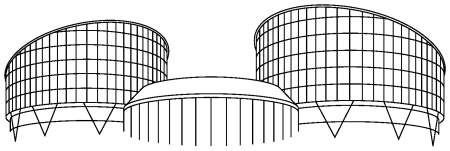

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF HAÁSZ AND SZABÓ v. HUNGARY

(Application nos. 11327/14 and 11613/14)

JUDGMENT

STRASBOURG

13 October 2015

FINAL

13/01/2016

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

In the case of Haász and Szabó v. Hungary,

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

Işıl Karakaş, *President,*
András Sajó,
Nebojša Vučinić,
Helen Keller,
Paul Lemmens,
Robert Spano,
Jon Fridrik Kjølbro, *judges,*
and Abel Campos, *Deputy Section Registrar,*

Having deliberated in private on 30 June and 8 September 2015,

Delivers the following judgment, which was adopted on the last mentioned date:

PROCEDURE

1. The case originated in two applications (nos. 11327/14 and 11613/14) against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Hungarian nationals, Ms Éva Haász and Ms Gabriella Szabó ("the applicants"), on 29 January 2014 and 20 March 2014, respectively .

2. The applicants were represented by Mr G. Szabó, a lawyer practising in Göd. The Hungarian Government ("the Government") were represented by Mr Z. Tallódi, Agent, Ministry of Justice.

3. The applicants complained, in particular, under Article 2 of the Convention about the excessive use of potentially lethal force against them by a police officer and the absence of an effective investigation into the event by the domestic authorities.

4. On 15 May 2014 and 29 August 2014, respectively, the complaints concerning Article 2 of the Convention were communicated to the Government and the remainder of the applications was declared inadmissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant was born in 1981 and lives in Siófok. The second applicant was born in 1995 and lives in Lepsény.

A. The incident of 6-7 August 2012

6. On 6 August 2012 the applicants were on an excursion to Lake Balaton. In the evening, they decided not to return home, but to spend the night in their car, a Fiat Punto, parked in a car park next to a pizzeria in Zánka. Waking up, they noticed that a car was passing by theirs, coming back and forth several times. They found this frightening and drove on to the village of Tagyon, where they stopped their car in the parking lot of a private house.

7. At the same time, around 3.05 a.m., an unknown person telephoned Mr S., a volunteer law enforcer, to tell him about a Fiat Punto suspiciously moving around in the neighbourhood, near a local grocery store. Mr S. informed off-duty police officer K., who was serving with the Balatonfüred Police Department.

8. Subsequently, officer K., driving his private car and taking a self-defence pistol, went to inspect the grocery store, together with Mr S. Not having found any trace of a criminal offence, they notified the duty officer of Balatonfüred Police Department about the sighting of the suspicious car. They were informed about the identity of the owner of the Fiat Punto, following which they continued to look for the vehicle in the surrounding area.

9. At about 3.30 a.m., they noticed the Fiat Punto parked in front of a private house. Officer K. stopped his vehicle, a black Ford Mondeo, perpendicularly to the applicants' car, about a metre away. Both officer K. and the volunteer law enforcer started to run towards the applicants' car, approaching from the back. The police officer shouted: "Police! Get out!" and held up his police identification card.

10. Ms Haász, sitting at the steering wheel, only noticed two people getting out of a dark civilian car and running towards them in civilian clothes. Finding this frightening, she attempted to drive away, forcing the garden gate of the adjacent property and driving into its yard. Inside the garden, the dimensions of which were 67 x 17.6 metres, and noticing that there was no other way to exit, she turned the car around and drove back towards the gate.

11. When the car was on its way out, officer K. waved at the car shouting "Police! Stop!" and fired a warning shot. As it appears from the case file, at this time Mr S. was standing in front of the police officer's car,

rather than in the prospective way of the applicants' car. When the car passed officer K., he shot twice more, at the car. The first shot was fired downwards from about 6 metres' distance, hitting the mudguard of the car on the left side at the level of the lights. The other shot was fired from about 4-4.5 metres following a downward trajectory. It went through the rear window, which fell into the car, missed the head of Ms Szabó by 5-10 centimetres and then went through the window of the right front door.

12. Ms Haász continued to drive, trying to leave the garden by passing around the police officer's car to the left. She finally hit the officer's car at its right side, at the passenger front door. At this moment Mr S. was standing next to the police officer's car, at its left side, next to the open driver's door.

13. Officer K. again called on the applicants to get out of the car, which they did. He put his gun away, presenting his police ID. Since the two men wore plain clothes and neither they nor their car had any police signs, the applicants realised that officer K. was a police officer and his associate a volunteer law enforcer only at this point in time.

Thereupon it became clear that the incident was based on a misunderstanding, since the applicants had only been frightened but had had no intention whatsoever of countering a police measure.

B. Investigation into the incident

14. Subsequently the Veszprém District Investigating Prosecutor's Office (*Veszprémi Nyomozó Ügyészség*) initiated proceedings against officer K. on charges of attempted manslaughter (the charge being later on re-characterised as intentional endangerment committed by a public official). The applicants were questioned several times as witnesses, and a confrontation took place. Other witnesses were also heard and the opinion of a forensic firearms expert was obtained.

15. Simultaneously, officer K.'s superior, the Head of Balatonfüred Police Department, investigated the use of a firearm by officer K. He found that the officer had had no intention of endangering human life – his purpose had been to halt the applicants' car, which had represented a danger for him and his associate – but that the officer's action, although not criminal, had been unprofessional. According to the superior's internal report, following a first warning shot, a second, intentional shot had been directed at the car, while the third one had been accidental, endangering the life of Ms Szabó. The supervisor initiated disciplinary proceedings, which were suspended pending the criminal proceedings.

