IN THE EUROPEAN COURT OF HUMAN RIGHTS
APPLICATION NUMBER 31016/17

Fatmir MEMEDOV

The Applicant

v

Macedonia

The Respondent State

The Applicant's Challenges to the Government's Version of the Facts

---

1. In accordance with the Court's letter of 20 November 2018, the applicant sets out here under separate cover his objections to the Government's version of the facts of the case. The Government's version of the facts can be found in the Government's Observations of 26 October 2018 (hereinafter "GO"). What the Government refer to as "Evidence" (i.e. the documents annexed to their observations), the applicant refers to here as Annexes. For example, what the Government call "Evidence 1.a" is, in this document, referred to as "Annex 1.a GO". The applicant also highlights at the outset that the Government appear intentionally to have withheld key documents in their possession. The applicant asks the Court to indicate to the Government to produce those documents in their reply to these observations or to explain their absence; if the Government fail to do so, the applicant asks the Court to make a finding of a violation of Article 38 of the Convention. See below, §§ 3, 4, 5, 6, and 9.e and Annex 1.

2. At § I.1 GO, the Government suggest that the applicant was throwing stones and/or otherwise obstructing police officers during the 5 May 2013 incident. The applicant rejects this accusation and submits that it has no evidentiary basis and should therefore not appear in the facts of the case. The Government base their claim on evidence to which they refer at § I.2 GO. That evidence consists of written statements given by nine police officers, which can be found at Annexes 1.a to 1.k GO. Reading these documents shows that they do not support the Government's assertion. The written statements of most of the police officers (Annexes 1.a to 1.h and 1.k GO) – those who are members of the notorious[1] "Alfa" unit directly involved in the police action on 5 May 2013 – make no mention of the applicant at all; to rely on them as a basis for asserting that the applicant engaged in unlawful behaviour is misleading, if not defamatory. Moreover, these statements contradict each other. Several police officers admitted forcing the crowd from the street into two local shops, but did not mention any arrest (Annexes 1.b, 1.c, and 1.d GO). Other officers (Annexes 1.f, 1.g, and 1.k GO), by contrast, described arresting two individuals (S.N. and F.B.) but did not mention that those individuals had fled the scene or had entered and hid in the local shops, as the Government claim towards the end of § I.1 GO.

3. Annexes 1.i and 1.j GO are the only annexes from this section that mention the applicant at all. Yet they also provide no basis for the Government's assertion that the applicant engaged in unlawful conduct. These two annexes are official notes made by police inspectors from Kisela Voda Police Station who were not involved in the incident and contain no direct information about the applicant's conduct prior to his arrest. What these documents reveal is that the

[1] On the Alfa unit, see *Kitanovski v Macedonia* (2015); see also application no.173/17.

applicant was brought to Kisela Voda Police Station by "T-253 of OOP Istok unit" (Annex 1.i GO). The Government have not produced descriptions of the events from officers I.D. and Z.T., who are probably the officers who actually arrested him (see below, § 6). This is odd, given their critical involvement in what happened to the applicant and the fact that the Government were able to produce written evidence from other officers. The applicant invites the Court to ask the Government to produce I.D.'s and Z.T.'s written evidence or explain its absence. The Government have also failed to disclose the minutes of the questioning of the applicant which took place at Kisela Voda Police Station by two police inspectors upon his arrest. Domestic law (Article 89 of the Criminal Procedure Code) requires that such minutes be kept; the Government must have access to them yet, despite the large number of documents submitted to the Court, the Government have omitted this key document. The applicant submits that this raises a presumption that the missing documents would corroborate the applicant's version of the events and demonstrate that from the outset the applicant informed the authorities that he had been subjected to ill-treatment by police.

4. The Government claim at § I.3 GO that the Ministry of Interior – Sector for Internal Control examined the incident and confirmed the events as described by the Government. They rely on Annex 2 GO; yet Annex 2 GO does not support their claim. Annex 2.a GO, dated 7 May 2013, is a report on the assessment of the use of force by members of the Alfa unit prepared by the commander of the Alfa unit. This can hardly be considered an independent assessment. As for Annex 2.b GO, dated 4 June 2013, the applicant notes that page 2 of the report is missing from the document the Government sent the Court. It is in any event visible that Annex 2.b GO was not prepared by the Sector for Internal Control; this "special report" was prepared

by the Ministry's Commissariat for Criminal Investigations – Unit for Violent Offences. The applicant points out that there appears to be another "special report" (no. 13.4/87315) dated 12 September 2013 and prepared by the Sector for Internal Control (see § 15 of the statement of the facts in the application form), but it has never been made available to the applicant, nor have the Government submitted it to the Court. The Government's failure to submit this document, despite the large number of documents they annexed to their observations, is noteworthy, and the applicant invites the Court to indicate to the Government to produce this document or explain its absence.

5. The Government state at § I.4 GO that according to the official record of the applicant's detention in Kisela Voda police station (Annex 3, GO), the applicant did not seek medical assistance. The applicant contests this. The relevant section of the police record (Annex 3 GO, page 2) was left blank. Page 3 of Annex 3 GO contains information about the applicant's medical condition, including his blood pressure, as well as the stamp of a doctor. It remains unclear from the official records when the applicant received medical attention, upon whose request the doctor examined him, and whether the doctor made any further report or examination of the applicant's visible injuries while the applicant was in police custody. Given that the Government appear to have withheld documents from the Court that are vital to this case, the applicant invites the Court to indicate to the Government to disclose any further medical documentation that may exist or to explain its absence, given that the applicant was clearly injured and was seen by a doctor whilst in custody.

