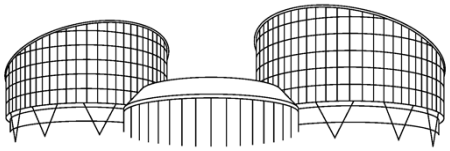

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF KARTER v. UKRAINE

(Application no. 18179/17)

JUDGMENT

Art 3 (+ Art 14) • Positive obligations • Inhuman or degrading treatment • Discrimination • Ineffective investigation into alleged verbal and physical attacks on the applicant, motivated by his sexual orientation • Authorities' failure in respect of first attack to react to applicant's coherent and persistent submissions that it was a hate crime undermined the prospects of such an offence being properly investigated • Ordinary criminal-law classification of conduct in respect of second attack undermined authorities' ability to uncover alleged homophobic motive • Motive of sexual orientation not recognised as aggravating circumstance in domestic criminal law

Prepared by the Registry. Does not bind the Court.

STRASBOURG

11 April 2024

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

In the case of Karter v. Ukraine,

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

Georges Ravarani*, President*,
Lado Chanturia,
Mārtiņš Mits,
Stéphanie Mourou-Vikström,
María Elósegui,
Kateřina Šimáčková,
Mykola Gnatovskyy*, judges*,
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the application (no. 18179/17) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Nik Vitaliyovych Karter ("the applicant"), on 2 March 2017;

the decision to give notice of the application to the Ukrainian Government ("the Government");

the parties' observations;

Having deliberated in private on 19 March 2024,

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

INTRODUCTION

1. The case, in which the applicant relied on Articles 3 and 14 of the Convention, concerns the State's alleged failure to conduct an effective investigation into alleged verbal and physical attacks on him, motivated by his sexual orientation.

THE FACTS

2. The applicant was born in 1986 and, according to the most recent available information, lives in Amsterdam. He was represented by Ms Y.V. Naumenko, a lawyer practising in Kyiv.

3. The Government were represented by their Agent, Ms M. Sokorenko.

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

5. The applicant is openly gay and identifies himself as a gay rights activist. He has spoken about the issue on Ukrainian television and in other media.

I. 2015 ATTACK

6. According to the applicant, on 14 September 2015 he and his friend Mr I.K. were attacked on the street by a group of four individuals at

1 Druzhby Narodiv (Obolonska) Square in Kyiv. The attackers used brass knuckles and made homophobic remarks.

7. As a result of the attack the applicant sustained a bruise to his face (a doctor certified on the same day that the applicant had sustained a contusion (*забійна рана*) under his right eye.), while I.K. had his phone and tablet stolen.

8. On the same day the police drew up a crime scene examination report, and questioned I.K., who described the events as set out in paragraph 6 above, and two other individuals, who stated that they had no information as to the identity of any possible suspects.

9. The next day the police instituted criminal proceedings on account of robbery. At some point during the proceedings, the offence was given the additional classification of "intentional infliction of minor bodily harm" (see relevant provisions of the Criminal Code in paragraph 50 below).

10. On 16 September 2015 the applicant was formally recognised as a victim (aggrieved party) in the proceedings (see the relevant provisions of the Code of Criminal Proceedings concerning that status in paragraph 52 below).

11. On 18 September 2015 a forensic medical expert determined that the applicant's injury, a stitched wound under the right eye, could have been caused on 14 September and had to be categorised as a "minor bodily injury".

12. On 16 and/or 19 September 2015 the applicant was questioned by a police investigator. He stated that at around 9.56 p.m. on 14 September 2015 four strangers had accosted him and his friend. They had started shouting homophobic slurs and hitting him and his friend. Among other things, they had hit him in the face with brass knuckles. The applicant had managed to escape and call the police, who arrived at the scene. The applicant stressed that the crime had been motivated by prejudice against homosexuals. He asked the police to investigate the involvement of "Right sector" militants who, he said, had repeatedly threatened him, including in response to the television shows in which the applicant had participated.[1]

13. On 23 September 2015 the Obolonskyy District Prosecutor's office instructed the police investigator to search for witnesses to the incident, and in particular to check pawnshops, markets and other places where Mr I.K.'s stolen belongings might possibly be sold.

14. On 1 October 2015 the applicant, in a handwritten statement, asked for the proceedings to be discontinued, adding that he had no complaints against police officers and asking not to be called for further interviews in that connection.

