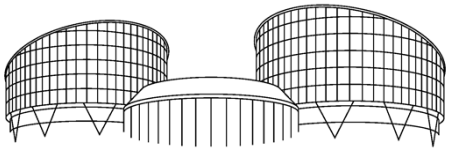

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF KANCIAŁ v. POLAND

(Application no. 37023/13)

JUDGMENT

STRASBOURG

23 May 2019

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 Kanciał v. Poland,

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

Linos-Alexandre Sicilianos, *President,*
Ksenija Turković,
Aleš Pejchal,
Krzysztof Wojtyczek,
Armen Harutyunyan,
Tim Eicke,
Jovan Ilievski, *judges,*

and Abel Campos, *Section Registrar,*

Having deliberated in private on 23 April 2019,

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

PROCEDURE

1. The case originated in an application (no. 37023/13) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Maciej Kanciał ("the applicant"), on 28 May 2013.

2. The applicant was represented by Mr L. Daca, a lawyer practising in Gdańsk. The Polish Government ("the Government") were represented by their Agent, Ms J. Chrzanowska, and subsequently by Mr J. Sobczak, of the Ministry of Foreign Affairs.

3. The applicant alleged that he had been ill-treated by police officers and that the authorities had failed to carry out an effective investigation into the matter, in breach of Article 3 of the Convention.

4. On 13 June 2016 notice of the application was given to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1985 and lives in Gdańsk.

A. Investigation against the applicant

6. On 9 June 2011 the Gdańsk Appellate Prosecutor's Office opened an investigation (no. Ap V Ds 27/11) into the kidnapping of J.R. the previous day. The investigation was delegated to the Central Bureau of Investigation of the Police ("the CBI"), Gdańsk branch. The CBI is the unit of the police responsible for preventing and combatting organised crime.

7. The kidnappers had demanded a ransom of 1,000,000 euros (EUR) from J.R.'s husband. Part of the ransom was paid on 15 June 2011. It appears that the victim was freed on 16 June 2011.

8. The CBI and the prosecutor obtained evidence relating to the applicant's phone calls and his connections to the mobile-phone network. On that basis, the police identified a number of possible suspects, including the applicant, among the friends of J.R.'s family and employees of the family company. On 16 June 2011 the prosecutor ordered that the applicant and other suspects be arrested on suspicion of kidnapping. The applicant was arrested on 16 June and released on 18 June 2011 (see paragraphs 11 and 17 below).

9. In the ensuing investigation, the police arrested the actual kidnappers.

10. On 20 April 2012 the prosecutor discontinued the investigation against the applicant and other suspects, finding that they had not committed the alleged offence. The prosecutor noted that the evidence available on 16 June 2011 had justified the decision to arrest the applicant and other suspects.

B. The applicant's arrest and the investigation into the alleged abuse of power by the police

11. On 16 June 2011 at 7.40 p.m. the applicant was arrested at his friends' flat in Tczew on suspicion of kidnapping. The arrest was carried out by the anti-terrorist police squad assisted by the CBI officers. The applicant was taken to the CBI headquarters in Gdańsk.

12. According to the police record dated 16 June 2011, the applicant had the following injuries on admission to the police detention facility in Gdynia: bruising of the left cheek and abrasions on his arms and back.

13. The following day the prosecutor charged the applicant with kidnapping and questioned him. The applicant and other suspects denied that they had been involved in the kidnapping. DNA tests had not confirmed the applicant's and the other suspects' involvement.

14. According to the record of arrest (*protokół zatrzymania*), the applicant did not ask for a medical examination. Nonetheless, the CBI arranged for him to have a medical examination at the hospital.

15. According to a medical certificate issued by the Regional Specialist Hospital in Gdańsk on 17 June 2011, the applicant complained that he had sustained injuries to his head, face and right arm during his arrest. An X-ray examination did not reveal any fractures. The certificate stated that the applicant's general condition was good and that he could take part in the investigation. The certificate further stated that the applicant was suffering from tenderness of his left temple (*tkliwość okolicy skroniowej lewej*), swelling of the left side of his face with bruising (*obrzęk lewej części twarzy z podbiegnięciami krwawymi*), and tenderness of his right arm and wrist.

The final diagnosis established bruising on his face and right wrist (*stłuczenie twarzy i nadgarstka*).

16. On 17 June 2011 the applicant was also examined in the health centre of the Ministry of Internal Affairs and Administration in Gdańsk. He complained of pain in the left side of his face and the right wrist. An examination established significant swelling in the area of his left eye socket *(silny obrzęk w okolicy oczodołu lewego)* and minor swelling of the right wrist.

17. The applicant was released on 18 June 2011 at 10 a.m.

18. On 27 June 2011 the applicant lodged a criminal complaint against the participating police officers in connection with his arrest. He alleged that he had been ill-treated during his arrest and subsequently in police custody. The applicant attached a copy of the medical examination report of 17 June 2011 and photographs documenting his injuries.

19. The applicant's criminal complaint was transferred to the Bydgoszcz Regional Prosecutor's Office. On 27 July 2011 the Bydgoszcz Regional Prosecutor instituted an investigation into the allegation of abuse of power by the police officers under Article 231 of the Criminal Code.

20. On the same day the applicant was heard by the prosecutor. He gave the following account: on 16 June 2011 he and his girlfriend had visited their friends, Ł.W. and D.W., in their flat. A sister of D.W.'s was present too. Between 6 and 7 p.m. the applicant had heard explosions. Shortly afterwards, a group of armed and masked police officers had stormed the flat. The applicant and others had followed the police orders to get down on the floor. The applicant had seen one of the police officers hit Ł.W. in the face with a rifle and seen Ł.W. bleeding. The other police officer had kicked the applicant in the face. The applicant had also been hit in the head, back and legs. Later, one of the officers had handcuffed him. The applicant alleged that subsequently an electrical discharge weapon, or Taser (*paralizator elektryczny* – hereinafter "EDW") had been used on his back, buttocks, genitals and ears. One of the police officers had pressed the applicant's face into a pool of Ł.W.'s blood on the floor. When being taken to a police car he was suffocated. In the police car, an EDW was continually used on the applicant's back until he started suffocating. The applicant was taken to a police station, where he was made to kneel down in front of a wall for half an hour. The police wanted to know where the money was and who he had worked with to kidnap the woman. The applicant was forced to sign a document which he could not read. He was then taken to a police detention facility in Gdynia. After his release, the applicant went to a hospital in Gdańsk for a medical examination. He also saw a surgeon, a neurologist and a psychologist.

