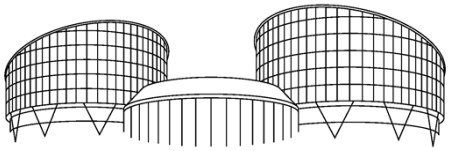

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF B.Ü. v. THE CZECH REPUBLIC

(Application no. 9264/15)

JUDGMENT

Art 3 (procedural and substantive) • Ineffective investigation into asylum seeker's allegations of ill-treatment by police while detained at airport • Court unable to conclude beyond reasonable doubt, partly due to investigation shortcomings, that use of force to restrain applicant was excessive

STRASBOURG

6 October 2022

FINAL

06/01/2023

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

In the case of B.Ü. v. the Czech Republic,

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

Síofra O'Leary, *President,*
Mārtiņš Mits,
Stéphanie Mourou-Vikström,
Lado Chanturia,
Arnfinn Bårdsen,
Mattias Guyomar,
Kateřina Šimáčková, *Judges,*
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the application (no. 9264/15) against the Czech Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr B.Ü. ("the applicant"), on 17 February 2015;

the decision to give notice to the Czech Government ("the Government") of the complaints raised under Article 3 of the Convention;

the decision not to have the applicant's name disclosed (Rule 47 § 4);

the decision not to give notice of the present application to the Turkish Government having regard to the Court's findings in *I v. Sweden* (no. 61204/09, 5 September 2013);

the parties' observations;

Having deliberated in private on 6 September 2022,

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

INTRODUCTION

1. The present application concerns ill-treatment allegedly suffered by the applicant whilst in the hands of Czech police officers and in a detention facility for foreigners, as well as a lack of effectiveness of the subsequent investigation by the domestic authorities. The applicant relied on Articles 3 and 13 of the Convention.

THE FACTS

2. The applicant was born in 1975 and lived, at the time of lodging his application and before being extradited to the Republic of Türkiye in 2016, in the Czech Republic. He now lives in Türkiye. He was represented by Ms E. Drhlíková, a lawyer.

3. The Government were represented by their Agent, Mr V.A. Schorm, of the Ministry of Justice.

4. The facts of the case may be summarised as follows.

I. INCIDENTS OF 16 OCTOBER 2013 AND DEVELOPMENTS OF THE FOLLOWING DAYS

5. On 16 October 2013 the applicant was removed from Switzerland to the Czech Republic. Upon his arrival at Prague Airport at 11.30 a.m., the Aliens Police Directorate took him into custody, for the purposes of proceedings regarding his administrative expulsion, and held him on the premises at Prague Airport.

6. On 16 October 2013 at 11.35 a.m., the applicant was subjected to a personal search (a "strip search" according to him, which the Government denied) and a search of his belongings. He was found to possess a number of medications which were temporarily seized.

7. When first interviewed in the presence of an interpreter, at 1.30 p.m., the applicant stated that his mental and physical health was good and that he did not take any medication. During another interview conducted at 2.30 p.m., he was informed about the opening of proceedings regarding his administrative expulsion; on that occasion, he reaffirmed that he was feeling well but stated that he regularly took sedatives and analgesics. The applicant alleged that after that interview he had been subjected to another strip search on the premises near the toilets, which the Government denied.

8. Subsequently the Aliens Police issued a decision on the applicant's expulsion, accompanied by a prohibition on his re-entering the territory of the European Union member States for five years, as well as an order for the applicant's detention in the Bělá-Jezová Detention Centre for Foreigners (the "DCF Bělá-Jezová"); because of the applicant's aggressiveness, the Aliens Police proposed that he be placed there under a strict regime.

9. At 7.30 p.m. the police officers informed the applicant that he would be transferred to the DCF Bělá-Jezová.

10. The parties differ in their accounts of the following events.

A. The applicant's version of events

11. According to the applicant, he feared another strip search, which he tried to explain to the police officer, who told him to shut up and punched him in the jawbone, and then hit him in the belly with a truncheon. When he screamed out in pain, two other police officers arrived and started to kick him and to beat him with truncheons. He managed to escape to the toilets where he locked himself in, which resulted in the police officers using tear gas. Unable to breathe and with his eyes closed, he fell on a mirror and broke it. The police officers then dragged him out of the toilets whilst beating him. He lost consciousness and woke up covered with blood and tightly handcuffed, while the police officers were trying, in front of passing travellers, to put him in a wheelchair in order to get him into an ambulance. When he protested and tried to attract the public's attention, he was again beaten with truncheons.

The police officers again used tear gas and handcuffed him, after which he was transferred to Motol Hospital for medical examination (see paragraph 18 below).

12. The applicant's account of events was supported by an affidavit of Ms B.S., a lawyer at the Organization for Aid to Refugees, who on 17 January 2014 reportedly overheard a police officer describing the incident involving the applicant at the airport to a social worker and a nurse. According to the affidavit, the police officer had hit the applicant when he had disagreed with another search of his belongings and caused a nasal fracture, a fact about which the police officer seemed to boast.

B. The Government's version of events

13. In their description of events, the Government relied on reports drawn up between 16 October 2013 and 5 November 2013 by the police officers involved.

1. Incident no. 1

14. According to the Government, when informed at 7.30 p.m. about his transfer to the DCF Bělá-Jezová, the applicant reacted aggressively and started to verbally attack the police officers present at that time, namely J.S., M.S. and P.Š., and that is why he was handcuffed to a belt. After asking the police officers to remove his handcuffs in order to go to the toilets, the applicant ran towards the mirror, broke it with his shoulder (or head, according to M.S.) and tried to injure himself with shards of glass. Following an unsuccessful request to the applicant to stop, J.S. resorted to coercive measures, that is grasping and kicking him, and using tear gas, in order to prevent the applicant from harming himself, and handcuffed him again. No injuries were caused to the applicant during that incident.

2. Incident no. 2

15. At around 7.45 p.m., the police officers already involved, J.S., M.S. and P.Š., were joined by P.M. and P.K. At that moment, the applicant managed to remove his handcuffs, attacking the police officers both verbally and physically. At 7.55 p.m., the police officers therefore resorted to coercive measures such as kicking and grasping the applicant, and managed to handcuff him again. According to the police officers involved, the applicant injured himself when he was struggling and hitting his head on the ground.

3. Incident no. 3

16. The applicant's handcuffs were removed again at 8.15 p.m. upon the arrival of a doctor who provided basic treatment for his visible injuries and bleeding, and decided to take him to the airport medical room. While the

applicant was being taken there in a wheelchair, he tried to get out, and attacked the police officers again, trying at one point to bite P.M.'s calf. In reaction, the police officers resorted for a third time to coercive measures, including tear gas applied from a close distance to the applicant's eyes. The applicant was been handcuffed again, and suffered further injuries as he repeatedly hit his head on the floor. According to P.M., the applicant could have been under the influence of narcotics or psychotropic substances.

C. Medical report of 16 October 2013

17. According to the report of the emergency medical service transferring him to Motol Hospital on the evening of 16 October 2013, the applicant behaved in a very aggressive manner.

18. At 8.45 p.m. he was taken to the above-mentioned hospital, where he was treated for the injuries suffered during the incidents with the police. An X-ray examination carried out at 9.32 p.m. revealed a fracture of the nasal bones and bleeding; a CT scan of the brain and the abdomen was negative. The doctor also stated that the applicant was very aggressive, with or without handcuffs, and that he refused to cooperate. According to the medical report issued by another doctor at 10.26 p.m., the applicant suffered a splintering fracture of the nasal bones, a 2 cm wide laceration on the face, and contusions in the chest area; he was very aggressive and did not cooperate. At 11.14 p.m. the applicant received treatment for the nose injury, his state was stabilised and he was able to be escorted to the DCF and detained.

