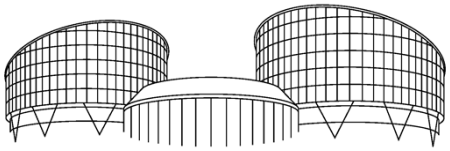

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF PÓSA v. HUNGARY

(Application no. 40885/16)

JUDGMENT

Art 3 (substantive) • Inhuman or degrading treatment • Applicant's injuries after his arrest caused accidentally from lawful, necessary and proportional police action according to domestic courts • No possibility to establish beyond reasonable doubt, on the basis of the evidence before the Court, whether or not the applicant's injuries were caused by the police using unnecessary force
Art 3 (procedural) • Impossibility to perform a thorough and effective investigation because of the omission of important pieces of evidence • Destruction of the full video recording of the arrest after the remarkably tight thirty-day statutory deadline and the late request of a copy by the prosecutor • No useful footage in the available short version of the recording • Absence of the police medical report sheet that might have shed more light on the circumstances of the incident

STRASBOURG

7 July 2020

FINAL

07/10/2020

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

In the case of Pósa v. Hungary,

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

Yonko Grozev, *President,*
Faris Vehabović,
Iulia Antoanella Motoc,
Branko Lubarda,
Carlo Ranzoni,
Jolien Schukking,
Péter Paczolay, *judges,*
and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to:

the application (no. 40885/16) against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Hungarian national, Mr István Pósa ("the applicant"), on 19 April 2016;

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

the parties' observations;

Having deliberated in private on 19 May and 16 June 2020,

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

INTRODUCTION

The case concerns police arrest conducted in a manner that resulted in the alleged ill-treatment of the applicant.

THE FACTS

1. The applicant was born in 1975 and lives in Sátoraljaújhely. He was represented by Mr I. Szikinger, a lawyer practising in Budapest.

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

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

4. In 2011 criminal proceedings were initiated against the applicant on suspicion of his involvement in a robbery. On 3 October 2011 at 1.40 a.m. the Anti-Terrorism Task Force ("TEK") resolved to arrest him. A TEK unit appeared at his home and repeatedly ordered him to come out from the house backwards and on his knees, and then to lie on the ground and to put his hands behind his back to be handcuffed. The applicant largely complied with the order, approaching the officers backwards and in a squatting position but, given his corpulence, he was unable to put his wrists sufficiently close to each other behind his back.

5. The applicant submitted that two TEK officers had then knelt on him and twisted his arms, while a third had struck him. After they had handcuffed him, he had been dragged, with his knees scraping on the gravelled ground, to the TEK car nearby, where he had been kicked several times and then forced into the car. In the car, he had been punched repeatedly.

6. The applicant's arrest was videotaped by the TEK; an edited and cut version (forty-eight seconds in length) was made available to the media.

7. According to the relevant TEK report, the applicant was examined on the spot by a TEK doctor and was found to be uninjured. On 3 October 2011 at 3 a.m. he was handed over to the Budaörs police station.

8. At 3 p.m. on the same day the applicant was transferred to the detention facility of the National Investigation Office (*Nemzeti Nyomozó Iroda*). At 3.30 p.m. he was examined by a doctor from the Institute for Forensic Sciences and then, at around 7.30 p.m., he was again examined at Szent János Hospital. According to the results of those examinations, he had suffered bruises to his arms and back, as well as abrasions to his back and his left knee.

9. On the basis of the medical findings, the National Investigation Office initiated an investigation into the applicant's possible ill-treatment.

10. On 29 February 2012 the prosecutor in charge of the case requested a copy of the original video recording of the applicant's arrest.

11. On 5 September 2012 the prosecutor discontinued the investigation. He found that, although the applicant had suffered injuries during his arrest, it could not be established that those injuries had resulted from a deliberately committed offence, rather than from a police operation carried out lawfully. He also noted that the full video recording of the applicant's arrest was no longer available, as it had been destroyed following the statutory thirty-day period, during which it could have been obtained for the purposes of an investigation. Although the short, edited version of the recording was available, it did not contain footage of the applicant being handcuffed.

12. The applicant's lodged a complaint against the decision to discontinue the investigation; that complaint was dismissed with final effect on 16 November 2012 by the Pest County Chief Public Prosecutor's Office.

13. Subsequently, the applicant brought substitute private prosecution proceedings against the two TEK officers involved.

14. On 5 February 2015 the Budapest Surroundings High Court (*Budapest Környéki Törvényszék*) dismissed the charges and acquitted the defendants. In the course of that trial, the court held two hearings, and obtained testimony from several witnesses, documentary evidence and the opinion prepared by a forensic expert at the request of the court. It noted that the police medical report sheet that was normally filled in when suspects were apprehended was missing from the file and that the full

version of the video recording was no longer available. The court observed that, during the course of the impugned police measure, the applicant had suffered minor bruises on both his upper arms, his right elbow, his back and his left knee. All these injuries healed within eight days and did not indicate that he had been struck, kicked or dragged along the ground, as alleged by the applicant. Analysing the available evidence, the court concluded that (i) the officers had not committed the offence of "ill-treatment during official proceedings" in that the use of force applied had been lawful, necessary and proportional, and (ii) the minor injuries that the applicant had sustained had been caused accidentally, without any intention to ill-treat him, when he had been immobilised and handcuffed by the officers.

