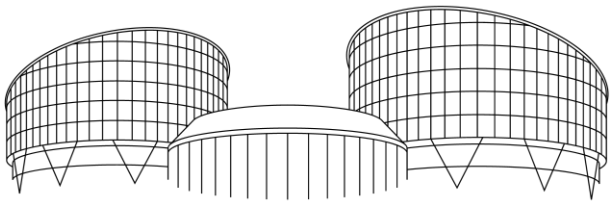

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF BORBÁLA KISS v. HUNGARY

(Application no. 59214/11)

JUDGMENT

STRASBOURG

26 June 2012

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 Borbála Kiss v. Hungary**,**

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

Françoise Tulkens, *President,*
Danutė Jočienė,
Isabelle Berro-Lefèvre,
András Sajó,
Işıl Karakaş,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*
and Françoise Elens-Passos, *Deputy Section Registrar,*

Having deliberated in private on 5 June 2012,

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

PROCEDURE

1. The case originated in an application (no. 59214/11) against the Republic of 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, Ms Borbála Kiss ("the applicant"), on 20 September 2011.

2. The applicant was represented by Mr L. Baltay, a lawyer practising in Gyál. The Hungarian Government ("the Government") were represented by Mr Z. Tallódi, Acting Agent, Ministry of Public Administration and Justice.

3. The applicant alleged, in particular, that she had been subjected to an inhuman and degrading police measure, which had not been adequately investigated.

4. On 23 November 2011 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1983 and lives in Tiszalúc.

A. The incident

6. On 4 September 2010 a family feast took place at a private house in Tiszalúc. It involved the applicant – who is of Roma origin – and another fifty people. After a first visit at 8.30 p.m. without any incident, at about 9.30 p.m. several police officers returned to the house, demanding that the music be turned down. Those present complied. Subsequently, a heated argument started between a Mr H. and a police officer. The applicant intervened, a tumultuous scene developed, and the officer called the applicant names. The officer, threatening her with arrest, grabbed her arm and pepper-sprayed her eyes. The Government submitted that this had been necessitated by the applicant's resistance. The applicant fell over, and then six or seven male officers dragged her on the ground to, and banged her against, the police car. While being dragged, her breasts became exposed, since her pullover was torn. She suffered bruises on her neck and her eyes were burning badly. Eventually, however, the officers refrained from arresting her.

7. The applicant then went to consult her general practitioner. The latter did not issue a medical certificate, but arranged for the applicant to be transferred to the County Hospital, where she was diagnosed with an eye injury which would heal in less than eight days.

B. Criminal proceedings pursued by the applicant

8. On 6 September 2010 the applicant and others involved in the incident filed a criminal report against unknown police officers with the Szerencs Police Department. On 27 September 2010 the Miskolc Investigation Office discontinued the investigation, finding that the applicant and the others had been feasting loudly and had countered the police intervention in an aggressive manner and that the police measures had been proportionate.

9. On 15 November 2010 the applicant filed an individual criminal report against unknown police officers. On 14 January 2011 Public Prosecutor Dr F. of the Investigation Office discontinued the investigation, observing that the force applied by the police had not been excessive.

10. On the applicant's complaint, on 28 January 2011 the Borsod-Abaúj-Zemplén County Public Prosecutor's Office reopened the investigation. It pointed out that further witness testimonies were necessary to clarify the circumstances and the proportionality of the police intervention. Subsequently additional evidence was obtained; in particular, a video recording of the testimonies given by the applicant and the others present was admitted to the file.

11. In the resumed proceedings, on 23 February 2011 Dr F. again discontinued the case, coming in essence to the same conclusion as before.

The applicant and the others present at the party were not heard in these, the preceding or the ensuing proceedings; neither were the suspected police officers interrogated or confronted with them. It appears that the decision was based on the minutes of the testimonies, which had been given by some witnesses in the criminal proceedings conducted against the applicant and her associates (see paragraphs 13 to 16 below), and which had not concerned the proportionality of the use of force by the police.

12. On 16 March 2011 the County Public Prosecutor's Office dismissed the applicant's complaint for want of evidence, pointing out that there had been no impartial witness to the incident.