D. Events of 17 – 25 October 2013

19. On 17 October 2013 at 2.20 a.m., the applicant was taken to the DCF Bělá-Jezová. The relevant department of the Aliens Police decided at 3 a.m. to place him in the section with a strict regime, under section 135(1) and (4) of the Aliens Act (Law no. 326/1999). Referring to the previous incidents at the airport, including the fact that the applicant had threatened the police officers and himself with shards of glass, the Aliens Police considered that that placement was justified by the applicant's aggressive behaviour, which called for an increased level of supervision. The decision contained an instruction that it could be challenged by way of an administrative action brought under Article 65 of the Code of Administrative Justice (Law no. 150/2002). According to the applicant, that decision was never served on him and was not part of his file held by the Aliens Police. The Government provided a copy of the decision signed by the responsible officer and by the interpreter certifying that the proceedings had been interpreted into Turkish; there is a mention on the decision that the applicant refused to sign without giving reasons.

20. Upon his arrival the applicant underwent a medical examination; the doctor referred to the medical reports from Motol Hospital (see paragraph 18 above).

21. Under the strict regime, the applicant was kept alone in a cell, separately from persons under the ordinary regime. He was monitored every thirty minutes by police officers.

22. On 17 October 2013, between 6.30 and 6.57 p.m., the applicant attempted to commit suicide by hanging himself by a towel tied to the top of the bed. Before the emergency services arrived at 7.20 p.m., the police officers managed to resuscitate him and to place him in a stable position; the DCF nurses then arrived and the applicant was subsequently transferred to the district hospital in Mladá Boleslav. There he was examined by a surgeon and an ear, nose and throat specialist. Since he stated that he would attempt to commit suicide again, the doctor decided to send him to a psychiatric hospital for observation and examination with the presence of an interpreter.

23. At about 10.30 p.m. the applicant was taken to the psychiatric hospital in Kosmonosy, where he was examined, diagnosed with personality disorders and given calming medication. Owing to the applicant's serious aggressiveness and lack of cooperation, the hospital was not able to ensure his observation in the hospital, where he might put other patients at risk. The psychiatrist noted in her report that it could not be ruled out that the applicant would repeat his purposeful behaviour, also having regard to his state of stress resulting from nicotine deprivation, and that observation in the DCF Bělá-Jezová was appropriate.

24. The applicant was then returned to the DCF in Bělá-Jezová and kept under the strict regime until 25 October 2013, on which date he was placed under the ordinary regime, although a psychologist who examined him on 23 October 2013 did not recommend that transfer because of the applicant's aggressiveness. Given the doctor's opinion, he was placed in a single cell. He was given medication which he sometimes refused.

II. THE ENSUING INVESTIGATIONS

A. Investigation of the incidents at the airport within the Aliens Police Directorate

25. On 17 October 2013 the use of coercive measures against the applicant, as reported by the police officers involved, was considered lawful and proportionate by the latters' hierarchical superiors at the Aliens Police Directorate. The camera recordings of the outer premises of the airport were also reviewed, but it appeared that the use of coercive measures was not visible on the recordings, which only showed the escort of an injured person accompanied by medical assistance.

26. On 22 October 2013 the General Inspectorate of Security Forces ("the GISF"), referring to the applicant's allegations made in his statement of 21 October 2013 (see paragraph 31 below), asked the department of internal inspection at the Aliens Police Directorate to examine whether the legal conditions for the use of coercive measures at the airport had been met and whether the conduct of the police officers involved could give rise to a disciplinary or criminal offence, in particular with regard to the alleged denial of medical assistance.

27. On 12 November 2013, the head of the department of internal inspection issued a statement that, on the basis of the material available, the police officers involved had used coercive measures in accordance with the Police Act and had not made any tactical mistakes.

28. On 19 November 2013 another superior police commissioner issued a report, also in response to the above request by the GISF (see paragraph 26 above). That report was based on the reports of the police officers involved, an explanation given by the applicant on 21 October 2013 in which he mentioned the incidents at the airport and alleged a complete denial of medication at the DCF, and a statement of the DCF doctor according to whom the applicant had continued to take his medication in the DCF. It was concluded that no unlawful conduct was identified either on the part of the police officers of the Prague Airport Aliens Police or on the part of the police officers of the DCF Bělá-Jezová. According to the report, the use of coercive measures was well documented, and reported by the relevant officers to their supervisors, who considered it lawful and proportionate, and the prosecutor was also informed; thus the use of coercive measures was lawful and the intervention of the police officers was found to be flawless.

B. Investigation of the attempted suicide

29. Following the applicant's suicide attempt on 17 October 2013, several police officers from the criminal police division of the regional police directorate arrived at the DCF at 8.50 p.m. in order to interview the DCF officers who had supervised the applicant that day and had found him hanging in his cell. They also conducted an on-site inspection and took photos of the applicant's cell. An official report was drawn up on 18 October 2013.

30. On 18 October 2013 two GISF officials started the investigation of the applicant's suicide attempt by questioning a police officer from the department of internal inspection and several officers from the DCF, and by collecting official reports about the supervision of the applicant on 17 October 2013, as well as medical reports. The first conclusion was that no offence had been committed by the police officers and that the department of internal inspection should examine the police officers' conduct from a disciplinary point of view.

31. On 21 October 2013 the applicant was questioned by a commissioner from the criminal police division of the regional police directorate. As well as mentioning the conflict with the police officers at the airport, he stated that he had been under psychiatric treatment for ten years and had already attempted to commit suicide several times. On 17 October 2013 he had decided to hang himself because he felt lonely and because he wanted to ask for asylum. He added that if he had to stay alone in the cell any longer, he would do it again.

32. In a report of 22 October 2013 a GISF official present at the applicant's interview on the previous day concluded that no offence had been committed by the DCF police officers with regard to the applicant's attempted suicide and that the matter could be terminated without further measures, which was approved by his superior. The report also noted that the applicant had mentioned an incident at the airport; and that although, according to the information available, the use of coercive measures was under investigation by the department of internal inspection of the Aliens Police, there should also be an investigation into the alleged denial of medical assistance to the applicant after the incident (see paragraph 26 above).

33. By a decision of 25 October 2013, a commissioner from the criminal police division of the regional police directorate discontinued an investigation, initiated following a notice by the DCF, into the matter of suspected assistance with the applicant's suicide attempt. It was concluded that the applicant had attempted suicide without pressure or help from any other person.

C. Criminal investigation initiated by the applicant

34. On 27 November 2013 the applicant lodged a criminal complaint with the GISF. He complained about his ill-treatment in police custody at the airport, namely about having been repeatedly beaten and kicked by the police officers who had also used tear gas against him, which had resulted in him suffering a fracture of the nose and a rib, and in numerous bruises. He asked for the investigation of the whole incident at the airport and proposed evidence such as his testimony, the questioning of the police officers concerned and the interpreter, the video recording from the airport security camera, and medical reports. The applicant also stated "for context" that at the recommendation of the Aliens Police at the airport, he had been placed in the DCF under a strict regime, despite his being in a bad health and in a bad mental state, and he had attempted to commit suicide there.

35. On 10 January 2014 the applicant was informed that the GISF had ended its investigation without finding any elements leading to a conclusion that the police officers had committed an offence or had acted unlawfully. The file was thus closed without any further measures being taken.

36. On 21 January 2014 the applicant asked the prosecutor to review the proceedings before the GISF, under Article 157a § 1 of the Code of Criminal Procedure. He claimed that the GISF had not taken any steps to establish the facts and had not even questioned him; no reasons had been given for the conclusion that the police officers had not committed any offence.

37. On the same day the applicant's representative requested that the GISF give her access to its file; the same request was then sent to the prosecutor's office to which the file had been transferred.

38. By a letter of 20 February 2014, the Prague Municipal Prosecutor refused to give the applicant access to the file, noting that since there were no criminal proceedings in this case, the complainant (even if he considered himself a victim) did not enjoy the rights set out in Article 65 § 1 of the Code of Criminal Procedure; moreover, the prosecution file was internal material not accessible to third parties. The applicant was also informed that, following his request for review, the GISF had been asked to complete the case file by 5 April 2014. It appears from a letter from the prosecutor addressed to the GISF that the latter was asked to supplement the file with the applicant's statement mentioned in the report of 19 November 2013 (see paragraph 28 above), the reports of the police officers involved about the use of coercive measures, and any available camera recordings made on the airport premises where the applicant was present on 16 October 2013.