16. The applicants also lodged a complaint formally challenging the lawfulness of the police measures with the Balatonfüred Police Department. These proceedings were suspended on 8 October 2012 pending the outcome of the criminal investigation.

17. On 3 July 2013 the Veszprém District Investigating Prosecutor's Office discontinued the investigation. It found that officer K.'s use of firearms was lawful in the face of the danger represented by the conduct of the applicants, namely driving, at a speed of 14-16 km/h, in the direction of his associate.

The Prosecutor's Office accepted officer K.'s statements, according to which he had given a warning before shooting and had first shot on perceiving a danger to the life of his associate. It also accepted the police officer's account of the events, namely that at the material time he could believe that his associate was standing between his car and the car of the applicants, which was approaching rather fast. Nonetheless, relying on the evidence furnished by a ballistic expert, the Prosecutor's Office dismissed officer K.'s statement that the second shot following the warning had been accidental.

The decision also relied on the report of the Chief of the Balatonfüred Police Department stating that officer K.'s conduct had been unprofessional as regards the second shot fired at the applicants' car.

The applicants' lawyer filed a complaint against the discontinuation.

18. On 22 July 2013 the Veszprém County Public Prosecutor's Office (*Veszprém Megyei Főügyészség*) dismissed the complaint, holding that the danger caused by the applicants had directly concerned the life and limb of officer K.'s associate. Relying on section 56 (2) of the Act on the Police, the Prosecutor's Office found that the risk that the associate might be hit by their car had justified the shots by officer K. even if they had not been preceded by the requisite procedure, in particular a warning about the use of firearms, since any delay caused by the warning could have compromised the success of the measure. According to the decision, the applicants' behaviour had constituted a direct threat to the life and limb of both Mr S. and officer K.

The applicants were informed that the complaint had been dismissed under section 199 (2) point b) of the Criminal Procedure Code and that they had the possibility of filing a motion for prosecution, acting as substitute private prosecutors, under sections 229-230 of the Criminal Procedure Code.

The decision was served on the applicants on 29 July 2013.

19. On 15 August 2013 the Veszprém County Public Prosecutor's Office rejected the applicants' renewed complaint. The County Public Prosecutor's Office informed the applicants that the prosecution authorities would not deal with any further complaint unless it disclosed relevant new facts.

In a letter of 27 June 2014 the Attorney General's Office informed the applicants that there was no legal ground to quash the decisions on the discontinuation of the investigation in respect of officer K.

20. Meanwhile, on 14 October 2013 the Head of Balatonfüred Police Department dismissed, in its resumed proceedings (see paragraph 16

above), the applicants' complaint about the actions of officer K. He concluded that although the latter's conduct had been unprofessional because of the way he had halted the applicants' car and the use of a self-defence pistol rather than a service pistol, it had not been unlawful. The applicants' appeal was dismissed by the Veszprém County Chief Police Department on 19 December 2013.

Since the incident, the applicants have been suffering from psychological troubles.

II. RELEVANT DOMESTIC LAW

21. Act no. XXXIV on the Police provides:

Section 15

"(1) A police measure shall not cause damage which is manifestly disproportionate to the legitimate aim of the measure.

(2) Should several police measures or means of coercion be available, the one which causes the least restriction, injury or damage to the affected person shall be chosen, while securing efficiency."

Section 54

"(1) A police officer may use a firearm for:

a) averting a direct threat to or attack on the life of another person;

b) averting a direct attack gravely endangering limb;

...

k) averting an attack against his own life, limb or personal freedom."

Section 56

"(1) Any discharging of a firearm shall be preceded, in the order of listing, by

a) instructing the person concerned to comply with the police measure;

b) applying other means of coercion;

c) warning that a firearm will be discharged;

d) a warning shot.

(2) The measures preceding the discharging of a firearm may be partly or fully set aside if, under the circumstances of the case, there is no time for the preceding measures and the delay directly endangers the success of the measure or the life or limb of the police officer or any third person."

22. Act no. XIX of 1998 on the Code of Criminal Procedure provides:

Title III – Conduct of the investigation

Discontinuation of the investigation

Section 190 (1)

"The public prosecutor shall, by a decision, discontinue the investigation:

a) if the action does not constitute a criminal offence,

b) if, on the basis of the results of the investigation, the commission of a criminal offence cannot be established and no result can be expected from the continuation of the procedure,

c) if the criminal offence was not committed by the suspect, or on the basis of the results of the investigation it cannot be established whether or not the criminal offence was committed by the suspect,

d) if a ground excluding imposition of punishment occurs, unless it appears necessary to order involuntary treatment in a mental institution,

e) due to the death of the suspect, lapse of time or pardon,

f) due to other statutory grounds eliminating imposition of punishment,

g) if there has been no private motion, request or complaint, and none can be submitted subsequently,

h) if the action has already been adjudicated by a final decision, including the case regulated in section 6 of the Criminal Code,

i) if the identity of the perpetrator could not be established in the investigations,

j) [the prosecutor shall discontinue the investigation and issue a reprimand] if the action committed by the suspect no longer poses a threat – or poses such an insignificant level of threat – to society that even the imposition of the most lenient punishment allowed under the law or the application of any other measure is unnecessary."

Section 191

"(1) Unless an exception is made in this Act, discontinuation of the investigation shall not prevent the subsequent resumption of the proceedings in the same case.

(2) Resumption of the proceedings shall be ordered by the public prosecutor or, if the investigation was terminated by a public prosecutor, by a senior prosecutor. If the suspect was reprimanded (section 71 of the Criminal Code), the public prosecutor or the senior prosecutor, respectively, shall quash the decision discontinuing the investigation. No objection shall lie against the decision ordering resumption of the investigation.

(3) If no complaint was filed against the discontinuation of the investigation or the senior prosecutor did not order the resumption of the investigation, subsequently only a court can order the resumption of the investigation against a person in respect of whom the investigation had previously been discontinued.

