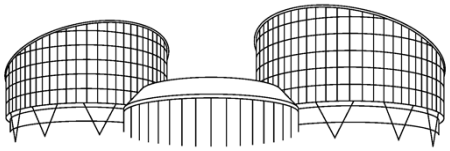

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF EL-ASMAR v. DENMARK

(Application no. 27753/19)

JUDGMENT

Art 3 (substantive and procedural) • Inhuman or degrading treatment • Ineffective investigation into deployment of pepper spray against an aggressive prisoner in an observation cell without prior warning • Failure to demonstrate deployment of pepper spray made strictly necessary by applicant's conduct

STRASBOURG

3 October 2023

FINAL

03/01/2024

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

In the case of El-Asmar v. Denmark,

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

Gabriele Kucsko-Stadlmayer*, President*,
Tim Eicke,
Faris Vehabović,
Branko Lubarda,
Armen Harutyunyan,
Anja Seibert-Fohr,
Anne Louise Bormann*, judges*,
and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to:

the application (no. 27753/19) against the Kingdom of Denmark lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Danish national, Mr Abdallah El-Asmar ("the applicant"), on 13 May 2019;

the decision to give notice to the Danish Government ("the Government") of the complaints concerning his exposure to pepper spray, and the decision to declare inadmissible the remainder of the application concerning his subsequent confinement to a restraint bed;

the parties' observations;

Having deliberated in private on 5 September 2023,

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

INTRODUCTION

1. On 4 April 2017, while the applicant was in prison and placed in an observation cell, two prison guards sprayed him with pepper spray. The precise circumstances were disputed. The applicant complained under the substantive and procedural aspects of Article 3 of the Convention.

THE FACTS

2. The applicant was born in 1992 and lives in Aarhus. He was represented by Mr Tobias Stadarfeld Jensen, a lawyer practising in Aarhus.

3. The Government were represented by their Agent, Mr Michael Braad, from the Ministry of Foreign Affairs, and their co-Agent, Ms Nina Holst-Christensen, from the Ministry of Justice.

A. Background

4. The applicant had a criminal past, which included robbery, violence and threats.

5. On 24 March 2017 he was arrested, charged in particular with breaching the Weapons and Explosives Act and detained on remand at a local prison. The "Client security assessment form" completed on admission recorded that the applicant was "possibly dangerous" and "possibly prone to escape". It further stated that the applicant's particular dangerousness and risk of escape could not be determined. However, it was assessed that he had displayed "particular problematic behaviour" and an observation was added to the effect that "... the inmate displayed an aggressive behaviour in connection with his admission. He was very vociferous and made many weird and obscure statements. He tried to encourage a physical fight with the staff and had no desire to communicate with the officers".

6. On 30 March 2017 he was transferred to Enner Mark Prison. There he was repeatedly placed in observation and security cells during the following days because of his aggressive and threatening behaviour. The following examples are drawn from the records provided and translated by the respondent Government as part of their written observations: on 31 March 2017, the applicant was found "mentally very unstable", in that he had ripped open his duvet and had taken out the padding. Moreover, he had threatened to kill a guard. When walking the applicant to the observation cell, some of the prison guards (P, L, M2, B) held his arms, because "his behaviour made them feel unsafe" and one prison guard, M2, reported that the applicant had made threats against him. On 1 April 2017 the applicant had smeared his window with toothpaste and threatened prison guard M2. On 2 April 2017 the applicant had threatened two prison guards (D2 and K). On 3 April 2017, in the morning, the applicant attempted to attack a prison guard, M1 it seems, with a pencil and a clenched fist. The immediate risk was averted by the prison guard "grab[bing] his left arm which he used to hold the pencil" and another prison guard (D2) grabbing his right arm. The applicant was ultimately pacified by putting him on the floor, two further prison guards (R2 and K) handcuffing him and a fifth prison guard (R1) holding his left leg. Thereafter he was placed in the security cell. Subsequently, in the evening, having returned to his regular cell, the applicant was screaming that he wanted a television, and when the prison guards entered the cell, he attempted to kick them, while jumping toward them. This attack was averted by one prison officer (T) "grab[ing] the [applicant's] left arm and use[ing] an arm-twisting hold to hold back the [applicant]" and, when the applicant continued to put up strong resistance, two other prison officers (D1 and D2) "grab[ing] the [applicant's] right arm and use[ing] an arm-twisting hold". Prison officer S held the applicant's right leg. He was thereafter handcuffed by D2, removed from his cell, taken to the security cell where he was placed flat on his stomach on the bed.

B. The incident of 4 April 2017

7. On 6 April 2017, via his lawyer, the applicant reported two prison guards (M1 and D1) to the police (*Sydøstjyllands Politi*) for aggravated violence under section 244 or 245 of the Penal Code in that they had sprayed him with pepper spray in an observation cell on 4 April 2017. He asked to be examined by a doctor independent from the prison.

8. On 10 April 2017 the police contacted the applicant by telephone and requested that he attend a doctor so that a medical report could be drawn up. The applicant refused. The police talked to a prison guard, who confirmed that the applicant refused to be examined by a doctor linked to the prison (henceforth a "prison doctor").

9. The prison journal for 4 April 2017 contained a report about the applicant's placement in the observation cell which recorded that he entered the cell at 8.54 a.m. According to that report, he was attended by a prison doctor, T, at 10 a.m. and threatened to destroy the cell and to kill the prison officers if he was not given a television and some cigarettes. Thereafter, he was attended by prison guards several more times. At 3 p.m., via the intercom, he shouted "OUTDOOR EXERCISE" multiple times and "you f... terrorists, come on in and I'll smash you". At 4 p.m. it was noted that he had flung his food at the window, had urinated underneath the door with urine running under the door, and had destroyed his mattress "which was in a thousand pieces all over the cell. The [applicant] stood shouting 'come on, I will kill you'". It was further noted that at 4.20 p.m. "[the applicant] stood kicking the door and shouting that he wanted to kill us all. We entered [the applicant's] cell, after which he ended up in the security cell because of an attack on staff. For more information, please see the security cell placement report of 4 April 2017."

