

**European Court of Human Rights
Council of Europe
Strasbourg, France**

APPLICATION

*under Article 34 of the European Convention on Human Rights and
Rules 45 and 47 of the Rules of Court*

IMPORTANT: This application is a formal legal document and may affect your rights and obligations.

I. THE PARTIES

A The applicant

Family name: Kiss

First name: Borbála

Gender: Female

Nationality: Hungarian

Date and place of birth: 27 October 1983, Miskolc, Hungary

Permanent address: Hungary 3565 Tiszalúc, Dankó utca 5.

Appointed representatives of the applicants:

1. Dr Levente Baltay

Attorney-at-law

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2. European Roma Rights Centre (ERRC)

The European Roma Rights Centre is an international public interest law organisation which monitors the human rights situation of Roma across Europe and provides legal defence in cases of human rights abuse. The ERRC has consultative status with both the Council of Europe and the Economic and Social Council of the United Nations.

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This application is being submitted jointly by Dr Levente Baltay attorney-at-law and the ERRC as the appointed representatives of the applicant.

B The High Contracting Party

The Republic of Hungary

II. STATEMENT OF THE FACTS

Introduction

1. The applicant is a Hungarian national of Roma ethnicity.
2. The applicant submits that the instant case discloses clear violations of a number of her rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"), in particular, of Article 3, Article 13 and Article 14 in conjunction with Article 3 and Article 13.
3. The applicant submits that her rights set forth in Article 3 of the Convention were violated during a police intervention on the evening of 4 September 2010 in a private house in Tiszalúc, when she was subjected to acts of police brutality inflicting on her physical and mental suffering amounting to inhuman and/or degrading treatment or punishment (substantive violation) and that, with respect to the same incident, the Hungarian prosecuting authorities have failed to satisfy their obligation under Article 3 to carry out an effective and impartial investigation, capable of leading to the punishment of the police officers responsible (procedural violation).
4. The applicant submits that her rights under Article 13 alone and in conjunction with Article 3 were violated by the lack of effective remedy concerning the alleged infringement of her right under Article 3 of the Convention.
5. The applicant submits that the ill-treatment which she received from the police violated the requirement of non-discrimination set forth by Article 14 taken together with Articles 3 and 13, in that she suffered abuse because of her Roma ethnicity, and there was a failure under both Articles 3 and 13 to investigate the ill-treatment with particular thoroughness, given the ethnicity of the applicant.
6. The facts of the case presented below are derived from official documents and reports as well as from the applicant's and other witnesses' statements.

The events on the evening of 4 September 2010

7. On the evening of 4 September 2010 the applicant was celebrating a christening with family and friends in a tent set up in the backyard of a private house in Tiszalúc, Hungary. There were approximately 50 people present, of whom around 20 were children. At 20.30 four police officers arrived at the house in a marked police car. The officers asked that they turn the music down. As requested, the music was turned down and the police left. Later in the evening, some time around 21.00 or 21.30, three police cars arrived with fifteen police officers equipped with sprays and truncheons, who again asked the owner of the house, Lászlóné Horváth, to turn the music down. She did.
8. Imre Horváth (the homeowner's brother-in-law) expressed his discontent with the police's request to turn the music down and complained about the police presence. He called for the music to be switched back up and for the party to continue.
9. In reply to his complaint two police officers started towards Imre Horváth and shouted "Let's beat up that faggot!" ("Üssük már szét azt a köcsögöt!").
10. Hearing this comment Lászlóné Horváth knelt down in front of the police officers asking them not to make trouble and saying that she was going to turn the music down and end the party.
11. At this point, Imre Horváth was standing in the middle of the crowd, which the police officers had to go through in order to reach him. The two officers started to push through the crowd which still included children, indiscriminately using truncheons and chemical spray on them, amongst whom, the applicant.
12. Imre Horváth was arrested and handcuffed.
13. At this point László Horváth (the son of the homeowner) stepped up to the police officers asking them not to take Imre Horváth to the police station, at which they handcuffed László Horváth too and sprayed him.
14. The crowd in the garden did not understand what was going on and as a result of the sudden intervention and aggression by the police they started to shout and ask the police why they handcuffed Imre Horváth. Several people were sprayed, including women with children (a six-month-old and a seven-year-old).¹
15. The applicant asked one of the police officers where Imre Horváth was going to be taken. In reply, one of the police officers replied: "What the fuck are you yelling at?" ("Hát te mi a faszomat kiabálsz?")²

¹ Annex No.2: Medical record issued by the Tiszalúc Emergency Centre, 4 September 2010.

² See video testimony: We serve and beat: Christening with tear gas, TASZ 2010, available at: http://jogtalanul.blog.hu/2010/12/10/szolgalunk_es_verunk_keresztelo_konnygazzal, at 03.10 mins.

16. The applicant asked the reasons for the tone of the police officer when the police officer grabbed her arm and told her that she was also going to be taken to the Szerencs police station. The applicant's partner pulled her back and when she looked at the police officer she was sprayed, whereupon she fell over. The applicant could not breathe, she was gasping. At this point, the police officer grabbed her and dragged her along the ground by the hood of her pullover to the police car. Her pullover ripped and the zipper dug into her neck. The applicant could not see anything: she could not open her eyes as they were burning because of the spray, but according to the applicant's sister who was present at least six policemen were pulling her on the ground.³ The applicant was thrown onto the police car and her breasts were exposed as a result of her ripped pullover.⁴ The applicant suffered bruises and scrapes on her back, had difficulty breathing because of the pressure to her neck and had pain in her eyes.⁵
17. After this, the applicant's brother begged the police not to take the applicant to the police station, as she has small children. Finally, the applicant was not taken to the police station.
18. The applicant, together with nine other victims visited the general medical practitioner (GP) the same night. The GP examined the applicant and others, however she did not issue an official medical document about the injuries, only a paper listing the names and date of birth of the ten persons including the applicant.⁶ A note was put next to the applicant's name: "Transferred to hospital by ambulance".⁷ According to the witness testimonies the doctor talked to the applicant and others in an off-hand manner.⁸ After the GP's examination, the applicant was taken to the Miskolc County Surgery Hospital by ambulance where she was diagnosed with eye injury which would heal within eight days.⁹

Domestic proceedings

19. Two days later, on 6 September 2010, the owner of the house, Lászlóné Horváth together with nine other victims including the applicant, wanted to file a felony report against the police-ill treatment at the nearby police station at the village of Taktaharkány. On that day the victims had an appointment at 8am with the local mayor who promised to take them to the police station to submit the felony report. However the police station of Taktaharkány left a message

³ Ibid. See at 04.33 mins.

⁴ Ibid. See at 04.35 mins.

⁵ Ibid. See at: 03.31 mins.

⁶ Annex No. 2: Medical record issued by the Tiszalúc Emergency Centre, 4 September 2010.

⁷ Ibid.

⁸ See video testimony: We serve and beat: Christening with tear gas, TASZ 2010, available at:

http://jogtalanul.blog.hu/2010/12/10/szolgalunk_es_verunk_keresztelo_konnygazzal, at: 06.31 mins.

