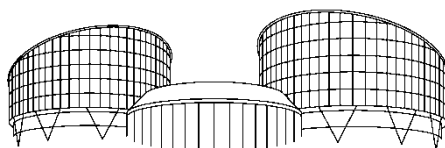


La Corte EDU sui maltrattamenti ingiustificati a danno di un migrante irregolare (CEDU, sez. I, sent. 5 ottobre 2023, ric. n. 37967/18)

La Corte EDU si è pronunciata su un caso di presunti maltrattamenti subiti dal ricorrente, da parte delle forze dell'ordine ungheresi, mentre veniva scortato ed allontanato verso la Serbia a causa del suo ingresso illegale in Ungheria. Egli lamentava peraltro l'inadeguatezza delle indagini svolte, in violazione dell'articolo 3 della Convenzione.

Dopo aver ricordato che, in casi come quello di specie, detta disposizione richiede che sia svolta un'indagine in grado di condurre all'identificazione e – se del caso – alla punizione dei responsabili, per accertare la loro responsabilità per i maltrattamenti in questione, la Corte EDU ha constatato l'assenza assoluta di prove in grado di stabilire o chiarire le circostanze esatte dell'incidente o di verificare se le lesioni del ricorrente fossero compatibili con la sua versione dei fatti. In ragione di ciò, la mancanza di indagini sufficientemente efficaci è stata considerata in contrasto con l'articolo 3 della Convenzione sotto il suo aspetto procedurale. Quanto al suo aspetto sostanziale la stessa disposizione è stata ritenuta ugualmente violata, ancorché le lesioni fisiche riportate dal ricorrente sono apparse assolutamente compatibili con l'uso della forza da parte degli agenti ungheresi. Per la Corte EDU inoltre, e date le circostanze del caso, i maltrattamenti perpetrati a danno migrante non erano necessari rispetto alla sua condotta e di qui la dichiarata violazione dell'articolo 3 della Convenzione.



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

FIRST SECTION

CASE OF XXX v. HUNGARY (No. 2)

(Application no. 37967/18)

JUDGMENT

STRASBOURG

5 October 2023

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 XXX v. Hungary (no. 2),

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

Marko Bošnjak, *President*,

Alena Poláčková,

Lətif Hüseyinov,

Péter Paczolay,

Ivana Jelić,

Erik Wennerström,

Raffaele Sabato, *judges*,

and Liv Tigerstedt, *Deputy Section Registrar*,

Having regard to:

the application (no. 37967/18) against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Pakistani national, XXX (“the applicant”), on 2 August 2018;

the decision to give notice to the Hungarian Government (“the Government”) of the application;

the parties’ observations;

Having deliberated in private on 5 September 2023,

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

INTRODUCTION

1. The case concerns the alleged ill-treatment of the applicant by Hungarian law-enforcement officers. The alleged incident took place in August 2016 while he was being escorted back to the external side of the Hungarian border fence with Serbia, following his apprehension on the grounds of his illegal entry into Hungarian territory. The applicant complained of ill-treatment and the inadequacy of the ensuing criminal investigation, in breach of Article 3 of the Convention.

THE FACTS

2. The applicant was born in XXX. According to information dating from January 2021, he lives in XXX. The applicant was represented by Ms B. Pohárnok, a lawyer practising in Budapest.

3. The Government were represented by their Agent, Mr Z. Tallódi, of the Ministry of Justice.

4. The background to the case may be summarised as follows.

5. In the applicant’s previous case (*Shahzad v. Hungary*, no. 12625/17, 8 July 2021), the Court found violations of Article 4 of Protocol No. 4 to the Convention and of Article 13 of the Convention taken in conjunction with Article 4 of Protocol No. 4 with regard to the applicant’s apprehension and removal to Serbia by Hungarian authorities, without his being identified or his situation examined, and without his being provided effective access to means of legal entry to Hungary.

6. In the present case, the applicant argued that his ill-treatment by the Hungarian police, after being sent back through the Hungarian border gate, and the ineffectiveness of the subsequent criminal investigation into his allegations had resulted in a breach of his rights under Article 3 of

the Convention. The facts of the case relevant for the examination of this new complaint may be summarised as follows.

7. The applicant, while on his way to Europe as an asylum-seeker, arrived at the Hungarian-Serbian border on 11 August 2016. On the evening of the same day, he crossed the border (in the company of eleven other Pakistani men) by cutting the border fence. After walking for approximately eight hours inland, at around 11 a.m. on 12 August 2016 they were intercepted by Hungarian police officers. In the course of the ensuing police action, the officers took photographs of each member of the group, checked their clothes and luggage, and recorded the International Mobile Equipment Identity (IMEI) numbers of their mobile phones.

8. At about 2.20 p.m. the apprehended men were transported by a police van to the nearest gate at the border fence, where several police and military officers were already waiting for them. When they arrived at the gate, the members of the group were lined up by the van. The subsequent events were video-recorded by one of the police officers standing nearby.