10. In the prison journal of 4 April 2017, in respect of the placement of the applicant in the security cell, a prison guard, D1, had written that four named prison guards (D1, M1, R1, J) had been "engaged in or had witnessed" the incident, which was described as follows:

> "at 4.25 p.m. [sic] the staff noticed that [the applicant] had [urinated] underneath the door and that he had destroyed his mattress. [The applicant] was kicking at the door while shouting 'I'm going to kill you all'.
>
> [prison guard] R1 opened the door, and I [D1] took a step into the cell. [The applicant] rushed towards me and tried to punch me in the head region. I pushed [the applicant] back into the cell and pulled out my pepper spray. [Prison guard] M1 pulled out his at the same moment and sprayed at [the applicant], who threw himself down onto the floor. While [the applicant] was immobilised on the floor, the mattress was removed from the cell. [The applicant] was still not calm and started shouting again, '[insulting language] ... I don't need any water, I'll take it like a real man'. As [the applicant] failed to calm down, he was moved to the security cell. I grabbed [the applicant's] right arm, and R1 grabbed his left arm. It was hard to hold [the applicant] as he had pepper spray all over and put up strong resistance. When we finally managed to place [the applicant] on the bed he was restrained without major difficulty. [The applicant] continued to

> make threats as to how he would kill us. The threats were made against [the prison guards] R1, M1, and D1."

At 4.27 p.m., by phone it appears, D1 had contacted the prison doctor T, who "concluded that if the inmate had only been subjected to pepper spray, there was no need to attend to the inmate", but had asked D1 to report on his condition one hour later.

At 5.29 p.m. D1 had contacted T again and stated that the applicant appeared unharmed, although still very agitated. T is reported to have said that he was unable to treat anger.

This report, which ran to ten pages, also contained detailed information about the applicant's placement in the security cell, specifying the times of each relevant event. It ended with the following passage:

> "[The applicant] has been advised of the possibility of lodging a complaint about the decision and the handling of the case with the Department of Prisons and Probation and that it could be an advantage to lodge any such complaint through the institution. The inmate has further been advised that it is likely that any complaint will only be considered if lodged within two months from today."

11. On 26 April 2017 the applicant, via his lawyer, made a separate complaint to the Department of Prisons and Probation (*Direktoratet for Kriminalforsorgen*), complaining that, on 4 April 2017, he had been exposed to pepper spray, and subsequently been placed in a security cell, where he had been confined to a restraint bed.

12. On 2 June 2017 the local prison authorities (the prison) gave its opinion to the Department of Prisons and Probation on the use of force (and his placement in the security cell), and stated the following, in so far as relevant to the present case:

> "... [the applicant] arrived ... on 30 March 2017 ... he was transferred because of his aggressive and threatening behaviour. ... On multiple occasions [the applicant] has attacked prison officers, and he has made several verbal threats against the staff ...
>
> According to a report on the security cell placement of 4 April 2017, the prison staff noticed that day that [the applicant] had urinated on the floor underneath the observation cell door. [The applicant] had also flung his food at the window, destroyed his mattress, and kicked at the cell door while shouting 'I'm going to kill you all'. As [the applicant] had been kicking violently at the door, behaviour which entails a risk of self-harm, the prison staff decided to open the observation cell door.
>
> When the staff opened the observation cell door, [the applicant] rushed towards the prison officer and punched out at him with his fist clenched. The punch was aimed at the prison officer's head. The prison officer pushed [the applicant] back into the cell and the staff pulled out their pepper sprays. Because of the agitation and aggressive behaviour on the part of [the applicant], pepper spray was subsequently used.
>
> In view of the facts of the case as stated in the report on the security cell placement, the staff had to use force to avert imminent violence as [the applicant] was extremely agitated and lashed out at the prison officer.
>
> The situation is therefore deemed to fall within section 62(1)(i) of the Sentence Enforcement Act.

Under section 62(2) of the Sentence Enforcement Act, force may be applied through the use of holds, shields, batons, pepper spray and CS gas.

The Division finds that the use of force was no more extensive than necessary to bring the situation under control and that the principle of a gentle approach was observed: see section 62(3) and the first sentence of section 62(4) of the Sentence Enforcement Act. The intensity of [the applicant's] attack on the staff made it necessary to immobilise [the applicant]. In this particular situation and in view of the staff's prior knowledge of [the applicant], pepper spray was deemed to be a gentler approach than the use of manual force. The reason for this assessment was that it would have entailed a potential risk of harm to both [the applicant] and staff if he were to have been immobilised by manual force, because of his agitation. [The applicant] has previously displayed behaviour of such an aggressive and violent nature that it took five persons to immobilise him while a sixth person handcuffed him: see the report on the security cell placement of 3 April 2017.

It follows from section 6 of the Executive Order on the Use of Force against Inmates in Prisons that, if possible, an inmate must be notified that pepper spray will be used. The Prison Section Manager of Unit E has stated that, in this specific incident, the staff did not warn [the applicant] before using pepper spray. The Prison Section Manager has further stated that the reason was the intensity of [the applicant's] attack on the staff present.

The Division finds no reason to criticise the decision to use pepper spray or the lack of notification as the Division further finds that it was not possible in the specific situation to inform [the applicant] that pepper spray would be used."

13. On 29 August 2017 the Department of Prisons and Probation found the use of pepper spray (and the placement in the security cell) justified. It stated, among other things:

"We have had the opportunity to look into the matter, and we find that the decision made by the local prison authorities was correct.

According to the case file, your client displayed extremely violent behaviour before being placed in the security cell on 4 April 2017 at 4.21 p.m [sic].

...

After his security cell placement [on 3 April 2017], your client has been placed in an observation cell before he could be returned to his own cell.

About two and a half hours after returning to his own cell, your client used the emergency call system.

The staff rushed to your client's cell, where he was standing on his bed, shouting and screaming because he had no television. Your client was being very loud and attacked the prison officers. He was therefore immobilised and placed in the security cell, where he made further threats such as 'I'll f... rape your wives' and 'I'll see you in three months, I'll be back to kill you – I'll cut your throats in front of your children'.

On 4 April 2017 at 8.54 a.m., your client was placed in an observation cell, and at 10 a.m. he said to the doctor that 'if my TV and cigarettes are not there for me when I come back, I will smash up all this ... once again, and the officers will be dead', and then he pointed at the staff and said, 'you people who restrained me will experience something really awful – it was pure luck that I did not decide to kill everybody yesterday' and 'you ... terrorists, come on in and I'll smash you'.