15. On 4 and 6 October 2015 police detectives reported to the investigator that, following the investigator's instructions given on 23 September 2015, they had conducted checks in respect of individuals who had previous convictions for similar offences and who resided in the area, but that those

[1] "Right sector" here appears to be used as a catch-all term for right-wing and far-right groups.

checks had not produced any useful results. Police officers also reported that they had interviewed residents of the flats of the building at the address where the applicant had been attacked, but they had seen nothing at the time of the attack.

16. On 15 October 2015 the applicant's lawyer applied to the police for investigative measures to be taken. She stated that the attack had taken place in front of the parking area of a shopping centre and asked the police to gather video recordings from the shopping centre's surveillance cameras.

17. On 16 October 2015 the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the United Nations Special Rapporteur on the situation of human rights defenders transmitted to the Government of Ukraine a complaint made by the applicant about the 2015 attack, in which he described himself as a human rights defender who worked to defend the rights of LGBTI persons. There is no indication of any follow-up to that complaint.

18. On 9 March 2016 the applicant's lawyer submitted a request to the police to have the applicant interviewed in her presence. She submitted that the applicant had not previously been asked about any identifying characteristics which might help find and identify the attackers.

19. On 10 March 2016 the applicant's lawyer asked the police to gather information from all major mobile phone providers about all numbers located in the vicinity of the place of attack, 1 Druzhby Narodiv (Obolonska) Square in Kyiv (a square at the intersection of two main roads, where a shopping centre, a metro station, numerous high-rise blocks of flats and commercial premises are located) around the time of the attack, from 9.40 p.m. to 10.40 p.m.

20. According to the applicant, in April 2016 his lawyer submitted a request, asking the police to additionally classify the attack under Article 161 § 2 of the Criminal Code (see paragraph 51 below), reiterating that the crime had been motivated by homophobic hate, as illustrated in particular by the fact that the attackers had uttered homophobic insults. She stressed that the applicant was openly homosexual and had spoken about the matter on television. For this, he had received threats. The attackers might have recognised him. The Government provided a certificate from the police stating that there was no trace of that request in the case file.

21. On 17 May 2016 the police informed the office of the Parliamentary Commissioner for Human Rights that the matter of the additional classification of the attack under Article 161 § 2 of the Criminal Code would be duly examined. In response to a further request on that matter from the Commissioner's office, the police informed it, on 20 August 2016, that the offence had been classified as a robbery.

22. On 13 October 2016 the applicant's lawyer again asked the police to conduct an additional interview with the applicant. According to the information provided by the police to the Government's Agent on

16 November 2022, that was the last action recorded in the case. The investigation appears to remain ongoing.

II. 2016 ATTACK

23. According to the applicant's submissions before the Court, on 13 March 2016 he and his friend, Mr Y., were harassed in a supermarket in Kyiv by two individuals, who used offensive homophobic slurs. The applicant and Y. then left the supermarket and entered an underground street passage, where they were attacked by the same individuals, who punched and kicked them. The police arrived shortly afterwards and apprehended the attackers.

24. According to a medical certificate provided by the applicant to the Court, following the attack on 13 March 2016, he presented with back and stomach pain and was diagnosed with cranial trauma and bruises on his back. There is no indication in the case file as to when the certificate was issued or whether it was communicated to the authorities.

25. On 13 March 2016 the applicant and Y. made statements to the police describing the events as set out in paragraph 23 above. It appears from the summary of the applicant's statement contained in the case file that the applicant had not stated that he himself had been physically assaulted in the underground passage but rather that he had run away and called the police when the attackers had started hitting Y.

26. On the same day the police interviewed Mr D.P., who stated that earlier on that day he and an acquaintance of his, Mr V.D., had been involved in a verbal altercation in a supermarket with some strangers. V.D. had followed them out of the supermarket and had then called D.P. and said that "a fight [had] started in the underground passage between [him] and those two guys." When he arrived at the scene, D.P. had witnessed the fight, during which "one of those guys [had] tried to strike but got it in the face." Everyone involved had then been taken to the police station. D.P. had a knife and a self-defence spray in his possession but had not used them (the police documented the seizure of those items separately). V.D. made a statement similar to that of D.P. According to his statement, in the course of the fight he had hit one of the strangers in the face.