39. On 9 April 2014 the GISF noted that the camera recordings were kept by the airport security department for the period of two weeks. It was not therefore possible to take into account the camera recordings of 16 October 2013, and this would not have been possible on 29 November 2013 either, when the applicant's criminal complaint had been received.

40. On 14 April 2014 the GISF decided to close the file concerning the investigation of the incidents of 16 October 2013 since it had not been established that an offence had been committed by a specific person. It was noted that the events had already been investigated by the department of internal inspection of the Aliens Police Directorate, and that according to the latter's file the use of coercive measures had been lawful. According to the internal document submitted to the Court by the Government, the applicant was to be informed about the closure of the file.

41. On 24 April 2014 the Prague Municipal Prosecutor informed the applicant that the prosecutor did not have jurisdiction to review the conduct of the GISF as the applicant had not initiated any criminal proceedings. Furthermore, on the basis of the facts as alleged by the applicant and established by the GISF (in particular the fact that disproportionate use of force by the police officers had not been objectively proven), the prosecutor did not find any reasons for taking any measures for the purposes of Article 157 § 2 of the Code of Criminal Procedure. However, this did not prevent the applicant from claiming damages by means of a civil action.

III. OTHER PROCEDURAL STEPS TAKEN BY THE APPLICANT

A. Constitutional appeal

42. On 11 March 2014 the applicant lodged a constitutional appeal. Relying on Articles 3 (both substantive and procedural aspects), 5, 8 and 14 of the Convention, he challenged the alleged ill-treatment by the officers of the Prague Airport Aliens Police, the latter's decision to detain him under a strict regime in the DCF Bělá-Jezová and the response given by the GISF to his criminal complaint. In that connection he pointed out that it was not clear what steps had been taken by the GISF before reaching its conclusions (see paragraph 34 above), that he had not been contacted or questioned at any point nor had he been informed whether the GISF had questioned any witnesses, for example the interpreter present at the airport. In his view, such an investigation could hardly be considered effective, and no redress had been provided by the prosecutor to which he had turned with a request for review (see paragraph 41 above), even his request to access the prosecution file having been rejected (see paragraph 38 above).

43. By decision no. IV. ÚS 936/14 of 4 August 2014 (served on 20 August 2014), the Constitutional Court dismissed the applicant's constitutional appeal as being manifestly ill-founded. It noted that it appeared from the investigation that after being taken into custody the applicant had had self-destructive tendencies and had fractured his nasal bones by hitting a mirror. He had sustained other injuries while being pacified by the police officers and had attempted to commit suicide the following day. The applicant's aggressiveness and the need to keep him under constant supervision, together with the psychiatric hospital's recommendation, had led to him being temporarily isolated from others. The Constitutional Court further observed that the GISF had not found the applicant's version of events to be credible as a result of its investigation, and the Prague Municipal Prosecutor had not found any failings in the GISF's conduct. The applicant's mere disapproval of the conclusions of the relevant authorities did not prove that his fundamental rights had been interfered with by the State authorities.

B. Compensation proceedings

44. On 15 April 2014 the applicant requested under the State Liability Act (Law no. 82/1998) that the Ministry of the Interior award him compensation for non-pecuniary damage caused by the authorities' unlawful conduct, namely the ill-treatment at the airport resulting in him suffering several injuries and his placement under a strict regime in the DCF before and after his attempted suicide.

45. On 6 October 2014 the Ministry rejected the request, reasoning that the conduct of the police officers in the applicant's case had been investigated

by the police inspection authorities, the Aliens Police Directorate, and the GISF, without any irregularities being found.

46. On 8 October 2014 the applicant applied to the courts for compensation. According to the applicant, hearings were held by the Prague 7 District Court in March, August and October 2017, after several years of inactivity.

47. By a judgment of 19 October 2017, the District Court dismissed the applicant's application. Based on the reports drawn by the police officers involved and their statements made at the hearing, the result of the police internal inspection and criminal investigation and the submissions by the DCF, the court considered that the police officers' actions did not amount to official misconduct for which the State could be held liable. On 10 November 2017 the applicant appealed to the Prague Municipal Court. The Court has not been informed about the outcome of the appellate proceedings.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. CODE OF ADMINISTRATIVE JUSTICE (LAW NO. 150/2002) AS IN FORCE AT THE MATERIAL TIME

48. Under Article 65 and subsequent provisions, an individual could ask the court to quash an administrative decision that violated his or her rights.

49. Under Article 82, a judicial action could also be brought in order to seek protection against an unlawful interference by an administrative authority or to have such interference declared unlawful.

II. ALIENS ACT (LAW NO. 326/1999) AS IN FORCE AT THE MATERIAL TIME

50. Under section 132(2) the area of a detention facility under the strict regime was separated from the area under the ordinary regime and consisted of accommodation premises and an open-air space.

51. Under section 135(1), aliens were placed under the strict regime in the event that (a) they were aggressive or required increased supervision for other important reasons, (b) they repeatedly and seriously breached internal rules of the facility, or (c) they repeatedly and seriously breached an obligation or prohibition provided for by the law in question. Under section 135(4), if the detained alien was placed under the strict regime for more than 48 hours, a decision had to be issued by the police.

III. GENERAL INSPECTORATE OF SECURITY FORCES ACT (LAW NO. 341/2011; IN FORCE SINCE 23 NOVEMBER 2011)

52. In accordance with section 1, the GISF is an armed security corps, headed by a director. The director is appointed and dismissed at the request of the Government and after examination by the security committee of the Chamber of Deputies and by the Prime Minister, to whom he is responsible. The GISF forms part of the organisation of the State and a budgetary unit whose receipts and expenses constitute an independent part of the State budget.

53. Section 2 provides that the GISF is responsible for looking for, revealing and verifying facts showing that a criminal offence has been committed by a police officer, and for investigating that offence.

IV. POLICE ACT (LAW NO. 273/2008) AS IN FORCE AT THE MATERIAL TIME

54. Under section 53(1) and (3), police officers were entitled to use coercive measures to protect their own or another person's safety, property or public order and to choose the coercive measure which would enable them to achieve the objective of the intervention and which was necessary to overcome the resistance or attack of the person concerned. Under section 53(5), when using coercive measures police officers had to make sure not to cause harm to the person concerned which would be disproportionate to the nature and dangerousness of that person's unlawful conduct.

55. Under section 54 police officers were also entitled to use handcuffs and methods that impaired spatial orientation in order to restrain a person deprived of liberty if there was a well-founded fear for the safety of persons, property or the protection of public order or if that person attempted to escape. Means impairing spatial orientation could be used only when it was not otherwise possible to achieve the objective of the intervention.

56. Under section 57 police officers had to provide a person who had been injured because of the use of a coercive measure with immediate medical assistance. They were also obliged to report on the use of coercive measures to their supervisor and to produce an official report stating why and how the coercive measure was used and the result thereof.

57. Section 58 provided that certain measures, including hitting, kicking and tear gas, could not be used against a person with an apparent illness, unless an attack by that person directly put at risk the life or health of the police officer or another person, or unless there was no other way to avoid a risk of significant property damage.

V. STATE PROSECUTION ACT (LAW NO. 283/1993) AS IN FORCE AT THE MATERIAL TIME

58. Section 12d of the Act provided that a higher prosecutor's office was to supervise the acts of the lower prosecutors' offices under its territorial jurisdiction and was entitled to give them written instruction on the procedures to be followed.

VI. CODE OF CRIMINAL PROCEDURE (LAW NO. 141/1961) AS IN FORCE AT THE MATERIAL TIME

59. Under Article 2 § 3 public prosecutors had to prosecute all criminal offences of which they became aware.

60. Article 65 § 1 provided, *inter alia*, that the charged person, the victim and the participating person, their counsel and representatives had the right of access to the files except for the record of any votes and the personal data of an anonymous witness, to make excerpts and notes therefrom, and to have duplicates of the files and the parts thereof made at their own expense.