C. Criminal proceedings conducted against the applicant

13. Simultaneously, criminal proceedings were conducted against the applicant and other participants in the feast on charges of obstructing justice. The bill of indictment bore the signature of Dr F.

14. The Government submitted that, in these proceedings before the Miskolc District Court, the circumstances of the case were being thoroughly examined, several witnesses were heard, and the applicant had the opportunity to state in person – and by being confronted with the impugned police officers – her position and observations, including her objections to the investigation and the prosecution proceedings.

15. On 8 March 2012 the applicant was found guilty as charged and sentenced to one year's suspended imprisonment. Her appeal is pending.

16. The applicant maintained that her first-instance trial was unfair and defence evidence was not given due weight. During the taking of evidence, out of the ten or so police officers who had been present at the incident, only two identified the applicant at all, and even they could not specify the role she had allegedly played in the events. The evidence against her was limited to the consideration that since she had gone to see a doctor, she (and others who had done so) must have been involved in the case. Statements of several police officers included the assertion that those who had been sprayed had obviously obstructed the police action, otherwise they would not have been sprayed. On the other hand, the applicant's own testimony was confirmed by several witnesses; and there were two different versions of the facts, both confirmed by the same number of witnesses. The applicant asserted that, nevertheless, the statement of the police officers had carried more weight in the District Court's eyes than that of the applicant's family members.

II. RELEVANT DOMESTIC LAW

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

Chapter IX

Title III – Conduct of the investigation

Discontinuation of the investigation

"Section 190 (1) The public prosecutor shall, by decision, discontinue the investigation:

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

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

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

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

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

f) due to other statutory grounds eliminating punishability,

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

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

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

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

"Section 191 (1) Unless an exception is made in this Act, discontinuation of the investigation shall not prevent the subsequent resumption of the proceedings in the same case.

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

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

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

"Section 207 (1) Prior to the preferment of the bill of indictment, the responsibilities of the court shall be performed at first instance by the judge designated by the president of the county court ('investigating judge').

(2) The investigating judge shall...

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

Title IV – Remedy during the investigation

"Section 195 (6) A motion for review may be filed with the public prosecutor's office against [certain] decisions ..., and against a decision rejecting a complaint against a prosecutorial decision ... within eight days of delivery. The prosecutor's office shall forward the motion for review and the case file to the court [i.e. the investigating judge] within three days."

"Section 198 (1) If the criminal report was filed by the aggrieved party, he may submit a complaint against the rejection of the report within eight days of its delivery in order to have the investigation ordered.

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

"Section 199 (1) On the basis of the complaint, the prosecutor or the senior prosecutor may:

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

b) reject the complaint if he finds it unfounded.

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

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

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

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

18. The applicant complained under Article 3 of the Convention about ill-treatment by the police and the absence of an adequate investigation.

19. Article 3 reads as follows:

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

20. The Government contested that argument.

A. Admissibility

1. Arguments of the parties

a. The Government

21. The Government asserted that the applicant should have submitted an objection to the investigating judge against the discontinuation of the investigation, requesting its resumption under section 191(3) of the Code of Criminal Procedure. Moreover, she could have filed individual criminal complaints against the officers involved. Had she done so, she could have taken the case before a court by making use of substitute private prosecution. By not availing herself of these procedural avenues, she did not exhaust domestic remedies.

b. The applicant

22. The applicant submitted that the Government's interpretation of section 191(3) was a misconception of the law. The investigating judge's power to decide on the continuation of an investigation was not by its nature a remedy for an aggrieved party against the termination of an investigation in pursuit of his complaint. Instead, it was a procedural safeguard in favour of suspects against arbitrary prosecutorial decisions, aimed at guaranteeing that only on the basis of a judicial decision could an investigation be reopened against suspects already cleared of charges. This was proven by the fact that section 191 was located in Chapter IX, Title III of the Code of Criminal Procedure (entitled Conducting the investigation), rather than Title IV (entitled Remedy during the investigation). In any case, under section 191, the investigating judge might order the continuation of the investigation only in cases where it was conducted against a particular suspect, which had not been the applicant's case.

