



Disregard of legal safeguards and an inadequate investigation into use of pepper spray on prisoner

In today's **Chamber judgment**¹ in the case of [El-Asmar v. Denmark](#) (application no. 27753/19) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 3 (prohibition of inhuman and degrading treatment) of the European Convention on Human Rights as regards the allegation of excessive use of force, and

a further violation of Article 3 concerning the lack of an effective investigation.

The case concerned the applicant's being pepper sprayed by two guards while held in an observational cell in prison in April 2017.

The Court found in particular that the investigation had not carefully addressed whether the legal procedural safeguards for the use of pepper spray had been complied with. It therefore considered that the Danish authorities had failed to carry out an effective investigation into Mr El-Asmar's allegations of ill-treatment. Moreover, several important questions, which could and should have been addressed to show that the use of pepper spray in this case had been "made strictly necessary by the applicant's conduct", had remained unanswered.

A legal summary of this case will be available in the Court's database HUDOC ([link](#)).

Principal facts

The applicant, Abdallah El-Asmar, is a Danish national who was born in 1992 and lives in Aarhus (Denmark).

On 24 March 2017 Mr El-Asmar was arrested and charged with breaching the Weapons and Explosives Act and detained on remand, first in a local prison and then in Enner Mark Prison. After arrival there, he was repeatedly placed in observation and security cells because of his aggressive and threatening behaviour.

On 4 April 2017, while being held in one such observation cell, Mr El-Asmar was pepper sprayed by two prison guards. The prison authorities maintained that the prison staff had had to resort to pepper spray as the applicant had been agitated and aggressive, had shredded his mattress to bits, had urinated on the floor and had lashed out at a prison officer. Mr El-Asmar acknowledged that he had ruined his mattress but maintained that he had been passive when the guards had entered the cell and that, after being sprayed, he had lost consciousness and had been dragged to a security cell.

On 6 April 2017, Mr El-Asmar reported the two prison guards to the police and asked to be seen by a non-prison doctor. A few days later the police asked him to see a prison doctor so that a medical report could be drawn up. Mr El-Asmar refused. On 26 April 2017, he, via his lawyer, made a separate complaint to the Department of Prisons and Probation (*Direktoratet for Kriminalforsorgen*), complaining that he had been exposed to pepper spray, and had subsequently been placed in a security cell, where he had been confined to a restraint bed.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

On 26 January 2018, the police decided not to initiate criminal proceedings against the prison officers. They noted that the reports of events were contradictory; that Mr El-Asmar had refused to be examined by a prison doctor; that there were no video-recordings of the incident, no other witnesses to what had happened in the observation cell and no other evidence which could support one version of events or the other.

The applicant appealed against that decision to the Regional Prosecutor. He maintained that the investigation had been ineffective because: (1) the investigation period had been protracted; (2) the parties involved had not been interviewed until several months after the incident; (3) no video-surveillance footage from the corridors in the prison had been secured; and (4) he had not been attended to by a non-prison doctor. On 16 November 2018, the decision to discontinue the criminal proceedings against the police officers was upheld as the use of force had perhaps been lawful.

Mr El-Asmar's complaints about the investigation had been forwarded to the Management Secretariat of the police on 12 September 2018. A year later, it agreed that the length of the proceedings, seven months from April to November 2017, during which no investigation steps had been carried out, was excessive and regrettable. It dismissed however the remainder of the applicant's procedural complaints, noting that all relevant evidence had been gathered, that the applicant had refused to assist in procuring a medical report, that no video-recording existed and that Mr El-Asmar had not pointed to any other evidence which could and should have been obtained. That decision was upheld after appeal.

Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of inhuman or degrading treatment), Mr El-Asmar complained that excessive force had been used on him in an unlawful manner. The prison guards had immediately resorted to pepper spray, despite his being locked in an observation cell and under their control. Referring to recommendations by bodies such as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the United Nations Committee against Torture (UNCAT), he submitted that pepper spray should never be used in confined spaces. He also contended that the investigation had been ineffective, in that it had been protracted; that the parties involved had not been interviewed promptly after the incident; that he had not been attended to by a doctor from outside the prison; that no video-surveillance footage from the corridors in the prison had been secured; and that only two of the four prison guards involved had been interviewed.