6. There are serious and unexplained contradictions and omissions in the record of the applicant's arrest. Annex 3 GO is the official record

of the applicant's detention in Kisela Voda Police Station. The name of the police officer who detained the applicant is illegible, and the name of the officer(s) who carried out the applicant's arrest is written using a code – "T-253" from the "OOP Istok" unit. Other documents submitted by the Government suggest that two teams of regular (i.e. non-Alfa) police forces were involved in the applicant's arrest – teams 251 and 253 from the OOP Istok unit. Team 251 consisted of officers I.D. and Z.T., who in 2016 and again in 2018 denied having any contact with the applicant. See Annexes 4.e, 4.f, 6.a, and 6.f GO. In his 2018 statement at Annex 6.f GO, Z.T. questioned the authenticity of the official record he apparently signed at the time of the events, confirming he made the arrest; the Government have withheld this official record, which is obviously in their possession as it was showed to Z.T. I.D.'s and Z.T.'s 2018 statements contradict Annex 4.h2 GO, according to which the public prosecutor indicated that his team (T251), which includes I.D. and Z.T., arrested the applicant in coordination with Alfa teams; the same document (Annex 4.h2 GO) also indicates that next to the applicant's name, the code "T253" was written. Team 253 consisted of Officers Atanasov and Ajdin and two trainee officers, S.K. and S.P. These officers have no recollection of having any contact with the applicant. Annex 4.h2 GO. That same document (Annex 4.h2 GO) also refers to official record no.5856 which concerns the applicant's deprivation of liberty without a court order, signed by Officers Atanasov and Ajdin, which, again, the Government have withheld from the Court, despite the large number of less relevant documents they have submitted. (Official record no.5856 may or may not be the document that Z.T. appears to have signed – but in 2018 denied signing – which seems to show that Z.T. arrested the applicant.) In his statement given to the Skopje Basic Public Prosecutor's Office in June 2018 (Annex 6.b GO), Officer Atanasov denied making the actual arrest, claiming only that he took

the applicant from the scene to the police station; he could not remember which officer formally arrested the applicant. Officer Ajdin told the Skopje Basic Public Prosecutor's Office that he could not remember the events of 5 May 2013 at all. Annex 6.e GO. The applicant highlights that these statements were made in 2018, some five years after the incident, because of the unexplained delays in the investigation. In accordance with domestic law (see the applicant's observations on the Government's observations on admissibility and the merits, § 10, for translations of the relevant provisions of domestic law), the following documents should also exist, which the Government have chosen not to annex to their observations, and whose absence they have failed to explain: the official police record of an arrest without a court order (which may or may not be official record no.5856); the record of the use of force (the applicant was brought to police station handcuffed); and the record of the applicant's handover upon arrival at the station. The Government can hardly claim that these do not exist: the same documents were provided in respect of S.N. and F.B., who were arrested at the same time: Annexes 1.f and 1.g GO. These documents contain the name(s) of the arresting officer(s) and key details about the circumstances in which people arrested have been deprived of their liberty. Again, the applicant invites the Court to ask the Government to disclose these documents or provide an explanation for their absence. If the Government refuse to do so, the applicant asks the Court to make a finding of a violation of Article 38 of the Convention. See *Khamidkariyev v Russia* (2017), § 107 ("*Article 38 of the Convention requires the respondent State to submit the requested material in its entirety, if the Court so requests, and to account for any missing elements*").

7. In response to § I.4 GO, the applicant notes that the official records do not reflect the actual time the applicant was deprived of his liberty. Annex 3 GO states that the applicant was detained in Kisela Voda Police Station from 5 May 2013 at 22.30 hours until 6 May 2013 at 19.30 hours, at which time he was brought before the investigating judge at Skopje Basic Court 1. For unexplained reasons, the procedure before the investigating judge lasted for approximately eight (8) hours, and the applicant was finally released on 7 May 2013 (see the date in Annex 4 to the application) at 03.30 hours. The applicant claims he complained to the investigating judge that the police had beaten him.

8. The applicant wishes to clarify that he was formally charged by prosecutors with the criminal offence of "attack on an official person performing an official duty", in accordance with Article 383 § 2 of the Criminal Code (see Annex 9 to the application). This is different from the offences police accused him of committing, which the Government cite at § I.5 GO. The formal charge under Article 383 § 2 of the Criminal Code was then dismissed for lack of evidence, as the Government note at § I.5 GO.

9. In summary, the applicant urges the Court to incorporate the following into the statement of the facts of the case when delivering its ruling:
    a. **The applicant claims – and there is no evidence to the contrary – that he was in no way involved in any criminal conduct on 5 May 2013.** The written evidence of police officers involved in the 5 May police raid do not refer to the applicant at all when describing the incident. The key evidence concerning the applicant's arrest was withheld by the Government.

b. **The Government have withheld documentary evidence of whatever inquiry the Ministry of Interior – Sector for Internal Control may have carried out.** While documents refer to a report drawn up by the Sector for Internal Control, the Government withheld it from the Court.

c. **The applicant was seen by a doctor at some point whilst in custody, but it is unclear when and at whose request, or what that examination revealed.** Any related documents have been withheld by the Government.

d. **The applicant was charged with the offence of "attack on an official person performing an official duty", in accordance with Article 383 § 2 of the Criminal Code, which was eventually dismissed for lack of evidence.** This differed from the offences of which police officers initially accused him.

e. **Despite submitting a large amount of documentary evidence to the Court, the Government appears intentionally to have refused to submit key documents which, as a matter of domestic law and practice, and/or in the light of other documents submitted, should exist, nor did the Government explain the absence of those documents.** The applicant asks the Court to indicate to the Government to provide these missing documents or explain their absence. If the Government fail to do so, the applicant asks the Court to find a violation of Article 38 of the Convention. See above, § 6 *in fine*. The missing documents include:

    i. Written evidence about the events from Officers I.D., Z.T., Atanasov, and Ajdin who are likely to be the officers who arrested the applicant and who, like the

other officers involved in the incident, would have prepared such notes.

ii. Minutes of the applicant's interrogation at Kisela Voda Police Station.

iii. The "special report" dated 12 September 2013 prepared for the Sector for Internal Control (no. 13.4/87315).

iv. Any documentation (which appears to exist) connected with a medical examination carried out whilst the applicant was in custody.

v. The official police record of the applicant's arrest, which took place without a court order (official record no.5856), signed by Officers Atanasov and Ajdin; and/or the document that Z.T. apparently signed – but in 2018 denied signing – indicating that he arrested the applicant (which may or may not be the same document).

vi. The record of the use of force to arrest the applicant.

vii. The record of handing over the applicant following his arrest.