(4) If the court rejected the motion for the resumption of the investigation, a repeated motion for resumption on the same ground shall not be allowed."

Section 207

"(1) Prior to the preferment of the bill of indictment, the responsibilities of the court shall be performed at first instance by the judge designated by the president of the county court ('investigating judge').

(2) The investigating judge shall ...

c) decide on the resumption of an investigation after its discontinuation (section 191(3))."

Title IV – Remedy during the investigation

Section 195 (6)

"A motion for review may be filed with the public prosecutor's office against [certain] decisions ..., and against a decision rejecting a complaint against a prosecutorial decision ... within eight days of delivery. The prosecutor's office shall forward the motion for review and the case file to the court [i.e. the investigating judge] within three days."

Section 198

"(1) If the criminal report was filed by the aggrieved party, he may submit a complaint against the rejection of the report within eight days of its delivery in order to have the investigation ordered.

(2) If the prosecutor discontinued the investigation, the aggrieved party may file a complaint with a view to the continuation of the procedure within eight days of the delivery of the decision on discontinuation."

Section 199

"(1) On the basis of the complaint, the prosecutor or the senior prosecutor may:

a) quash the decision rejecting the report or discontinuing the investigation and deliver a decision on ordering or continuing the investigation or on pressing charges;

b) reject the complaint if he finds it unfounded.

(2) After the rejection of his complaint, the aggrieved party may act as a substitute private prosecutor if:

a) the report was rejected under section 174(1) a) or c), or

b) the investigation was discontinued under section 190(1) a) to d) or f)."

23. Decree 30/2011. (IX. 22.) of the Minister of Interior on the Service Regulation of the Police provides:

Section 4

"5) An off-duty police officer shall take measures if

a) a duty officer is not present and any delay caused by informing him, or the failure to take a measure would cause unavoidable damage to the interest of crime prevention, or the protection of life and property."

THE LAW

I. JOINDER OF THE APPLICATIONS

24. The two applications in the present case raise the same issue. Therefore, the Court is of the view that, in the interest of the proper administration of justice, the applications should be joined in accordance with Rule 42 § 1 of the Rules of Court.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

25. The applicants complained that police officer K. had used excessive force against them, putting their lives at risk, and that the authorities had failed to carry out an adequate and effective investigation into the incident. They argued that the incident amounted to a breach of their rights under Articles 2, 3, 5, 8 and 13 of the Convention.

The Court considers that the complaints fall to be examined under Article 2 alone, which subsumes the other aspects of the case.

Article 2 of the Convention reads as follows:

> "1. Everyone's right to life shall be protected 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."

26. The Government contested that argument.

A. Admissibility

1. Exhaustion of domestic remedies

27. The Government asserted that the applicants should have made use of substitute private prosecution under section 199(2) of the Code of Criminal Procedure. By not availing themselves of this procedural avenue, they had not exhausted domestic remedies. The Government also maintained that the applicants had not sought judicial review of the decision of the Veszprém County Chief Police Department of 19 December 2013, as provided by section 190 (1)–(2) of the Administrative Procedures Act. In the Government's view, the applications should be rejected pursuant to Article 35 § 1 of the Convention, which provides as follows:

> "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

28. The applicants submitted that in the case of *Borbála Kiss v. Hungary* (no. 59214/11, 26 June 2012), the Government had argued that the applicant had failed to exhaust domestic remedies by not availing herself of an ordinary remedy – substitute private prosecution under section 199(2) of the Code of Criminal Procedure Criminal Procedure, seeking the pursuit of discontinued criminal proceedings, but that objection had been dismissed by the Court.

The applicants also contended that the Government had not demonstrated that the remedies to which they referred were effective. They submitted that, by way of an example, in Borsod-Abaúj-Zemplén County only two actual trials had resulted from the total of eleven substitute private prosecutions initiated in the period between 2006 and 2010. In the light of such statistics, this legal avenue could not be regarded as being capable of leading to the identification and punishment of those responsible, as required by the Court's settled case-law in relation to complaints under Article 2 of the Convention.

29. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness. However, Article 35 § 1 does not require that recourse should be had to remedies which are inadequate or ineffective (see *Aksoy v. Turkey*, 18 December 1996, §§ 51-52, *Reports of Judgments and Decisions* 1996-VI; and *Barta v. Hungary*, no. 26137/04, § 45, 10 April 2007).

30. As regards the Government's arguments concerning the possibility of a substitute private prosecution, it is true that the applicants could have initiated substitute private prosecution against officer K. and attempted to pursue criminal proceedings against him (see paragraphs 18 and 22 above). However, as the Court has already found, victims are not required to pursue the prosecution of officers accused of ill-treatment on their own, this being a duty of the public prosecutor who is certainly better, if not exclusively, equipped in that respect (see *Otašević v. Serbia*, no. 32198/07, § 25, 5 February 2013).

The Court therefore sees no reason to require the applicants to have pursued the prosecution of the accused officer on their own by initiating substitute private prosecution, since it was the responsibility of the public prosecutor to ensure that a preliminary investigation was carried out, that evidence was obtained and that, if evidence against the alleged perpetrators

was sufficient, proceedings were pursued against them (see *Stojnšek v. Slovenia*, no. 1926/03, § 79, 23 June 2009).

31. The Court further observes that the Veszprém District Investigating Prosecutor's Office opened an *ex officio* criminal investigation in respect of officer K. on charges of attempted manslaughter and that the applicants complained about the discontinuation of the investigation.

32. In the Court's view, by virtue of this remedy the State was afforded an opportunity to put matters right since these proceedings could have resulted in the identification and the punishment of those responsible. The applicants must therefore be regarded as having brought the substance of their complaint to the notice of the national authorities and as having sought redress through the national channels for their complaint. The applicants were thus not required in addition to pursue the matter by way of substitute private prosecution.