The application was lodged with the European Court of Human Rights on 13 May 2019.

Judgment was given by a Chamber of seven judges, composed as follows:

Gabriele **Kucsko-Stadlmayer** (Austria), *President*,
Tim **Eicke** (the United Kingdom),
Faris **Vehabović** (Bosnia and Herzegovina),
Branko **Lubarda** (Serbia),
Armen **Harutyunyan** (Armenia),
Anja **Seibert-Fohr** (Germany),
Anne Louise **Bormann** (Denmark),

and also Ilse **Freiwirth**, *Deputy Section Registrar*.

Decision of the Court

The Court noted several shortcomings in the investigation. In particular, no assessment had been made as to whether the use of force, in the form of using pepper spray on Mr El-Asmar in the observation cell, had been strictly necessary, nor any attempt to clarify why exactly the prison guards had gone into the cell. It had not been established whether entering the observation cell had been imperative and urgent, had been necessary but not specifically urgent, or whether it had even been necessary at all. The investigation had not looked at whether any risk assessment or preparation had taken place beforehand, or whether the national legal safeguards for the use of pepper spray had been complied with.

In particular, the Court noted that Executive Order no. 296 of 28 March 2017 on the Use of Force against Inmates in Prisons expressly required that a prisoner be warned before pepper spray was used and that he/she be given a chance to obey orders. It also set out that any use of pepper spray had to be recorded in a register, that relief had to be provided for any symptoms caused by it and that the prisoner had to be told of any possibility to appeal. In this case, it was not clear whether the investigation had established that Mr El-Asmar had been offered relief for any symptoms, nor whether the incident had been recorded in a dedicated register and reported to the Prison and Probation Service.

The Court reiterated the concern expressed by international bodies about pepper spray being used by law enforcement in confined spaces, in particular that voiced by the CPT and the UNCAT that pepper spray is a potentially dangerous substance which should not be used in confined spaces and never deployed against a prisoner who has already been brought under control. Moreover, in its 2019 report to the Danish Government ([CPT/Inf \(2019\) 35](#)), the CPT had observed that since its 2014 visit, a number of texts had been adopted or amended to reinforce the safeguards surrounding the use of pepper spray, including that prisoners should receive prior warning that pepper spray would be used if they failed to comply with the instructions of staff. On that basis it recommended that “the necessary steps be taken to guarantee that the texts governing the use of pepper spray are correctly applied ... throughout Denmark’s prisons. It should also be ensured that all cases in which pepper spray is deployed are systematically recorded as such in the establishments concerned and reported (with the sending of a written report) to the Prison and Probation Service”.

In the light of these recommendations, the Court considered that the investigation should have carefully addressed whether the legal procedural safeguards for the use of pepper spray had been complied with. As it had not done so, the Court considered that the Danish authorities had failed to carry out an effective investigation into the applicant’s allegations of ill-treatment. There had, consequently, been a violation of the procedural aspect of Article 3 of the Convention.

At the same time, the Court fully acknowledged the difficulties that States might encounter in maintaining order and discipline in penal institutions. This was particularly so in cases of unruly behaviour by dangerous prisoners, a situation in which it was important to find a balance between the rights of different detainees or between the rights of detainees and the safety of prison officers.

However, the Court noted that the Regional Prosecutor had used the wording that “it could not be ruled out that the use of force had been lawful” and that the investigation had focused on deciding whether or not to bring criminal charges against the prison guards rather than taking a stand on whether there had been a breach of Article 3 of the Convention and whether the use of force had been “made strictly necessary by the applicant’s conduct”, which is the Convention standard for determining such a matter.

The burden of proof had lain with the Government to provide a satisfactory and convincing explanation. However, due to the investigative flaws, several important questions, which could and should have been addressed by the authorities had remained unanswered – in particular whether the prison guards’ actions and, in particular, the use of pepper spray without prior warning, had

been strictly necessary, and whether the operation had been prepared adequately and in compliance with the Executive Order and the recommendations of the CPT.

There had therefore also been a violation of the substantive aspect of Article 3.

[Just satisfaction \(Article 41\)](#)

The Court held that Denmark was to pay the applicant 10,000 euros (EUR) in respect of non-pecuniary damage and EUR 10,000 in respect of costs and expenses.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.