10. In order to assist the Court and the Government, the applicant has prepared a chart that the Government should use to reply to the applicant's assertion that the Government are intentionally withholding key documents. This chart can be found at Annex 1 to this submission.

11. If the Government submit these documents in their response, the applicant requests the opportunity to comment on them, or on any explanation for their absence.

12. The applicant also takes this opportunity to update the Court on the civil proceedings pending before the domestic courts. The Government have reported at § I.6 GO (final bullet point) that the applicant's case against the Public Prosecutor's Office has been suspended. The applicant wishes to clarify this point. After the case was lodged, some confusion emerged as to who the appropriate defendant was; as a result, parallel cases were lodged against the Public Prosecutor's Office of the Republic of Macedonia and the Skopje Basic Public Prosecutor's Office. On 16 May 2017 Skopje Basic Court 2 suspended the litigation against the Public Prosecutor's Office of the Republic of Macedonia until the case against the Skopje Basic Public Prosecutor's Office is resolved. Annex 8.b GO. On 14 November 2018, Skopje Basic Court 2 held a final hearing in the case against the Skopje Basic Public Prosecutor's Office, during which the applicant's father gave oral evidence and the applicant's lawyer presented closing statements (Annex 2 to this document). The applicant's father confirmed that neither he nor his son had ever been contacted by prosecutors to give statements about the events of 5 May 2013. Even though the delivery and public announcement of the judgment were scheduled for 21 November 2018, they did not take place and the applicant is still waiting for the judgment to be delivered. The civil case against the Ministry of Interior is still pending. The most recent hearing took place on 26 November 2018 (Annex 3 to this document). That was the final hearing and the applicant is now awaiting the judgment in that case.

13. The applicant notes that the Government have not commented on section D of the statement of the facts contained in the application form. The applicant invites the Court to incorporate that section in full into the statement of facts in the judgment.

14. The applicant also wishes to stress that there is evidence in support of his claim that the police officers who beat him used racial slurs against him. This can be found at Annex 25 to the application: F.B. gave evidence on 31 January 2017 in the applicant's civil case against the Ministry of Interior confirming that racial slurs were used. The applicant stresses that it is important to include this in the statement of the facts in the case.

15. The applicant also submits that when he was arrested he was not allowed to contact a lawyer or anyone else. When he asked to make a phone call he was told that he was not "*in an American TV show*". When he insisted, he was allowed to call his father, but there was a problem on the line: he could hear his father but his father could not hear him. His father nonetheless figured out that the applicant had been arrested and arranged for a lawyer, who came to assist the applicant the next day.

The European Roma Rights Centre
3 January 2019

Annexes

1. Chart for the Government to complete concerning documents the applicant claims the Government have withheld
2. Minutes of the hearing in the applicant's civil case against the Public Prosecutor's Office, 14 November 2018
3. Minutes of the hearing in the applicant's civil case against the Ministry of Interior, 26 November 2018

Annex 1 – Chart About Documents the Government Have Withheld from the Court

Missing Document	For the Government to Complete	
	Does the Document Exist? (Yes/No)	**If the document does not exist, or if it exists and will not be submitted, please provide an explanation.**
Written evidence about the events of 5 May 2013 from police officers I.D., Z.T., Atanasov, and Ajdin.		
Minutes of the applicant's interrogation at Kisela Voda Police Station.		
The "special report" dated 12 September 2013 prepared for the Sector for Internal Control (no. 13.4/87315).		

Documentation connected with a medical examination carried out whilst the applicant was in custody.		
The official police record of the applicant's arrest, which took place without a court order (official record no.5856), signed by Officers Atanasov and Ajdin; and/or the document that Z.T. apparently signed – but in 2018 denied signing – indicating that he arrested the applicant (which may or may not be the same as official record no.5856).		

The record of the use of force to arrest the applicant.		
The record of handing over the applicant following his arrest.		

IN THE EUROPEAN COURT OF HUMAN RIGHTS
APPLICATION NUMBER 31016/17

Fatmir MEMEDOV

The Applicant

v

Macedonia

The Respondent State

The Applicant's Observations on the Government's Observations on Admissibility and the Merits

---

A. Preliminary Remarks – Inappropriateness of the Intention to Assign the Present Case to a Three-Judge Committee – the Applicant's Article 5 § 1(c) Claim – Claim of a Violation of Article 38

1. The applicant submits these observations pursuant to the Court's letter dated 20 November 2018. The observations of the Government of Macedonia on admissibility and the merits, dated 26 October 2018, are hereinafter referred to as "GO". In accordance with the Court's letter, a separate document has been sent to the Court setting out the applicant's challenges to the Government's version of the facts. Otherwise, these observations follow the format the Government have adopted, for ease of reference. What the Government refer to as "Evidence" (i.e. the documents annexed to their observations), the applicant refers to as Annexes. For example, what the Government call "Evidence 3" is, in this document, referred to as "Annex 3 GO". There are no annexes to this document.