At 4 p.m., the staff noticed that your client had urinated underneath the door, flung his food at the window and destroyed the mattress while continually shouting 'Come on! I'll kill you!'

Subsequently, your client also kicked at the door while shouting that he would kill the staff.

When the staff, four persons, entered the observation cell, your client rushed towards them and tried to punch them. For safety reasons the staff then used pepper spray against your client. ...

The prison further stated that, in accordance with section 66(5) of the Sentence Enforcement Act, an institution must contact the prison doctor immediately when an inmate has been restrained and that that provision was observed as the staff contacted the doctor at 4.27 p.m.

Your complaint has therefore not been treated as a complaint about the prison doctor's professional assessment and decision to not attend your client during his restraint. In any case, the prison is not the appropriate authority to consider complaints of that nature, for which reason you are advised to complain to the Patient Safety Authority [*Styrelsen for Patientsikkerhed*].

Accordingly, we find that the decision was correct.

We agree with the prison. Just like the prison, we find that it was justified to use pepper spray against your client and to restrain your client.

As to the use of pepper spray, we have attached particular importance to your client's very aggressive behaviour, which he had displayed for several days, and to the fact that he said the same day: 'if my TV and cigarettes are not there for me when I come back, I will smash up all this ... once again, and the officers will be dead', and then he pointed at the staff and said: 'you people who restrained me will experience something really awful – it was pure luck that I did not decide to kill everybody yesterday' and 'you f... terrorists, come on in and I'll smash you', and that your client immediately attacked the four prison officers who opened the door to his cell.

In this particular situation, pepper spray was deemed a gentler approach than the use of manual force because of the potential risk of harm to both [the applicant] and the staff if your client were to be immobilised by manual force.

...

On the basis of the above, we also find that the facts disclose no breach of Article 3 of the Convention."

14. In the proceedings arising out of his report to the police (see paragraph 7 above), the latter interviewed the applicant on 13 November 2017, and the prison guards D1 and M1 on 4 and 5 January 2018 respectively.

15. The applicant explained that he had destroyed the mattress in the observation cell when he had been placed there. D1 and M1 had entered the cell and, although the applicant had been passive and had surrendered, they had both sprayed him with pepper spray in the face and on his back. He had fainted momentarily. Subsequently, four prison guards, including D1 and M1, had dragged him, while he was on his back on the floor, and placed him in the security cell. He had not wished to be examined by the prison doctors, as he considered them biased. Some days after the incident, a prison doctor (K)

had summoned him for an examination, but he had refused, because the examination was to take place in the kitchen, where some of the prison guards who had previously confined him to a constraint bed were present.

16. D1 and M1 explained that the applicant had destroyed property in other cells before. On the relevant day he had been placed in the observation cell, where he had made threats and screamed, flung his food at the window, urinated on the walls and the floor, destroyed the mattress with his teeth, and tried to break the window in the door to the cell. After this, and principally in order to remove the mattress, D1 and M1 had entered the cell. There the applicant had attempted to punch D1 in the face. D1 and M1 had therefore used pepper spray against the applicant. They both denied that the applicant had fainted. On the contrary, the applicant had continued his offensive and insulting behaviour. Since they were sliding in urine and the air was filled with pepper spray, which made it unpleasant for all parties, they needed help from two other prison guards to carry the applicant to the security cell (located next to the observation cell), where he had been offered medical care and water, which he had refused, stating that he "took it like a real man". The incident had been immediately reported to the prison doctor on duty and registered in the prison journal.

17. The police verified whether there were any relevant video-recordings, but in vain, since there was no video surveillance in the observation cell and the security cell (for reasons of privacy), or from the corridor.

18. On 26 January 2018 the police decided not to initiate criminal proceedings against D1 and M1. It was noted that the reports of events were contradictory; that the applicant had refused to be examined by a prison doctor; that there were no video-recordings of the incident, no other witnesses to what had happened in the observation cell and no other evidence which could support one version of events or the other; and that in those circumstances it was unlikely that criminal proceedings against D1 and M1 would lead to a conviction.

19. On 23 February 2018, via the Prosecution Service, the applicant appealed against the decision to the Regional Prosecutor (*Statsadvokaten i Viborg*) and maintained that the investigation had been ineffective because: (1) the investigation period had been protracted; (2) the parties involved had not been interviewed until several months after the incident; (3) no video-surveillance footage from the corridors in the prison had been secured; and (4) the applicant had not been attended to by a doctor independent from the prison. The applicant requested that the Regional Prosecutor give a decision on whether there had been a breach of the procedural limb of Article 3.

20. Because of a mistake, the appeal was not submitted to the Regional Prosecutor until September 2018.

21. On 16 November 2018 the Regional Prosecutor upheld the decision to discontinue the criminal proceedings against D1 and M1. She noted that

the descriptions of events were contradictory, that there was no video surveillance in the observation cell, and that the fact that D1 and M1 had used pepper spray was not by itself sufficient for a conviction for violence, since it could not be ruled out that the use of force had been lawful.

22. The applicant was advised that his complaints about the investigation had been sent to the Management Secretariat of the police on 12 September 2018 for an initial decision.

23. By a letter of 2 July 2019 the Management Secretariat of the police invited the applicant's lawyer to submit any observations he might have about the investigation. No observations were submitted.

24. On 2 September 2019 a representative of the Management Secretariat of the police gave a decision on the procedural aspect of his complaint. She noted at the outset that the fact that the applicant had not wished to be examined by the prison doctor had given the authorities the impression that the case was not very serious or urgent. Nevertheless, in respect of complaint number (1), given that it was a report about violence, she agreed that the length of the proceedings (*sagsbehandlingstiden*), seven months from April to November 2017, during which no investigation steps had been carried out, was excessive and regrettable. She did not, however, find the investigation ineffective. Therefore, she dismissed the remainder of the applicant's procedural complaints (2) to (4). She noted that all relevant evidence had been gathered, that the applicant had refused to assist in procuring a medical report, and that no video-recording existed. Lastly, the applicant had not pointed to any other evidence which could and should have been obtained.