Article 65 § 2 provided that during the pre-trial procedure the prosecutor or the police authority could, for serious reasons, deny access to the files and the exercise of other rights set out in paragraph 1.

61. In accordance with Article 157 § 2, public prosecutors could ask the police to perform acts which were necessary to elucidate the case or to identify the perpetrator. In order to verify whether a criminal offence had been committed public prosecutors were entitled, *inter alia*, to ask the police to submit the files, including those in which no criminal proceedings had been initiated, documents, materials and reports on action taken.

62. Article 157a § 1 provided that the person subject to the criminal proceedings and the victim were entitled, throughout the preliminary phase of the proceedings, to request the prosecutor to eliminate delays or flaws in the conduct of the police.

63. Under Article 159a § 1, when no suspicion arose that a criminal offence had been committed, the prosecutor or the police had to issue a decision to discontinue the case, unless there was a different means for its resolution.

VII. THE CONSTITUTIONAL COURT'S CASE-LAW

64. It is the Constitutional Court's case-law as from 2015 (see, for example, judgments nos. I. ÚS 1565/14 of 2 March 2015 and I. ÚS 860/15 of 10 November 2015) that, with regard to an alleged violation of Article 3 of the Convention under its procedural limb, the applicants have to request a review not only by the prosecutor under Article 157a of the Code of Criminal Procedure but also by the supervising prosecutor under section 12d

of the State Prosecution Act. When a case has been terminated without criminal proceedings being initiated, the criminal authorities are not prevented from reopening an investigation at the instruction of the supervising prosecutor.

DOCUMENTS OF THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

65. In its Standards (CPT/Inf (2002) 1 - Rev. 2015, p. 80), the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT") expressed very serious reservations about the use of incapacitating or irritant gases to bring recalcitrant detainees under control in order to remove them from their cells and transfer them to an aircraft. The use of such gases in very confined spaces, such as cells, entails manifest risks to the health of both the detainee and the staff concerned. Staff should be trained in other control techniques (for instance, manual control techniques or the use of shields) to immobilise a recalcitrant detainee.

66. In its reports pertaining to its visits carried out in a number of member States of the Council of Europe, the CPT has made the following recommendations:

- Regarding the use of means of restraint in Slovakia, the CPT stressed that whenever a person in custody is or becomes highly agitated, the police should immediately contact a doctor and act in accordance with the doctor's opinion (CPT/Inf (97) 2, paragraph 45);

- In a report on a periodic visit to Austria, the CPT observed that in a custodial setting the police should call in a medical doctor whenever it is found necessary to restrain an agitated or violent detainee, and act in accordance with the doctor's opinion. If recourse is had to means of physical restraint *vis-à-vis* such a detainee, those means of restraint should be removed at the earliest opportunity; means of restraint should never be applied, or their application prolonged, as a punishment (CPT/Inf (2005) 13, paragraph 16);

- In a report on a visit to Denmark, the CPT emphasised that every instance of the use of force and special means (such as pepper spray, handcuffs and shields) should be recorded in a dedicated register, established for that purpose. The entry should include the times at which the use of force or special means began and ended, the circumstances of the case, the reasons for resorting to force or special means, the type of means used, and an account of any injuries sustained by prisoners or staff. Without such a record, it would be impossible to analyse accurately the overall situation in a prison and to draw the appropriate conclusions as regards use of force or special means (CPT/Inf (2019)35, paragraph 100);

- Regarding the use of pepper spray in prisons in Bosnia and Herzegovina, the CPT stated (CPT/Inf (2009) 25):

> "Pepper spray is a potentially dangerous substance and should not be used in confined spaces. Even when used in open spaces the CPT has serious reservations; if exceptionally it needs to be used, there should be clearly defined safeguards in place. For example, persons exposed to pepper spray should be granted immediate access to a medical doctor and be offered an antidote. Pepper spray should never be deployed against a prisoner who has already been brought under control."

- Similar observations as to the use of pepper spray in prison were made by the CPT explicitly towards the Czech Republic (CPT/Inf (2009) 8, paragraph 46; similarly in CPT/Inf (2015) 18, paragraph 38):

> "There can be no justification for the use of pepper spray against a single prisoner locked in his cell. Pepper spray is a potentially dangerous substance and should not be used in confined spaces. Further, if exceptionally it needs to be used in open spaces, there should be clearly defined safeguards in place. For example, persons exposed to pepper spray should be granted immediate access to a medical doctor and be offered measures of relief. Pepper spray should never be deployed against a prisoner who has already been brought under control. Further, it should not form part of the standard equipment of a prison officer."

- Recently, the CPT made the following observations as to the use of pepper guns in Slovak prisons (CPT/Inf (2019)20, paragraph 94):

> "The Committee welcomes the fact that, at Banská Bystrica Prison, the previously used tear-gas canisters have been abolished. They were replaced by so-called 'pepper-guns' which were considered safer as they disperse the tear-provoking substance in a more targeted manner than spray canisters and are thus less likely to be harmful, especially within confined spaces ...
>
> The CPT must emphasise that only exceptional circumstances can justify the use of such devices, and that such use should be surrounded by appropriate safeguards. In particular, persons exposed to a pepper-gun discharge should be supplied immediately with the means to alleviate the effects and be granted rapid access to a medical doctor. Further, a pepper-gun should never be deployed against a prisoner who has already been brought under control."

- As to the use of pepper spray against foreign nationals deprived of their liberty, the CPT stated in a report on a visit to Malta (CPT/Inf (2021)1, paragraph 19):

> "... pepper spray is a potentially dangerous substance and should not be used in confined spaces and should never be deployed against any person who has already been brought under control. Indeed, the CPT underlines that staff working within immigration detention facilities should not be equipped with batons, handcuffs or pepper spray as standard equipment."

INTERNATIONAL REGULATIONS ON RIOT CONTROL CHEMICALS AND FURTHER INFORMATION

67. Under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction of 13 January 1993 ("the CWC"), tear gas or so-called "pepper spray" are not considered chemical weapons (the CWC contains an annex listing the names of prohibited chemical products). The use of such methods is authorised for the purpose of law enforcement, including domestic riot control (Article II § 9 (d)).

The CWC entered into force with regard to the Czech Republic on 29 April 1997.

68. In its judgment *Oya Ataman v. Turkey*, no. 74552/01, § 18, ECHR 2006-XIV, the Court noted that it is recognised that the use of pepper spray" can produce effects such as respiratory problems, nausea, vomiting, irritation of the respiratory tract, irritation of the tear ducts and eyes, spasms, chest pain, dermatitis or allergies. In strong doses, it may cause necrosis of tissue in the respiratory or digestive tract, pulmonary oedema or internal haemorrhaging (haemorrhaging of the suprarenal gland).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 IN RELATION TO THE CONDITIONS OF DETENTION IN THE DCF BELA JEZOVA

69. The Court notes at the outset that, relying on Article 3 of the Convention, the applicant complained, firstly of ill-treatment at the airport and secondly, about the conditions of his detention in the DCF Bělá Jezová where he was placed under a strict regime and denied appropriate medical care, without any regard to his psychological problems and self-destructive tendencies. He also challenged the lack of effectiveness of the investigation in general.

70. The Government observed that the applicant did not complain about being wilfully ill-treated or humiliated at the DCF but about his placement under the strict regime and the conditions thereof. In that regard, however, he had not exhausted available domestic remedies. The Government were of the view that in line with the Court's judgments in *Ananyev and Others v. Russia* (nos. 42525/07 and 60800/08, § 98, 10 January 2012) and *Gorbulya v. Russia* (no. 31535/09, § 54, 6 March 2014), the applicant had at his disposal both preventive and compensatory remedies which, taken as complementary, could be considered effective. It was irrelevant in that context whether he had mentioned the issue in his criminal complaint, which moreover was made after his release from the strict regime.