⁹ Annex No. 3: Medical records of the applicant issued by the Borsod-Abaúj- Zemplén County Hospital, 5 September 2010.

with the mayor that they would not receive the victims and they could not report any felony at that station, because “they [Taktaharkány police station] had nothing to do with this case”.¹⁰ Therefore, Lászlóné Horváth together with the other victims went to the Szerencs Police station where she filed a report against the police. Lászlóné Horváth’s complaint was recorded as case file number 436/2010.¹¹ Whilst waiting at the police station to file this complaint they saw some of the officers who had been involved in the intervention two days before. The officers clearly recognised them and hurried into another room. The applicant suspects that the officers used this opportunity to file a complaint against her and others, so as to frustrate their own efforts to bring the officers to justice (which indeed happened). The fact that the officers’ complaint was not filed immediately after the event and is recorded as case file number 435/2010, would support the applicant’s suspicion and is material to the consideration the prosecutor ought to have made.

20. On 27 September 2010, the Miskolc Prosecutorial Investigation Office dismissed the complaint, stating that the reported police conduct did not amount to criminal acts.¹² The Prosecutor relied on evidence submitted by the police, such as reports made by the police officers and by the station commander’s report. The prosecutor claimed that people in the crowd were drunk, aggressive and continuously resistant and the police use of force was reasonable and proportionate and therefore in accordance with the law.¹³
21. On 15 November 2010, the applicant filed another separate felony report in her own name on the same incident with the Miskolc Prosecutorial Investigation Office, alleging that the police officers committed the criminal offence of ‘maltreatment in official proceedings’.¹⁴ The applicant stated that there were many eyewitnesses present who could testify.¹⁵
22. On 22 November 2010, the Miskolc Prosecutorial Investigation Office ordered preliminary inquiries to supplement the complaint with further documents, after which the Miskolc Prosecutorial Investigation Office gathered the relevant police reports into the incident.
23. On 8 December 2010, the Miskolc Prosecutorial Investigation Office opened the investigation into the case.¹⁶

¹⁰ See video testimony: We serve and beat: Christening with tear gas, TASZ 2010, available at: http://jogtalanul.blog.hu/2010/12/10/szolgalunk_es_verunk_keresztelo_konnygazzal, at: 08.18 mins

¹¹ Annex No. 4: Felony report of Lászlóné Horváth, 6 September 2010

¹² Annex No. 5: Decision on dismissal of the complaint, Miskolc Prosecutorial Investigation Office, 27 September 2010, page 2

¹³ Ibid.

¹⁴ Act No. IV of 1978 the Criminal Code, 226. § (1)

¹⁵ Annex No. 6: Felony report submitted by the applicant to the Miskolc Prosecutorial Investigation Office against the police intervention, 15 November 2010.

¹⁶ Annex No. 7: Notice on launching the investigation, Miskolc Prosecutorial Investigation Office, 8 December 2010, Miskolc, Hungary.

24. On 14 January 2011, the Miskolc Prosecutorial Investigation Office closed the investigation, stating that, based on the felony report and other written documents gathered during the investigation, the commission of a criminal offence could not be established and a continued investigation was not expected to yield any result. It further stated that the use of force by the police was reasonable and proportionate and therefore it was in accordance with the law.¹⁷ The decision was signed by Zoltan Friedmanszky, prosecutor.
25. On 24 January 2011, the applicant submitted an appeal against this decision, claiming that the decision of the prosecutor to discontinue the investigation for an expected lack of results was unsubstantiated, in view of the clear conflict between the applicant's felony report and the police officers. The applicant also claimed that the investigative authority failed to question the applicant and other witnesses and, instead of resolving the conflict between the felony report of the applicant and the documentation provided by the police officers, the prosecutor established the facts of the case solely based on the written evidence provided by the police. The investigative authority did not hear the victims and other witnesses. The applicant applied to the Borsod–Abaúj–Zemplén County Prosecutor to annul the decision and order the continuation of the investigation.¹⁸
26. On 28 January 2011, the Borsod–Abaúj–Zemplén County Prosecutor found in favour of the applicant and ordered the continuation of the investigation. The County Prosecutor noted that the investigation on the first instance was solely based on paper evidence and therefore indicated that in order to establish the facts of the case it was necessary to gather all evidence regarding the case, including the evidence gathered with regards to the administrative offence (civil disturbance) and the criminal procedure launched against the applicant and others¹⁹, as well as watching the video testimony of the applicant and others submitted by the applicant and, based on that, gathering witness testimonies if needed.²⁰ The Prosecutor also requested the assessment of the legality, the proportionality and the adequacy of the police conduct.²¹
27. On 23 February 2011, the Miskolc Prosecutorial Investigation Office closed the investigation stating that the action of the police officers did not constitute a criminal offence.²² The decision was signed by the same prosecutor who brought the first instance decision on the closure of the investigation: Friedmanszky Zoltan prosecutor. The decision of the Miskolc Prosecutorial

¹⁷ Annex No. 8: Decision on closing the investigation, Miskolc Prosecutorial Investigation Office, 14 January 2011, Miskolc, Hungary.

¹⁸ Annex No. 9: Applicant's Complaint, 24 January 2011.

¹⁹ See paragraph 30, below.

²⁰ Annex No. 10: Decision on continuation of the investigation, Borsod-Abaúj-Zemplén County Prosecutor, 28 January 2011, Miskolc, Hungary.

²¹ Ibid.

²² Annex No. 11: Decision on discontinuation of the investigation Miskolc Prosecutorial Investigation Office, 23 February 2011, Miskolc, Hungary.

Investigation Office argued that the police intervention was adequate, necessary and proportionate. It also stated that, as requested by the Borsod–Abaúj–Zemplén County Prosecutor, further evidence was gathered such as the felony report into the same incident made by Lászlóné Horváth as well as documentation with regards to the criminal procedure launched against the applicant and others (see paragraph 30 below). Neither the applicant nor other eyewitnesses were questioned during the investigation.

28. On 7 March 2011 the applicant submitted an appeal against this decision, claiming that the decision was not based on consideration of more evidence and did not resolve the ambiguities with regards to the facts as described by the applicant and other witnesses and the police officers. The applicant claimed that based on the witnesses' video testimonies she submitted, as well as the felony report submitted by Lászlóné Horváth, there was reasonable suspicion that the police committed the offence of 'maltreatment in official proceedings', and the ambiguities between the testimonies of the victims and the police officers could be resolved only by judicial consideration.²³
29. On 16 March 2011, the Borsod–Abaúj–Zemplén County Prosecutor dismissed the applicant's appeal, stating that it was unsubstantiated.²⁴ In its decision the Borsod–Abaúj–Zemplén County Prosecutor argued that a disinterested person who could have testified about the alleged excessive use of force of the police was not identified during the investigation nor was identified by the applicant in the appeals. The video testimonies submitted by the applicant, in his view, could not lead to a different assessment of the evidence. Therefore he concluded that a continued investigation was not expected to yield any result and therefore the appeal was unsubstantiated.

Criminal procedure against the applicant and others

30. A criminal complaint was lodged against the applicant and others by the police officers alleging that they committed the crime of obstruction of justice committed in a group (242/B. § (1), (3) of the Criminal Code) by shouting, swearing at the police, demanding the police not to arrest Imre Horváth and the applicant and holding/pulling them back and therefore preventing the police intervention. The indictment against the applicant and others were submitted to the Miskolc City Court on 11 February 2011 and the trial of the accused began in May 2011. It is

²³ Annex No. 12: Applicant's Complaint, 7 March 2011.

