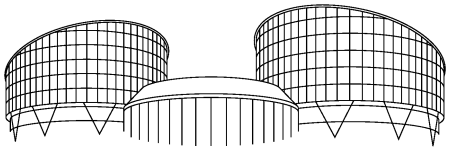

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

# CASE OF ABDU v. BULGARIA

*(Application no. 26827/08)*

JUDGMENT
(Extracts)

STRASBOURG

11 March 2014

**FINAL**

11/06/2014

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*

**In the case of Abdu v. Bulgaria,**

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

Ineta Ziemele, *President,*
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Paul Mahoney,
Krzysztof Wojtyczek, *judges,*
and Françoise Elens-Passos, *Section Registrar,*

Having deliberated in private on 11 February 2014,

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

# PROCEDURE

1. The case originated in an application (no. 26827/08) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Sudanese national, Mr Nasredin Rabi Abdu ("the applicant"), on 15 April 2008.

2. The applicant was represented by Mrs M. Ilieva, a lawyer practising in Sofia. The Bulgarian Government ("the Government") were represented by their Agents, Mrs M. Kotseva and Mrs M. Dimova, of the Ministry of Justice.

3. The applicant alleged that the authorities had failed in their obligation to conduct an effective investigation into the racist attack against him.

4. On 9 September 2010 the application was communicated to the Government.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1968 and lives in Sofia.

6. On 13 May 2007, at around 7.30 p.m., the applicant and one of his friends, Z.N., also a Sudanese national, were involved in a fight with two Bulgarian youths outside a shopping centre in central Sofia. The two Bulgarian youths, M.V. and R.G., fled before the police arrived, but they were arrested and remanded in custody for breach of the peace

(*хулиганство*). The report drawn up by the police officers described the two Bulgarian youths as skinheads, adding that they were already known to the police for various offences such as breach of the peace, theft, burglary and drug trafficking.

7. The police initiated a preliminary investigation. The applicant and his friend, the two Bulgarian youths and an eyewitness were interviewed. According to the applicant's submissions, Z.N. and he had been coming out of the shopping centre when they were attacked by the two young men. The first Bulgarian, who had a shaved head, had thrown the applicant on to the ground and kicked him. The applicant had then got up and punched him back. The two Bulgarians had insulted them by calling them "Negros" (негри), also shouting "dirty Negros, what are you doing here?". The second Bulgarian, who had long hair, had brandished a knife and threatened Z.N. with it. The applicant and Z.N. had fled, and had met a police patrol, which had started looking for the two Bulgarians and managed to arrest them a few minutes later. Z.N.'s statements broadly corroborated those of the applicant.

8. According to M.V., the fight had begun because one of the Sudanese youths had shoved him with his shoulder when they had passed each other at the entrance to the shopping centre. He said that he had not paid any attention to what his friend R.G. had been doing. The fighting had stopped at some stage and his friend and he had fled when someone warned them that the police were on their way.

9. R.G. confirmed that one of the Sudanese men had pushed his friend M.V. as he passed by and that that was when the fight had started. Blows had been exchanged on both sides, and M.V. had had his face bloodied. At one stage R.G. had taken out his knife, which had put an end to the fight, and the two groups had then gone their separate ways. M.V. and R.G had been arrested by the police a few minutes later.

10. The eyewitness stated that he had seen one of the Bulgarians, the one with the shaved head, trip up one of the Sudanese men, who had then riposted with a punch. A general fight had then broken out among the four persons involved.

11. The applicant was examined by a forensic medical expert on 15 May 2007. According to the medical certificate drawn up on that occasion, the applicant had a swelling of the nasal base, an approximately one-centimetre-long abrasion on the left-hand side of his nose, covered with a scab, a swollen finger on his left hand and a contusion to the right knee. According to the medical certificate, the injuries noted had caused physical pain. They had resulted from blows struck by blunt instruments and could have been occasioned in the manner described by the applicant, namely in the course of a fight.

12. At the end of the investigation the police transmitted the evidence gathered to the public prosecutor for a decision on instituting a criminal

prosecution for racist violence pursuant to Article 162 § 2 of the Criminal Code.

