FIFTH SECTION

CASE OF IVAN VASILEV v. BULGARIA

(Application no. 48130/99)

JUDGMENT

STRASBOURG

12 April 2007

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 Ivan Vasilev v. Bulgaria,

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

Mr P. LORENZEN, *President*,
Mrs S. BOTOUCHAROVA,
Mr K. JUNGWIERT,
Mr R. MARUSTE,
Mr J. BORREGO BORREGO,
Mrs R. JAEGER,
Mr M. VILLIGER, *judges*,
and Mrs C. WESTERDIEK, *Section Registrar*,

Having deliberated in private on 20 March 2007,

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

PROCEDURE

1. The case originated in an application (no. 48130/99) against the Republic of Bulgaria lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Ivan Tsekov Vasilev, a Bulgarian national born in 1979 and living in Vidin, on 14 April 1998.

2. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

3. The applicant was represented before the Court by Mr Y. Grozev, a lawyer practising in Sofia. The Bulgarian Government ("the Government") were represented by their Agent, Ms M. Dimova, of the Ministry of Justice.

4. The applicant alleged that he had been ill-treated by two police officers and that the ensuing criminal proceedings against the officers, resulting in their acquittal, had failed to adequately remedy that.

5. On 4 November 2003 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, on 30 January 2006 it decided to examine the merits of the application at the same time as its admissibility. On the same date it invited the parties to submit additional observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The events of 14 May 1994

6. On the evening of 14 May 1994 the applicant, at that time aged fourteen, went out with several friends in the centre of Vidin to play electronic games. On the way back he left the main group to see a classmate of his and her sister to their door. After he had walked the girls home at about 9.40 p.m., he ran back to re-join his friends. The applicant was wearing shorts, a yellow tee-shirt and a green sleeveless jacket.

7. On the same evening, some time after 9.00 p.m., the Vidin police received a report that an ice-cream booth in the centre of the town had been vandalised by two individuals. A police patrol was dispatched to the scene and arrested the first of them, but the second managed to get away. All patrols in the area were put on alert and ordered to track him down. The description given over the police radio was of a man wearing short pants and a light-coloured tee-shirt.

8. At that time Mr G.G. and Mr V.E., both trainee police officers, were in the area of the incident, patrolling in Mr V.E.'s private car. Although they were supposed to be accompanied by a supervising police officer, chief sergeant A., they were patrolling by themselves, as sergeant A. had been dispatched elsewhere. Their car was in a street which was not well lit. Seeing the applicant running past the car, they assumed that he was the offender at large. They got out of the car and gave chase. The applicant heard their steps, but, seeing that they had come out of an unmarked rather than a police car, kept on running. It was disputed whether or not Mr G.G. and Mr V.E. had shouted “Stop! Police!” after the applicant. They submitted that they had done so, whereas the applicant and several witnesses stated that they had not heard the officers shouting. The chase continued for about a minute. The applicant ran by a Mr I.P. Shortly afterwards, Mr G.G. caught up with the applicant in front of a beauty parlour and apparently tripped him over. The applicant fell on the ground, face down. Mr G.G. then started hitting the applicant's back and legs with a truncheon and kicking his torso. Soon after that Mr V.E. caught up with them and also started hitting the applicant's back and legs with a truncheon and kicking his torso. The applicant averred that Mr V.E. had sat on his back and had delivered several truncheon blows to his head. The applicant was crying and begging the officers to stop, insisting that he had done nothing wrong. Mr I.P. was an eyewitness to the incident, and so were a Mr P.S. and a Mr V.K.

9. Shortly afterwards, chief sergeants A.K. and I.G. arrived at the scene. By that time the physical assault on the applicant had stopped. The applicant was lying on the ground and Mr G.G. and Mr V.E. were standing beside him. The applicant's tee-shirt was soaked with blood coming from the neck area.

10. Chief sergeants A.K. and I.G. helped the applicant get into their patrol car. On the way to the hospital they stopped at a fountain and told him to wash the blood off his neck. The applicant told the officers that he felt pain in his legs and in his right lumbar area.

11. The applicant was admitted to the emergency ward of the Vidin Regional Hospital at 10.01 p.m. Upon his admission he stated that he could not see. His blood pressure was measured to be 70/0. It was found that he had a traumatic-lacerated injury on the back of his head. He was also complaining of severe pain in the area of the right kidney. He was taken to the surgical ward and the injury on his head was treated.

12. From the hospital the applicant was taken to the police station, where he was questioned at about 10.30 p.m. It was established that he had nothing to do with the breaking of the ice-cream booth. After the questioning an officer took the applicant home. When the applicant's mother saw the state the applicant was in, she asked a friend to drive the applicant and herself back to the emergency ward of the Vidin Regional Hospital. There she was informed that the applicant had already been treated and that there was nothing more the staff could do, as there were no doctors on the ward at that time, only paramedics.

13. The applicant and his mother then went to the police station to find out why he had been beaten and apprise the police of the names of the eyewitnesses to the incident. They were given the names of the officers who had assaulted the applicant and sometime around midnight left the station and went home.

B. The applicant's health condition and medical treatment after the events of 14 May 1994

14. When the severe pain in the applicant's right lumbar area continued through the night and blood showed up in his urine, a doctor was called in and examined the applicant at 2.10 a.m. on 15 May 1994. He found that the applicant had a reddening of the skin in the groins, parallel traces of blood suffusions and grazes on the calves, three on the left leg and two on the right leg, and a head injury.