21. The applicant alleged that as a result of his arrest he had sustained bruising to his head and back and sprained thumbs, as well as burns on his back from the EDW.

22. The prosecutor noted that owing to a technical error it had not been possible to examine the CCTV footage dated 17 June 2011 from the Gdańsk Appellate Prosecutor's Office, where the applicant had been questioned.

23. The prosecutor established that on 9 June 2011 the Gdańsk Appellate Prosecutor's Office had opened an investigation into the kidnapping of J.R., and a ransom demand. On 16 June 2011, having regard to the evidence in his possession, the appellate prosecutor ordered the arrest of a number of suspects, including the applicant and his girlfriend.

24. The prosecutor heard evidence from other individuals arrested with the applicant. The applicant's girlfriend stated that police officers in balaclavas and bulletproof vests had forced the door of the apartment. One of the officers had handcuffed her. The applicant's girlfriend had heard the applicant screaming and had seen blood on the floor of the flat. She had been taken to a police station, where she had been threatened with the EDW. After her release, she had seen the applicant with a swollen face and a black eye; his back was covered with little scabs from the EDW.

25. Ł.W. testified that, *inter alia*, the police had forced the door and thrown a stun grenade into the apartment. The police officers had ordered everyone to get down on the floor. Ł.W. stated that the applicant had been kicked and hit by three police officers, and that the EDW had been used on him.

26. D.W. stated that one of the police officers had hit her husband, Ł.W., in the face with a rifle. Z.M. confirmed this. Ł.W., D.W. and Z.M. were arrested on suspicion of possession of drugs. They were not suspected of involvement in the kidnapping.

27. The prosecutor ordered a forensic opinion to be prepared. She requested that the forensic expert establish, *inter alia*, what injuries the applicant had sustained in connection with his arrest. The forensic expert had access to the relevant parts of the prosecutor's case file and medical documentation.

28. The forensic opinion was prepared on 26 June 2012. On the basis of the medical documentation, including the police record dated 16 June 2011 and certificates dated 17 June 2011, the forensic opinion established that the applicant had sustained tenderness of his left temple, swelling of the left side of his face with bruising, swelling of the right wrist, and abrasions on his wrists and his back. It further established on the basis of photographs that the applicant had also had bruising on his left arm, the side of his torso and below his navel, and abrasions on his knees.

29. The forensic expert stated that the bruising could have been caused by the impact of a blunt object or a fall onto such an object. In the applicant's case, the bruising of the face and torso could have resulted from being kicked; however, being kicked with military-type boots would be more likely to have caused abrasions or crush wounds. The bruising of the applicant's left arm could have resulted from having arm locks applied to

him while he was being moved. The abrasions on his wrists could have resulted from the use of handcuffs. The expert further stated that the angular abrasions on the applicant's back could have resulted from the use of an EDW.

30. The forensic opinion concluded that the applicant's injuries had resulted in impairment to his health for a period not exceeding seven days.

31. The prosecutor also heard evidence from the police officers. She established that the arrest had been carried out by a special anti-terrorist police squad composed of eight officers. They had been accompanied outside the flat by seven police officers from the Gdańsk branch of the CBI. The police had considered it necessary to use the special squad because the suspects had been involved in kidnapping, their methods had been brutal, and there was a risk that they possessed dangerous implements. Members of the anti-terrorist squad were equipped with rifles, helmets, and bullet-proof vests, and were wearing balaclavas. The squad had forced the door open and used a stun grenade.

32. The applicant was arrested by officer R. According to his evidence and those of other officers involved, the applicant had been lying down on the floor with his hands under his body. Officer R. had been sitting on the applicant. The officer had ordered the applicant to lift his arms so he could be handcuffed. However, the applicant had refused to do so and had tried to dislodge the officer. Given the risk that the applicant might have had a firearm and seeing that the applicant had refused to be handcuffed, officer R. had decided to use the EDW on the applicant's back as the other officer was attempting to handcuff him. Officer R. stated that he did not remember how many times he had discharged the weapon, but he had done so to overcome the applicant's resistance. He had aimed the weapon at the applicant's back. Officer R. stated that each discharge had released direct current for a few seconds. This may have been applied to different parts of the applicant's back. The applicant was then arrested.

33. Officers of the special squad stated that they did not use any other force.

34. On 26 July 2012 the Regional Prosecutor discontinued the investigation into the alleged abuse of power by the police officers for lack of sufficient evidence that a criminal offence had been committed.

35. The prosecutor found that officers of the special squad had explained in detail what had happened during the arrest and the manner in which coercive measures were used. The officers had stated that they had only used measures which had been justified by the situation. They had denied that they had hit, kicked or hit with a rifle any of the arrestees. With regard to the EDW, the prosecutor stated:

> "The electroshock weapon was used in accordance with procedure, and only in respect of [the applicant], in the circumstances described by the police officer arresting him and owing to his non-compliance with the orders."

36. The prosecutor noted that the arrest of five people (two men and three women) had taken place in a flat, in fact in one room (with four people in it) in a very small space. At least eight people (four arrestees and at least four officers) had been in this room. In connection with the use of a stun grenade in the flat, it could not be ruled out that the arrestees had sustained some unintended injuries.

37. The prosecutor noted that the applicant had not recorded any objections to the manner of his arrest in the record of arrest, despite the allegedly drastic actions of the police officers. Furthermore, on 11 October 2011 the Gdańsk-Południe District Court had dismissed the applicant's appeal against the prosecutor's decision of 16 June 2011 ordering his arrest. The court had found that, in the light of the evidence available at the material time, the arrest had been justified and carried out lawfully.

38. In conclusion, the prosecutor accepted that the applicant had sustained the injuries as described in the forensic opinion. Nonetheless, having analysed the totality of the evidence in the case, the prosecutor could not unequivocally establish that the injuries had resulted from the officers' actions. The prosecutor noted that the arrests had been carried out rapidly, and that the officers' actions had been aimed at apprehending the suspects swiftly and efficiently. The police officers had presented a consistent version of events. Despite the fact that the version of events presented by the applicant could not be entirely ruled out, the prosecutor, having regard to the principle of *in dubio pro reo*, decided to discontinue the investigation for lack of sufficient evidence for suspicion that the alleged offence had been committed.