71. In particular, the Government argued that the conditions of the applicant's placement in a supervised cell separated from others were linked to the strict regime of his detention, as set out in the decision of 17 October 2013 based on the Aliens Act (Law no. 326/1999), which the applicant could have challenged by way of an administrative action brought under Article 65 of the Code of Administrative Justice (see paragraphs 19 and 48 above). Furthermore, the applicant could have complained about the actual conditions in the cell, with regard to his state of health, by means of an action based on Article 82 of the above-mentioned Code (see paragraph 49 above), and requested a preliminary measure. None of those preventive remedies aimed at ending the situation complained of had, however, been used by the applicant. The Government admitted that the applicant had lodged a constitutional appeal which had been dismissed as manifestly ill-founded without the Constitutional Court having examined his objections in detail; it contended, however, that the constitutional appeal did not appear as an adequate remedy from the preventive point of view.

72. The Government further submitted that a compensatory remedy was also available to the applicant, namely an action under the State Liability Act (Law no. 82/1998), which could have led to financial satisfaction *ex post facto* (the Government referred to the domestic practice summarised in *Svoboda and others v. the Czech Republic* (dec.), no. 43442/11, § 35, 4 February 2014). It was noteworthy that the applicant had used that remedy, which remained pending (see paragraphs 44-47 above).

73. In order to challenge the Government's plea of non-exhaustion, the applicant pointed out that in his criminal complaint accompanied by a description of the events (see paragraph 34 above), he had expressly mentioned his placement in solitary confinement and his suicide attempt. He had thus raised that complaint at least in substance and could not be blamed for the authorities' failure to investigate it. Since he had chosen the most appropriate remedy available, he was not required to use parallel remedies having essentially the same objective (he cited *Jasinskis v. Latvia*, no. 45744/08, §§ 53-54, 21 December 2010).

74. The applicant also argued that even if he had not raised the issue of solitary confinement in his criminal complaint, the police and the GISF had been made aware of it at the latest during his interview of 21 October 2013, and should have started to investigate this aspect of ill-treatment of their own motion.

75. The Court agrees with the Government that the applicant's complaint was aimed at the conditions of his detention in the DCF Bělá Jezová, which followed from his placement under a strict regime. That regime enabled the authorities to separate the applicant from other detainees and to subject him to increased supervision because of his previous aggressive behaviour.

76. In this connection, the Court observes that the relevant decision delivered by the Aliens Police on 17 October 2013 (see paragraph 19 above)

contained advice about the possibility of lodging an administrative action under Article 65 of the Code of Administrative Justice, enabling a person to seek the quashing of an administrative decision which violated his or her rights (see paragraph 48 above). The Government added that the applicant could also have sought protection against any other interference stemming from the actual conditions to which he had been subjected by means of an action brought under Article 82 of the same Code (see paragraph 49 above).

77. The applicant did not submit that those avenues would have been ineffective, simply arguing that he had satisfied the condition of exhaustion of domestic remedies by lodging a criminal complaint. The Court notes however that the said complaint concerned the ill-treatment which the applicant claimed to have suffered at the hands of the police at the airport (see paragraph 34 above), and in respect of which such a remedy is indeed considered adequate (see, for example, *Bureš v. the Czech Republic*, no. 37679/08, § 82, 18 October 2012).

78. Thus, in the circumstances of the present case, the Court considers that, in order to obtain a review by the domestic courts of his complaints relating to the regime of detention and to the alleged lack of appropriate medical treatment, the applicant should have used the remedies provided by the Code of Administrative Justice, as suggested by the Government (see, *mutatis mutandis*, *Buishvili v. the Czech Republic*, no. 30241/11, § 56, 25 October 2012).

79. Having failed to use those means capable of providing redress in respect of the above complaints submitted to the Court, the applicant did not satisfy the condition of exhaustion of domestic remedies. Furthermore, he did not inform the Court about the outcome of the proceedings for damages which he had brought under the State Liability Act, which enabled him to claim compensation for any damage caused by unlawful official conduct of the police (see paragraphs 44-47 above).

80. Accordingly, this part of the application must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION IN ITS PROCEDURAL ASPECT

81. The applicant complained, under the procedural limb of Article 3 of the Convention, that the investigation into his alleged ill-treatment at the airport was ineffective, mainly because no relevant and independent evidence had been taken and because he had not been sufficiently involved in the investigation.

Article 3 reads as follows:

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

A. Admissibility

82. The Government did not contest the admissibility of the applicant's complaints regarding the investigation into the incidents at the airport. Noting that according to the case-law of the Czech Constitutional Court (see paragraph 64 above), the applicants are now expected to request both a review by the prosecutor under Article 157a of the Code of Criminal Procedure and a review by the supervising prosecutor under section 12d of the State Prosecution Act, the Government accepted that although the applicant had used only the first of the two avenues (see paragraph 36 above), the Constitutional Court, having ruled on the present case prior to the above-mentioned case-law, did examine the applicant's constitutional appeal on the merits.

The Government were convinced, however, that the applicant had not submitted an arguable complaint of ill-treatment to the national authorities, and he was not entitled to rely on the procedural requirements of Article 3.

83. The Court shares the Government's view that it would be unduly formalistic to require the applicant to exercise the remedy provided by section 12d of the State Prosecution Act, which the Constitutional Court had not at the time obliged him to use (see, *mutatis mutandis*, *Maslák and Michálková v. the Czech Republic*, no. 52028/13, § 96, 14 January 2016, and *Zličić v. Serbia*, nos. 73313/17 and 20143/19, §§ 74-78, 26 January 2021).

84. The Court considers, however, that the applicant's allegations of ill-treatment suffered at the airport, corroborated by medical certificates documenting his injuries, were sufficiently credible to give rise to an obligation on the part of the authorities to investigate them in compliance with the requirements of Article 3 of the Convention. This complaint, within the scope delimited above, is thus not manifestly ill-founded and must be declared admissible.

B. Merits

1. The applicant

85. In his application form, the applicant claimed that the investigation had not been sufficiently diligent, in particular because it had not been initiated immediately upon the authorities being informed about the matter, he had not been questioned and no relevant evidence had been secured. Moreover, the investigation had not allowed for adequate public scrutiny since he had not been involved in it in a way which would have enabled him to safeguard his legitimate rights, nor had he been given access to the file or duly informed about the outcome.

86. In his observations, the applicant emphasised that the GISF had had knowledge of his complaints of ill-treatment at the airport from the time of his interview conducted on 21 October 2013 in the presence of a GISF officer. While it was true that the following day the GISF had notified the police department of internal inspection (see paragraph 26 above), which, however, could not be considered as an independent and impartial authority, they had not initiated their own investigation until he had lodged a criminal complaint. Had they started an investigation of their own motion, they could have used the airport's camera recordings.

2. The Government

87. The Government noted that the applicant had not complained about his alleged ill-treatment at the airport until 27 November 2013, by which time the video recordings from the airport security camera had already been erased (see paragraph 39 above). In the Government's view, the inconsistencies in the applicant's assertions which, in addition, contradicted the statements of other people involved, together with the late submission of his criminal complaint, cast doubt on the credibility of the applicant's allegations.

88. In addition, the Government pointed out that the incidents at the airport (as well as the applicant's suicide attempt) had been investigated both by the relevant police authorities and the GISF, the latter being an independent authority under the Court's case-law (the Government referred to *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, ECHR 2007-II and *Kummer v. the Czech Republic*, no. 32133/11, 25 July 2013), whose activity had been supervised by the prosecutor. The latter had endorsed the conclusions of the GISF, given reasons for his decision and duly notified the applicant (see paragraph 41 above). The investigation had been thorough enough to confirm or refute the applicant's allegations of ill-treatment. Ultimately the case was examined by the Constitutional Court.