15. At 9.15 a.m. on 15 May 1994 the applicant went once more to the emergency ward of the Vidin Regional Hospital. At 10 a.m. he was admitted to the surgical ward. He was diagnosed as suffering from contusion in the right lumbar area, commotion of the right kidney and

haematuria (blood in the urine), and was treated with styptics and antibiotics. He remained in hospital until 28 May 1994.

16. Two days later, on 30 May 1994, the applicant was urgently admitted to the urology centre of the Medical Academy in Sofia because of macroscopic haematuria (high levels of blood in his urine) and sustained dull pain in his right lumbar area. His right kidney was found to be surrounded by a haematoma and retaining liquid. It was established that his blood pressure was 140/100 because of, among other reasons, the pressure from the haematoma on the kidney. The applicant was treated with spasmolytics, analgesics and antibiotics. The applicant had to be released on 13 June 1994 due to an in-hospital infection outbreak.

17. Throughout the following years the applicant underwent numerous examinations of his right kidney.

18. On 15 July 1996 the applicant was admitted to the urology ward of the National Institute for Urgent Medical Care "Pirogov", after complaining from dull pain in his right lumbar area. He was diagnosed as suffering from hydronephrosis of the right kidney (pathological chronic enlargement of the collecting channels of a kidney, leading to the compression and the eventual destruction of kidney tissue and the deterioration of the kidney function). On 22 July 1996 he underwent surgery and his right kidney was removed. On 9 August 1996 he was released from hospital.

C. The criminal proceedings against the police officers

19. On 14 May 1994 the applicant's mother complained about his beating to the Vidin Regional Prosecutor's Office. On 16 May 1994 the applicant's father also lodged a complaint with the Vidin District Prosecutor's Office.

20. On 21 June 1994 the Pleven Military Prosecutor's Office, which was competent to deal with offences allegedly committed by police officers, opened criminal proceedings against Mr G.G. and Mr V.E.

21. The investigator to whom the case was assigned conducted a series of interviews on 27, 28 and 29 June 1994. He questioned the applicant, Mr I.P., Mr V.K. and several other witnesses. On 16 and 17 August 1994 the investigator questioned chief sergeant A.K. and two other police officers.

22. On 17 August 1994 Mr G.G. and Mr V.E. were charged and questioned. During questioning Mr G.G. stated that he had tripped the applicant but had not subjected him to any other violence. Mr V.E. stated that he had only hit the applicant once with a truncheon on the legs, but had not subjected him to any other violence.

23. On an unspecified date the investigator ordered a medical expert report to determine the extent of the applicant's injuries. The report was drawn up by Dr A.I., head of the forensic medicine ward of the Vidin

Regional Hospital. She found that the applicant had had a wound on his head, haematomas and grazing on his legs, contusion of the right lumbar area and haematuria. She concluded that the beating had caused the applicant a short-term life-threatening health disorder, due to a traumatic-haemorrhagic shock resulting from the contusion of the right kidney and a massive haematoma around the kidney.

24. On 6 July 1995 the applicant's mother, acting for the applicant, who was still underage, submitted a civil claim against Mr G.G. and Mr V.E. She sought 400,000 old Bulgarian levs (BGL)[1] on the applicant's behalf.

25. Another series of interviews was conducted on 20 September 1995 by another investigator at the Pleven Regional Military Prosecutor's Office. Mr V.K. and Mr P.S. were questioned.

26. On 3 November 1995 the Pleven Military Prosecutor's Office submitted to the Pleven Military Court an indictment against Mr G.G. and Mr V.E., charging them with causing intermediate bodily harm to the applicant. On 6 November 1995 the case was set down for hearing.

27. The first hearing took place on 12 February 1996. Mr G.G. and Mr V.E. were represented by Mr L.I., a former military prosecutor-general. The applicant, who was also represented by counsel, amended his civil claim, seeking interest as from the date of the beating and naming the Vidin Regional Directorate of Internal Affairs as a third defendant. The court heard Mr G.G., Mr V.E., the applicant, the applicant's mother, chief sergeant A.K., several other police officers, Mr I.P., Mr V.K. and Mr P.S. Noting that the statements of the accused differed from those of the eyewitnesses, the court carried out a confrontation. Finally, the court heard Dr A.I., the medical expert who had given an opinion about the extent of the applicant's injuries. The accused disputed Dr A.I.'s conclusions and requested a new medical report to be drawn up by three experts, excluding Dr A.I. The court acceded to the request and ordered a new expert report, to be drawn up by three medical experts.

28. In their report the three medical experts (Dr P.L., head of the forensic medicine and ethics department of the High Institute of Medicine in Pleven, Dr V.G., head of department at the Urology Clinic of the Institute, and Dr K.P., senior assistant at the anaesthesiology and intensive care departments of the Institute) concluded that as a result of the 14 May 1994 incident the applicant had suffered a contusion of the right kidney, haematomas and grazing of the two legs, a wound on the head and a reddening in the right part of the groins. Unlike Dr A.I., they concluded that the traumatic-neurogenic shock suffered by the applicant had not become truly life-threatening. They also found that before the incident the applicant had been suffering from a congenital kidney anomaly, which had been the

[1] . After a period of sharp inflation rise in 1995-97, on 5 July 1999 the Bulgarian lev was revalorized. One new Bulgarian lev (BGN) equals 1,000 old Bulgarian levs (BGL).

reason for the applicant's haematuria after the incident. In the experts' view, the applicant's kidney injury had not been life-threatening and had had no long-lasting effects on his health. The beating had caused the applicant only a temporary (two- or three-week) health problem.

