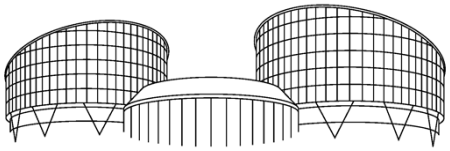

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF KALKAN v. DENMARK

(Application no. 51781/22)

JUDGMENT

Art 2 (substantive) • Positive obligations • Life • Death of applicant's son in prison after being restrained in a prone position leg lock for about thirteen minutes, following which he suffered a heart attack • Domestic authorities' failure to transmit to the prison authorities known updated information on the additional risks associated with the prone position or review and update their instructions and training until after the incident • Failure, at the relevant time, to issue clear and adequate instructions for prison guards and to train them on the use of the prone position when restraining prisoners • As a result, prison officers involved in the present case lacked the high level of competence required when dealing with a risk-to-life situation

Prepared by the Registry. Does not bind the Court.

STRASBOURG

27 May 2025

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 Kalkan v. Denmark,

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

Lado Chanturia*, President*,
Tim Eicke,
Lorraine Schembri Orland,
Ana Maria Guerra Martins,
Anne Louise Bormann,
Sebastian Răduleţu,
András Jakab*, judges*,
and Simeon Petrovski, *Deputy Section Registrar,*

Having regard to:

the application (no. 51781/22) against the Kingdom of Denmark lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Danish national, Ms Nermin Kalkan ("the applicant"), on 3 November 2022;

the decision to give notice to the Danish Government ("the Government") of the application;

the observations submitted by the respondent Government and the observations in reply submitted by the applicant;

the comments submitted by a non-governmental organisation, Dignity - Danish Institute against Torture, which had been granted leave to intervene by the President as a third party in the proceedings (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court);

Having deliberated in private on 6 May 2025,

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

INTRODUCTION

1. Relying on Articles 2 and 3 of the Convention, the applicant complained that her son, E., had been restrained while in prison in a prone position leg lock (*brystvendt benlås*) for about thirteen minutes, following which he suffered a heart attack. He died in hospital a few days later.

THE FACTS

2. The applicant was born in 1968 and lives in Vejle. She was represented by Mr Tobias Stadarfeld Jensen, a lawyer practising in Aarhus, and Mr Jacques Hartmann, a professor at the University of Dundee.

3. The Government were represented by their Agent, Ms Vibeke Pasternak Jørgensen, of the Ministry of Foreign Affairs, and their co-Agent, Ms Nina Holst-Christensen, of the Ministry of Justice.

4. The facts of the case may be summarised as follows.

I. THE INCIDENT ON 11 JANUARY 2011 THAT GAVE RISE TO THE APPLICANT'S COMPLAINT UNDER THE CONVENTION

5. It is not in dispute between the parties that on 11 January 2011 between 10.01 a.m. and 10.14 a.m. the applicant's son, E., was restrained while in prison in a prone position leg lock, following which he suffered a heart attack. He died on 14 January 2011.

6. The following facts were found by the domestic courts on the basis of documentation and testimonies in subsequent civil proceedings for compensation for E.'s death.

7. At the relevant time E. was 23 years old and was serving a prison sentence of two years and sixty days for robbery and making threats against prison staff during a previous term of imprisonment.

8. On 29 November 2010, he had been transferred to a local prison (*Kolding Arresthus)* because of his violent behaviour towards a fellow inmate and threats against a prison officer in another prison.

9. On 11 January 2011 at 7 a.m., there was a changeover of shifts at the local prison. E., who was in his cell, was agitated and speaking loudly in a language which the staff did not understand. Fellow inmates told the prison officers that E. had played loud music in his cell during the night. The prison officers tried to calm E. down, but he pounded on the cell walls and continued playing loud music.

10. At the morning meeting at around 9.30 a.m., it was decided that E. would be temporarily moved to an observation cell to avoid his harming himself by pounding his head, legs and/or arms against the wall, and for the sake of maintaining order in the prison. It was also decided to ask for E. to be transferred to another prison more suitable to his agitated behaviour.

11. After the morning meeting, before 9.50 a.m., four prison officers entered E.'s cell to move him to the observation cell. E. behaved in a threatening manner towards the officers and knocked one of them to the ground. The other prison officers took hold of E., placed him in a prone position leg lock on the bed and handcuffed him. The prison officers released the hold and brought E. to his feet while he was handcuffed. E. shouted and resisted. The prison officers then removed E. from the cell using a transport hold. They carried E. out of the cell, down the stairs and into the observation cell in the basement.

12. In the observation cell, the prison officers placed E. in a prone position on the bed. In total six prison officers were either inside or just outside the observation cell. E. calmed down and his left hand was uncuffed. Then E. kicked out and hit one of the prison officers in the chest, making the prison officer fall backwards and hit her chest and head against the wall. E. shouted, and his behaviour was violent and fiery. One of the prison officers was sent to the office to call the police to request assistance in transferring E. to another prison (*Enner Mark*) as soon as possible. The prison officers moved E. to the

floor of the observation cell, placed him in a prone position leg lock and handcuffed him. In the meantime, at around 9.50 a.m., the senior duty officer of the local prison had called the other prison in order to have E. transferred there immediately. At 9.54 a.m. the senior duty officer at the local prison requested police assistance in transferring E. to the other prison. At 9.56 a.m. a police car was sent to the local prison. At around 10.01 a.m. two police officers arrived at the local prison, where E. was lying on the floor of the observation cell handcuffed in a prone position leg lock. E. tried to get free and he shouted and screamed, and the prison officers tried to keep him in the prone position leg lock. At 10.06 a.m., the police officers who had arrived requested a bigger car to transport E. in. After a while, E. began to calm down somewhat, but he was still shouting. The prison officers released the leg lock, and instead placed cable ties around his legs. Shortly after that, E. stopped shouting and a prison officer who had been observing E. throughout the time that the officers had been using force against him could no longer feel E.'s pulse. The prison officers immediately removed the handcuffs and cable ties, turned E. over, placed him in a supine position and gave him first aid. At 10.14 a.m. the police and prison staff contacted the emergency operations centre to request an ambulance. The ambulance arrived at the local prison at 10.18 a.m., followed by an emergency response doctor who arrived at 10.20 a.m. At 10.26 a.m. the medical staff attempted to resuscitate E., but he remained unconscious. The emergency response doctor discontinued the emergency treatment at 10.45 a.m. and E. was transferred to the hospital. E. died three days later, on 14 January 2011 at 11.39 p.m., without having regained consciousness.

II. THE CAUSE OF DEATH

13. A post-mortem examination of E. was performed on 14 January 2011. The National Post-Mortem Examination Centre for Funen and South Jutland issued a report on 17 January 2011, a supplementary report on 21 February 2011 and an additional report on 29 September 2011. The medical professionals concluded in those reports that the cause of E.'s death could not be determined with certainty on the basis of the information available. However, the following appears in the supplementary post-mortem examination report:

> "Deaths of this type are relatively rare, but by now many cases have been described in the medical literature. The deceased are described as having been extremely physically hyperactive, having been loud, having had superhuman strength and having had a reduced pain threshold immediately prior to their deaths. ...
>
> The cause of such deaths is probably a pathological process involving an acute stress response, which is a physiological mechanism involving the activation of the autonomic nervous system and the release of a series of hormones from the pituitary gland and adrenal glands into the bloodstream, including the 'fight-or-flight' hormones adrenalin and noradrenalin (known as catecholamines). ...

> The mechanism described above was most likely the cause of death in the present case.
>
> No other external factors of relevance to the death were found. No signs of neck holds were found. Such a hold would cause bruises to the neck and petechiae in the conjunctiva of the eye and the facial skin. Furthermore, no basis was found for concluding that pressure had been applied to the deceased's back. Scientific studies have shown that the rest position (lying in a prone position while handcuffed behind one's back) does not lead to significantly impaired respiration and cannot in itself lead to oxygen deficiency. ..."

14. In an opinion of 2 April 2012, the Medico-Legal Council (*Retslægerådet*) [which make medico-forensic and pharmaceutical assessments for public authorities for the purpose of cases concerning the legal circumstances of individuals] said the following about whether the cause of E.'s death could be presumed to be excited delirium syndrome (ExDS):

> "According to the information available, E. was extremely agitated and was resisting violently. In that situation, his oxygen demand would have been high. Because he was kept in a prone position, his breathing may have been impeded, which could have been a contributory cause of his death. ExDS is a much-debated phenomenon, but multiple observations of E correspond to what have been described in the literature as symptoms of that condition. It therefore cannot be ruled out that ExDS was also a factor. ..."

15. A supplementary opinion was issued by the Medico-Legal Council on 10 August 2012 and another opinion was issued by the Copenhagen University Hospital on 9 August 2012. As with the reports referred to in paragraphs 13 and 14 above, neither of these could determine the cause of E.'s death with certainty.

III. E.'S MENTAL HEALTH

16. Prior to the incident, E. had undergone psychiatric examinations in 2003 and 2009. On both occasions the psychiatrists concluded that E. did not suffer from a chronic mental illness.

17. Following the incident, the Department of Prisons and Probation (*Direktoratet for Kriminalforsorgen*) requested an assessment of E.'s mental state prior to and on 11 January 2011. The following appears in a consultant psychiatrist's report of 4 July 2014:

> "... Based on an overall assessment of the above, I find it most likely that E. was mentally ill, suffering from chronic schizophrenia, and that the illness had developed gradually since 2008-2009.
>
> ...
>
> As stated above, I find it most likely that E. suffered from schizophrenia and that he was therefore mentally ill at the time when force was used against him – but that the local prison staff had no way of knowing that. It should be added that the post-mortem examination showed that E. was not under the influence of controlled substances at the time when force was used against him. ..."

18. A Department of Prisons and Probation memorandum of 4 June 2015 says that during the six weeks of his incarceration in the local prison E. was attended by doctors and nurses on six occasions because he complained of physical pain.