27. On 14 March 2016 criminal proceedings were instituted on account of the infliction of light bodily injuries on Y.

28. On 5 April 2016 the applicant was questioned as a witness. The applicant's statement, as recorded by the police in the case file, can be summarised as follows. The applicant stated that he was a gay rights activist. On 13 March 2016 he and his friend Y. had had a conflict with two strangers at the supermarket, who had insulted them and used offensive homophobic slurs. The strangers had left the supermarket first and the applicant and Y. went home. When they had been in the underground passage, the applicant

had heard somebody running up behind them, had felt a hit on his back and, turning around, had seen the two young men with whom he had had the conflict in the supermarket. The applicant had then been hit in the stomach and the men had started hitting Y. while uttering insults. The applicant had run out of the underground passage and called the police. Returning, he had told the men that the police had been called and they had run away. After the police had arrived at the scene, he had accompanied them in their search for the attackers, who had been found and taken to the police station.

29. On 5 April 2016 a forensic medical expert analysis to determine the level of severity of the applicant's injuries was ordered.

30. The investigator recorded in the file that Y. could not be contacted, making a medical assessment and interview impossible.

31. On 6 April 2016 the applicant's lawyer asked the police to formally recognise him as an aggrieved party in the proceedings, arguing that he met the definition of a "victim" (aggrieved party) set out in Article 55 of the Code of Criminal Procedure, since, during the attack, he had been hit in the stomach and shoulder and humiliated on account of his sexual orientation and homophobic insults had been directed towards him.

32. The next day the applicant's lawyer asked the police to additionally classify the attack under Article 161 § 2 of the Criminal Code (see paragraph 51 below), reiterating that the crime had been motivated by homophobic hate.

33. On 18 April 2016 the police investigator refused to recognise the applicant as a victim on the grounds that there was no evidence in support of his statements that he had also been a victim in the attack on Y.

34. The applicant's lawyer appealed. She argued, in particular, that the applicant had only been interviewed as a witness, rather than a victim, despite the fact that he stated that he had been hit in the stomach and shoulder and had been insulted with homophobic slurs both at the supermarket and during the attack in the underground passage. This indicated that the applicant had suffered physical and moral damage due to the attackers' illegal actions.

35. On 16 May 2016 the Kyiv Svyatoshynskyy District Court overruled the decision of 18 April 2016 and ordered that the applicant be recognised as a victim. It did so on the grounds that the police had failed to take sufficient steps to investigate the incident and to comply with instructions issued in that regard by the supervising authority.

36. On 23 May 2016 the investigator discontinued the investigation on the grounds that it had proven impossible to identify witnesses who could confirm or deny Y.'s statements and establish the circumstances of the event. Accordingly, it was not possible to establish the requisite elements of a criminal offence.

37. On 29 June 2016 the decision of 23 May 2016 was overruled by the Svyatoshynskyy District Prosecutor's office as unfounded.

38. On 25 July 2016 a forensic medical expert issued a report, stating that it was impossible to classify the severity of the applicant's injuries owing to the absence of medical documentation. There is no indication that the applicant had been asked to provide such documentation or informed of the expert's conclusions.

39. The investigator again recorded in the file that Y. could not be contacted, making it impossible to undertake a medical assessment or interview.

40. In August 2016 the applicant's lawyer asked the investigator to comply with the District Court's ruling, recognise the applicant as a victim and recognise her as his representative. The same month the investigator responded to that request, informing the applicant's lawyer that to comply with the court order, she would have to appear in person.

41. On 12 October 2016 the applicant's lawyer replied, stating that there was no need, and no requirement under the law, to appear in person and repeated her request.

42. On 24 October 2016 the investigator discontinued the proceedings. He stated that Y. had failed to respond to repeated calls summoning him to be interviewed within the framework of the investigation and to be examined to determine the legal classification of the severity of his injuries. Accordingly, the investigation had been unable to collect sufficient evidence to indicate that a criminal offence had been committed.

43. The applicant's lawyer appealed. She argued that the only investigative steps taken in the case were interviews with Y. and the applicant. No forensic medical expert report had been ordered to document the injuries. The guards and the sales staff of the supermarket where the conflict had arisen had not been interviewed and the video recording of the conflict had not been secured. The suspects had been identified by the police immediately but they had still not been charged. Moreover, despite repeated statements by Y. and the applicant that the attackers had used homophobic slurs and that the attack had been motivated by prejudice, which indicated that an offence under Article 161 of the Criminal Code had been committed, that matter had not been investigated in any way.

44. On 13 and 16 January 2017 the district prosecutor and the district court (independently of each other and apparently without knowing of each other's decisions) allowed the appeal and overruled the decision of 24 October 2016 on the grounds that the investigator had failed to provide arguments against the appeal and that his decision had not indicated sufficient reasons for discontinuation.