²⁴ Annex No. 13: Final decision on the dismissal of the applicant's complaint, Borsod-Abaúj-Zemplén County Prosecutor, 16 March 2011, Miskolc, Hungary.

currently ongoing. The indictment was signed by Zoltán Friedmanszky, prosecutor of the Miskolc Prosecutorial Investigation Office.²⁵

III. STATEMENT ON THE ALLEGED VIOLATIONS

31. The applicant submits that the instant case discloses clear violations of a number of rights guaranteed by the Convention, in particular, of Article 3, Article 13 and Article 14 in conjunction with Article 3 and Article 13.
32. As a preliminary matter, the applicant submits that her allegations of Convention violations in the instant case should be interpreted against the backdrop of the systematic police brutality and discrimination suffered by Roma in Hungary. The applicant therefore respectfully submits the following non-comprehensive survey of observations by international monitoring organisations.
33. The Council of Europe's European Commission against Racism and Intolerance (ECRI) in its latest 2009 report on Hungary concluded: "that incidents of police brutality towards Roma continue to be reported. Empirical evidence also suggests that Roma are disproportionately subjected to police stop and search activities, which in turn contributes to disproportionate representation of Roma within the criminal justice system. Prejudice against Roma still permeates the police force, as other sectors of society."²⁶
34. In its Concluding Observations concerning Hungary, issued in November 2010, the United Nations Human Rights Committee said it was "concerned at the persistent ill-treatment and racial profiling of the Roma by the Police" and recommended the state to adopt "specific measures to raise awareness in order to promote tolerance and diversity in society and ensure that judges, magistrates, prosecutors and all law enforcement officials are trained to be able to detect hate and racially motivated crimes"²⁷.
35. The UN Committee Against Torture in its Conclusions and Recommendations on Hungary published on 6 February 2007, noted with concern the allegations of excessive use of force and ill-treatment by law enforcement officials, especially in the course of or in relation to apprehension, as well as remained concerned at the number of reports of ill-treatment by law enforcement agencies, the limited number of investigations carried out by the State party in such cases, and the very limited number of convictions in those cases which are investigated.

²⁵ Annex No. 14: Indictment of the applicant and others, Miskolc Prosecutorial Investigation Office, 11 February 2011

²⁶ ECRI report on Hungary (fourth monitoring cycle), page 47, published 24 February 2009. Available at: <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Hungary/HUN-CbC-IV-2009-003-ENG.pdf>

²⁷ Concluding observations of the Human Rights Committee Hungary, paragraph 18, 100th session, Geneva, 11-29 October 2010. Available at: <http://www2.ohchr.org/english/bodies/hrc/hrcs100.htm>

The Committee expressed its deep concern at reports of ill-treatment of and discrimination against the Roma by law enforcement officials, especially the police.²⁸

36. As recently as 27 May 2011, the UN Special Rapporteur on Racism on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Githu Muigai, on a country visit in Hungary noted the violence and abuse against Roma by the police and discrimination in the judiciary, including in the criminal justice system.²⁹

37. In its annual human rights report the U.S. Department of State noted that “human rights problems included police use of excessive force against suspects, particularly Roma” and that “the Hungarian Civil Liberties Union (HCLU) reported that police often verbally and physically abused suspects of Roma origin in certain areas of the country, most frequently in the northeastern Borsod-Abaúj-Zemplén County.”³⁰

IV. STATEMENT ON THE ALLEGED VIOLATIONS OF ARTICLE 3

38. In view of the facts of the case, the applicant submits that:

- a) during the police intervention on the evening of 4 September 2010 in the private house in Tiszalúc, she was subjected to acts of police brutality inflicting on her physical and mental suffering amounting to inhuman and/or degrading treatment or punishment (substantive violation) under Article 3 of the Convention, and
- b) with respect to the same incident, the Hungarian prosecuting authorities have failed to satisfy their obligation under Article 3 to carry out an effective and impartial investigation, capable of leading to the punishment of the police officers responsible (procedural violation).

a) Statement on the substantive violation of Article 3

39. The applicant submits that the police intervention, namely the use of abusive language, spraying her, dragging her on the ground by the hood of her pullover, throwing her against a car, as well as exposing her breasts in public amounts to inhuman or degrading treatment.

²⁸ Conclusions and recommendations of the Committee Against Torture, Hungary, paras 14, 16, 19, 37th session, 6-24 November 2006, Available at:

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/403/45/PDF/G0740345.pdf?OpenElement>

²⁹ Press statement delivered by the United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Githu Muigai, on 27 May 2011 in Budapest, available at: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11078&LangID=E>

³⁰ U.S. Department of State, 2010 Human Rights Report: Hungary, Available at: <http://www.state.gov/g/drl/rls/hrrpt/2010/eur/154428.htm>

40. In support of her claim of a substantive violation of Article 3, the applicant relies on the jurisprudence outlined below.
41. The European Court of Human Rights ("Court") has stated on many occasions that "Article 3 enshrines one of the fundamental values of democratic society" and also declared that "...Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15§2 even in the event of a public emergency threatening the life of the nation".³¹ Thus under the Convention, any form of torture and inhuman or degrading treatment or punishment is prohibited in absolute terms irrespective of the victim's conduct.³²
42. Both the Commission and the Court have made clear that Article 3 prohibits the infliction, not only of physical injury, but also of mental suffering. In the case of *Ireland v United Kingdom*, the Court defined terms used in Article 3 as follows: torture as "deliberate inhuman treatment causing very serious and cruel suffering"; inhuman treatment or punishment as "the infliction of intense physical and mental suffering"; degrading treatment as "ill-treatment designed to arouse in victims feelings of fear, anguish, and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance".³³
43. In *The Greek Case*, the European Commission explained: "The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation, is unjustifiable...Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience."³⁴ In that case, the Commission found that Article 3 covered "the infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault."³⁵
44. This Court has itself made clear that, in evaluating claims of violation of Article 3, it will take into account a range of factors that bear on the vulnerability of the victim. Thus, in its judgment in *Ireland v United Kingdom*, the Court held: "...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 in the nature of things, relative; it depends on all the circumstances of the case, such as the duration

³¹ *Selmouni v France* [GC], no. 25803/94, para 95, ECHR 1999-V, and the *Assenov and Others v Bulgaria* judgment of 28 October 1998, Reports of Judgments and Decisions 1998-VIII, p. 3288, para 93, *Labita v Italy* [GC], no. 26772/95, judgment of 6 April 2000.

³² *Chahal v United Kingdom*, judgment of 15 November 1996, Reports 1996-V, p. 1855, para 79; *Labita v Italy* [GC], no. 26772/95, judgment of 6 April 2000.

³³ *Ireland v United Kingdom*, A-25 (1978).

³⁴ Report of 5 November 1969, Yearbook XII; *The Greek Case* (1969), p. 186.