9. The footage shows the applicant and the eleven other men standing in front of a van. The applicant is reading a document. Once he finishes reading, a police officer takes the sheet of paper away from him, while someone else is heard saying "understand" and a few seconds later "go". Then the applicant and the eleven other men go through a gate in the border fence, one by one. On the other (external) side of the fence eight police officers can be seen, surrounding the group as they arrive. One of the officers can be heard ordering the men to sit down after crossing the fence. The video-recording suddenly stops when the last man passes the border gate and sits down on the ground. Towards the end of the recording, one of the police officers is seen pointing at the group and some of the officers can be heard discussing in Hungarian the following: "Look, those two who ... the first two ... which one? ... That one, and the bald one, and this one, we take them out."

10. According to the applicant, when all of them were sitting on the ground, the police officers started beating them up. The applicant was allegedly hit on the head with a metal rod and lost consciousness momentarily. When he came to, he was punched, kicked and beaten with batons and a metal rod by two police officers. Once the beatings were over, the applicant and the other migrants were ordered to run towards Serbia. After running about a hundred metres, the group, who were in pain and were bleeding from their wounds, stopped to rest in a field. According to the applicant, this was when some of the members of the group realised that they had left their belongings (bags and telephones) at the scene of the alleged abuse. The applicant stated that these items had been burnt by the officers. He and his companions took photographs of their injuries, sending them at 4.15 p.m. to one of his acquaintances on Facebook messenger. The photograph of the applicant, wearing the same clothes as he had worn during the police action (as evident in the photographs and video-recording taken by the police), shows him with injuries to his head.

11. From the field, the applicant and his companions went to the One Stop Centre for Migrants in Subotica, near the Serbian border with Hungary. Owing to his injuries, an ambulance took the applicant to the local hospital. A medical report was drawn up at 9.14 p.m., which noted two wounds measuring 10 cm and 4 cm in length on the applicant's head, as well as bleeding and sore bruises all over his body. His injuries required stitches.

12. Later, at 11.30 p.m., the applicant – among other members of the group – gave a statement at the Serbian Subotica police department about what had happened. The transcript of his testimony included a statement referencing the burning of their belongings.
13. After an extended stay in Serbia, the applicant eventually returned to Pakistan at the end of 2016.
14. On 18 October 2016 the applicant's representative lodged a criminal complaint against unknown police officers, alleging ill-treatment committed in the course of official proceedings (*bántalmazás hivatalos eljárásban*), an offence under Article 301 §§ 1 and 2 of Act no. C of 2012 on the Criminal Code. In his complaint, the applicant gave an account of the circumstances of the police action and the incident. He submitted that one of the police officers had a dog with him while another had three stars on his epaulette, whose identity number he remembered was 40052.
15. A criminal investigation was opened on 24 October 2016 by the Szeged Directorate of the Central Investigative Prosecutor's Office.
16. On 2 November 2016 the Kelebia branch office of the Border Control Service of the Bács-Kiskun County police headquarters informed the prosecutor that badge no. 40052 and the related patches had been turned in on 16 February 2014 and stored locked away in a cupboard ever since.
17. On 30 November 2016 the prosecutor requested the head of the Border Control Service of the Bács-Kiskun County police headquarters to share records of all apprehension and escort measures that had taken place on 12 August 2016. On 13 December 2016 the Service confirmed that on 12 August 2016, at around 11 a.m., twelve Pakistani nationals had been intercepted near Katymár. It was further reported that on the same day, at 3.25 p.m., the apprehended men had been returned to Serbian territory through a gate on the temporary security border fence without any coercive measures being used. Police reports which were drawn up on the day of the incident were attached to the statement, as supporting documents.
18. Subsequently, the investigative authority obtained the video-recording of the applicant being escorted by the police and a Hungarian translation of the applicant's medical report from the Serbian language.
19. On 6 and 10 January 2017 seven border control officers belonging to the Hungarian Bácsbokod and Bácsalmás Border Control Offices, who had participated in the applicant's apprehension, were questioned as witnesses in the case. Three of them had accompanied the group to the border gate as well.
20. Concerning the escort measure, Police Officer T.H. stated that he had been driving a car ahead of the van transporting the group to the border gate. They had asked for reinforcement and some officers had already been waiting for them when they had arrived at the border fence. He had been the one who had made the video-recording of the escort measure. When the gate had been opened, the members of the group had gone through it one by one. He remembered that a few colleagues had been standing on the other side of the fence. Once the migrants had reached the other side, he had stopped the recording and had gone to the car and reported by radio to his superior that the return had been carried out. He had then gone back to his colleagues but had not seen anybody remaining on the other side of the fence and assaulting the migrants. The migrants had disappeared into the bushes on the Serbian side within minutes, thus he considered it impossible that anyone would have hurt them.