25. On 27 September 2019 the applicant appealed against that decision to the Regional Prosecutor.

26. On 9 January 2020 the Regional Prosecutor upheld the decision for the same reason as that given by the Management Secretariat of the police.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. The Constitution

27. Article 63, paragraph 1, of the Constitution (*Grundloven*) reads as follows:

> "The courts of justice shall be empowered to decide any question relating to the scope of executive authority; though any person wishing to question such authority shall not, by taking the case to the courts of justice, be excused interim compliance with the orders given by the executive authority."

28. The basic principle of the provision is that courts can carry out a judicial review of, for example, the legal basis of administrative decisions, the scope of the authority's jurisdiction and the observance of formal rules,

but not the exercise of administrative discretion. Thus, the courts do not have the power to review a decision made by the prosecution as to whether or not to bring charges in a criminal case. Moreover, by virtue of section 975 of the Administration of Justice Act (*Retsplejeloven*), when the prosecution has decided not to bring charges in a criminal case, the case can only be re-opened if at a later stage new evidence of significant weight emerges (see, among other authorities, *Jørgensen and Others v. Denmark* (dec.), no. 30173/12, § 36, 28 June 2016).

B. The Sentence Enforcement Act

29. The relevant provisions of the Danish Sentence Enforcement Act (*straffuldbyrdelsesloven*), as applicable at the time of the incident, read as follows:

Section 62

"*(1)* The Department of Prisons and Probation and the institutions of the Prison and Probation Service may use force against an inmate if it is necessary:

(i) to avert imminent violence, overcome violent resistance or to prevent suicide or other self-harm;

...

(2) Force may be applied through the use of holds, shields, batons, pepper spray and CS gas.

(3) No force may be used if it would be disproportionate in view of the purpose of the measure and the indignity and discomfort likely to be caused by the measure.

(4) Any use of force must be as considerate as conditions permit. A doctor must attend to the inmate following the use of force if it is suspected that the inmate has fallen ill, including sustaining injuries, in connection with the use of force, or if the inmate himself or herself requests medical assistance.

(5) The Minister of Justice shall lay down rules on the right to carry weapons and on the use of force against inmates."

Section 66

"*(1)* By a decision of the relevant institution of the Prison and Probation Service, an inmate may be placed in a security cell and be restrained by the use of a body belt, wrist and ankle straps and mittens, if this is necessary:–

(i) to avert imminent violence or overcome violent resistance; or

..."

C. Executive Order no. 296 of 28 March 2017 on the Use of Force against Inmates in Prisons

30. The relevant provisions of Executive Order no. 296 of 28 March 2017 on the Use of Force against Inmates in Prisons

(*magtanvendelsesbekendtgørelsen*), as applicable on 4 April 2017, read as follows:

Section 2

"Holds, shields, batons, pepper spray and CS gas may be used only as set out in the directions issued by the Department of Prisons and Probation."

Section 4

"*(1)* It is permitted to carry pepper spray in closed prisons and local prisons. Otherwise, pepper spray may be carried only if there is a situation of particular risk which may necessitate the use of pepper spray.

...

(3) The institutions of the Prison and Probation Service shall issue directions identifying the employees of the institutions of the Prison and Probation Service who may decide when the conditions for handing out pepper sprays and/or batons have been met: see the second sentence of subsection (1) and subsection (2), and that such weapons may therefore be carried."

Section 6

"Before pepper spray or CS gas is used, the relevant inmate must be notified, if possible, that pepper spray or CS gas will be used in case of failure to obey staff orders. It must be ensured, if possible, that it is possible for the inmate to obey the order."

Section 7

"Following the use of pepper spray or CS gas, the relevant inmate must be offered the necessary relief for symptoms caused by the use of pepper spray or CS gas."

Section 8

"*(1)* Where force has been used against an inmate, a report on the use of force must be entered into the dedicated module of the Client System relating to the use of force as soon as possible. A record must be made in this respect confirming that the inmate has been advised that he or she may appeal against the decision on the use of force to the Department of Prisons and Probation: see section 9(1), and for the time-limit for lodging an appeal see section 9(2).

(2) Upon request, an inmate must be given a copy of the report."

D. Circular Letter no. 9315 concerning the Executive Order on the Use of Force against Inmates in Prisons

31. It appears from paragraph 2.1 of Circular Letter no. 9315 concerning the Executive Order on the Use of Force against Inmates in Prisons (*Skrivelse nr. 9315 om bekendtgørelse om anvendelse af magt over for indsatte i Kriminalforsorgen institutioner*) that providing and carrying pepper spray will be permitted in the event of sudden situations of particular risk in open prisons if there has been a specific incident involving particular danger or

risk, such as an incident with a violent inmate, and if it is considered necessary for security reasons to carry pepper spray for a certain period.

32. Moreover, the following appears in paragraph 3 of the Circular Letter:

> "As regards the use of pepper spray, it is observed that normally this is not allowed in closed rooms if less intrusive means of force are available and adequate."

II. INTERNATIONAL MATERIALS

A. Documents of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

33. In its 2014 Report to the Danish Government (CPT/Inf (2014) 25), the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) said the following about the use of pepper spray in Danish prisons (see paragraph 63, p. 40):

> "63. As regards the use of force, an examination of the relevant documentation showed that in most instances prison officers only resorted to manual restraint (hand grips) to control an agitated prisoner and that where batons were deployed their use was proportionate. This picture was generally confirmed by interviews with prisoners.
>
> As regards pepper spray, Executive Order 547 of 27 May 2011 on the Use of Force in Prisons provides for its use where there is a concrete situation of particular risk, and the Director or other responsible officer authorises its distribution and deployment. Further, the Executive Order states that an inmate should be informed that pepper spray will be used if staff orders are not obeyed. Following its use the inmate should be offered relief and a report drawn up on its use, which is sent to the Department of Prisons and Probation.
>
> In the cases examined by the CPT's delegation, it was always reported that the inmate was warned that pepper spray would be used if he did not comply with the officer's order and following its use the inmate was provided with the possibility to wash himself, and was usually seen by a member of the health-care staff. Further, its application did not appear to be excessive; for example, five times in the 13 months at Western Prison. However, in a few of the cases examined it appeared that the use of pepper spray was a result of poor communication. For example, ...
>
> In sum, clearly defined safeguards do regulate the use of pepper spray in Danish prisons.
>
> However, the CPT considers that pepper spray is a potentially dangerous substance and should not be used in confined spaces. In particular, it should never be considered legitimate to diffuse pepper-spray through the hatch of a cell door. Moreover, the Committee considers that its use could be further reduced through improved communication skills by prison officers.
>
> The CPT recommends that the Danish authorities review the use of pepper spray in the light of the above remarks."