IV. THE CRIMINAL INVESTIGATION AFTER THE INCIDENT

19. A criminal investigation was initiated by the South Jutland Police to ascertain whether the conditions were met for bringing criminal charges against the prison officers involved. The police conducted interviews with the prison officers who had been present at the incident on 11 January 2011 as well as with all the inmates, emergency response doctors, and others involved.

20. On 18 April 2013, the Prosecution Division for Special Cases of the South Jutland Police decided to discontinue the investigation as it could not reasonably be thought that a criminal offence had been committed.

21. On 14 June 2013, the State Prosecutor of Viborg upheld that decision.

V. THE EXAMINATION OF THE CASE BY THE OMBUDSMAN

22. The case was also examined by a High Court judge acting in the capacity of Substitute Ombudsman (*sætteombudsmanden*). The Substitute Ombudsman concluded in his report of 20 April 2015, *inter alia*, that the use of force applied by the prison officers had not been contrary to the directions that were (then) in force, nor had the use of force exceeded the extent necessary.

VI. THE CIVIL COMPENSATION PROCEEDINGS

23. On 20 April 2018, the applicant lodged compensation proceedings in the City Court (*Københavns Byret*) claiming compensation from the Department of Prisons and Probation for the death of E. The applicant claimed, *inter alia*, that the course of events and the force used against E. were in violation of Articles 2 and 3 of the Convention. The applicant also claimed that the Department of Prisons and Probation had failed to fulfil its positive obligation under those articles to oversee and update the rules governing the use of force by its officers. The applicant further argued that the prison officers had placed and kept E. in a prone position in the observation cell unlawfully because the restraint had been performed without taking into account the danger of the hold, which was contrary to the directions that then applied; that the use of force was disproportionate given the behaviour exhibited by E.; and that the means used had not been adapted to E.'s behaviour.

24. The City Court had before it various written statements made to the police by people who had been involved in the incident on 11 January 2011. It appeared from those statements that, among other events, four named prison officers, A.K., C.S., F.M. and K.R., had restrained E. in the prone position leg lock from 10.01 a.m. to 10.14 a.m. Prison officer C.S. explained on 17 January 2011 that prison officer A.K. had established the leg lock and that he [C.S.] had pushed against A.K.'s back to help her maintain it. Prison officers F.M. and K.R. had held E.'s arms and shoulders to keep him down on the floor. Subsequently, senior duty officer P.P. had put cable ties around E.'s ankles. In a supplementary interview on 17 August 2011 C.S. explained that F.M. and K.R. "had held their knees against E.'s upper arms to keep him still in the prone position. Neither of the two prison officers placed their knees higher than on the upper arms. Accordingly, they had been nowhere near E.'s back or shoulders".

25. The City Court heard the applicant and the witnesses A.K., P.P., and M.G. The prison officers A.K. and P.P. explained that they had been trained in how to apply holds and not to put pressure on the back of a detainee in the prone position, but they had not otherwise been trained on the risks of using the prone position. M.G. had been a senior training consultant at the Prison and Probation Service since 1997 and became the secretary of the task force set up after E.'s death (see paragraph 63 below). He explained among other things that the training material used prior to the applicant's death only contained information on how to apply holds. During practice sessions, students were instructed not to put pressure on the inmate's back. M.G. added the following: "However, it was okay to place a knee on an inmate's shoulder because that would not make it feel like the respiratory passage was blocked in the same way". He further stated that the purpose of the prone position leg lock was to make it possible to handcuff the inmate but, if possible, one should opt not to use handcuffs. M.G. stated: "If a knee was pressed down on a handcuffed person's shoulder, that person would feel as though his or her breathing was impeded, but direct pressure would not be being put on the back. The instructions did not say that the prison officer should place a knee on the inmate's shoulder. That should only be done in cases where it would calm the situation. The last step after a situation had settled down would be that the inmate would be handcuffed and brought to a standing position". The task force (see paragraph 63 below) had obtained advice from the other Nordic countries and from Morocco, Jordan and Germany. M.G. was unfamiliar with a British Prison Service Order on the use of Force from 2005 (see paragraph 51 below).

26. On 17 October 2019 the City Court found against the applicant for the following reasons:

> "... This court therefore finds that at around 10.01 a.m., E. was restrained in the hold called a prone position leg lock and that he was released from that hold at some point before 10.14 a.m.

Even though the cause of death cannot be determined with certainty on the basis of the post-mortem examination reports, the medical opinions or the opinions of the Medico-Legal Council, the opinion issued on 2 April 2012 by the Medico-Legal Council does not rule out the placing of E. in a prone position as having possibly contributed to his death.

During the procedures that followed, several inquiries were made, and the incident became the subject of a police investigation. No criminal or disciplinary proceedings have been instituted against any of the prison officers involved.

The court observes that [the applicant] has not claimed that the authorities failed to investigate the matter appropriately.

Article 2 of the Convention guarantees individuals the right to life and Article 3 prohibits torture and inhuman or degrading treatment. The authorities are required to provide a plausible explanation of why persons in the custody of the authorities have died, and the authorities must show that sufficient efforts are made to prevent such deaths. It is also a requirement that the use of force must be regulated. In addition, persons with mental conditions belong to a particularly vulnerable group, to which the authorities must pay special attention.

It appears from the report issued on 4 July 2014 by K., a consultant psychiatrist and the consulting psychiatrist for the Department of Prisons and Probation, that it is highly probable that E. suffered from schizophrenia. It is stated in the report that the prison staff could not have known this.

The enforcement of sentences is governed by the Sentence Enforcement Act and the executive orders and regulations made under it.

Under section 62(1) of the Sentence Enforcement Act as then in force (Consolidation Act no. 1162 of 5 October 2010), institutions may use force against inmates if it is necessary to prevent imminent violence, to overcome violent resistance or to prevent suicide. Subsection (2) provides that force may be applied through the use of holds, shields, batons and CS gas. Subsection (3) provides that no force may be used if it would be disproportionate to its purpose or would cause excessive indignity and discomfort. Subsection (4) provides that any use of force must be applied as gently as circumstances permit.

The explanatory notes to the Bill on enforcement of sentences and related matters (Bill no. 145/1999 of 8 December 1999) confirmed that the provisions of clause 62(2) include a list of the means by which force may be applied against inmates. When choosing a specific means of force, the principles of proportionality and gentleness set out in subsection (4) must be observed.

In Executive Order no. 382 of 17 May 2001 (subsequently Executive Order no. 547 of 27 May 2011 and Executive Order no. 588 of 30 April 2015), the Ministry of Justice laid down detailed rules on the use of force under section 62 of the Sentence Enforcement Act. Section 2 of the Executive Order says that force may be applied by means of holds, shields, batons and CS gas only and that it must be applied in accordance with any directions from the Department of Prisons and Probation, which is part of the Ministry of Justice.

Letter no. 87 of 16 May 2001 on the Executive Order on the Use of Force against Inmates in State and Local Prisons says, *inter alia*, that force may be applied by means of holds, shields, batons and CS gas only and that it must be applied in accordance with any directions from the Department of Prisons and Probation under the Ministry of Justice. It appears, particularly in respect of holds, that the use of handcuffs would

normally be a more appropriate and gentle means of restraint than arm locks when moving inmates from one location to another.

The prone position leg lock is described in further detail in a recommendation of January 1994 on the prevention and resolution of conflicts. This was made by the task force for the training of uniformed staff in the use of lawful means of force and restraint, which had been set up by the Department of Prisons and Probation under the Ministry of Justice.

It further appears that, in the basic prison officer training programme, physical conflict resolution has been taught by reference to holds such as the prone position leg lock [illustrations from 2005 were submitted to the City Court].

From the statements and the other circumstances of the case, the City Court is not convinced that the prison staff members used force contrary to the directions that were (then) in force when handling E. Moreover, the City Court is not convinced that force was used to a greater extent than absolutely necessary, given the urgency of the situation and the violent behaviour exhibited by E. throughout the incident. It is observed in that connection that the initial reasons for the prison staff members' involvement were that they were concerned that he might harm himself and wanted to take care of him during his imprisonment in the local prison. It is further observed that the statements and the medical information about marks and so on that were found on the deceased do not suggest any reason to think that the prison officers sat on top of E. at any point while he was in a prone position.

It was not in breach of the directions that (then) applied that E. was kept in a prone position for a short time after he had slowly calmed down or that the leg lock was replaced by cable ties around his ankles. It appears from the statements, *inter alia*, that a prison officer continuously observed E., including taking his pulse, and that E. was turned over and placed in a supine position immediately when the observing prison officer started to suspect that something was wrong.

It further appears that the prison officers immediately initiated first aid when they noticed that E. was not breathing.

Accordingly, there is no basis for finding that the incident and its fatal outcome constitute a violation of Article 2 of the Convention, nor that force was used contrary to Article 3 of the Convention.

[The applicant] has submitted that the Prison and Probation Service has failed to fulfil its duty, *inter alia*, to update and keep updated the rules governing the use of force and that the Prison and Probation Service has consequently failed to observe its positive obligations under Articles 2 and 3 of the Convention, for which reasons those rights have been violated.

Material about the prone position leg lock has been available in addition to the rules laid down in the Act and the Executive Order and regulations made under it. According to the prison staff, they received both theoretical and practical training in the use of the hold. On the basis of the evidence, including the statements made by [A.K.] and [M.G.], the court further accepts that the training provided about the prone position leg lock included the instruction that no pressure may be applied to a restrained person's back while the person is in a prone position.

At the time of the incident, directions and instructions for use of the prone position leg lock therefore did exist.

The questions are whether those directions must be considered to have been inadequate at the time and, if so, whether that was a cause that contributed to the cardiac arrest suffered by E. and his subsequent death.

It must be assumed that the presentation about pepper spray dated 2009 by the Police College and 2011 by the Prison and Probation Service, in which instructions for dealing with persons in a prone position are also provided, was not shown to the staff of the Prison and Probation Service until after the incident.