3. The Court's assessment

(a) General principles

89. The Court refers to the general principles on the procedural obligation under Article 3 of the Convention concerning the complaints of police ill-treatment set out in particular in *El-Masri v. the former Yugoslav Republic of Macedonia* ([GC], no. 39630/09, §§ 182-85, ECHR 2012) and *Bouyid v. Belgium* ([GC], no. 23380/09, §§ 115-23, ECHR 2015). Those principles indicate that the provisions of Article 3 require by implication that there should be some form of effective official investigation where an individual makes a credible assertion that he has suffered treatment infringing Article 3 at the hands, *inter alia*, of the police or other similar authorities. The investigation must be capable of leading to the establishment of the facts of

the case and to the identification and – if appropriate – punishment of those responsible. Article 3 of the Convention additionally requires that an official investigation be conducted even in the absence of an express complaint, if there are sufficiently clear indications that ill-treatment might have occurred (see, for example, *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, no. 71156/01, § 97, 3 May 2007, and *Gjini v. Serbia*, no.1128/16, § 93, 15 January 2019).

90. For an investigation to be effective, the institutions and persons responsible for carrying it out must be independent from those targeted by it. This means not only a lack of any hierarchical or institutional connection but also practical independence (see, for example, *Scavuzzo-Hager and Others v. Switzerland*, no. 41773/98, §§ 81-82, 7 February 2006, and *Ergi v. Turkey*, 28 July 1998, §§ 83-84, *Reports of Judgments and Decisions* 1998-IV). It should also be broad enough to permit the investigating authorities to take into consideration not only the actions of the State agents who directly used force but also all the surrounding circumstances.

91. In addition, the investigation must be thorough. That means that 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 investigation or otherwise base their decisions on. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence, and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of the standard of effectiveness. A requirement of promptness and reasonable expedition is implicit in this context.

92. With regard to the issue of victim participation in the proceedings, in particular, the Court would stress that the procedural obligation under the Convention requires that the investigation must be accessible to the victims to the extent necessary to safeguard their legitimate interests (see, for example, *X and Others v. Bulgaria* [GC], no. 22457/16, § 189, 2 February 2021). Victims should be able to participate effectively in the investigation in one form or another, in particular, by having access to the materials of the investigation, so they are not left in a complete vacuum as regards its progress.

93. In addition, following an investigation there should be a reasoned decision available to reassure a concerned public that the rule of law has been respected (see *V.D. v. Croatia (no. 2)*, no. 19421/15, §§ 66 and 77, 15 November 2018, with further references). There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or

tolerance of unlawful acts (see, *inter alia*, *Oleksiy Mykhaylovych Zakharkin v. Ukraine*, no. 1727/04, § 67, 24 June 2010).

(b) Application to the present case

94. Turning to the present case, the Court observes, first, that a review of the coercive measures used against the applicant at the airport was carried out, of their own motion, by the superior police officers of the Aliens Police Directorate the day after the incident. The use of coercive measures against the applicant as reported by the police officers involved was considered lawful and proportionate (see paragraph 25 above). Later, relying again mainly on the reports of the police officers involved, neither the head of the department of internal inspection at the Aliens Police Directorate nor the superior police commissioner identified any unlawful conduct on the part of the police officers (see paragraphs 27 and 28 above).

95. It thus follows that those initial investigative measures, admittedly very prompt, were conducted by the hierarchical superiors of the police officers involved and by the department of internal inspection within the same police directorate which had been implicated in the incident (compare, for example, *Rehbock v. Slovenia*, no. 29462/95, § 74, ECHR 2000-XII; *Eremiášová and Pechová v. the Czech Republic*, no. 23944/04, § 155, 16 February 2012; and *Mafalani v. Croatia*, no. 32325/13, § 99, 9 July 2015). Consequently, and noting that the Government did not claim that those police authorities were to be considered independent within the meaning of Article 3 of the Convention (see paragraph 88 above), the Court agrees with the applicant (see paragraph 86 above), that that investigation failed to meet the requirements of the hierarchical, institutional and practical independence of those carrying out the investigation from those implicated in the events.

96. The Court notes in this connection that since the entry into force, on 23 November 2011, of the General Inspectorate of Security Forces Act (Law no. 341/2011), the authority responsible for looking for, revealing and verifying the facts showing that a criminal offence has been committed by a police officer and for investigating that offence is the GISF (see paragraphs 52-53 above). In the Court's view, the GISF can now be considered as complying with the requirements of independence, since it is both hierarchically and institutionally independent of the police (see paragraph 52 above), compared with the previous bodies responsible for investigating police officers' conduct which the Court did not consider to meet the requirement of independence (see *Eremiášová and Pechová*, cited above, § 154, where the Court criticised the fact that the Supervision Department of the Minister of the Interior was, like the police, under the authority of the Ministry of the Interior and directly managed by the Minister of the Interior; and *Kummer*, cited above, §§ 85-86, in which the Court noted that the Police Inspectorate was still a unit of the Ministry of the Interior, although its head was appointed by, and responsible to, the Government, and

that the members of the Police Inspectorate remained police officers who had been called to perform duties in the Ministry of the Interior).

97. However, it is noteworthy in the present case that the GISF first limited itself to asking the department of internal inspection at the Aliens Police Directorate to examine the airport incident again, without considering it necessary to conduct its own investigation (see paragraph 26 above). It did not become involved in the investigation until 27 November 2013, that is five weeks after the incident at the airport, when the applicant lodged a formal criminal complaint directly with that authority. More importantly, although it was thus incumbent on the GISF to ensure that an effective and independent investigation was carried out and that relevant measures capable of establishing the cause of the applicant's injuries and the responsibility of the suspected police officers were taken, it appears from the file that the GISF did not conduct any investigative measures itself. It did not, for example, interview the applicant, the police officers involved, the doctor who examined the applicant at the airport (see paragraph 16 above) or the author of the affidavit submitted by the applicant (see paragraph 12 above). Instead, following the instruction by the prosecutor (see paragraph 38 above), it seems to have limited its enquiry to considering the applicant's statement of 21 October 2013, relating mainly to his attempted suicide, and the reports of the police officers involved about the use of coercive measures. It also appears that in its final conclusion that no offence had been committed (see paragraph 39 above) the GISF relied heavily on the findings made by the department of internal inspection of the Aliens Police Directorate which, as said above, lacked the requisite hierarchical and institutional independence. It would seem in the light of the information available to the Court (see also paragraph 94 above) that the GISF does not engage in any genuine investigation unless the results of an internal police inspection show that an offence might have been committed by a police officer. In the Court's view, generally, such a practice cannot, however, satisfy the procedural requirements of Article 3 of the Convention.

98. It is true, as submitted by the Government (see paragraph 87 above), that by the time the applicant made his criminal complaint to the GISF, the video recordings from the airport security camera had already been erased. It is likewise true, however, that the GISF could have proceeded to an investigation earlier of its own motion, as alleged by the applicant (see paragraph 86 *in fine* above), which would have allowed it to view the recordings. In any event, that piece of evidence would apparently have not had great weight since the recordings did not show the core of the incident at the airport (see paragraph 25 above).

99. Against the above background, it cannot be concluded that the GISF proceeded to any kind of genuine and independent investigation of the circumstances of the applicant's alleged ill-treatment by the police at the airport (see *Mafalani*, cited above, §§ 100-03, and, by contrast, *V.D.*

v. Croatia (No. 2), cited above, §§ 69-70). In spite of the fact that the GISF operated under the control, triggered by the applicant's request for review (see paragraphs 36 and 38 above), of the Prague Municipal Prosecutor, his merely supervisory role was not sufficient to redress the above shortcomings (compare with *Kummer*, cited above, § 87).

100. Although that finding would suffice to conclude that there has been a violation of Article 3 in its procedural aspect, the Court considers it important to examine in the present case the issues of the applicant's participation in the investigation and, more generally, of public scrutiny.