39. The applicant appealed against the prosecutor's decision. He alleged that the prosecutor's assessment of the evidence had been one-sided and aimed at exonerating the police officers.

40. The applicant submitted that it was undisputed that he had sustained numerous injuries in the course of his arrest. This had been confirmed by the forensic opinion. His injuries could not have resulted from anything but ill-treatment on arrest, specifically from the use of the EDW, blows with a rifle, and kicks. The applicant also underlined that all the arrestees had consistently described brutal behaviour on the part of the police officers. All the arrestees had confirmed that none of them had offered any resistance and that they had all followed police orders.

41. On 18 March 2013 the Gdańsk-Północ District Court upheld the prosecutor's decision. It found that the prosecutor had correctly assessed the evidence in the case and had reached proper conclusions. It noted that there was no need to supplement the evidence. The court held that in the light of the collected evidence it was not possible to unequivocally determine that the alleged offence of abuse of power had been committed.

42. The court noted that the cases and manner of use of coercive measures by the police was regulated in the Ordinance of the Council of

Ministers of 17 September 1990 on the Use of Coercive Measures by the Police. Police officers could use these measures in accordance with the rules laid down in section 16(1) and (2) of the Police Act of 6 April 1990.

43. The court attached importance to the fact that the Gdańsk-Południe District Court had dismissed the applicant's appeal against his arrest. That court had found that the arrest had been carried out lawfully.

44. The court noted that the arrestees' behaviour and the fact that the arrest had concerned a case of kidnapping had determined the nature of the actions taken by the officers. The officers had acted out of surprise and the situation had developed rapidly. Their objective had been to proceed to a quick and effective arrest. Thus, the manner of the carrying out of the arrest had been undoubtedly conditioned by the necessity to execute it effectively.

45. The court noted that there were two conflicting versions of events. In this context, it found that those conflicting versions did not permit a clear determination of the relevant facts. In addition, other evidence in the case, particularly medical evidence, did not allow such a determination.

46. Accordingly, the actions of the police officers could not be considered to amount to a criminal offence. It did not appear unequivocally from the case file that the applicant (and other suspects) could have sustained the injuries as alleged by them in the course of their arrest. The medical evidence did not clarify the relevant uncertainties. The court also noted that the applicant and other suspects had not challenged the police officers' actions in the record of arrest or during their questioning.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Use of force by the police

1. Police Act

47. Section 16 of the Police Act of 6 April 1990, in the version applicable at the material time, read, in so far as relevant:

> "1. If a lawful order given by a police authority or police officer has not been complied with, a police officer may apply the following coercive measures:
>
> 1) physical, technical and chemical means of restraining or escorting persons or of stopping vehicles;
> 2) truncheons;
> 3) water cannons;
> 4) police dogs and horses;
> 5) rubber bullets fired from firearms;
>
> 2. Police officers may apply only such coercive measures as correspond to the exigencies of a given situation and are necessary to have their orders obeyed."

2. Ordinance on the Use of Coercive Measures by the Police

48. The Ordinance of the Council of Ministers of 17 September 1990 on the Use of Coercive Measures by the Police (*Rozporządzenie Rady Ministrów w sprawie określenia przypadków oraz warunków i sposobów użycia przez policjantów środków przymusu bezpośredniego*) was issued on the basis of section 16(4) of the Police Act. It was applicable at the material time.

49. Section 1(1) of the Ordinance stipulated that the police may use coercive measures in accordance with the rules laid out in section 16(1) and (2) of the Police Act. Coercive measures could be used after a person had failed to comply with an order and after a warning had been given (section 1(2)). A police officer could act without giving an order or a warning if a delay would cause danger to life, health or property (section 1(3)). The Ordinance prescribes that a police officer should use coercive measures in a manner which causes as little harm as possible, and should discontinue their use if the person complies with orders (section 2(1)(2).

50. Section 5 of the Ordinance provides that physical force can be used to overpower a person, to counter an attack, or to ensure compliance with an order. When such force is being used, it is forbidden to strike a person, except in self-defence or to counter an attack against life, health or property.

51. Section 8 of the Ordinance regulates the use of electrical discharge weapons (*paralizator elektryczny*). Such a weapon may be used against persons who cause danger to life, health or property and if the use of other coercive measures is impossible or has been rendered ineffective. The EDW may be used specifically, *inter alia*, in the following situations: in order to overpower a person who is refusing to obey an order to immediately drop a dangerous implement; to counter an attack or to overcome active resistance; to arrest a person suspected of having committed an offence or to prevent the escape of a detainee (section 8(3)). Care should be exercised when using an EDW, having regard to the fact that such a weapon may cause danger to life and health.

B. Ombudsman of Poland

52. In a letter to the Commander in Chief of the Police (*Komendant Główny Policji*) dated 28 June 2017, the Ombudsman (*Rzecznik Praw Obywatelskich*) expressed his concerns about the use of EDWs by the police. He recommended that police officers should be obliged to file a detailed report after every use of that weapon. In his annual report for the year 2017, the Ombudsman also addressed the issue of the use of EDWs by the police.

III. COUNCIL OF EUROPE MATERIALS

53. The 20th General Report on the Activities of the Committee for the Prevention of Torture (CPT), dated 26 October 2010, stated, *inter alia:*