21. According to his witness testimony, Police Officer T.M. had been patrolling with two Slovak police officers who were there in the framework of international police cooperation. They had joined the police action following the group's apprehension in a cornfield and they also accompanied them to the border fence. T.M. stated that once he had taken away the Urdu document from the applicant, he had left the scene with the Slovak officers, and thus they had not seen how the migrants had been escorted through the gate. He denied seeing anyone hurting the migrants nor had he heard any use of violence. The day after the incident, he was called in to write up a report about the apprehension and escort measure as a result of such allegations being made by Serbian police through the relevant contact point.

22. In his testimony, Police Officer I.Cs. gave a similar account of events. He had also left the scene before the group of migrants had been escorted through the gate and had only learnt of the allegations of abuse the subsequent day, as he had been asked to write a report as well.

23. Two police officers specifically mentioned that the purpose of photographing and video-recording the illegal migrants had been to protect themselves from unfounded allegations of ill-treatment.

24. On 7 February 2017 a further six police officers were questioned as witnesses. They belonged to the Siklós police headquarters in Baranya County. On the day of the incident, they had been commanded to the border gate in question, to secure the escort measure. Police Officer Z.K., who was the sector commander, testified that they had checked that none of the migrants had any injuries. He had then gone to the other side of the border fence with his colleagues, where they formed a corridor. They waited for the whole group to pass through the gate; when everyone had reached the external side of the fence, they made the group proceed towards Serbia. He had given the command to order the migrants to sit down out of considerations for safety. He explained that a seated person could not move that easily, run away or attack a police officer next to him. He denied hurting the migrants. The other five police officers had the same recollection of the events and all of them denied using any force. Nor had they seen that anyone else had hurt them. Police Officer Z.Sz. further remarked that the whole escorting operation had lasted five or ten minutes. Police Officer D.H. explained that the purpose of ordering the people to sit down was to prevent them from pulling the police defence apart and trying to cross the fence at various points simultaneously. Police Officer P.S. gave similar reasons for that tactic.

25. On 22 February 2017 the applicant's representative submitted several requests to obtain further evidence.

26. Among others, she requested that the prosecutor's office seek information from the Bács-Kiskun County police headquarters and the Slovakian police force concerning the IMEI number of the applicant's telephone and whether any GPS data had been recorded as to the position and movement of the police van and other vehicles present near the border gate. She also requested the investigative authority to contact the Serbian mobile network provider *mts* to obtain information about the positioning of the applicant's telephone with the help of its IMEI number. In her view, any comparison of the above data would have been essential to clarify how long the individuals involved in the alleged incident had been present next to the gate, at the likely location of the ill-treatment.

27. Furthermore, the representative also requested the investigative authority to obtain the applicant's statement, as recorded by the Serbian police, and various internal documents about the police escort.

28. Lastly, she also brought to the attention of the authorities the contradictions in Police Officer T.H.'s testimony as regards the end of the escort operation. According to her, T.H.'s statement – namely that the migrants had disappeared in the bushes within a matter of a few minutes – was not supported by the video-recording, which ends when the migrants are still sitting on the ground, encircled by police officers. In her view it was highly unrealistic that following that, the migrants would have disappeared in the bushes within a matter of minutes. She therefore requested that T.H. be questioned again with a view to clarifying that contradiction.

29. All but two of the applicant's lawyer's requests were dismissed on 7 March 2017. The investigative authority agreed to establish the place of the offence by means of GPS coordinates and to obtain the statement made by the applicant to the Subotica police department. However, it found that it was not necessary to obtain GPS data pertaining to the police vehicles or mobile information concerning the applicant's or the officers' mobile phones, as no evidence could be expected from a comparison of such data that might have been used to prove the offence in question. Data from an analysis of mobile information could have been used to determine the approximate location of the individuals alleged to have been involved in the offence, but according to the prosecutor's office no doubt had arisen in that connection. The same applied to the request to contact the Serbian mobile network provider, which would also have led to the investigation becoming unnecessarily protracted.

30. On 23 March 2017 the investigation was terminated, as the commission of a crime could not be established on the basis of the information gathered. Reiterating the content of the police officers' witness testimonies and the applicant's criminal complaint, the prosecutor's office found that it could not be established beyond reasonable doubt that any force had been used against the applicant during the police action. The prosecutor noted that the applicant's testimony given at the Serbian Subotica police department and his criminal complaint submitted to the Hungarian prosecutor's office contained several contradictions. In particular, his allegation in his police testimony about the seizure and burning of his personal belongings contradicted the fact that he later took photographs of his injuries with his mobile phone. The prosecutor's office thus concluded that as the discrepancies in the applicant's statements could not be resolved in his absence, the investigation had to be terminated.

31. On 11 April 2017 the applicant's lawyer lodged a complaint, requesting the continuation of the proceedings. She submitted that the authority had failed to fully clarify the circumstances of the case. In particular, it had failed to establish the geolocation of the victim and the police officers during the police measure, to establish the identity of the other migrants in the group and to interview them or to obtain a copy of T.H.'s report furnished to the service commander by radio. The applicant's legal representative reiterated her earlier requests, that had been rejected, for the admission of evidence (see paragraphs 26, 27 and 28 above) and made a few new requests. She provided the applicant's contact details to the authorities and requested that he – who had meanwhile returned to Pakistan – be questioned and an identification parade be held. She also pointed to a few contradictions in the witness testimony of Police Officers T.M. and T.H. and thus

requested their repeated questioning, as well as questioning of the two Slovak police officers. Lastly, she found it necessary to bring in an expert to review the Serbian medical report in order to establish the nature of the applicant's injuries and how they had been caused.