101. It notes that the authorities did not attempt to question the applicant specifically with regard to the incident at the airport (in contrast with his attempted suicide, in respect of which he was questioned – see paragraph 31 above), the applicant was not informed of the findings made in the course of the investigative measures conducted in his absence and of his rights as a victim, and his proposals as to evidence with regard to his criminal complaint (see paragraph 34 above) were apparently not responded to. In addition, the applicant was refused access to the investigation file, without that refusal being justified by anything but a referral to Article 65 of the Code of Criminal Procedure (see paragraph 60 above). Indeed, that provision does not allow victims to access the file before charges are brought and criminal proceedings initiated, which, in the Court's view, impairs the victim's opportunities for effective participation in the investigation (compare with *Oleksiy Mykhaylovych Zakharkin*, cited above, § 73).

102. The Court considers that such a restriction of the applicant's right of access to the case file, which was made possible owing to the lack of relevant safeguards in the domestic legal framework, was disproportionate and did not meet the requirement of effective access to the proceedings for the purpose of Article 3 of the Convention.

103. The Court also notes that the GISF failed to duly inform the applicant about the progress and the outcome of the investigation, in order, *inter alia*, to prevent any appearance of collusion in or tolerance of unlawful acts (see the case-law cited in paragraph 93 above). In this connection, the Court is of the view that the succinct information received by the applicant on 10 January 2014 (see paragraph 35 above) cannot be said to be a duly reasoned decision of the GISF terminating the investigation (see, by contrast, *V.D. v. Croatia (No. 2)*, cited above, § 79). Furthermore, it is unknown to the Court whether and how the applicant was informed about the GISF's decision of 14 April 2014 to close the file (see paragraph 39 *in fine* above).

104. In these circumstances, the Court finds that the investigation was not accessible to the applicant to the extent necessary to safeguard his legitimate interests (see, for example, *Slimani v. France*, no. 57671/00, § 44, ECHR 2004-IX (extracts); *Oleksiy Mykhaylovych Zakharkin*, cited above, §§ 71-74; and *Enukidze and Girgvliani v. Georgia*, no. 25091/07, § 250, 26 April 2011).

105. The foregoing considerations are sufficient to enable the Court to conclude that the investigation into the applicant's allegations of police ill-treatment did not comply with the Convention requirements of independence and effectiveness and failed to provide for the applicant's effective participation.

106. There has accordingly been a violation of the procedural aspect of Article 3 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION IN ITS SUBSTANTIVE ASPECT

107. The applicant complained that the actions taken against him by the police officers at the airport qualified as ill-treatment prohibited by Article 3 of the Convention.

A. Admissibility

108. The Government did not contest the admissibility of the applicant's complaint regarding the alleged ill-treatment at the airport in its substantive aspect.

109. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

110. According to the applicant, the Government had agreed that all his injuries, namely the fracture of his nasal bones, a small laceration on the head and contusions on the chest, had been caused during the police custody at the airport, and reached the level of severity required by Article 3. The applicant argued, however, that the Government's description of how these injuries had occurred was invalidated by logical inconsistencies, a lack of explanations and a lack of any independent evidence such as photographs or camera recordings (since those showing at least his escort to the ambulance had been erased). Not only had the Government relied only on the statements of the police officers involved, who could not be considered impartial, but they had not even attempted to explain how he had suffered the fracture of his nasal bones. Also, if the Government were correct in asserting that he had tried to harm himself and others with shards of a broken mirror, he would certainly have cut his hands on those glass shards; however, neither the police nor the medical reports had mentioned any such injuries. Lastly, the police officers had differed in their description of how he was supposed to have broken the

mirror in the toilet (whether handcuffed, or with his head or shoulder) and there was no statement from the doctor who had treated him at the airport (see paragraph 16 above).

111. The applicant further contended that in any event the physical force and coercive measures used against him during the three incidents, accompanied by two applications of tear gas and repeated handcuffing, were not made strictly necessary by his own conduct. He stressed that he had been from the very beginning outnumbered by the police officers and under their control. In spite of his being disoriented because of the use of the tear gas, it was not a doctor but rather other police officers who had been called for support after incident no. 1 (see paragraph 15 above) and severe physical force had been used against him during incident no. 2, which had left him bleeding. Incident no. 3 had occurred when he was being transported in a wheelchair.

112. Concerning in particular the tear gas, the applicant asserted that it had been applied directly to his face, in a confined space and while he was under the complete control of the police; moreover, he had not been taken to a doctor immediately afterwards (in this respect, he cited *Abdullah Yaşa and Others v. Turkey*, no. 44827/08, §§ 49-50, 16 July 2013).

113. Emphasising the need to respect the fundamental human dignity of mentally disabled persons detained by the authorities (and citing *Dybeku v. Albania*, no. 411/06, 18 December 2007), the applicant asserted that it was not disputed that he suffered from depression and self-destructive tendencies, which should have made the authorities treat him as a vulnerable person and avoid coercive measures (he referred to *Bureš*, cited above). In his view, the Czech authorities had had enough information to conclude that he was likely to suffer from psychosocial disorder, given in particular the amount of medication found in his possession and his statement about taking sedatives and analgesics, made during the second interview (see paragraph 7 above). Moreover, it was possible to find out that he had been subjected to psychiatric treatment during his previous stay in the Czech Republic between 2008 and 2011.

(b) The Government

114. The Government were convinced that in the present case, the required standard of proof "beyond reasonable doubt" had not been met by the applicant, whose credibility and good faith were put in doubt by important inconsistencies in his statements. In the main aspects, the applicant's account of events was in direct contradiction with the comprehensive presentation of the facts put forward by the Government, which was supported by all the necessary documents. The Government noted in particular that the applicant had on several occasions omitted to mention his previous psychiatric problems, be it to the interviewing police officers or to the medical staff at Motol Hospital or at the DCF. In addition, on the one hand he had denied any

aggressiveness or self-harming during the incidents at the airport but, on the other hand, he had placed responsibility on the authorities for inappropriately placing him under a strict regime despite his bad mental state and suicidal tendencies.

115. In the Government's view, it was very unlikely that the police officers would have used force in the way claimed by the applicant, or that they would have brutally beaten him. In this respect the police officers' statements appeared more probable and showed, together with medical reports, that every single one of the police actions had been aimed only at stopping the applicant's self-destructive conduct and aggressiveness towards others. The Government also contended that it was typical in situations occurring on premises not accessible to the public that no other evidence, such as the testimony of witnesses other than the police officers involved or camera recordings, would be available, as was the case here. It would be excessively burdensome for the State if, in situations similar to the present one, the police officers' statements were to be regarded as automatically untrustworthy and if the victim's statements were sufficient for the Court to find a violation.

116. While the Government did not dispute that the applicant had been injured during his stay at the airport when in the hands of the police, they asserted that according to the documentation submitted, the police officers' conduct during the incidents at the airport had been proportionate to the applicant's high level of aggressiveness and physical violence, which required appropriate measures. The level of physical force used against the applicant had observed the principle of proportionality and the consequences to his health could not be considered excessive or disproportionate in the specific circumstances of the case (the Government cited, *mutatis mutandis*, *Perrillat-Bottonet v. Switzerland*, no. 66773/13, 20 November 2014). Indeed, according to the medical reports, the applicant had suffered a minor injury to the head, a splintering fracture of the nasal bones, and contusions on the chest; there was also no mention of any consequences of the use of tear gas (see paragraph 18 above).

117. Concerning specifically the tear gas, the Government observed that, despite criticising its use in confined spaces, neither the standards put forward by the CPT nor the Court's case-law (they referred to *Ali Güneş v. Turkey*, no. 9829/07, § 41, 10 April 2012, and *Tali v. Estonia*, no. 66393/10, §§ 77-78, 13 February 2014) formally prohibited it. According to the Government, it followed from the principles formulated by the CPT and the Court that tear gas could be applied only as an *ultima ratio*. The situation of the present applicant differed from *Ali Güneş* and *Tali* (both cited above) since the incident had occurred in an international airport, and the applicant had not been handcuffed and had thus not been under the complete control of the police officers when the tear gas had been used against him, firstly in the toilets where he had threatened himself and the police officers with shards of

glass, and secondly during his escort through the public airport premises where he had tried to bite one of the police officers. It had thus been used adequately without the applicant having suffered excessively. The Government emphasised that alternative coercive measures had previously proved to be ineffective in view of the applicant's extreme and unforeseeable behaviour, and that the applicant had received medical treatment immediately after the incident, first at the airport itself and then at Motol Hospital. In that context, the overall very short duration of the three individual incidents had to be taken into account, especially with regard to the requirement of expeditious medical treatment after the use of the tear gas.