23. Moreover, as regards substitute private prosecution, the applicant submitted that she had not filed a nominative criminal report enabling substitute private prosecution under section 199(2) of the Code of Criminal Procedure essentially because that remedy would have been superfluous, exposed her to reprisals including prosecution for false accusation, and offered little prospect of success (given that in the years of 2007 and 2008, altogether only 51 cases resulted in convictions out of a total of 1073 substitute private prosecution motions).

2. The Court's assessment

24. The Court recalls that the obligation to exhaust domestic remedies requires that an applicant make normal use of remedies which are effective, sufficient and accessible in respect of his Convention grievances. To be effective, a remedy must be capable of remedying directly the impugned state of affairs (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004). The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see *Akdivar and Others v. Turkey*, 16 September 1996, § 66, *Reports of Judgments and Decisions* 1996-IV).

25. In the present circumstances, the Court however considers that it is not necessary to embark on a closer scrutiny of the parties arguments' about the effectiveness of a motion to be submitted to the investigating judge, since in any case, the Government have not produced any evidence to show that such a request has proved effective in similar cases and would consequently constitute a remedy to be exhausted in the circumstances.

26. Moreover, the Court notes that the applicant filed a criminal report concerning the alleged ill-treatment and considers that therefore she cannot reasonably be expected to have filed a second, virtually identical but nominative one directed against the particular officers, enabling substitute private prosecution.

27. It follows that the application cannot be rejected for non-exhaustion of domestic remedies (see *Gubacsi v. Hungary*, no. 44686/07, §§ 30 to 33, 28 June 2011). Moreover, the Court considers that it is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

a. The Government

28. The Government submitted that, according to the findings of the investigation carried out by the domestic authorities, the applicant's allegations of ill-treatment had not been supported beyond any doubt by the witness testimonies. The medical report did not specify any injuries resulting from ill-treatment, but merely indicated the consequences of the use of pepper spray. The applicant had showed resistance while obstructing a police measure, and the police officers had had to apply force and pepper spray in order to counter that and to pick her out from a drunken crowd. The hostile conduct of the people surrounding her had endangered the success of the measure. The injury caused by the police had thus occurred in the course of a lawful police measure and been necessary and proportionate.

29. The applicant's allegations had been adequately investigated by the Hungarian authorities, but the evidence obtained had not been sufficient to establish the police officers' criminal responsibility. This evidence had been assessed freely, separately and collectively, in accordance with the provisions of the Code of Criminal Procedure. The Government added that the criminal proceedings against the applicant and her associates were still pending before the appellate court.

b. The applicant

30. The applicant submitted that the police intervention amounted to inhuman and degrading treatment. Contrary to Government claims, her allegations were supported by other participants of the feast who had filed a criminal report against the officers concerned as well as by the witnesses' video testimonies. The Government had not shown how this evidence was defective, nor had an effective investigation been undertaken to allow them to do so. Nevertheless, the burden of proof to explain how her injuries had been sustained and to demonstrate that the intervention had been lawful rested on the Government. They had however failed to point to the particular behaviour of the applicant which had necessitated the police's action. The conclusions reached in the criminal proceedings conducted against her (see paragraph 16 above) in no way supported the Government's claim that the use of force and pepper spray had been necessary and proportionate so as to counter her alleged resistance. On the contrary, the impugned measures had not been necessary or proportionate. The applicant drew attention to the fact that she was shorter and weaker than either of the at least seven male officers present.

31. Furthermore, the authorities had failed to carry out a thorough, effective and independent investigation into the incident capable of leading to punishment of the police officers responsible. Instead, a parallel investigation was initiated against the applicant and others, leading to her own conviction at first instance.

2. The Court's assessment

32. Article 3 of the Convention, as the Court has observed on many occasions, enshrines one of the fundamental values of democratic society. Even in the most difficult of circumstances, such as the fight against terrorism or crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of its Protocols, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.

33. The Court recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim. In respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 (see *Tekin v. Turkey*, 9 June 1998, §§ 52 and 53, *Reports of Judgments and Decisions* 1998-IV).

34. The Court notes that as a result of the disputed police intervention, the applicant suffered bruises on her neck and irritation in her eyes, to heal within less than eight days. Moreover, it has not been disputed that she was dragged on the ground, banged against a car and her breasts were exposed (see paragraphs 6 and 7 above).