45. In June 2017 the police informed the applicant, in response to his repeated applications of June 2017 to be formally recognised as a victim and for an update on the investigation, that there was no need for a formal decision on recognition as a victim under domestic law since the right of the victim in criminal proceedings arose automatically from the moment that person

lodged a complaint that a criminal offence had been committed against him (see paragraph 52 below). They informed him that, in any event, the proceedings had been discontinued in October 2016.

46. In June 2018 the police investigator informed the applicant's lawyer, in reply to a request for information on the progress of the investigation, that it had been discontinued on 24 October 2016.

47. At an unspecified date the police resumed the investigation but on 20 November 2019 the proceedings were discontinued again. The applicant's lawyer was informed of that decision on 18 March 2021 in response to a request submitted earlier that month for information about the proceedings.

48. On 15 February 2022 the prosecutor's office overruled the 2019 discontinuation decision. A further discontinuation decision was issued on 8 June 2022 but was overruled on 30 November 2022. In the latter decision the prosecutor's office overruled the discontinuation decision as being unlawful and taken without sufficient effort having been made to establish the circumstances of the case.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW

A. Criminal Code 2001

49. At the relevant time, Article 67 of the Criminal Code listed, among various aggravating circumstances to be taken into account in sentencing, the commission of a crime on the grounds of racial, national or religious enmity or hostility. The Law no. 2227-VIII of 6 December 2017 introducing amendments to the Criminal Code added the commission of a crime "on the grounds of gender identity" (*на ґрунті статевої приналежності*) to those aggravating circumstances.

50. Article 125 of the Code criminalises the offence of "intentional infliction of minor bodily harm" and makes it punishable by a fine or community service. Article 186 § 2 of the Code criminalises robbery, that is, the open taking of another's property by violence, and makes it punishable by four to six years' imprisonment.

51. Article 161 of the Code criminalises the offence of violation of the equality of citizens on the grounds of race, ethnicity, religious beliefs, gender or "other characteristics". Paragraph two of that Article makes the same acts, if accompanied by violence, deception or threats, or if they are committed by a person exercising official authority, punishable by a fine or by imprisonment for a period from two to five years.

B. Code of Criminal Procedure 2012

52. Article 55 of the Code defines a victim (aggrieved party) as a person who has sustained damage as a result of a criminal offence. An aggrieved party acquires procedural rights from the moment he or she lodges a complaint about the offence committed against him or her. Article 56 lists the rights of aggrieved parties, including the right to be informed about a suspicion or charges notified to a defendant and about decisions to discontinue criminal proceedings; the right to submit evidence; the right to appeal against decisions of the investigating authority, the prosecutor and the court; and the right to obtain compensation for damage caused by the offence.

53. Article 303 § 1 lists the decisions, actions or failures to act by an investigator or prosecutor which are amenable to appeal during the pre-trial investigation. Article 303 § 2 provides that the decisions, actions or failures to act of the investigator or the prosecutor which are not amenable to appeal during the pre-trial investigation may be examined by the trial court at the preparatory hearing. A translation of Article 303 can be found in *Adnaralov v. Ukraine* (no. 10493/12, § 34, 27 November 2014).

II. INTERNATIONAL MATERIAL

54. On 31 March 2010 the Committee of Ministers of the Council of Europe adopted Recommendation CM/Rec(2010)5 to member States on measures to combat discrimination on grounds of sexual orientation or gender identity. In so far as relevant, it reads as follows:

> "**A. "Hate crimes" and other hate-motivated incidents**
>
> 1. Member states should ensure effective, prompt and impartial investigations into alleged cases of crimes and other incidents, where the sexual orientation or gender identity of the victim is reasonably suspected to have constituted a motive for the perpetrator; they should further ensure that particular attention is paid to the investigation of such crimes and incidents when allegedly committed by law enforcement officials or by other persons acting in an official capacity, and that those responsible for such acts are effectively brought to justice and, where appropriate, punished in order to avoid impunity.
>
> 2. Member states should ensure that when determining sanctions, a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance."

55. In its report on Ukraine adopted on 20 June 2017, the European Commission against Racism and Intolerance (ECRI) noted:

> "**Legislative issues**
>
> 112. ECRI notes that on the Rainbow Europe Map 2016 reflecting European countries' legislation and policies guaranteeing LGBT human rights, Ukraine ranked 44th out of 49 countries.