34. The 2019 report of the CPT to the Danish Government (CPT/Inf (2019) 35) also addressed the use of pepper spray in prisons and emphasised the following (see paragraphs 99 and 100):

"99. The CPT delegation was informed that, since the 2014 visit, a number of texts had been adopted or amended to reinforce the safeguards surrounding the use of pepper spray. Specifically, it was expressly stated that, in principle, pepper spray may be used in confined areas only if the deployment of other means does not seem sufficient to secure the desired outcome. Prisoners should also receive a warning that pepper spray will be used if they fail to comply with the instructions of staff. In addition, after pepper spray has been deployed, the prisoner in question must be offered assistance, and a report drawn up and sent to the Prison and Probation Service. The number of cases in which pepper spray has been used appears to be falling (125 cases in 2017 and 77 in 2018, at national level). These are positive developments.

That said, it emerged that these directives were not always correctly applied. At Storstrøm Prison, for example, one prisoner alleged that he had not been warned before pepper spray was used. Moreover, in the prison's statistics, this case had been recorded under the 'use of force' section, with no mention being made of the deployment of pepper spray.

The CPT recommends that the necessary steps be taken to guarantee that the texts governing the use of pepper spray are correctly applied in Storstrøm Prison and indeed throughout Denmark's prisons. It should also be ensured that all cases in which pepper spray is deployed are systematically recorded as such in the establishments concerned and reported (with the sending of a written report) to the Prison and Probation Service [bold added].

100. The CPT wishes to emphasise that every instance of use of force and of special means (pepper-spray, handcuffs, shields, etc.) should be recorded in a dedicated register, established for that purpose. The entry should include the times at which the use of force/special means began and ended, the circumstances of the case, the reasons for resorting to force/special means, the type of means used, and an account of any injuries sustained by prisoners or staff. Without such recording, it will be impossible to analyse accurately the overall situation in a prison and to draw the appropriate conclusions as regards use of force/special means.

The delegation observed that there was no such register at the Copenhagen Police Headquarters Prison, that the resort to shields (and pepper spray, see paragraph 99) was not recorded at Storstrøm Prison and that the use of handcuffs was usually not logged in any of the establishments visited. **The CPT recommends that the Danish authorities take the necessary measures to remedy these shortcomings [bold added]**".

B. Documents of the United Nations Committee against Torture

35. In its concluding observations on the combined sixth and seventh periodic reports of Denmark (CAT/C/DNK/CO/6-7, 4 February 2016), the United Nations Committee against Torture (UNCAT) issued the following recommendation:

"**Use of pepper spray**

30. While noting that the use of pepper spray is regulated and has diminished, the Committee is concerned at reports of its still fairly frequent use by the police and in prisons (art. 16).

31. The State party should take measures to further restrict the use of pepper spray, and prohibit its use in confined spaces, on persons with mental disabilities or on individuals who have been brought under control."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

36. The applicant complained that he had been exposed to pepper spray in contravention of the substantive and procedural limbs of Article 3 of the Convention, which reads as follows:

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

A. Admissibility

37. The Government submitted that the complaint should be declared inadmissible for failure to exhaust domestic remedies, since the applicant had failed to initiate proceedings under Article 63 of the Constitution (see paragraph 28 above). They referred to a High Court judgment of 4 June 2014 (U.2014.3045Ø) concerning the lawfulness of, among other things, placement in a security cell and confinement to a restraint bed.

38. The applicant disagreed.

39. To the extent that the Government's objection is to be understood as arguing that the applicant, after the Regional Prosecutor's decision to discontinue the criminal proceedings, should have instituted civil proceedings under Article 63 of the Constitution in order to challenge the use of force and possibly obtain compensation, the Court reiterates that in the area of unlawful use of force by State agents – and not mere fault, omission or negligence – civil or administrative proceedings aimed solely at awarding damages, rather than ensuring the identification and punishment of those responsible, are not adequate and effective remedies capable of providing redress for complaints based on the substantive aspect of Articles 2 and 3 of the Convention (see, for example, *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, § 135, 19 December 2017; *Semache v. France*, no. 36083/16, § 53, 21 June 2018; and *Jørgensen and Others v. Denmark* (dec.), no. 30173/12, §§ 62-64, 28 June 2016).

40. The Court further reiterates that in proceedings initiated under Article 63 of the Constitution the domestic courts do not have the power to review a decision made by the prosecution as to whether or not to bring charges in a criminal case (see paragraph 28 above). Therefore, in the Court's view, such proceedings cannot be said to constitute an effective remedy that must be pursued for exhaustion purposes in a case about alleged unlawful use of pepper spray by State agents.

41. It follows that the Government have failed to show that Article 63 of the Constitution would in the circumstances of the present case have been an effective remedy which the applicant should have made use of for the purposes of Article 35 § 1 of the Convention. The Court further notes that the application 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

42. The applicant maintained that excessive force had been used on him in an unlawful manner. He had been locked in an observation cell and had therefore already been under the complete control of the prison guards, who had not attempted to use any less intrusive measures than pepper spray. He referred to the recommendations by bodies such as the CPT and the UNCAT (see paragraphs 33 and 35 above) and submitted that pepper spray should never be used in confined spaces.

43. He also contended that the investigation had been ineffective, in that it had been protracted; that the parties involved had not been interviewed promptly after the incident; that he had not been attended to by a doctor from outside the prison; that no video-surveillance footage from the corridors in the prison had been secured; and that only two of the four prison guards involved had been interviewed.

44. The Government submitted that Article 3 of the Convention did not, in general, rule out the use of pepper spray in confined areas, but that such use depended on a specific assessment of all the relevant circumstances. In this particular case, the applicant had not been brought under control as he was destroying property and attacking a prison guard in the observation cell. The recourse to pepper spray had therefore been made strictly necessary by the applicant's aggressive and violent conduct.