2. The Applicant takes this opportunity to reiterate the comments made in his letter to the Court dated 10 August 2016 about the Court's intention to treat this case as a matter of "well-established case law" and to assign it to a three-judge committee. The applicant argued in the 10 August 2018 letter that Article 28 § 1(b) of the Convention is inapplicable. As the applicant has not received a reply from the Court on this point, he is setting out those points again here.

3. The Court has communicated questions to the Parties specifically about whether Article 1 of Protocol no.12 was violated. The Court is of course aware that there is very little case law under Protocol no.12. There is no case law under Protocol no.12, as far as the applicant is aware, concerning police brutality, or concerning whether in police brutality cases the standard that applies is the same as it is under Article 14 taken with Article 3. Of course it may not be necessary for the Court to consider separately whether there has been a violation of Article 1 of Protocol no.12 if the Court finds a violation of Article 14 taken with another provision of the Convention (see, e.g., *Savez crkava "Riječ života" v Croatia* (2010), § 115); but it is far from clear (and certainly not the subject of "well-established case law") whether the Court might find a violation of Article 1 of Protocol no.12 in a case of racially motivated police brutality where an applicant cannot show "*beyond reasonable doubt*" that there was a violation of Article 14 taken with the substantive limb of Article 3.

4. The applicant respectfully submits that treating this application as being the subject of well-established case law amounts to prejudging the merits of the case: either there must clearly be a violation of the substantive limb of Article 3 taken with Article 14

(obviating any consideration of Article 1 of Protocol no.12); or the analysis under Article 1 of Protocol no.12 must be no different to the analysis under Article 3 taken with Article 14 (a point which has never been considered in the Court's case law and which the applicant submits is not correct).

5. None of the three judgments mentioned in the Court's letter of 5 July 2018 concern Article 1 of Protocol no.12. Indeed, they are judgments concerning States which have not ratified the Protocol: Bulgaria, Greece, and Hungary.

6. The applicant also notes that there are at least two other cases currently pending before the Court concerning racially motivated police brutality that have been communicated with questions to the Parties about Article 1 of Protocol no.12: *X and Y v Macedonia* (application no.173/17); and *Muhammad v Spain* (application no. 34085/17). In the former, in which the European Roma Rights Centre is also representing the applicants, there has been no indication that the case is being treated as a matter of well-established case law. The applicant's representatives' understanding is that the same is true for *Muhammad v Spain*.

7. The applicant notes that the Court has not asked the Parties questions about the alleged violation of Article 14 of the Convention taken with Article 5 § 1(c). The applicant urges the Court to deal specifically with the unlawfulness of his detention. This is particularly important given that the Government appear intentionally to have withheld documents from the Court that would establish whether the applicant's arrest and detention were lawful. This allegation is set out in more detail in the applicant's challenges to the Government's version of the facts (also submitted today). In

brief, the applicant asserts that the Government appear to have withheld key documents in their possession relating to the applicant's arrest and detention. These intentionally withheld documents including record(s) of his arrest without a court order, records of his handover at the station, and records of the use of force to arrest him, as well as the minutes from his interrogation, and medical documentation drawn up during a medical examination that appears to have taken place. Given the absence of these documents, and given the confusion created by other documents the Government have submitted, the applicant submits that a separate finding of a violation of Article 14 taken with Article 5 § 1(c) is appropriate. See, mutatis mutandis, *Selami and others v Macedonia* (2018), *passim*.

8. As for the documents which the applicant alleges the Government have intentionally withheld from the Court, the applicant invites the Court to indicate to the Government to produce those documents in response to these observations or explain their absence. If the Government fail to do so, the applicant asks the Court to make a separate finding of a violation of Article 38 of the Convention. See *Khamidkariyev v Russia* (2017), § 107 ("*Article 38 of the Convention requires the respondent State to submit the requested material in its entirety, if the Court so requests, and to account for any missing elements*"). The full list of missing documents can be found in the applicant's challenges to the statement of the facts, § 9.e and in Annex 1 to that document (a chart the applicant's representatives have prepared to enable the Government to reply to this assertion).

B. Statement of the Facts

9. In accordance with the Court's instructions, the applicant has lodged a separate document setting out his challenges to the Government's version of the facts. The applicant's challenges can be found at section I GO.

C. Relevant Domestic Law and Practice

10. The applicant wishes to add the following provisions. The translations have been prepared by the applicant's representatives.

Criminal Code

Unlawful Deprivation of Freedom

Article 140

1. A person who unlawfully deprives another person of freedom, keeps another detained, or in some other way takes away or limits the freedom of movement of another, shall be punished with a fine, or with imprisonment of up to one year.
2. If the offence described in paragraph 1 is committed with an act of domestic violence, the perpetrator shall be punished with imprisonment of six months to three years.
3. Attempting this offence is punishable.
4. If the unlawful deprivation of freedom is performed by an official person, or by misuse of official position or authorisation, the official shall be punished with imprisonment of six months to five years.
5. If the unlawful deprivation of freedom lasted longer than thirty days, or if it was performed in a cruel manner, or if the health of the person unlawfully deprived of freedom was seriously damaged because of

this, or if some other serious consequence occurred as a result, the perpetrator shall be punished with imprisonment of one to five years.

6. If the person who was unlawfully deprived of freedom lost his life because of this, the perpetrator shall be punished with imprisonment of at least four years.