118. As to the applicant's argument of his vulnerability (see paragraph 113 above), the Government contended that the possible negligence of the police officers, who were not medical experts and might not have been familiar with the medication found in the applicant's possession, should not in itself lead to a conclusion of a violation of Article 3.

2. The Court's assessment

119. The Court reiterates that in cases involving the use of force during an arrest, its task is to review whether the force used was strictly necessary and proportionate in view of the circumstances of the case. In order to answer this question, the Court has to take into consideration the applicant's injuries and the circumstances in which they were inflicted (see, for example, Petyo Popov v. Bulgaria, no. 75022/01, § 54, 22 January 2009, and Rustam Khodzhayev v. Russia, no. 21049/06, § 56, 12 November 2015).

120. 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 (see, for example, *Anzhelo Georgiev and Others v. Bulgaria*, no. 51284/09, § 66, 30 September 2014, and *Mihhailov v. Estonia*, no. 64418/10, § 104, 30 August 2016). 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 an infringement of the right set forth in Article 3 of the Convention (see, among other authorities, *El-Masri*, cited above, § 207, and *Bouyid*, cited above, § 100).

121. Allegations of ill-treatment have to be supported by appropriate evidence. In assessing evidence, the Court has generally applied the standard of proof of "beyond reasonable doubt". However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events at issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of individuals within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to

provide a satisfactory and convincing explanation while in the absence of such explanation the Court may draw inferences which may be unfavourable for the Government (see, among other authorities, *Bouyid*, cited above, § 83). Whilst it is not, in principle, the Court's task to substitute its own assessment of the facts for that of the domestic courts, the Court is nevertheless not bound by the domestic courts' findings in this regard (see, for example, *Stevan Petrović v. Serbia*, nos. 6097/16 and 28999/19, § 119, 20 April 2021).

122. Turning to the circumstances of the present case, the Court acknowledges that the situation in which the applicant found himself could have caused him a considerable level of anguish and distress. It is not disputed by the parties that he was arrested at Prague Airport immediately after his removal from Switzerland and that the incidents between him and the police officers at the airport left him with a broken nose, an injury to the head and contusions on the chest. The contention between the parties is as to precisely how the applicant's condition came about. The Government submitted for their part that the injuries had been caused by the use of force which was proportionate to the applicant's extreme and unforeseeable behaviour, including self-harming. The applicant, on the other hand, disputed that explanation and insisted that the police had used force and coercive measures against him which had not been made strictly necessary by his own conduct.

123. As to the existing medical evidence concerning the applicant's condition during and after his transfer from the airport to the hospital (see paragraphs 17 and 18 above), the Court observes that it contains nothing as regards the cause of the applicant's injuries, but repeatedly mentions that the applicant behaved in a very aggressive manner, irrespective of whether he was handcuffed or not. For its part, the Constitutional Court noted from the investigation file, in its response to the applicant's constitutional appeal, that the applicant had fractured his nasal bones himself by hitting a mirror (see paragraph 43 above).

124. Concerning the application of the tear gas, it appears from the applicant's allegations that the device used against him was pepper spray. The latter, although a potentially dangerous substance which should not be used in confined spaces, is sometimes considered to be less harmful than tear gas because it disperses the tear-provoking substance in a more targeted manner. However, the use of pepper spray may produce side-effects such as respiratory problems, nausea, vomiting, irritation of the respiratory tract, irritation of tear ducts and eyes, spasms, thoracic pain, dermatitis or allergies (see paragraph 68 above; and see *Oya Ataman v. Turkey*, cited above, § 25).

125. In the present case, the Court notes from the file that the police officers had had recourse to pepper spray in the airport premises after the prior use of manual control techniques had not proved effective and at a time when the applicant, who was showing active resistance, was not under their complete control, in particular during incident no. 1 when he had found himself alone in the toilets and had behaved in a very dangerous manner

(see paragraph 14 above). It is also noteworthy that rapid access to a doctor was secured for the applicant directly at the airport (see paragraph 16 above) and that he did not claim to have suffered, after being exposed to the gas, any of the above-mentioned side effects that it may produce, nor were any such ill effects mentioned by the hospital doctors (see paragraph 18 above). Thus, the Court is of the view that the use of the pepper spray in the circumstances of the present case was not disproportionate or unlawful.

126. Lastly, the Court considers that at the time of the incidents at the airport, it was not possible for the police officers to know, on the basis only of medications found in the applicant's possession and his statement about his use of sedatives and analgesics, that the applicant might be in a vulnerable condition owing to a psychosocial disorder. Such a disorder was diagnosed later (see paragraph 23 above) and the applicant was offered treatment. Moreover, it was only on 21 October 2013 that the applicant mentioned his psychiatric treatment for depression (see paragraph 31 above). On the other hand, the Court accepts that the applicant's actual condition could have increased his aggressiveness which the police officers were called to control.

127. The Court acknowledges that the Government provided a plausible explanation regarding the applicant's behaviour and how the applicant's injuries had been caused, and produced appropriate evidence showing facts that cast doubt on the account given by the applicant in both regards (see paragraphs 115 and 116). In view of all the material in its possession, the Court finds itself unable to conclude beyond all reasonable doubt that the police officers' recourse to physical force to restrain the applicant was excessive and that the applicant was subjected to treatment contrary to Article 3 at the airport. However, it emphasises that this inability derives at least in part from the shortcomings in the investigations conducted by the domestic authorities (see paragraphs 94-106 above; and see *Lopata v. Russia*, no. 72250/01, § 125, 13 July 2010, *Gharibashvili v. Georgia*, no. 11830/03, § 57, 29 July 2008, *Mehdiyev v. Azerbaijan*, no. 59075/09, § 75, 18 June 2015, and *Gablishvili and Others v. Georgia*, no. 7088/11, § 63, 21 February 2019).

128. In view of the foregoing, the Court concludes that, as far as the substantive limb of Article 3 of the Convention is concerned, there has been no violation of that provision in respect of the applicant's alleged ill-treatment at the airport.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

129. Lastly, the applicant complained under Article 13 of the Convention that he had had no effective domestic remedy to assert his claims of ill-treatment.

130. The Court is of the view that the applicant's complaint can be considered as aimed at the outcome of the investigation in the present case and that, as such, it amounts to a restatement of his complaint under the

procedural limb of Article 3 of the Convention. For this reason, it concludes that, while this complaint is admissible, no separate issue arises under Article 13 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

131. 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

132. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage suffered as a result of the violation of his right not to be subjected to inhuman and degrading treatment under Article 3 of the Convention.

133. The Government observed that any just satisfaction under this head should reflect, on a fair basis, both the scope of the violations found and the relevant case-law of the Court.

134. Having regard to the nature of the violation found, the Court, ruling on an equitable basis, awards EUR 12,800 to the applicant in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

135. The applicant did not submit any claim in respect of costs and expenses. The Court therefore makes no award under this head.

C. Default interest

136. 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 complaints concerning the applicant's ill-treatment at the airport, the investigation thereof and the alleged lack of an effective remedy admissible, and the remainder of the application inadmissible;

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

3. *Holds* that there has been no violation of the substantive aspect of Article 3 of the Convention;

4. *Holds* that no separate issue arises under Article 13 of the Convention;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the amount of EUR 12,800 (twelve thousand eight hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (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;

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

Done in English, and notified in writing on 6 October 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik Registrar	Síofra O'Leary President