13. By an order of 15 June 2007 the district prosecutor decided not to bring a criminal prosecution. He considered that while a fight had indeed occurred among the four men, it had not been established that M.V. and R.G. had acted for reasons linked to Z.N's and the applicant's racial origins. The causes of the altercation were unclear, and the three versions of the facts – by the applicant and Z.N., by M.V. and R.G., and by the eyewitness –conflicted as to how and by whom the fight had been started. The two Sudanese men had claimed that they had been called "dirty Negros", but the fact that it had been precisely their racial origin that had motivated the violence had not been corroborated by any other piece of evidence. The eyewitness, in particular, had not mentioned having heard any exchanges between those involved. The prosecutor concluded that in the absence of evidence of the specific motivation provided for by law, the offence had not been made out.

14. The applicant lodged an appeal with the higher prosecutor against the decision not to prosecute. He submitted that the investigation had been incomplete and that the investigators should have questioned M.V. and R.G. about their motivation and their reasons for wearing black clothing, "Ranger-style" military shoes and even Nazi insignia, as he remembered seeing such insignia on a T-shirt worn by one of the assailants. According to the applicant, the police officers who had attended the scene should also have been interviewed about how M.V. and R.G. had been dressed at the time of their arrest. Similarly, the investigators should have explicitly asked the eyewitness whether he had heard the exchanges between those involved, which they had not.

15. On 15 October 2007 the Sofia public prosecutor's office confirmed the district prosecutor's decision. The public prosecutor held that there was nothing to suggest that the violence had been perpetrated on the grounds of the applicant's racial origin as the sole fact that he was black was insufficient to make out the offence.

16. By a letter of 29 July 2008 the applicant's lawyer asked for a copy of the criminal case file, without providing reasons for her request. On 6 August 2008 the district prosecutor refused to supply the copies requested on the grounds that the lawyer had already been notified of the prosecutor's decisions and that now that the appeal had been dismissed, the case was closed.

...

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLES 3 AND 14 OF THE CONVENTION REGARDING THE INEFFECTIVENESS OF THE INVESTIGATION

28. The applicant complained that the authorities had failed in their obligation to conduct an effective investigation into the racist attack which he had suffered, and in particular that they had not taken sufficient action to establish a possible racist motive for the assault. He relied on Articles 3 and 14 of the Convention, which read as follows:

**Article 3**

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

**Article 14**

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

...

### B. Merits

#### *1. The parties' submissions*

32. The Government submitted that the treatment inflicted on the applicant had not attained the minimum level of severity for the application of Article 3. They also considered that the authorities had adopted all the requisite investigative measures to shed light on any possible racist motivation for the violence inflicted on the applicant. They pointed out that the police officers had attended the scene and apprehended those responsible, that an investigation had been conducted during which all the witnesses had been questioned, and that prosecution for racist violence had been considered. Nevertheless, according to the evidence obtained during the investigation, only the applicant and his friend had submitted that insults such as "dirty Negros" had been uttered, which circumstance had not been confirmed by the sole eyewitness or by any other evidence.

33. The Government confirmed the determination of the Bulgarian authorities to shed light on and prosecute all acts of racist violence, but submitted that the existence of such motivation had not been established in the present case. They reiterated the arguments put forward in the context of the objection as to non-exhaustion of domestic remedies to the effect that

the applicant could have brought criminal proceedings for minor injuries or civil proceedings against those responsible.

34. The applicant contested the Government's submissions. He submitted that even if the physical injuries inflicted on him were not very severe, the assessment of the severity threshold required under Article 3 of the Convention should take account of the racist motive for the violent acts and the possible effects of such motivation, namely feelings of fear, anguish and inferiority.

35. In connection with the effectiveness of the investigation conducted, the applicant maintained that the prosecutor had ignored the evidence gathered by the police investigation pointing to a racist motive for the attack. He stressed that between the years 2000 and 2009, no convictions had ever been made on the basis of Article 162 and the other provisions of the Criminal Code against discrimination offences and hate crime.

*2. The Court's assessment*

**a) The severity of the treatment inflicted on the applicant**

36. The Court reiterates that in order to fall within the scope of Article 3, ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative by definition, and depends on all the circumstances of the case, including the duration of the ill-treatment, its physical and mental effects and, in some cases, the victim's sex, age and state of health. Further factors to be taken into account include the purpose of the ill-treatment and the underlying intention or motivation (see, for example, *El Masri v. "the former Yugoslav Republic of Macedonia"* [GC], no. 39630/09, § 196, ECHR 2012). The Court has considered some types of treatment "inhuman", particularly where it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering, and also "degrading" because it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them (see, among other authorities, *Labita v. Italy* [GC], no. 26772/95, § 120, ECHR 2000-IV).