Attack upon an Official Person When Performing Security Activities

Article 383

1. A person who attacks or seriously threatens to attack an official person, or a person who assists such a person, whilst that official is performing activities of public safety or for protection of the constitutional system of the Republic of Macedonia, or whist that official is engaged in preventing or discovering a crime, apprehending a perpetrator of a crime, maintaining public peace and order, or guarding a person who has been deprived of freedom, shall be punished with a fine, or with imprisonment of up to three years.
2. If, when the offence described in paragraph 1 was committed, the perpetrator, by using a weapon or some other dangerous object, mistreats or insults the official person or the person who assists the official person, or inflicts bodily injury, the perpetrator shall be punished with imprisonment of six months to five years.
3. If, when the offence described in paragraph 1 was committed, the official person or the person who assists the official person sustained a serious bodily injury, the perpetrator shall be punished with imprisonment of one to ten years.
4. If the perpetrator of the offences described in paragraphs 1 and 2 was provoked by the unlawful or rude conduct of the official person or the person who assists the official person, the perpetrator may be acquitted.

Criminal Procedure Code

Minutes

Article 89

1. For each action undertaken during the criminal procedure, minutes shall be compiled at the same time when the action is performed, and if this is not possible, immediately after that.
2. The minutes shall be compiled by a clerk. Only when a search of a home or a person is carried out, or the action is taken outside the official premises of the body, and a minute recorder cannot be secured, the minutes can be compiled by the person who undertakes the action.
3. The minutes compiled by a clerk shall be compiled in such a way that the person in charge dictates out loud to the clerk what to write in the minutes.

Law on Police

13. Receiving reports and complaints, filing reports and notifications

Article 63

The police officer is obliged to file a criminal report for criminal offences, charges for misdemeanours, complaints, and other events.

When during the filing of the criminal report referred to in paragraph 1 of this Article, the police officer, by undertaking appropriate police actions, determines that the report concerns a criminal act which is prosecuted privately, or if it is established that the act has no features of a criminal offence, the police officer is obliged to inform the injured party immediately, and at the latest within 15 days.

When a police officer receives a written or oral complaint for a criminal offence prosecuted by means of a private suit, and whose perpetrator is known, the officer is obliged to notify the person authorised to file a private lawsuit, unless that person has already filed the lawsuit.

Upon receipt of a criminal report, or upon learning of the existence of grounds for suspecting a criminal offence has occurred that can be prosecuted ex officio, the police officer shall inform the public prosecutor without delay, in accordance with the law.

Rulebook on the Conduct of Police Activities

Article 20

When a person taken into custody without a written order is brought before the competent court, the police officer shall submit to the court a written report.

The police officer may submit the report mentioned in paragraph 1 of this Article orally on the record.

The police officer shall ask the court for written confirmation stating the time of handing over the person who is being detained, as well as the psycho-physical condition of the person at the moment of handing over the person.

Article 24

The police officer shall ensure that a person taken into custody enjoys the conditions for exercising her/his rights determined by law and shall duly document this.

For each arrest on the basis of a written order, the police officer shall prepare an official note including information on: the number and date of issuance of the order, the detained person, the reasons for which the arrest was carried out, manner in which the rights guaranteed by law to the person in custody were communicated and exercised, and the circumstances of the arrest.

For each arrest without a written order, the police officer shall prepare an official note containing the information referred to in paragraph 2 of this Article, except for the information on the written order.

Article 26

Minutes shall be prepared for the detention, which shall contain data on the day and hour when the person was detained; the reasons for the detention; the time when the person was informed of her/his rights; the psycho-physical condition of the person at the moment of detention; the time when the person's family, attorney, doctor, the representative of the diplomatic-consular mission, and the like were contacted; the time when the person was interviewed; whether the person was transferred to another police station and the reasons for this; the time when the detention ended or the person appeared before a court, and other data.

After drafting the minutes, the police officer shall read the contents to the detained person, who shall sign them.

In the event that the detained person does not act in accordance with paragraph 2 of this Article, the police officer shall note the reason for the person's behaviour.

A copy of the minutes shall be handed over to the detained person upon termination of the detention.

If, upon termination of the detention, the person is not brought before the competent court and is instead transferred to another police station, a copy of the minutes referred to in paragraph 1 of this Article shall be delivered to that police station.

D. Admissibility

11. The applicant notes at the outset that, procedurally, the present case is strikingly similar to another case pending before the Court: *X and Y v Macedonia* (application number 173/17). The Court will undoubtedly wish to follow the admissibility ruling in that case when deciding on the Government's objections to admissibility in the present case.

12. At § III.1 GO, the Government maintain two, mutually exclusive positions: that the ongoing investigation is effective (in the Government's repeated phrase, it is "*pretty much alive*": §§ III.3, IV.7 GO), making this application premature; and that the investigation proved ineffective so long ago that the application was out of time when submitted. Each approach is independently misguided, for the reasons set out directly below. The attempt to rely on both simultaneously shows a failure by the Government seriously to engage with the case. Instead, the Government have opted for a "kitchen sink" approach to admissibility, into which they also throw the unsupported argument that the civil proceedings pending against the Ministry of Interior and the Public Prosecutor's Office must be exhausted before the Court can examine this complaint.

13. The Government begin by asserting, at § III.2 GO, that the applicant cannot explain why he waited 10 months and 20 days to lodge a criminal complaint. This is disingenuous: the Government are aware that the applicant complained in various ways about the ill treatment he suffered before finally turning to the Public Prosecutors' Office when those other complaints produced no effect. Here are a list of the applicant's earlier attempts to complain about the unlawful detention and ill-treatment he suffered:
    a. The applicant complained whilst detained at Kisela Voda Police Station about having been beaten during the incident.
    b. The applicant complained to the investigating judge on 7 May 2013 that he had been beaten by police.
    c. The applicant complained about the ill-treatment he suffered on 9 May 2013 in his appeal against the investigating judge's decision (Annex 5 to the application).

d. On 20 June 2013, a little over one month after the incident, the Helsinki Committee for Human Rights in Macedonia lodged a complaint (Annex 10 to the full application and § 13 of the statement of the facts in the application form) on the applicant's behalf with the Ministry of Interior – Sector for Internal Control.
e. The applicant's domestic lawyer lodged a complaint with the Ministry of Interior – Sector for Internal Control on 10 September 2013 (Annex 13 to the application and § 15 of the statement of the facts in the application form). As mentioned in the statement of the facts, the "special report" into the incident was never disclosed to the applicant, nor have the Government annexed it to their observations. This appears to be part of a pattern of withholding these reports from victims of police brutality. See, e.g., *Trajkoski and others v Macedonia* (2008), § 46 *in fine*. The applicant invites the Court to indicate to the Government to submit this report or explain its absence.