In the years leading up to the incident, Denmark and Norway saw the deaths of several persons who had been placed in a prone position leg lock, but the circumstances of those cases are inconsistent with those of the case at hand. In *Benjamin*, see the Eastern High Court judgment, published in the Danish weekly law reports, ref. U.1996.353Ø, considerable pressure was applied to Benjamin's back while he was placed in a 'fixed leg lock' hold. Considerable pressure was also applied to the applicant in *Obiora v. Norway*, in which the ECtHR delivered its judgment on 21 June 2011. In *Løgstør*, see the Supreme Court judgment published in the Danish weekly law reports, ref. U.2011.2510H, the medical opinions emphasised the severe obesity of the detainee combined with his intense level of activity and possible use of controlled substances.

Although a recommendation was made on 15 May 2014 to replace the leg lock with a different hold, there is still no basis for finding that the directions for use of the prone position leg lock and other restraints that were in force at the time were inadequate or did not sufficiently take into account the risks associated with the use of the hold. Particular reference is made to the fact that in November 1997 the Health Authority (*Sundhedsstyrelsen*) had made no objection to the Prison and Probation Service's catalogue of photographs and detailed descriptions of the holds and techniques taught to and used by uniformed staff in state and local prisons.

It cannot lead to a different outcome, based on the reasons submitted by the defendant, that experience from the UK and the opinion issued by the Norwegian Ombudsman have not been taken into account to a wider extent.

It has therefore also not been proved that the defendant violated Articles 2 and 3 of the Convention by the use of inadequate directions.

In summary, the City Court finds on the basis of the foregoing that neither the prison staff nor the Department of Prisons and Probation have acted in violation of Article 2 and Article 3 of the Convention, for which reason the City Court finds in favour of the defendant."

27. The applicant appealed against the City Court judgment to the High Court of Eastern Denmark (*Østre Landsret*), which heard the witnesses M.G., F.M. and K.O. [an employee at the Department of Prisons from 1981 to 2020]. The prison officer F.M. explained that he had been instructed in the use of the prone position leg lock and that it was important not to put too much pressure on the bent leg as that would risk causing a knee injury.

28. M.G explained, *inter alia*: "that the combination of the prone position leg lock and handcuffs was often used on inmates refusing to cooperate after having been either placed in a 'simple' leg lock or having been handcuffed as the only measure. Inmates who had only been handcuffed could put up a violent resistance and, for example, head-butt others. Also, those inmates might injure themselves. As an element of a leg lock, where the inmate was very agitated, you could place one knee on the inmate's shoulder or upper

arm to keep the inmate on the ground. That would not affect the inmate's breathing to any significant degree". Moreover: "until the task force was set up in 2011, it had not been thought that holding persons in a prone position leg lock applied in accordance with the [previous] regulations might present a risk of asphyxiation".

29. In a decision of 24 March 2020 the High Court refused the applicant's request for the commission of an additional opinion by the Medico-Legal Council as to whether the pressure put on E.'s arms while he was handcuffed behind his back and placed in the prone position could have impeded his breathing. The High Court found that since extensive investigations into E.'s injuries had already been carried out and many statements had been taken, a further report from the Medico-Legal Council would not be able to assist the court in reaching its decision.

30. On 2 November 2021 the High Court found against the applicant for the following reasons:

> "Basing its conclusions on the evidence produced to the High Court – including the witness evidence, the information about the times of phone calls, and the accounts and reports prepared – the High Court agrees that the actual sequence of events relative to the incident that took place in the morning of 11 January 2011 in the Kolding Local Prison was as described by the City Court.
>
> Further, the High Court accepts as established fact that the testimony given by witness [F.M.] – combined with the post-mortem examination reports and the statements produced from the other staff members at the local prison – shows that E. was restrained by means of the hold called a prone position leg lock in combination with the use of handcuffs and that none of the local prison staff members involved in the incident in the observation cell sat on E. or applied any pressure directly on his back. That conclusion is supported by the evidence given by witness [M.G.] who stated that, even prior to 2011, the Prison and Probation Service emphasised in its staff training that when using the hold called the prone position leg lock there must be no application of any kind of pressure on the back of a restrained person. It is observed that, based on the evidence produced, it cannot be considered a fact that E. was restrained using the hold called the fixed leg lock or a TARP position.
>
> Furthermore, the High Court agrees that the cause of E.'s death cannot be determined with certainty on the basis of the information available. In its opinion of 2 April 2012 one of the things the Medico-Legal Council said in its answer to question 4 was that E.'s breathing might have been impeded because he had been kept in a prone position, which may have contributed to his death. The Medico-Legal Council also said that the excited delirium syndrome (ExDS) is a much-debated phenomenon but that multiple observations about E. corresponded to what have been described in the literature as the symptoms of that condition, and that it cannot be ruled out that 'ExDS was also a factor'.
>
> As to the City Court's judicial review under Articles 2 and 3 of the Convention, the High Court agrees with the reasoning and decision of the City Court. As stated above, the High Court is not convinced that the local prison staff members involved in the incident in the observation cell sat on or applied any pressure directly on E.'s back.
>
> On the specific question of whether the Prison and Probation Service had sufficiently updated its directions for the use of the prone position leg lock, the High Court agrees with the City Court's finding, which is also supported by the evidence given by witness

[M.G.] in the High Court. It also observes in this regard that the rules on the use of force must be assessed in conjunction with the training and instructions actually provided to prison staff. As to the directions prior to 2011 – when they are assessed in conjunction with the training and instructions then given to the staff – the evidence produced shows them to have been clear and it appears that they served to warn staff members, to a sufficient extent and at the high professional level necessary, about the potential risks involved in using the prone position leg lock. That must be looked at in the light of the information provided about what was then known on the subject and in the light of the testimony of witness [M.G], which was partly about the ongoing updating of the directions and the training, partly about the 2012 revision process, and partly about the training on the general principles of the use of force and on conflict prevention. Separately, the initiation of a revision of the conflict management tools that took place after E.'s death resulted in a recommendation that an alternative be found to the prone position leg lock, but that could not by itself lead to a different outcome in this case. The information produced to the High Court on other countries' specific decisions or general directions on the use of force by means of the prone position leg lock cannot simply be compared with the background and circumstances of the case at hand and therefore cannot lead to a different outcome.

On the basis of these observations, the High Court upholds the earlier judgment in favour of the respondent."

31. On 4 July 2022, the Appeals Permission Board (*Procesbevillingsnævnet*) refused to grant leave to appeal to the Supreme Court (*Højesteret*).

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTISE

A. The Sentence Enforcement Act

32. The enforcement of sentences is governed by the Sentence Enforcement Act (*straffuldbyrdelsesloven*) (at the relevant time, Act no. 1162 of 5 October 2010), which in so far as relevant read as follows:

Section 62

"An institution may use force against an inmate if necessary:

(i) to avert imminent violence, to overcome violent resistance or to prevent suicide or other self-harm;

(ii) to prevent escape or to apprehend escaped inmates; or

(iii) to enforce a direction when prompt compliance is necessary and the inmate refuses or fails to comply with instructions from staff members.

(2) Force may be applied through the use of holds, shields, batons and CS gas.

(3) No force may be used if it would be disproportionate in view of the purpose of the measure and the indignity and discomfort presumably caused by the measure.

(4) Any force must be applied as gently as circumstances permit. A doctor must attend the inmate following the use of force if it is suspected that the inmate has fallen

ill or sustained any injury in connection with the use of force or if the inmate himself requests medical assistance.

(5) The Minister of Justice shall make the rules on the use of force against inmates.

(6) The Minister of Justice may launch a pilot scheme introducing the use of force by means of pepper spray in certain institutions of the Prison and Probation Service."

33. The preparatory notes to the Sentence Enforcement Act (Bill no. 145 of 8 December 1999) described section 62(2) as follows:

"Subsection (2) includes a list of the means through which force may be applied against inmates. When a specific means of force is being chosen, the principles of proportionality and gentleness set out in subsection (4) must be observed."

34. The Sentence Enforcement Act is supplemented by a number of executive orders, notably the Executive Order on the Use of Force against Inmates in Prisons (Executive Order no. 382 of 17 May 2001), of which the relevant provisions read as follows:

Section 2

"Force may be applied through the use of holds, shields, batons and CS gas only and must be in accordance with directions from the Department of Prisons and Probation under the Ministry of Justice. ..."

Section 7

"If an institution has used force against an inmate, a report on the use of force must be made as soon as possible. ..."

Section 8

"(1) The director of the relevant institution or the person so authorised shall make the decision on the use of force.

(2) If, because of the circumstances in the individual case, it is impossible to await a decision from a person authorised under subsection (1) of this section, the decision must be made by the officer present who is in charge. In such cases, a person authorised under subsection (1) of this section must be notified of the incident as soon as possible."

B. Directions from the Department of Prisons and Probation about the prone position at the time of the incident

35. At the time of the incident, the directions of the Department of Prisons and Probation were to be found in Letter no. 87 of 16 May 2001 on the Executive Order on the Use of Force against Inmates in State and Local Prisons. The relevant text of the Letter read as follows:

"Please find enclosed the Executive Order on the Use of Force against Inmates in State and Local Prisons (Copenhagen Prisons). The Executive Order enters into force on 1 July 2001. The Executive Order applies to all inmates in State and local prisons. Section 62 of the Sentence Enforcement Act and the Executive Order says that those

provisions do not apply to inmates in the halfway houses of the Prison and Probation Service.

In addition to the rules provided in the Act and the Executive Order, the institution may use force under the general rules of Danish law on self-defence.

Section 2 of the Executive Order provides that force may be applied by means of holds, shields, batons and CS gas only in accordance with directions from the Department of Prisons and Probation under the Ministry of Justice.

In connection with any use of force, a report must be made using the special report form of the Department of Prisons and Probation ..."

