Procedure), comment on all evidence taken and file motions concerning evidence (Article 43 of the Code of Criminal Procedure), and file motions asking for further investigation (Article 166 § 1 of the Code of Criminal Procedure).

The Court has found that the applicant's complaints under Articles 2 and 3 of the Convention are arguable. The Court therefore considers that the complaints under Article 13, read together with Articles 2 and 3, require examination on the merits. It follows that this part of the application cannot be rejected as manifestly ill-founded pursuant to Article 35 § 3 of the Convention, nor is any other ground of inadmissibility made out.

D. Article 14

The applicant complained that her rights, and the rights of her deceased husband, under Articles 2, 3 and 13 of the Convention were violated in conjunction with Article 14 on grounds of ethnic origin.

Article 14 provides as follows:

“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.”

In particular, the applicant submitted her husband's death and ill-treatment at the hands of the police, and the inadequate investigation which followed, were due in substantial part to his Roma ethnicity. She argued that her husband was subjected to significantly harsher treatment by the police than non-Roma criminal suspects. She further submitted that Roma in Slovakia ran an impermissibly high risk of being ill-treated and/or tortured in the hands of Slovak law enforcement organs.

The Government contested that argument. They submitted that there was no evidence to suggest that in the present case Mr Šarišský was subjected to significantly harsher treatment by the police on account of his Roma ethnicity. They argued that the complaint was manifestly ill-founded as there was no evidence that the applicant had experienced any discrimination in her enjoyment of the rights guaranteed by the Convention.

The Court considers that the complaint raises serious issues of law under the Convention which require an examination of the merits. The Court therefore concludes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

It must therefore be declared admissible.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the application.

Fatoş Aracı
Deputy Registrar

Nicolas Bratza
President