33. As regards the non-exhaustion of the other remedy referred to by the Government, that is, judicial review of the decision of the Veszprém County Chief Police Department, the Court notes that once the above-mentioned criminal remedies were in progress, the applicants were not required to embark on another attempt to obtain redress by pursuing an administrative claim (see *Akpınar and Altun v. Turkey*, no. 56760/00, § 68, 27 February 2007).

34. The Court therefore considers that the applications cannot be rejected for non-exhaustion of domestic remedies.

2. The six-month rule in regard to the second applicant

35. The Court reiterates that Article 35 § 1 of the Convention provides that the Court may only deal with a matter where it has been introduced within six months from date of the final decision in the process of exhaustion of domestic remedies. It is not open to the Court to set aside the application of the six-month rule in the absence of the relevant objection from the Government (see *Belaousof and Others v. Greece*, no. 66296/01, § 38, 27 May 2004).

36. In the present case, the Court notes that the applicants lodged a complaint against the decision of the Veszprém District Investigating Prosecutor's Office by which the investigation against officer K. had been discontinued. On 22 July 2013 the Veszprém County Public Prosecutor's Office dismissed their complaint, which decision was served on them on 29 July 2013.

37. Thereupon, the applicants lodged further complaints with the County Public Prosecutor's Office and the Attorney General's Office, in response to which they were informed that there was no ground for quashing the final decision and any potential continuation of the investigation was subject to the disclosure of relevant new facts. The Court thus finds that the final decision in the case was given by the County Public Prosecutor's Office and

that the applicants' ensuing petitions to the County Public Prosecutor's Office and the Attorney General's Office were not effective remedies for the purposes of Article 35 § 1 (see *Bethlen v. Hungary*, no. 26692/95, Commission decision of 10 April 1997, unreported). Consequently, these complaints did not interrupt the running of the period of six months under Article 35 § 1 of the Convention, which must be counted from 29 July 2013, the day on which the final decision was served on the applicants.

38. Ms Szabó, however, introduced her complaint with the Court only on 20 March 2014, that is, after the six months' time-limit had expired.

Accordingly, by virtue of Article 35 §§ 1 and 4 of the Convention, the Court cannot entertain the second applicant's complaint as it has been lodged out of time and is thus inadmissible.

3. As regards the first applicant

39. The Court finds that, with regard to the first applicant, the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further finds that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

40. The first applicant complained that officer K. had used excessive and potentially lethal force against her in circumstances where it was not absolutely necessary. She alleged that the officer had fired a pistol at her and Ms Szabó from a very close range while they were panicking because they thought they were being attacked by unknown persons. She maintained that officer K. had had no reason to believe that either his or his associate's life was in danger.

The first applicant further submitted that the authorities had failed to conduct an effective investigation into the question of whether the use of a firearm by officer K. was justified. In particular, it had not been clarified whether it had been absolutely necessary in the circumstances.

41. As to the substantive aspect of Article 2, the Government relied in essence on the reasoning of the Veszprém County Public Prosecutor's Office discontinuing the investigation in respect of officer K., according to which the officer's act did not constitute a crime since he had been authorised by law to use his gun in order to avert an attack directed against the life or limb of a third person.

42. Concerning the procedural limb of Article 2, the Government argued that the obligation to conduct an effective official investigation had been fulfilled. Firstly, an official criminal investigation had been instituted to establish the circumstances of the incident and officer K.'s responsibility for

the felonies of attempted manslaughter or intentional endangerment committed by a public official. The decision of the Prosecutor's Office was based on testimonies given by several witnesses, including the first applicant, Ms Szabó and Mr S., on on-site reconstructions and an expert ballistic opinion. Furthermore, administrative proceedings had been conducted by the Balatonfüred Police Department to scrutinise the police operation, and had led to the finding that, although to some extent unprofessional, it had been lawful.

2. The Court's assessment

(a) Applicability of Article 2

43. In the present case, the force used against the first applicant was not lethal. This, however, does not exclude an examination of the applicant's complaints under Article 2, the text of which, read as a whole, demonstrates that it covers not only intentional killing but also situations where it is permitted to use force which may result, as an unintended outcome, in the deprivation of life (see *İlhan v. Turkey* [GC], no. 22277/93, § 75, ECHR 2000-VII). In fact, the Court has already examined complaints under this provision where the alleged victim had not died as a result of the impugned conduct (see *Makaratzis v. Greece* [GC], no. 50385/99, ECHR 2004-XI, and *Atiman v. Turkey*, no. 62279/09, 23 September 2014, with further references).

44. The degree and type of force used and the unequivocal intention or aim behind the use of force may, among other factors, be relevant in assessing whether in a particular case the State agent's actions in inflicting injury short of death must be regarded as incompatible with the object and purpose of Article 2 of the Convention (see *İlhan* cited above, § 76).

45. Therefore, the Court must determine whether the force used against the first applicant was potentially lethal and what impact the conduct of officer K. and the volunteer law enforcer had not only on the applicant's physical integrity but also on the right to life.

46. The Court accepts that the officer did not intend to kill the applicant. Nonetheless, according to the expert ballistic report, there were two holes in the car caused by bullets following a downward trajectory, the first one to the level of the car's lights, the second one to the level of the passengers. The car's rear window was broken and had partly fallen in because of the bullet which came through the rear window (see paragraph 11 above) narrowly missing the passenger's head.

47. The Court notes that the present case is different from previous ones in which the Court examined the use of potentially lethal force causing injuries (see, for example, *Atiman*, cited above, § 31). The instant case concerns the use of a firearm shot in the direction of the applicant, which – although did not hit her – generated a risk of serious injury or loss of life.