45. The Government also maintained that the investigation had been effective and expeditious. Admittedly, the authorities had apologised for the excessive period of seven months between the initial report to the police and the date when the parties had been interviewed, but that was not an indication that the overall investigation was incompatible with Article 3, particularly since the delay had not resulted in any evidence being lost. Nor had there been any risk that the matter would become time barred.

2. The Court's assessment

(a) General principles

46. The Court reiterates that "any conduct by law-enforcement officers *vis-à-vis* an individual which diminishes human dignity constitutes a

violation of Article 3 of the Convention" and that this "applies in particular to the use of physical force against an individual where it is not made strictly necessary by his conduct, whatever the impact on the person in question" (see, among other authorities, *Pranjić-M-Lukić v. Bosnia and Herzegovina*, no. 4938/16, § 73, 2 June 2020).

47. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. The burden of proof is then on the Government to provide a satisfactory and convincing explanation by producing evidence establishing facts which cast doubt on the account of events given by the victim. In the absence of such explanation, the Court can draw inferences which may be unfavourable for the Government. That is justified by the fact that persons in custody are in a vulnerable position and the authorities are under a duty to protect them (see, among other authorities, *Ibrahimov and Mammadov v. Azerbaijan*, nos. 63571/16 and 5 others, § 89, 13 February 2020).

48. Concerning the use of pepper spray, the Court has stated that such use "is authorised for the purpose of law enforcement" (see for example, *Ali Güneş v. Turkey*, no. 9829/07, § 38, 10 April 2012), but has endorsed the CPT concerns that "pepper spray is a potentially dangerous substance and should not be used in confined spaces" and its conclusion that "pepper spray should never be deployed against a prisoner who has already been brought under control" (see, in particular, *Ali Güneş*, cited above, §§ 39 and 41, *and Tali v. Estonia*, 66393/10, § 78, 13 February 2014).

49. Regarding the procedural obligation implied by Article 3, the essential purpose of an investigation is to secure the effective implementation of the domestic laws prohibiting torture and inhuman or degrading treatment and punishment in cases involving State agents or bodies, and to ensure their accountability for ill-treatment occurring under their responsibility (*Shmorgunov and Others v. Ukraine*, nos. 15367/14 and 13 others, § 329, 21 January 2021). The Court reiterates in particular that in order to be effective the investigation must be capable of leading to the identification and, if appropriate, punishment of those responsible. A requirement of promptness and reasonable expedition is implicit in this context. It may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (see, among others, *Baranin and Vukčević v. Montenegro*, nos. 24655/18 and 24656/18, §§ 133-137, 11 March 2021). The investigation 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. Although this is not an obligation of results to be achieved but of means to be employed, 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 required standard of effectiveness (see, *inter alia*, *A.P. v. Slovakia*, no. 10465/17, § 71, 28 January 2020).

(b) Application of these principles to the present case

(i) The procedural limb

50. In the present case, it was undisputed that pepper spray had been used against the applicant, while he was placed in the observation cell. Only the circumstances were disputed.

51. The applicant complained both to the Department of Prisons and Probation (see paragraph 11 above) and to the prosecution authorities (see paragraph 7 above) about being exposed to pepper spray.

52. On 29 August 2017 the Department of Prisons and Probation found that the use of pepper spray had been justified, and that there had been no violation of Article 3 (see paragraph 13 above).

53. On 16 November 2018, having carried out an investigation, the Regional Prosecutor decided to discontinue the criminal proceedings against the prison guards D1 and M1 (see paragraph 21 above). Subsequently, on 9 January 2020 the Regional Prosecutor dismissed the applicant's three specific complaints about the investigation and partly accepted his complaint concerning the length of the investigation (see paragraph 26 above).

54. The Court notes from the outset, and this has not been disputed by the parties, that the Regional Prosecutor was independent from those implicated in the events, not only due to a lack of hierarchical or institutional connection but also enjoying practical independence (see, for example, *Baranin and Vukčević v. Montenegro*, cited above, § 134).

55. The prosecution authorities, at two levels, obtained statements from the applicant and the two prison guards most directly involved. They verified the prison journal records regarding the date, time and location of the use of force and the transfer of the applicant from the observation cell to the security cell. They tried to obtain medical information and video-surveillance footage, but in vain.

56. Regarding the requirement of promptness and reasonable expedition, the prosecution authorities agreed with the applicant that the length of the proceedings was protracted and regrettable (see paragraph 24 above) since for the first seven months, no investigation had been carried out. They did not, however, find that the investigation had been ineffective or inadequate for that reason since in their view, all relevant evidence had been gathered and no evidence had been lost because of the lapse of time.

57. The Court observes that the criticism of the domestic authorities related to the seven months which elapsed after the applicant reported the incident (see paragraph 7 above) until he was interviewed for the first time by the police (see paragraph 14 above). It took another two months for the

relevant prison guards to be interviewed (see paragraph 14 above). In the Court's view an investigation that takes so long to start cannot be considered "prompt". Subsequently, however, it was conducted with reasonable expedition.

58. In this particular case, however, the identity of the relevant prison guards was recorded (contrast *Labita v. Italy* [GC], no. 26772/95, § 134, ECHR 2000-IV) and D1's description of the facts in the prison journal concerning the applicant's placement in the security cell corresponded to those later submitted by him and M1. In these specific circumstances, the Court can agree that the delay in the early phase of the investigation cannot of itself lead to a finding that the investigation was ineffective.

59. Turning to the question whether the investigation was adequate, the Court is fully aware that the investigation conducted by the prosecution authorities was aimed at deciding whether or not to bring charges against D1 and M1 and at addressing the applicant's four specific complaints about the investigation. However, the Court notes that the subject of the investigation thereby became rather narrow and did not entail an assessment of whether the use of force, in the form of deploying pepper spray against the applicant in the observation cell, had been "made strictly necessary by his conduct" failing which it would violate Article 3 of the Convention.