29. The next hearing took place on 19 June 1996. The court heard the three medical experts, who stated that they adhered to the conclusions given in their report. The prosecutor noted that the first report, drawn up by Dr A.I., and the second report, drawn up by the three medical experts, substantially differed on the issue of the extent of the injuries suffered by the applicant. He therefore requested an additional expert report, to be drawn up by five experts, including Dr A.I. The court acceded to the request.

30. On 20 May 1997 the report of the five medical experts was ready. They concluded that the applicant had suffered a traumatic-neurogenic shock, which, however, had not deteriorated and had not become life-threatening. They also concluded that before the incident the applicant had been suffering from a congenital kidney anomaly, which had been the reason for his haematuria after the incident. In the experts' view, the applicant's kidney injury had not become life-threatening. As regards the later surgical removal of the kidney and its potential causal link with the beating, the experts were of the opinion that, in view of the long time-span between the beating (14 May 1994) and the surgery (22 July 1996) and the nature of the injury, it could not be concluded that the removal of the kidney had been a direct and proximate consequence of the beating. Additionally, the applicant's congenital kidney anomaly had been prone to natural deterioration and could have led on its own to a decline in the kidney function, which was what had made the removal necessary. It could not be categorically established that the beating had not contributed to the need for the removal of the kidney, but the main factor had been the congenital anomaly.

31. After several adjournments due to difficulties with the attendance of all five medical experts, the Pleven Military Court listed a hearing for 26 January 1998. At that hearing the court heard all five medical experts. Four of them stated that they adhered to the conclusions made in their report. By contrast, Dr A.I. stated that she did not agree with the conclusions of the report and that she still maintained the opinion expressed in her initial report. The applicant presented X-rays of his kidneys and, after examining them, the four experts stated that they still adhered to the conclusions reached in their report. The applicant increased his civil claim to BGL 10,000,000. In his concluding argument the public prosecutor stated that, in view of the experts' opinion, he did not pursue the charge of intermediate bodily harm, and urged the court to characterise the officers' act as inflicting minor bodily harm.

32. In a judgment of 26 January 1998 the Pleven Military Court found Mr G.G. and Mr V.E. guilty of inflicting the applicant minor bodily harm and not guilty of inflicting him intermediate bodily harm. It sentenced them to five months' imprisonment, suspended for three years. The court also partially allowed the applicant's claim for damages, awarding him BGL 300,000[1], to be paid jointly and severally by the two officers and the vicariously liable Regional Directorate of Internal Affairs in Vidin.

33. The court found that Mr G.G. had tripped the applicant and that the applicant had fallen on the ground face down. After that Mr G.G. had delivered a number of blows on the applicant's back and legs with a truncheon and had kicked several times his torso. When Mr V.E. had arrived he had also hit the applicant's back and legs with a truncheon and had kicked his torso. During the beating the applicant had told the two accused that he had done nothing wrong. The court stated that it did not find the accused's averment that they had not beaten the applicant persuasive, because it was disproved by the testimony of two eyewitnesses – Mr I.P. and Mr V.K. – and of the applicant himself. The court considered that the eyewitnesses' and the applicant's testimony was consistent and reliable.

34. The court also examined the officers' assertion that they had acted lawfully, in a situation calling for the arrest of a suspect, and that they had inflicted bodily harm in their efforts to subdue the applicant. In that connection, it noted that the accused were substantially stronger physically than the applicant, that Mr I.P., Mr V.K. and chief sergeant A.K. had testified that the applicant had not tried to resist, and that at the time of the incident the applicant had been fourteen years old. The court accordingly rejected the assertion.

35. As regards the extent of the applicant's injuries, the court held that the opinion of the four medical experts, which appeared objective, impartial, consistent, well-reasoned and in conformity with the medical documents in the case file, should be given more credit than that of Dr A.I. In the court's view, the four experts' arguments confuted her opinion. The court therefore held that as a result of the beating the applicant had suffered a temporary (two- or three-week) non-life-threatening health disorder, which amounted to minor bodily harm within the meaning of Articles 128 to 130 of the Criminal Code of 1968 ("the CC").

36. Finally, the court rejected Mr G.G. and Mr V.E.'s defence under Article 12a of the CC that they had only used the force necessary to arrest a presumed offender, injuring the applicant in the process of subduing his resistance. The court acknowledged the great disparity in terms of physical strength between the two policemen and the applicant. Moreover, the other witnesses had clearly indicated that the applicant had not put up any resistance requiring the use of force. Finally, at the time of the incident the

[1] . Approximately 153 euros.

applicant had been only fourteen years old and his age was visible from his physical features.

37. Mr G.G. and Mr V.E. appealed, arguing that their actions had not constituted an offence, as they had acted within the bounds allowed by the National Police Act of 1993. In the alternative, they submitted that the sentences imposed on them were too harsh. The applicant also appealed, arguing that the amount of damages awarded to him was too low.

38. The Military Court of Appeals held a hearing on 8 June 1998. The officers were represented by their counsel, Mr L.I. The applicant was represented by two lawyers.