36. The directions above were supplemented by specific instructions given to prison officers as part of their initial and in-service training. Prison officers were taught how to use the approved holds, including the prone position leg lock, as well as general conflict management and de-escalation skills.

37. Additional directions for the use specifically of the prone position leg lock hold were given during the initial basic training of prison officers and in-service training courses.

38. As from January 1994, conflict management training in the Prison and Probation Service was centralised. The basic training programme and the in-service training courses were essentially the same. The training provided on holds included information on the risks that might be associated with the use of individual holds, including the prone position leg lock. For the purpose of the training, the list of permitted holds, including written descriptions and photographs, was handed out to the participants (the prone position leg lock was entitled *benlås 2*). At the time of the incident, the basic training programme lasted three years, and there were eighty hours of training in self-defence, the use of force and conflict management theory. The conflict management theory training focused on, *inter alia*, conflict prevention to avoid the need to use force against inmates. In addition to the basic training programme, prison officers received regular in-service training in the use of force and holds. Prior to 2011, it was a requirement for prison officers to participate in a conflict management refresher course every seven years. This four-day course included thirty-six hours of training in self-defence, the use of force and conflict management theory.

39. The training in the use of approved holds was based on the so-called "list of permitted holds" in the Recommendation on the Prevention and Resolution of Conflicts (*Indstilling om konfliktforebyggelse og -løsning*) made in January 1994 by the Staff Training Centre of the Prison and Probation Service. The recommendation, including the list of permitted holds, was approved by the Health Authority in 1997. The recommendation further included the following description on how to apply the prone position leg lock:

"10. Prone position leg lock, variant 1

Technique: The starting position here is standing next to a person lying in a prone position. Bend down to start applying the leg lock. Grasp the instep and a toe of one foot of the person lying prone with your hands. Raise the person's leg to make it point upwards at an angle of about 70 degrees.

Twist your leg that is further away from you around the knee joint of the person lying prone, and then bend his or her leg around your instep. Lastly, let go with your hands and lean over the person lying prone, so bending his or her leg and placing his or her foot against your chest. At the same time, use your free hand to grasp the person's shoulders.

Principle: This hold is based on the principle of raising the leg around a point. At the same time, it uses the principle of the lever in that the toe and instep of the person lying prone are grasped, making it as easy as possible to push the leg up towards the person's bottom.

Assessment: For this hold, as for hold 9, the technique for pacifying the person is the infliction of sufficient pain to make the person choose to stay down. The hold is rather difficult to apply and, as with hold 9, it will normally require more than one person to apply it.

11. Prone position leg lock, variant 2

Technique: The starting position here is to stand between the legs of a person lying in a prone position. Grasp the tip of a toe of the person lying prone. Place the tip of the toe in the hollow of the knee on the other leg. Bend the leg that has a foot in the hollow of the knee up towards the bottom of the person lying prone, and twist the ankle joint (the tip of the toe must point towards the head of the person lying prone).

Principle: This leg lock also uses the principle of the lever in that the tip of the toe is grabbed. Moreover, the leg of the person lying prone is bent around a point, that is, the person's own foot. The technique for pacifying the person is the same as the technique applied with holds 9 and 10. ..."

C. Directions to the Police about the prone position before and at the time of the incident

1. The Benjamin case

40. On New Year's Eve in 1992 a young man, Benjamin, was arrested by the Danish police and held in a prone position fixed leg lock (also called the TARP position, where the person is in a prone position with his hands handcuffed behind his back and his lower legs bent upwards and fixed under the handcuffs). Benjamin suffered a cardiac arrest and was eventually left brain damaged. The High Court judgment (published in the Danish weekly law reports, ref. U.1996.353Ø) found the police liable for the incident. Subsequently, because of that case, the police were no longer allowed to use the prone position fixed leg lock.

2. The Løgstør case

41. In June 2002 the Danish police were implicated in a fatal incident involving the use of the prone position leg lock on an obese and hyperactive young man. The Supreme Court found that the authorities could not be held liable for his death (the judgment was published in the Danish weekly law reports, ref. U 2011.2510H), and accordingly that there had been no violation of Article 2 of the Convention.

D. Instructions from 2005

42. In 2005 the following instructions were given to the police about the risk associated with the use of the prone position leg lock and hyperactivity:

> "Following the State Prosecutor's inquiry in April 2005, the Police Academy have issued a circular to the police and the prosecution regarding self-defence grips and techniques. In the communication, it was stated, among other things, that any prone positioning of overweight individuals, who may also be hyperactive and/or under the influence of drink or drugs, should be of as short duration as possible."

E. Medical assessment from 2007

43. In 2006 the Danish police sought a medical assessment of their techniques, and a report on this issue (in 2007) said *inter alia*:

> "1. Background for a medical reassessment of the medical evaluation.
>
> In 1995/1996, a medical assessment of police self-defence techniques and the use of force was conducted to clarify the risks associated with their use.
>
> The results of the medical assessment were subsequently incorporated into a new textbook in the field. In the relatively few cases where, because of the medical evaluation or for other reasons, particular caution needed to be exercised in the use of special techniques, that was highlighted in the textbook, as well as being emphasised in oral instructions and teaching guidelines.
>
> Since that medical assessment, experience has led to developments in the area and an understanding that adjustments and changes to certain techniques and procedures are needed. The number of techniques has also been reduced to ensure greater routine use of fewer grips and techniques. These circumstances further confirm the need for a new textbook in the field.
>
> Based on the above, the National Police therefore asked the National Board of Health in August 2006 to recommend medical expertise that could be included in a renewed medical assessment of police self-defence techniques and the use of force.
>
> ...
>
> 3. Results of the medical assessment of police self-defence techniques and use of force.
>
> In cases where the medical assessment gave rise to the identification of particular risks or where special caution needed to be exercised in using a self-defence technique or in the use of force, this was indicated by the illustration of the specific grip/technique in

the folder of photographs provided to support the practical demonstration of the grips/techniques.

In addition, the folder of photographs incorporated the remarks from the previous medical review as stated in the current textbook. Furthermore, medical assessments of specific cases were incorporated. ..."

44. The medical evaluation notes obtained by the Danish police in 2007 made the following statement, among others, on the risk associated with the prone position and hyperactivity:

"One must be aware that heavy and even slightly prolonged pressure on the chest can be dangerous when the individual is lying face down. Similarly, during any form of pacification involving putting a person in a prone position, it is advisable to carefully monitor the pulse and breathing of the individual, who should not be left alone.

If the situation requires that the detained individual remains on the ground afterwards, weather conditions should be taken into consideration, so that the time spent in that position - especially in low temperatures - is as brief as possible.

Prone positioning of overweight individuals, who may also be hyperactive and/or influenced [of alcohol or drugs], should also be of as short a duration as possible."

F. Updated instructions of 2009

45. The updated textbook material from 2009 stated explicitly that the "prone position should only be used briefly".

46. Teaching material from 2009 prepared by the Danish Police Academy included slides showing *inter alia* that holding a person in the prone position while that person was handcuffed and/or physically restrained (*fysisk belastet*) presented a heightened risk of positional asphyxiation.

II. EXPERIENCE FROM OTHER COUNTRIES REGARDING THE PRONE POSITION BEFORE AND AT THE TIME OF THE INCIDENT

A. France

47. In November 1998, Mr Saoud died after having been handcuffed and kept pinned to the ground on his stomach for thirty-five minutes by police officers using their body weight. Two police officers had held him by the wrist and ankles while a third police officer placed his outstretched arms on his shoulders and a knee in the small of his back. The cause of death was "slow mechanical asphyxia". Following *Saoud v. France* (no. 9375/02, 9 October 2007), the French authorities issued a note of 8 October 2008 to the police on the use of force, which set out the following (see *Boukrourou and Others v. France*, no. 30059/15, Chapter II.B.1.b, 16 November 2017):

"... When the use of force is considered necessary during police operations, the greatest difficulty is in reconciling the three demands of immediate reaction, continuing vigilance and the proportionality of any measures taken.

The conditions in which the use of force is legitimate are clearly defined in the texts, which confirm that when force is required it must be used with careful judgment and in proportion to the gravity of the danger presented.

You are therefore formally reminded that as soon as a person is arrested, and however serious the charges of which they are suspected, the police are responsible for that person, who is under the protection of the intervening officers. Bearing this in mind, if it is necessary to immobilise the person, any pressure – particularly on the thorax or the abdomen – must be as brief as possible and must be relaxed as soon as the person is restrained by regulated and appropriate means. As the medical services emphasise frequently, restraining a person face down must therefore be done as little as possible, particularly if the restrained person's hands are handcuffed behind the back. The same rules must clearly be adhered to when transporting an arrested person.

Where appropriate, all arrangements must be made for a medical examination to be carried out promptly.

A police doctor (centre 15) should be informed as a matter of course before any intervention which is expected to be dangerous, particularly where it involves a person who is a danger to himself or to others. The police doctor is responsible for deciding whether a medical team should be called to the scene. (...)"

B. The United Kingdom

48. After the death of Mr Roger Sylvester in 1999, the Metropolitan Police Service (MPS) issued instructions on the use of the prone position. MPS Police Notice 12/99 defined positional asphyxia and emphasised that this could occur extremely rapidly. It listed eight factors that could contribute to death from positional asphyxia:

- "The body position of a person results in partial or complete airway obstruction and the subject is unable to escape from that position;
- Pressure is applied to the back of a person held in the face down prone position;
- Pressure is applied restricting the shoulder girdle or accessory muscles of respiration whilst laid down in any position;
- The person is intoxicated through drink or drugs;
- The person is left in the face down, prone position;
- The person is obese (particularly those with large 'beer bellies');
- Where the person has heightened levels of stress; and
- Where the person may be suffering respiratory muscle failure, related to prior violent muscular activity (such as after a struggle)."

49. A MPS Review of 2004 arising from the inquest following the death of Mr Sylvester, recommended that:

"Officer safety training should stress that restraining a person in the prone position is potentially dangerous and include appropriate techniques to re-position violent persons from the prone position as quickly as possible (Restraint & Mental Health Report September 2004)."