32. On 21 April 2017 the prosecutor's office decided in favour of the continuation of the investigation in order to obtain the witness testimony of the applicant through international legal assistance.

33. Thereafter, the prosecutor's office sent a request to the Slovakian regional prosecutor's office in Košice for the two Slovak police officers to be questioned through international legal assistance.

34. The two police officers were interviewed on 12 and 18 September 2017. They gave a very similar account of events. They both stated that they had been present only until the migrants went through the gate, as at that point they had returned to service, as ordered. While they had been present, the migrants had not suffered any abuse. In fact, during their assignment abroad they had never once seen the Hungarian police assaulting migrants.

35. In addition, one of them, Police Officer J.K., testified that there had been no Serbian police officers present on the other side of the fence. Once they had reached the other side, the migrants had sat down in order to wait for each other. He said that, as a general rule, Hungarian police would wait for the migrants to advance about a hundred metres into Serbian territory, preventing them from returning back. In his opinion, the assault might have taken place on the Serbian side of the border, as to his knowledge a fight had broken out between the migrants themselves or between the Serbian police and the migrants.

36. On 20 November 2017 the investigation was terminated again since the commission of a crime could not be established and there was no prospect of any other results. The prosecutor's office found that no evidence substantiating beyond all reasonable doubt the applicant's allegations of ill-treatment could be obtained. It reiterated its previous argument about the applicant's contradictory statements (see paragraph 30 above) and that those contradictions could not be resolved in his absence. At the same time, it rejected the representative's request for testimony to be taken from the applicant as, in its view, no evidence capable of leading to the indication of a reasonable suspicion of a criminal offence against a specific person could have been expected from his testimony.

37. On 13 December 2017 the applicant's representative submitted a complaint against this decision. She maintained her objections already filed against the first termination and her requests for the admission of evidence made on 11 April 2017 (see paragraph 31 above). She further requested that J.K. be interviewed again to clarify the source of his statement about the fight that had taken place among the migrants or between the migrants and the Serbian police.

38. The applicant's complaint was rejected as unfounded by the Attorney General's Office on 9 February 2018. It found that the prosecutor's office had fully explored the facts and had given detailed and well-grounded reasons as to why it was not possible to prove beyond reasonable doubt that Hungarian police officers had ill-treated the applicant. Even though, in the light of the medical and photographic evidence, it was not in dispute that he had suffered physical injuries, it could not be established either – to the extent necessary for indictment – that these injuries had been inflicted by Hungarian police officers and not by someone else. It noted that the applicant's legal representative did not rely on any new fact, circumstance or evidence that had not been

already examined or dealt with by the prosecutor's office. As regards the proposed further investigative measures, it stated that they would have been futile and would have resulted in the proceedings being unnecessarily protracted.

RELEVANT LEGAL FRAMEWORK

I. RELEVANT DOMESTIC LAW

39. Act no. C of 2012 on the Criminal Code provides:

Article 164

“(1) Any person who causes bodily harm to or injures the health of another person is guilty of battery.

(2) If the injury or illness caused by battery takes less than eight days to heal, the perpetrator is guilty of the misdemeanour of simple battery punishable by a term of imprisonment not exceeding two years.”

Article 301

“(1) Any public official who physically abuses another person in the course of official proceedings shall be guilty of a serious offence punishable by imprisonment of between one and five years.”

II. RELEVANT COUNCIL OF EUROPE MATERIAL AND REPORTS OF INTERNATIONAL BODIES

40. The relevant international and Council of Europe material on police ethics and the treatment of migrants arriving at the Hungarian border is outlined in *Alhowais v. Hungary* (no. 59435/17, §§ 51-55, 2 February 2023). The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the Commissioner for Human Rights of the Council of Europe, the UN Human Rights Committee and the UN Committee on the Elimination of Racial Discrimination noted with concern the repeated and consistent allegations of excessive use of force and violence – including kicks, punches and baton blows to various parts of the body – by the Hungarian police during forcible removals.

41. In addition, besides the findings cited in *Alhowais* (cited above, § 52), the following observations are also relevant from the Report to the Hungarian Government on the visit to Hungary carried out by the CPT between 20 and 26 October 2017, adopted on 18 September 2018 (CPT/Inf (2018) 42):

“16. According to the Hungarian authorities, a procedure has been put in place in order to prevent instances of ill-treatment and to protect police officers against false allegations of ill-treatment. This is that, prior to being escorted through the border fence, every foreign national should be photographed and allocated a unique number, every transfer should be video-recorded and a written record should be kept of it.