39. In a judgment of 8 June 1998 the Military Court of Appeals upheld the Pleven Military Court's judgment. It held that the manner in which the applicant's injuries had been caused had been correctly established by the lower court. There existed direct evidence that the applicant had been subjected to violence even after he had been brought to the ground and had not had the possibility to resist or run away. Even if the officers had misidentified the applicant, this had not legally justified the physical assault that they had inflicted on him. Moreover, the use of force had continued after the applicant had been subdued. There existed a direct causal link between the violence and the injuries sustained, as confirmed by all of the medical expert reports. The court went on to state that it did not agree with the lower court's conclusion as regards the extent of the applicant's injury. To exclude the causal link between the surgical removal of the applicant's right kidney and the incident of 14 May 1994, the Pleven Military Court had relied on the conclusion of four medical experts and had rejected as illogical the conclusion of Dr A.I. However, that court had disregarded that conclusion on purely formal grounds, without discussing its main points. It was unclear whether the opinion of the four experts was in fact based on the raw medical data, which in turn cast doubt on its correctness. The court concluded that if the lower court had taken into account these considerations, it could have made a different finding as to the reason for the surgical removal of the applicant's right kidney. However, since no appeal had been lodged by the prosecution, the court only noted this factual mistake and did not correct it in its judgment by holding that the applicant had suffered intermediate bodily harm, as that would worsen the accused's position.

40. Mr G.G. and Mr V.E. appealed on points of law to the Supreme Court of Cassation. The applicant also appealed, requesting an increase in the amount of damages awarded.

41. The Supreme Court of Cassation held a hearing on 17 September 1998. It heard the applicant's and the officers' oral argument and accepted their written pleadings for consideration. The prosecutor present at the hearing submitted that both appeals were groundless and should be dismissed.

42. In a final judgment of 11 November 1998 the Supreme Court of Cassation reversed Mr G.G.'s and Mr V.E.'s convictions and acquitted them. It also dismissed the applicant's civil claim. Its opinion read as follows:

> "...The courts below arrived at the erroneous conclusion that the two [officers]' act had been wrongful and contrary to Article 131 [§ 1] (2) of the CC...
>
> This is so for the following reasons:
>
> The [officers'] act does not amount to an offence, as they acted under the prerequisites of section 40(1), points 1 and 2 of the National Police Act [of 1993] and within the bounds set by this Act on the use of physical force, namely information about the perpetration of a publicly prosecutable offence in the centre of Vidin, which was broadcast over the [police] radio station and was received by [Mr G.G.] and [Mr V.E.]. Moreover, the description of the perpetrator who had fled from the crime scene coincided with the appearance of the [applicant], and for this reason the ... officers mistook him for the wanted offender. What is more, the [applicant] did not obey and through his actions refused to comply with the lawful order of the [officers], who tried to stop him by shouting 'Stop! Police!' Instead, he tried to escape, in order to avoid arrest by the [police], who, in line with their duties, gave chase with a view to arresting the suspect. As it were, not only did the [applicant] not obey, but he also resisted the [police officers]. Finally, the injuries he sustained upon his arrest are within what is permissible under sections 40 and 41 of the [National Police Act of 1993].
>
> The overall situation, including the [applicant]'s inadequate behaviour, led the [officers] to conclude that he was the offender who was being sought after and who had to be caught, overawed and apprehended. This conclusion and the lawful actions of the officers, including the use of force with its consequences for the [applicant], rule out the criminality of their act. [To hold o]therwise [would mean to render] the above-mentioned provisions of the [National Police Act of 1993] nugatory."

II. RELEVANT DOMESTIC LAW

A. Use of force by the police

43. Section 40(1) of the now repealed National Police Act of 1993 („Закон за националната полиция") read, as relevant:

> "... police [officers] may use ... force ... when performing their duties only if they [have no alternative course of action] in cases of:
>
> 1. resistance or refusal [by a person] to obey a lawful order;
>
> 2. arrest of an offender who does not obey or resists the police [officers]; ..."

44. By section 41(2) of the Act, the use of force had to be commensurate to, *inter alia*, the specific circumstances and the personality of the offender. Section 41(3) of the Act directed police officers to "protect, if possible, the

health ... of the persons against whom [force was being used].” Section 41(4) of the Act provided that the use of force had to be discontinued immediately after its aim had been attained.

45. Article 12a § 1 of the CC, adopted in 1997, provides that the injuring of alleged offenders during their arrest is not a criminal act, provided that there exists no other way for their apprehension and the measures used during the arrest do not exceed what is necessary and lawful. By paragraph 2 of this Article, there is such an excess where there exists an obvious disproportion between the character and the gravity of the offence allegedly perpetrated by the arrestee and the circumstances of the arrest, and also where the arrestee is unnecessarily and excessively harmed. The persons effecting the arrest are criminally liable only if they cause the harm wilfully.

B. Duty to investigate police ill-treatment

46. Articles 128, 129 and 130 of the CC make it an offence to inflict grievous, intermediate or minor bodily harm on another person. The CC defines intermediate bodily harm as, *inter alia*, one which involves a temporary life-threatening health disorder or a permanent non-life-threatening health disorder (Article 129 § 2 of the CC). Minor bodily harm is one which does involve a health disorder, but is not specifically referred to in Articles 128 § 2 and 129 § 2 of the CC (Article 130 § 1 of the CC).