37. Even where the victim did not suffer serious or lasting physical injuries, the Court has held that corporal punishment inflicted on an adolescent should be described as "degrading" in so far as it constituted an assault on "precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity" (see *Tyrer v. United Kingdom*, 25 April 1978, § 33, Series A no. 26). By the same token, in a case concerning harassment of a person suffering from physical and mental disabilities, the Court ruled that the feelings of fear and helplessness caused by the ill-treatment were sufficiently serious to attain the level of severity required to fall within the scope of Article 3 of the Convention, even though the applicant had only suffered physical injuries

on one occasion (see *Đorđević v. Croatia*, no. 41526/10, § 96, ECHR 2012). The Court has on several occasions examined from the angle of Article 3 situations in which the applicants had not suffered any physical injuries (see, for example, *Gäfgen v. Germany* [GC], no. 22978/05, § 131, ECHR 2010, concerning threats of torture, and *Kurt v. Turkey*, 25 May 1998, §§ 133-34, *Reports of Judgments and Decisions* 1998-III, relating to the disappearance of a relative).

38. Furthermore, the former European Commission on Human Rights accepted that discrimination based on race could, in certain circumstances, of itself amount to "degrading treatment" within the meaning of Article 3 (see *East African Asians v. United Kingdom*, nos. 4403/70 and others, Commission report of 14 December 1973, Decisions and Reports 78, pp. 57 and 62, §§ 196 and 207). Discriminatory remarks and racist insults must in any event be considered as an aggravating factor when considering a given instance of ill-treatment in the light of Article 3 (see *Moldovan and Others v. Romania (no. 2)*, nos. 41138/98 and 64320/01, § 111, ECHR 2005-VII (extracts), and *B.S. v. Spain*, no. 47159/08, § 41, 24 July 2012).

39. In the present case the applicant and his friend were involved in a fight with two young men who, according to the applicant violently attacked them. During the fight blows were exchanged and the applicant and his friend were threatened with a knife. The medical report mentions several injuries to the applicant's body – a swelling of the nasal base, an approximately one-centimetre-long abrasion on the left-hand side of the nose, covered with a scab, a swollen finger on his left hand and a swollen right knee (see paragraph 11 above). These physical after-effects are compounded by a possible racist motive for the violence perpetrated: the applicant submitted that he had been the target of racist insults, and the police reports themselves had described the two youths involved in the fight as skinheads. The Court considers that in the light of all these factors, particularly the infringement of human dignity constituted by the presumed racial motive for the violence, treatment such as that alleged by the applicant falls within the scope of Article 3 of the Convention (see, *mutatis mutandis*, *B.S. v. Spain*, cited above, § 41).

**b) Compliance with the State's positive obligations**

*(i) General principles*

40. The Cour reiterates that the obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires them to to take steps to ensure that individuals within their jurisdiction are not subjected to ill-treatment, even administered by private individuals (see *A. v. the United Kingdom*, 23 September 1998, § 22, *Reports*, 1998-VI; *Z. and Others v. the United*

*Kingdom* [GC], no. 29392/95, §§ 73-75, ECHR 2001-V; and *M.C. v. Bulgaria*, no. 39272/98, § 149, ECHR 2003-XII).

41. Such protection necessitates in particular establishing a legislative framework to shield individuals adequately from treatment incompatible with Article 3 (see *A. v. the United Kingdom*, cited above, § 24; *M.C. v. Bulgaria*, cited above, § 153; and *Nikolay Dimitrov v. Bulgaria*, no. 72663/01, § 66, 27 September 2007). The positive obligations on States may, in the case of certain very serious acts committed by individuals, require the enactment of criminal provisions (see *M.C. v. Bulgaria*, §§ 150-153, and *Nikolay Dimitrov*, § 67, both cited above).

42. Furthermore, where an individual claims on arguable grounds to have suffered acts contrary to Article 3, that Article requires the national authorities to conduct an effective official investigation to establish the facts of the case and identify and punish those responsible. Similar requirements are also set out in the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment .... The Court's case-law states that these obligations apply whatever the status of the persons charged, including private individuals (see *Šečić v. Croatia*, no. 40116/02, § 53, 31 May 2007, and *Nikolay Dimitrov*, cited above, § 68).