However, the examination of a considerable number of such records at the Csongrád County Border Police Division in Szeged revealed a striking discrepancy between theory and practice. All the records seen by the delegation were incomplete. In particular, the names and personal data of the persons concerned were not recorded at all. In a number of cases, one single form was completed for a whole group of persons being escorted through the border fence (as opposed to individual records for each person).

...

In the light of the above, the CPT considers that the system currently in place cannot be regarded as an effective tool to prevent instances of ill-treatment or to protect police officers against any

unfounded allegations of ill-treatment in the context of apprehension and subsequent escort of foreign nationals through the border fence.”

42. During the CPT’s visit to Hungary from 20 to 29 November 2018, “the [delegation] found that nothing had been done since the CPT’s 2017 *ad hoc* visit to put in place effective safeguards to prevent ill-treatment of persons returned by Hungarian police officers through the border fence towards Serbia” (Report to the Hungarian Government on the visit to Hungary carried out by the CPT from 20 to 29 November 2018, adopted on 17 March 2020, CPT/Inf (2020) 8).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

43. The applicant complained, under Article 3 of the Convention, of having been ill-treated by Hungarian police officers after being sent back through the security border fence on 12 August 2016 and of the respondent State’s subsequent failure to conduct an effective official investigation in that regard.

Article 3 of the Convention reads as follows:

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

A. Admissibility

44. The Government contended that the complaint concerning the alleged failure to carry out an effective investigation into the alleged ill-treatment of the applicant was inadmissible as he had failed to exhaust domestic remedies by lodging an action to establish official liability. A criminal complaint against the alleged perpetrators was no substitute for this, as the criminal-law and the civil-law avenues of redress had different objectives.

45. The applicant disagreed. By lodging a criminal complaint, he had availed himself of the only effective remedy capable of providing genuine redress for his grievances in the form of the identification and punishment of those responsible, as opposed to a civil lawsuit which might have merely resulted in an award of damages.

46. The Court reiterates that under Article 35 § 1 of the Convention, it may only deal with an application after all domestic remedies have been exhausted. The obligation to exhaust domestic remedies requires an applicant to make normal use of remedies which are effective, sufficient and accessible in respect of his Convention grievances. To be effective, a remedy must be capable of resolving directly the impugned state of affairs (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004).

47. The Court notes that as regards treatment contrary to Article 3 of the Convention, the filing of a criminal complaint against the police officers concerned is, in Hungary, a generally effective remedy for the purposes of exhaustion under Article 35 § 1 of the Convention (see *Alhowais*, cited above, § 68). It is undisputed by the parties that in the present case the applicant made full use of this criminal-law avenue by pursuing a criminal complaint against unknown police officers, alleging ill-treatment committed in the course of official proceedings along with the offence of battery. Furthermore, in his repeated requests for the admission of evidence and his two complaints against the termination of the criminal investigation, the applicant pointed to all the alleged deficiencies of the investigation. In principle, as a result, a review by the higher

prosecutor's office would have been capable of remedying any potential shortcomings of the investigation (*ibid.*, § 70). The applicant thus brought both his substantive and procedural complaints to the attention of the investigative authorities.

48. As regards the Government's contention that in the event of an investigative shortcoming irreparably compromising the outcome of the investigation, the only effective remedy would be a civil action for damages, the Court notes that it has already dismissed such an objection in previous cases against Hungary involving allegations of use of force by State agents (see, for instance, *Barta v. Hungary*, no. 26137/04, § 46, 10 April 2007; in relation to claims under Article 3, *Alhowais*, cited above, § 71; and in relation to a claim under Article 2, *Oláh v. Hungary* (dec.), no. 56558/00, 14 September 2004). It sees no reason to hold otherwise in the present case. The applicant's complaints cannot therefore be dismissed on the ground that he did not institute civil proceedings for damages against the State. Consequently, the Government's objection must be dismissed.

49. The Court further notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *Procedural aspect of Article 3 of the Convention*

(a) The parties' arguments

(i) *The applicant*

50. The applicant submitted that the investigative authorities had failed to carry out an effective investigation as required by Article 3 of the Convention. In particular, they had failed to take testimony from him, organise an identity parade or a face-to-face confrontation, identify and locate his eleven companions, re-interview the police officers who had made contradictory statements, or obtain an expert report in order to verify the cause of his injuries. They had also failed to secure highly relevant items of evidence, such as GPS data from police vehicles and from the official and private mobile phones of the police officers present at the incident, as well as the IMEI numbers of the migrants' phones which had been recorded at the time. He argued that the inferences drawn from the analyses and comparison of such data could have helped to clarify who had been present at the scene of the alleged incident and for how long following the abrupt termination of the video-recording.

(ii) *The Government*

51. The Government submitted that the criminal investigation carried out by the authorities in the present case had been effective. However, the applicant had left Hungary and had not been available to help clarify the origin of his injuries or to identify the alleged perpetrators. Nor had other witnesses been available. Thus, the testimony of absentee witnesses could not have been used in any criminal trial against the police officers involved in the events. Even though the investigative authority had accommodated all the requests made by the applicant to take further investigative measures, his version of events could not be proven. In the Government's view, it was not the task of the public prosecutor's office to investigate whether the applicant's injuries had in fact been caused by his fellow companions.