³⁵ *Ibid.*, p. 461.

of the treatment, its physical or mental effects and in some cases, the sex, age, and state of health of the victim, etc.”³⁶

45. In applying these principles in the instant case, the applicant recalls that she is a woman and considerably physically smaller than the at least seven male officers present. She was in a private, family situation when she was dragged on the ground by at least six police officers and injured and exposed in the presence of family and friends which in addition to the physical suffering she underwent, made the event particularly emotionally traumatic.
46. The rationale for taking account of the victim's sex, age and state of health in assessing whether Article 3 has been violated is clear: the level of ill-treatment required to be "degrading" depends, in part, on the vulnerability of the victim to physical or emotional suffering. The same reasoning supports the conclusion that association with a minority group historically subjected to discrimination and prejudice may, as in the instant case, render a victim more vulnerable to ill-treatment for the purposes of Article 3, particularly where, as in Hungary, law enforcement bodies have consistently failed to address systematic patterns of violence and discrimination against Roma.³⁷
47. In view of the above, the applicant respectfully submits that being of Romani origin, and as such members of a particularly vulnerable minority, only served to reinforce her feelings of degradation, helplessness and lack of legal protection during and after the event complained of as a violation of Article 3 of the Convention.
48. As to the standard and burden of proof in the present case, the applicant recalls that both the Commission and the Court have recognised the difficulties of proof which confront an applicant claiming torture, and/or inhuman or degrading treatment or punishment under Article 3.³⁸
49. The Commission in its report in *Ireland v UK* held that, where the alleged victim of physical abuse is in the custody of government forces at the relevant times, the government bears the burden of showing that its agents were not responsible for the resulting injuries.³⁹
50. In *Ribitsch v Austria*, the Court reaffirmed “that a state was morally responsible for any person in detention, since he was entirely in the hands of the police.”⁴⁰ Thus, “[i]n the event of injuries being sustained during police custody, it was for the government to provide evidence establishing facts which cast doubts on the account of events given by the victim, particularly

³⁶ *Ireland v United Kingdom*, Judgment of 18 January 1978, 2 EHRR 25, para. 162. (See also *Aydin v Turkey*, Judgment of 25 September, 1997, para. 84; *Tyler v United Kingdom*, 2 EHRR 1 (1978), para. 30; *Costello-Roberts v United Kingdom*, 19 EHRR 112 (1993), paras. 26-28.).

³⁷ The applicant refers to paragraphs 32-37 above.

³⁸ *Aksoy v Turkey*, judgment of 18 December 1996; *Ribitsch v Austria*, 21 EHRR 573 (1995)

³⁹ *Ireland v UK*, B 23-I, Commission Report pp. 412-413 (1976).

⁴⁰ *Ribitsch v Austria*, 21 EHRR 573 (1995), para. 31.

if this account was supported by medical certificates."⁴¹ Concluding that "the Government has not satisfactorily established that the applicant's injuries were caused otherwise than – entirely, mainly, partly – by the treatment he underwent while in police custody".⁴²

51. In view of the facts of the instant case and the above cited jurisprudence, the government is required to demonstrate that the injuries sustained by the victim (and medically certified) were not result of excessive and unjustified use of force.

52. In the view of the facts of the instant case and the above cited jurisprudence, the applicant respectfully submits that she was subjected to police abuse amounting to inhuman and degrading treatment.

b) Statement on the procedural violation of Article 3

53. In support of her claim under b) the applicant relies on the following jurisprudence of this Court.

54. The procedural obligation in Article 3 requires "an effective official investigation" that will be thorough and "capable of leading to the identification and punishment of those responsible".⁴³ Such an investigation must be launched ex-officio, in the absence of a complaint, if there are sufficiently clear indications that torture or other ill-treatment has occurred.⁴⁴

55. In the case of *Assenov and Others v Bulgaria*, the Court stated 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 the breach of Article 3, that provision, read 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 in [the] Convention', requires by implication that there should be an effective official investigation. This obligation ... should be capable of leading to the identification and punishment of those responsible (...). If this were not the case, the general legal prohibition of 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."⁴⁵

56. In the judgment of *Jasar v Macedonia* the Court reiterated that: "The investigation into serious allegations of ill-treatment must be thorough. That means that the authorities must always

⁴¹ Ibid.

⁴² Ibid para. 34

⁴³ *Assenov and Others v Bulgaria*, (90/1997/874/1086), judgment of 28 October 1998, para. 102.

⁴⁴ *97 Members of the Gldani Congregation of Jehovah's Witnesses v Georgia*, No. 71156/0, judgment of 03 August 2007; 46 EHRR 613.

⁴⁵ *Assenov and Others v Bulgaria*, (90/1997/874/1086), judgment of 28 October 1998, para. 102.

make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions (see *Assenov and Others*, cited above, paragraph 103). They must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony and forensic evidence (see *Tanrikulu v. Turkey* [GC], no. 23763/94, ECHR 1999-IV, § 104, and *Gül v Turkey*, no. 22676/93, § 89, 14 December 2000). Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard (see *Boicenco*, cited above, § 123).⁴⁶

57. In *Boicenco v Moldova* the Court also stated that the person conducting an investigation must be independent of those implicated in the alleged ill-treatment, both institutionally and in practice.⁴⁷ In the same case it was also stated that all reasonable steps must be taken to obtain relevant evidence, including forensic and eye-witness evidence.⁴⁸ The available witnesses and possible suspects should be questioned and the investigation must be conducted with reasonable expedition.⁴⁹ Reasons must be given for rejecting a complaint.⁵⁰

58. In the case of *Kmetty v Hungary*, the applicant complained that he was ill-treated by the police, and that the investigations into his related complaints had been inadequate, in breach of Article 3 of the Convention. In this case, the Court was not persuaded that this investigation was sufficiently thorough and effective to meet the requirements of Article 3. For example, the authorities failed, without good explanation, to interview key witnesses. The Court concluded that there had been a violation of Article 3 on this ground.⁵¹ In *Ognyanova and Choban v Bulgaria*, the Court criticised a prosecution inquiry which applied different standards when assessing the testimonies, as that given by the applicant was deemed to be subjective but not those given by the police officers. The credibility of the latter testimonies should also have been questioned, as the prosecution investigation was supposed to establish whether the officers were liable on the basis of disciplinary or criminal charges.⁵² Similarly, the 2009 Opinion of the European Commissioner for Human Rights notes as one of the requirements of a thorough investigation as ‘pursuing lines of inquiry on grounds of reasonable suspicion and not disregarding evidence in support of a complaint or uncritically accepting evidence, particularly police testimonies, against a complaint’.⁵³

⁴⁶ *Jasar v Macedonia*, No 69908/01, judgment of 15 February 2007, para. 56.

⁴⁷ *Boicenco v Moldova*, No. 41088/05, judgment of 11 October 2006, para. 123.

⁴⁸ *Ibid.*

⁴⁹ *Labita v Italy 2000- IV; 46 EHRR 1228 GC*

⁵⁰ *Poltoratskiy v Ukraine 2003-V;39 EHRR 916i*

⁵¹ *Kmetty v Hungary*, No 57967/00; judgment of 16 March 2004, paras. 37-43.

⁵² No 46317/99; judgment of 23 February 2006, para.99.

⁵³ *Independent and effective determination of complaints against the police*, CommDH (2009) 4, para.79.