60. In particular, the prosecution authorities noted that the reports of events were contradictory (see paragraphs 18 and 21 above). However, even if it was a violent attack by the applicant that triggered the use of the pepper spray, it does not appear that the prosecution authorities made an assessment of the incident in the context of the surrounding circumstances, including the applicant's prior behaviour and threats or the prison authorities' ability to respond to prior attacks without the need to deploy pepper spray (see the case-law cited in paragraph 49 above). Notably, they did not examine in any detail the reason for entering the observation cell, the preparation (if any) of the action, or whether the legal safeguards for the use of pepper spray laid down in domestic law had been complied with.

61. The Court also notes that there were inconsistencies in the descriptions of the events and the timing set out in the prison journals (see paragraph 9 and 10).

62. According to the prison journal records of the applicant's placement in the observation cell on 4 April 2017 (see paragraph 9 above), he was placed there at 8.54 a.m. At 10 a.m. he had been screaming and making threats, at 3 p.m. he had again been screaming and making threats; at 4 p.m. he had flung his food at the window, urinated underneath the door, destroyed his mattress, and shouted that he would kill the prison guards; and at 4.20 p.m., just before the guards had entered the cell, the applicant had kicked the door and shouted again that he wanted to kill them.

63. That description of the events appears to have led the prison to state, in its opinion of 2 June 2017 to the Department of Prisons and Probation, that

"as [the applicant] had been kicking violently at the door, behaviour which entails a risk of self-harm, the prison staff decided to open the observation cell door" (see paragraph 12 above).

64. However, according to the prison journal records of the applicant's placement in the security cell, "at 4.25 p.m. the staff noticed that [the applicant] had [urinated] underneath the door and that he had destroyed his mattress. The applicant was kicking at the door while shouting that he wanted to kill them all" (see paragraph 10 above).

65. That description of the events was supported by the explanations provided by D1 and M1 when they were later interviewed by the prosecution authorities. The two prison guards added that the applicant had tried to break the window in the door to the cell and that after this, but principally in order to remove the mattress, they had entered the cell (see paragraph 16 above).

66. The Court thus finds that the prosecution authorities made no adequate attempt to clarify whether the prison guards entered the observation cell in order to protect the applicant against self-harm, or to remove a mattress that seems to have already been destroyed, or for other reasons, and so were unable to establish whether entering the observation cell had been imperative and urgent, had been necessary but not specifically urgent, or whether it had been necessary at all.

67. Likewise, there seems to have been no questioning in respect of the preparation of the action. It thus appears that the prosecution authorities, without any further examination, accepted the assessment of 2 June 2017, submitted by the prison to the Department of Prisons and Probation (see paragraph 12 above) that in the specific situation, "because of the intensity of the applicant's attack on the staff" it had not been possible to warn the applicant that pepper spray would be used. The Court observes in this connection that, as in the case of *Tali* (cited above), the prison authorities generally and the prison guards involved in the events of 4 April 2017 personally were well aware that the applicant was a violent and aggressive prisoner, who had made daily threats against them and had been placed in observation and security cells several times, and who had engaged in physical attack against them only the day before (see notably paragraphs 5 and 6 above). On the relevant day he was again aggressive, and had, at least on two occasions, at 10. a.m. and 3 p.m., threatened to kill or "smash" the prison guards. Apparently at 4 p.m., some twenty minutes before the prison guards entered the cell, he had destroyed property in the observation cell (see paragraphs 4 and 15 above) and screamed that he wanted to kill them all. However, there is no indication that the investigation authorities examined whether the prison guards could and should have foreseen that their entering the cell could involve a risk of the applicant turning violent towards them or could have averted that risk by making specific preparations before entering the cell. An examination of the preparation of the operation could have shed light on whether, as on previous occasions, the applicant could have been

brought under control by less intrusive means without the need to deploy pepper spray (see paragraph 6 above), and whether the use of special equipment other than pepper spray, could have sufficed (see *Tali*, cited above, § 78 and contrast *Konstantinopoulos and Others v. Greece (no. 2)*, nos. 29543/15 and 30984/15, § 72, 22 November 2018, concerning the excessive use of force, including the use of "tasers", in an operation which had been planned and prepared in terms of risk assessment).

68. Finally, it would have been relevant to question more thoroughly why, as part of the preparation, despite their prior knowledge and the passage of some 20 minutes between the applicant's conduct being first recorded and the prison guards entering his cell the latter could not have forewarned the applicant, before entering the observation cell, that pepper spray would be used against him if he did not obey orders, or why, for example, they did not enter his cell with the pepper spray visibly drawn ready to be used. This is particularly so as the Executive Order no. 296 of 28 March 2017 on the Use of Force against Inmates in Prisons, and Circular Letter no. 9315 (see paragraph 30 above), expressly requires that "before pepper spray or CS gas is used, the relevant inmate must be notified, if possible, that pepper spray or CS gas will be used in case of failure to obey staff orders. It must be ensured, if possible, that it is possible for the inmate to obey the order" (section 6 of the Executive Order). In this context, it might also have been appropriate to examine whether in respect of preparing to enter his cell there had been sufficient "assistance" available (see paragraph 34 above, point 99), and whether provision could or should have been made for specific evidence about the operation to be gathered.

69. Lastly, it appears that the prosecution authorities assumed, without addressing the issue, that the remaining legal safeguards for the use of pepper spray provided for under domestic law had been complied with.

70. It will be recalled that the Executive Order no. 296 of 28 March 2017 on the Use of Force against Inmates in Prisons (see paragraph 30 above), set out, among other things, that the inmate had to be offered the necessary relief for symptoms caused by the use of pepper spray (section 7) and the use of force had to be entered into the dedicated module of the Client System as soon as possible, and that the inmate had to be advised on the availability of any appeal (section 8).

71. In this connection, the Court reiterates the concern expressed by international bodies about pepper spray being used by law enforcement in confined spaces, in particular that voiced by the CPT and the UNCAT that pepper spray is a potentially dangerous substance which should not be used in confined spaces and should never be deployed against a prisoner who has already been brought under control (see paragraphs 33 and 35 above). Moreover, in its 2019 report to the Danish Government (CPT/Inf (2019) 35) (see paragraph 34 above), the CPT observed that since its 2014 visit, a number of instruments had been adopted or amended to reinforce the safeguards

surrounding the use of pepper spray, including that prisoners should receive a warning that pepper spray will be used if they fail to comply with the instructions of staff. On that basis it recommended that "the necessary steps be taken to guarantee that the texts governing the use of pepper spray are correctly applied ... throughout Denmark's prisons. It should also be ensured that all cases in which pepper spray is deployed are systematically recorded as such in the establishments concerned and reported (with the sending of a written report) to the Prison and Probation Service". In the light of these recommendations, the Court considers that the investigation should have carefully addressed whether the procedural safeguards laid down in domestic law for the use of pepper spray had been complied with, seeing that these would be elements to be taken into account in assessing whether the use of pepper spray in the present case had amounted to ill-treatment contrary to Article 3 of the Convention.