113. There is no punishment of incitement to hatred under Article 161(1) of the Criminal Code or violence under Article 161(2) motivated by homo/transphobia. The second part of Article 161(1) referring to discrimination has an open-ended list of grounds which could, therefore, include sexual orientation and gender identity. Further, there is no reference to the grounds of sexual orientation and gender identity under the aggravated forms of certain offences or the general provisions relating to aggravating circumstances, although the Action Plan on Implementation of the National Human Rights Strategy provides for the inclusion of these motives. ECRI was informed that a working meeting of the central executive authorities and civil society organisations was held in May 2016 and that a draft law including these elements is under discussion.

114. ECRI strongly recommends that sexual orientation and gender identity are specifically included as grounds in Article 161(1) and (2) of the Criminal Code as well as in all the aggravated forms of offences and the general provisions on aggravating circumstances under Article 67(1)(3)."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

56. The applicant complained under Articles 3 and 8 of the Convention, taken alone and together with Articles 13 and 14, was well as Article 1 of Protocol No. 12, that the domestic authorities had failed to investigate the attacks effectively by establishing, in particular, a possible homophobic motive on the part of the attackers.

57. Being the master of the characterisation to be given in law to the facts of the case (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 114, 20 March 2018, and compare *Identoba and Others v. Georgia*, no. 73235/12, § 106, 12 May 2015, and *Aghdgomelashvili and Japaridze v. Georgia*, no. 7224/11, §§ 51 and 52, 8 October 2020), the Court finds it appropriate to examine these complaints under Article 3 and Article 14 of the Convention, which read as follows:

Article 3

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

Article 14

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

A. Admissibility

1. The Government

58. The Government submitted that the applicant had failed to exhaust domestic remedies by failing to lodge a complaint under Article 303 of the Code of Criminal Procedure (see paragraph 53 above) about the investigation authorities' omissions, notably the failure to classify the offence under Article 161 of the Criminal Code.

59. The authorities had taken all the necessary actions to investigate the 2015 attack even though the applicant had behaved inconsistently by requesting that that investigation be discontinued. The supervising prosecutor had provided relevant instructions to the police. The applicant had not complained of inaction on the part of the police.

60. As for the 2016 attack, in quashing the decision not to recognise the applicant as a victim, the District Court had not found that the applicant had in fact been a victim of the attack but rather had overruled the decision on procedural grounds. The applicant had failed to show diligence in the defence of his interests and to cooperate by refusing to appear when invited (the Government referred to the events described in paragraph 41 above). With reference to the expert's opinion of 25 July 2016 (see paragraph 38 above) the Government also submitted that the authorities had been unable to establish the extent of the applicant's injuries owing to the absence of medical documentation and the applicant's failure to provide it. There was therefore no evidence that the minimum level of severity necessary to bring Article 3 into play had been reached.

2. The applicant

61. The applicant submitted that Article 303 of the Code of Criminal Procedure, relied on by the Government, contained an exhaustive list of the decisions, actions or failures to act by investigators and prosecutors which were amenable to appeal during the pre-trial investigation. The decision not to reclassify an offence was not among them. The applicant had made a number of requests to compel the authorities to conduct the investigation properly but none of them had been satisfied. In any event, in accordance with the Court's case-law it was the authorities', and not the applicant's, duty to take active steps to ensure the effectiveness of an investigation.

3. The Court's assessment

(a) Non-exhaustion objection

62. The Court has already expressed doubts about the effectiveness in practice of a complaint under Article 303 of the Code of Criminal Procedure, given in particular the investigating authorities' frequent practice of disregarding instructions issued by prosecutors and the courts (see *Adnaralov*

v. Ukraine, no. 10493/12, § 39, 27 November 2014). The applicant's experience in respect of the 2016 attack tends to support that conclusion.

63. Therefore, the Court dismisses the Government's objection of non-exhaustion. The remainder of the issues raised by the Government in this context fall to be examined as part of the examination on the merits.

(b) Whether the attacks fell within the ambit of Article 3

64. The Court notes that it has not been contested that the applicant sustained injuries as a result of the 2015 attack or that Article 3 was applicable in the context of that attack (see and compare *Aleksandr Nikonenko v. Ukraine,* no. 54755/08, §§ 7 and 40, 14 November 2013; *İbrahim Demirtaş v. Turkey*, no. 25018/10, § 31, 28 October 2014; and *Genderdoc-M and M.D. v. the Republic of Moldova*, no. 23914/15, §§ 38 and 39, 14 December 2021).