43. The obligation to conduct an effective investigation is an obligation not of result but of means: the authorities must take the reasonable measures available to them to secure evidence concerning the incident at issue. A requirement of promptness and reasonable expedition is also implicit in this context (see *Šečić*, § 54, and *Nikolay Dimitrov*, § 69, both cited above).

44. Moreover, when investigating violent incidents triggered by suspected racist attitudes, the State authorities are required to take all reasonable action to ascertain whether there were racist motives and to establish whether feelings of hatred or prejudices based on a person's ethnic origin played a role in the events. Treating racially motivated violence and brutality on an equal footing with cases lacking any racist overtones would be tantamount to turning a blind eye to the specific nature of acts which are particularly destructive of fundamental human rights. A failure to make a distinction in the way in which situations which are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention (see *Šečić*, cited above, §§ 66-67; *Beganović v. Croatia*, no. 46423/06, §§ 93-94, 25 June 2009; and, *mutatis mutandis*, *Seidova and Others v. Bulgaria*, no. 310/04, § 70, 18 November 2010, and *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 160, ECHR 2005-VII). The said obligation also applies where a given type of treatment incompatible with Article 3 is inflicted by a private individual (see *Šečić*, § 67, and *Beganović*, § 94, both cited above).

45. In practice, of course, it is often extremely difficult to prove racist motivation. The obligation on the respondent State to investigate possible racist overtones to an act of violence is an obligation of means rather than

an obligation to achieve a specific result; the authorities must take all reasonable measures having regard to the circumstances of the case (see *Šečić*, § 66; *Beganović*, § 93; *Seidova and Others*, § 70; and *Nachova and Others*, § 160, all cited above).

46. The obligation on the authorities to seek a possible link between racist attitudes and a given act of violence is thus part of the responsibility incumbent on States under Article 14 of the Convention taken in conjunction with Article 3, but it is also an aspect of the procedural obligations flowing from Article 3 of the Convention. Owing to the interplay of the two provisions, issues such as those raised by the present case may fall to be examined under one of the two provisions only, with no separate issue arising under the other, or may require examination under both Articles. This is a question to be decided in each case depending on the facts and the nature of the allegations made (see, *mutatis mutandis*, *Nachova and Others*, cited above, § 161, and *B.S. v. Spain*, cited above, § 68). In the present case, in view of the allegations made by the applicant to the effect that the ineffectiveness of the investigation stems precisely from the fact that the authorities insufficiently investigated the racist aspects of the acts of violence, the Court considers that the complaint should be considered from the angle of both the provisions in question – Article 3 taken separately and Article 14 in conjunction with Article 3.

*(ii) Application of these principles to the present case*

47. The Court observes that under Article 162 of the Bulgarian Criminal Code, violence committed against others for racial reasons is a criminal offence punishable by imprisonment. In enacting that provision the Bulgarian authorities complied with the obligation flowing from the International Convention on the Elimination of All Forms of Racial Discrimination, under which the States Parties undertook to make violence based on racial considerations a criminal offence .... There can therefore be no doubt that the provisions of Bulgarian criminal law prohibit the ill-treatment complained of by the applicant, who does not in fact complain about the existing legal framework. Consequently, the Court cannot criticise the Bulgarian authorities for an omission in establishing legislation geared towards preventing ill-treatment with racist overtones.

48. Moving on to the obligation to conduct an effective investigation, the Court notes that a preliminary investigation was promptly initiated after the incident, during which the applicant, his friend Z.N., the two young men involved, M.V. and R.G., and an eyewitness were questioned. The evidence gathered during the investigation and the medical certificate issued to the applicant were transmitted to the public prosecutor for a decision on whether the two Bulgarian youths should be prosecuted for racist violence under Article 162 § 2 of the Criminal Code. However, the prosecution decided that the offence had not been made out and, in particular, that the

racist motivation for the violence had not been established. While it is not for the Court to rule on the application of domestic law or adjudicate on the individual guilt of persons charged with offences, it must nevertheless review whether and to what extent the competent authorities, in reaching their conclusion, may be deemed to have submitted the case to the careful scrutiny required by the procedural obligations of the Convention (see, *mutatis mutandis*, *Vasil Petrov v. Bulgaria*, no. 57883/00, § 78, 31 July 2008).