(b) The Court's assessment

(i) *General principles*

52. The relevant general principles are summarised in *Bouyid v. Belgium* ([GC], no. 23380/09, §§ 115-23, ECHR 2015) and *El-Masri v. the former Yugoslav Republic of Macedonia* ([GC], no. 39630/09, §§ 182-85, ECHR 2012).

53. The Court reiterates that where an individual makes a credible assertion that he has suffered treatment contrary to Article 3 of the Convention at the hands of the police or other similar authorities, that provision, read in conjunction with the State's general duty under Article 1 of the Convention, requires by implication that there should be an effective official investigation.

54. In particular, such investigation should be capable of leading to the identification and – if appropriate – punishment of those responsible, to ensure their accountability for the ill-treatment in question (see *Bouyid*, cited above, §§ 117 and 119, and *Stevan Petrović v. Serbia*, nos. 6097/16 and 28999/19, § 109, 20 April 2021). 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. They must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony and forensic evidence. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard (see *El-Masri*, cited above, § 183). Lastly, the victim should be able to participate effectively in the investigation in one form or another (*ibid.*, § 185).

(ii) *Application of the above principles to the present case*

55. The Court notes at the outset that the applicant had been summarily removed from Hungary to Serbia, which has resulted in a finding of a violation of Article 4 of Protocol No. 4 in *Shahzad* (cited above, §§ 67-68). It further observes that following his removal to Serbia, the applicant submitted a criminal complaint to the prosecutor's office, in which he stated that during his forced removal he had been punched, kicked and beaten with batons and a metal rod by two police officers on 12 August 2016 (see paragraph 10 above). He supported his allegations by submitting photographs of his injuries taken following his alleged ill-treatment by the Hungarian officers and the Serbian medical report that was drawn up later that day, confirming that he had suffered injuries to his head. In view of the above, the Court considers that he had an arguable claim, prompting the Hungarian authorities to investigate his alleged ill-treatment.

56. Upon receiving the applicant's criminal complaint, the investigative authority launched an investigation against unknown perpetrators. Thus, while the investigation was opened promptly, it remains to be seen if the other criteria referred to above (see paragraph 54) were complied with.

57. The Court observes that the key element in the present case was when and how the applicant had received his injuries and, in particular, whether or not these injuries were inflicted by Hungarian police officers following the applicant's return through the border gate.

58. The Court takes note of the statements made by police officers involved in the applicant's apprehension and removal and by other State authorities in general (see paragraphs 23 and 41 above), according to which every return of foreign nationals through the border fence is supposed to be video-recorded in order to protect police officers against false allegations of ill-treatment. In the present case, however, the video-recording stops when the last man passes through the border gate and the rest of the group is sitting on the ground, surrounded by the police officers. Therefore,

no video footage recorded the entirety of the measures taken by the Hungarian police, including when and how they ordered the members of the group to stand up and leave the area. The fact that the video-recording ends abruptly while the police operation is still ongoing sits uncomfortably with the declared purpose of the recording and had, moreover, not been addressed in the investigation. It is particularly striking that the investigative authority did not question T.H. – the officer who had recorded the return – in this regard.

59. In the absence of video footage that would be capable of disproving the occurrence of any ill-treatment, other viable means of the investigative authorities to obtain more information on this element could have been either the collection of further evidence that had the potential to establish or clarify the exact circumstances of the incident or the procurement of further testimony from individuals who were present during the incident.

60. As regards the collection of evidence, the Court is satisfied that the prosecutor's office secured copies of the police reports drawn up concerning the escort measure and arranged for the translation of the applicant's statement to the Serbian police and the medical reports of his examination in Subotica Hospital. However, no forensic expert opinion was commissioned to verify whether the applicant's injuries were compatible with his version of events. Furthermore, the applicant has repeatedly requested that certain investigative measures be taken for establishing his geolocation, as well as that of his companions and of the alleged perpetrators during the critical time frame between the start of the escort measure at 3.25 p.m. and the recording of the applicant's injuries at 4.15 p.m. The investigative authorities rejected all requests for the admission of evidence to this end as unnecessary and unsuitable as proof of the commission of the crime in question (see paragraph 29 above). In the absence of any explanation for their alleged unsuitability in the particular case, the Court cannot endorse this conclusion as in its view such measures might have been capable of shedding light on the question of who had been present at or near to the alleged scene of the incident and for how long.