48. In the light of the above circumstances, and in particular the degree and type of force used, the Court concludes that the applicant was a victim of conduct which, by its very nature, put her life at risk. The Court thus considers that Article 2 is applicable in the instant case, and the principles developed in its case-law on the use of potentially lethal force should apply, *mutatis mutandis*, in the instant case (see also *Kitanovski v. the former Yugoslav Republic of Macedonia*, no. 15191/12, § 52 to 57, 22 January 2015).

(b) The substantive limb of Article 2

(i) General principles

49. Article 2, which safeguards the right to life, ranks as one of the most fundamental provisions in the Convention and enshrines one of the basic values of the democratic societies making up the Council of Europe. The Court must subject allegations of a breach of this provision to the most careful scrutiny. In cases concerning the use of force by State agents, it must take into consideration not only the actions of the agents of the State who actually administered the force but also all the surrounding circumstances, including such matters as the relevant legal or regulatory framework in place and the planning and control of the actions under examination (see *Makaratzis*, cited above, §§ 56-59).

50. The exceptions contained in paragraph 2 of Article 2 indicate that this provision extends to, but is not concerned exclusively with, intentional killing. The text of Article 2, read as a whole, demonstrates that paragraph 2 does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. However, the use of force must be no more than "absolutely necessary" for the achievement of one of the purposes set out in sub-paragraphs (a), (b) or (c) of paragraph 2 of Article 2 (see *McCann and Others v. the United Kingdom*, 27 September 1995, §§ 147- 148, Series A no. 324).

51. The use of force by agents of the State in pursuit of one of the aims described in paragraph 2 of Article 2 of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and the lives of others (see *Andronicou and Constantinou v. Cyprus*, 9 October 1997, § 192, *Reports* 1997-VI).

52. When called upon to examine whether the use of potentially lethal force was legitimate, the Court, detached from the events at issue, cannot substitute its own assessment of the situation for that of an officer who was

required to react in the heat of the moment to avert an honestly perceived danger to his life or the lives of others (see *Huohvanainen v. Finland*, no. 57389/00, § 97, 13 March 2007).

53. It must also be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case. As a general rule, where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and it is for the latter to establish the facts on the basis of the evidence before them (see *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, §§ 179-180, ECHR 2011 (extracts), and the authorities cited there).

54. In addition to setting out the circumstances when recourse to potentially lethal force may be justified, Article 2 implies a primary duty on the State to secure the right to life by putting in place an appropriate legal and administrative framework defining the limited circumstances in which law-enforcement officials may use force and firearms (see *Atiman*, cited above, § 30).

55. The Court has already examined in the case of *Oláh* the provisions of Hungarian law concerning the use of firearms by the police and found that they cannot be considered to be in contradiction with the principles flowing from the Convention or the Court's case-law (see *Oláh v. Hungary* (dec.), no. 56558/00, 14 September 2004).

56. Furthermore, the Court has held in previous cases that, in carrying out its assessment of the planning and control phase of law-enforcement operations from the standpoint of Article 2 of the Convention, it must have particular regard to the context in which the incident occurred, as well as to the way in which the situation developed (see *Bubbins v. the United Kingdom*, no. 50196/99, § 141, ECHR 2005-II (extracts). Thus, the Court's assessment of whether the use of potentially lethal force was "absolutely necessary" within the meaning of Article 2 § 2 cannot be limited to the situation at the moment when the actual discharge of a firearm by a State agent occurred. It must also take into account the circumstances leading up to the event which caused an immediate risk to life. This will enable an assessment of whether the operational decisions taken by those involved, and the conduct of the operation as a whole, demonstrate that appropriate care was taken to ensure that any risk to an individual's life was minimised to the greatest extent possible and that State agents were not negligent in their choice of action (see *Andronicou and Constantinou*, cited above, §§ 181.

(ii) Application of those principles to the present case

57. The Court observes in this regard that the police intervention in this case was not a pre-planned operation, but a reaction to a situation prompted by the police officer's and the volunteer law-enforcer's choosing to follow

up an event which had come to their attention. Nonetheless, it cannot be held that officer K. was called upon to respond to any unexpected circumstances in the heat of the moment, since the entire incident took place largely as a result of the officer's own conduct. In the Court's view, in circumstances where the need to resort to potentially lethal force occurs as a consequence of a series of decisions and measures taken by a police officer, those decisions will engage the State's responsibility to the same extent as the planning and control of police operations.

58. According to the evidence adduced before the domestic courts, officer K. used his weapon in order to stop the car to protect the life and limb of the volunteer law enforcer accompanying him. This is one of the instances contemplated by the second paragraph of Article 2 when the resort to lethal, or potentially lethal, force may be legitimate.

59. The Court accepts that officer K. intervened in order to stop the applicants' car that had, in his perception, created a danger for his associate of being run over – which danger he deemed warranted the use of potentially lethal force. In the light of the general principles described above (see paragraph 55), the Court must therefore examine whether the considerations which led the officer to open fire were compatible with Article 2 of the Convention and, in particular, whether the operation, viewed in its entirety, was conducted in such a manner as to minimise, to the greatest extent possible, the risk created by the use of potentially lethal force by the discharge of the firearm.

60. Following a call on the applicants to get out of the car, office K. fired a warning shot. However, the applicants did not stop the vehicle. As confirmed by the ballistics report, the bullets hit the car while it was moving in the direction of Mr S. For the Court, officer K. could plausibly perceive this as an imminent attack on the life or limb of Mr S.