14. The applicant also notes that there is no deadline under domestic law to file a criminal complaint. At no point have the authorities ever claimed that the passage of time between the incident and the complaint caused a problem.

15. The Government claim at § III.2 GO that "*The Public Prosecution Office did not remain passive*". This is simply not true. The Government admit in their observations that no action was taken until 2016; they can cite nothing earlier in their unconvincing attempt, at § I.6 GO, to paint a picture of a diligent investigation. The earliest document in Annex 4 dates from April 2016, more than two years after the complaint was lodged. The Government provide

no explanation for this delay. The Government also claim that the period of three years between the complaint and the application is not excessive. This underestimates the length of the investigation. In cases where investigations into ill-treatment were ongoing at the date an application was lodged, the Court takes into account the full length of the investigation, including any time after the application was lodged, up to the date of judgment if the investigation has still not ended. See, e.g., *Hugh Jordan v United Kingdom* (2001), § 136 ("*The inquest has still not concluded at the date of this judgment*"). As of today, the investigation has lasted four years and eight months. That is too long; and the delays (particularly the two-year delay following the complaint during which prosecutors did nothing) are unexplained. The applicant therefore rejects the Government's call for the application to be declared premature (§ III.3 GO).

16. At § III.4 GO, the Government argue that the discrimination claims the applicant is pursuing before the civil courts must be exhausted before the Court can examine the applicant's complaints. The Government fail to cite any case law to support their position, nor do they engage with the applicant's argument, found at section G of the application form, that once he has exhausted a single set of remedies, he can turn to the Court. The applicant cited extensively from *Dzeladinov and others v Macedonia* (decision, 2007) to this effect on the application form. The Court's case law shows that situations such as this – where a further set of remedies is underway, even though the applicant has already exhausted one set of remedies – can only be examined under Article 37 § 1(c) of the Convention and not, as the Government suggest, under Article 35 § 1. *Atmaca v Germany* (decision, 2012). As the Court noted in *Atmaca*, it is only in very specific circumstances, such as a "*lack of diligence on the applicant's part [or] measures… taken by the*

domestic authorities in order to redress the situation complained of", that the Court will strike out a case on the basis that another set of proceedings is in train. In *Atmaca* itself, it was an undertaking by the Government that triggered the strike-out decision. No circumstances justifying a strike-out decision are present in this case.

17. Paradoxically, at the same time that the Government argue that the ongoing investigation may still prove effective, they also argue (at §§ III.7 GO) that the applicant should have known as early as 27 April 2016 that the investigation was ineffective. The contradiction in the Government's arguments is flagrant: the Government ask the Court to accept, simultaneously, that the investigation is "pending" and "alive" (§ III.3 GO), with prosecutors showing diligence throughout 2016 and 2017 (§ I.6), and that "*none of the subsequent activities [after 27 April 2016] cannot [sic]*[1] *be considered as constituting new development [sic] which could revive the State's procedural obligation under the Convention and bring accordingly the application within the six-months time limit*" (§ III.7 GO). Setting aside this contradiction, the applicant notes that according to the Court's case law, the six-month time limit has not begun to run in cases such as this "*so long as there was a realistic possibility, on the basis of the information the applicants were receiving from the authorities, that the investigative measures could be advancing*". *Burlya and others v Ukraine* (2018), § 111. The Government rely on *Deari and others v Macedonia* (decision, 2012), a case in which "*The applicants did not show any interest by following up the conduct of or the progress made in the criminal investigations until*" years after the public prosecutor had decided there were no

[1] Presumably the Government meant to say "can" instead of "cannot".

grounds to proceed with the investigation. In the present case, the authorities (and indeed, the Government, in their observations) maintain that the investigation might still lead somewhere. The applicant submits that he has been particularly diligent in following up with the authorities. Indeed, he has been conscious of his duty to remain diligent as well as his duty to turn to the Court as soon as he concluded that the investigation would not be effective. The Government never argue that the applicant has not been diligent, which was the critical factor in the *Deari* judgment. The applicant maintains that the 17 March 2017 decision (Annex 26 to the application) was the appropriate trigger for his application. Prior to that date, "*the Court cannot fault the applicant… for having put [his] trust in the system…, giving the authorities the benefit of the doubt and awaiting further progress before applying to the Court*". *Burlya and others v Ukraine* (2018), § 111.

E. The Merits

18. The applicant rejects an approach – applicable in cases where only Article 3 (taken with or without Article 14) is at issue – which separates the substantive and procedural aspects of the case. The applicant has complained about a violation of Article 1 of Protocol no.12. There is significant evidence of institutional antigypsyism in policing in Macedonia. Institutional antigypsyism manifested itself in an interlocking pattern in the present case, extending from:
    a. the notoriously violent "Alfa" police unit that was unleashed on a Roma-majority neighbourhood; to
    b. the Ministry of Interior – Sector for Internal Control who appear to have stifled the internal investigation into the applicant's complaints; to
    c. the prosecutors who were inactive for two years; and even to

d. the Government's representatives before the Court, who have, it appears, intentionally withheld key documents in their submission to the Court, with no explanation (see the applicant's challenges to the Government's version of the facts, § 9.e and the accompanying table at Annex 1).

