SECOND SECTION

CASE OF GUBACSI v. HUNGARY

(Application no. 44686/07)

JUDGMENT

STRASBOURG

28 June 2011

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of **Gubacsi** v. Hungary,

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

Françoise Tulkens, *President,*
Danutė Jočienė,
David Thór Björgvinsson,
Giorgio Malinverni,
András Sajó,
Işıl Karakaş,
Paulo Pinto de Albuquerque, *judges,*
and Françoise Elens-Passos, *Deputy Section Registrar,*

Having deliberated in private on 17 May and 7 June 2011,

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

PROCEDURE

1. The case originated in an application (no. 44686/07) against the Republic of Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Hungarian national, Mr Gábor **Gubacsi** ("the applicant"), on 3 October 2007.

2. The applicant was represented by Mr A. Kádár, a lawyer practising in Budapest. The Hungarian Government ("the Government") were represented by Mr L. Höltzl, Agent, Ministry of Public Administration and Justice.

3. The applicant alleged that the ill-treatment he had suffered at the hands of the police and the ensuing absence of an adequate investigation amounted to a violation of Article 3 of the Convention.

4. On 8 February 2010 the President of the Second Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1974 and lives in Budapest.

6. In the evening of 19 August 2006 the applicant was involved in a minor car accident at a parking lot in the town of Siófok. He claimed that he had found his car damaged when he had returned to the parking lot from a nearby restaurant in order to fetch some cash, whereas the police asserted – based on the testimony of an eye witness, an off-duty policeman who had been passing by – that it had been the applicant who had crashed into a parked car with his own vehicle while driving out of the parking lot. In response to an alert from the off-duty

police officer, at around 10.40 p.m. the Siófok Police Station sent two patrolling officers, I.K. and K.P.P., to the scene of the accident.

7. The two officers checked the applicant's identity and breathalysed him. The test clearly showed that he was heavily under the influence of alcohol. He was accordingly taken to the Siófok Medical Centre for a blood and urine test. The test was performed by Dr I.E.V. at 11.40 p.m. She recorded on the blood alcohol test form that the applicant's legs were injured. The applicant was then taken to another department of the Medical Centre, where Dr Gy.K. examined him at 12.15 a.m. on 20 August and recorded superficial abrasions on his left knee and ankle.

8. After the examination, the applicant was driven back to the parking lot because the officers had received instructions to take photographs of the scene. When the applicant was informed that, after the pictures had been taken, he would be taken to the police station to fill in certain papers, he attempted to escape. While running past the officers, he knocked over Officer K.P.P, who suffered superficial abrasions. Officer I.K. chased the applicant and finally managed to bring him to the ground and to handcuff him with the help of K.P.P. According to the police, during the chase the applicant crossed a number of roads, and while doing so he bumped into and fell over some moving cars.

9. Subsequently, the officers requested help by radio. Two other police cars arrived, and at 12.30 a.m. the applicant was driven to the Siófok Police Station by Officers G.V. and Z.S.

10. Before the applicant – by then suspected of the offence of violence against an official – was taken into custody, he was sent from the police station back to the Medical Centre for another medical examination. He was driven to the Medical Centre by Officers Sz.R. and Z.S.

11. At 12.43 a.m., Dr Gy.K. again examined the applicant and recorded that, in addition to the abrasions on his leg, already recorded, he had a small swelling on his cheek.

12. Following the medical examination, the applicant was taken back to the Siófok Police Station and placed in a cell in the station's custodial unit. He was guarded by Officers Z.T. and P.L.

13. Due to his allegedly strange behaviour, around 3.00 a.m. the applicant was again driven in a police van to the Medical Centre for a drug test, escorted by Officers Gy.C., M.N., Sz.R. and Z.M. At 3.15 a.m. Dr I.E.V. carried out the drug test, after which the applicant was taken back to the police station.

14. The applicant submits that during one of the transfers described above, he was ill-treated in the police car or van by the police officers escorting him, who allegedly hit him in the face, sides and stomach. He also submits that, during his custody after the drug test, he was severely ill-treated by four police officers in the corridor of the custodial unit. He was allegedly made to stand with his face against the wall, and was kicked and/or hit by several police officers all over his body. He fell to the ground, where the ill-treatment continued. He received kicks and blows in his back, side, kidney area, pelvis, back of the neck, temple, jaw, upper back and thighs. Afterwards, he was again made to stand up against the wall and ordered to spread his legs, following which a police officer he could not see kicked him in the testicles. He then collapsed and the beating ended.

15. Although the applicant states that owing to his drunkenness and the beating he is not fully able to reconstruct the events of the night, or to recognise all the police officers who ill-treated him, he was adamant throughout the entire ensuing procedure that he could recognise two of the four officers who were present during his beating in the custodial unit. In the course of the investigation, the applicant identified those two officers as G.V. and Z.T.

16. The applicant's custody ended on 20 August at 7.00 a.m. From 7.54 to 8.09 a.m. he was questioned by Officer M.T. under suspicion of drug abuse, since the drug test had revealed traces of marijuana in his blood.