61. However, the Court must take into account the circumstances in which the situation had evolved. The background to the police intervention was a report from an unidentified person to Mr S. saying that an unknown vehicle was parked and driving around close to a local grocery store (see paragraph 7 above). Having arrived at the scene, police officer K., off duty, and Mr S., a volunteer law enforcer, established that there were no signs of any criminal act. There was no immediate need for action, whether for the purpose of arresting persons suspected of having committed a crime or preventing the commission of a crime. The Court observes that, in the assessment made by the national authorities, no convincing grounds were adduced to justify officer K.'s and Mr S.'s decision to continue to pursue their search for the car, and this without properly identifying themselves. In this context the Court notes that, under section 4 of Decree 30/2011. (IX. 22.), even if an off-duty officer considers that further action was necessary, he should proceed with any measure himself only if a delay caused by informing a duty officer would cause unavoidable damage to

crime prevention or the protection of life and property (see paragraph 23 above).

62. The Court also observes that the identity of the owner of the Fiat Punto was communicated to officer K. by the duty officer of Balatonfüred Police Department. In this connection, the Court reiterates that a crucial element in the assessment of decisions to be taken, for the purposes of an operation in the field of law enforcement, must be the analysis of all the available information about the surrounding circumstances, including the danger – if any – posed by the persons concerned (see *Nachova*, cited above, § 103). However, it does not appear that, when approaching the applicants and blocking the way of their car, officer K. or Mr S. paid any heed to the fact that neither of the persons in the car was wanted by the police, posed any known danger otherwise, or had any reason whatsoever to expect any police action against them.

63. Indeed, as the situation unfolded, the passengers in the car could not possibly know that the men approaching their car were law enforcement officers: they were driving a private car, were dressed in plain clothes and wore no insignia. Furthermore, it cannot be argued that the applicants were in a position to identify officer K. as a policeman, given that he was approaching their car from behind in the dark, although holding his police ID card in his hand. As was confirmed by the domestic authorities, it was only after the shots had been fired and the applicants had stepped out of the vehicle that they recognised that the men were officers.

64. For the Court, the Government have not adduced any convincing argument calling into question the conclusion that to approach the car in the dark without any visible identification and create a threatening setting by blocking the way of the applicants' car was susceptible to provoke an unpredictable reaction from those inside the car.

65. Lastly, the Court observes that the conduct of officer K. and Mr S. was without any instruction or supervision by a senior officer.

66. In conclusion, the Court underlines that, due to the fundamental nature of the right protected by Article 2 of the Convention, its assessment cannot, in principle, be limited to the factual conclusions made by the national authorities, unless it is satisfied that all the necessary elements, as derived from its case-law under Article 2, have been taken into account (see paragraph 55 above) by those authorities, including, notably, the context and the evolution of the situation.

Viewing the instant events in their entirety, the Court is not satisfied that the actions taken by officer K. before the actual shooting occurred had been reasonable in the light of the available information on the nature of the threat posed by the applicants. Nor was his intervention conducted in such a way as to minimise the risk of the events unfolding into a life-threatening situation culminating in the use of firearms.

67. Accordingly, the Court finds that there has been a violation of the substantive limb of Article 2.

(c) The procedural limb of Article 2

(i) General principles

68. The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see *Çakıcı v. Turkey* [GC], no. 23657/94, § 86, ECHR 1999-IV). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. This investigation should be independent, accessible to the victim's family, carried out with reasonable promptness and expedition, effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances or otherwise unlawful, and afford a sufficient element of public scrutiny of the investigation or its results (see *Hugh Jordan v. the United Kingdom*, no. 24746/94, §§ 105-109, 4 May 200).

The same reasoning applies in the case under consideration, where the Court has found that the force used by the police against the applicants endangered their lives (see *Makaratzis*, cited above, § 73).

(ii). Application of those principles to the present case

69. In the instant case, the prosecutor opened a formal investigation. However, this was then discontinued by the Veszprém District Investigating Prosecutor's Office, whose findings were upheld by the Veszprém County Public Prosecutor's Office. That office had established that the sole intention of the police officer had been to stop the first applicant and Ms Szabó, who were endangering the life and limb of the Mr S. The authorities established that the police officer had been persuaded that those two were attempting to escape while driving their car in the direction of Mr S. Thus officer K. had rightly opened fire with the aim of stopping them. These arguments were sufficient for the authorities to discontinue the investigation.

70. In this regard the Court emphasises that the national authorities' assessment of events – which did not include any judicial fact-finding – was limited to examining whether officer K. had committed a criminal offence by the impugned shooting, without an examination of the wider context of, or the events leading up to, the incident.

71. Indeed, while the Veszprém District Investigating Prosecutor's Office endorsed the finding of the police report according to which officer K.'s conduct had been unprofessional (see paragraph 17 above), neither this nor any other authority embarked on an examination of the manner in which the operation to track and halt the applicants had been carried out and of the effect that manner had on the necessity of using a firearm.

72. In view of the lack of a thorough and effective investigation calling into question the necessity of using potentially lethal force, let alone a judicial review of the decision to discontinue the investigations, the Court finds that there has been a violation of the procedural limb of Article 2 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

73. 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

74. The first applicant claimed 4,266 euros (EUR) in respect of pecuniary and EUR 40,000 in respect of non-pecuniary damage.

75. The Government considered her claims to be excessive.

76. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, it considers that the first applicant must have suffered some non-pecuniary damage. Making its assessment on the basis of equity, the Court awards EUR 15,000 under this head.

B. Costs and expenses

77. The first applicant also claimed EUR 1,333 for the costs and expenses incurred before the domestic authorities and EUR 3,720 for those incurred before the Court. This latter sum corresponds to 31 hours of legal work billable by her lawyer at an hourly rate of EUR 120.

78. The Government contested this claim.

79. 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 the full sum claimed, that is, EUR 5,053.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Decides*, unanimously, to join the applications;

2. *Declares*, unanimously, Ms Szabó's application (no. 11613/14) inadmissible;

3. *Declares*, unanimously, Ms Haász's application (no. 11327/14) admissible;

4. *Holds*, by six votes to one, that there has been a violation of Article 2 of the Convention both under its substantive and procedural aspects in regard to Ms Haász;

5. *Holds*, by six votes to one,
   (a) that the respondent State is to pay Ms Haász, 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 15,000 (fifteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 5,053 (five thousand and fifty-three 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;

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

Done in English, and notified in writing on 13 October 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos	Işıl Karakaş
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Lemmens;

(b) dissenting opinion of Judge Kjølbro.