19. Analysing the substantive and procedural aspects of the case separately is inconsistent with Article 1 § 2 Protocol no.12, which prohibits discrimination by "*any public authority*". This prohibition, the applicant respectfully submits, requires an examination of the ways in which public authorities interact so as to engender, reinforce, facilitate, and/or conceal discrimination. Separating the examination of whether the police discriminated against the applicant (when beating and unlawfully detaining him) from whether prosecutors failed to investigate properly would ignore the gravamen of the applicant's complaint: that institutional antigypsyism has been allowed to flourish in policing in Macedonia, and has manifested itself in this case because of the ways in which various actors – police, Ministry of Interior officials, prosecutors, even the Government's representatives before the Court – acted or failed to act.

E.i The substantive limb of Article 3 taken with Article 14 and related claims under Article 1 § 2 of Protocol no.12

20. The Government argue at §§ IV.2-4 GO that there is insufficient evidence that the applicant's injuries – already visible at the time he arrived at Kisela Voda Police Station – were caused by police. The applicant submits that all of the evidence points to the conclusion that these injuries were inflicted by police officers. The applicant was in a shop in a neighbourhood suddenly overwhelmed by police

officers. During the raid, the applicant was arrested. There has never been any suggestion, by the Government or otherwise, that there was violence that night between civilians. The only violence that anyone suggests occurred was between civilians and police. The Government's attempt to rely on the Court's judgment in *Pihoni v Albania* (2018) is therefore misplaced: in that case, the applicant was admittedly involved in a "*brawl*" with other civilians before coming into contact with police (*Pihoni*, §12). In the present case there is no suggestion that the applicant had any physical contact with anyone other than police officers. Nor is there any evidence that he attacked or otherwise provoked the police. The applicant therefore submits that the burden is on the Government to show that the applicant's injuries were not the result of ill-treatment. The applicant furthermore notes that "*the applicant's description of the relevant circumstances regarding his alleged ill-treatment was very detailed, specific and coherent…, and involved consistent information regarding the place, time and manner of the treatment*". *Asllani v Macedonia* (2015), § 77. The Government rely on the suggestion that the applicant was involved in criminal behaviour that night; yet Skopje Basic Court 1 closed the investigation (see Annex 9 to the application) against the applicant and three other persons after the prosecuting authorities withdrew the charges due to a lack of evidence. The Government's hint that the applicant is somehow responsible for his injuries because he might have been involved in criminal conduct that night flies in the face of the presumption of innocence. As set out in the applicant's challenge to the Government's version of the facts (§ 2), the Government maintain this baseless accusation by referring to evidence (statements by police) which does not support it.

21. The applicant has argued in the application form that this case should not be seen merely in the light of Article 3 taken with Article 14, but also under Article 1 § 2 of Protocol no.12. The Court cannot ignore the evidence of institutional antigypsyism in Macedonian policing, set out at section D of the statement of the facts in the application form and apparently accepted by the Government, based as it is on conclusions of United Nations and Council of Europe bodies. Nor can the Court ignore the fact that Topaana is a well-known Roma-majority neighbourhood that appears to have been targeted for an unusually vicious police raid. As the applicant argued in the application form, by accepting to be bound by Protocol no.12, Macedonia not only accepted to expand the material scope of the prohibition on discrimination, but also accepted more searching scrutiny in discrimination cases.

22. The question is whether the applicant has made a prima facie case that he suffered discriminatory police brutality on the night of 5 May 2013. There is sufficient evidence to shift the burden of proof: the unusually large scale of the police raid in a well-known Roma-majority neighbourhood; the applicant's credible claim that he was attacked whilst in a shop, having done nothing (an assertion supported by the written evidence submitted by the Government at Annex 1 GO); the applicant's credible claim that racial slurs were used; and the ample international information about discrimination against Roma by police in Macedonia. The applicant urges the Court to set aside the usual four-part analysis that applies in cases where Protocol no.12 is not applicable, and which would have the Court examine, separately, whether the substantive and procedural limbs of Article 3 have been violated, taken on their own and then with Article 14. Protocol no.12, the applicant submits, instead demands that the Court consider the situation as a whole,

determining whether there is a presumption that the applicant suffered discrimination, and then placing the burden on the Respondent Government to show otherwise.

23. The Government, at § IV.5 GO, are counting on the Court to undertake the kind of analysis used in cases were Protocol no.12 is not applicable. They are also counting on the Court to disregard the entire context around the 5 May 2013 operation, and around discriminatory policing in Macedonia more generally, and instead isolate the applicant's experience from the context of a violent, large-scale police raid on a Romani neighbourhood. The applicant again submits that Protocol no.12 demands a different approach, taking into account the circumstances of the event and the evidence that Roma in Macedonia are particularly likely to be targeted for the kind of police misconduct that took place on 5 May 2013.

24. The Government also allege at § IV.5 GO that the applicant did not complain about the racist remarks in his complaint of 10 September 2013. This is inaccurate. The 10 September complaint specifically mentioned verbal abuse by police officers. See Annex 13 to the application, first full paragraph. The only difference between the 10 September complaint and the complaint made on 28 March 2014 is that in the latter, the applicant's lawyer set out the exact words that were used. In the 10 September complaint, the applicant's lawyer specifically referred to discrimination based on ethnicity, as can be seen from the text of the complaint (Annex 13 to the application).