47. If the bodily harm is inflicted by a police officer in the course of or in connection with the performance of his duties, the offence is an aggravated one (Article 131 § 1 (2) of the CC). It is publicly prosecutable (Article 161 of the CC).

48. Criminal proceedings for publicly prosecutable offences could be instituted only by the decision of a prosecutor or an investigator (Article 192 of the CCP, as in force at the relevant time). The prosecutor or the investigator had to open an investigation whenever they received information, supported by sufficient evidence, that an offence had been committed (Articles 187 and 190 of the CCP, as in force at the relevant time).

49. Before 1993 the offences allegedly committed by police officers were tried by military courts (Article 388 § 1 (2) of the CCP, as in force at the relevant time). In December 1993 this text was amended to provide that the military courts no longer had jurisdiction in respect of such offences (Article 388 § 1 (2) of the CCP, as amended in December 1993). A new amendment in June 1995 reverted to the old regime (Article 388 § 1 (2) of the CCP, as amended in June 1995 and in force until 1 January 2000). If a case falls within the jurisdiction of the military courts, the preliminary investigation is handled by military investigators and prosecutors.

C. Civil remedies in respect of police ill-treatment

50. Section 45(1) of the Contracts and Obligations Act of 1951 („Закон за задълженията и договорите“) provides that everyone is obliged to make good the damage which they have, through their fault, caused to another person. Section 49 of the Act provides that a person who has entrusted another with performing a job is liable for the damage caused by that other person in the course of or in connection with the performance of the job.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

51. The applicant complained that in the evening of 14 May 1994 he had been ill-treated by two police officers. He relied on Articles 3, 5 § 1 and 8 of the Convention.

52. The Court considers that the complaint should be examined solely under Article 3 of the Convention, which provides:

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

A. Admissibility

53. The Government raised an objection, claiming that the applicant had failed to exhaust domestic remedies. They submitted that he could have claimed damages under section 45 et seq. of the Contracts and Obligations Act of 1951. The fact that the officers had been acquitted did not automatically forestall this possibility, as the degree of fault required in respect of a tort was lesser than the one required for a criminal offence. Section 45(2) of that Act created a presumption of fault. The applicant could thus either sue the police officers in tort, or try to establish their employer's vicarious liability.

54. The applicant submitted that after the acquittal of the police officers and the dismissal of his civil claim by the Supreme Court of Cassation, he had not had at his disposal any further remedies. In his view, a civil suit could not provide an effective remedy in respect of an alleged ill-treatment by State agents; only a criminal investigation was sufficient to redress such grievances. In any event, a civil suit was not possible, because a civil court would be bound by the Supreme Court of Cassation's holding as to the lack of criminality in the officers' act. Moreover, a fresh civil action by the applicant, whether against the officers themselves or their employer, would

be rejected on *res judicata* grounds, as the applicant's civil claim in the criminal proceedings had already been dismissed.

55. Article 35 § 1 of the Convention provides, as relevant:

> "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law..."

56. The aim of the rule of exhaustion of domestic remedies referred to in Article 35 § 1 is to afford Contracting States an opportunity to put matters right through their own legal system before having to answer before an international body for their acts (see, among many other authorities, *Egmez v. Cyprus*, no. 30873/96, § 64, ECHR 2000-XII). Where there is a choice of remedies, the exhaustion requirement must be applied to reflect the practical realities of the applicant's position, so as to ensure the effective protection of the rights and freedoms guaranteed by the Convention (see *Allgemeine Gold- und Silberscheideanstalt A.G. v. the United Kingdom*, no. 9118/80, Commission decision of 9 March 1983, Decisions and Reports (DR) 32, p. 165; and, more recently, *Krumpel and Krumpelová v. Slovakia*, no. 56195/00, § 43, 5 July 2005). Moreover, an applicant who has used a remedy which is apparently effective and sufficient cannot be required also to have tried others that were also available but probably no more likely to be successful (see *Wójcik v. Poland*, no. 26757/95, Commission decision of 7 July 1997, DR 90-A, p. 28; *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3286, § 86; *Aquilina v. Malta* [GC], no. 25642/94, § 39, ECHR 1999-III; and *Günaydin v. Turkey* (dec.), no. 27526/95, 25 April 2002).

57. The Court notes that the applicant's parents complained about the incident to the prosecution authorities, which opened criminal proceedings against those responsible. The applicant joined these proceedings as a civil claimant (see paragraphs 19, 20 and 24 above). Seeing that the remedies available within the criminal justice system in Bulgaria are the normal avenue of redress for alleged police ill-treatment (see *Kemerov v. Bulgaria* (dec.), no. 44041/98, 2 September 2004, with further references), the Court does not find the applicant's choice of procedure unreasonable. It may be true that even after the acquittal of the officers and the dismissing of the civil claim in the criminal proceedings the applicant could still bring a tort action against the officers or against the body vicariously liable for their actions. However, the Court, in line with its consistent case-law, considers that, having used up the possibilities available to him within the criminal justice system, the applicant was not required to embark on another attempt to obtain redress by issuing separate civil proceedings (see *Assenov and Others*, cited above, p. 3286, § 86).