65. As to the 2016 attack, the applicant provided medical evidence of injuries sustained as a result of that attack (see paragraph 24 above). However, there is no indication in the file as to when that medical certificate was obtained and that it was ever communicated to the authorities. The applicant's submissions to the national authorities made no mention of the existence of that medical certificate, despite the repeated allegations that he had been hit during the attack (see paragraphs 28, 31 and 34 above).

66. In view of the above, the Court concludes that the authorities had no proof of the applicant's injuries and the applicant failed to explain his failure to provide to them the proof he supposedly had. The Court, therefore, cannot find it established that the applicant suffered physical injuries as the result of the attack.

67. It is uncontested, however, that the applicant's companion was physically attacked in his presence and the applicant had also been targeted, even though he may have escaped the worst of the attack. In the circumstances of the present case, the applicant must have perceived the threat of physical violence not only very seriously, but as imminent, especially in view of the previous attack he had suffered in 2015. A threat of conduct prohibited by Article 3, provided it is sufficiently real and immediate, may fall foul of that provision (see, for instance, *Women's Initiatives Supporting Group and Others v. Georgia*, nos. 73204/13 and 74959/13, § 60, 16 December 2021, and *Oganezova v. Armenia*, nos. 71367/12 and 72961/12, § 94, 17 May 2022).

68. The fact that violence, or at least a threat of violence, was directly associated with homophobic insults is also an important element in the Court's assessment (see, *mutatis mutandis*, *Aghdgomelashvili and Japaridze*, § 47, and *Identoba and Others*, §§ 70-71, both cited above).

69. The Court concludes, therefore, that both attacks fell within the ambit of Article 3 of the Convention.

70. The Court 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

(a) The applicant

71. The applicant submitted that, in respect of the 2015 attack, the authorities had failed to secure the video recordings from surveillance cameras and mobile telephone data.

72. The investigation into the 2016 attack had been closed and resumed four times, and the applicant had repeatedly been denied victim status, despite a court decision in his favour and even though he had suffered injuries as a result of the attack and had also been insulted and humiliated in public. That refusal had hindered the applicant in the protection of his rights. Some essential investigative actions had not been conducted: in particular, no video footage from the surveillance cameras located in the shop or in the surrounding area had been collected and staff working in the shop had not been interviewed. The attackers had been apprehended the same day but had not been charged. The attack had only been classified as the infliction of minor injuries, which meant that the statute of limitations was three years. The statute of limitations for the offence under Article 161 § 2 of the Criminal Code would have been five years but that had also now expired.

73. The failure to reclassify the offence illustrated disregard by the investigating authorities of the discriminatory motives behind the attacks and was evidence of discrimination against the victims allowing the attackers to feel impunity and continue targeting members of the community.

(b) The Government

74. The Government argued that the classification of the attacks as robbery and infliction of injuries as opposed to the offence under Article 161 of the Criminal Code did not amount to a failure to comply with the obligation to uncover possible hate-crime motives, as it was for the national authorities to interpret and apply domestic law and the applicant had not shown that classification under Article 161 would have had any impact on the effectiveness of the investigation. The initial classification of the offence at the stage of the investigation had not been decisive as the offence could have been reclassified at the trial. To have an arguable basis for a discrimination complaint the applicant had to be able to show that he was in a relevantly similar situation to others who had been treated differently. The applicant had failed to show that he had been treated any differently from any other person in the course of the investigation.

2. The Court's assessment

(a) Relevant general principles

75. Article 3 of the Convention requires that the authorities conduct an effective official investigation into alleged ill-treatment, even if such treatment has been inflicted by private individuals (see *T.M. and C.M. v. the Republic of Moldova*, no. 26608/11, § 38, 28 January 2014). For an investigation to be regarded as "effective", it should in principle be capable of leading to the establishment of the facts of the case and to the identification and – if appropriate – punishment of those responsible. This is not an obligation as to the results to be achieved, but the 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 this standard, and a requirement of promptness and reasonable expedition is implicit in this context (see *Bouyid v. Belgium* [GC], no. 23380/09, §§ 116 and 119-23, ECHR 2015).