The MPS Review of 2004 considered whether to recommend a time limit but concluded that it was neither safe nor practicable to set one and that the prone position should be for "the minimum time necessary to achieve control".

50. In 2004 the Joint Committee on Human Rights (JCHR), appointed by the House of Lords and the House of Commons, considered matters relating to human rights in the United Kingdom and in particularly focused on Article 2 of the Convention and the duty to protect the right to life and the positive duty of the State to investigate following any death in State custody. The JCHR comprised six members of the House of Lords and six members of the House of Commons. Its members took oral evidence from numerous witnesses. In relation to the prone position, the subsequent Third Report (Session 2004-05, § 248) stated:

> "Reliance on prone restraint is a matter of concern for compliance with Article 2, given the known dangers of this position, evidenced by previous deaths. Whilst we appreciate that an inflexible time limit may cause difficulties in practice, we emphasise that Article 2 requires that patients and detainees should not be placed at risk by use of this position unless absolutely necessary to avert a greater risk to themselves or others, and that they should be restrained in this position for the shortest possible time necessary. In our view use of the prone position, and in particular prolonged use, needs to be very closely justified against the circumstances of the case, and this should be reflected in guidance. There is a case for guidance prescribing time-limits for prone restraint, departure from which would have to be justified by individual circumstances. Equally importantly, those restraining a detainee should be capable of minimising the risks to him or her, through techniques to ensure, amongst other things, that airways are not blocked. They should be appropriately trained to do so."

51. A 2005 Prison Service Order (Order Number 1600) on the Use of Force, also considered the prone position:

> "The prone position (face down) should only be used if necessary. If it cannot be avoided the time spent in this position must be minimised. If the person has to be restrained in the prone position, avoid pressing down on the chest. Use the limb, as binding the wrists will be considerably safer than kneeling on the back of someone's chest. The amount of time that restraint is applied is as important as the form of restraint and the position of the detainee. Prolonged restraint and prolonged struggling will result in exhaustion, possibly without subjective awareness of this, which may result in sudden death. Situations that need to be particularly closely monitored are:
>
> - Relocation of the prisoner – The supervisor must satisfy themselves that the prisoner is not in a physically distressed condition following relocation;
> - Periods during which the prisoner is/has been laid in the face-down (prone) position. A prisoner must never be kept or left in the prone position with their hands held behind their back in ratchet handcuffs;
> - The use of C&R on a pregnant prisoner."

C. Norway

52. In September 2006, Mr Obiora died after being arrested by police officers in Trondheim (see *Obiora v. Norway* (dec.), no. 31151/08, 21 June 2011). After a struggle with the police, Mr Obiora was handcuffed. Subsequently, two police officers held him on the ground in the prone position. One leant his body weight on top of Mr Obiora, trying to apply a leg lock, whereupon Mr Obiora fainted. He was placed on his side so that he could breathe and taken to hospital on the floor of a police car. On his arrival at the hospital approximately seven minutes later it was established that his heart had stopped. In May 2007 the Special Unit for Investigation of Police Matters decided not to charge any of the police officers involved.

53. On 16 February 2010 the Parliamentary Ombudsman (Civil Matters) gave an opinion of his own motion (case 2007/2439) on Mr Obiora's death and on the issue of responsibility for police techniques in the use of force on arrest, in particular restraining a person by placing him face down. He observed, *inter alia*, that despite the risks of the prone position being well known in the international literature and well understood in neighbouring countries, and also known to the Danish Police, they were not known to the Norwegian Police or to the Norwegian Police University College. In the proceedings concerning Mr Obiora's death, the Norwegian Bureau for the Investigation of Police Affairs had acknowledged that the domestic authorities should have kept up with the international literature. Considering the matter as a whole, the Ombudsman found that Norway had not sufficiently complied with its obligations under the Convention in respect of the use of restraint by placing an arrested person face down on arrest. The State ought to have been aware of the health hazards involved in the use of this technique. That knowledge would have provided the requisite basis for regulating its use and ensuring adequate training of the police with a view to avoiding loss of life or serious injury. Against the background of the information available regarding the dangers of restraining a person by placing him face down, it would not have entailed an excessive burden for the Norwegian authorities to have acquired the necessary knowledge about the health hazards of the technique by the time of Mr Obiora's death. That necessary knowledge could have been acquired without undue expense.

54. In particular, regarding the available knowledge and training concerning the prone position as in place around September 2006, the Parliamentary Ombudsman stated as follows:

> "Looking at the information provided by the department, it seems clear that Norwegian justice and police authorities had very limited knowledge of the risks associated with the use of the prone position at the time of Obiora's death. The police were only trained in the dangers of applying strong pressure or weight to an arrestee's neck and back, as well as the general risks associated with impaired respiration. There was no form of education provided to police students, and no guidelines were given to

the police, about the risks of using the prone position, including the risk of respiratory failure due to pressure on the upper body using this technique."

55. On 16 February 2010 the Norwegian Government concluded a settlement agreement with Mr Obiora's sons by paying compensation of 400,000 Norske Kroner (NOK - approximately 50,000 Euros (EUR) at the relevant time), plus NOK 100,000 to his brother.

56. In the meantime, the Directorate of Police issued the following guidelines (Circular 2007/011), which stated:

"In situations where it appears absolutely necessary to gain control over a resisting individual, the prone position can be used. As soon as the arrested person is handcuffed or if control over the arrested person is established in another manner, the person must be taken out of the prone position."

III. REPORTS OF THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (CPT)

57. In its 13th General Report on its activities (CPT/Inf (2003) 35), of 10 September 2003, under the heading "Deportation of foreign nationals by air", the CPT stated the following (§ 34):

"... In cases where resistance is encountered, escort staff usually immobilise the detainee completely on the ground, face down, in order to put on the handcuffs. Keeping a detainee in such a position, in particular with escort staff putting their weight on various parts of the body (pressure on the ribcage, knees on the back, immobilisation of the neck) when the person concerned puts up a struggle, entails a risk of positional asphyxia. ...

The CPT has made it clear that the use of force and/or means of restraint capable of causing positional asphyxia should be avoided whenever possible and that any such use in exceptional circumstances must be the subject of guidelines designed to reduce to a minimum the risks to the health of the person concerned."

58. Previously, in its report of 3 April 1997 to the Danish Government on the visit to Denmark (CPT/Inf (1997) 4), the CPT stated, *inter alia,* as follows (pp. 10-11):

"13. Reference should also be made to the use by the police of the means of restraint known as the 'leg lock'; a matter which has been the subject of an exchange of correspondence between the CPT and the Danish authorities (cf. page 160 and pages 182 to 183 of document CPT/Inf (96) 14). The application of the so-called "fixated leg lock" (in which a detainee is handcuffed behind his back, one of his legs is flexed across the other, and one foot is wedged behind his handcuffed wrists) was suspended by the Minister for Justice in a Circular of 29 June 1994. However, the police are still authorised to use a number of other forms of leg-lock restraint. Those latter forms of leg lock have recently been the subject of an exhaustive medico-legal review, which has clarified the manner in which certain of these methods are to be applied.

Nonetheless, the delegation was concerned by the content of a recent official complaint concerning a person (arrested in Copenhagen on 21 July 1996) to whom a "manual" leg lock had been applied.

> Apparently as a consequence of the manner in which she was restrained, the person concerned sustained a broken leg (left tibia, just below the knee) and a shattered knee cap.
>
> The Committee recommends that the Danish authorities continue closely to monitor cases involving the application of "leg lock" means of restraint, to ensure that they are not, on occasion, being applied by police officers in an over-zealous fashion. In addition, it would like to be informed of the outcome of the investigation into the above-mentioned case."

59. In their response dated 11 December 1997 (CPT/Inf (97)14), (page 1-3), the Government of Denmark reported that the use of the "fixated leg lock" had been prohibited. They also provided detailed written instructions (Circulars dated 29 June and 8 December 1994) by the Ministry of Justice to the police regarding the "manual leg lock" [prone position leg lock], including requirements for the supervision of the person's pulse and breathing, emphasising that a leg lock should not be prolonged more than was strictly necessary. Moreover, they highlighted the 1996 medical revision of holds and other techniques.

60. In their report dated 24 July 2008 (CPT/Inf (2008) 26), the CPT stated regarding training of Danish Police *inter alia*, (§§ 10-11):

> "The 2004 Police Act contains detailed provisions on the use of firearms, truncheons, dogs and gas by the police.
>
> ...
>
> The use of the so-called "manual leg lock" restraint technique is also the subject of detailed instruction. More generally, police training in self-defence holds and techniques has been the subject of a recent review conducted in 2007.
>
> ...
>
> 11. The CPT welcomes the action taken by the Danish authorities to provide appropriate guidance and training to police officers with a view to preventing ill-treatment. At the same time, it is clear that the authorities must remain vigilant and continue to remind police officers that no more force than is strictly necessary should be used when effecting an arrest and transporting a detained person. In this context, the Committee trusts that the Danish authorities will continue closely to monitor cases involving the use of dogs and the application of "manual leg lock" means of restraint, to ensure that they are being applied by police officers in a necessary, justifiable and proportional manner, and with a view to further reducing the number of incidents and injuries. As regards handcuffing during transportation, it should be resorted to only when the risk assessment in the individual case clearly warrants it and be done in a way that minimises any risk of injury to the detained person."

61. In their response dated 13 March 2009 (CPT/Inf (2009)12) (pages 4-5), the Government once again assured the CPT that Danish Police continued monitoring the forcible means applied and that they were "limited to the extent necessary". Furthermore, the Government highlighted:

> "New instructional material on the subject, which also covers the use of the so-called "manual leg lock", was developed in 2008 by the Police College. Prior to that, in 2007

a group of independent medico-legal experts examined, assessed, and approved the techniques, holds and methods comprised by the instruction."