58. Moreover, a tort action would have at most resulted in an award of damages, whereas in cases of serious ill-treatment by State agents the alleged breach of Article 3 cannot be remedied exclusively through the

payment of compensation (see, among many other authorities, *İlhan v. Turkey* [GC], no. 22277/93, § 61, ECHR 2000-VII). If the authorities could confine their reaction to such incidents solely to the payment of compensation, while not doing enough to identify and punish those responsible, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity. Thus the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice (see *Krastanov v. Bulgaria*, no. 50222/99, § 60, 30 September 2004, with further references).

59. The Government's objection must therefore be dismissed.

B. Merits

60. The applicant submitted that the physical force employed by the police officers for his arrest had been clearly excessive and completely unwarranted. He had been fourteen years old at the time of the incident. The car from which the officers had come out had not been marked as a police vehicle. The street in which the chase had started had not been well lit and the officers had not properly identified themselves. He had therefore run not to avoid arrest, but because, fearing for his safety, had tried to get to a place with better lighting and more bystanders. Having reached such a spot, he had stopped before the officers had caught up with him. Furthermore, although he had not resisted arrest, he had received an unwarranted beating, had been kicked and hit with truncheons while lying on the ground. This assault had continued long after he had been subdued. As a result, his kidney had been seriously injured, which had later led to its surgical removal.

61. The Government submitted that the encroachment upon the applicant's bodily integrity – a health disorder which had lasted two or three weeks – had not amounted to inhuman and degrading treatment within the meaning of Article 3, as it had not exceeded the threshold of severity under this provision. The use of force against the applicant had lasted less than a minute, for the sole purpose of preventing his flight. The officers' actions had been unavoidable and had been discontinued immediately after the applicant's arrest. The officers had exhibited no positive intention of injuring or humiliating the applicant. Immediately after the incident they had escorted the applicant to a hospital and then to his home. The applicant's averment that his kidney had been injured as a result of the incident had been rejected by the national courts. As the applicant's injuries had not been caused by the use of excessive force and as he had resisted arrest, it was incumbent on him to prove the causal link between the use of force and the subsequent kidney problems. Another point which had to be taken into account was that in Bulgaria there existed detailed rules on the

use of force by law enforcement officers; these rules provided adequate protection against ill-treatment.

62. As the Court has stressed many times, Article 3 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 Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 of the Convention even in the event of a public emergency threatening the life of the nation (see, among many other authorities, *Assenov and Others*, cited above, p. 3288, § 93). To fall within the scope of Article 3 ill-treatment must attain a minimum level of severity. 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. Further, in determining whether a particular form of ill-treatment should be qualified as torture, consideration must be given to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As noted in previous cases, it appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering (see, among many other authorities, *İlhan*, cited above, §§ 84 and 85).

63. According to the Court's case-law, Article 3 does not prohibit the use of force for effecting an arrest. However, such force may be used only if indispensable and must not be excessive (see, among others, *Klaas v. Germany*, judgment of 22 September 1993, Series A no. 269, p. 17, § 30; *Rehbock v. Slovenia*, no. 29462/95, §§ 68-78, ECHR 2000-XII; *Altay v. Turkey*, no. 22279/93, § 54, 22 May 2001; *Hulki Güneş v. Turkey*, no. 28490/95, § 70, 19 June 2003; *Krastanov v. Bulgaria*, no. 50222/99, §§ 52 and 53, 30 September 2004; and *Günaydın v. Turkey*, no. 27526/95, §§ 30-32, 13 October 2005).

64. The Court finds that the injuries which the applicant sustained at the hands of the police officers led to grave physical pain and suffering. Moreover, they had lasting consequences for his health (see paragraphs 8, 11 and 14-18 above). It is also clear that the acts of violence against the applicant were committed by the police officers in the performance of their duties. They took place during the applicant's arrest (see paragraphs 8 and 9 above). The exact circumstances of the arrest and intensity of the force used against the applicant were disputed by the parties and were subject to conflicting evaluations by the national courts. While the first- and the second-instance courts were of the view that the violence against the applicant had been wrongful and had exceeded what was necessary to effect his arrest, and accordingly found the police officers guilty (see paragraphs

34, 36 and 39 above), the Supreme Court of Cassation held that the use of force had been fully warranted and reversed the conviction (see paragraph 42 above). However, the acquittal of the officers by a national court bound by the presumption of innocence and by the manner in which domestic law regulates the use of force by the police does not absolve Bulgaria from its responsibility under the Convention (see, *mutatis mutandis*, *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, p. 26, § 34). The Court must scrutinise the alleged breach of Article 3 with heightened vigilance, because this provision prohibits inhuman treatment in absolute terms, irrespective of the victim's conduct (ibid., p. 24, § 32). Bearing in mind the nature and the extent of the applicant's numerous and serious injuries, the circumstances surrounding his arrest (including the fact that the officers, who were merely trainees, were not accompanied by a supervisor – see paragraph 8 *in limine*), and the fact that at the material time the applicant was only fourteen years old and clearly inferior to the officers in terms of physical strength, and analysing these facts in the light of its jurisprudence in this domain (see paragraph 63 above), the Court concludes that the force used against the applicant was clearly excessive, both in intensity and duration.

65. There has accordingly been a violation of Article 3 of the Convention.

II. ALLEGED VIOLATIONS OF ARTICLES 3, 6 § 1 AND 13 OF THE CONVENTION

66. The applicant complained that the criminal proceedings against the police officers, in which he had participated as a civil claimant, had been unfair. He submitted that the courts had not been objective in their assessment of the facts and had failed to redress the grievance which he bore as a result of the beating. He relied on Articles 3, 6 and 13 of the Convention.