76. When investigating violent incidents, such as ill-treatment, State authorities have the duty to take all reasonable steps to unmask possible discriminatory motives. The respondent State's obligation to investigate possible discriminatory motives for a violent act is an obligation to use best endeavours, and is not absolute. The authorities must do whatever is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of violence induced by, for instance, racial or religious intolerance, or violence motivated by gender-based discrimination. Where there is a suspicion that discriminatory attitudes induced a violent act, it is particularly important that the official investigation is pursued with vigour and impartiality, having regard to the need to continuously reassert society's condemnation of such acts and to maintain the confidence of minority groups in the ability of the authorities to protect them from violence with a discriminatory motive. Compliance with the State's positive obligations requires that the domestic legal system must demonstrate its capacity to enforce criminal law against the perpetrators of such violent acts. Treating violence and brutality with a discriminatory intent on an equal footing with cases that have no such overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention (see, for example, *Genderdoc-M and M.D.*, cited above, § 37, with further references).

77. The Court considers that the authorities' duty to prevent hatred-motivated violence on the part of private individuals, as well as to investigate the existence of a possible link between a discriminatory motive and the act

of violence can fall under the procedural aspect of Article 3 of the Convention, but may also be seen to form part of the State's obligations under Article 14 of the Convention to secure the fundamental values enshrined in Article 3 without discrimination. Owing to the interplay between the two provisions, issues such as those in the present case may indeed fall to be examined under only one of the two provisions, with no separate issue arising under the other, or may require simultaneous examination under both Articles. This is a question to be decided in each case in the light of its facts and the nature of the allegations made (see *Identoba and Others*, cited above, § 63, with further references).

(b) Application of the above principles to the present case

(i) 2015 attack

78. The Court observes at the outset that on 1 October 2015, about two weeks after the 2015 attack, the applicant requested that the criminal proceedings in connection with that attack be discontinued (see paragraph 14 above). However, that request was never granted and, just two weeks later, the applicant renewed his interest in the investigation and consistently maintained it afterwards. Therefore, there is no indication that his request had an influence on the effectiveness of the investigation.

79. The Court is not convinced by the applicant's argument that the authorities should have conducted an extremely extensive mobile telephone data collection operation, with unclear prospects of success. Likewise, without prejudice to the obligation of the investigative authorities to act on their own motion, the possibility that there might be a video recording of the events was not raised by the applicant until a month after the attack, and there is no indication that by that time any such recordings were still available (see paragraphs 16 and 19 above).

80. However, the Government did not explain why it took the authorities more than a week to order and to conduct interviews with residents of the building at the location where the attack took place. There is also no indication that the searches requested into possible channels for the distribution of stolen goods were conducted (see paragraphs 13 and 15 above).

81. In addition to those omissions, there is no indication that the authorities took any steps to follow up on the applicants' hate crime allegations. The attack was initially classified as a robbery, given that some property had been taken from the applicant's friend. However, it is apparent that that official classification limited the nature of inquiries made by the police in connection with the attack, which concentrated on the stolen property and did not include any search for individuals who might have been motivated by prejudice (see paragraphs 13 and 15 above), especially in view of the applicant's persistent submissions that that may have been a motive for

the crime (see paragraph 12 above). The authorities' failure to react to such coherent and persistent submissions undermined the prospects of the alleged hate crime offence being properly investigated.

82. There has therefore been a violation of the procedural limb of Article 3, taken in conjunction with Article 14 of the Convention, in respect of the investigation into the 2015 attack.

(ii) 2016 attack

83. To establish that the investigation into the 2016 attack was not effective, it would be sufficient to observe that, on the day of the attack, the police obtained statements from individuals who, to all appearances, essentially confessed to having participated in the attack (see paragraph 26 above), yet the police failed to follow up on those statements in any way.

84. In such circumstances the applicant's sometimes non-cooperative approach at the later stages (see paragraphs 41 and 65 above), while regrettable, cannot be said to have undermined the investigation. While not excusing such an attitude, the Court observes that it may have been associated with the police's inexplicable insistence that there was no evidence of the applicant being a victim in the attack, despite the fact that the statements given by the uncontested victim Y. and suspected attackers seemed to support the applicant's version as to how the events unfolded (see paragraphs 25, 26 and 33 above).

85. Another salient element indicating a breach of the State's procedural obligations is the failure to respect the applicant's rights in the proceedings relating to the 2016 attack. In that connection, there was a contradiction in the authorities' position since they initially refused the applicant's application to be recognised as a victim (see paragraph 33 above) and then pointed out, correctly, that under domestic law it was sufficient to make such an application and there was no need for a formal recognition decision (see paragraphs 45 and 52 above).

86. Despite thus suggesting that the applicant had acquired the status of a victim *ipso facto*, the police nevertheless neglected to inform him of the discontinuation decision of 2019 for more than a year, even though they were required to do so by domestic law (see paragraphs 47 and 52 above).