59. Applying the above-mentioned principles to the facts of the instant case, the applicant maintains that the Hungarian authorities failed to carry out a thorough, effective and independent official investigation into the incident capable of leading to punishment of the police officers responsible. Instead, referring to paragraph 30 above, a parallel investigation was initiated against the applicant and others leading to the accusation of the applicant for committing the felony of “obstruction of justice committed in group.” At the time of the submission of the present application the criminal procedure against the applicant and others is already at the trial phase.
60. The applicant submits that the investigation carried out by the Hungarian authorities was not thorough for the following reasons:
61. The Hungarian authorities carried out a pro forma investigation without giving due consideration to the evidence provided by the applicant, and established the facts of the instant case solely based on the paper evidence submitted by the police officers.
62. In particular, the applicant submits that during the investigation the Miskolc Prosecutorial Investigation Office acting as first instance investigative authority gathered only documentary evidence and did not hear any witnesses. It gathered only the felony report made by the applicant, which included the allegation of her ill-treatment by the police officers, and the police documentation regarding the incident. Based on these pieces of evidence the Miskolc Prosecutorial Investigation Office concluded that there was no data revealed under the investigation that would lead to the establishment of a criminal offence committed by the police officers and continued procedure was not expected to yield any result. The prosecutor in its decision also stated that the documentation that was available to his office – including felony reports made by the police and police report about the incident – refutes the facts submitted by the applicant in the felony report.
63. The prosecutor of the Miskolc Prosecutorial Investigation Office, Zoltán Friedmanszky, made a value judgment and did not take into account the ambiguities between the different testimonies and did not gather any further evidence, such as testimonies from the victims, to attempt to clarify ambiguities. Instead, he closed the investigation by establishing the facts of the incident by solely relying on the documentary evidence submitted by the police.
64. Only upon appeal by the applicant, did the higher prosecutor’s office, the Borsod–Abaúj–Zemplén County Prosecutor’s Office find for the applicant and order the continuation of the investigation, referring the case back to the Miskolc Prosecutorial Investigation Office “[...] to

gather further evidences, including the video testimony of the applicant and others submitted by the applicant and based on that gathering witness testimonies if needed [...]”⁵⁴.

65. However the case was referred back again to the *same* prosecutor of the Miskolc Prosecutorial Investigation Office.
66. Although after the referral the Miskolc Prosecutorial Investigation Office did gather further pieces of evidence, all of them – except the video testimony – were paper based and taken from the parallel investigation (paragraph 30 above) in which the applicant and others were accused of committing a criminal offence. Despite discrepancies in the accounts, the prosecutor arbitrarily preferred the police version of events.
67. The evidence taken from the parallel investigation was as follows: nine witness testimonies of the police officers as victims; the witness testimony of the person who reported the public disturbance; the decision of the Miskolc Prosecutorial Investigation Office about the dismissal of the felony report of Lászlóné Horváth into the same incident. From the applicant’s side, the prosecutor considered only: the witness testimony of Lászlóné Horváth who submitted the initial felony report, and the witness testimony of Imre Horváth who himself states that he was taken by the police officers to the police station that night and was released later and did not witness what happened to the applicant.⁵⁵
68. The applicant emphasises, that the ‘new’ evidence listed during the investigation of the instant case was taken by the investigating authorities in the context of a criminal investigation against the applicant and others and were thus given under materially different circumstances.
69. The applicant further notes with reference to paragraphs 54-58 above on the jurisprudence of this Court on collecting evidence, that no witness testimonies were taken during the investigation into the ill-treatment of the applicant, however the applicant submitted a video testimony recorded by the HCLU and it was watched by the Miskolc Prosecutorial Investigation Office which concluded that it did not contain new information or evidence with regards to the incident as the video contained the content of the felony reports submitted by Lászlóné Horváth and the applicant.
70. Nevertheless Zoltán Friedmanszky prosecutor closed the investigation again, this time concluding that the acts did not constitute criminal offences and noted exactly the same as in his first decision: “the prolonged investigation was not successful either and it did not reveal any facts based on which the investigation should be continued that would lead to the establishment of a criminal offence committed by the police officers and continued procedure

⁵⁴ Annex No Decision on continuation of the investigation, Borsod-Abaúj-Zemplén County Prosecutor, 28 January 2011, Miskolc, Hungary.

⁵⁵ Annex No Decision on discontinuation of the investigation, Miskolc Investigative Prosecutor, 23 February 2011, Miskolc, Hungary.

was not expected to yield any result.” The prosecutor in its decision again states that the documentation that was available to his office refutes the facts submitted by the applicant in the felony report.

71. The appeal by the applicant to this decision was upheld by the Borsod–Abaúj–Zemplén County Prosecutor’s Office. This final decision concluded that that no disinterested person who could have testified about the alleged excessive use of force of the police was identified during the investigation, nor was identified by the applicant in the appeals. According to the prosecutor the video testimonies submitted by the applicant could not lead to a different assessment of the evidence.⁵⁶
72. The applicant submits that under the Hungarian criminal procedure the applicant was not required to name a disinterested person to testify. In addition, in view of the investigation into the incident in which the prosecutor based his decision on the evidence provided by the police in a parallel procedure in which the applicant was accused of committing a crime, such a requirement would have been clearly in contravention of the principle of objectivity and independence. The applicant submitted the video testimonies in which the applicant and others presented a totally different version of the facts, which could have led to a different assessment of the evidence by the Hungarian authorities.
73. The applicant submits that the investigation was quickly closed by the Hungarian investigative authorities who concluded – on insufficient, inappropriate and one-sided evidence – that the use of force by the police was reasonable and proportionate in accordance with the law, i.e. it was not a criminal act and thus a further investigation was not expected to yield any result. No effort was made to clarify ambiguities and there was no opportunity to bring evidence before a judge. This clearly contravenes the principle of thoroughness in carrying out an effective investigation into alleged incidents of ill-treatment, as established in the jurisprudence of the Court set out in paragraph 56 above.
74. The applicant submits that the pro forma investigation into the alleged ill-treatment of the applicant was not thorough and therefore not in compliance with the requirements of Article 3. In order to comply with the requirements of Article 3 of the Convention, the investigative authorities should have made a serious attempt to find out what happened and should not have relied “on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions.”⁵⁷ They must have taken all reasonable steps available to them to secure the evidence concerning the incident, including, most importantly, the eyewitness testimony of the victims.

⁵⁶ Annex No. 13: Decision, Borsod-Abaúj-Zemplén County Prosecutor, 16 March 2011, Miskolc, Hungary.

⁵⁷ *Assenov and Others v Bulgaria*, (90/1997/874/1086), judgment of 28 October 1998, para. 102.

75. In addition the applicant claims that the prosecuting authorities were not sufficiently independent, as the supposed investigation into her complaints (before and after referral by the higher prosecutor) was carried out by the Miskolc Prosecutorial Investigation Office, the same office and indeed the very same prosecutor that indicted the applicant and others on criminal charges over the event.
76. Hungarian prosecutors cannot remotely be considered “sufficiently independent” as they exercise dual and contradictory functions as parties to, and supervisors of the criminal process. On the one hand, as parties, they participate in criminal proceedings as representatives of the state, investigating crime, making formal charges and prosecuting at trial and on appeal.⁵⁸ On the other hand, as supervisors, prosecutors collectively act as the final decision making body in an investigation, administering criminal proceedings in the pre-trial phase and possessing the ultimate power to terminate an investigation without bringing charges.⁵⁹
77. In the instant case, under Hungarian law it falls within the exclusive competence of the prosecutor’s office to conduct investigations into criminal offences committed by members of the police as well as in the criminal offence of obstruction of justice (Section 242/A of the Criminal Code).⁶⁰
78. This means that in the instant case and in the parallel case launched against the applicant and others it is the same prosecutor’s office that had the competence to conduct the investigation.
79. At the same time, it is clear from the nature of these offences that there is necessarily a conflict between these two procedures, insofar as the two offences (maltreatment in official proceedings (226. §) and the crime of obstruction of justice (242/B. §)) take opposing positions on the same set of events.
80. However there was a possibility to remain impartial as the Hungarian law provides for the exclusion of the prosecutor “who cannot be expected to form an unbiased opinion for other reasons.”⁶¹ The prosecutor affected by a ground for exclusion shall immediately notify the head of the prosecutor’s office thereof.⁶²
81. This did not happen and the same prosecutor acted in both cases, even though the cases made clear that the parties were adverse to each other. .
82. The applicant also submits that in the criminal procedure against her and others, she was indicted on 11 February 2011 by the Miskolc Investigative Prosecutor even before the

⁵⁸ Act No. XIX of 1998, Code of Criminal Procedure 28 – 29. §

⁵⁹ Act No. XIX of 1998, Code of Criminal Procedure

⁶⁰ Act No. XIX of 1998, Code of Criminal Procedure 29. § e)-f)

⁶¹ Act No. XIX of 1998, Code of Criminal Procedure 31. § 1 d)

⁶² Act No. XIX of 1998 Code of Criminal Procedure, 32. (1)

complaint submitted by the applicant into the very same incident had been definitively dismissed.