A.I.K.
A.C.

CONCURRING OPINION OF JUDGE LEMMENS

1. I voted with my colleagues in finding that Ms Haász's application is admissible and well-founded. However, my reasons for declaring her application admissible are somewhat different from those of the majority.

The Government raised an objection of non-exhaustion of domestic remedies, based in part on the fact that the applicant did not make use of the possibility of a substitute private prosecution (see paragraph 27 of the judgment). The majority rejects this objection on the ground that, since it was the responsibility of the public prosecutor to carry out an investigation, which he also did, and since the applicant had brought her complaint to his attention, she was not required to pursue the matter herself by way of substitute private prosecution (see paragraphs 30-32 of the judgment).

I respectfully disagree with this reasoning.

2. The Court's case-law attaches certain weight to action effectively taken by the victim as a private public prosecutor (see, for example, *Barta v. Hungary*, no. 26137/04, § 47, 10 April 2007; *Horváth and Vadászi v. Hungary* (dec.), no. 2351/06, 9 November 2010; *Réti and Fizli v. Hungary*, no. 31373/11, § 25, 25 September 2012; and *Bajić v. Croatia*, no. 41108/10, §§ 80-82, 13 November 2012; see also *Slimani v. France*, no. 57671/00, §§ 39-41, ECHR 2004-IX (extracts)). Such action brings the matter before a court. As a party to the criminal proceedings the victim has more procedural rights than as a simple complainant before the public prosecutor. Section 199(2) of the Hungarian Code of Criminal Procedure suggests that a substitute private prosecution is the normal remedy for the victim after the rejection by a higher-ranking prosecutor of a complaint against the decision by a lower-ranking prosecutor to discontinue the investigation. The private prosecution is then indeed the only possible way, it seems, for the victim to obtain a judicial assessment of the facts complained of.

I am aware of the line of cases according to which, if a criminal report or complaint has been filed with the police or the prosecutor, the victim should not be required to lodge a further criminal complaint with the competent court (see, for example, *Balogh v. Hungary*, no. 47940/99, §§ 31-32, 20 July 2004; *Stojnšek v. Slovenia*, no. 1926/03, § 79, 23 June 2009; *Gubacsi v. Hungary*, no. 44686/07, § 32, 28 June 2011; *Borbála Kiss v. Hungary*, no. 59214/11, § 26, 26 June 2012; *Volk v. Slovenia*, no. 62120/09, § 78, 13 December 2012; *Otašević v. Serbia*, no. 32198/07, § 25, 5 February 2013; *Lakatoš and Others v. Serbia*, no. 3363/08, § 80, 7 January 2014; and *Milić and Nikezić v. Montenegro*, nos. 54999/10 and 10609/11, § 85, 28 April 2015). This case-law is also followed in the present case. With all due respect, it fails in my opinion to distinguish between police and prosecuting authorities on the one hand and judicial authorities on the other. It also fails to take into account the differences between proceedings

conducted by a public prosecutor and proceedings conducted by a court. We are dealing with substantially different complaint mechanisms. Where the second mechanism exists, it is in my opinion a remedy that should in principle be exhausted.

The reasoning of the majority is in this case all the more inadequate since the majority finds a violation of the procedural limb of Article 2 precisely because of, among other things, the absence of "any judicial fact-finding" (see paragraph 70 of the judgment) or of any "judicial review of the decision to discontinue the investigations" (see paragraph 72 of the judgment). It is obvious that a substitute private prosecution could, at least in theory, have offered the competent judicial body an opportunity to find the facts, if need be by ordering additional measures of investigation, and to continue the proceedings.

3. I would have preferred a line of reasoning which examined the effectiveness in practice of the private criminal proceedings (see, for example, *Matko v. Slovenia*, no. 43393/98, § 95, 2 November 2006).

The applicant argues, on the basis of some statistical data, that in recent years only a few trials have resulted from substitute private prosecutions (see paragraph 28 of the judgment).

Since the Government do not demonstrate the effectiveness in practice of a private prosecution, I can concur with the majority's conclusion that it was not necessary for the applicant to pursue this avenue, and that therefore her complaint relating to the substantive limb of Article 2 is admissible.

DISSENTING OPINION OF JUDGE KJØLBRO

1. I respectfully disagree with the majority that there has been a violation of the substantive and procedural limbs of Article 2 of the Convention.

The substantive limb of Article 2

2. On the basis of the findings of the domestic authorities' investigation and their assessment of the incident, my colleagues rightly point out that "officer K. intervened in order to stop the applicant's car, [which] had ... created a danger for his associate of being run over ..." (see paragraph 59 of the judgment). Furthermore, they rightly point out that "officer K. could plausibly [have] perceive[d] [the car] as an imminent attack on the life or limb of [his associate]" (see paragraph 60). In other words, my colleagues are willing to accept that the shooting was necessary in order to stop the car and thus protect life and limb. This would normally lead to the conclusion that there had been no violation of the substantive limb of Article 2 of the Convention.

3. In my colleagues' assessment, however, the use of potentially lethal force was not "absolutely necessary" and therefore amounted to a violation of Article 2 of the Convention (see paragraphs 61-67). In so stating, my colleagues are, at least indirectly, blaming officer K. for having created the situation which rendered it necessary to open fire on the car, thereby endangering the life of the persons inside it. In their assessment, my colleagues are applying the Court's case-law according to which a police operation must be planned and controlled in such a way as to minimise the risks for life (see paragraph 57).