> "72. Electrical discharge weapons ["EDWs"] are increasingly being used when effecting arrests, and there have been well-publicised examples of their misuse in this context (e.g. the repeated administration of electric shocks to persons lying on the ground). Clearly, the resort to EDW in such situations must be strictly circumscribed. The guidance found by the CPT in some countries, to the effect that these weapons may be used when law enforcement officials are facing violence – or a threat of violence – of such a level that they would need to use force to protect themselves or others, is so broad as to leave the door open to a disproportionate response. If EDW gradually become the weapon of choice whenever faced with a recalcitrant attitude at the time of arrest, this could have a profoundly negative effect on the public's perception of law enforcement officials.
>
> ...
>
> 77. EDW should be equipped with devices (generally a memory chip) that can be used for recording various items of information and conducting checks on the use of the weapon (such as the exact time of use; the number, duration and intensity of electrical discharges, etc). The information stored on these chips should be systematically read by the competent authorities at appropriate intervals (at least every three months). Further, the weapons should be provided with built-in laser aiming and video recording devices, making safe aiming possible and enabling the circumstances surrounding their use to be recorded.
>
> ...
>
> 78. Electrical discharge weapons issued to law enforcement officials commonly offer different modes of use, in particular a 'firing' and a 'contact' (drive-stun) mode. In the former, the weapon fires projectiles which attach to the person targeted at a short distance from each other, and an electrical discharge is generated. In the great majority of cases, this discharge provokes generalised muscular contraction which induces temporary paralysis and causes the person concerned to fall to the ground. In contrast, when the 'contact' mode is used, electrodes on the end of the weapon produce an electrical arc and when they are brought into contact with the person targeted the electrodes cause very intense, localised pain, with the possibility of burns to the skin. The CPT has strong reservations concerning this latter mode of use. Indeed, properly trained law enforcement officials will have many other control techniques available to them when they are in touching distance of a person who has to be brought under control.
>
> ...
>
> Post-incident procedure
>
> 82. Following each use of an EDW, there should be a debriefing of the law enforcement official who had recourse to the weapon. Further, the incident should be the subject of a detailed report to a higher authority. This report should indicate the precise circumstances considered to justify resort to the weapon, the mode of use, as well as all other relevant information (presence of witnesses, whether other weapons were available, medical care given to the person targeted, etc). The technical information registered on the memory chip and the video recording of the use of the EDW should be included in the report.

83. This internal procedure should be accompanied by an external monitoring element. This could consist of systematically informing, at regular intervals, an independent body responsible for supervising law enforcement agencies of all cases of resort to EDW.

84. Whenever it transpires that the use of an EDW may not have been in accordance with the relevant laws or regulations, an appropriate investigation (disciplinary and/or criminal) should be set in motion."

54. The CPT's report on the visit to Poland carried out from 11 to 22 May 2017 stated, *inter alia*:

"22. ... the Committee also recommends that particular attention be paid to reiterating to all police officers instructions regarding the proper conduct as concerns the use of electric discharge weapons (tasers) and to enforcing those rules. In this context, it should be made clear to all police staff that electric discharge weapons may only be used when there is a real and immediate threat to life or risk of serious injury. Recourse to such weapons for the sole purpose of securing compliance with an order is inadmissible.

The CPT considers that the use of electric discharge weapons should be subject to the principles of necessity, subsidiarity, proportionality, advance warning (where feasible) and precaution. Furthermore, recourse to such weapons should only be authorised when other less coercive methods (negotiation and persuasion, manual control techniques, etc.) have failed or are impracticable and where it is the only possible alternative to the use of a method presenting a greater risk of injury or death (e.g. firearms)."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

55. The applicant complained of ill-treatment during his arrest and of the absence of an effective investigation in that connection. He relied on Article 3 of the Convention, which reads as follows:

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

A. Admissibility

56. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Substantive aspect of Article 3

(a) The applicant's submissions

57. The applicant argued that the authorities had decided to arrest him with the assistance of a special police squad when there had not been sufficient grounds to consider that he had committed the alleged crime. Furthermore, there had been no basis to assume that the applicant was a dangerous person.

58. When carrying out his arrest the police had used disproportionate force, despite the fact that the applicant had offered no resistance and followed their orders. The applicant claimed that in the course of his arrest the police officers had hit him in the face, head, back, and legs, kicked him in the face, fired on various parts of his body with the EDW, forced him to drink blood from the floor, and strangled him with a T-shirt folded around his neck. These acts had resulted in numerous bodily injuries, as well as intense physical and mental suffering.

59. The applicant stated that he had got down on the floor in a position which could have meant that his hands were hidden under his body. At that point the officer could have taken hold of the applicant's hands without difficulty and handcuffed him, instead of using the EDW on him a number of times.

60. The applicant had sustained numerous injuries. These had been demonstrated by forensic analysis, photographs documenting the applicant's physical condition, and statements by other people arrested with the applicant. The Government had not presented a convincing explanation for the circumstances and causes of the injuries inflicted. The nature of the injuries had clearly indicated that they had resulted from the use of an EDW, a blunt instrument in the form of a rifle grip, and military-type boots. The above-mentioned injuries had not and could not have resulted from any other circumstances but the applicant's arrest. The Government did not present any evidence that the applicant had acted violently, might have been armed, or had resisted arrest.

61. All those arrested submitted that the police had acted violently. They had not resisted, and had followed the orders given during their arrest. Thus, there had been no need to use the EDW or other coercive measures. Moreover, all those arrested had been taken completely by surprise by so many police officers storming the flat and using the stun grenades. This had eliminated any resistance on their part.

62. The applicant had not complained about the officers' actions during his arrest, because of the shock that he had suffered. All he had wanted was to leave the prosecutor's office as soon as possible, as he had been threatened with further violence.

(b) The Government's submissions

63. The Government argued that the applicant had not been subjected to inhuman or degrading treatment. In particular, the officers' use of force had been adequate and proportionate in the circumstances of the case.

64. The applicant had been arrested on suspicion of having committed or being involved in a serious crime. The applicant had been detained for less than two days (from 7.40 p.m. on 16 June 2011 until 10 a.m. on 18 June 2011). The applicant had been arrested at his friends' flat. The officers had ordered the applicant to get down on the floor in order to handcuff him easily and to protect themselves from any weapons the applicant and the others might have had. The use of any other measures in respect of the applicant had been caused by his refusal to follow orders. The officers had aimed the EDW at the applicant's back. According to the Government, this way of using an EDW had a weaker impact and had not caused any negative medical consequences. The measures taken by the officers had been consistent with the Ordinance on the Use of Coercive Measures by the Police. The Government claimed that the use of coercive measures to arrest the applicant had been made strictly necessary by his own conduct.

65. With regard to the applicant's physical and mental state, the Government underlined that during his questioning the applicant had not complained of any injuries, and avowed that he had been feeling well. The applicant had complained about the officers' actions in connection with his arrest only after his release. For these reasons, his allegations should not have been considered credible. The officers' actions had not been aimed at causing the applicant actual bodily injury or physical and mental suffering. Their actions, specifically handcuffing, immobilising on the floor and using an EDW, had only been aimed at the applicant's swift arrest.