67. The text of Article 3 has been set out in paragraph 52 above. Articles 6 and 13 provide, as relevant:

Article 6 § 1

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

Article 13

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Admissibility

68. The parties did not comment on the admissibility of this complaint.

69. The Court considers that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, nor inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

70. The applicant submitted that the proceedings against the police officers had been flawed in several respects. The courts had failed to convict the officers and had rejected his civil claim despite the availability of clear and overwhelming evidence of the unjustified use of force against him. The courts had also failed to properly examine the causal link between the beating and the ensuing surgical removal of his kidney. The approach adopted by Supreme Court of Cassation, leading to the officers' acquittal, had been in clear conflict with the standards under Article 3 of the Convention, whereas the investigation required under this provision had to be based on criteria comparable to those developed by the Court.

71. The Government submitted that the authorities had conducted an effective investigation of the incident of 14 May 1994. The investigation had been started promptly and had later proceeded at a good pace, with a slight delay due to the need to prepare medical reports. The authorities had gathered all relevant pieces of evidence, including witness' statements and medical opinions. All levels of court had analysed the evidence in detail. The applicant's initial averment that they had been influenced by the counsel for the police officers, who had formerly been a military prosecutor, was completely groundless.

72. The Court considers that the applicant's complaint concerning the lack of an effective investigation falls, in the circumstances, to be dealt with under Article 13 of the Convention rather than Article 3 thereof (see, *mutatis mutandis*, *İlhan*, cited above, §§ 89-93).

73. The Court further finds that the applicant's complaints under Article 6 of the Convention are very closely bound up with his criticism of the manner in which the courts treated his ill-treatment and the repercussions which this had on the capability of the proceedings against the police officers to redress the grievances which he harboured as a result of this ill-treatment. It is accordingly appropriate to examine those complaints in relation to the State's more general obligation under Article 13 to provide an effective remedy in respect of all alleged violations of the Convention (see, *mutatis mutandis*, *Kaya v. Turkey*, judgment of 19 February 1998, *Reports* 1998-I, p. 329, § 105; and *Sabuktekin v. Turkey*, no. 27243/95, § 108, ECHR 2002-II (extracts)).

74. Article 13 requires a domestic remedy to enforce the substance of the Convention rights and freedoms in whatever form they might be secured in the national legal order (see, among many other authorities, *İlhan*, cited above, § 97).

75. The scope of the obligation under Article 13 varies depending on the nature of the complaint. In the case of an arguable allegation of a breach of Article 3, Article 13 calls for an effective mechanism for establishing the liability of State officials or bodies for acts or omissions involving a breach of the victims' rights under the Convention (see, *mutatis mutandis*, *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 109, ECHR 2001-V; and *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 97, ECHR 2002-II). In particular, if the allegations concern torture or serious ill-treatment by State agents, this mechanism must consist, at a minimum, of a thorough and effective investigation capable of leading to the identification and punishment of those responsible (see, among many other authorities, *İlhan*, cited above, § 97). This investigation must be based on a standard comparable to the one used by the Court in assessing complaints under Article 3 (see *Tzekov v. Bulgaria*, no. 45500/99, § 71, 23 February 2006, citing *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 113, ECHR 2005-VII). The same goes for the ensuing judicial proceedings, should the case come to trial. The national authorities, while bound by the presumption of innocence and by the terms in which domestic law is couched (see *Ribitsch*, cited above, p. 26, § 34), must nevertheless review the acts alleged to amount to a breach of Article 3 of the Convention in the light of the principles which lie at the heart of the Court's analysis of complaints under this provision (see, *mutatis mutandis*, *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, pp. 47-48, § 121; *Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 215, p. 39, § 123; and *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 138, ECHR 1999-VI).

76. On the basis of the evidence adduced in the present case, the Court has found that the respondent State is responsible under Article 3 for the inhuman treatment suffered by the applicant (see paragraph 65 above). The applicant's complaint in this regard was therefore arguable for the purposes of Article 13. He was accordingly entitled to the protection afforded by this provision.

77. The Court notes that while the authorities investigated the applicant's beating, brought those responsible for it to trial, and convicted and sentenced them, the conviction and sentence were later quashed and the police officers who assaulted the applicant were acquitted. Unlike the situation obtaining in *Ribitsch* (cited above), in the case under consideration this acquittal was not due to the lack of sufficient proof that the officers had committed the act alleged against them, but was rather the result of the manner in which the Supreme Court of Cassation construed the

domestic-law provisions regulating the use of force by the police (see paragraph 42 above). It is not for the Court to determine whether this construction was correct, as it is for the national courts to interpret domestic law. The Court must however verify whether the manner in which this law has been applied led to a breach of the applicant's right under Article 13 of the Convention to an effective remedy. As already noted (see paragraph 75 above), this right implies that the domestic courts have to examine allegations of breaches of Article 3 of the Convention in line with the standards developed by the Court in its case-law under that provision.

78. As is apparent from this case-law, in each case the Court carefully examines whether the force used during arrest operations is excessive and goes beyond what may be considered strictly necessary in the circumstances (see the cases cited in paragraph 63 above). Indeed, sections 40 and 41 of the National Police Act of 1993, which expressly direct the police to minimise the use of force and tailor it to the surrounding circumstances and the person against whom it is being used, seem to reflect similar concerns (see paragraphs 43 and 44 above).