The applicant appealed against that judgment.

15. On 9 February 2016 the Budapest Court of Appeal upheld the first-instance judgment, ruling in particular that the applicant's wife could not possibly have been an eyewitness to the incident and that her testimony on certain points had been at variance with that of the applicant.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

16. The applicant complained of police brutality and of the inefficiency of the investigation into his allegations. He relied on Article 3 of the Convention, which provides as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Admissibility

17. The Government submitted that the application had been submitted outside the six-month time-limit laid down in Article 35 § 1 of the Convention, to be calculated from the final decision of 16 November 2012 (see paragraph 12 above), which had marked the exhaustion of effective remedies. The applicant disagreed, arguing that the substitute private prosecution proceedings (see paragraphs 13 to 15 above) had constituted an effective remedy, given the circumstances of the case.

18. The Court has held in a number of cases that applicants are not required, with respect to the exhaustion of domestic remedies, to bring substitute private prosecutions, essentially because to do so would constitute the pursuit of a legal avenue that would have the same objective as their criminal complaints (see *R.S. v. Hungary*, no. 65290/14, § 38, 2 July 2019; *M.F. v. Hungary*, no. 45855/12, § 34, 31 October 2017; *R.B. v. Hungary*, no. 64602/12, §§ 60-65, 12 April 2016; and *Borbála Kiss v. Hungary*,

no. 59214/11, §§ 25-27, 26 June 2012; see also *Matko v. Slovenia*, no. 43393/98, § 95, 2 November 2006).

19. In the case of *Butolen v. Slovenia* (no. 41356/08, § 70, 26 April 2012, with further references), the Court has reiterated that, in respect of allegations of ill-treatment by State officials, the injured party was not required to pursue the prosecution of an accused officer within the capacity of a so called "subsidiary prosecutor", this being the responsibility of the public prosecutor, who is certainly better, if not exclusively, equipped in that respect. However, in that case the Court has also held that when an applicant, such as Mr Butolen or the applicant in the present application, takes over the prosecution and moreover is successful in obtaining a judicial investigation and later a trial against officers accused of ill-treatment, those proceedings, which clearly concern the substance of his Article 3 complaint, as well as the evidence produced therein, become an inherent part of the case and shall be taken into account.

20. The Court therefore finds that by lodging his application within six months of 9 February 2016 (which was the date of the final decision issued in the substitute private prosecution trial that concerned the merits of his Article 3 complaint – see paragraph 15 above) the applicant complied with the six-month time-limit provided in Article 35 § 1 of the Convention. It cannot be said that he deliberately tried to defer the time-limit set out in Article 35 § 1 by making use of inappropriate procedures that could have offered him no effective redress for the complaint in issue under the Convention (see, *mutatis mutandis*, *Petrović v. Serbia*, no. 40485/08, § 60, 15 July 2014). Only if an applicant takes recourse to a remedy that is doomed to failure from the outset can the decision in respect of that recourse not be taken into account for the purposes of the calculation of the six-month period (see *Jeronovičs v. Latvia* [GC], no. 44898/10, § 75 *in fine*, 5 July 2016); however, this is not the case in the present application. The Government's objection that the application was lodged out of time must therefore be rejected.

21. The Court furthermore 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

22. The parties did not submit observations on the merits of the case.

23. The Court's relevant case-law has recently been summarised in, among many other authorities, the judgment in *M.F. v. Hungary* (cited above, §§ 42–45 and 51, with further references). In addition, where an individual is deprived of his or her liberty or, more generally, is confronted with law-enforcement officers, any recourse to physical force which has not been made strictly necessary by the person's conduct diminishes human

dignity and is in principle an infringement of the right set forth in Article 3 of the Convention. The Court emphasises that the words "in principle" cannot be taken to mean that there might be situations in which such a finding of a violation is not called for, because the above-mentioned severity threshold has not been attained. Any interference with human dignity strikes at the very essence of the Convention. For that reason any conduct by law-enforcement officers *vis-à-vis* an individual which diminishes human dignity constitutes a violation of Article 3 of the Convention. That applies in particular to their use of physical force against an individual where it is not made strictly necessary by his conduct, whatever the impact on the person in question (see *Bouyid v. Belgium* [GC], no. 23380/09, §§ 100-101, ECHR 2015).

24. In the present case, the applicant suffered several bruises in the course of the incident in question (see paragraphs 8 and 14 above). It remains to be considered whether the State should be held responsible under Article 3 for the injuries.