66. The Government submitted that according to the investigation's findings there was no credible evidence that the officers had treated the applicant inappropriately. In their view, the officers' actions had been justified by the circumstances of the case. The allegations of ill-treatment and sustained injuries had not been supported by appropriate evidence. Moreover, the applicant's alleged injuries did not attain a sufficient level of severity to fall within the scope of Article 3.

(c) The Court's assessment

(i) General principles

67. The general principles with respect to the obligation of the High Contracting Parties under Article 3 of the Convention not to submit individuals under their jurisdiction to inhuman or degrading treatment or torture in the course of encounters with the police were recently set out in detail in paragraphs 81-90 of the Court's judgment in *Bouyid v. Belgium* ([GC], no. 23380/09, 28 September 2015).

(ii) Application to the present case

68. The applicant was arrested on 16 June 2011 at 7.40 p.m. In a record dated 16 June 2011 and prepared in connection with his admission to the police detention facility in Gdynia, officer M.G. noted that the applicant had the following injuries: bruising on the left cheek and abrasions on his arms and back (see paragraph 12 above).

69. On 17 June 2011, while in police custody, the applicant was taken for medical examination to two healthcare facilities in Gdańsk, where he complained about the injuries sustained in the course of his arrest. The medical certificate of 17 June 2011 from the hospital attested that the applicant was suffering, *inter alia*, from swelling of the left side of his face with bruising and tenderness of his right arm and wrist (see paragraph 15 above). The certificate of the same date from the Ministry of Internal Affairs and Administration's health centre identified significant swelling in the area of the applicant's left eye socket (see paragraph 16 above).

70. The forensic opinion dated 26 June 2012 confirmed those injuries sustained in connection with the applicant's arrest. It further identified bruising on the applicant's left arm and the side of his torso (see paragraph 28 above). The opinion further established that the abrasions on the applicant's wrists could have been caused by the handcuffs.

71. The prosecutor in her decision on discontinuation accepted that the applicant had sustained the injuries as described in the forensic opinion (see paragraph 38 above). The Government claimed that the causes of the applicant's injuries were not supported by appropriate evidence. However, they did not produce any explanation to rebut the presumption that the impugned injuries occurred while the applicant was under police control. Having regard to medical certificates issued in the course of the applicant's custody and the forensic opinion's conclusions, the Court considers that the existence of the applicant's injuries sustained in the course of his arrest is beyond dispute.

72. The Court reiterates that in respect of a person who is deprived of his or her liberty, or, more generally, is confronted with law-enforcement officers, any recourse to physical force which has not been made strictly necessary by his or her own conduct diminishes human dignity and is, in principle, an infringement of the right set forth in Article 3 (see, among other authorities, *Ribitsch v. Austria*, 4 December 1995, § 38, Series A no. 336; *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 207, ECHR 2012; and *Bouyid,* cited above, § 88).

73. The use of force by the police, in particular in the course of arrest operations, does not always amount to treatment contrary to Article 3 of the Convention. However, it is settled case-law that such force will not be in breach of this Article only if it was indispensable and not excessive (see, among many others, *Ivan Vasilev v. Bulgaria*, no. 48130/99, § 63, 12 April 2007, and *Lewandowski and Lewandowska v. Poland*, no. 15562/02, § 59,

13 January 2009). Where injuries have been sustained at the hands of the police, the burden of showing that the force was necessary lies on the Government (see, among other authorities, *Rehbock v. Slovenia*, no. 29462/95, § 72 *in fine*, ECHR 2000-XII; *Altay v. Turkey*, no. 22279/93, § 54, 22 May 2001; and *Boris Kostadinov v. Bulgaria*, no. 61701/11, § 53, 21 January 2016). The Court attaches particular importance to the type of injuries sustained and the circumstances in which force was used (see *R.L. and M.-J.D. v. France*, no. 44568/98, § 68, 19 May 2004, and *Tzekov v. Bulgaria*, no. 45500/99, § 57, 23 February 2006).

74. The Court reiterates that even in the most difficult circumstances, such as the fight against terrorism and organised crime, Article 3 prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned (see, among other authorities, *Gäfgen v. Germany* [GC], no. 22978/05, § 87, ECHR 2010, and *El-Masri*, cited above, § 195). Moreover, persons who are held in police custody and more broadly all persons under the control of the police or a similar authority, are in a situation of vulnerability. The authorities are consequently under a duty to protect them (see *Bouyid,* § 107, cited above).

75. The Court considers that it is necessary to distinguish two stages of the police operation. The first stage lasted until the moment the applicant was arrested and handcuffed, or in other words, put effectively under the control of the police officers. The second stage concerned the period subsequent to the applicant's immobilisation.

76. In respect of the first stage, the Court notes that it was observed by the prosecutor that the officer R. had used an EDW because the applicant, while lying down on the floor, had kept his hands under his body, had refused to be handcuffed and had tried to dislodge the officer. The prosecutor appeared to acknowledge that no other coercive measures had been used against the applicant (see paragraphs 32-33 and 35 above). The Government contended that the use of coercive measures had been prompted by the applicant's refusal to follow police orders (see paragraph 64 above). The applicant, on the other hand, claimed that he had followed orders and nonetheless had been hit and kicked by the officers (see paragraphs 20 and 58 above). Having regard to the conflicting evidence as well as to the shortcomings identified in the investigation (see paragraphs 90-94 below), the Court is unable to determine whether the use of force by the police during the first stage of the operation was excessive (see, *mutatis mutandis*, *Karbowniczek v. Poland***,** no. 22339/08, § 58, 27 September 2011). It considers that it is not necessary to examine this matter further as in any event, there is a violation of Article 3 of the Convention for the reasons expressed below.

77. Indeed, the Court has to assess the use of force during the period subsequent to the applicant's immobilisation. It has already established that

the applicant sustained bruising and swelling on the left side of his face, as well as bruising on his left arm and the side of his torso. The forensic expert observed that the bruising of the face and torso could have resulted from kicks. These findings appear to be consistent with the applicant's account of his arrest. On the basis of the available material, the Court is not in a position to determine exactly how the impugned injuries were inflicted on the applicant's face, his left arm and the side of his torso. It notes that the prosecutor did not explain the origin of those injuries, but found that she could not attribute them to the actions of the police officers. Instead, the prosecutor somehow suggested that the injuries had been the side-effect of the police operation that had had to be carried out swiftly. The Court cannot accept this assertion. It finds that neither the prosecutor nor the Government provided the evidence that the applicant had engaged in any conduct in the period following his immobilisation that might have justified the use of force against him which had resulted in the impugned injuries. Accordingly, the Government have failed to demonstrate that the use of force by the police during that stage of the police operation was strictly necessary.