62. In its document CPT/Inf/E (2002) 1 – Rev. 2010, published on 8 March 2011, the CPT noted, in respect of the deportation of foreign nationals, that in cases where resistance was encountered, escort staff usually immobilised the detainee concerned completely on the ground, face down, in order to place him or her in handcuffs. Keeping a detainee in such a position – in particular in the event that escort staff put their weight on various parts of the body (for example, exerting pressure on the ribcage, placing their knees on the person's back or immobilising the person's neck) after the person concerned has put up a struggle – entails a risk of positional asphyxia. According to the CPT, the use of force and/or methods of restraint capable of causing positional asphyxia should be avoided whenever possible and any such use in exceptional circumstances must be subject to guidelines designed to reduce to a minimum the risks to the health of the person concerned.

IV. DIRECTIONS FROM THE DANISH DEPARTMENT OF PRISONS AND PROBATION ABOUT THE PRONE POSITION AFTER THE INCIDENT GIVING RISE TO THE PRESENT CASE

63. Following the incident giving rise to the present case, the Prison and Probation Service set up a task force which included medical experts appointed by the Health Authority. In May 2012, the task force published its report (*Instilling om revision af Kriminalforsorgens konflikthåndteringsmidler m.v.),* in which it pointed out, *inter alia*, that at the time there was a need for more exact knowledge about the risk of using physical means of force, including the prone position leg lock, particularly against persons with chronic diseases (heart and lung conditions), substance abusers, mentally ill persons and obese persons. The task force concluded that the prone position leg lock should be avoided as a means of physical restraint, but recommended, based on an overall assessment of medical and safety considerations, that the prone position leg lock hold should continue to be permitted for the time being.

64. Based on that report, the Department of Prisons and Probation reiterated in its letter of 12 June 2012 to its institutions that the prone position leg lock must not involve any application of pressure to the chest or abdomen and that inmates must be placed in a position that allows free breathing immediately when they have been pacified and handcuffed.

65. In the autumn of 2012, the Prison and Probation Service set up a standing committee to review the means and strategies used for control, safety and self-defence (the Methodology Committee). Further, the committee was tasked with the development of a hold to replace the prone position leg lock. Based on experience gained in Bavaria, Germany, the use of a newly

developed hold, the Methodology Committee recommended that the prone position leg lock be phased out and that the "controlled lateral decubitus position" hold be phased in.

66. Based on the recommendations of the Methodology Committee, the Security Unit of the Department of Prisons and Probation introduced a new list of permitted holds in May 2014. As a consequence of the new list, the prone position leg lock was phased out and replaced by the controlled lateral decubitus position.

67. As of 1 January 2019, the prone position leg lock was no longer approved for use in Prison and Probation Service institutions.

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 2 AND 3 OF THE CONVENTION

68. Relying on the substantive limb of Articles 2 and 3 of the Convention, the applicant complained that the Danish authorities had failed to give prison guards clear and adequate instructions on the use of the prone position for restraining prisoners, although they knew or ought to have known that it involved a real and immediate risk to life. She also complained that keeping E. in the prone position for at least thirteen minutes could not be considered "absolutely necessary".

69. As a master of the characterisation to be given in law to the facts of the case before it (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 114 and 126, 20 March 2018), the Court considers that the applicant's complaints should be examined only under Article 2 of the Convention, the relevant part of which reads as follows:

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

A. Admissibility

70. The Government submitted that the application should be declared manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

71. The applicant disagreed.

72. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. Arguments by the parties

(a) The applicant

73. Firstly, the applicant maintained that there had been a breach of the positive obligation imposed on the State under Article 2 of Convention in that, although the authorities knew or ought to have known that the use of the prone position involved a real and immediate risk to life, they had failed to give prison guards clear and adequate instructions on how to use it when restraining prisoners.

74. The legislative framework referred to by the Government did not contain any guidelines or instructions regarding the use of restraint techniques, and the Government failed to produce any evidence that the training of the prison officers included information about the risks associated with the prone position.

75. That finding was supported by the witness testimonies given in the courts in the compensation proceedings. None of the prison staff had been aware at the time that placing an individual in the prone position leg lock was potentially fatal and none of them had thought of changing E.'s position from the prone position as soon as possible and securing his airways, although plenty of staff were available.

76. Nevertheless, at the relevant time, several countries, such as France, Norway, and the United Kingdom (see paragraphs 47-56 above) had detailed rules on the use of the prone position.

77. More importantly, for almost a decade prior to the death of E., the Danish police had had detailed rules on the use of the prone position. Since the *Benjamin* and *Løgstør* cases (see paragraphs 40-41 above) they had been fully aware of the risks, including the risk where the person restrained was hyperactive.

78. However, the Danish Prison authorities had failed to seek any medical opinions or advice on the use of the prone position. The most recent medical opinion dated back to 1997 when the first set of holding techniques was adopted (see paragraph 39 above), and the only instructions available pertaining to the risks were the instructions given in the letter dated 12 June 2012 (see paragraph 64 above), a year and a half after E.'s death.

79. The applicant's view was that the situation in the Danish Prison and Probation Service mirrored the situation in Norway in 2006 which the Norwegian Ombudsman had criticised as contrary to the Convention in 2010 (see paragraphs 53-54 above).

80. Secondly, the applicant maintained that there had been a breach of the State's negative obligation under Article 2 of Convention, since keeping E. in the prone position for more than thirteen minutes within an enclosed prison observation cell could not be considered "absolutely necessary" for the

purposes of that provision. The applicant accepted that the initial placing of E. in the prone position was legitimate, but as soon as E. was secured in handcuffs, the prison guards should have moved him into the recovery position, by rolling him onto his side, or had him sit up.

81. The instructions given in other countries at the time and the general stand taken by the Court (the applicant refers, notably, to *Saoud v France*, no. 9375/02, § 102, 9 October 2007) all indicated that the use of the prone position should be limited to an absolute minimum. The Norwegian and British guidelines even stated that the prone position should cease to be used as soon as the arrested person was handcuffed (see paragraphs 51 and 56 above).

82. In addition, the authorities must have been aware of E.'s vulnerability and his mental condition.

83. The applicant noted that the Government had emphasised the fact that the prison guards had not put any weight on E.'s back. However, this illustrated a misunderstanding of the underlying medical issue. There was widespread agreement that prone restraint created a serious risk of positional asphyxia. This risk existed independently of any additional weight being put on an individual's back, although if weight were put on someone's back, that could exacerbate the risk. This fact was reflected in the instructions given in other countries, all of which emphasised that handcuffed individuals should not be restrained face-down and that serious attempts should be made to bring an end to such a situation.

(b) The Government

84. The Government submitted that extensive and thorough investigations had been carried out into the events leading to E.'s death. The investigations showed no causal link between the force used and the death, although it also could not be ruled out that the force had contributed to the death, and the domestic courts had found that the force used had not exceeded what was absolutely necessary.

85. Furthermore, at the relevant time in 2011 there were clear and adequate instructions and a regulatory framework was in place on the use of manual techniques, including the prone position leg lock, namely section 62 of the Sentence Enforcement Act (see paragraph 32 above), Executive Order no. 382 of 17 May 2001 on the Use of Force against Inmates in Prisons (see paragraph 34 above), and Letter no. 87 of 16 May 2001 (see paragraph 35 above), all supplemented by specific and refresher training of prison officers, all of which had been thoroughly assessed and approved as compliant with Article 2 and 3 of the Convention by the City Court and the High Court in the present case. In particular the domestic courts found it established that the training included, *inter alia*, information on the risks associated with the use of the prone position leg lock, including instructions that the inmate must be

continuously observed and that nothing should rest on an inmate's back as that might affect his or her breathing.

86. The Government added that individuals suffering from mental illnesses are not generally placed within the Prison and Probation Service, but that the prison staff in the present case did not know, and could not have known, that E. was likely schizophrenic (see paragraph 17 above).

87. The Government also pointed out that following the incident, efforts were made to identify the risks associated with the prone position leg lock and to develop a hold to replace it, which resulted in a new list of holds permitted within the Prison and Probation Service in 2014 (see paragraph 66 above).

88. The Government contended that the present case could not be compared to previous cases before the Court or dealt with by the Danish police, as the circumstances varied significantly as to the holds used, the application of pressure, the lack of monitoring and other risk factors relating to the health of the individual detainee. For example, in the *Benjamin* case (see paragraph 40 above) the person had been placed in a "fixed leg lock", considerable pressure was applied to his back, and the police failed to monitor his state of health for approximately seven minutes; in the *Løgstør* case (see paragraph 41 above) medical opinions had emphasised the severe obesity of the detainee combined with his intense activity and possible use of controlled substances; in *Saoud*, cited above, pressure had been applied to the body of a young man for thirty-five minutes; in *Obiora v. Norway*, ((dec.), no. 31151/08, 21June 2011), considerable pressure had also been used. Moreover, in contrast to the case of Mr Obiora, in which the Norwegian Ombudsman had observed that "there was no form of education ... or guidelines ... about the risk of using the prone position" (see paragraph 54 above), prison officers in Denmark had been trained in minimising the risks, including the instruction that the inmate must be continuously observed and that nothing should rest on the inmate's back as that might affect his or her breathing.

89. The Government acknowledged that at the time the risk associated with using the prone position leg lock on persons suffering from excited delirium syndrome (ExDS), also referred to as hyperactivity or acute stress response, was not known "and was in fact a much-debated phenomenon" (see paragraphs 15 and 30 above) and therefore not included in the training given by the prison authorities. In the Government's opinion, however, as also found by the domestic courts, the previous cases from Denmark and abroad had not established the knowledge required or enabled the authorities to act on the risk associated with ExDS or to implement safeguards.

90. Lastly, the Government submitted that the use of the prone position leg lock in the present case had been absolutely necessary because of E.'s conduct. The prison officers had exercised proper vigilance to ensure that any danger to E.'s life was kept to a minimum and they had not been negligent in

their choice of the means of restraining him. The Government referred in this respect to, among other things, the findings of the domestic courts.