35. The Court considers that the humiliating conduct of the police operation and the injuries suffered by the applicant were sufficiently serious to amount to degrading treatment within the scope of Article 3 (see mutatis mutandis *Peers v. Greece*, no. 28524/95, § 75, ECHR 2001-III).

It remains to be considered whether the State should be held responsible under Article 3 for these injuries.

36. The Court observes that the applicant was apprehended in the midst of a tumultuous scene which had evolved at a party. It notes the Government's assertion that the coercion applied by the police was necessitated by the applicant's alleged resistance to a lawful measure. However, it takes the view that the Government have not furnished any convincing or credible arguments which would provide a basis to explain or justify the degree of force used during the arrest operation. In particular, it

has not been clarified what particular conduct on the applicant's side warranted a manoeuvre, in the course of which the latter had to be sprayed in the eyes, dragged on the ground allowing the exposure of her breasts and banged against a car – and this in the presence of six or seven male law enforcement agents, whose physical force clearly exceeded that of the applicant.

Since the Government have not shown the contrary, the Court cannot but conclude that, even assuming that the situation objectively required the use of force, the extent to which it was applied was excessive. Such use of force resulted in injuries and suffering of the applicant, amounting to degrading treatment.

37. Moreover, as regards the applicant's complaint about the adequacy of the investigation, originally raised under Article 13 of the Convention, the Court observes that this matter constitutes an issue falling under the procedural limb of Article 3 (see *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV).

The Court notes at the outset that no internal investigation or disciplinary procedure appears to have been carried out within the police force concerning the appropriateness of the police action.

It further observes that in pursuit of the criminal report filed by the applicant and the others allegedly ill-treated, a criminal investigation was launched – and then re-launched – against unknown perpetrators. However, neither the applicant and her associates nor the suspected police officers were heard in person – or confronted – in these proceedings (see paragraph 11 above). It is true that minutes of the testimonies given by some witnesses were obtained for the purposes of these proceedings; however, those testimonies were collected in the parallel proceedings conducted against the applicant and her associates and did not concern the proportionality of the use of force by the police. The procedure was terminated essentially on account of the irreconcilable testimonies given by the protagonists; and thus no individual criminal responsibility of any particular police officer could be established.

In these circumstances, the Court finds that there has been no adequate investigation into the applicant's allegations, capable of leading to the identification of the alleged perpetrators. For the Court, this cannot be regarded as having been substituted for by the investigation into the parallel case conducted against the applicant and her associates.

38. Having regard to the above considerations, the Court concludes that the applicant has been subjected to degrading treatment and that no adequate investigation has been carried out into her allegations. There has, accordingly, been a breach of Article 3 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

39. The applicant also complained under Article 14 read in conjunction with Article 3 of the Convention that the incident and its allegedly abortive investigation had been tainted by anti-Roma discrimination.

The Court observes that there is no evidence in the case file disclosing any appearance of discriminative conduct of the police's side (see, *a contrario*, *Moldovan and Others v. Romania (no. 2)*, nos. 41138/98 and 64320/01, § 139, ECHR 2005-VII (extracts)) This complaint is therefore manifestly ill-founded within the meaning of Article 35 § 3 (a) and must be rejected, pursuant to Article 35 § 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. 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

41. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

42. The Government contested this claim.

43. The Court considers that the applicant must have suffered some non-pecuniary damage and awards her, on the basis of equity, EUR 5,000.

B. Costs and expenses

44. The applicant also claimed EUR 5,166 for the costs and expenses incurred before the Court. This amount should correspond to 65 hours of billable legal work charged at an hourly rate of EUR 60, plus EUR 1,266 of additional legal costs.

45. The Government contested this claim.

46. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 3,000 for the proceedings before the Court.

C. Default interest

47. 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 UNANIMOUSLY

1. *Declares* the complaint concerning Article 3 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a substantive and a procedural violation of Article 3 of the Convention;

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 Hungarian forints at the rate applicable at the date of settlement:
      (i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 3,000 (three 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;

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

Done in English, and notified in writing on 26 June 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President