83. Therefore the applicant submits that it could not be expected that the same prosecutorial authority (Miskolc Prosecutorial Investigation Office) and the same individual prosecutor (Zoltán Friedmanszky) that investigated the criminal offence launched against the applicant and ultimately led to an indictment against the applicant, accusing the applicant of obstruction of justice, could have conducted an independent investigation into the applicant's allegation of maltreatment that could have led to the prosecution of the perpetrators.
84. In view of the above the applicant submits that the failure to assign the applicant's complaint to a different prosecuting authority than the one investigating the criminal liability of the applicant for her alleged intervention on the night in question, undermines the principle of the independence of the investigating authority.
85. In addition the applicant submits that the fact that the same prosecutor acted in the referred case and brought a decision in a related case where he already did so on the first instance cannot be considered independent.
86. In summary, the applicant submits that the pro forma investigation conducted by the Hungarian investigative authorities was not thorough, effective and independent as the investigative authorities did not make a serious attempt to find out the circumstances of the alleged ill-treatment of the applicant, they failed to collect all evidence, including testimonies of the eyewitnesses, they disregarded the concordant witness testimonies and established the facts of the case solely based on the evidence submitted by the police. The Hungarian investigative authorities were not independent when the same prosecutor acted in the referred case and brought a decision in a case where he already did so on the first instance and when the same authority investigated the alleged ill-treatment of the applicant.
87. In view of the facts as outlined above, the applicant submits that her claim of police abuse surpasses the threshold of being "arguable", making a comprehensive official investigation necessary. Thus the failure of the Hungarian prosecuting authorities to carry a comprehensive investigation which would show that the use of force applied during the arrest was not excessive constitutes procedural violation of Article 3.⁶³

V. STATEMENT ON THE ALLEGED VIOLATION OF ARTICLE 13

88. The applicant alleges a breach of Article 13 which provides:

⁶³ *Rehbock v Slovenia*, No. 29462/95, judgment of 28 November 2000, para. 76.

"Everyone whose rights and freedoms as set forth in this 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."

89. The applicant submits that the procedures before the Hungarian authorities did not provide her with an effective remedy concerning the alleged infringement of her right under Article 13 of the Convention.
90. The Hungarian authorities' failure to effectively prosecute a crime against those responsible for the applicant's inhuman or degrading treatment and to compensate her, constitutes a separate and independent violation of the applicant's right to an effective remedy before a national authority – and as such a violation of Article 13 read in conjunction with Article 3.
91. Article 13, when read together with Article 1 of the Convention, imposes an obligation on Contracting Parties to provide effective remedies in the national legal order for any violations of the Convention's rights.
92. This Court has held that Article 13 "guarantees the availability at the domestic level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this article is thus to require the provisions of a domestic remedy to allow the competent national authorities both to deal with the substance of the relevant complaint and to grant appropriate relief".⁶⁴ The Court has elaborated further on the precise contours of the "effective remedies" to be afforded at the domestic level, stating that whenever "an individual has an arguable claim that he has been tortured by the agents of the State, the notion of an effective remedy entails, in addition to the payment of compensation, where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedures."⁶⁵
93. According to the well-established case law of the Court, where a right with as fundamental importance as the right to life or the prohibition against torture, inhuman and degrading treatment is at stake, Article 13 requires in addition to the payment of compensation where appropriate, a thorough and effective investigation, capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigation procedure.⁶⁶ There should be available to the victim or the victim's family a mechanism for establishing any liability of state officials or bodies for acts or omissions involving the breach of their rights under the Convention. Furthermore, in the case of a breach

⁶⁴ *Assenov and Others v. Bulgaria*, (90/1997/874/1086), judgment of 28 October 1998, para 117; *Kaya v. Turkey*, (158/1996/777/978), Judgment of 19 February 1998, *Aksoy v Turkey* (100/1995/606/694), judgment of 18 December 1996, para. 95.

⁶⁵ *Aksoy v Turkey*, para. 98.

⁶⁶ *Kaya v Turkey*, judgment of 19 February 1998, Reports 1998-I, pp 330-31 & 107.

of Article 3 of the Convention, which ranks as one of the most fundamental provisions of the Convention, compensation for non-pecuniary damage flowing from the breach should in principle be part of the range of available remedies.⁶⁷

94. In its preamble, the Convention explicitly refers to the principle of "the rule of law" as being one of its driving forces and founding principles. In the context of Article 13, this founding principle requires *inter alia* that each individual has sufficient guarantees for his effective protection against arbitrary or unlawful decisions of the authorities which violate his rights under the Convention.
95. In *Silver and Others v UK*, the Court established that in order to comply with the requirements of Article 13, the decision-making authority capable of providing a remedy should be "sufficiently independent" of the authority alleged to be responsible for the violation of the Convention.⁶⁸ Such independence must exist in law as well as in practice.
96. As to the effectiveness of the remedy, this Court noted that the existence of remedies must be sufficiently certain not only in theory but also in practice. In determining whether any particular remedy meets the criteria of availability and effectiveness, regard must be had to the particular circumstances of the individual case. The Court must take realistic account not only of formal remedies available in the domestic legal system, but also of the general legal and political context in which they operate as well as the personal circumstances of the applicant.⁶⁹
97. The applicant submits that the Hungarian authorities have failed to proceed with an effective and independent official investigation capable of leading to punishment of the police officers responsible.
98. The applicant submits that her efforts to appeal the decisions on the discontinuation of the investigation were fruitless and proved that the remedies available to the applicant for her alleged ill-treatment by the police officers were not effective in the instant case in violation of Article 13 of the Convention.
99. The appeals submitted by the applicant noted the various deficiencies of the investigation, including the over-reliance on documentary evidence provided by the police, the failure to resolve the ambiguities in the different versions of facts presented, failure to consider the evidence submitted by the applicant and the failure to hear eyewitnesses, the failure to consider the applicant's claims during the procedure and the arbitrariness of the prosecutor's conclusion on the closure of the investigation.

⁶⁷ *D.P. & J.C. v UK* 2003, 36 E.H.R.R. 14 para. 135.

⁶⁸ *Silver and Others v UK*, (A - 61) (1983), para. 116.

⁶⁹ *Akdivar and Others v Turkey* [GC], judgement of 30 August 1996, No. 21893/93; paras. 68-69.