79. However, in the instant case the Supreme Court of Cassation did not embark on an assessment of the proportionality of the force used against the applicant. While it referred to sections 40 and 41 of the National Police Act of 1993, it did not endeavour to analyse the degree of force and whether it was necessary and proportionate in the circumstances (see paragraph 42 above). The courts below it had clearly established that the applicant had suffered numerous injuries and that these were the result of excessive force (see paragraphs 34, 36 and 39 above). Without subjecting these findings to doubt, the Supreme Court of Cassation gave them a different legal qualification, holding that the officers had lawfully assaulted the applicant, as he had tried to escape and had been – albeit wrongfully – identified as the person wanted by the police. In so doing, that court treated as irrelevant a number of other factors – that at the time of the events the applicant was fourteen years old, that the violence against him had continued after he had been subdued, and that the beating had been wilful –, all of which were material for determining whether the act complained of amounted to a breach of Article 3 of the Convention. This approach was fully inconsistent with the standards stemming from this Court's case-law in this domain. The Supreme Court of Cassation thus failed to address the substance of the applicant's Convention complaint.

80. There has therefore been a violation of Article 13 of the Convention.

III. ALLEGED VIOLATIONS OF ARTICLE 5 §§ 1 AND 2 OF THE CONVENTION

81. The applicant complained that after being examined in the emergency ward of the Vidin Regional Hospital at 10.01 p.m. on 14 May

1994 he was taken to the police station where he was questioned and was not informed of what offence he was being suspected. He relied on Article 5 §§ 1 and 2 of the Convention.

82. Article 5 §§ 1 and 2 provide, as relevant:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> ...
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."

83. The Court notes that the applicant was taken to the police station at about 10.30 p.m. on 14 May 1994 and was released half an hour later (see paragraph 12 above). It does not appear that later he tried to use any domestic remedy in respect of the violations he alleged. Even assuming that no such remedies existed, the Court considers that, in so far as the complaints under Article 5 §§ 1 and 2 are concerned, the six-month period under Article 35 § 1 of the Convention started to run at the time of the applicant's release from custody, that is on 14 May 1994. However, the applicant lodged his application with the Court on 14 April 1998, long after its expiration.

84. It follows that these complaints have been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

85. 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. Pecuniary damage

86. The applicant claimed 40,000 euros (EUR) in respect of pecuniary damage. He submitted that the injuries necessitating the surgical removing

of his kidney had been the direct and proximate result of his beating by the police officers. According to the information in his possession, the average price of a kidney transplantation was between EUR 40,000 and EUR 50,000. The applicant did not submit any documents in corroboration of his claim.

87. The Government did not comment.

88. The Court notes that the applicant does not aver that he has already undergone a kidney transplantation, nor has he produced any proof of the exact cost of such a transplantation, such as an estimate from an appropriate medical institution. The Court, even assuming that the removing of the applicant's kidney was the result of the violence against him, cannot speculate on this issue and therefore rejects the applicant's claim as unsubstantiated.

B. Non-pecuniary damage

89. The applicant claimed EUR 25,000 in non-pecuniary damages. He relied on the relevant case-law and submitted that he had sustained extremely serious injuries as a result of his ill-treatment and had experienced acute pain while being ill-treated. The injury to his kidney had also caused him severe pain for the two years after his beating, until the kidney was removed. The applicant further submitted that he has suffered emotionally as a result of the manner in which the authorities had handled the case against the police officers who had ill-treated him.

90. The Government did not comment.

91. The Court found above that the applicant, who was only fourteen years old at the time of his ill-treatment, suffered serious injuries at the hands of police officers. It also found that in the instant case the remedies in the domestic legal system did not turn out to be effective. Having regard to the awards made in previous similar cases and to the circumstances of this case, the Court decides to award in respect of non-pecuniary damage the sum of EUR 12,000, plus any tax that may be chargeable.

C. Costs and expenses

92. The applicant sought the reimbursement of EUR 2,880 incurred in legal fees for the proceedings before the Court. He submitted a time-sheet of the hours which his representative had spent working on the case and the fee agreement between them.

93. The Government did not comment.

94. According to the Court's case-law, an applicant is entitled to reimbursement of his 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, the Court, having regard to the

information in its possession, the above criteria and the fact that the applicant has received EUR 715 by way of legal aid from the Council of Europe, considers it reasonable to award the sum of EUR 2,165, plus any tax that may be chargeable.

C. Default interest

95. The Court considers it appropriate that the default interest 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. *Dismisses* the Government's objection of non-exhaustion of domestic remedies;

2. *Declares* admissible the applicant's complaints about his ill-treatment by two police officers and about the ineffectiveness of the domestic remedies in this regard;

3. *Declares* the remainder of the application inadmissible;

4. *Holds* that there has been a violation of Article 3 of the Convention;

5. *Holds* that there has been a violation of Article 13 of the Convention;

6. *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:
      (i) EUR 12,000 (twelve thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 2,165 (two thousand one hundred sixty-five euros) in respect of costs and expenses;
      (iii) any tax that may be chargeable on the above amounts;
   (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;

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

Done in English, and notified in writing on 12 April 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia WESTERDIEK
Registrar

Peer LORENZEN
President