49. In this connection, the Court notes that the prosecuting authorities concentrated their investigations and analyses on whether the two Sudanese men or the two Bulgarians had started the fight. They thus confined themselves to establishing the *actus reus* of the offence governed by Article 162 § 2 of the Criminal Code, that is to say the violence perpetrated, merely noting the lack of evidence that the violence had been motivated by racist considerations. The authorities accordingly did not deem it necessary to question the eyewitness explicitly on any exchanges he might have heard during the fight or to question the two Bulgarian youths about any possible racist motivation for their acts. Yet right from the beginning of the investigation the applicant had claimed that he suffered racist insults, and the police report described the two Bulgarians as skinheads, well-known for their extremist, racist ideology (see *Šečić*, cited above, § 68). The applicant also highlighted these shortcomings in the investigation in the appeal which he lodged against the decision not to prosecute, drawing the prosecutor's attention to the way in which the two youths were dressed and the need to question them about their motives, but these requests were ignored by the higher prosecutor (see paragraphs 7 and 14-15 above).

50. In view of the foregoing considerations, the Court considers that having regard to the specific substantiated allegations made by the applicant during the criminal proceedings, the competent authorities had plausible evidence at their disposal suggesting possible racist motivation for the violence inflicted on the applicant and failed in their obligation to take all reasonable measures to investigate a possible racist motive for the violence which occurred.

51. The Government, however, had contended that other legal remedies had been open to the applicant which he had not used and which could have fulfilled the procedural obligations under the Convention, such as a private prosecution for minor injuries or claiming damages in tort *vis-à-vis* the two persons responsible, M.V. and R.G. (paragraphs 28 and 32 above). The Court observes that, in connection with the physical injuries inflicted on the applicant, a private prosecution in respect of minor bodily harm brought by the applicant himself, would help establish the facts and identify and punish those responsible, and therefore be deemed to meet the needs of Article 3. However, such proceedings would not cover the alleged racist insults or the racist motivation for the violence against the applicant, which are a

fundamental part of the applicant's complaint. As to the possibility of bringing an action for damages against those responsible, the Court observes that such an action, which could lead to payment of compensation but not to the prosecution of those responsible, would not fulfil the State's procedural obligations under Article 3 in a case of assault (see *Biser Kostov v. Bulgaria*, no. 32662/06, § 72, 10 January 2012). The legal remedies mentioned by the Government therefore cannot be considered, under the circumstances of the present case, capable of fulfilling the State's procedural obligations, and the Court must dismiss the Government's objection as to non-exhaustion of domestic remedies in this regard.

52. Furthermore, the Court notes the findings of various national and international authorities concerning the failure by the Bulgarian authorities effectively to implement provisions punishing cases of racist violence. In its 2009 report, the European Commission against Racism and Intolerance of the Council of Europe noted that when complaints are filed concerning racist assaults "little action is taken", and drew the authorities' attention to the need to deal effectively with such complaints .... The UN Committee on the Elimination of Racial Discrimination has also observed that "the criminal provisions relating to racist acts are still infrequently applied" .... More recently, in 2013, the Ombudsman of the Republic of Bulgaria voiced his concern about the increasing numbers of race hate crimes, and called on the authorities not to "reduce such acts to offences of public disorder ... but to investigate possible hate crimes".

53. In the light of the foregoing observations, the Court concludes that there has been a violation of Article 3 under its procedural aspect, taken separately and in conjunction with Article 14 of the Convention.

...

## FOR THESE REASONS, THE COURT

...

3. *Holds*, by five votes to two, that there has been a violation of Article 3 under its procedural aspect, taken separately and in conjunction with Article 14, and *rejects* the objection as to non-exhaustion of domestic remedies raised by the Government;

...

Done in French, and notified in writing on 11 March 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

| | |
|---|---|
| Françoise Elens-Passos | Ineta Ziemele |
| Registrar | President |

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges P. Mahoney and K. Wojtyczek is annexed to this judgment.

I.Z.
F.E.P.

# PARTIALLY DISSENTING OPINION OF JUDGES MAHONEY AND WOJTYCZEK

1. We can only record our complete agreement with our colleagues in their condemnation of racism, which infringes human dignity and therefore constitutes a particularly insidious form of human rights violation; further, we fully share their view that the States, by virtue of the various relevant international instruments, must adopt effective measures to combat this social scourge.