100. Additionally, the fact that a criminal procedure was launched against the applicant and others alleging that the applicant committed the crime of obstruction of justice in a group and that the applicant was indicted by the same authority and the same prosecutor (Zoltán Friedmanszky) who conducted the investigation into the alleged ill-treatment of the applicant means that the investigation could not have been sufficiently independent and could not have amounted to an effective investigation into the applicant's allegation of maltreatment, as there is a necessary and fundamental conflict of interest. In consequence, the remedy that was provided to her in the instant case, namely lodging a complaint against the police intervention, was not effective as there was no thorough and impartial investigation conducted by the Hungarian authorities that would have led to the identification of the perpetrators.

VI. STATEMENT ON THE ALLEGED VIOLATION OF ARTICLE 14 IN CONJUNCTION WITH ARTICLE 3 AND ARTICLE 13

101. The applicant submits that her rights under Article 3 and 13 of the Convention were violated in conjunction with Article 14 of the Convention on grounds of her ethnic origin. Article 14 of the Convention provides:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

102. The applicant submits that the treatment which she received by the police violated the requirement of non-discrimination set forth by Article 14 taken together with Articles 3 and 13 in that she, *because* of her Roma ethnicity, was subjected to significantly harsher treatment by the police than would have been given to non-Roma. Furthermore, there was a failure both under Articles 3 and 13 to investigate with particular thoroughness, given the ethnicity of the applicant.

103. The Court has established that discrimination on account of a person's ethnic origin is a form of racial discrimination and is particularly invidious, in view of its perilous consequences and requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism and racist violence.⁷⁰

⁷⁰ *Nachova and Others v Bulgaria* [GC], nos. 43577/98 and 43579/98, § 145, ECHR 2005-VII; and *Timishev v Russia*, nos. 55762/00 and 55974/00, § 56, ECHR 2005-XII

104. The applicant belongs to the Romani ethnic minority, a group that enjoys protection under Article 14 of the Convention. The Court has noted in previous cases that Roma do not only enjoy protection from discrimination, but that they also require special protection.⁷¹
105. Having regard to the particular circumstances of this case, the applicant submits that the Hungarian authorities were under positive obligation to investigate whether racist bias was behind the ill-treatment that the applicant was subjected to.
106. In the case of *Nachova and Others v Bulgaria*, the Court established a fundamental principle as concerns the obligation to investigate possible racist motives behind acts of violence by State agents, as follows: "... [W]hen investigating violent incidents and, in particular, deaths at the hands of State agents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention. Admittedly, proving racial motivation will often be extremely difficult in practice. The respondent State's obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and not absolute."⁷²
107. The *Nachova* principle has been applied and developed by the Court. As Judge Björgvinsson states in his partly dissenting opinion in the case of *Mižigárová v Slovakia*⁷³, as well as Judges Gyulumyan and Power in the judgment of *Carabulea v Romania*,⁷⁴ the authorities' failure to conduct such an investigation leads to the conclusion that there has been a procedural violation of Article 14 in conjunction with Articles 3 and 13 of the Convention.
108. As Judges Gyulumyan and Power argue in their dissenting opinions to the judgment of *Carabulea v Romania*, a case concerning the death of a Romani man in police custody in Romania, "[a]bsent evidence of actual verbal racist abuse, a person in the position of the applicant is in an almost impossible situation in proving that discrimination based on his brother's ethnicity was a factor in the events that transpired. In the normal course of events it is incumbent upon the one who alleges to prove. However, the Court has previously recognised that Convention proceedings do not in all cases lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (see *Aktaş v. Turkey* (extracts), no.

⁷¹ *Chapman v the United Kingdom*, judgment of 18 January 2001, *Connors v the United Kingdom*, judgment of 27 May 2004

⁷² *Nachova and Others v Bulgaria* [GC], nos. 43577/98 and 43579/98, para. 160.

⁷³ *Mižigárová v Slovakia*, no 74832/01

⁷⁴ *Carabulea v Romania*, no 45661/99

24351/94, § 272, ECHR 2003-V). Where fundamental human rights are at issue the Court has not hesitated to develop its evidentiary law in order to assist it in its search for truth, establishing, where necessary, a shift in the burden of proof from the applicant onto the Government (see *Tomasi v. France*, 27 August 1992, §§ 108-111, Series A no. 241-A).⁷⁵

109. The judges further opine that such a shift of the burden of proof is appropriate in the circumstances of the case of *Carabulea* precisely because it was the authorities and not the applicant's family who could have accessed the relevant information which could have verified or rebutted the allegation of the applicant's family that discrimination based on the deceased's Roma ethnicity played a part in his death while in detention.⁷⁶
110. In view of the above the applicant alleges that the ill-treatment which she was subjected to during the police intervention was at least partly due to her Roma ethnic origin. While it is true in the instant case that there was no information about any racist language used against the applicant by the police officers, the offensive language and the excessive use of force by the police and the lack of a thorough and impartial investigation has, in the applicant's view, no other viable explanation
111. The applicant submits, in her position – similarly to the case of *Carabulea v Romania* – absent evidence of actual verbal racist abuse the applicant is in an almost impossible situation in proving that discrimination based on her ethnicity was a factor in the events that transpired.
112. In any event, the applicant submits that, where discrimination constitutes a possible explanation for ill-treatment and where the applicant is a member of a minority group that has been subject to pervasive mistreatment and discrimination, including at the hands of law enforcement, it is incumbent upon the State to investigate that motivation. However the Hungarian authorities failed to do so.
113. The judges also noted in their dissenting opinions that “[...] where a state is the subject of persistent criticism from international quarters for the manner in which it treats an ethnic minority, justice may require that the burden shifts to such a state to show that discrimination formed no part of the events in respect of which complaints are made. In other words, as part of its overall obligation to respond to and investigate claims of discrimination against Roma in custody, the Romanian state ought to be in a position to answer the applicant's allegations by reference to relevant and reliable information which shows that members of the Roma community who enter police custody are treated no differently than other members of

⁷⁵ Dissenting opinion of Judges Gyulumyan and Power in the judgment of *Carabulea v Romania*

⁷⁶ Ibid.

Romanian society. Their failure to discharge that burden in this case gives rise, in our view, to an issue under Article 14 in conjunction with Articles 2 and 3 of the Convention.”⁷⁷

114. In addition as Judge Björgvinsson states in his partly dissenting opinion in the case of *Mižigárová v Slovakia*⁷⁸ which concerned the fatal shooting of a Romani man in police custody in Slovakia, with regards to the procedural head of Article 14 in conjunction with Article 2 of the Convention: “Furthermore, the persistent criticism from international bodies manifested in these reports should have alerted the authorities to the possible existence of such a motive. Thus, the authorities were, in my view, under the obligation to conduct an investigation as to whether racist motives played a part in Mr. Lubomír Šarišský’s death. Since no such investigation was carried out I conclude that there has been a violation of the procedural head of Article 14 in conjunction with Article 2 of the Convention.”⁷⁹
115. In addition, the OSCE Office for Democratic Institutions and Human Rights in its resource guide *Preventing and responding to hate crimes* contains a detailed list of hate crime indicators that was developed by national experts and law enforcement agencies. The guide states: “Hate crime indicators are objective facts that signal that a case may involve a hate crime. If such indicators exist, the incident should be recorded as a possible hate crime and should trigger further investigation about the motive for the crime. [...] The perception of the victim(s) is a primary indicator of bias motivation. These perceptions are based on the victim’s own experience with prejudice, the circumstances of the attack, their identification of the attackers and many other factors. Sometimes, witnesses’ perceptions can also provide strong indicators of the apparent motive of the perpetrator. In some OSCE countries, such as Canada and the United Kingdom, any reported crime which a victim, witness or police officer believes to have been hate motivated must be recorded and investigated as a potential hate crime.”⁸⁰
116. As to further characteristics of the victim and the perpetrator of hate crimes, the guide notes some circumstances that may be *indicative* of a hate crime, including, amongst others: The ethnicity/national origin, of the victim differs from that of the offender; the victim is a member of a group that is overwhelmingly outnumbered by members of another group in the area where the incident occurred; the victim is a member of a minority who is attacked by a group from members of a different population group; or the victim is identifiable as “different” from the attackers and, often, from the majority community, by such factors as appearance, dress,

⁷⁷ Dissenting opinion of Judges Gyulumyan and Power in the judgment of *Carabulea v Romania*

⁷⁸ *Mižigárová v Slovakia*, no 74832/01

⁷⁹ Ibid.