78. The applicant also complained of the repeated use of an EDW and beating following his immobilisation in the flat and during his transport to the police station (see paragraph 20 above). In this connection the Court notes that it remains unclear how many times the officers used the EDW, but it appears from the arresting officer R's testimony that he did so more than once (see paragraph 32 above). The investigation did not elucidate this important fact, beyond the general finding that the weapon had been used in accordance with the procedure. The applicant claimed that the officers had used the EDW repeatedly on different parts of his body. That claim of repeated use appears to be corroborated by the forensic expert's finding that the angular abrasions on the applicant's back could have resulted from the use of this kind of weapon. The manner of the use of the EDW and the marks that it left on the applicant's back would correspond to the use of EDW in "contact" (drive-stun) mode. The CPT noted that this mode of use causes very intense, localised pain, with the possibility of burns to the skin (see paragraph 53 above).

79. In that regard the Court further observes that section 16 of the Police Act, as applicable at the time, allowed only the use of the force necessary to ensure compliance with orders. Furthermore, the relevant Ordinance provided that the police could use force only after giving a warning, unless a delay would cause danger to life, health or property (section 1(2) and (3)). It also stipulated in section 8 that an EDW could be applied if the use of other coercive measures was impossible or had been rendered ineffective (see paragraphs 49-51 above).

80. Having regard to the above, the Court finds that the use of force by the police during the period following the applicant's immobilisation was not shown to be indispensable by the applicant's conduct and thus

excessive. It further appeared incompatible with the Polish law, which required that its use was reserved for ensuring compliance with police orders.

81. Given the nature of the applicant's injuries and the associated physical and mental suffering, the Court finds that the treatment in question during the period following the applicant's immobilisation amounted to inhuman and degrading treatment.

82. Accordingly, there has been a violation of the substantive head of Article 3.

2. Procedural aspect of Article 3

(a) The applicant's submissions

83. The applicant maintained that the investigation in the present case had not been thorough. The refusal to accept that the applicant had been a victim of ill-treatment had been based exclusively on the police officers' statements. All the officers had testified in their own favour and had tried to evade responsibility. Their testimony should be approached with special caution; there was no basis for giving priority to it over the applicant's and other arrestees' statements.

(b) The Government's submissions

84. The Government submitted that on 27 June 2011 the applicant had lodged his complaint against the police officers and that proceedings had been initiated the same day. On 27 July 2011 a formal investigation had been opened following preliminary checks. The investigation had been transferred to the Bydgoszcz Regional Prosecutor's Office in order to ensure its independence.

85. The prosecutor had obtained all the essential evidence in the case, in particular statements from the police officers and a forensic opinion on the applicant's injuries. The prosecutor had analysed in detail all the evidence in the case and provided comprehensive justification for her decision. After hearing all the witnesses and taking into account the forensic opinion, the prosecutor found that the applicant had sustained the injuries as described in the opinion. Nonetheless, having regard to the totality of the evidence, the prosecutor could not unequivocally establish that the injuries had resulted from the officers' actions.

86. Furthermore, the applicant's allegations had been duly assessed by the District Court in its decision of 18 March 2013. The court had agreed with the prosecutor's findings and found the applicant's complaint unjustified. Overall, the investigation into the allegations of ill-treatment had been thorough and effective as required by Article 3.

(c) The Court's assessment

(i) General principles

87. The general principles with respect to the procedural obligation of the High Contracting Parties under Article 3 of the Convention to investigate acts of ill-treatment by State agents were likewise set out in detail in paragraphs 115-23 of the Court's judgment in *Bouyid* (cited above).

(ii) Application to the present case

88. The applicant's allegation, as set out in his complaint to the prosecuting authorities, that the police had subjected him to ill-treatment in the course of his arrest, was arguable. The allegation was made shortly after the events, and was supported by medical evidence and photographs, which showed significant bruising on his face and other parts of his body as well as burns on his back (see paragraph 18 above). The authorities were therefore required to carry out an effective investigation into the applicant's alleged ill-treatment.

89. The Court reiterates that the obligation to carry out effective investigations is not an obligation of results to be achieved, but of means to be employed. However, any deficiency in the investigation which undermines the investigation's ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of the required standard of effectiveness (see *Bouyid*, cited above, § 120).

90. The Court notes that the investigation did not give answers to a number of major questions arising in the case, specifically how exactly the officers had used force against the applicant, whether its use had been proportionate, and what the origin of the acknowledged injuries had been. These are significant flaws in the investigation into the alleged ill-treatment by the police, having regard to the injuries that the applicant sustained.

91. With regard to the use of the EDW, the investigation concluded that it had been used on the applicant with a view to overcoming his non-compliance with an order (see paragraph 35 above). However, for the Court the analysis of the use of the EDW remains inadequate. The investigation failed to determine the important factual circumstances of the case. In particular, the prosecutor failed to address the applicant's allegations concerning the repeated use of an EDW after the applicant had been immobilised on the floor and during his transport to the police station. The prosecutor also failed to deal with the allegations of beating during the applicant's transport and later in the course of police custody.

92. Furthermore, there was no proper analysis of the lawfulness of the use of EDW. The prosecutor found that EDW had been used "in accordance with the procedure", without providing any further details. The District Court, for its part, generally referred to section 16(1) and (2) of the Police Act and the Ordinance on the Use of Coercive Measures by the Police. The

authorities failed, however, to analyse compliance with the rules regulating the use of EDWs, in particular with section 8 of the Ordinance.

93. For the Court, the necessity of the use of EDW by the police during an arrest has to be investigated in a rigorous manner, given that the electroshock discharges applied in contact mode (known also as "drive-stun" mode) are known to cause intense pain and temporary incapacitation (see *Anzhelo Georgiev and Others v. Bulgaria*, no. 51284/09, § 75, 30 September 2014).