25. The Government's formalistic approach to these two documents is completely at odds with the kind of contextual analysis that the applicant claims Protocol no.12 demands. Indeed, the applicant

submits that the racially offensive remark was only part of the evidence of discriminatory conduct. The applicant urges the Court to examine the present case in the light of all the evidence, presented in the application form, of a general climate of institutional antigypsyism within Macedonian law enforcement. This is enough to raise a presumption of discrimination in this case, particularly given the extreme nature of the police intervention in a well-known Roma-majority neighbourhood. See, mutatis mutandis, *Oršuš and others v Croatia* (Grand Chamber, 2010), § 153 (where an unfavourable measure only affects Roma, "*the measure in question clearly represents a difference in treatment*"). The Government have offered no evidence that raids of this kind ever happen in non-Roma neighbourhoods; nor have they shown that when non-Roma claim to have been victims of police brutality, prosecutors' investigations are similarly slow and inconclusive. This is key evidence to which the Government have access. The applicant insists that in order for the Government to demonstrate that there was no discrimination contrary to Article 1 § 2 of Protocol no.12, they must provide data showing whether such incidents happen in non-Roma communities. *E.B. v France* (Grand Chamber, 2008), § 74 ("*the Government, on whom the burden of proof lay, were unable to produce statistical information*").

26. The applicant also recalls that when giving oral evidence in court on 31 January 2017 before Skopje Basic Court 2, F.B., who was with the applicant during the incident, confirmed that the police officers used racist slurs. See Annex 25 to the application.

E.ii The procedural limb of Article 3 taken with Article 14 and related claims under Article 1 § 2 of Protocol no.12

27. The applicant rejects the Government's suggestion at § IV.6 GO that his decision to seek asylum can be held against him. Such a finding is inconsistent with the applicant's right to claim asylum, protected by Article 14 § 1 of the Universal Declaration on Human Rights. Furthermore, the applicant left Macedonia seven (7) months after making his criminal complaint, giving the authorities ample time to interview him. During that time, the Basic Public Prosecutor's Office never contacted the applicant. The applicant also draws the Court's attention to the fact that prosecutors rejected the criminal complaint in the same month the applicant left the country: November 2014. At that point they had concluded they had enough evidence to deal with the complaint. The applicant also contests the assertion that he was "*not available*" to the domestic authorities. The applicant's domestic lawyer remained in touch with the authorities to respond to any requests. The Government fail to mention anything investigators were unable to do as a result of the applicant's absence.

28. The Government also argue (at § IV.6 GO, second bullet point) that the applicant filed a criminal complaint "*quite late*" after the incident, which prevented prosecutors from ordering an effective medical examination. The question of the timing of the complaint has already been discussed above. In any event, the Government's comment ignores the fact that there is no dispute about the applicant's injuries. The Government readily admit at § IV.2 GO that "*it is apparent (from Evidence 3) that the applicant was injured at the time of his admission at the police station in Kisela Voda*". What is at issue in the investigation is not whether the applicant was

injured but by whom and under what circumstances. Furthermore, the applicant's injuries necessarily healed within a brief period; do the Government expect the Court to believe that investigators would have ordered a medical examination so quickly, given their subsequent conduct? In any event, the applicant acted diligently, securing medical evidence while his injuries were fresh. This evidence was submitted with the application (Annexes 2 and 6 to the application). These documents, along with the description of the injuries in the official records of the applicant's detention at the police station (Annex 3 GO), were sufficient to allow the authorities to conclude that the injuries were real. There was never any need for forensic analysis of the applicant's body.

29. The Government rely at § IV.7 on the fact that the police officers involved in the 5 May 2013 raid had no criminal convictions or criminal proceedings pending against them and had never themselves been in prison. The suggestion seems to be that police officers with criminal convictions might conceivably be involved in such a raid; it should be obvious that any officer authorised to use force should not have a criminal past that would suggest (s)he might be capable of this kind of brutality. The Government also admit that the charges against the applicant were "*taken into account*" in the investigation; in other words, the fact that the applicant was charged with an offence against the police played a role, despite the fact that those charges were baseless. This is contrary to the presumption of innocence. It also does not support the Government's argument: if the applicant's allegations against the police are true, then it is entirely understandable that the police would bring trumped-up charges to intimidate him.

30. At § IV.7 GO the Government revive their argument that the investigation is still viable, claiming it has not been going on for too long. The applicant continues to assert that the investigation – now in its fifth year – has not been conducted in a timely manner. Why did prosecutors wait two years before hearing any suspects or witnesses? Why were the witnesses the applicant proposed only heard some five years after the incident, in June 2018 (see Annexes 5.l and 5.m GO)?

31. At § IV.8 GO, the Government finally turn to the applicant's concerns about institutional antigypsyism. Their response is that if there were institutional racism in Macedonia, the applicant would not have been "*acquitted*" (an inaccurate term here – the charges against him were withdrawn for lack of evidence). The argument is difficult to follow. The facts of the case create a presumption that the charges were trumped-up; that is, they were baseless, yet were brought by police to intimidate the applicant. The police officers who made the accusations seemed to believe they had worked: by 10 June 2013, the applicant had not pursued any complaint for police brutality, and on that date the charges were withdrawn. It was only following that decision that the applicant decided to pursue the matter, first on 20 June 2013 with support from the Helsinki Committee for Human Rights in Macedonia.

32. The Government have nothing to say in response to the reports from the UN Human Rights Committee, the UN Committee Against Torture, the Council of Europe Commissioner for Human Rights, and the Helsinki Committee for Human Rights in Macedonia cited in the application form, and which provide evidence of institutional antigypsyism in law enforcement in Macedonia.

33. In conclusion, the applicant urges the Court to find that Macedonia has violated Article 1 of Protocol no.12 to the Convention and/or Article 3 and Article 5 § 1(c) taken with Article 14. The applicant also invites the Court to find a violation of Article 38 of the Convention, unless the authorities produce the documents in their possession the applicant claims have been intentionally withheld.

The European Roma Rights Centre
3 January 2019