On the other hand, we disagree with the majority on some questions of interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms. We must stress, first of all, that the mandate of the European Court of Human Rights is defined in a restrictive manner in Article 19 of the Convention. The Court's role is to ensure the observance of the engagements undertaken by the High Parties Contracting in the Convention and the Protocols thereto. The Convention and the Protocols lay down a collective guarantee on some of the universally recognised human rights, establishing a minimum standard of protection for the selective catalogue of rights and freedoms which they set out, which minimum standard is binding on all States Parties. While the domestic legislation of the States and other international instruments may impose higher standards of protection or make good any omissions in the human rights protection afforded by the Convention and the Additional Protocols thereto, this does not in itself extend the mandate assigned to the Court.

2. Article 3 of the Convention prohibits torture and inhuman or degrading treatment or punishment. This provision requires the States Parties to the Convention not only to refrain from acts prohibited by the provision but also to guarantee effective protection against such acts, whether they are committed by public officials or private individuals. However, the inhuman or degrading nature of the act must be assessed in the light of all the circumstances of the case. In order for ill-treatment to fall within the scope of Article 3, it must attain a minimum level of severity. It follows that there may be types of violence which, although morally reprehensible and very often condemned by domestic legislation in the Contracting States, do not fall within Article 3 de la Convention (see *Ireland v. United Kingdom*, 18 January 1978, § 167, Series A no. 25). Moreover, the standard applicable to the public authorities must automatically be more stringent than that applied in interpersonal relations. Consequently, the threshold for inhuman or degrading treatment is lower for acts committed by the public authorities than for acts committed by private individuals. Similarly, in the latter case, according to the Court's well-established case-law, the obligation to investigate is only confirmed if there

is sufficient evidence to corroborate a suspicion of offences of a specific level of severity committed by private individuals.

In the present case, the applicant acknowledges that the injuries he received were not particularly severe. Moreover, there are four versions of events, namely those of the applicant, M.C., R.G. and the eyewitness, the latter having confirmed none of the other three versions. In our view, under the particular circumstances of the case, the minimum threshold for the obligation to investigate deriving from Article 3 of the Convention was not attained. In this connection, we do not think that the quotation (in paragraph 39 *in fine* of the judgment) from *B.S. v. Spain* (no. 47159/08, §§ 39-40, 24 July 2012) corroborates the conclusion reached by the majority because, unlike the acts complained of in *B.S.*, the racist abuse denounced in the present case was not attributable to any State officials exercising supervision over the victim.

We agree that motivation, particularly racist motivation, is an important factor in assessing the severity of (ill-)treatment in the light of Article 3 of the Convention. Under the circumstances of the present case, however, the reliance by the majority on a putative racist motivation in order to transform a case of minor violence inflicted by private individuals into a case of ill-treatment liable to attain the severity threshold required by Article 3 of the Convention does not constitute a convincing argument. In our view, by adopting this approach the majority, while seeking, commendably, to make good an omission in the protection provided by the Convention, has distorted the import of Article 3.

3. The Bulgarian authorities have concluded that the individuals involved in the violence did not commit any offence. However, the Court judgment solely finds a violation of Article 3 of the Convention on the grounds that no investigation had been conducted into the possible racist motivation of the violence carried out. The majority neither pronounce on the investigation into the violence as such nor contest the facts established on completion of the investigation. This raises questions about the approach adopted by the majority. The first question which logically arises is whether the applicant was the victim of an assault. Only after such an assault has been substantiated can the reason for its occurrence be examined. The obligation to investigate the motive for the violence carried out only eventuates after the investigators have established the assault. A finding cannot be made against a State for failing to investigate possible racist motives for an assault without first of all substantiating the assault, or at least noting shortcomings in the investigation into the assault itself.

4. The majority highlight a range of international documents bearing witness to the problem of racism in Bulgaria in an attempt to demonstrate the peculiarity of the situation in this State. The particularly worrying nature

of the situation in Bulgaria is used to vindicate lowering the threshold for the applicability of Article 3 of the Convention. We do not find this approach very convincing because unfortunately racism is a general problem that affects all Council of Europe countries. Moreover, the documents quoted concern general problems and seem irrelevant to the assessment of the facts in the present case.

5. We voted differently on the question of compensation. Judge Mahoney aligned with the majority in voting to award damages to the applicant, while Judge Wojtyczek voted against.