94. The authorities must always make a serious attempt to find out what happened, and should not rely on hasty or ill-founded conclusions to close their investigations (see *Bouyid*, cited above, § 123). However, in the instant case the authorities unconditionally accepted the statements of the eight police officers, members of the special anti-terrorist squad, without taking note of the fact that they obviously had an interest in the outcome of the case and in diminishing the extent of their responsibility (see *Lewandowski and Lewandowska*, cited above, § 73,). The investigation accorded considerably less weight to the applicant's version of events, supported by medical certificates, which was also consistent with the evidence of four other individuals arrested with the applicant. The prosecutor further failed to take into account the fact that prior to her decision the applicant and his alleged accomplices had been cleared of any involvement in the kidnapping.

95. Having regard to the foregoing, the Court concludes that the investigation in the instant case fell foul of the required standard of effectiveness.

96. It follows that there has been a breach of Article 3 of the Convention under its procedural head.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

97. 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

98. The applicant claimed 60,000 euros (EUR) in just satisfaction, without specifying under which head of damage he was claiming. He referred to the severity of the physical and mental suffering that he had experienced.

99. The Government argued that the claim was grossly exorbitant in the circumstances of the case and should be rejected. Alternatively, they asked the Court to assess the issue of compensation on the basis of its case-law in

respect of similar cases, with due regard to the national economic circumstances.

100. The Court has found a breach of both the substantive and procedural aspects of Article 3 in the applicant's case. Having regard to the circumstances of the case and making its assessment on an equitable basis, the Court awards the applicant EUR 25,000 in respect of non-pecuniary damage.

B. Costs and expenses

101. The applicant claimed an unspecified amount for the costs and expenses incurred before the domestic courts and for those incurred before the Court.

102. The Government submitted that the applicant did not specify the amount sought. They also argued that the applicant had failed to substantiate the costs claimed and had thus failed to satisfy the requirements of Rule 60 §§ 1-2 of the Rules of Court.

103. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. The Court notes that the applicant did not quantify his claim. He also did not submit any supporting documents showing that he had actually incurred costs in respect of his legal representation in the domestic or Strasbourg proceedings. In those circumstances, and bearing in mind the terms of Rule 60 §§ 2 and 3 of its Rules, the Court rejects the claim in respect of costs and expenses.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

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

3. *Holds* that there has been a violation of Article 3 of the Convention under its procedural head;

4. *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, EUR 25,000 (twenty-five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;

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

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

Done in English, and notified in writing on 23 May 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos	Linos-Alexandre Sicilianos
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Judges Turković and Eicke is annexed to this judgment.

L.-A. S.
A.C.

CONCURRING OPINION OF JUDGES TURKOVIĆ AND EICKE

Introduction

1. While we agree that in this case there has been both a procedural and a substantive violation of Article 3 of the Convention, in relation to the latter we fundamentally disagree both with the decision of the majority in § 75 "to distinguish two stages of the police operation" as well as the conclusion reached – or better the failure to reach a conclusion - in relation to the question whether the conduct of authorities during the "first stage" (also) amounted to substantive breach of Article 3.

2. Before setting out the reasons for our disagreement, we want to underline the importance of the work done by the Committee for the Prevention of Torture (CPT) in relation to the use of electrical discharge weapons ("EDWs") in the context of law enforcement operations and, in particular, when effecting an arrest (see §§ 53 and 54). This is only the second time that this Court has had the opportunity to address the use of EDWs (the other being Anzhelo Georgiev and Others v. Bulgaria, no. 51284/09, 30 September 2014) and this judgment rightly highlights and endorses the CPT's conclusions on their use set out in its 20th General Report, dated 26 October 2010, in the context of Article 3 of the Convention.

3. Having considered the evidence before the Court and the CPT's conclusions and applied this Court's consistent case-law, for the reasons identified below, it seems to us to be clear that in this case the Court had no choice but to conclude that there has been a substantive violation of Article 3 in relation to the whole operation or, if one were to adopt the majority's distinction, that there has been a clear violation of Article 3 during the "first stage" of the arrest and that the asserted inability of the majority to determine whether the use of force during this "first stage" was excessive is inconsistent with the Court's established case-law and, in fact, amounts to an unwarranted reversal of the burden of proof inconsistent with the fundamental values of a democratic society enshrined in Article 3.

Two stages

4. In § 75, the majority asserts that it is "necessary" to distinguish two stages of the police operation in question without, however, providing any explanation as to why it is "necessary" to do so. Such a distinction is not required or even suggested by the Court's case-law nor is there any suggestion in the judgment or the observations of the parties that the applicant himself sought to distinguish between two "stages" of the arrest.

5. In fact, the relevant aspects of the applicant's complaint before this Court are summarised in § 55 as being "of ill-treatment during his arrest". The fact that his complaint was, in fact, a single complaint concerned with the totality of the arrest operation is further underlined by his submissions set out in §§ 58 and 61:

> "When carrying out his arrest the police had used disproportionate force, despite the fact that the applicant had offered no resistance and followed their orders. The applicant claimed that in the course of his arrest the police officers had hit him in the face, head, back, and legs, kicked him in the face, fired on various parts of his body with the EDW, forced him to drink blood from the floor, and strangled him with a T-shirt folded around his neck. ...
>
> ...
>
> All those arrested submitted that the police had acted violently. They had not resisted, and had followed the orders given during their arrest. Thus, there had been no need to use the EDW or other coercive measures. Moreover, all those arrested had been taken completely by surprise by so many police officers storming the flat and using the stun grenades. This had eliminated any resistance on their part."

6. In light of the above, there is no reason we can see, and certainly no "necessity", for creating what appears to us to be an artificial distinction between two "stages" of the arrest operation rather than treating the whole operation (i.e. both "stages" of it) as a single operation which is the subject of a single complaint.

The "first stage"

7. Adopting for present purposes the distinction introduced by the majority, it is clear from the evidence in relation to the initial/early stages of the arrest (the "first stage") that the police operation in this case took place in the context of an investigation into a most serious criminal offence, namely kidnapping. That said, it also appears (though this is of absolutely no relevance to the assessment under Article 3) that the arrest was being effected "after the event", i.e. after part of the ransom had been paid and the victim had been released and there was not, therefore, unlike the explanations sought to be advanced in *Gäfgen v. Germany* [GC], no. 22978/05, ECHR 2010, any intention of saving the victim's life or preventing a deterioration of the victim's situation.

8. In assessing the applicant's complaint under Article 3 it is important to note that the judgment, in § 71 and by reference to the totality of the arrest operation and before drawing the distinction between the two "stages" of that operation, makes clear that "[h]aving regard to medical certificates issued in the course of the applicant's custody and the forensic opinion's conclusions, ... the existence of the applicant's injuries sustained in the course of his arrest is beyond dispute".