72. It appears that the investigation authorities found it established that the prison guards offered the applicant water and called the prison doctor immediately after the incident and again one hour later, (see paragraphs 10 and 16 above), and that although the applicant may, at that time, have declined any treatment, he was not attended by a prison doctor immediately after the use of pepper spray. It is not clear, however, whether they found it established in those circumstances, that the applicant was offered the necessary relief for symptoms caused by the use of pepper spray as required *inter alia* by section 7 of the Executive Order. Nor does there appear to have been any consideration of the appropriateness of the doctor's apparently dismissive response, as recorded, that "if the inmate had only been subjected to pepper spray, there was no need to attend to the inmate".

73. It follows from the prison journal records of the applicant's placement in the observation and security cells that the deployment of pepper spray was registered and described, and that the applicant had been advised that he could appeal against the decision on the use of pepper spray to the Department of Prisons and Probation. However, there is no information as to whether the incident had also been recorded in a dedicated register and reported to the Prison and Probation Service (see, in this connection, the 2019 report of the CPT, § 100, see paragraph 34 above).

74. In the light of the foregoing, the Court considers that the respondent State's authorities failed to carry out an effective investigation into the applicant's allegations of ill-treatment with a view to establishing whether in the circumstances of this case the deployment of pepper spray had been "made strictly necessary by the applicant's conduct" as required by Article 3 of the Convention (see paragraph 46 above). There has, consequently, been a violation of Article 3 of the Convention under its procedural limb.

(ii) The substantive limb

75. Turning to the substantive aspect of Article 3 of the Convention, the Court fully acknowledges the difficulties that States may encounter in maintaining order and discipline in penal institutions. This is particularly so in cases of unruly behaviour by dangerous prisoners, a situation in which it is important to find a balance between the rights of different detainees or between the rights of detainees and the safety of prison officers (see, among other authorities, *Tali*, cited above, § 75).

76. While the Regional Prosecutor noted that the descriptions of the events were contradictory, and decided not to bring criminal charges against D1 and M1, the Court, however, notes that the Regional Prosecutor used the wording that "it could not be ruled out that the use of force had been lawful" (see paragraph 21 above). As stated above (see paragraph 59), the Court is of the view that the investigation conducted by the prosecution authorities was clearly aimed at deciding whether or not to bring criminal charges against D1 and M1, rather than taking a stand on whether there had been a breach of Article 3 of the Convention as such, and whether it had been demonstrated convincingly that the use of force had been "made strictly necessary by the applicant's conduct", which is the Convention standard for determining such a matter, the burden of proof being on the Government (see paragraphs 46-47 above).

77. Moreover, due to the investigative flaws identified above, several important questions, which could and should have been addressed by the relevant domestic authorities in order to show that the use of pepper spray in this case had been "made strictly necessary by the applicant's conduct", remain unanswered.

78. In particular, the prosecution authorities failed to examine whether, despite their prior knowledge of the applicant's repeated threats and physical attacks on the prison guards and the passage of some 20 minutes between the applicant's conduct being first recorded and the prison guards entering his cell, their actions and, in particular, the use of pepper spray without prior warning, had been strictly necessary, and whether in these circumstances, the operation had been prepared adequately and in compliance with the Executive Order and the recommendations by the CPT (see paragraph 70 above).

79. Having regard to the above, and in particular the lack of any prior warning, the Court cannot but conclude that the Government have failed to demonstrate that the use of force was "made strictly necessary by the applicant's conduct".

80. It follows that there has also been a violation of the substantive limb of Article 3 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

81. 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

82. The applicant claimed 60,000 euros (EUR) in compensation for non-pecuniary damage.

83. The Government submitted that the claim was excessive.

84. The Court considers it undeniable that the applicant sustained non-pecuniary damage on account of the violation of Article 3 of the Convention. Making its assessment on an equitable basis as required by Article 41 of the Convention, it awards EUR 10,000 under this head.

B. Costs and expenses

85. The applicant claimed the costs and expenses incurred in the Convention proceedings in the amount of 152,492.50 Danish kroner (DKK – equivalent to approximately EUR 20,500), corresponding to legal fees for a total of 68.5 hours of work carried out by his representative, and to translation costs in the amount of DKK 893.75 inclusive of VAT (equivalent to approximately EUR 120).

86. The Government found the amount excessive. Moreover, they noted that the applicant had applied for and could be expected to be granted legal aid under the Danish Legal Aid Act (*Lov 1999-12-20 nr. 940 om retshjælp til indgivelse og førelse af klagesager for internationale klageorganer i henhold til menneskerettighedskonventioner*). Where legal aid was granted, the Department of Civil Affairs would usually pay up to DKK 40,000 (equivalent to approximately EUR 5,400) on a provisional basis. In the Government's view, that sum was sufficient to cover the legal costs related to the case before the Court.

87. In the present case, it is uncertain whether the applicant will be granted legal aid under the Danish Legal Aid Act. Therefore, the Court finds it necessary to assess and decide the applicant's claim in respect of costs and expenses.

88. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession, the above criteria, and awards made in comparable cases against Denmark (see, among other authorities, *Aggerholm v. Denmark*, no. 45439/18, § 127, 15 September 2020, and *Tim Henrik Bruun Hansen v. Denmark*, no. 51072/15, § 92, 9 July 2019), the Court considers it

reasonable to award the sum of EUR 10,000, covering the costs for the proceedings before it, including legal fees and translation costs.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

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

3. *Holds* that there has been a violation of the substantive limb of Article 3;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;
      (ii) EUR 10,000 (ten thousand euros), in respect of costs and expenses, plus any tax that may be chargeable to the applicant;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 3 October 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth Deputy Registrar	Gabriele Kucsko-Stadlmayer President