4. The arguments mentioned by my colleagues, whether assessed separately or in conjunction, do not provide a sufficient basis for finding a violation of the substantive limb of Article 2 of the Convention. In my view, there are insufficient grounds for stating that officer K., through his decisions and actions, created a dangerous situation which rendered it necessary to use potentially lethal force.

5. In assessing the case it is important to underline that the operation in question was not a pre-planned measure, but a spontaneous reaction to a situation which had arisen and come to officer K.'s attention, leaving no or very little time to prepare the subsequent operation (see, for example and *a contrario*, *Mansuroğlu v. Turkey*, no. 43443/98, § 86, 26 February 2008, and *Finogenov and Others v. Russia*, nos. 18299/03 and 27311/03, § 243, ECHR 2011 (extracts)). At 3.05 a.m. an unknown person telephoned the volunteer law enforcer to tell him about a suspicious car in the neighbourhood. The volunteer law enforcer informed officer K., who was off-duty at the time. The two of them circulated in the area looking for the

car. The vehicle was spotted at 3.30 a.m. and the subsequent sequence of events, culminating in the shooting, developed within a very short time, probably seconds or minutes at the most.

6. In my view, officer K. cannot be criticised for having continued to search for the suspicious car, and there is no basis for stating that in so doing he breached domestic provisions (see paragraph 61).

7. The fact that the identity of the car's registered owner was known to officer K. and that the owner was not wanted by the police cannot, in my view, serve as a basis for criticising the officer for having searched for a vehicle seen in the neighbourhood in the middle of the night (see paragraph 62).

8. It transpires clearly from the domestic investigation that officer K., when approaching the car parked in front of a private house, shouted that he was from the police and that the persons inside the car should get out of it, while showing his police identity card (see paragraph 9).

9. Furthermore, it clearly follows from the domestic investigation that, when the driver of the car had unsuccessfully tried to escape from the scene by driving away and was subsequently heading towards officer K., officer K. again shouted that he was from the police and that the driver should stop. Furthermore, he fired a warning shot (see paragraph 11).

10. In the domestic authorities' assessment, as accepted by my colleagues, the two shots which hit the car were fired in order to stop the vehicle, which was posing a direct threat to the life and limb of the volunteer law officer.

11. Given that officer K., for good reasons, honestly believed that it was necessary to open fire in order to protect his associate's life and limb, the Court should have reached the conclusion that the use of potentially lethal force was "absolutely necessary" (see, for example, *Makaratzis v. Greece* [GC], no. 50385/99, § 64-66, ECHR 2004-XI; *Bubbins v. the United Kingdom*, no. 50196/99, § 138, ECHR 2005-II (extracts); and *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 189, ECHR 2011 (extracts)). In my opinion, the majority is second-guessing the decisions taken by officer K. with the clarity of hindsight and finding a violation of Article 2 on that basis.

The procedural limb of Article 2

12. Immediately after the incident, an investigation was initiated. Indeed, the incident was subject to both a criminal and a disciplinary investigation. The investigations were opened immediately and completed expeditiously. All the relevant evidence was gathered. Amongst other measures, the applicants were heard as witnesses, as were the off-duty police officer and the volunteer law enforcer, and other witnesses. The opinion of a forensic firearms expert was obtained. On the basis of the

investigation undertaken at domestic level, it has been possible for the Court to perform an assessment of the shooting incident and of the events leading up to the use of the firearm, and my colleagues have not pointed to any absent investigative measures or concreate shortcomings in the gathering of evidence that could justify finding the investigation ineffective.

13. In fact, the basis on which my colleagues find a violation of the procedural limb of Article 2 is twofold: first, the domestic authorities' assessment of the events "did not include any judicial fact-finding"; second, the domestic authorities' assessment did not include "an examination of the wider context of, or the events leading up to, the incident".

14. In my view, these two arguments, whether assessed separately or in conjunction, do not provide a sufficient basis for finding a violation of the procedural limb of Article 2 of the Convention.

15. By "judicial fact-finding" my colleagues are referring to domestic courts, as opposed to administrative authorities. However, in the prosecutor's assessment, no criminal offence had been committed. The prosecutor therefore dismissed the criminal complaint lodged by the applicant, and for that reason no "judicial fact-finding" took place. Had the prosecutor considered that a criminal offence had taken place, he would have indicted officer K. and brought the case before the criminal courts.

16. Having regard to the presumption of innocence as guaranteed by Article 6 § 2 of the Convention, as well as to the well-established principle of objectivity in criminal law, the Convention cannot be interpreted as requiring the prosecutor to indict and press criminal charges against a person, if, in his or her assessment and on the basis of a proper examination of all the relevant evidence, no criminal offence has been committed, or the evidence is insufficient to secure a conviction.

17. In my view, therefore, it is not justified to criticise the lack of "judicial fact-finding" unless there is a basis for criticising the prosecutor for not having indicted and brought the case before a criminal court (see *Gürtekin and Others v. Cyprus*, nos. 60441/13, 68206/13 and 68667/13, § 28, 11 March 2014 (dec.)). In this context, I cannot but note that it was open to the applicants to institute a subsidiary private prosecution, had they wished to obtain a court's assessment of the facts of the case.

18. In my view, there is no basis for stating that the prosecutor's decision to dismiss the complaint was arbitrary or manifestly unreasonable or that it was not "based on an adequate assessment of all the relevant factual elements in the case" (see *Milić and Nikezić v. Montenegro*, nos. 54999/10 and 10609/11, § 99, 28 April 2015). Nor can it be alleged that the domestic authorities did not examine the wider context of the incident or the events leading up to the incident. The incident and the events leading up to the shooting were investigated and assessed, but my colleagues disagree with the prosecutor's decision to dismiss the complaint.

Conclusion

19. For the reasons mentioned above, there has, in my view, been no violation of the substantive or the procedural limb of Article 2 of the Convention.