⁸⁰ Preventing and responding to hate crimes: a resource guide for NGOs in the OSCE region, OSCE/ODIHR 2009, page 21., available at: <http://www.osce.org/odihr/39821>

language or religion.⁸¹ Thus, under this OSCE guidance, the Hungarian authorities should have investigated the possible racial bias behind the mistreatment of the applicant by the police.

117. The applicant submits that in her case there was no investigation carried out in order to find out the possible existence of racist motive behind the ill-treatment of the applicant. In addition, in the applicant's view considering that various international reports have repeatedly underlined the problem of police abuse with respect to the Roma community in Hungary and therefore Roma in Hungary run a high risk of being ill treated at the hands of Hungarian law enforcement officials – referring in this respect to paragraphs 32-37 above – Hungarian authorities had the positive obligation to investigate possible racist motives behind acts of violence by its State agents in order to prove that Roma are not treated differently by Hungarian authorities than other members of the Hungarian society.
118. As to the burden of proof, the applicant respectfully submits that, by providing reports by various international monitoring bodies, the applicant established a prima facie case of discrimination. Therefore the burden of proof shifts to the Government to show that the ill-treatment of the applicant is the result of objective factors unrelated to any discrimination on grounds of ethnicity.

VII. STATEMENT WITH REGARDS TO ARTICLE 35(1) OF THE CONVENTION

119. Article 35(1) of the Convention articulates the admissibility criteria for an application to the Court, stating that the Court may only deal with such a matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law. The Court's jurisprudence has further made it clear that the local remedies rule requires the exhaustion of remedies which are available, effective and sufficient. The existence of remedies in practice must be sufficiently certain not only in theory, but in practice, failing which they will lack the requisite accessibility and effectiveness.
120. The applicant respectfully submits that she exhausted all domestic remedies that were available and capable of providing redress in respect of her complaint. In particular, the applicant submits that the last domestic remedy was delivered by the Borsod–Abaúj–Zemplén County Prosecutor on 16 March 2011 which was received by the applicant in writing on 21 March 2011. For further details, the Court is referred to paragraph 29 above.

⁸¹ Ibid.

121. The applicant submits that in accordance with the Court's assessment provided in the case of *Gubacsi v Hungary*, the applicant was not required to launch a substitute private prosecution as provided for under 199. § (2) (b) of the Hungarian Criminal Procedure Act⁸² in order to exhaust domestic remedies. The Court noted in the cited case that if the applicant already filed a felony report concerning the alleged ill-treatment then he cannot reasonably be expected to have filed for substitute private prosecution which is a second report, virtually identical but directed against particular police officers.⁸³
122. In the instant case on 15 November 2010 the applicant filed a criminal report with the Miskolc Prosecutorial Investigation Office against the police intervention as well as submitted appeals against the decisions of the authorities. The last decision brought by the Borsod –Abaúj-Zemplén County Prosecutor on 16 March 2011 stated that there is no place for further appeal against this decision. For further details the Court is referred to paragraphs 19-29 above.
123. Therefore the applicant exhausted all domestic remedies that were available and capable of providing redress in respect of her complaint and she could not be reasonably expected to have filed a second, virtually identical complaint, i.e. to pursue a substitute private prosecution. In view of the above, the fact that the applicant did not pursue this avenue does not interfere with her obligations under Article 35(1).

VIII. STATEMENT OF THE OBJECTIVE OF THE APPLICATION

124. The objective of the application is to find the Hungarian Government in breach of the following articles of the Convention:
- a. Article 3 both substantive and procedural aspect alone and/or in conjunction with Article 14;
 - b. Article 13 in conjunction with Article 3;
 - c. Article 14 in conjunction with Article 3 and Article 13.
125. The applicant claims as a specific remedy non-pecuniary damages for just satisfaction and costs and expenses and respectfully reserves the right to provide detailed claims in due course.
126. As a matter of general remedies, the applicant asks the Court to instruct the Hungarian Government to secure measures to ensure that allegations of ill-treatment by police officers are effectively investigated in a way that investigation into alleged ill-treatment is carried out

⁸² Act No. XIX of 1998, Code of Criminal Procedure

⁸³ *Gubacsi v Hungary*, No. 44686/07, judgment of 28 June 2011, para 32.

by a sufficiently independent investigative body and that perpetrators are prosecuted and punished; to include bias motivation as a general aggravating factor into the criminal code, and to provide for mandatory anti-bias trainings of law-enforcement officials. Applicant can provide more detail on how these general remedies should be structured at the request of the Court.

IX. STATEMENT CONCERNING OTHER INTERNATIONAL PROCEEDINGS

127. No complaint has been submitted under any other international procedure of investigation or settlement.

X. LIST OF ANNEXES

1. Annex No. 1: Power of Attorney
2. Annex No. 2: Medical record issued by the Tiszalúc Emergency Centre, 4 September 2010.
3. Annex No. 3: Medical records of the applicant issued by the Borsod-Abaúj- Zemplén County Hospital, 5 September 2010.
4. Annex No. 4: Felony report of Lászlóné Horváth, 6 September 2010.
5. Annex No. 5: Decision on dismissal of the complaint, Miskolc Prosecutorial Investigation Office, 27 September 2010.
6. Annex No. 6: Felony report submitted by the applicant to the Miskolc Prosecutorial Investigation Office against the police intervention, 15 November 2010.
7. Annex No. 7: Notice on launching the investigation, Miskolc Prosecutorial Investigation Office, 8 December 2010.
8. Annex No. 8: Decision on closing the investigation, Miskolc Prosecutorial Investigation Office, 14 January 2011.
9. Annex No. 9: Applicant's Complaint, 24 January 2011.
10. Annex No. 10: Decision on continuation of the investigation, Borsod-Abaúj-Zemplén County Prosecutor, 28 January 2011
11. Annex No. 11: Decision on discontinuation of the investigation, Miskolc Prosecutorial Investigation Office, 23 February 2011
12. Annex No. 12: Applicant's Complaint, 7 March 2011.
13. Annex No. 13: Final Decision, Borsod-Abaúj-Zemplén County Prosecutor, 16 March 2011.
14. Annex No. 14: Indictment of the applicant and others, Miskolc Prosecutorial Investigation Office, 11 February 2011.

XI. PREFERRED LANGUAGE

English

XII. DECLARATION AND SIGNATURE

The applicant hereby declares that, to the best of her knowledge and belief, the information given in the present application is true and correct.

Budapest, 20 September 2011

Dr Levente Baltay
Attorney-at-law

Robert Kushen
Executive Director
European Roma Rights Centre