2. Comments submitted by the third-party intervener, Dignity

91. Dignity, the Danish Institute against Torture, submitted, among other things, that in January 2011 the Danish legislation on the use of force by prison staff did not provide any information about the use of the prone position leg lock. They also noted that according to point 1.1.6 of the report from May 2012 (see paragraph 63 above), in 2011, there had been eighty-six registered cases of use of the prone position leg lock in Danish prisons, amounting to 12 % of all registered incidents of the use of force (approximately six hundred and seventy cases).

92. In respect of medical expertise on the prone position leg lock, Dignity submitted that:

> "Three main theories explain the serious consequences of the use of the prone position leg lock: 1) positional asphyxia; 2) excited delirium and 3) prone restraint cardiac arrest (PRCA). Point 1): Individuals put in this position may die from asphyxia because they are unable to breathe normally when lying on their chest. Point 2): The prone position may result in what some scientists call "excited delirium syndrome", where the individual experiences a severe bodily stress reaction, hyperventilation, and agitation, which may lead the individual to go into cardiac arrest. Point 3): Lastly, deaths during restraint of persons in the prone position may be due to a heart-condition named PRCA rather than as a result of the matters raised in points 1) or 2). To date, none of these theories - or combinations thereof - has been confirmed with certainty or ruled out as having confirmed the underlying cause of death during a prone position leg lock."

3. The Court's assessment

(a) General principles

93. Together with Article 3, Article 2 of the Convention enshrines one of the basic values of the democratic societies making up the Council of Europe. The object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, among many other authorities, *Salman v. Turkey* [GC], no. 21986/93, § 97, ECHR 2000-VII; *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, §§ 174 and 177, ECHR 2011 (extracts); and *T.V. v. Croatia*, no. 47909/19, § 46, 11 June 2024).

94. In the light of the importance of the protection afforded by Article2, the Court must subject allegations of a breach of this provision to the most careful scrutiny, taking into consideration not only the actions of State agents 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 v. Greece* [GC], no. 50385/99, §§ 57-59, ECHR 2004-XI; *Tekin and Arslan v. Belgium*,

no. 37795/13, § 84, 5 September 2017; and *Machalikashvili and Others v. Georgia*, no. 32245/19, § 99, 19 January 2023).

95. Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into custody in good health but is subsequently injured, it is incumbent on the State to provide a plausible explanation of how those injuries were caused. The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies (see *Salman*, cited above, § 99 and *Tekin and Arslan*, cited above, § 83).

96. Article 2 of the Convention also imposes on the State the positive obligation to train its law-enforcement officials in such a manner as to ensure that they have a high level of competence and to prevent any treatment that runs contrary to that provision (see *T.V. v. Croatia*, cited above, § 50, and the cases cited therein).

(b) Application of those principles to the present case

97. The Court notes from the outset that the applicant did not complain about the domestic decision not to prosecute the prison officers (see paragraphs 20-21 above), nor did she call into doubt the efficacy of the investigation.

98. The issue for the Court is therefore whether in January 2011 the Danish authorities had given prison guards clear and adequate instructions on the use of the prone position when restraining prisoners, and if so whether the prison guards in this case followed those instructions in practice.

(i) Relevant legal and administrative framework

99. In January 2011 a regulatory framework on the use of force, including the prone position leg lock, was set out in section 62 of the Sentence Enforcement Act, section 2 of Executive Order no. 382 of 17 May 2001 on the Use of Force against Inmates in Prisons, and Letter no. 87 of 16 May 2001 (see paragraphs 32, 34 and 35 above). The Court observes that the prone position or the prone position leg lock was not specifically defined in those legal documents.

(ii) Prison staff training

100. However, the legislation was supplemented by specific and refresher training of prison officers. The training in the application of approved holds was based on a "list of permitted holds" in a Recommendation for the Prevention and Resolution of Conflicts made in January 1994 by the Staff Training Centre of the Prison and Probation Service (see paragraph 39 above). The list described the prone position leg lock. The recommendation and the list were approved by the Health Authority in 1997.

101. The City Court and the High Court found that the prison guards' training had included information on the risks associated with the use of the prone position leg lock, notably instructions that the inmate must be continuously observed and that nothing should rest on the inmate's back as that might affect his or her breathing (see paragraphs 26 and 30 above).

102. The Court sees no reason to question the domestic courts' findings in this respect. It observes, however, that there seemed to be a prevailing understanding by the prison authorities at the time that there were no risks associated with the use of the prone position as long as there was no pressure against the back. The testimony of M.G., who had been a senior training consultant at the Prison and Probation Service since 1997 and who was the secretary of the task force set up after E.'s death (see paragraph 25 above), was that he considered it permissible to "place a knee on an inmate's shoulder because that would not make it feel like the respiratory passage was blocked". However, later dung the same testimony he stated that "if a knee was pressed down on a handcuffed person's shoulder, that person would feel as though his or her breathing was impeded, but direct pressure would not be being put on the back. The instructions did not say that the prison officer should place a knee on the inmate's shoulder. That should only be done in cases where it would calm the situation."

103. Following the incident giving rise to the present case, the Prison and Probation Service set up a task force. In May 2012 the task force published a report which said, *inter alia*, that there was a need for a more precise understanding of the risks of using physical means of force, including the prone position leg lock, particularly against persons with chronic diseases (heart and lung conditions), substance abusers, mentally ill persons and obese persons. The task force concluded that the prone position leg lock should be avoided as a means of physical restraint, but recommended, based on an overall assessment of medical and safety considerations, that the prone position leg lock hold should continue to be permitted for the time being. Following that report, the Department of Prisons and Probation reiterated in its letter of 12 June 2012 to its institutions that the prone position leg lock must not involve any application of pressure to the chest or abdomen and that as soon as they have been pacified and handcuffed, inmates must be placed in a position that allows them to breathe freely (see paragraphs 63-64 above).

104. As of 1 January 2019, the prone position leg lock was no longer approved for use in the institutions of the Prison and Probation Service (see paragraph 67 above).

(iii) Information about the prone position available before January 2011

105. The City Court and the High Court both found that in January 2011 the Danish authorities had issued clear and adequate instructions for prison guards on the use of the prone position leg lock when restraining prisoners.

The City Court found that the previous fatal incidents in Denmark and Norway were distinguishable from the present case, and that taking the United Kingdom experience and the Norwegian Ombudsman's opinion into account to a greater extent would not have led to a different outcome (see paragraph 26 above). The High Court agreed with the City Court that the Prison and Probation authorities had sufficiently updated their directions for the use of the prone position leg lock (see paragraph 30 above).

106. The Court observes that before the incident in January 2011 giving rise to the present case, several countries and institutions had updated their training information about the risks associated with the use of the prone position.

107. In *Saoud* (cited above) the Court referred to international background material (§§ 60-65) and stated (§ 102) that the prone position restraint constituted a technique which was "highly dangerous to life". Following the judgment, the French authorities issued a note to the police on the use of force on 8 October 2008. It said that "if it is necessary to immobilise the person, any pressure – particularly on the thorax or the abdomen - must be as brief as possible and must be relaxed as soon as the person is restrained by regulated and appropriate means. As the medical services emphasise frequently, restraining a person face down must therefore be done as little as possible, particularly if the restrained person's hands are handcuffed behind the back" (see paragraph 47 above).

108. In the United Kingdom, after the death of Mr Sylvester in 1999, the Metropolitan Police Service issued Notice 12/99 defining positional asphyxia and emphasising that this could occur extremely rapidly. They listed eight factors that could contribute towards death through positional asphyxia, including leaving the person in the face down or prone position (see paragraph 48 above). A subsequent report from 2004/2005 stated that "Reliance on prone restraint is a matter of concern for compliance with Article 2, given the known dangers of this position, evidenced by previous deaths. Whilst we appreciate that an inflexible time limit may cause difficulties in practice, we emphasise that Article 2 requires that patients and detainees should not be placed at risk by use of this position unless absolutely necessary to avert a greater risk to themselves or others, and that they should be restrained in this position for the shortest possible time necessary" (see paragraph 50 above). A 2005 Prison Service Order said that "the prone position [face down] should only be used if necessary. If it cannot be avoided the time spent in this position must be minimised. ... The amount of time that restraint is applied is as important as the form of restraint and the position of the detainee. Prolonged restraint and prolonged struggling will result in exhaustion, possibly without subjective awareness of this, which may result in sudden death" (see paragraph 51 above).

109. In Norway, Mr Obiora died in September 2006 after he had been held on the ground in a prone position. The Norwegian Parliamentary Ombudsman

in an opinion dated 16 February 2010 stated that "looking at the information provided by the department, it seems clear that Norwegian justice and police authorities had very limited knowledge of the risks associated with the use of the prone position at the time of Mr Obiora's death. The police were only trained in the dangers of applying strong pressure or weight to an arrestee's neck and back, as well as the general risks associated with impaired respiration. There was no form of education provided to police students, and no guidelines were given to the police, about the risks of using the prone position, including the risk of respiratory failure due to pressure on the upper body using this technique" (see paragraph 54 above).

110. In the meantime, on 10 September 2003, in relation to the deportation of foreign nationals by air, the CPT had stated the following: "In cases where resistance is encountered, escort staff usually immobilise the detainee completely on the ground, face down, in order to put on the handcuffs. Keeping a detainee in such a position, in particular with escort staff putting their weight on various parts of the body (pressure on the ribcage, knees on the back, immobilisation of the neck) when the person concerned puts up a struggle, entails a risk of positional asphyxia. ... the CPT has made it clear that the use of force and/or means of restraint capable of causing positional asphyxia should be avoided whenever possible and that any such use in exceptional circumstances must be the subject of guidelines designed to reduce to a minimum the risks to the health of the person concerned" (see paragraph 57 above).