17. After his release, the applicant was driven by a friend to the nearby town of Balatonkenese, where he and his wife were spending their holiday. The applicant told them that he had been ill-treated and showed them his injuries. The applicant spent the whole day resting at his friend's place. He was given pain killers by his wife. Both his wife and his friend confirmed that he had visible injuries.

18. In the evening of 20 August, the applicant travelled back to Budapest, and the next day he visited general practitioner Dr Cs.K., who recorded the following injuries: swelling on the left cheek, sensitive to pressing; walnut-sized localised swelling filled with blood on the left side of the top of the head; superficial crusted bruises around the left wrist and the lower arm; cherry-sized contusions on the left and right upper arm; a walnut-sized contusion on the upper front part of the left hip; egg-sized crusted bruises on both sides of the waist; as well as abrasions above both knees (two cherry-sized abrasions above the right, and one walnut-sized and one egg-sized abrasion above the left knee).

19. After recording the injuries, the general practitioner sent the applicant to the Department of Urology of Szent János Hospital in Budapest, because his left testicle was severely swollen. In addition to the injuries detected by the general practitioner, at the Department of Urology it was recorded that the applicant's left testicle was swollen to the size of a goose egg. A contusion of the testicle and a haematocele (swelling caused by blood collecting in a body cavity) were established. Since treatment did not help, the urologist suggested surgery, which the applicant refused.

20. On 26 August 2006 the applicant's legal representative filed a complaint with the Siófok Police Station and requested that the part of the complaint relating to the applicant's ill-treatment be forwarded to the competent prosecutorial investigation office.

21. Based on the forwarded complaint, the Kaposvár Prosecutorial Investigation Office launched an investigation. The Office subsequently heard the applicant and numerous police officers, held an identification parade and a series of confrontations, and obtained an expert opinion. In spite of the fact that the applicant claimed to have recognised two of the four police officers who were present during his ill-treatment in the custodial unit, the Office terminated the investigation on 20 February 2007. It stated that although the injury to the applicant's testicle was caused by ill-treatment that might have been inflicted during his detention at the Siófok Police Station, it was not possible to establish the identity of the perpetrator. According to the decision to terminate the proceedings, the police officers who might have inflicted the ill-treatment all denied responsibility and corroborated each other's statements; the doctors whom the applicant had met on the night of the events claimed not to have detected injuries that might have been indicative of ill-treatment, and the applicant had made contradictory statements during the procedure, which might well have been because he

was heavily under the influence of alcohol and drugs, but which weakened his credibility all the same.

22. On 14 March 2007 the applicant's counsel submitted a complaint against the decision to terminate the investigation to the Somogy County Chief Prosecutor's Office, submitting that the Prosecutorial Investigation Office had not taken all the possible measures to establish the responsibility of the perpetrators, and that in any event the evidence was sufficient to press charges against the two officers whom the applicant had recognised.

23. On 30 March 2007 the Chief Prosecutor's Office rejected the complaint. That decision, including a warning that no further remedy lay against the rejection, was served on the applicant's lawyer on 17 April 2007.

II. RELEVANT DOMESTIC LAW

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

Chapter IX

Title III – Conduct of the investigation

Discontinuation of the investigation

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

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

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

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

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

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

f) due to other statutory grounds eliminating punishability,

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

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

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

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

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

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

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

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

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

(2) The investigating judge shall...

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

Title IV – Remedy during the investigation

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

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

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

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

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

b) reject the complaint if he finds it unfounded.

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

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

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

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

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

Article 3 reads as follows:

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

26. The Government contested that argument.

A. Admissibility

1. Arguments of the parties

a. The Government

27. The Government asserted that the applicant should have submitted an objection to the investigating judge against the discontinuation of the investigation, requesting its resumption under section 191(3) of the Code of Criminal Procedure (see paragraph 24 above). Moreover, since the applicant was aware of the identities of the impugned police officers, he should have filed individual criminal complaints against each of those officers. Had he done so, he could have taken the case before a court by making use of substitute private accusation. By not availing himself of these procedural avenues, he did not exhaust domestic remedies.

b. The applicant

28. The applicant submitted that the Government's interpretation of section 191(3) was a misconception of the law. The investigating judge's power to decide on the continuation of an investigation was not by its nature a remedy for an aggrieved party against the termination of an investigation in pursuit of his complaint. Instead, it was a procedural safeguard in favour of suspects against arbitrary prosecutorial decisions, aimed at guaranteeing that only on the basis of a judicial decision could an investigation be reopened against suspects already cleared of charges. This was demonstrated by the ministerial reasoning in the bill underlying the Code of Criminal Procedure, supported by scholarly views expressed in various commentaries attached to this provision of the Code, and proven by the fact that section 191 was located in Chapter IX, Title III of the Code (entitled Conducting the investigation), rather than Title IV (entitled Remedy during the investigation). In any case, under section 191, the investigating

judge might order the continuation of the investigation only in cases where it was conducted against a particular suspect, which had not been the applicant's case.