9. The evidence in relation to the "first stage" recorded in the judgment further makes clear that:

(a) although the arrest took place in a flat with a number of occupants, of the five persons in the flat, only two (the applicant and his girlfriend) were sought and arrested in connection with the kidnapping and the remaining three were, in fact, only arrested on suspicion of possession of drugs (§ 26);

(b) the arrest was carried out by 15 police officers, including 8 officers from a special anti-terrorist police squad who "were equipped with rifles, helmets and bullet-proof vests, and were wearing balaclavas and used a stun grenade" (§ 31) to enter the flat;

(c) (as the relevant police officer himself confirmed and the prosecutor established) at the time of the first use of the EDW on the applicant he was "lying down on the floor with his hands under his body" and one of the officers was "sitting on the applicant". Nevertheless, it is recorded that, according to his own evidence, that same officer nevertheless decided to use the EDW on the applicant "given the risk that [he] might have a firearm and seeing that [he] had refused to be handcuffed" (§ 32); and

(d) (as corroborated by one of the other occupants of the flat) after the police had ordered everyone to get on the floor, the applicant "had been kicked and hit by three police officers, and ... the EDW had been used on him" (§ 25).

10. The general principles underlying this Court's approach to an allegation of treatment contrary to the requirements off Article 3 by someone wholly or largely within the control of the police are well known and the judgment understandably limits itself (§ 67) to a cross reference to the relevant paragraphs in the Court's recent judgment in *Bouyid v. Belgium* [GC], no. 23380/09, 28 September 2015.

11. However, in light of the majority's conclusion that "[h]aving regard to the conflicting evidence as well as the shortcomings in the investigation (...), the Court is unable to determine whether the use of force by the police during the first stage of the operation was excessive" (§ 76) it is worth setting out what are, for me, the key elements of the Court's approach in relation to the assessment of the evidence in such cases:

"Allegations of ill-treatment contrary to Article 3 must be supported by appropriate evidence. To assess this evidence, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (...).

On this latter point the Court has explained that where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. The burden of proof is then on the Government to provide a satisfactory and convincing explanation by producing evidence establishing facts which cast doubt on the account of events given by the victim (...). In

the absence of such explanation, the Court can draw inferences which may be unfavourable for the Government (...). That is justified by the fact that persons in custody are in a vulnerable position and the authorities are under a duty to protect them (see, among other authorities, Salman, cited above, § 99). (Bouyid at §§ 82-83, underlined emphasis added).

The Court notes that Article 3 does not prohibit the use of force in certain well-defined circumstances. However, such force may be used only if indispensable and must not be excessive (...). When a person is confronted by the police or other State agents, recourse to physical force which has not been made strictly necessary by the person's own conduct diminishes human dignity and is in principle an infringement of the rights set forth in Article 3 of the Convention (...). Such a strict proportionality approach has been accepted by the Court also in respect of situations in which an individual was already under the full control of the police (...). The Court attaches particular importance also to the type of injuries sustained and the circumstances in which force was used (...).

Where injuries have been sustained at the hands of the police, the burden to show the necessity of the force used lies on the Government (...). (Anzhelo Georgiev, §§ 66 - 67, underlined emphasis added)."

12. When applying these principles to the facts of this case, as summarised above, it is further important to bear in mind

(a) the view of the CPT, as recorded in § 70 of its 2010 Report (not reproduced in the judgment but reiterated by the CPT in § 22 of its report on its visit to Poland in 2017, judgment § 54) that "the use of EDW should be limited to situations where there is a real and immediate threat to life or risk of serious injury. Recourse to such weapons for the sole purpose of securing compliance with an order is inadmissible. Furthermore, recourse to such weapons should only be authorised when other less coercive methods (negotiation and persuasion, manual control techniques, etc) have failed or are impracticable and where it is the only possible alternative to the use of a method presenting a greater risk of injury or death"; and

(b) the fact that, in § 72 of that Report (judgment § 53), the CPT gives as its example of "misuse" of EDWs "the repeated administration of electric shocks to persons lying on the ground".

13. In light of the evidence before this Court, including that given by the police officer in question, and having regard to the guidance given by the CPT, it is clear that, absent a "a satisfactory and convincing explanation" from the Respondent Government, there are here "strong presumptions of fact" leading to the inevitable inference that the force used was excessive and that it amounted to a substantive violation of Article 3 of the Convention.

14. No such "satisfactory and convincing explanation" has, however, been provided by the Respondent Government or the domestic authorities. On the contrary, as the judgment records in § 76, the Government sought to

justify the use of the EDW, on an individual lying on the floor with his hands under his body, essentially on the basis of "the applicant's refusal to follow police orders". As the CPT's conclusions make clear, such an explanation cannot, on its own, be sufficient and, in principle, the repeated use of an EDW on a person lying on the ground is a misuse of such a weapon. However, no further explanations or attempts at justifying the use of the EDW was provided. In fact, as the judgment further notes in §§ 90-95, the domestic investigation, and therefore by necessity the Respondent Government before this Court, "did not give answers to a number of major questions arising in the case, specifically how exactly the officers had used force against the applicant, whether its use had been proportionate and what the origin of the acknowledged injuries had been" and "failed to address the applicant's allegations concerning the repeated use of an EDW after the applicant had been immobilised on the floor".

15. As a consequence, it appears to us that the only option open to the Court was to conclude, as it had done in *Anzhelo Georgiev*, § 78, that the authorities failed to discharge the burden satisfactorily to disprove the applicants' version of the events and did not furnished convincing arguments to justify the degree of force used against the applicant and that it is therefore satisfied that during "first stage" of the police operation of 11 June 2011 the police subjected the applicant to treatment incompatible with Article 3 of the Convention.

16. For the majority to assert that it is "unable" to determine this issue and to refuse to reach a final conclusion about whether the treatment during the "first stage" of the arrest, a question which only falls to be answered because the majority chose to distinguish between different "stages" of the arrest, is not only inconsistent with the Court's established approach under Article 3 to cases such as the present but amounts to an unwarranted reversal of the burden of proof in relation to the justification of force used in relation to an individual under the control or in the custody of the authorities, inconsistent with the fundamental values of a democratic society enshrined in Article 3.