61. As regards the taking of testimony from witnesses, the Court observes that the prosecutor's office heard fifteen police officers altogether, including two Slovak officers, who had been involved at various points in the police operation. However, neither the applicant nor his companions were heard in person in the course of the proceedings. There is no indication that the domestic authorities tried to locate the applicant or to identify any of the potential witnesses who were removed with him from Hungary. The Court notes that the applicant stayed in Serbia for a couple of months following his removal. Given his particular situation as an irregular migrant (who, once being outside the territory, would find it difficult to remain available for any further medical examination or interview), the investigative authority would have been expected to contact him through his legal representative as soon as possible to locate him. The Court also notes with concern that the investigative authority had an inconsistent approach towards the necessity of the applicant's witness testimony itself: even though, upon the applicant's complaint, the investigative authority decided to continue the investigation with a view to hearing the applicant (see paragraph 32 above), such an interview was not ultimately taken during the relaunched proceedings. The investigative authority justified this omission by arguing that no evidence capable of leading to the indication of a reasonable suspicion of a crime committed by a specific person could have been expected from the applicant's testimony. For the Court, in the absence of

any new development, it remains unclear what gave rise to this change in the authorities' approach. Even though in their observations the Government submitted that in the absence of an international agreement it was doubtful whether Pakistan would have complied with a request for international legal assistance, nothing in the case file indicates that the prosecutor's office considered the applicant's Pakistani residency to have been an impediment to seeking such assistance (see paragraph 32 above). In conclusion, while the Court is mindful of the difficulties that the investigative authorities faced owing to the migrants' removal from Hungary, the fact remains that neither the applicant nor his companions were interviewed during the criminal proceedings.

62. The Court also takes note of the applicant's argument that the prosecutor's office made no genuine effort to clarify certain contradictions in some of the officers' testimonies and refused the applicant's requests in this respect (see paragraphs 28, 31 and 37 above).

63. Therefore, it can be concluded that the investigation was mainly confined to the interviews of the police officers involved in the apprehension and escort measure and to a review of the police records drawn up by the Hungarian and Serbian police officers. As a result, when establishing the facts, the authorities mostly relied on the statements of the alleged perpetrators and other police officers who were not present during the alleged incident. These statements were relied on despite the fact that – while concordant in denying the use of force – they were divergent concerning certain aspects of the police measure (such as who had been present at the border gate and for how long, why the migrants were made to sit down, where they were directed to). At the same time, the authorities questioned the credibility of the applicant's statements, finding them to be contradictory, and concluding that his version of events was not corroborated by evidence that would have proved its veracity beyond reasonable doubt. No explanation has been provided for this somewhat inconsistent approach of the authorities to the assessment of the credibility of the parties' statements (see *Alhowais*, cited above, § 89).

64. In the light of the foregoing, the Court finds that the investigating authorities' failure to interview the applicant, order a forensic medical assessment of his injuries and take all the necessary investigative measures to resolve the factual contradictions and uncertainties with which they were faced rendered the investigation into the applicant's alleged ill-treatment ineffective.

65. In these circumstances, having regard to the lack of a sufficiently effective investigation into the applicant's allegations, the Court holds that there has been a violation of Article 3 of the Convention in its procedural aspect.

2. *Substantive aspect of Article 3 of the Convention*

(a) The parties' arguments

(i) *The applicant*

66. The applicant submitted that Hungarian police officers had punched, kicked and beaten him with batons and a metal rod between 3.25 p.m. and 4.15 p.m. on 12 August 2016, following his return through the border fence. In his view there was ample evidence available – including circumstantial evidence and credible country information on the systematic ill-treatment of migrants subjected to “push-back” measures by the Hungarian police at the border fence – that clearly supported his version of events. It was the Hungarian authorities' duty to disprove, in the

course of the domestic criminal proceedings, the affirmation that his injuries were the result of his ill-treatment by the Hungarian police officers. However, the authorities were unable to prove otherwise. The fact that the Government based their conclusion as to the absence of ill-treatment exclusively on the denial of the potential perpetrators raised doubts about the well-foundedness of such a conclusion. Lastly, the applicant contended that the Government's alternative explanations for the causes of his injuries were wholly unsubstantiated and had not even been raised in the course of the domestic proceedings.

(ii) *The Government*

67. The Government submitted that there was no evidence proving the allegations that the applicant's injuries had been caused by the Hungarian authorities. All witnesses had denied the allegations of ill-treatment. In the Government's view, between the time of the applicant's and his companions' return through the border gate and their statements made to the Serbian authorities, sufficient time had elapsed for them to have sustained their physical injuries in other ways. The Government found several alternative scenarios plausible. Since it had been the applicant who had had the most severe injuries among the members of the group, the Government found it reasonably feasible that he was part of a human-trafficking organisation and that his companions had turned against him and had beaten him up following the unsuccessful transit attempt through Hungary. Alternatively, they could also have agreed that it was in all of their interests to report the injuries as having been caused by the Hungarian authorities, which could have explained why they made identical statements to the Serbian police about their ill-treatment and the burning of their belongings, including their telephones and money.