25. The Court observes that, in addition to the discontinued prosecutorial investigation into the case, courts at two instances dealt with the applicant's allegations. On the basis of the available evidence, they concluded that there were no elements to prove that the injuries suffered by the applicant had been caused otherwise than accidentally in a lawful, necessary and proportional police measure. The Court of Appeal, moreover, disregarded the testimony of the applicant's wife, ruling that she could not possibly have seen the incident (see paragraph 15 above).

26. The Court notes that the domestic authorities were unable to identify any direct witnesses who had seen police officers ill-treating the applicant, and that they moreover found, on the basis of the forensic expert's opinion, that the injuries recorded in the medical reports did not correlate with the applicant having been struck, kicked or dragged along the ground. For its part, the Court finds no convincing reason to depart from those conclusions and cannot establish beyond reasonable doubt, on the basis of the evidence before it, whether or not the applicant's injuries were caused by the police exceeding the force necessary to properly perform a lawful measure.

27. Under these circumstances, the Court cannot but find that there has been no violation of Article 3 of the Convention under its substantive limb (see *Kleutin v. Ukraine*, no. 5911/05, § 58, 23 June 2016).

28. The Court does, however, consider that, taken together, the injuries suffered by the applicant and the circumstances of the arrest give rise to a reasonable suspicion that he may have been subjected to ill-treatment by the police.

29. The Court reiterates that where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, taken in conjunction with the State's general duty under Article 1 of the Convention

to "secure to everyone within their jurisdiction the rights and freedoms defined in ... the Convention", requires by implication that there should be an effective official investigation. This investigation should be capable of leading to the identification and punishment of those responsible. If that were not the case, the general legal prohibition on torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see, among many other authorities, *Kmetty v. Hungary*, no. 57967/00, § 38, 16 December 2003, and *M.F. v. Hungary*, cited above, § 51). The investigation must be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances and, as pointed out above, of identifying and – if appropriate – punishing those responsible. This is not an obligation of result, but of means. The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability to establish the person responsible will risk falling foul of this standard (see also *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 301, ECHR 2011 (extracts)).

30. The Court observes that following the applicant's complaint, the authorities carried out an investigation into his allegations, which was followed by a trial at two levels of jurisdiction in substitute private prosecution proceedings (see paragraph 25 above). It is not, however, persuaded that that investigation was sufficiently thorough and effective to meet the above-mentioned requirements of Article 3.

31. The Court notes that the full, uncut version of the video recording of the applicant's arrest was not available during the ensuing proceedings, having been destroyed after the relevant, remarkably tight, thirty-day statutory deadline (see paragraphs 10 and 11 above). Had this not been the case, the authorities may have had strong evidence at their disposal to prove or disprove the applicant's allegations. Although the short, edited version of the recording was available, it did not contain footage of the applicant being handcuffed. Moreover, a further element underlying the inadequacy of the investigation was the absence of the police medical report sheet, which is normally filled in when suspects are apprehended (see paragraph 14 above). That document, if it had been available, may have shed more light on the circumstances of the incident complained of.

32. With those important pieces of evidence missing, the authorities were, in the Court's view, hardly in a position to perform a thorough and effective investigation into the applicant's arguable claim that he was ill-treated by police officers. The above omissions necessarily prevented the national courts from making as full findings of fact as they might have otherwise done. An adequate investigation would have required diligence and promptness (see *Menesheva v. Russia*, no. 59261/00, § 67,

ECHR 2006-III). The Court notes that in the present case the prosecutor in charge of the case requested a copy of the original video recording of the applicant's arrest only on 29 February 2012, when the statutory thirty-day period, during which it could have been obtained for the purposes of an investigation, had long expired (see paragraph 11 above).

33. Consequently, the Court finds that there has been a violation of Article 3 of the Convention under its procedural limb.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

34. 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

35. The applicant claimed 7,000 euros (EUR) in respect of non-pecuniary damage.

36. The Government contested this claim.

37. The Court finds that the applicant can reasonably be considered to have suffered non-pecuniary damage on account of the distress and frustration resulting from the inadequacy of the investigation into his complaints of ill-treatment. Making its assessment on an equitable basis, the Court accepts the entirety of the applicant's claim and awards him EUR 7,000 under this head.

B. Costs and expenses

38. The applicant also claimed EUR 2,000 for the costs and expenses incurred before the Court, as per the lawyer retainer agreement.

39. The Government contested this claim.

40. 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 were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the full sum claimed – that is to say, EUR 2,000.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Declares*, by a majority, the application admissible;

2. *Holds*, unanimously, that there has been no violation of the substantive limb of Article 3 of the Convention;

3. *Holds*, unanimously, that there has been a violation of the procedural limb of Article 3 of the Convention;

4. *Holds*, unanimously,
   (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 7,000 (seven thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 2,000 (two thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points.

Done in English, and notified in writing on 7 July 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth Deputy Registrar	Yonko Grozev President