111. In 1997, the CPT's statements relating to its visit to Denmark concerned, *inter alia*, the so-called "fixated leg lock" (in which a detainee is handcuffed behind his back, one of his legs is flexed across the other, and one foot is wedged behind his handcuffed wrists), a hold that was suspended in June 1994. In respect of the prone potion leg lock (the manual leg lock), there had been some injuries, notably a broken leg, and the Ministry of Justice had therefore issued instructions to the police emphasising that the leg lock should not be extended beyond the strictly necessary (see paragraphs 58 and 59 above).

112. In 2008/2009 the CPT's correspondence with the Danish Government focused on, *inter alia*, the training of the Danish police. New material had been issued, which also included instructions on the prone position leg lock (see paragraphs 60 and 61 above).

113. The Court therefore observes that in Denmark various authorities, notably the Danish police, had followed the experiences, developments and risks associated with the hold techniques known at the time.

114. For example, in 2005 instructions were issued to the police on the prone positioning of overweight individuals, who might also be hyperactive and/or under the influence, saying it should be of as short a duration as possible (see paragraph 42 above).

115. In 2006 the Danish police decided to update the previous medical assessment of their techniques, which dated from 1995/1996 (see paragraph 43 above). In 2007 a group of independent medico-legal experts examined, assessed and approved the techniques, holds and methods comprised by the instruction. In respect of the risk associated with the prone position and hyperactivity, they pointed out in their evaluation that "one must be aware that heavy and even slightly prolonged pressure on the chest can be dangerous when the individual is lying face down. Similarly, during any form of pacification involving putting a person in a prone position, it is advisable to carefully monitor the pulse and breathing of the individual, who should not be left alone. If the situation requires the detained individual remains on the ground afterward, weather conditions should be taken into consideration, so that the time spent in that position - especially in low temperatures - is as brief as possible. Prone positioning of overweight individuals, who may also be hyperactive and/or influenced [of alcohol or drugs], should also be of as short a duration as possible" (see paragraph 44 above).

116. Consequently, as from 2009, the updated Danish police training material explicitly stated that the "prone position should only be used briefly". It included slides showing how holding a person who was being physically restrained or who was handcuffed in the prone position presented a heightened risk of positional asphyxiation (see paragraphs 45 and 46 above).

117. The Court is fully aware that understanding of the risks associated with the prone position has developed over time, and that it speaks now with the benefit of hindsight. However, the Danish authorities, in particular the police, became aware around 2007 or 2008 that the risks associated with the prone position, or the prone position leg lock, were not limited to its use on "overweight individuals, who may also be hyperactive and/or under the influence of alcohol or drugs", or to "pressure being put on the back", or were avoidable if the inmate was continuously observed. This meant that holding someone in a prone position if that person was agitated or physically restrained, increased the risk of positional asphyxiation. Nevertheless, either this information was not transmitted to prison authorities, or it did not prompt them to review and update their instructions and training until 2012, after the incident giving rise the present case.

118. In such circumstances, the Court cannot agree with the domestic courts that in January 2011 the Prison and Probation Service had sufficiently updated its directions for the use of the prone position leg lock.

119. The Court therefore finds that the Danish authorities, at the relevant time, had failed to issue clear and adequate instructions for prison guards on the use of the prone position when restraining prisoners.

(iv) The circumstances of the present case

120. In respect of the incident on 11 January 2011 it is not in dispute between the parties that the initial placing of E. in the prone position was justifiable (see the applicant's arguments summarised in paragraph 80 above), and that E. was restrained in the prone position leg lock for about thirteen minutes, following which he suffered a heart attack.

121. The cause of death could not be determined with certainty, but the description of E.'s behaviour led to the finding that his death was probably caused by a pathological process involving an acute stress response. Because he was restrained in a prone position, it was possible that his breathing may have been impeded, which could have contributed to his death. It also could not be ruled out that ExDS had also been a contributory factor (see paragraphs 13-15 above).

122. The domestic courts concluded that the prison staff had complied with the instructions they had been given at the time and that the force used had been absolutely necessary (see paragraphs 26 and 30 above).

123. The Court has no reason to doubt that the prison officers followed their training and the instructions then in force, nor that some use of force was absolutely necessary. Nor does it cast doubt on the finding (see paragraph 17 above) that the prison staff could not have known that E. was most likely suffering from schizophrenia. The Court also accepts that no pressure was applied to E.'s back, that he was monitored during the incident, and that he received adequate medical care immediately after having suffered the heart attack.

124. The Court also accepts that the risks related to the prone position and ExDS at the relevant time were much debated.

125. The remaining question is therefore whether the Court's finding in paragraph 119 above, that at the relevant time the Danish authorities had failed to issue clear and adequate instructions to prison guards on the use of the prone position when restraining prisoners, entails the conclusion that the prison officers involved in the present case lacked the appropriate training to ensure that they had the high level of competence required to prevent any treatment contrary to Article 2 of the Convention (see the cases-law quoted in paragraph 96 above).

126. In respect of the training given and the directions in force in January 2011 it will be recalled that M.G. explained to the City Court that: "as an element of a leg lock, where the inmate was very agitated, you [the prison staff] could place one knee on the inmate's shoulder or upper arm to keep the inmate on the ground. That would not affect the inmate's breathing to any significant degree" and: "until the task force was set up in 2011, it had not been thought that holding persons in a prone position leg lock applied in accordance with the [previous] regulations might present a risk of asphyxiation" (see paragraph 28 above). The prison officers involved in the incident explained that they had only been trained on the dangers of putting

pressure on a person's back or neck and the dangers of leg injury (see paragraph 25 and 27 above).

127. The updated instructions and training set out in the letter of 12 June 2012 from the Department of Prison and Probation pointed out that the prone position leg lock must not involve any application of pressure to the chest or abdomen and that inmates must be placed in a position that allows free breathing immediately when they have been pacified and handcuffed (see paragraph 64 above).

128. The Court finds that if the prison officers had been trained according to those updated instructions when they were restraining E. in January 2011, and if they had been aware of the risks previously identified by Danish medical experts and communicated to the Danish police in 2007 (see paragraph 115 above), they would have had alternatives to keeping E. in the prone position for about thirteen minutes. As explained by prison officer C.S. (see paragraph 24 above), E. was held down by two prison officers who held his arms (and possibly shoulders) to keep him down on the floor, and they may have held their knees against E.'s upper arms to keep him still in the prone position. These actions, combined with E.'s agitation and resistance, increased the risk of positional asphyxiation (see paragraph 46 above). The Court acknowledges that since the cause of E.'s death could not be determined with certainty (see paragraph 121 above), an alternative hold, or compliance with the updated instructions and training, might not have prevented E.'s death, but it would at least have ensured that the prison officers had the high level of competence required.

(v) Conclusion

129. Having regard to the foregoing considerations, the Court finds that the Danish authorities failed to fulfil their positive obligation to give prison guards clear and adequate instructions on the use of the prone position when restraining prisoners, and similarly failed to train their law-enforcement officials, and that consequently the prison officers involved in the present case lacked the high level of competence required when dealing with a situation that presented a risk to life.

130. There has accordingly been a violation of Article 2 of the Convention. This conclusion dispenses the Court from ascertaining whether keeping E. in the prone position for thirteen minutes could be considered "absolutely necessary" (see paragraphs 68 and 80 above).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

131. 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

132. The applicant claimed 60,000 Euros (EUR) in compensation for non-pecuniary damage relating to the alleged violation of Article 2 of the Convention.

133. The Government submitted that the claim was excessive.

134. The Court finds that the applicant sustained non-pecuniary damage on account of the violation of Article 2 of the Convention. Making its assessment on an equitable basis as required by Article 41 of the Convention, it awards EUR 25,000 under this head (see also, among others, *Saoud*, cited above, § 140; *Tekın and Arslan,* cited above, § 116; and *T.V. v. Croatia*, no. 47909/19, § 78, 11 June 2024).

B. Costs and expenses before the Court

135. The applicant claimed the costs and expenses incurred in the Convention proceedings in the amount of 242,050 Danish kroner (DKK, equivalent to approximately EUR 32,500), corresponding to legal fees for a total of 100 hours of work, carried out by her two representatives.

136. The Government found the amount excessive and pointed out that the applicant had been granted legal aid under the Danish Legal Aid Act (*Lov 1999-12-20 nr. 940 om retshjælp til indgivelse og førelse af klagesager for internationale klageorganer i henhold til menneskerettighedskonventioner*) and had provisionally been granted legal aid up to DKK 40,000 (equivalent to approximately EUR 5,400).

137. In the present case, the applicant has provisionally been granted DKK 40,000 under the Danish Legal Aid Act. However, it is uncertain whether the applicant will subsequently be granted additional legal aid by the Ministry of Justice or how a dispute between the parties about the applicant's outstanding claim for legal aid is to be decided. The Court therefore finds it necessary to assess and decide the applicant's claim for costs and expenses (see, for instance, *Aggerholm v. Denmark*, no. 45439/18, § 126, 15 September 2020).

138. 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 were reasonable as to quantum. In the present case, regard being had to the documents in its possession, the above criteria, awards made in comparable cases against Denmark (see, notably, *El-Asmar v. Denmark*, no. 27753/19, § 88, 3 October 2023; *Aggerholm*, cited above, § 127; and *Daugaard Sorensen v. Denmark*, no. 25650/22, § 81, 15 October 2024), and the fact that the applicant has already been paid DKK 40,000 under the Danish Legal Aid Act, the Court

considers it reasonable to award an additional sum of EUR 6,000 to cover the costs for the proceedings before the Court.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 2 of the Convention in respect of the positive obligation on the State to give prison guards clear and adequate instructions on the use of the prone position when restraining prisoners and to train its law-enforcement officials accordingly;

3. *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 25,000 (twenty-five thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;
      (ii) EUR 6,000 (six thousand euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;
   (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;

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

Done in English, and notified in writing on 27 May 2025, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Simeon Petrovski	Lado Chanturia
Deputy Registrar	President