87. The Court has already discussed as problematic the classification of attacks motivated by prejudice under the ordinary provisions of criminal law (see, for example, *Identoba and Others*, cited above, § 76, and *Burlya and Others v. Ukraine*, no. 3289/10, § 139, 6 November 2018).

88. In the present case such a classification allowed the authorities to disregard the applicant's status as a victim by insisting that proof of physical injuries was needed even though he and another victim had consistently alleged that the attack involved not only physical violence but also homophobic slurs. By nevertheless categorising the attack as the infliction of bodily injuries, the authorities evaded the question of such slurs and thus

apparently justified their doubt that the applicant, because he was unable to show physical injuries, was a victim at all.

89. It is, of course, primarily for the national authorities to interpret and apply domestic law (see, for example, *De Tommaso v. Italy* [GC], no. 43395/09, § 108, 23 February 2017). Nevertheless, there is a clear indication in the present case that the criminal-law classification the national authorities chose undermined their ability to uncover the alleged homophobic motive behind the attack (compare *Oganezova*, § 103, and *Genderdoc-M and M.D.*, § 44, both cited above).

90. The Court also observes that ECRI has criticised the lack of explicit recognition of attacks motivated by sexual orientation as an aggravating circumstance in domestic criminal law in general and under Article 161 of the Criminal Code in particular (see paragraph 55 above). Its recommendation, however, has not been followed. The present case illustrates the difficulty that the absence of such recognition in domestic criminal law causes in the effective investigation of homophobia-motivated attacks (compare *Stoyanova v. Bulgaria*, no. 56070/18, §§ 70-73, 14 June 2022).

91. The Court considers that it was essential for the relevant domestic authorities to conduct the investigation taking all reasonable steps with the aim of unmasking the role of possible homophobic motives for the attack. The Court considers that without such a strict approach from the law-enforcement authorities, prejudice-motivated crimes would unavoidably be treated on an equal footing with ordinary cases without such overtones, and the resultant indifference would be tantamount to official acquiescence to or even connivance with hate crimes (see *Identoba and Others*, cited above, § 77, and *Beizaras and Levickas v. Lithuania*, no. 41288/15, § 155, 14 January 2020).

92. There has therefore been a violation of the procedural limb of Article 3 of the Convention, taken in conjunction with Article 14 of the Convention, in respect of the investigation into the 2016 attack on the applicant.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

93. 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."

94. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage and EUR 4,400 in respect of costs and expenses.

95. The latter claim included EUR 2,000 for legal fees incurred before the domestic authorities and EUR 2,400 incurred before the Court. The applicant

submitted, in support of this claim, a legal services contract between him and his lawyer under which he undertook to pay, at the rate of EUR 100 per hour, for her services in representing him before domestic courts and authorities and before the Court. According to the contract, payment was due after completion of the proceedings in Strasbourg and within the limits of the sum awarded by the Court in respect of costs and expenses. The applicant also provided a statement of services provided, signed by him and the lawyer, according to which the lawyer worked for twenty hours in representing the applicant before domestic courts and authorities, sixteen hours in preparation of the application to the Court and eight hours in preparation of the reply to the Government's observations.

96. The Government contested those claims, considering them excessive and not supported by sufficient evidence. They argued, in particular, that the terms of the contract indicated that the costs were not incurred by the applicant and that the description of services provided was too general and vague.

97. The Court awards the applicant EUR 7,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

98. 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 were actually and necessarily incurred and are reasonable as to quantum. The Court considers the documentation provided by the applicant sufficient to show that his claim for costs and expenses meets the above criteria (see, for example, *Maymulakhin and Markiv v. Ukraine*, no. 75135/14, §§ 87-89, 1 June 2023). The Court, accordingly, awards the applicant EUR 4,400 in respect of costs and expenses, plus any tax that may be chargeable to him, to be transferred directly into the account of the applicant's lawyer, Ms Naumenko.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 3 under its procedural limb, taken in conjunction with Article 14 of the Convention, in respect of the investigation into the 2015 attack on the applicant;

3. *Holds* that there has been a violation of Article 3 under its procedural limb, taken in conjunction with Article 14 of the Convention, in respect of the investigation into the 2016 attack on the applicant;

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:

(i) EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 4,400 (four thousand four hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be transferred directly into the account of the applicant's lawyer, Ms Naumenko;

(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 11 April 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik Registrar	Georges Ravarani President