29. Moreover, the applicant submitted that if he had filed a criminal report against the particular police officers, the public prosecutor might have either rejected it – but under section 199(2) such a rejection would not have given rise to supplementary private prosecution – or ordered another investigation, which would inevitably have led to the same conclusion as had already been reached by the Kaposvár Prosecutorial Investigation Office.

2. The Court's assessment

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

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

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

33. It follows that the application cannot be rejected for non-exhaustion of domestic remedies. Moreover, the Court considers that it is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

a. The Government

34. The Government submitted that, according to the findings of the investigation conducted by the domestic authorities, the applicant's allegations of ill-treatment were not supported beyond any doubt by the witness testimonies, nor were they confirmed by the medical opinion, except for the injury to his testicles. His allegations had been adequately investigated by the authorities but the evidence so obtained had not been sufficient to establish the criminal responsibility of the impugned police officers. Indeed, the ill-treatment which the applicant had sustained had been proven in the investigation but the identity of the perpetrators could not be established, essentially due to contradictions and uncertainties in the applicant's testimony.

b. The applicant

35. The applicant submitted that before he had been taken into police custody, he had only had minor injuries, namely some superficial abrasions on his left knee and ankle and a small swelling on his cheek. By the time he had been released from police custody, he had had several severe injuries as recorded by doctors. The Government did not provide any plausible explanation for these injuries, which had been caused by ill-treatment by police officers. Moreover, he argued that the investigation into his allegations had not been adequate, in particular in regard to the alleged omission of the requisite confrontations between key witnesses and the conduct of recognition sessions.

2. The Court's assessment

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

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

38. The Court notes that on his committal to police custody, the applicant was recorded to have abrasions on his leg as well as a small swelling on his cheek (see paragraph 11 above). On the day after his release, however, he was diagnosed with several injuries, including a swelling on the left cheek, another one filled with blood on the head, superficial crusted bruises around the left wrist and the lower arm, contusions on the left and right upper arm, a contusion on the upper front part of the left hip, crusted bruises on both sides of the waist, abrasions above both knees, as well as the contusion of a testicle and a haematocele (see paragraphs 18 and 19 above).

39. The Court considers that the injuries suffered by the applicant were sufficiently serious to amount to inhuman and degrading treatment within the scope of Article 3 (see, for example, *A. v. the United Kingdom*, 23 September 1998, § 21, *Reports* 1998-VI; *Ribitsch v. Austria*, 4 December 1995, §§ 13 and 39, Series A no. 336).

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

40. The Court reiterates that where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused (see *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V).

41. On the basis of all the material before it, the Court finds that the Government have not established that the applicant's injuries were caused otherwise than by the treatment meted out to him in police custody. Indeed, in the decision to terminate the proceedings it was recognised that ill-treatment might have been inflicted on the applicant while he had been in detention. Moreover, the Government have acknowledged in their observations that the ill-treatment was proven in the investigation (see paragraph 34 above).

42. Having regard to this consideration, the Court concludes that the applicant has been subjected to inhuman and degrading treatment. There has, accordingly, been a breach of Article 3 of the Convention.

43. As regards the applicant's complaint about the adequacy of the investigation, the Court observes that, against the background of the injuries the applicant had sustained, as recorded by a general practitioner and an urologist, a formal investigation was launched, in the course of which the applicant and numerous police officers were heard, an identification parade and a series of confrontations took place, and an expert opinion was obtained. The procedure was terminated essentially on account of the irreconcilable testimonies given by the protagonists and the fact that the applicant, heavily under the influence of drugs and alcohol at the time of the incident, had given contradictory statements. Because of this, no individual criminal responsibility of any particular police officer could be established (see paragraph 21 above). In these circumstances, the Court is satisfied that there has been an adequate investigation into the applicant's allegations.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

45. The applicant claimed, as pecuniary damage, 500 euros (EUR). He submitted that due to the injuries sustained he had been out of work for two months, and this amount corresponded to lost income and moreover the costs of medicines he had had to purchase. As to non-pecuniary damage, he claimed EUR 10,000.

46. The Government contested these claims.

47. The Court awards the applicant the entirety of these claims, i.e. EUR 10,500.

B. Costs and expenses

48. The applicant also claimed EUR 3,750 for the legal costs incurred before the Court. This amount, supported by documents, corresponded to his lawyer's fee – EUR 3,640, that is, 28 hours charged at EUR 130 per hour, payable on successful completion of the case – and to the clerical costs incurred, i.e. EUR 110.

49. The Government contested this claim.

50. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the full sum claimed, i.e. EUR 3,750.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

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

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Hungarian forints at the rate applicable at the date of settlement:

(i) EUR 10,500 (ten thousand five hundred euros), plus any tax that may be chargeable, in respect of pecuniary and non-pecuniary damage;

(ii) EUR 3,750 (three thousand seven hundred and fifty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 28 June 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos Françoise Tulkens
Deputy Registrar President

GUBACSI v. HUNGARY JUDGMENT