(b) *The Court's assessment*

(i) *General principles*

68. The relevant general principles are summarised in *Bouyid* (cited above, §§ 81-90 and 101).

69. In order for ill-treatment to fall within the scope of Article 3, it must attain a minimum level of severity, which usually involves actual bodily injury or intense physical or mental suffering (*ibid.*, §§ 86-87). However, where an individual is deprived of his or her liberty or, more generally, is confronted with law-enforcement officers, any recourse to physical force which has not been made strictly necessary by the person's conduct diminishes human dignity and is an infringement of the right set forth in Article 3 of the Convention (*ibid.*, §§ 88 and 101).

70. Allegations of ill-treatment contrary to Article 3 must be supported by appropriate evidence. To assess this evidence, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (*ibid.*, § 82). Where the events at issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of individuals within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. The burden of proof is then on the Government to provide a satisfactory and convincing explanation by producing evidence establishing facts which cast doubt on the account of events given by the victim, while in the absence of such explanation the Court can draw inferences which may be unfavourable for the Government (*ibid.*, § 83).

71. In order to benefit from the presumption of fact in respect of injuries occurring during their detention, individuals claiming to be the victims of a violation of Article 3 of the Convention must

demonstrate that they display traces of ill-treatment after being under the control of the police or a similar authority. Many of the cases which the Court has dealt with show that such persons usually provide medical certificates for that purpose, describing injuries or traces of blows, to which the Court attaches substantial evidential weight (*ibid.*, § 92).

(ii) *Application of the above principles to the present case*

72. The Court notes that in the present case the applicant showed signs of physical injuries following his contact with the Hungarian police officers. While at the beginning of the removal measure the applicant was apparently unhurt, fifty minutes later he was bleeding from the injuries he had sustained, as supported by photographic evidence. Furthermore, a medical certificate issued a few hours after the alleged incident recorded two wounds measuring 10 cm and 4 cm in length on the applicant's head, as well as bleeding and bruises all over his body.

73. The Court further takes note of the findings of the above-cited materials of United Nations and Council of Europe bodies, reporting a series of cases of physical violence alleged to have taken place during "push-back" operations near the Serbian border (see paragraph 40 above).

74. The Court also notes with regret the fact that the video-recording, which was supposed to serve as evidence against all unfounded allegations of ill-treatment, had stopped before the applicant and his companions were released while under the Hungarian police officers' control (see paragraphs 9 and 58 above). This premature ending of the recording – together with the officers' conversation at the end of the video about "taking out" some members of the group – raises concerns about how the police measure ended.

75. In the light of the above evidence, the reports of international human rights bodies (see paragraphs 40, 41 and 42) and the specific circumstances of the case, the Court considers that a sufficiently strong presumption arises as to the fact that the applicant's injuries had in fact been caused by the acts of the Hungarian police officers securing the escort measure, bearing in mind that no one else was present at the scene of the alleged incident at the relevant time.

76. In such circumstances the burden of proof was on the Government to provide an alternative explanation as to how and when the injuries of the applicant were sustained (see *Bouyid*, cited above, § 83).

77. The Court is not persuaded however by the Government's contention that the applicant's injuries could have been inflicted upon him after he had left the border fence area, as a result of being beaten either by the other members of the group or by the Serbian police. The Court notes that the applicant's injuries were documented shortly after his release. There is no indication that there was any discord between the members of the group. Nor is there any indication that the applicant and his companions came into contact with the Serbian police until 4.15 p.m. – by which time he was already injured. In principle, nothing would have prevented the applicant and his companions from filing a criminal complaint against Serbian police officers; yet no such complaint was filed. As the Government's explanations are not supported by any fact or evidence, they remain mere conjecture (see, *mutatis mutandis*, *Balogh*, cited above, § 48).

78. The foregoing considerations are sufficient to enable the Court to conclude that the authorities have not provided any plausible explanation as to the cause of the applicant's injuries. Thus, the Government have not satisfactorily established that the applicant's injuries were caused by anything other than the treatment alleged by the applicant.

79. As to whether the use of force against the applicant was rendered strictly necessary by his conduct, the Court observes that nothing in the circumstances of the case or in the case file indicates that the use of force was necessary at all.

80. Accordingly, the Court finds that the applicant has been subjected to ill-treatment prohibited by Article 3 of the Convention, and that there has been a violation of that provision in its substantive aspect.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

81. 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

82. The applicant claimed 26,000 euros (EUR) in respect of non-pecuniary damage.

83. The Government contested his claim as being excessive.

84. Ruling on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant EUR 20,000, plus any tax that may be chargeable on that amount.

B. Costs and expenses

85. The applicant also claimed EUR 7,800 for the costs and expenses incurred before the Court. This sum corresponds to 52 hours of legal work billable by his lawyer at an hourly rate of EUR 150.

86. The Government contested this claim as excessive.

87. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award EUR 5,000 under this head.

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 in its procedural aspect;
3. *Holds* that there has been a violation of Article 3 of the Convention in its substantive aspect;
4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

- (i) EUR 20,000 (twenty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
- (ii) EUR 5,000 (five thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses*, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 5 October 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Liv Tigerstedt Deputy Registrar

Marko Bošnjak President